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Pretrial

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absolutely nothing in the record to indicate that counsel had been afforded the mandatory ten days to prepare for trial.[333]

III. PRETRIAL

by

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Speedy Trial, Continuance, Venue, Order of Trial Severance, Double Jeopardy, Recusal of Judge, Vindictive Indictment, Indictment, Discovery, Search and Seizure, Suppression of Evidence

A. *Speedy Trial*

In *Turner v. State*[334] a delay of two years and three months occurred between the defendant's first request for a speedy trial and the trial. The Texas Court of Criminal Appeals applied the balancing test set out in *Barker v. Wingo*[335] and found that the length of the delay, the reason for the delay, and the fact that the defendant had asserted his rights and was actually prejudiced by the delay demonstrated that he was deprived of his right to a speedy trial. Dissenting from the overruling of the State's motion for rehearing, Judge Douglas asserted that the defendant had not been "harmed" sufficiently to justify the order of dismissal. Since the defendant was a federal prisoner during the entire time he sought a speedy trial on the State charge, the examination of the issue of "harm" by both the majority and the dissent will be of future significance.

In *Newcomb v. State*[336] a hearing on a motion to revoke the defendant's probation was delayed for seven months, during which time he was jailed. The court ruled that *Ex parte Trillo*,[337] guaranteeing a prompt hearing on the motion to revoke *if requested by the defendant*, did not apply because no such request was made. Further, the court declined to address the issue of whether his right to a speedy trial under the *Barker v. Wingo*[338] doctrine had been violated. The defendant had asserted on appeal that the length of delay in his case constituted a denial of a speedy hearing *as a matter of law* rather than as applied to the particular facts of his case. The court refused to address the issue sua sponte and thereby declined to establish precedent for considering unassigned *Barker v. Wingo*[339] error.

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333. *Id.* The opinion differentiated this case from McBride v. State, 519 S.W.2d 433 (Tex. Crim. App. 1974), in which the record showed that counsel had filed a motion for discovery ten days prior to trial.

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334. 545 S.W.2d 133 (Tex. Crim. App. 1976).
335. 407 U.S. 514 (1972).
336. 547 S.W.2d 37 (Tex. Crim. App. 1977).
337. 540 S.W.2d 28 (Tex. Crim. App. 1976).
338. 407 U.S. 514 (1972).
339. *Id.*

Petitioner in *Ex parte Mead*[340] claimed that he had not had a prompt hearing in mental illness court to determine his competency to face criminal charges. He sought dismissal of the criminal action because his constitutional right to a speedy hearing had been violated. Finding that petitioner had such a constitutional right, the court nevertheless declined to order immediate release, and instead ordered a trial within thirty days to rectify the "tragic picture painted by this appeal."[341]

In *United States v. Rice*[342] the defendant complained that the three and one half year delay between the close of the alleged criminal activities and the return of the indictment constituted a denial of a speedy trial by indictment delay. The sixth amendment right to a speedy trial, however, arises only when a defendant becomes an accused, either through arrest, indictment, or information.[343] The guarantee against the bringing of overly stale criminal charges must be enforced through the due process clause and the applicable statute of limitations. Under the due process test a defendant must demonstrate either substantial actual prejudice resulting from the delay or that the delay was an intentional measure designed to gain a tactical advantage for the prosecution.[344] Since neither showing would have been met in this case even if the defendant's assertions had been proved, the denial of an evidentiary hearing on the matter by the trial court was held not erroneous.

Although not effective until July 1, 1978, important legislation affecting the speedy trial in criminal cases was passed by the Texas Legislature during this survey period. The Code of Criminal Procedure was amended to add article 32A which provides specific time limitations within which cases must be tried.[345] While the Federal Speedy Trial Act[346] is not identical to the new Texas act, recent litigation concerning the applicability and constitutionality of the federal act[347] should provide a fertile source of challenges to the state act.

B. *Continuance*

Motions for continuance were filed before trial in both *Salinas v. State*[348] and *Leach v. State*.[349] In *Salinas* the evidence adduced at a pretrial hearing did not indicate that the defendant could secure a missing witness even if given the requested delay; it did, however, indicate that the trial would be delayed indefinitely if the continuance were granted. In affirming the denial

340. 550 S.W.2d 679 (Tex. Crim. App. 1977).
341. *Id.* at 682.
342. 550 F.2d 1364 (5th Cir. 1977).
343. *See* United States v. Marion, 404 U.S. 307 (1971); United States v. Davis, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).
344. *See* United States v. Marion, 404 U.S. 307 (1971).
345. *See* TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Supp. 1978). Cases must be tried within limits varying from 30-120 days, depending on the seriousness of the offense.
346. 18 U.S.C. § 3161 (Supp. IV 1974).
347. *See* United States v. Howard, [1977] 22 CRIM. L. REP. (BNA) 2182 (D. Md. 1977), holding that the Federal Speedy Trial Act unconstitutionally encroaches on the power of the judiciary.
348. 542 S.W.2d 864 (Tex. Crim. App. 1976).
349. 548 S.W.2d 383 (Tex. Crim. App. 1977).

of the motion for continuance, the court additionally noted that the defendant's motion did not allege as statutorily required[350] that the testimony could not be procured from any other known source. In *Leach* the defendant sought a continuance so that he could have the benefit of his chemist's analysis to show that the substance he was accused of delivering was not LSD. He failed, however, in his motion for new trial to produce evidence to show that the chemist's testimony would have been favorable to his defense.

Munoz v. State[351] was reversed because the record failed to show that the defendant's appointed attorney had been afforded the mandatory ten days for preparation prior to trial.[352] A formal notice had been sent to counsel more than ten days before the trial on a different case involving the same defendant. The record, however, contained no affirmative showing that counsel was afforded the mandatory time in the actual case at issue.

Motions for continuance were made during the trial in *Walker v. State*[353] and *Ewing v. State*.[354] In neither case did the trial court err in denying the motion since neither defendant presented for the record the purported additional testimony or evidence that would have been offered in support of his defense.

C. *Venue*

Reversal for an abuse of discretion in denying a change of venue remains difficult to obtain. Absent a showing of "the existence of such prejudice in the community that the likelihood of obtaining a fair and impartial jury is doubtful,"[355] a trial judge is within the limits of his discretion in denying the change of venue.

The decision in *Bell v. State*,[356] reversing a ninety-nine year sentence for rape, resulted in the passage of new legislation affecting venue. Bell was found guilty of abducting a girl in Dallas County and driving her to a home in Rockwall County, where he forcibly raped her; he then drove her back to Dallas County and was arrested after a high-speed chase. It was uncontroverted that the actual rape was committed in Rockwall County, but the trial itself took place in Dallas. The special venue statute provided that a prosecution for rape could proceed in the county in which the rape occurred; in any county of the judicial district in which the rape occurred; or, if the rape occurred in a judicial district comprising only one county, in any adjoining county.[357] Since Rockwell County is part of a multicounty judicial district, the court held that venue was proper only in that district, and not proper in adjoining Dallas County. In reversing the conviction, the court

350. TEX. CODE CRIM. PROC. ANN. art. 29.07 (Vernon 1966).
351. 542 S.W.2d 173 (Tex. Crim. App. 1976).
352. TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 1965).
353. 543 S.W.2d 634 (Tex. Crim. App. 1976) (continuance requested to secure missing witness).
354. 549 S.W.2d 392 (Tex. Crim. App. 1977) (continuance sought to obtain corroboration of defendant's mistreatment in jail).
355. James v. State, 546 S.W.2d 306, 309 (Tex. Crim. App. 1977).
356. 546 S.W.2d 614 (Tex. Crim. App. 1977).
357. 1965 Tex. Gen. Laws, ch. 722, art. 13.22, at 360.

overruled *Phillips v. State*[358] to the extent that it had misinterpreted article 13.22 by finding venue in a single county judicial district when the offense was committed in an adjoining county. Judge Odom concurred but expressed puzzlement over the legislature's restrictions on rape prosecutions. Apparently the message got to the legislature, because the venue statute was amended during this survey period to allow a prosecution for rape in the county in which it is committed, in the county in which the victim is abducted, or in any county through or into which the victim is transported in the course of the abduction and rape.[359] This broadens the allowable venue even beyond that which would have been necessary to prosecute the defendant in *Bell*.

D. *Order of Trial*

When a severance is granted, defendants may agree upon the order in which they are to be tried; if they fail to agree, the court directs the order of trial.[360] In *Lafoon v. State*[361] one defendant complained that the trial court erred in refusing to grant his request for order of trial. The court held that the statutory requirements were not met by the defendant, however, since the only request made by the four co-indictees was that one specific person be tried first. As there was no agreed order of trials for all persons, there was no abuse of discretion by the trial court in denying the motion as to one defendant.

E. *Severance*

The defendant in *Overton v. State*[362] was tried before a jury upon a single indictment containing two counts of aggravated robbery. He was acquitted on one count but found guilty of the other. He objected to the joinder of offenses in a single indictment by motions to quash and to require the State to elect on which count he was to be tried. In reversing the conviction, the court found that the motions clearly amounted to a request for severance under section 3.04 of the Penal Code,[363] which grants an accused the right to sever offenses arising out of the same criminal episode which have been joined under article 21.24 of the Code of Criminal Procedure.[364]

The Fifth Circuit affirmed a denial of severance in *United States v. Bolts*.[365] Bolts contended that the mass of evidence implicating his co-defendant prejudiced his own right to a fair trial. Relying on the general rule that persons jointly indicted should be tried together,[366] the court held that an adequate cautionary instruction to the jury concerning the possibility of prejudice was sufficient to protect his right to a fair trial.[367]

358. 459 S.W.2d 632 (Tex. Crim. App. 1970).
359. *See* TEX. CODE CRIM. PROC. ANN. art. 13.15 (Vernon Supp. 1978).
360. TEX. CODE CRIM. PROC. ANN. art. 36.10 (Vernon 1966).
361. 543 S.W.2d 617 (Tex. Crim. App. 1976).
362. 552 S.W.2d 849 (Tex. Crim. App. 1977).
363. TEX. PEN. CODE ANN. § 3.04 (Vernon 1974).
364. TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1966).
365. 558 F.2d 316 (5th Cir. 1977).
366. *See* United States v. Morrow, 537 F.2d 120 (5th Cir. 1976).
367. 558 F.2d at 323.

F. *Double Jeopardy*

The decisions of the United States Supreme Court during this survey period broke new ground in the area of double jeopardy. The decisions on double jeopardy matters dealt with two issues: (1) multiplicity of prosecutions and (2) retrial and government appeal of issues arising out of aborted criminal proceedings.

In *Brown v. Ohio*[368] the Court reaffirmed *Blockburger v. United States*[369] which required an examination of the two crimes to see if they are actually the same statutory offense for double jeopardy purposes. The Court indicated that, as a general proposition, a defendant may not be prosecuted for both a lesser offense and the greater offense that includes it. Thus, a prosecution for auto theft following a conviction for joy riding was barred. Further, the Court held that the State could not seek convictions for both crimes by focusing the charges on different periods during the nine day unauthorized taking of the automobile.

Although the Court purported to do nothing more than clarify the trilogy of double jeopardy decisions announced in the previous term concerning the right of the government to appeal from unfavorable trial court rulings,[370] some new criteria were discussed. In *United States v. Martin-Linen Supply Co.*[371] the Court examined a judgment of acquittal entered by the trial court in response to a hung jury. Refusing to limit itself to the form of the judgment, the Court analyzed the substance of the district court's action. Since the record clearly established that the district court had determined that the evidence presented was legally insufficient to sustain a conviction, the Court held that the judgment was equivalent to a not guilty verdict for double jeopardy purposes.

In *Lee v. United States*[372] the district court had granted a defense motion to dismiss the information as defective after the government had already presented its evidence. Justice Powell, writing for the majority, held that the allowance of a retrial was proper because the dismissal was functionally indistinguishable from a mistrial declaration that contemplates a retrial. Mr. Justice Marshall, dissenting, stated that the Court had passed up an opportunity to prohibit rather than to condone fundamental errors in criminal procedure.

The court of criminal appeals in *Reynolds v. State*[373] relied on Supreme Court decisions[374] to affirm a conviction for delivery of a controlled substance despite a prior federal conviction for the identical offense. Although the defendant committed only one act, by violating statutes of two separate sovereigns he committed two separate offenses; thus he could be prosecuted and punished for both.

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368. 97 S. Ct. 222, 53 L. Ed. 2d 187 (1977).
369. 284 U.S. 299 (1932).
370. Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).
371. 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).
372. 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977).
373. 548 S.W.2d 733 (Tex. Crim. App. 1977).
374. Waller v. Florida, 397 U.S. 387 (1970); Benton v. Maryland, 395 U.S. 784 (1969); Bartkus v. Illinois, 359 U.S. 121 (1959).

G. *Recusal of Judge*

When the defendant in *Vera v. State*[375] waived a jury and pled guilty to delivery and possession of heroin, the trial judge stated that he was not inclined to give probation in a sale of heroin case. On appeal the defendant contended that he was denied a fair trial on the issue of punishment because the trial court was prejudiced against the range of punishment provided by statute. The defendant did not ask the court to apply statutory[376] or constitutional grounds[377] for disqualification of a judge. Instead, he sought application of article 35.16(c)(2), relating to juror disqualification.[378] That statute provides that a juror is disqualified if he has a bias or prejudice against any of the law applicable to the case. Bias or prejudice not based upon interest, however, is not a legal disqualification for a judge[379] and the court declined to apply article 35.16(c)(2) to trial judges.

H. *Vindictive Indictment*

While the United States Supreme Court recognized the legitimacy of plea bargaining in *Santobello v. New York*,[380] only when it decided *Bordenkircher v. Hayes*[381] did it face the issue of limits on prosecutorial conduct in the plea bargaining process. The defendant in *Hayes* was told that if he refused to plead guilty to an offense carrying two to ten years imprisonment, he would instead be charged under the habitual criminal act and, if convicted, would face a mandatory life sentence. He chose not to plead guilty and insisted on a jury trial. The prosecutor obtained an indictment under the habitual criminal statute and the defendant was convicted. The Court held that allowing the prosecutor to carry out his threat did not violate the defendant's right to due process. In particular, the Court stressed the fact that the defendant had had prior warning of what the prosecutor intended to do and re-emphasized the need for effective plea bargaining in criminal prosecutions.

The Fifth Circuit addressed the subject of vindictive prosecution in *Hardwick v. Doolittle*.[382] The court allowed a prosecutor some room to explain and justify his actions in order to rebut a presumption of vindictive prosecution. Thus, he may show that his reasons for reindictment were other than to punish a defendant for exercising his legal rights. On the other hand, in *United States v. DeMarco*[383] the Ninth Circuit ruled that the appearance of vindictiveness on the part of the prosecutor and apprehension of vindictiveness on the part of the defendant bring a case squarely within the doctrine

375. 547 S.W.2d 283 (Tex. Crim. App. 1977).
376. TEX. CODE CRIM. PROC. ANN. art. 30.01 (Vernon 1966).
377. TEX. CONST. art. V, § 11.
378. TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon 1966).
379. Aldridge v. State, 342 S.W.2d 104 (Tex. Crim. App. 1961) (bias of trial judge, standing alone, does not constitute error; accused can complain of erroneous ruling made by trial court as resulting from prejudice, but it would be error in ruling rather than prejudice that would give him right to complain). *See also* Bolding v. State, 493 S.W.2d 181 (Tex. Crim. App. 1973).
380. 404 U.S. 257 (1971).
381. 46 U.S.L.W. 4089 (Jan. 18, 1978).
382. No. 76-1065 (5th Cir. Aug. 29, 1977).
383. 550 F.2d 1224 (9th Cir. 1977). The prosecutor made no attempt to rebut the appearance of vindictiveness.

prohibiting vindictive indictment expressed in *North Carolina v. Pearce*[384] and *Blackledge v. Perry*.[385]

I. *Indictment*

For many years the court of criminal appeals has consistently reversed more cases for improper indictments than any other single cause. Thus, it is wise to allege that an indictment is fundamentally defective as a ground of error, even if no motion to quash was made in the trial court.

The form of an indictment may make it fundamentally defective. For example, it must show on its face that the offense charged is not barred by limitations.[386] When there is a special statute prohibiting conduct, the allegation must be charged under it and not under the general statute.[387] When an unnecessary fact is alleged to describe an element which is legally essential to charge a crime, it must be proved as alleged, even though needlessly stated.[388] When an otherwise innocent act may become criminal by manner and means, it is necessary to allege facts showing the manner and means which made the act a criminal offense.[389] Nevertheless, the State need not specifically describe personal property which is the subject of a theft,[390] despite the wording of article 21.09 the Code of Criminal Procedure.[391] Ambiguities in indictments caused by misspelled or misplaced words of art will not result in reversal unless they can be shown to have misled the defendant.[392]

In several cases[393] interpreting the statute governing the passing of forged checks, the court held that failure to file a motion to quash waived the defect in indictments which omitted to allege that the defendant passed the checks *knowing* that they were forged. Similarly, in *Eanes v. State*[394] failure to file a motion to quash constituted waiver of defects in an indictment which omitted the manner and means used to commit an assault.

Citing a nineteenth century case which referred to "hairbreadth distinctions"[395] in indictments, the court in *Martin v. State*[396] rewrote the law

384. 395 U.S. 711 (1969).
385. 417 U.S. 21 (1974).
386. *Ex parte* Dickerson, 549 S.W.2d 202 (Tex. Crim. App. 1977).
387. *See, e.g., Ex parte* Harrell, 542 S.W.2d 169 (Tex. Crim. App. 1977) (defendant should have been charged under more specific statute prohibiting possession of a forged instrument with intent to utter it, rather than general offense of possession of a criminal instrument with intent to use it in commission of offense).
388. Weaver v. State, 551 S.W.2d 419 (Tex. Crim. App. 1977) (indictment alleging that deadly weapon was .22 caliber "Ruger" held at fatal variance with proof that weapon used was "Luger").
389. Posey v. State, 545 S.W.2d 162 (Tex. Crim. App. 1977).
390. Welch v. State, 543 S.W.2d 378 (Tex. Crim. App. 1976).
391. TEX. CODE CRIM. PROC. ANN. art. 21.09 (Vernon Supp. 1978). This statute provides that "if known, personal property alleged in an indictment shall be identified by name, kind, number, and ownership."
392. Butler v. State, 551 S.W.2d 412 (Tex. Crim. App. 1977) (use of the word "of" rather than "by" in part of indictment did not make indictment defective for uncertainty).
393. Ivy v. State, 547 S.W.2d 626 (Tex. Crim. App. 1977); Edmond v. State, 546 S.W.2d 289 (Tex. Crim. App. 1977); Jones v. State, 545 S.W.2d 771 (Tex. Crim. App. 1977).
394. 546 S.W.2d 312 (Tex. Crim. App. 1977). The conviction, however, was reversed on other grounds.
395. Goode v. State, 2 Tex. Crim. 520 (1877).
396. 541 S.W.2d 605 (Tex. Crim. App. 1976).

concerning idem sonans, which means names are the same that have the same sound. The court concluded that the resolution of questions involving the rule of idem sonans should be limited primarily to the triers of fact. They will, therefore, refrain from disturbing on appeal a jury or trial court determination that names in question are idem sonans unless evidence shows that the names are patently incapable of being sounded the same or that the accused was misled to his prejudice. All decisions in conflict with that rule were overruled.[397] Consequently questions involving the rule of idem sonans must be raised in the first instance at trial; if raised for the first time on appeal, they will be treated as having been waived.

Many indictments were found to be defective for errors of omission. Failure of an attempted arson indictment to allege that a defendant acted "wilfully," as specified by statute,[398] resulted in reversal in *Huggins v. State*.[399] In theft and criminal mischief cases failure to allege that property was destroyed or taken without the "effective consent of the owner" resulted in numerous reversals.[400] Likewise, failure to allege a "culpable mental state" resulted in reversals in *Bocanegra v. State*[401] and *Tew v. State*.[402] Clearly, an indictment which does not allege an offense under the law is utterly insufficient and any conviction based thereon will be considered void; this will allow reversals for "fundamental error."

Although normally indictments which track the pertinent portions of a statute and allege culpability are sufficient, in certain cases additional information must be set out to give the defendant sufficient notice of the precise charge against him.[403] Thus, in *Amaya v. State*[404] an information charging a defendant with obtaining welfare benefits by means of wilfully false statements was defective for failing to set out the specific "wilfully false statements" allegedly made. Similarly, an indictment charging a parent with injury to a child by failure to secure proper medical treatment was held insufficient because it failed to allege the relationship which placed the defendant under a statutory duty to secure such medical treatment.[405] Further, an indictment for indecency with a child[406] must state that the sexual contact was engaged in "with the intent to arouse or gratify the sexual desire of any person" because "[w]here a particular intent is a material fact in the description of the offense, it must be stated in the indictment."[407] An indictment for driving a motor vehicle while the operator's license was suspended must state the reason for the suspension.[408]

397. *Id.* at 608.
398. The statute applicable at that time was TEX. PEN. CODE ANN. app. art. 1316 (Vernon 1974) (repealed 1973).
399. 544 S.W.2d 147 (Tex. Crim. App. 1976).
400. Reynolds v. State, 547 S.W.2d 590 (Tex. Crim. App. 1977); Davis v. State, 547 S.W.2d 43 (Tex. Crim. App. 1977); Timms v. State, 542 S.W.2d 424 (Tex. Crim. App. 1976).
401. 552 S.W.2d 130 (Tex. Crim. App. 1977).
402. 551 S.W.2d 375 (Tex. Crim. App. 1977).
403. *See* American Plant Food Corp. V. State, 508 S.W.2d 598 (Tex. Crim. App. 1974).
404. 551 S.W.2d 385 (Tex. Crim. App. 1977).
405. Ronk v. State, 544 S.W.2d 123 (Tex. Crim. App. 1976).
406. Victory v. State, 547 S.W.2d 1 (Tex. Crim. App. 1976).
407. TEX. CODE CRIM. PROC. ANN. art. 21.05 (Vernon 1966).
408. Tave v. State, 546 S.W.2d 317 (Tex. Crim. App. 1977).

"Attempt" indictments are not fatally defective for omitting the magic language, "conduct amounting to more than mere preparation that tends but fails to effect the commission of the offense intended,"[409] but they must nevertheless state an offense. In *Hobbs v. State*[410] the State intended to charge attempted capital murder, but the indictment failed to recite that the defendant hired or employed another person; because the indictment failed to meet the statutory definition of the crime, the conviction was reversed. An indictment which describes the conduct made the basis of the attempt, however, does not have to allege the constitutent elements of the offense attempted.[411]

J. *Discovery*

Although most of the significant opinions in the discovery area had to do with "evidence favorable to the accused," some general discovery law was clarified. One such clarification involved disclosure of witnesses to be used by the State in any stage of the trial.[412] In *Young v. State*[413] the trial court granted a pretrial motion seeking discovery of the names of the witnesses expected to be used by the State at the punishment stage of the trial; the State informed the court that it did not know what witnesses it would call on punishment. Since the defendant never raised the issue again, nor did he object when the State called witnesses at the punishment stage, the court of criminal appeals denied reversal. Likewise, in *Smith v. State*[414] the defendant moved for discovery of technical reports concerning a rape committed during a bank robbery. The prosecutor informed the court that he did not have the information available when the request was made. As no further request was made, failure to comply with the discovery motion was not error. In *Gollin v. State*[415] the prosecutor furnished defense counsel with a typewritten copy of a confession, rather than a copy of the original. Since the defendant showed no harm or prejudice from receipt of the copy instead of the original, the court found no error. In contrast, a motion for discovery requesting the name of an informer, who was shown to be a material witness, resulted in error meriting reversal in *Stein v. State*[416] when the State failed to produce the witness.

Because state courts rely increasingly on presentence reports prepared by probation officers in assessing punishment, *United States v. Hodges*[417] may in certain instances apply to state court proceedings. In that case the Fifth Circuit held that, upon request, defendant or his counsel was entitled to sufficient time to read the presentence report and to comment on any alleged factual inaccuracy before sentence was imposed.

409. Hobbs v. State, 548 S.W.2d 884 (Tex. Crim. App. 1977).
410. *Id.*
411. Williams v. State, 544 S.W.2d 428 (Tex. Crim. App. 1976).
412. *See* Hoagland v. State, 494 S.W.2d 186, 189 (Tex. Crim. App. 1973) (Odom, J., concurring).
413. 547 S.W.2d 23 (Tex. Crim. App. 1977).
414. 547 S.W.2d 6 (Tex. Crim. App. 1977).
415. 554 S.W.2d 683 (Tex. Crim. App. 1977).
416. 548 S.W.2d 61 (Tex. Crim. App. 1977).
417. 547 F.2d 951 (5th Cir. 1977).

Alleged *Gaskin* rule[418] violations were considered in several significant opinions. *Toler v. State*[419] held that even if the defendant was entitled to examine a police offense report error was waived since the reports were not included in the appellate record or sealed and forwarded to the court for inspection. According to *Mendoza v. State*,[420] harm in denying reports or statements is determined by considering whether an accused is thereby denied effective cross-examination or possible impeachment of a witness. Therefore, in determining "harmfulness" the appellate court must be able to see a report or statement, and failure to make an effort to incorporate it in the appellate record will result in waiver of any error.[421] Furthermore, when reports are included for appellate review, an error by the trial court in failing to provide the reports to counsel during trial is harmless if the witnesses' testimony is entirely consistent with his prior statements.[422] On the other hand, it was not error for the trial court in *Granviel v. State*[423] to order that the report of a psychiatrist appointed by the court on defense counsel's request be turned over to the State. Since the psychiatrist had been appointed by the court, his report was available to either party; moreover, communications between a physician and his patient are not privileged in Texas.[424]

Contentions that the State suppressed "evidence favorable to the accused" were numerous. In *Ex parte Prior*[425] the defendant contended that the State suppressed from his counsel the fact that he was unconscious during a robbery and rape offense. Since he knew of his condition at the time of the offense, however, he was not allowed to attribute suppression of evidence to the prosecution.[426] The defendant was unsuccessful in *United States v. Trevino*[427] in discovering the presentence report of a complaining witness who had pled guilty to the offense before testifying against the defendant. Interpreting his motion for discovery as a *Brady v. Maryland*[428] request, the Fifth Circuit nevertheless declined to extend *Brady*, holding that material possessed by the court or its probation officer is not within *Brady* reach. In *Ransonette v. State*,[429] the defendant contended that the trial court erred in denying his request to have the court make an *in camera* inspection of the prosecutor's file to determine if it contained evidence favorable to him. The motion in effect admitted that he knew of no material

418. Gaskin v. State, 177 Tex. Crim. 7, 353 S.W.2d 467 (1961) (defendant has right to inspect prior statements of prosecution witnesses).
419. 546 S.W.2d 290 (Tex. Crim. App. 1977).
420. 552 S.W.2d 444 (Tex. Crim. App. 1977).
421. *Id.*
422. Ogle v. State, 548 S.W.2d 360 (Tex. Crim. App. 1976).
423. 552 S.W.2d 107 (Tex. Crim. App. 1976), *cert. denied*, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977).
424. Bonewald v. State, 157 Tex. Crim. 521, 251 S.W.2d 255 (1952); Dodd v. State, 83 Tex. Crim. 160, 201 S.W. 1014 (1918).
425. 540 S.W.2d 723 (Tex. Crim. App. 1976).
426. *Cf.* Means v. State, 429 S.W.2d 490 (Tex. Crim. App. 1968) (failure to disclose evidence which may have been helpful to defense not reversible error where not materially affecting determination of guilt or innocence).
427. 556 F.2d 1265 (5th Cir. 1977).
428. 373 U.S. 83 (1963).
429. 550 S.W.2d 36 (Tex. Crim. App. 1976).

held by the prosecutor which was favorable to his defense. Such a request was too broad to be effective under the holding of the Supreme Court in *United States v. Agurs*[430] that a general request for exculpatory matters is equivalent to no request at all. The court in *Ransonette* held that under *Brady v. Maryland*[431] and *Means v. State*[432] the elements which must be shown in a successful motion for favorable evidence are: (1) suppression of evidence by the prosecution after a request by the defense; (2) the evidence's favorable character for the defense; and (3) the materiality of the evidence.[433] Therefore, the request was properly denied.

In contrast, the deliberate actions taken by the State to suppress evidence favorable to the accused, whether or not in response to a request by defense counsel, result in constitutional error. For example, in *Ex parte Turner*[434] the prosecution had knowledge that a narcotics officer effected the release of a State's witness. This knowledge, the court held, should not have been suppressed and in fact hidden from the defense "irrespective of the good faith or bad faith of the prosecution."[435] The suppression of facts deprived the defendant of due process.

K. *Search and Seizure; Suppression of Evidence*

Warrantless Arrest—Scope of Search. Officers may stop citizens in automobiles on less than probable cause under the same sorts of circumstances enabling them to stop those on foot.[436] For example, cars may be stopped for driver's license checks, but further investigation requires something more. Detecting the odor of marijuana and seeing a passenger under the influence of drugs justifed further investigation in *Tardiff v. State*.[437] Since the purpose of such a detention is strictly limited by statute,[438] however, it will not justify an investigation exceeding the initial purpose in the absence of articulable suspicious conduct.[439]

In *Robertson v. State*[440] a thorough automobile search, pursuant to a lawful traffic arrest, was held to be proper when the automobile had been taken into police custody. Acknowledging that such an "inventory" search has been approved by the Supreme Court in *South Dakota v. Opperman*,[441] the dissent distinguished *Opperman* on its facts; in *Robertson* the car was merely under police "control" following an accident, rather than in police

430. 427 U.S. 97 (1976).
431. 373 U.S. 83 (1963).
432. 429 S.W.2d 490 (Tex. Crim. App. 1968).
433. *See* Moore v. Illinois, 408 U.S. 786 (1972).
434. 545 S.W.2d 470 (Tex. Crim. App. 1977).
435. *Id.* at 475.
436. The constitutional validity of such an investigative stop depends on "specific and articulable facts and circumstances" and the officer's reasonable inferences from those facts in each individual case. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Sibron v. New York, 392 U.S. 40 (1968); Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972).
437. 548 S.W.2d 380 (Tex. Crim. App. 1977).
438. TEX. REV. CIV. STAT. ANN. art. 6687(b), § 13 (Vernon 1977).
439. Faulkner v. State, 549 S.W.2d 1 (Tex. Crim. App. 1976) (overruling Black v. State, 491 S.W.2d 428 (Tex. Crim. App. 1973). Black had affirmed a conviction for possession of a pistol seen only after looking for car registration papers to confirm an apparently valid driver's license).
440. 541 S.W.2d 608 (Tex. Crim. App. 1976).
441. 428 U.S. 364 (1976).

"custody" as occurs when a vehicle is impounded. The dissenting judge described the case as providing a "new exception to the fourth amendment."[442] Nevertheless, absent "inventory search" testimony, automobile searches continue to be limited to that area necessary to protect the officers from bodily injury during the arrest process[443] and to those things in plain view.

The "plain view doctrine" was clarified by the court of criminal appeals in *McDougald v. State*[444] and *DeLao v. State*.[445] In *McDougald* the court reversed because of the failure to suppress evidence of a pistol. Although the pistol was admittedly in plain view after voluntary consent had been given to view the inside of the vehicle, the facts did not authorize an investigatory stop under any theory; thus, only the unlawful stop allowed the officer to be in a position to see the gun in plain view. In *DeLao* the defendant was convicted for possession of heroin found in a red balloon on a window sill. At the time the balloon was seized, the defendant was away from the residence in police custody and thus search was not justified as incident to arrest. Moreover, the facts did not indicate that the contraband was in plain view.[446]

Border search law was expanded to include a search of international mail when customs officials have reasonable cause to suspect that the envelope contains contraband.[447] *Ochs v. State*[448] also extended the "open fields doctrine"[449] from the west Texas plains to the east Texas piney woods. Details from an informant, insufficient to establish probable cause but adequate to allow corroboration from surveillance officers, brought the case within the *Draper*[450] doctrine. The surveillance and viewing of marijuana, made on Appellant's property at a distance of fifty yards from his house, was considered a permissible intrusion onto "open fields."

In *Vargas v. State*[451] a "private search" by a hospital nurse did not constitute a "search" to which the exclusionary rule applies.[452] When such a search uncovered a pistol, security officers were then justified in continuing the inventory of the defendant's personal effects which included a heroin-filled balloon.

Search With Warrant. The seizure of a pharmacist's prescription records pursuant to an "administrative warrant" resulted in reversal in *Poindexter v.*

442. 541 S.W.2d at 611.
443. Beck v. State, 547 S.W.2d 266 (Tex. Crim. App. 1976). Although the traffic arrest was valid, the arresting officer stated that he searched the glove compartment because of his concern for "self protection." The record failed to present facts which would have given the officer reasonable grounds to believe he was in danger or that the person they encountered was armed or dangerous. No testimony was presented by the officers regarding an "inventory search."
444. 547 S.W.2d 40 (Tex. Crim. App. 1977).
445. 550 S.W.2d 289 (Tex. Crim. App. 1977).
446. Nicholas v. State, 502 S.W.2d 169 (1973).
447. United States v. Ramsey, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977).
448. 543 S.W.2d 355 (Tex. Crim. App. 1976).
449. First articulated in Hester v. United States, 265 U.S. 57 (1925), the doctrine excepts from the protection of the fourth amendment those items found in open fields.
450. Draper v. United States, 358 U.S. 307 (1959).
451. 542 S.W.2d 151 (Tex. Crim. App. 1976).
452. The nurse in *Vargas* was not searching for contraband.

State.[453] The law enforcement officers had forcibly entered the defendant's pharmacy without his consent, pursuant to an administrative order obtained "for the purpose of examining, inspecting, and copying all records."[454] The court held that the statute authorizing administrative searches[455] did not permit searches such as the one which had taken place. Nor did the administrative order qualify for treatment as a search warrant, since it was not based upon a sworn affidavit setting forth facts showing probable cause.[456]

Finding that the minimum requirements for proving credibility were not set forth in the affidavit, *Avery v. State*[457] reversed the defendant's conviction. The only facts before the magistrate were that "informants have both given information on numerous occasions in the past in reference to violations of the gambling laws of this state."[458] Nothing showed whether that information was true or false.

Expunication of Record. Effective August 29, 1977, a person who is "entitled" to expunction of his criminal record may file a petition in district court in the county in which he was arrested.[459] He is entitled if no indictment or information has been presented pursuant to his arrest, if he has been released and a charge has been dismissed, and if he has not been convicted of a felony in the preceding five years.[460] The effect of an order of expunction is to disallow arrest records for any purpose; to allow petitioner to deny the occurrence of the arrest and the existence of the expunction order; and to allow him to limit his answers under oath about the arrest to the fact that the matter in question has been expunged.[461]

Mere Evidence Warrants. A significant broadening of the allowable scope for search warrants results from the amendment to article 18.01 of the Code of Criminal Procedure.[462] Two subsections have been added to the Article which allow the issuance of "mere evidence" warrants. While the statute attempts to specifically limit the proper circumstances for such a warrant, allowing search and seizure of "property or items, except the personal writings of the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense"[463] significantly strengthens the ability of the prosecutor to look for such "evidence."

453. 545 S.W.2d 798 (Tex. Crim. App. 1977).
454. *Id*. at 800.
455. Tex. Pen. Code Ann. app. art. 725b, § 15, art. 726d, § 6 (Vernon 1974) (repealed 1974).
456. TEX. CODE CRIM. PROC. ANN. art. 18.01 (Vernon 1977).
457. 545 S.W.2d 803 (Tex. Crim. App. 1977).
458. *Id*. at 804.
459. TEX. CODE CRIM. PROC. ANN. art. 55.02 (Vernon Supp. 1978).
460. *Id*. art. 55.01.
461. *Id*. art. 55.03.
462. *Id*. art. 18.01 (Vernon 1977).
463. *Id*. art. 18.02(10).