



1979

Criminal Procedure

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Recommended Citation

James J. Hippard Sr., *Criminal Procedure*, 33 Sw L.J. 505 (1979)
<https://scholar.smu.edu/smulr/vol33/iss1/17>

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CRIMINAL PROCEDURE

by

James J. Hippard, Sr.*

I. INVESTIGATION TO INDICTMENT

A. *Investigation, Search, Seizure, and Arrest*

Temporary Investigative Detention. It is settled that even without probable cause a police officer may briefly stop a suspicious individual, whether a pedestrian or an occupant of a car, in order to determine his identity or to maintain the status quo momentarily while obtaining more information.¹ In *Armstrong v. State*² the Texas Court of Criminal Appeals set down the test for allowing such brief stops without probable cause:

There must be a reasonable suspicion by the law enforcement officer that some activity out of the ordinary is or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to crime.³

Three recent cases clarify this test. In *Shaffer v. State*⁴ a police officer observed defendant driving his cab five to ten miles per hour at 3:00 a.m. in a commercial area where all businesses were closed. It was not a high crime area and defendant was not violating any traffic laws or driving erratically. The court held the stop illegal, observing that "even in the absence of bad faith, detention based 'on a mere hunch' is illegal Where the events are as consistent with innocent activity as with criminal activity, a detention based on these events is unlawful."⁵

The defendant in *Jones v. State*⁶ was a white male walking with two black men in a black neighborhood near the noon hour. Defendant looked at a police car as it approached and then placed his hand in his pocket. Although there was no indication that the incident took place in a high crime area, the police officer stopped the defendant for questioning. The court held the original detention illegal since there was no basis for the officer to believe that defendant was engaging in any criminal activity.

In comparison, *Amorella v. State*⁷ upheld the investigative detention of the defendants under the following circumstances. Defendants' car was

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1. *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968).

2. 550 S.W.2d 25 (Tex. Crim. App. 1976).

3. *Id.* at 31.

4. 562 S.W.2d 853 (Tex. Crim. App. 1978).

5. *Id.* at 855.

6. 567 S.W.2d 209 (Tex. Crim. App. 1978).

7. 554 S.W.2d 700 (Tex. Crim. App. 1977).

parked with the engine running in front of a closed store at 1:30 a.m. in a high crime area where all other businesses were closed. Two defendants were in the car and one defendant was standing in back of the car with the trunk open. When the police car passed, the outside man closed the trunk, got into the car and started away. *Amorella* upheld the detention because there was activity out of the ordinary and some indication that the activity was related to crime.

*Temporary Seizure of Nonarrested Traffic Offender. Pennsylvania v. Mimms*⁸ extended the less than probable cause temporary detention concept of *Terry v. Ohio*⁹ to all nonarrested traffic offenders stopped for the issuance of a traffic summons. A police officer stopped defendant Mimms to issue a ticket for driving with an expired license plate. As a routine precautionary measure the officer ordered Mimms out of his car. When Mimms emerged from his car, the officer noticed a bulge in his jacket, frisked him, and discovered a revolver. Defendant was convicted for carrying a concealed deadly weapon and possessing a firearm without a license.

The Court held that once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver out of the vehicle without violating the fourth amendment's proscription of unreasonable searches and seizures. Justice Stevens, in his dissent, asserted that such a general rule appeared to abandon the central teaching of the Court's fourth amendment jurisprudence "which has ordinarily required individualized inquiry into the particular facts justifying every police intrusion."¹⁰ The Justice also feared that the rule would eventually be expanded to allow an automatic safety search of every driver and passenger legitimately stopped no matter how trivial the offense.¹¹

Searches by Private Citizens. It has long been recognized that the fourth amendment is not applicable to searches by private citizens who are neither law enforcement officers nor acting as agents for a law enforcement officer, and thus does not require the exclusion of evidence so obtained.¹² In *Moore v. State*¹³ the State unsuccessfully sought to apply this rule to a search by an off-duty police officer. Moore was convicted for possession of marijuana after an off-duty police officer searched the defendant's parked van without probable cause. The Court rejected the State's contention that the officer was a private citizen at the time of the search, pointing out that a police officer's off-duty status is not a limitation upon the discharge of police authority since an officer, for many purposes, is on duty twenty-four hours a day.

8. 434 U.S. 106 (1977) (per curiam).

9. 392 U.S. 1 (1968).

10. *Id.* at 116 (Stevens, J., dissenting).

11. *Id.* at 121-23.

12. *Burdeau v. McDowell*, 256 U.S. 465 (1921).

13. 562 S.W.2d 484 (Tex. Crim. App. 1978).

The rule that the fourth amendment proscribes only governmental action, however, was successfully used in *Bodde v. State*,¹⁴ in which evidence obtained by defendant's landlady from his apartment was held not subject to fourth amendment exclusion. The court held that although article 38.23 of the Code of Criminal Procedure provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case,"¹⁵ it did not render inadmissible the items seized by the defendant's landlady since she was rightfully on the premises.¹⁶

An arguable implication of the decision is that the result would have been otherwise if the landlady had not been rightfully on the premises.

Warrantless Exterior Examination of an Impounded Vehicle. The United States Supreme Court held in *Cardwell v. Lewis*¹⁷ that when probable cause exists a warrantless examination of the exterior of an impounded vehicle is reasonable and invades no right of privacy. In *Cardwell* defendant's car had been impounded by the police and paint scrapings were taken from the car during an external examination. Under very similar circumstances the Texas Court of Criminal Appeals upheld a warrantless, probable cause examination in *Easley v. State*.¹⁸ It should be noted, however, that neither *Cardwell* nor *Easley* asserts that examination of an impounded vehicle's exterior is immune from fourth amendment proscription. In both cases there were findings of probable cause and the basic problem was the lack of a search warrant. The plurality in *Cardwell*, however, found the possibility of the car's removal sufficiently exigent to excuse the lack of a warrant, whereas the *Easley* court did not address this problem. The plurality opinion in *Cardwell* is questionable support for an even more questionable result in *Easley*.

Warrantless Search—"Murder Scene" Exception. The Supreme Court of Arizona held that "a reasonable, warrantless search of the scene of a homicide . . . does not violate the Fourth Amendment . . . [if it begins] within a reasonable period following the time when the officials first learn of the murder (or potential murder)."¹⁹ In *Mincey v. Arizona*²⁰ the United States Supreme Court unanimously rejected this asserted exigency justification for a warrantless search. *Mincey* reiterates the basic rule that warrantless searches are per se unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions. The Court

14. 568 S.W.2d 344 (Tex. Crim. App. 1978).

15. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1966) (emphasis added).

16. 568 S.W.2d at 353.

17. 417 U.S. 583 (1974).

18. 564 S.W.2d 742 (Tex. Crim. App. 1978).

19. *Mincey v. Arizona*, 115 Ariz. 472, 482, 566 P.2d 273, 283 (1977), quoted in *Mincey v. Arizona*, 98 S. Ct. 2408, 2412, 57 L. Ed. 2d 290, 298 (1978).

20. *Mincey v. Arizona*, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

explained that the seriousness of the offense under investigation did not in and of itself create an exigent circumstance of the kind that would justify a warrantless search; that is, there was no emergency threatening life or limb, nor was there any indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant.

Search Warrant Affidavit—Truthfulness Challenge. The long established Texas prohibition against going behind the face of a search warrant affidavit²¹ has been overturned by the Supreme Court. *Franks v. Delaware*²² held that if a defendant makes a substantial preliminary showing that an affiant knowingly and intentionally, or with reckless disregard for the truth, includes a false statement in his affidavit for a search warrant, the fourth amendment requires a hearing if the alleged false statement was necessary to the finding of probable cause. The search warrant must be voided and the fruits of the search suppressed if the allegations are proven by a preponderance of the evidence. In order to secure an evidentiary hearing on a veracity challenge the defendant's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. Affidavits, or sworn or otherwise reliable statements of witnesses, should be furnished, or their absence satisfactorily explained.²³

The difficult question raised by *Franks*, which the Court specifically declined to decide, is "whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made."²⁴ The Court hints at the answer to its own question by reference to its decision in *McCray v. Illinois*,²⁵ which held that the due process clause of the fourteenth amendment did not require the State to expose an informant's identity upon a defendant's mere demand when there was ample evidence in the probable cause hearing to show that the informant was reliable and his information credible.

The holding in *Franks* may evolve into a requirement that an unidentified informant be brought forward by the State at a pretrial evidentiary hearing upon the defendant's adequate preliminary allegation of deliberate falsehood or of reckless disregard for the truth. As Justice Douglas stated in the *McCray* dissent: "It is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer."²⁶

In Texas the identification of previously unidentified informants may be required to be revealed only at the time of trial and then only if the informer either participated in the offense, was present at the time of the offense or arrest, or was otherwise shown to be a material witness to the

21. See, e.g., *Oubre v. State*, 542 S.W.2d 875 (Tex. Crim. App. 1976).

22. 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

23. *Id.* at 2685, 57 L. Ed. 2d at 682.

24. *Id.* at 2684, 57 L. Ed. 2d at 681.

25. 386 U.S. 300 (1967).

26. *Id.* at 316 n.2.

transaction or as to whether defendant knowingly committed the act charged.²⁷ Perhaps *Franks* has opened the door to pretrial revelation of the informer and to possible suppression of evidence whenever the defendant is able to mount a substantial veracity challenge to a search warrant affidavit based on information from an allegedly reliable unidentified informant.

Standing. In Texas a defendant who seeks to challenge the legitimacy of a search and seizure as the basis for suppressing relevant evidence has the burden of alleging standing: (1) by reason of his proprietary or possessory interest in the thing searched or seized; (2) his legitimate presence on the premises searched; or (3) his having been charged with an offense, an essential element of which is possession of the seized evidence. The last basis is commonly referred to as the "automatic standing" doctrine.

Prior to *Sullivan v. State*,²⁸ decided in May 1977, the State was required to contest the defendant's standing contentions under items (1) or (2) above in the trial court or else be precluded from raising the issue on appeal.²⁹ In *Sullivan* a majority of the court of criminal appeals sitting en banc held that the "State does not have the burden of listing or verbalizing in the trial court every possible basis for holding a search legal or else waive that basis for urging on appeal the validity of the search."³⁰ The dissent in *Sullivan* urged that unless the State is required to raise the issue of standing at trial, the defendant is denied the opportunity to present evidence on the issue, and is thus denied due process of law.³¹ In the future, defendants asserting standing under items (1) or (2) above should always offer as complete proof of standing as they possibly can even though the State makes no move to contest standing at the trial level.

The defendant also contended in *Sullivan* that the State was precluded from asserting that he possessed and used a gun to murder the victim, and yet lacked sufficient possession to confer standing to challenge the search of the car that produced the gun. The court responded that the State was not taking a contradictory position barred by law, in view of the State's assertion that the defendant had disavowed any proprietary or possessory interest in the searched car *before the search was made*. In such an event the State may argue without contradiction that the defendant had possession of the murder weapon at one time for purposes of conviction, but that at a later time, because of abandonment, defendant lacked the possessory interest in the car necessary to confer standing to object to the search of the car and seizure of the murder weapon.

Search Warrant—Blood. The taking of a blood sample from a defendant

27. *Bernard v. State*, 566 S.W.2d 575 (Tex. Crim. App. 1978).

28. 564 S.W.2d 698 (Tex. Crim. App. 1977) (en banc).

29. *See, e.g., Maldonado v. State*, 528 S.W.2d 234 (Tex. Crim. App. 1975).

30. 564 S.W.2d at 704.

31. *Id.* at 706.

is a search and seizure within the meaning of both the fourth amendment³² and article I, section 9 of the Texas Constitution.³³ Effective May 25, 1977, article 18.02 of the Texas Code of Criminal Procedure was amended to permit the issuance of a search warrant for "property or items . . . constituting evidence of an offense or contributing evidence tending to show that a particular person committed an offense."³⁴ Prior to the addition of this language, a majority of the court of criminal appeals in *Escamilla v State*³⁵ stated that even a properly prepared search warrant issued upon a showing of probable cause would be invalid because blood was not one of the items for which a search warrant could issue under article 18.02.

It remains to be seen whether blood will be construed to be "property" or an "item" within the meaning of amended article 18.02(10). It is clear that even if the amended statute is construed to permit search and seizure of a defendant's blood, a properly obtained search warrant issued upon a showing of probable cause would nevertheless be required because a person's blood type remains constant throughout his lifetime so there can be no valid claim of exigency.³⁶ Neither can there be a valid warrantless search for blood incident to a lawful arrest since it is not unlawful to possess blood, nor would the possession of blood endanger the arresting officer.³⁷ The only exception to the warrant requirement as a prerequisite to a search for blood would be where positive and unequivocal consent was proven by clear and convincing evidence to have been freely and voluntarily given, and this burden cannot be discharged by showing mere acquiescence to a claim of lawful authority.³⁸

Arrest Warrant Execution—Knock or No Knock. "Knock and announce" statutes, requiring police officers to announce their identity and purpose before making a forcible entry to arrest or search, have been enacted in most states³⁹ and by the federal government.⁴⁰ Texas has such statutes,⁴¹ but the Texas Court of Criminal Appeals emphasized once again in *Jones v. State*⁴² that Texas might as well have an explicit "no knock" statute.

In *Jones* the officers admitted that they neither knocked nor announced their identity before making a forcible entry into defendant's dwelling to

32. *Schmerber v. California*, 384 U.S. 757 (1966).

33. *Smith v. State*, 557 S.W.2d 299 (Tex. Crim. App. 1977); *Escamilla v. State*, 556 S.W.2d 796 (Tex. Crim. App. 1977).

34. TEX. CODE CRIM. PROC. ANN. art. 18.02(10) (Vernon 1977).

35. 556 S.W.2d at 799.

36. *Smith v. State*, 557 S.W.2d 299 (Tex. Crim. App. 1977). This assertion in no way conflicts with the holding in *Schmerber v. California*, 384 U.S. 757 (1966), in which a warrantless taking of blood was upheld because of the threatened destruction of evidence, namely, the momentary presence of alcohol in the bloodstream of a defendant accused of driving while intoxicated.

37. 557 S.W.2d at 302.

38. 556 S.W.2d at 799.

39. For a list of these statutes, see Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964).

40. 18 U.S.C. § 3109 (1976).

41. TEX. CODE CRIM. PROC. ANN. arts. 15.25, .26, 18.06(b) (Vernon 1977).

42. 568 S.W.2d 847 (Tex. Crim. App. 1978) (en banc).

make an arrest. Defendant urged that evidence seized in conjunction with the arrest should have been suppressed in light of the officers' acknowledged violations of article 15.25 and 15.26 of the Texas Code of Criminal Procedure. The court summarily rejected this contention, reasoning that in earlier decisions involving the same statutory requirements as applied to searches, the court had not allowed an officer's failure to knock and announce to render the ensuing searches illegal.⁴³ Thus, the court could perceive no reason why noncompliance with the same requirements as applied to arrests should render the arrest illegal. Since the court's conclusion of legality is just as summary in the earlier decisions cited, it appears that the court has in effect nullified articles 15.25, 15.26, and 18.06(b) of the Code of Criminal Procedure.

Historically, knock and announce statutes are codifications of early common law principles respecting protection of privacy, mitigation of violence, and the preservation of property.⁴⁴ These are obviously the legislative goals of the Texas statutes, and there is no practical way to enforce these public policy goals other than to suppress evidence obtained in violation of the statutory requirements.⁴⁵ Given this public policy foundation, it is for the legislature to decide whether the goals are to be discarded.

Validity of Search and Seizure—Jury Charge. Where an issue of fact is raised concerning the validity of a search and thus the admissibility of evidence obtained by the search, the defendant has a right under article 38.23 of the Code of Criminal Procedure⁴⁶ to have the jury charged concerning such issue. *Jordan v. State*⁴⁷ reminds us that it is reversible error for the trial court to refuse such a requested charge.

Defendant Jordon was convicted for unlawfully carrying a gun on a premises licensed to sell alcoholic beverages. At trial the officer who detained and searched defendant asserted the validity of the detention and search by reason of information allegedly given to him by defendant's former girlfriend. The former girlfriend took the stand for defendant and denied giving any information to the officer. This conflicting testimony raised an article 38.23 issue as to the validity of defendant's detention and search, and thus as to the admissibility of the gun found on defendant. As

43. *Barnes v. State*, 504 S.W.2d 450 (Tex. Crim. App. 1974); *Smith v. State*, 491 S.W.2d 924 (Tex. Crim. App. 1973).

44. Annot., 21 A.L.R. FED. 820, 823 (1974).

45. See generally Annot., 70 A.L.R.3d 217 § 3 (1976).

46. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1966) provides:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

47. 562 S.W.2d 472 (Tex. Crim. App. 1978).

the terms of article 38.23 are clearly mandatory, the trial court's refusal of the requested charge was held to be reversible error.

B. *Confessions and Admissions*

Custodial Silence Used to Impeach. A prosecutor may use post-arrest statements for impeachment purposes even though they are inadmissible as evidence of guilt because of *Miranda* defects.⁴⁸ Consider, however, the use of silence for impeachment purposes, both where the silence precedes and succeeds *Miranda* warnings. *Doyle v. Ohio*⁴⁹ established that the use of a defendant's silence at the time of arrest for impeachment purposes *after* receiving proper *Miranda* warnings violates the due process clause of the fourteenth amendment.⁵⁰ Although the *Doyle* court conceded that there are no express assurances in *Miranda* warnings that silence will not carry a penalty, such assurance is implicitly given to any person receiving the warning.⁵¹

The United States Court of Appeals for the Fifth Circuit in *United States v. Henderson*⁵² established a nonconstitutional rule for custodial but pre-*Miranda* warning silence that may prove definitive: the custodial silence of a defendant, prior to having received *Miranda* warnings, cannot be used to impeach unless such silence is totally inconsistent with the defendant's innocence and his exculpatory statements given at the trial. The court further explained that it would be the rare and exceptional case where comment on silence would be permissible and emphasized that there must be *total* inconsistency before impeachment can take place. If any rational explanation for the defendant's silence exists, then any reference to silence carries with it an intolerably prejudicial impact and will constitute reversible error, even absent any objection by the defendant.⁵³

A brief consideration of the facts in *Henderson* will clarify application of the rule. The defendant, a federal prisoner, was properly subjected to a custodial search by prison guards, which led to the discovery of marijuana on his person. The guards took defendant to a locked interrogation room where he remained until an FBI agent arrived to interrogate him. From the time of the search until the FBI agent came, the guards neither questioned defendant nor gave him *Miranda* warnings, and defendant remained silent. After receiving the *Miranda* warnings, defendant told the FBI agent that he had found the marijuana while performing his janitorial duties shortly before being stopped and searched, and that he had re-

48. *Harris v. New York*, 401 U.S. 222 (1971).

49. 426 U.S. 610 (1976).

50. The Court distinguished and excluded from application of the rule the situation in which a prosecutor uses the fact of post-arrest silence to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version on arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. *Id.* at 619 n.11.

51. *Id.* at 618.

52. 565 F.2d 900 (5th Cir. 1978).

53. *Id.* at 905.

mained silent because he feared being called a "snitch" by other prisoners. This exculpatory explanation was asserted by defendant at trial. During closing argument, the prosecutor commented on defendant's pre-*Miranda* warning silence, without objection by defendant's attorney. Defendant was convicted and on appeal the Fifth Circuit reversed and remanded for the reasons discussed above. Under the *Henderson* rule the result would have been the same even if defendant elected to remain silent in response to the interrogation of the FBI agent. The other federal circuits and the various states would do well to adopt the approach taken by the Fifth Circuit.

The Right to Silence. In *Griffin v. California*⁵⁴ the Supreme Court held that the fifth amendment gives a defendant the absolute right to remain silent in a trial and forbids either comment by the prosecution on the defendant's silence or instructions by the court that such silence is evidence of guilt. The Court, however, expressly reserved decision on whether a defendant can require the trial judge to instruct the jury that defendant's silence must be disregarded.⁵⁵ In the recent case of *Lakeside v Oregon*⁵⁶ the Court once again left that question unanswered, but at the same time concluded that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the fifth and fourteenth amendments. While rejecting the defendant's contention that it was a violation of the fifth amendment for a trial judge to draw the jury's attention in any way to the defendant's failure to testify unless the defendant acquiesces, the Court conceded that "[i]t may be wise for a trial judge not to give such a cautionary instruction over defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law."⁵⁷

Lakeside effects no change in Texas law. In *Rogers v. State*⁵⁸ the court of criminal appeals affirmed earlier cases holding that it was not reversible error to give such an instruction, but once again admonished trial judges to omit the instruction when requested by the defense to do so. The court in *Rogers* spoke of the importance of a trial court's being able to instruct the jury in the language of article 38.08 of the Texas Code of Criminal Procedure, which states that "the failure of any defendant to . . . testify shall not be taken as a circumstance against him" In view of this justification for not allowing a defendant to waive such an instruction, it is indeed strange to find that in Texas a defendant may not insist on that same instruction.⁵⁹

Justice Stevens, in his *Lakeside* dissent, joined by Justice Marshall, argued that since a defendant may waive his fifth amendment right to silence

54. 380 U.S. 609 (1965).

55. *Id.* at 615.

56. 435 U.S. 333 (1978).

57. *Id.* at 340.

58. 486 S.W.2d 786 (Tex. Crim. App. 1972).

59. *Galan v. State*, 164 Tex. Crim. 521, 301 S.W.2d 141 (1957).

without leave of the trial court, it follows that a defendant should also be able to waive, without leave of the trial court, any lesser right he might have to an instruction regarding said right to silence.⁶⁰ The logic of this argument is compelling.

Confession Voluntariness—State's Evidence Alone Does Not Raise Issue. The defendant in *Brooks v. State*⁶¹ moved to suppress his confession as involuntary, asserting that he was not physically capable of making the confession at the time it was made. A *Jackson v. Denno*⁶² hearing was had during the trial and the State, in anticipation of an attack on the confession, put on evidence of voluntariness. It turned out, however, that the defendant presented no evidence to indicate that the confession was not voluntary.

At the conclusion of the trial, defendant requested a jury instruction on voluntariness pursuant to article 38.22(c) of the Texas Code of Criminal Procedure,⁶³ which provides that "[w]hen the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement or confession." The trial court refused to give the instruction and defendant was convicted. He appealed, asserting that the trial court erred in not giving a jury instruction on voluntariness, and that the appeal should have been abated per *Hester v. State*⁶⁴ until the trial court made a specific detailed fact finding as to whether defendant was physically capable of making a confession at the time he was interrogated by the police.

The court of criminal appeals ruled: (1) evidence presented by the State in anticipation of an attack on the voluntariness of a confession does not put voluntariness in issue; only when some evidence is presented that a confession is not voluntary is the matter put in issue;⁶⁵ and (2) even though the trial court should have made a specific fact finding regarding physical ability, there was no reason to abate since defendant never actually mounted a challenge of the voluntariness and admissibility of the confession.⁶⁶

C. Lineups and Pretrial Identification

According to *Kirby v. Illinois*⁶⁷ the sixth amendment right to counsel attaches to corporeal identification conducted at or after the initiation of adversary judicial criminal proceedings.⁶⁸ This principle was reaffirmed in

60. 435 U.S. at 347-48.

61. 567 S.W.2d 2 (Tex. Crim. App. 1978).

62. 378 U.S. 368 (1964).

63. The language of art. 38.22(c) is now found virtually unchanged at TEX. CODE CRIM. PROC. ANN. art. 38.22, § 7 (Vernon Pam. Supp. 1966-78).

64. 535 S.W.2d 354 (Tex. Crim. App. 1976).

65. 567 S.W.2d at 3.

66. *Id.* at 4.

67. 406 U.S. 682 (1972).

68. *Id.* at 688.

Moore v. Illinois.⁶⁹ In *Moore* the United States Supreme Court held that a rape victim's identification of defendant during his uncounseled preliminary hearing, after the victim signed a complaint, was an uncounseled corporeal identification conducted at or after the initiation of adversary judicial criminal proceedings and violated the defendant's sixth amendment right to counsel. Further, the Court reemphasized that the right to counsel applies to one-on-one identification proceedings as well as to lineups.⁷⁰

During the survey period the Texas Court of Criminal Appeals applied the *Kirby* rule in a questionable manner. In *Wyatt v. State*⁷¹ the defendant was arrested on January 29, 1975, and was taken on January 30, at 8:35 a.m., before a magistrate who, pursuant to article 15.17 of the Texas Code of Criminal Procedure,⁷² informed him that he was charged with the offense of aggravated robbery.⁷³ Defendant signed a printed acknowledgment form. At 1:40 p.m. on the same day defendant was placed in a lineup without waiver of his right to an attorney and identified by the robbery victim. On January 31 at 11:09 a.m. a formal complaint was filed charging defendant with aggravated robbery, and he was subsequently convicted of the crime.

On appeal defendant contended that the trial court erred in failing to suppress the victim's identification at trial and all evidence of the lineup because the lineup had been held after defendant had been charged with aggravated robbery and he should have been given the opportunity to have counsel present pursuant to *Kirby*. The court of criminal appeals upheld the conviction, asserting that informing a defendant of the accusation against him does not constitute the initiation of adversary criminal procedures. Consequently, the court concluded that "the lineup was investigatory in nature and not accusatory. It was conducted prior to any arraignment, indictment, or formal charges being brought against [defendant] and . . . [he] was not entitled to counsel as a matter of absolute right."⁷⁴

It is difficult to understand how the *Wyatt* lineup could have been investigatory in nature and not accusatory when it did not take place until defendant had been under arrest for the better part of twenty-four hours, and after a magistrate of the State of Texas had informed him, both orally and in writing, that he was charged with the offense of aggravated robbery.⁷⁵ The court's reasoning becomes even more difficult to follow upon considering that the magistrate was carrying out the duty imposed on him by article 15.17 to "inform in clear language the person arrested of the accusa-

69. 434 U.S. 220 (1977).

70. *Id.* at 229.

71. 566 S.W.2d 597 (Tex. Crim. App. 1978).

72. TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon 1977).

73. 566 S.W.2d at 600.

74. *Id.*

75. *Id.*

tion against him and of any affidavit filed therewith."⁷⁶

It is also hard to accept the court's description of the lineup as "investigatory" when under Texas law the only legal temporary investigative detention without probable cause is the brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information.⁷⁷ Thus, under the facts of *Wyatt* and under applicable Texas law, it must be assumed that defendant had been arrested with probable cause to believe he had committed aggravated robbery. After all, this is the charge with which defendant was accused, according to the magistrate's warning given on the second day of the defendant's arrest. How then could a lineup subsequent to all of this be merely investigatory in nature?

As iterated in *Kirby* and reiterated in *Moore*, the point that marks the commencement of a criminal prosecution to which alone the explicit guarantees of the sixth amendment are applicable is the point at which a defendant finds "himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."⁷⁸ That point would appear to have been reached in *Wyatt*.

II. PRETRIAL PROCEDURE

A. *Indictments and Informations*

Defective Indictments and Informations—Void or Voidable. The court of criminal appeals continues its struggle with the excessive complexity and confusion in the law of indictments and informations,⁷⁹ but not always successfully. Hereafter "indictment" is used as including "information."

In an indictment "[t]he offense must be set forth in plain and intelligible words."⁸⁰ Also, whenever it becomes necessary to describe property in an indictment, the property must be described with as much specificity as possible.⁸¹ Over the years the court has handed down conflicting opinions as to when a deficiency in the allegation of an offense would be regarded as substantively objectionable so as to render the defective indictment *void*, or objectionable only as to form so as to render the defective indictment merely *voidable*. The distinction is extremely important because a void indictment is ineffective to invoke the court's jurisdiction,⁸² and may be

76. TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon 1977) (emphasis added).

77. *Armstrong v. State*, 550 S.W.2d 25, 30 (Tex. Crim. App. 1977).

78. *Moore v. Illinois*, 434 U.S. 220, 228 (1977)(quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

79. Foreman & Jones, *Indictments Under the New Texas Penal Code*, 15 HOUS. L. REV. 1 (1977).

80. TEX. CODE CRIM. PROC. ANN. arts. 21.02(7) (indictment), 21.21(7) (information) (Vernon 1966).

81. *Id.* art. 21.09 (Vernon Supp. 1978-79).

82. A prerequisite to the exercise of power by a court to hear and determine a criminal case is a legal invocation of the jurisdiction of that court. In criminal trials the court's jurisdiction to act can only be invoked by a valid written pleading. Where the State's pleading (indictment or information) is found to be void, the court's jurisdiction is never legally in-

attacked at any time.⁸³ In comparison, if the indictment is merely voidable, the defect will be treated as waived and denied appellate consideration if a defendant fails to urge it before trial by timely motion to quash.⁸⁴

In *American Plant Food Corp. v. State*⁸⁵ the court laid down a new, more lenient rule for measuring the sufficiency of an indictment to advise a defendant with reasonable certainty of the accusation he was being called upon to meet: unless the deficiency in the description of the offense alleged to have been committed by the defendant is of such a degree as to utterly fail to charge that an offense against the law has been committed by the defendant, it is objectionable only as to form and not as to substance.⁸⁶ Under the *American Plant Food* rule an indictment cannot be fundamentally defective and thus void unless the defect in the description of the offense is "of such a degree as to charge no offense against the law."⁸⁷

Conversely, under the new rule, a defendant's complaint that an indictment fails to give adequate notice of precisely what the defendant is charged with and fails to allege sufficient facts to bar a subsequent conviction is an objection as to form and must be properly raised in a pretrial motion to quash. Absent a motion to quash, the defect in the indictment is waived and will not thereafter be considered. In other words, such a defect only renders the indictment voidable, not void. The court explained this aspect of the rule by pointing out that prior to trial the defendant may raise such an objection if he wishes, "but if he goes to trial without raising any such objection, he may not . . . [raise it] for the first time thereafter, since it must be presumed he has found the charge sufficient to his own satisfaction. He may not wait to see whether the jury will acquit him, and then, upon an adverse verdict, claim for the first time that he had no notice or that the charge will not bar a subsequent conviction."⁸⁸

During the survey period the court had occasion to make specific application of the *American Plant Food* rule in three cases, two of them en banc decisions. The results do not appear to be consistent. In *Rhodes v. State*⁸⁹ defendant was convicted and given probation for theft of wall paneling valued at over fifty dollars. Defendant's probation was subsequently revoked and on appeal of that revocation, the sufficiency of the indictment was considered for the first time. Applying the *American Plant Food* rule, the court concluded that the deficiency of the property description was not of such a degree as to utterly fail to charge that an offense against the law had been committed by the defendant. To the contrary, said the court, this was a defect in form, as the indictment failed to give sufficient description of the property allegedly stolen. The defendant, however, waived the in-

voked, and the court's power to act is as absent as if it did not exist. *Ex parte Cannon*, 546 S.W.2d 266, 270 (Tex. Crim. App. 1977) (Odom, J., concurring).

83. *American Plant Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974).

84. *Id.* at 603-04.

85. 508 S.W.2d 598 (Tex. Crim. App. 1974).

86. *Id.* at 603.

87. *Id.* at 602.

88. *Id.* at 604.

89. 560 S.W.2d 665 (Tex. Crim. App. 1978) (en banc).

sufficiency when he failed to make a timely motion to quash. In the language of *American Plant Food*, "if he goes to trial without raising any such objection, he may not urge them [*sic*] for the first time thereafter, since it must be presumed he has found the charge sufficient to his own satisfaction."⁹⁰

Two months later in *Ex parte Canady*,⁹¹ a majority of the court, again sitting en banc, found an armed robbery indictment, which charged the defendant with having taken "corporeal personal property" from the victim, to be fundamentally defective and therefore void. The court reasoned that the property description was so defective as to be no description at all and, under the *American Plant Food* rule, rendered the indictment defective to such a degree that it charged no offense, and was void. Consequently, the defendant's habeas corpus attack on the indictment eight years after it was issued was successful, and the indictment was dismissed.

The dissent of Judge Vollers, joined by Judge Douglas, asserts that the majority opinion is in direct contravention of the rule laid down in *American Plant Food*. The point of the dissent is well taken. In the dissent's view the indictment was only voidable, not void, because it did not utterly fail to charge that an offense against the law was committed by defendant. To the contrary, the charge of taking "corporeal personal property" alleges the necessary element in question, that is, a taking of property.⁹²

The dissent agreed that the property description in the indictment was clearly insufficient,⁹³ but pointed out that, under the teachings of *American Plant Food*, the indictment was only voidable and as such was subject to a pretrial motion to quash. Had the defendant made such a motion, the indictment would have been quashed, but since no such motion was made, the insufficiency was waived. Thus, the indictment was not vulnerable to further attack and was sufficient to support defendant's conviction.

In June a panel of the court was once again presented with an opportunity to apply the *American Plant Food* rule in *Pollard v. State*.⁹⁴ The defendant was convicted of aggravated kidnapping and on appeal alleged for the first time that the indictment was void as fundamentally defective for failing to allege the specific manner in which the abduction was accomplished. The court rejected this contention, citing *American Plant Food*, and asserted that "indictments which allege an offense in the terms of the applicable penal statute are sufficient."⁹⁵ This observation seems to be in keeping with the dissent in *Ex parte Canady*.

The hypertechnical approach to indictment construction is not yet behind us.

Indictment Copy to Accused in Custody—A "Must" Ten Days Before

90. 508 S.W.2d at 604.

91. 563 S.W.2d 266 (Tex. Crim. App. 1978) (en banc).

92. *Id.* at 270.

93. *Id.* at 269.

94. 567 S.W.2d 11 (Tex. Crim. App. 1978).

95. *Id.* at 12.

Trial. In *Johnson v. State*⁹⁶ defendant was under arrest for aggravated robbery. Awaiting trial in jail, he was served with a copy of his indictment less than ten days before his scheduled trial date. On the date his trial was to begin, defendant requested a continuance because he had not had ten days after being served with a copy of the indictment to prepare for trial. The trial judge refused, the trial was held, and defendant was convicted. The court reversed and remanded because defendant, being in custody, had an absolute right on demand to a period of at least ten days between being served with a copy of the indictment and being put to trial.⁹⁷

B. *Statute of Limitations*

Article 12.05(b) and (c) of the Texas Code of Criminal Procedure calls for the tolling of an applicable statute of limitations during the pendency of an indictment, information, or complaint.⁹⁸ A trio of cases during the survey period clarifies what is required to invoke this tolling provision. The court sitting en banc held in *Ex parte Ward*⁹⁹ that a complaint filed in a justice court will not toll running of the applicable statute of limitations in a felony case. Defendant was indicted for aggravated rape on July 6, 1977, over three years and three months after the alleged rape. The indictment, however, alleged, and the State was prepared to prove, that on March 14, 1974, a complaint was filed in justice court against defendant Ward, who at the time could only be identified as an unknown white male with the nickname "Cherokee" and be described by height, weight, and hair color. Defendant filed a writ of habeas corpus asserting that the indictment was void on its face. The court dismissed the indictment as void on its face, pointing out that article 12.05(c) required the indictment, information, or complaint to be "filed in a court of competent jurisdiction" in order to toll the running of the limitation statute, and the justice court did not have jurisdiction of the felony offense charged.¹⁰⁰

The court explained that a contrary holding "would be to allow a 'credible person' to file a complaint in the justice court charging an accused with a felony offense without inquiry being made about the nature of the knowledge upon which an affiant bases his factual statements, and thereby toll the statute of limitations forever."¹⁰¹ The holding in *Ward* means that a prosecutor who has a reasonably accurate description of an unknown

96. 567 S.W.2d 214 (Tex. Crim. App. 1978).

97. TEX. CODE CRIM. PROC. ANN. art. 27.12 (Vernon 1966).

98. *Id.* arts. 12.05(b), (c) (Vernon 1977) provide:

(b) The time during the pendency of an indictment, information, or complaint shall not be computed in the period of limitation.

(c) The term "during the pendency," as used herein, means that period of time beginning with the day the indictment, information, or complaint is filed in a court of competent jurisdiction, and ending with the day such accusation is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason.

99. 560 S.W.2d 660 (Tex. Crim. App. 1978).

100. *Id.* at 662.

101. *Id.*

person accused of committing a felony must go ahead and seek an indictment of the unknown person fitting the description, as permitted by article 21.07.¹⁰²

*Ex parte Slavin*¹⁰³ and *Vasquez v. State*¹⁰⁴ make it clear that once an indictment is filed in a court of competent jurisdiction, the applicable statute of limitation is tolled under article 12.05 whether that indictment turns out to be valid, voidable, or void.¹⁰⁵ *Slavin*, a case of first impression, points out that as long as the second indictment is brought under the same penal statute as the first indictment, the fact that the first indictment was voidable and quashed, or void and dismissed as fundamentally defective, does not prevent the first indictment from tolling the statute of limitations for the period of time the indictments were in effect.

Query: How can a *void* indictment, which is a nullity incapable of even invoking a trial court's jurisdiction,¹⁰⁶ be capable of tolling a statute of limitations?

Vasquez dealt with the defendant's contention that because article 12.05(c) makes reference only to "invalid" indictments, a valid indictment fails to toll the running of the statute of limitations. The court rejected this argument, concluding that the legislature could not have intended such an "absurd result."¹⁰⁷

C. Speedy Trial

Article V, section 5¹⁰⁸ of the Texas Constitution has been amended, effective January 1, 1978, to give the court of criminal appeals additional power to grant extraordinary writs in cases regarding criminal matters. The court had occasion to exercise this new power in *Thomas v. Stevenson*,¹⁰⁹ in which the court ordered that a writ of mandamus issue in the event that a speedy criminal trial was not granted below. Petitioner Thomas was serving a life sentence in Texas for attempted murder. Detainers were filed against him with the Texas Department of Corrections based on two burglary indictments in Victoria County. Petitioner filed several requests with the trial court for a speedy trial that were ignored. He then filed a petition for writ of mandamus.

102. TEX. CODE CRIM. PROC. ANN. art. 21.07 (Vernon 1966) provides: "When the name of the person is unknown to the grand jury, that fact shall be stated, and if it be the accused, a reasonably accurate description of him shall be given in the indictment."

103. 554 S.W.2d 691 (Tex. Crim. App. 1977).

104. 557 S.W.2d 779 (Tex. Crim. App. 1977).

105. See text accompanying notes 82-84 *supra* for an explanation of the difference between "void" and "voidable" indictments.

106. See, e.g., *State v. Olsen*, 360 S.W.2d 398, 400 (1962) (per curiam) (jurisdiction of court to try issue of insanity before trial of main charge can be invoked only by a motion or request for a trial of the issue of present insanity and any judgment entered on question of insanity without such motion or request is void); *Ex parte Caldwell*, 383 S.W.2d 587, 589 (Tex. Crim. App. 1964) (absent notice of appeal, a court is without jurisdiction to enter any order other than to dismiss the appeal).

107. 557 S.W.2d at 784.

108. TEX. CONST. art. V, § 5.

109. 561 S.W.2d 845 (Tex. Crim. App. 1978).

The court of criminal appeals used its new power only to compel a speedy trial for petitioner. Although the court indicated that the petitioner's sixth amendment right to a speedy trial had been violated, it did not order the cases dismissed because it lacked mandamus jurisdiction to compel a dismissal of criminal charges.¹¹⁰ The court, however, indicated that after July 1, 1978, the effective date of the Texas Speedy Trial Act,¹¹¹ it may have mandamus jurisdiction to compel a reluctant trial court to dismiss in conformity with the dictates of the new Act.¹¹²

D. *Double Jeopardy, Collateral Estoppel, and Carving*

Double Jeopardy—Reversal Solely for Lack of Sufficient Evidence. The defendant in *Burks v. United States*¹¹³ asserted an insanity defense to a bank robbery charge, but was convicted by a jury in federal district court. The Sixth Circuit reversed and remanded the conviction, holding that the government had not fulfilled its burden of proving sanity beyond a reasonable doubt. The United States Supreme Court, expressly overruling several earlier decisions, held that the double jeopardy clause of the fifth amendment precludes a second trial once the reversing court has found the evidence insufficient to sustain the jury's verdict of guilty. The Court explained that otherwise the prosecution is unconstitutionally afforded a second opportunity to supply evidence that it failed to muster in the first trial.¹¹⁴

The Supreme Court was careful to distinguish a reversal based on insufficiency of the evidence from a reversal for trial error, noting that the fifth amendment does not preclude the retrial of a defendant whose conviction is set aside for an error in the proceedings leading to conviction.¹¹⁵ The Court also made clear that a defendant does not waive this right to a judgment of acquittal (directed verdict) by moving for a new trial, either as one of his remedies or as his sole remedy.¹¹⁶ There can be no doubt about the applicability of *Burks* to state criminal proceedings. In *Greene v. Massey*,¹¹⁷ handed down the same day, the Supreme Court remanded a Fifth Circuit decision that affirmed the trial court's denial of federal habeas corpus relief to a Florida murder defendant for further consideration in light of *Burks*.

Attachment of Double Jeopardy in Jury Trials. The point at which jeop-

110. *Id.* at 847 n.1. The court concurred with the rationale of *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969), in which the supreme court concluded that it did not have mandamus jurisdiction to compel a dismissal of criminal charges.

111. TEX. CODE CRIM. PROC. ANN. arts. 28.061, 32A.02 (Vernon Supp. 1978-79).

112. 561 S.W.2d at 847 n.1. The court noted that the Texas Speedy Trial Act would require indictments to be dismissed unless a speedy trial ensued. The court chose to reserve judgment on whether *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969), would remain valid after the effective date of the Act.

113. 437 U.S. 1 (1978).

114. *Id.* at 11.

115. *Id.* at 15-17.

116. *Id.* at 17.

117. 437 U.S. 19 (1978).

ardy attaches in a state jury trial is no longer open to question; it attaches when the jury is impaneled and sworn, according to a six-to-three majority of the United States Supreme Court in *Crist v. Bretz*.¹¹⁸ The Court concluded that this rule, applied in federal courts since 1963,¹¹⁹ is an integral part of the fifth amendment made applicable to the states by the fourteenth amendment because of the need to protect an accused's interest in retaining a chosen jury, "an interest with roots deep in the historic development of trial by jury."¹²⁰ The Texas Court of Criminal Appeals has held that jeopardy does not attach until an accused has pleaded, even though a jury has been sworn to try him.¹²¹ With the advent of *Crist*, this, of course, can no longer be the law in Texas.

Double Jeopardy—Federal Government Appeal after Midtrial Acquittal or Dismissal. Unlike Texas prosecutors, federal prosecutors can, pursuant to federal statute,¹²² appeal a decision, judgment, or order of a district court dismissing an indictment except when prohibited by the double jeopardy clause. In 1975 the United States Supreme Court substantially curtailed a federal prosecutor's statutory right to appeal the midtrial dismissal of an indictment. *United States v. Jenkins*¹²³ held that under the double jeopardy clause, the Government had no right to appeal such dismissals because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand."¹²⁴

Now, just three years later, the Supreme Court has expressly overruled *Jenkins* in *United States v. Scott*.¹²⁵ So, once again in federal criminal trials if the defendant obtains a midtrial termination in his favor before any determination of guilt or innocence, the federal prosecutor can appeal and seek reversal and a new trial without violating the double jeopardy clause. The five-Justice majority explained that the Court in *Jenkins* pressed too far the concept of the defendant's valued right to have his trial completed by a particular tribunal. When a defendant obtains a midtrial termination of the proceedings against him without any finding by a court or jury as to his guilt or innocence, he has not been deprived of his valued right to go to the first jury. The double jeopardy clause does not relieve a defendant from the consequences of his voluntary choice.¹²⁶ The dissent, however, argued that the most fundamental rule in the history of double jeopardy jurisprudence is that a retrial following a final judgment for the accused, no matter at what stage of the trial, threatens intolerable interfer-

118. 437 U.S. 28 (1978).

119. *Downum v. United States*, 372 U.S. 734 (1963).

120. 437 U.S. at 36.

121. *Rameriz v. State*, 171 Tex. Crim. 507, 352 S.W.2d 131 (Tex. Crim. App. 1961).

122. 18 U.S.C. § 3731 (1976).

123. 420 U.S. 358 (1975).

124. *Id.* at 370.

125. 437 U.S. 82 (1978).

126. *Id.* at 98-100.

ence with the constitutional policy against multiple trials.¹²⁷

Double Jeopardy—Mistrial Declared over Defendant's Objection. The United States Supreme Court reemphasized in *Arizona v. Washington*¹²⁸ that a new trial is permissible under the double jeopardy clause when a mistrial is declared over a defendant's objection only if the termination of the earlier trial is justified by a *manifest necessity*. In this situation the prosecutor must shoulder the heavy burden of demonstrating a high degree of necessity. Although the Court appeared unanimous as to the rule thus stated, there was a six-to-three split on the application of the rule to the circumstances presented.

During the opening statement, the defendant's attorney made improper and prejudicial remarks about prosecutorial misconduct in an earlier trial of defendant. After considerable deliberation the trial judge granted the prosecutor's motion for a mistrial over defendant's objection. At the subsequent trial, defendant's double jeopardy motion was rejected. The case then was certified to the Supreme Court, which held that a subsequent trial would not violate the double jeopardy clause even though the record contained neither a specific finding of manifest necessity by the trial court nor all the factors that led the trial court to declare a mistrial.¹²⁹ The majority based its determination on the proposition that reviewing courts must accord substantial deference to a trial judge's determination that the improper conduct of defendant's attorney is so prejudicial as to leave no alternative but to declare a mistrial to secure the ends of justice.¹³⁰

The practical procedural lesson to be learned from *Washington*, by prosecutors and defense attorneys alike, is that the facts pertaining to a prosecutor's mistrial motion, made over defendant's objection, should be clearly stated in the record. If the trial court does grant the prosecutor's motion, then the prosecutor should be certain that the trial court makes an explicit finding of manifest necessity with reasons stated in support of such finding. Although such procedural assistance is not constitutionally mandated, "[r]eview of any trial court decision is, of course, facilitated by findings and by an explanation of the reasons supporting the decision."¹³¹

Double Jeopardy—Defense Motion for Mistrial. In *United States v. Jorn*¹³² the Supreme Court stated that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."¹³³ *Rios v. State*¹³⁴ adds an interesting footnote to the

127. *Id.* at 104.

128. 434 U.S. 497 (1978).

129. *Id.* at 516-17.

130. *Id.* at 510-11.

131. *Id.* at 517.

132. 400 U.S. 470 (1971) (plurality opinion).

133. *Id.* at 485.

134. 557 S.W.2d 87 (Tex. Crim. App. 1977).

general rule. Through no fault of the prosecutor, a state witness gave improper testimony that was prejudicial to the defendant. The attorney for defendant moved for a mistrial. Defendant, who was present, said nothing, and the motion for mistrial was granted. At the subsequent trial, defendant asserted a double jeopardy bar on the ground that the trial judge in the earlier trial had failed to ask defendant whether he personally wanted a mistrial.

The court of criminal appeals ruled against defendant's contention because in Texas a defendant does not have the right to hybrid representation,¹³⁵ and also because defendant impliedly consented to the waiver of his double jeopardy claim by standing silently by while his attorney asked for a mistrial. The first reason is questionable. The court relied on the majority opinion in *Landers v. State*¹³⁶ that an accused does not have the right to hybrid representation. As pointed out in the *Landers* dissent,¹³⁷ however, the majority opinion simply does not square with the clear language of article I, section 10 of the Texas Constitution, which provides: "In all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both . . ." ¹³⁸ The second reason appears valid in light of *United States v. Dinitz*,¹³⁹ wherein the United States Supreme Court stated that it had "implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right."¹⁴⁰ In any event, the practical approach of careful trial judges, in situations like this, would be to ask the defendant on the record whether he personally concurs in his attorney's request for a mistrial.

Collateral Estoppel. The Fifth Circuit recently clarified the collateral estoppel aspect of fifth amendment double jeopardy protection in *Hutchings v. Estelle*.¹⁴¹ In a habeas corpus proceeding a Texas state prisoner convicted of felony theft was claiming the collateral estoppel protection of the constitutional prohibition against double jeopardy. In his first trial defendant was indicted for the offense of burglary with intent to commit theft. A jury found him not guilty. Thereafter, defendant was tried on an indictment for theft of certain guns which had been taken in the burglary for which defendant had been found not guilty. In the second trial, a jury found defendant guilty.

Because an assertion of collateral estoppel raises issues of *constitutional fact*, a reviewing court must examine the entire record.¹⁴² The Fifth Circuit Court of Appeals did so and reached the following conclusions. The

135. *Id.* at 91.

136. 550 S.W.2d 272 (Tex. Crim. App. 1977).

137. *Id.* at 281.

138. TEX. CONST. art. I, § 10.

139. 424 U.S. 600 (1976).

140. *Id.* at 609-10 n.11.

141. 564 F.2d 713 (5th Cir. 1977).

142. *Ash v. Swenson*, 397 U.S. 436 (1970).

crucial issue in the first trial was who committed the burglarious entry of the house. Since there was no eyewitness evidence as to which of three companions, including defendant, burglarized the house, a jury verdict of not guilty was rendered. The only issue in the second trial was *not* an issue at all in the first trial—who stole the guns that were in the burglarized house? There was ample eyewitness evidence that defendant had the guns shortly after the burglary and tried to sell them.

The jury in the first trial quite rationally could hold that the State had not identified the burglar beyond a reasonable doubt, yet at the same time it could also be convinced beyond a reasonable doubt, had the issue been before the jury,¹⁴³ that the defendant stole the guns, if not by his own efforts, then through the help of his two companions. The court of appeals, therefore, concluded that collateral estoppel did not apply since it is only established if the prior not guilty verdict necessarily meant that the defendant could not have been guilty of the offense charged in the second prosecution.¹⁴⁴

Carving—A Texas Double Jeopardy Concept. The carving doctrine is a long recognized Texas double jeopardy concept whereby “a person cannot be *convicted* of different parts of a single transaction, though said parts are in contemplation of law distinct offenses.”¹⁴⁵ This means that a Texas prosecutor can carve as large an offense out of a single transaction as he can, but he must only cut once. He cannot obtain a conviction for one offense arising out of a single transaction and then later obtain another conviction for a different offense arising out of the same transaction.

The decisions of the court of criminal appeals over the years concerning carving have not always been reconcilable, usually because of confusion over what constitutes a “single transaction.” Recently, however, the court seems to have settled on a standard definition of a single transaction: “[A]n uninterrupted and continuous sequence of events or assaultive acts directed toward a single victim.”¹⁴⁶ Yet one of the three carving cases handed down during the survey period indicates that confusion over the meaning of “single transaction” as used in the carving doctrine has not been eliminated.

*O'Briant v. State*¹⁴⁷ is an understandable and correct application of the carving doctrine. Defendant first robbed a waitress at gunpoint inside a cafe and then went out the back door of the cafe where he shot and

143. In *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972), the Fifth Circuit expanded *Ash v. Swenson* to hold that an evidentiary matter previously adjudicated against the State could not be relitigated (used) in a subsequent criminal prosecution. This includes testimony previously rejected by a trial jury in another case. See *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975). There the court's finding that the identity of the gun thief was not decided in the first trial was crucial.

144. See *Turner v. Arkansas*, 407 U.S. 366 (1972).

145. *Ex parte Joseph*, 558 S.W.2d 891, 893 (Tex. Crim. App. 1977); see *Wright v. State*, 17 Tex. Ct. App. 152 (1884).

146. *Ex parte Birl*, 545 S.W.2d 169, 170 (Tex. Crim. App. 1977); *Hawkins v. State*, 535 S.W.2d 359, 362 (Tex. Crim. App. 1976).

147. 556 S.W.2d 333 (Tex. Crim. App. 1977).

wounded another cafe employee who was in the parking lot. Defendant was first convicted for armed robbery and later for attempted murder. On appeal he contended that his conviction for attempted murder was barred by the carving doctrine since the robbery and shooting constituted a single transaction. The court rejected this interpretation of the carving doctrine, pointing out the new definition of "single transaction" quoted above.¹⁴⁸ In this case, the court explained, there were two victims and two separate and distinct transactions: inside the cafe victim number one, the waitress, was subjected to armed robbery in one transaction, and in the cafe parking lot victim number two was shot and wounded in the second transaction.

*Ex parte Olson*¹⁴⁹ also applied the new standard definition. Defendant was first convicted of the offense of murder, followed by a conviction for robbery by assault. The facts of the case show that defendant was robbing a convenience store when the clerk made a movement and defendant shot and killed him. The court sustained defendant's contention that he had been subjected to double jeopardy by way of the carving doctrine, citing *Ex parte Birl*,¹⁵⁰ in which the court had reached the same conclusion when confronted with essentially the same fact situation as presented in *Olson*.

In *Birl* the defendant started out the door of the small grocery store he had just robbed when the clerk, who had been on the floor, made a movement and defendant shot him. Defendant was convicted first for armed robbery and then for murder. On appeal the State argued that the robbery offense was complete when defendant took the money, and the act of standing in the doorway interrupted the transaction so that the murder was a separate transaction. In dismissing the murder conviction by reason of the carving doctrine, the *Birl* court cited the standard definition of single transaction and explained that "[t]he time sequence of events was continuous and did not break the chain of antecedent violence perpetrated upon the complaining witness so as to give rise to the inception of another separate and distinct offense."¹⁵¹

*Ex parte Joseph*¹⁵² is a carving case that cannot be reconciled with the court's holdings in *Birl*, *O'Briant*, and *Olson*. At a time when the old Texas Penal Code was still in effect, defendant Joseph drove his victim to a secluded spot where he first forced her to commit oral sodomy and then raped her. He was convicted by a jury for the rape and sentenced to twelve years. Later, he was tried and convicted by a jury for the offense of sodomy and given ten years.

The defendant filed a writ of habeas corpus contending that the second trial for the offense of sodomy should have been barred by the carving doctrine since both offenses arose out of the same operative set of events, at the same time, against the same complaining witness. The court rejected defendant's carving contention, stating that "[s]ince both the rape and the

148. See note 146 *supra* and accompanying text.

149. 560 S.W.2d 688 (Tex. Crim. App. 1978).

150. 545 S.W.2d 169 (Tex. Crim. App. 1977).

151. *Id.* at 171.

152. 558 S.W.2d 891 (Tex. Crim. App. 1977).

act of sodomy upon the prosecutrix herein were not proven by the same evidence and the act of sodomy was complete prior to the commission of the act of rape, the doctrine of carving does not bar multiple convictions of the [defendant]."¹⁵³

The *Joseph* decision is wholly contrary to the court's asserted definition of "single transaction."¹⁵⁴ In *Joseph* there was an uninterrupted and continuous sequence of events or assaultive acts directed toward a single victim. Just as in *Olson* and *Birl*, "the time sequence of events was continuous and did not break the chain of antecedent violence perpetrated upon the complaining witness so as to give rise to the inception of another separate and distinct offense."¹⁵⁵ The kaleidoscopic treatment that the words "single transaction" have received at the hands of the court in carving doctrine cases is reminiscent of Humpty Dumpty's discourse on the meaning of words: "When I use a word . . . it means just what I choose it to mean—neither more nor less."¹⁵⁶

E. Venue

Prosecutors and trial judges take heed. The court of criminal appeals has twice during the survey period reminded one and all that a defendant who files a motion for change of venue, supported by affidavits pursuant to the provisions of the Code of Criminal Procedure,¹⁵⁷ is entitled to a change of venue as a matter of law absent controverting affidavits filed by the State.¹⁵⁸

F. Discovery

Brady Motions. The diligent defense attorney should always make a *Brady* motion,¹⁵⁹ but a general *Brady* motion, for example, a request for "all *Brady* material" or for "anything exculpatory," is the same as no *Brady* motion at all. This is the effect of *Frank v. State*,¹⁶⁰ which adopts the guidelines of *United States v. Agurs*¹⁶¹ for determining when a con-

153. *Id.* at 893.

154. See note 146 *supra* and accompanying text.

155. *Ex parte Olson*, 560 S.W.2d at 689.

156. L. CARROL, ALICE THROUGH THE LOOKING-GLASS ch. 6 (1872). The full exchange between Alice and Humpty Dumpty reads:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is" said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

157. TEX. CODE CRIM. PROC. ANN. art. 31.03 (Vernon 1966).

158. *Stapleton v. State*, 565 S.W.2d 532 (Tex. Crim. App. 1978); *Durrough v. State*, 562 S.W.2d 488 (Tex. Crim. App. 1978).

159. In *Brady v. Maryland*, 373 U.S. 83 (1963), due process was held to require prosecutors to disclose exculpatory information upon the request of defense counsel.

160. 558 S.W.2d 12 (Tex. Crim. App. 1977).

161. *United States v. Agurs*, 427 U.S. 97 (1976).

victed defendant will be granted a new trial by reason of the prosecutor's failure to volunteer *unrequested* exculpatory information.

While the Supreme Court in *Agurs*, for the first time, interprets the due process clauses of the fifth and fourteenth amendments as imposing a constitutional duty on state and federal prosecutors to volunteer *unrequested* exculpatory information, the imposition of the duty on prosecutors is of little practical value to defendants. This is so because a prosecutor's failure to volunteer such information, whether deliberate or otherwise, does not violate the duty so as to result in a new trial unless a reviewing court, after reviewing all of the evidence, finds that "the omitted evidence creates a reasonable doubt that did not otherwise exist"¹⁶² as to the defendant's guilt.¹⁶³

Conversely, a prosecutor's failure to respond to a specific *Brady* motion, that is, a pretrial request for exculpatory information described and identified in as specific terms as possible, will result in a due process violation and thus a new trial if the reviewing court finds no more than that the "suppressed evidence might have affected the outcome of the trial."¹⁶⁴

The impact of this double standard can best be seen by applying each standard to the facts of *Frank*. Defendant, a black man, was charged with aggravated robbery, which he denied. He was tried before an all white jury. The several eyewitnesses who identified defendant as the robber were white, whereas the several eyewitnesses who said defendant was not the robber were black. Another white eyewitness, Stone, was not called to testify after the prosecutor brought him into the courtroom during the trial and he was unable to positively identify defendant. The prosecutor did not inform defendant's attorney of Stone's failure to identify defendant.

Under the *non-request* standard of *Agurs* and *Frank*, defendant failed to convince the court that the omitted evidence created a reasonable doubt as to his guilt.¹⁶⁵ Had the specific *Brady* motion standard of *Agurs* and *Frank* been applicable, however, defendant probably would have, and certainly should have, obtained a new trial, since he would only have needed to convince the court that the "suppressed evidence might have affected the outcome of the trial."¹⁶⁶

As a practical matter, *Frank* and *Agurs* emphasize doing what diligent defense attorneys should already be doing anyway, that is, pack into their *Brady* motions detailed descriptions of as many exculpatory sources, situations, and circumstances as their investigation and foresight can develop, so as to maximize the opportunity of getting a new trial under the more liberal due process standard, should suppression occur. As can be seen from the facts of *Frank*, however, not all suppression pertains to pretrial

162. *Id.* at 112.

163. The rule is not applicable to unrequested evidence which "is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." *Id.* at 110.

164. *Id.* at 104.

165. *Frank*, 558 S.W.2d at 14.

166. *Agurs*, 427 U.S. at 104.

evidence, and it is not always easy to anticipate the kinds of suppression that can occur. This necessarily brings into question the whole approach of *Agurs*, as adopted by *Frank*. "It shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done."¹⁶⁷ The majority in *Agurs* acknowledges this,¹⁶⁸ and since it is a command of the Texas Code of Criminal Procedure, it must also be acknowledged by the court of criminal appeals.

In seeing that justice is done, both federal and Texas prosecutors have the duty to "make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."¹⁶⁹ This prosecutorial duty to disclose exculpatory evidence has been an aspect of due process of law since *Mooney v. Holohan*,¹⁷⁰ a fact recognized by the court of criminal appeals in *Means v. State*.¹⁷¹

When a prosecutor knows or should know that particular information has exculpatory value and does not reveal the information to a defense attorney, be it calculated, merely advertent, or inadvertent, there is a breach of the prosecutor's duty. Such a breach of duty should constitute a denial of due process requiring a new trial if "the suppressed evidence might have affected the outcome of the trial." This is the standard imposed by *Agurs* when the defendant makes a specific *Brady* motion request for exculpatory information.¹⁷² It should also be the standard when no *Brady* motion, or only a general *Brady* motion, is filed. Whether a defense attorney exercises the diligence or has the insight to specifically request suppressed information, or has the foresight to anticipate the future suppression of information during trial, is beside the point.

Depositions. Deposition in Texas criminal cases continues to be a discovery tool for defendants in name only. To obtain permission to take depositions under article 39.02,¹⁷³ the defendant must show good reason to a trial court whose discretion is described as "wide,"¹⁷⁴ but in fact is practically unlimited. This is so because an abuse of discretion can only result in a new trial if the defendant is able to demonstrate that he was injured by the trial court's refusal,¹⁷⁵ and the court of criminal appeals has seldom found injury to have resulted from such a refusal.

Usually a criminal defendant wants and needs to take the depositions of state witnesses who will not voluntarily make themselves available for in-

167. TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 1977).

168. 427 U.S. at 104.

169. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1976). See also State Bar of Texas, Code of Professional Responsibility EC 7-13, DR 7-103 (1973).

170. 294 U.S. 103 (1935).

171. 429 S.W.2d 490, 493 (1968).

172. 427 U.S. at 104.

173. TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon Pam. Supp. 1966-78).

174. *James v. State*, 546 S.W.2d 306, 309 (Tex. Crim. App. 1977).

175. *Id.*

vestigative questioning. This was the situation in *James v. State*¹⁷⁶ wherein the court reiterated its previous position that where the witnesses sought to be deposed testified at trial and were subjected to cross-examination, § the defendant has not sustained any injury by reason of the trial court's refusal to permit pretrial depositions of said witnesses, even if the refusal were to be considered an abuse of discretion.¹⁷⁷

As any civil trial attorney can verify, the right to thoroughly cross-examine a witness at trial is seldom an adequate substitute for a pretrial deposition. The court's almost automatic rejection of the contention that lack of advance access to witnesses is injurious to a defendant appears unrealistic. The attitude of the court, however, seems fixed, and any change will almost surely have to come from the legislature.

G. *Incompetency to Stand Trial*

If at any time, either before trial or during trial, evidence comes to the attention of a Texas trial judge of sufficient force to create in the judge's mind reasonable grounds to doubt a defendant's competency to stand trial,¹⁷⁸ the judge must impanel a separate jury to determine whether defendant is in fact competent to stand trial.¹⁷⁹ The procedure prescribed by the Texas statute for determining a defendant's competency to stand trial prior to the beginning of a trial on the merits¹⁸⁰ has not proved troublesome for the court of criminal appeals, but that part of the statute providing the procedure to be followed once a trial on the merits is underway¹⁸¹ has caused a split in the court. Section 2(b) of article 46.02 of the Code of Criminal Procedure reads: "If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether . . . there is evidence to support a finding of incompetency to stand trial."¹⁸²

In *Johnson v. State*¹⁸³ the court sitting en banc considered the meaning of section 2(b). A six-judge majority construed the language of the section to mean that the trial court need not interrupt the trial on the merits unless and until the judge concludes reasonable grounds exist to doubt the defendant's competency. Once the judge entertains such a doubt, he then must interrupt the trial on the merits and impanel a separate jury, pursu-

176. 563 S.W.2d 599 (1978).

177. 563 S.W.2d at 603. See *Greer v. State*, 523 S.W.2d 687, 689 (Tex. Crim. App. 1975); *McKinney v. State*, 491 S.W.2d 404, 407 (Tex. Crim. App. 1973).

178. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(a) (Vernon 1979) provides that "A person is incompetent to stand trial if he does not have: (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against him."

179. *Id.* art. 46.02 is, in part, a codification of the constitutional requirement announced in *Pate v. Robinson*, 383 U.S. 375 (1966).

180. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(a) (Vernon 1979).

181. *Id.* art. 46.02, § 2(b).

182. *Id.*

183. 564 S.W.2d 707 (Tex. Crim. App. 1978) (en banc).

ant to section 4(a), to try the competency issue.¹⁸⁴

The dissent argued that whenever any evidence of incompetency from any source is brought to the attention of the trial court, section 2(b) *requires* the court to stop the trial and conduct a hearing out of the presence of the jury for the limited purpose of determining if there is evidence of sufficient force to create in the judge's mind reasonable grounds to doubt defendant's competency. Only if the section 2(b) hearing leads to such a conclusion, said the dissent, must the trial court impanel a separate section 4(a) jury to try the competency issue.¹⁸⁵

The dissent further concluded that "[t]he whole purpose of a Section 2(b) inquiry is to determine *whether* the claims [of incompetency] are baseless. If only well-founded claims trigger Sec. 2(b), [as the majority would have it,] then a Sec. 4(a) hearing will always follow, and the Sec. 2(b) inquiry would be a wasteful formality."¹⁸⁶ Judge Odom, who authored the dissent, appears justified in asserting that "[t]he majority's confusion is manifest."¹⁸⁷

III. PLEA BARGAINING AND GUILTY PLEAS

A. *Plea Bargaining*

Now that plea bargaining has finally "come out of the closet,"¹⁸⁸ courts are being called upon to define the limits of the activity. The United States Supreme Court has recognized the importance of counsel during plea bargaining,¹⁸⁹ the need for a public record indicating that a plea was knowingly and voluntarily made,¹⁹⁰ and the requirement that a prosecutor's plea bargaining promise be kept.¹⁹¹ In its most recent decision in this area of the law, *Bordenkircher v. Hayes*,¹⁹² the Court held five-to-four that a state prosecutor could threaten to reindict and prosecute a defendant on a more serious charge if he did not plead guilty to the lesser offense with which he was originally charged without violating the fourteenth amendment due process prohibition against prosecutorial vindictiveness. Defendant Hayes was originally indicted by a Kentucky grand jury for uttering a forged instrument. During plea bargaining negotiations, the prosecutor told defendant that if he did not plead guilty in return for a recommended five-year prison sentence, he would obtain a reindictment of him as a habitual criminal by reason of two prior felony convictions and subject him to a mandatory life sentence. When the defendant rejected the

184. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4(a) (Vernon 1979).

185. 564 S.W.2d at 713.

186. *Id.*

187. *Id.*

188. In *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978), the Supreme Court describes it as an "open acknowledgement of this previously clandestine practice."

189. *Brady v. United States*, 397 U.S. 742 (1970).

190. *Boykin v. Alabama*, 395 U.S. 238 (1969).

191. *Santobello v. New York*, 404 U.S. 257 (1971).

192. 434 U.S. 357 (1978).

five-year offer, the prosecutor successfully executed his threat and Hayes was sentenced to life imprisonment.

The majority distinguished *Bordenkircher* from *Blackledge v. Perry*,¹⁹³ in which the due process clause was held to prohibit a prosecutor from vindictively reindicting a convicted misdemeanant on a felony charge for having exercised an appellate remedy. In *Blackledge* it was the State's unilateral imposition of a penalty upon a defendant for having chosen to exercise a legal right that violated due process, while *Bordenkircher*, on the other hand, involved the "give-and-take" of plea bargaining where there is no punishment or retaliation as long as the accused is free to accept or reject the prosecutor's offer.¹⁹⁴ The majority conceded that confronting a defendant with the risk of a more severe punishment may discourage the defendant from asserting his trial rights, but that this was an inevitable and permissible attribute of any legitimate system that encourages the negotiation of pleas.¹⁹⁵

Three dissenting justices¹⁹⁶ maintained that prosecutorial vindictiveness, in whatever context, is still vindictiveness and the due process clause should protect an accused against it.¹⁹⁷ Justice Powell, in a narrower view, stated that due process protection should apply to this particular case because the prosecutor's admitted purpose "was to discourage and then to penalize with unique severity [defendant's] exercise of constitutional rights."¹⁹⁸

Whether a prosecutor's plea bargaining promise was kept was the issue in two cases handed down by the Texas Court of Criminal Appeals, *Washington v. State*¹⁹⁹ and *Nunez v. State*.²⁰⁰ *Washington v. State* involved a plea bargaining agreement in which defendant agreed to plead guilty to an aggravated robbery charge and an attempted murder charge in return for the prosecutor's promise to dismiss a pending capital murder charge. The defendant plead guilty to the two lesser charges as agreed, but before the prosecutor dismissed the capital murder case, the defendant filed notice of appeal in the two guilty plea cases. Thereafter the prosecutor proceeded with the capital murder case and obtained a death penalty conviction. The court held that since the defendant never agreed as part of the plea bargain to forego his right to appeal, he did not breach the bargain when he filed notice of appeal. Thus the State was bound by its agreement to terminate the capital murder trial.²⁰¹ When the court reversed the capital murder conviction and ordered said prosecution dismissed, in effect it specifically enforced the original plea bargain.²⁰²

193. 417 U.S. 21 (1974).

194. 434 U.S. at 363.

195. *Id.* at 364.

196. Justices Blackmun, Brennan, and Marshall.

197. 434 U.S. at 368.

198. *Id.* at 373.

199. 559 S.W.2d 825 (Tex. Crim. App. 1977).

200. 565 S.W.2d 536 (Tex. Crim. App. 1978).

201. 559 S.W.2d at 828.

202. *Id.*

In *Nunez v. State*²⁰³ the defendant pled guilty in return for the prosecutor's promise to make no recommendation regarding punishment. Although the prosecutor kept his promise and made no recommendation as to punishment, the probation officer did recommend the maximum penalty permissible under law. The trial court refused defendant's motion to withdraw his guilty plea and assessed punishment at eighteen years in prison. The court of criminal appeals rejected defendant's contention that the probation officer was an agent of the prosecution and upheld the conviction imposed by the trial court. The court reasoned that "[p]robation officers are assigned or designated by the courts. . . . The district attorney's office does not employ a probation officer nor do they have any authority over the probation officers."²⁰⁴ The reasoning of the court may be technically correct, but it is hard to shake the feeling that the State of Texas did not keep its word.

B. *Guilty Pleas*

Pleading guilty is a significant and serious event because it constitutes a waiver by the defendant of his fundamental rights to a jury trial,²⁰⁵ to confront his accusers,²⁰⁶ to present witnesses in his defense,²⁰⁷ to remain silent,²⁰⁸ and to be convicted by proof beyond all reasonable doubt.²⁰⁹ This is why the United States Supreme Court has imposed upon the states, through the fourteenth amendment due process clause, the duty to interrogate defendants who plead guilty to ensure that the plea is being entered intelligently and voluntarily and that the waiver of these fundamental rights affirmatively appears on the record.²¹⁰ Article 26.13²¹¹ of the Texas Code of Criminal Procedure is a codification of this constitutional mandate. Under this article Texas trial judges now must affirmatively determine by interrogation and admonishment that the defendant who pleads guilty is mentally competent, voluntarily pleading guilty, and is aware of the range of punishment attached to the offense. In the case of a plea bargain defendant must be told that the trial court can follow or reject any plea bargain agreement and that defendant may withdraw his plea of guilty in the event of rejection.

Since a large majority of criminal cases are disposed of by guilty pleas, it is most unfortunate that too many trial judges continue to carelessly handle their constitutionally mandated admonishment obligations under article 26.13. It is also unfortunate that the court of criminal appeals all too often protects the slipshod efforts of trial judges under the "substantial

203. 565 S.W.2d 536 (Tex. Crim. App. 1978).

204. *Id.* at 537.

205. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

206. *Pointer v. Texas*, 380 U.S. 400 (1965).

207. *Washington v. Texas*, 388 U.S. 14 (1967).

208. *Malloy v. Hogan*, 378 U.S. 1 (1964).

209. *In re Winship*, 397 U.S. 358 (1970).

210. *Boykin v. Alabama*, 395 U.S. 238 (1969).

211. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1978-79).

compliance" clause of article 26.13²¹² when it appears obvious that the record does not reflect an intelligent and voluntary waiver as required by the due process clause. Of course, some of the admonishment efforts of trial judges are so patently deficient that they are beyond the help of even the most generous interpretation of the "substantial compliance" clause, leaving the court with no choice but to reverse and remand. This is true in cases where no admonishment is provided regarding the range of punishment,²¹³ where admonishment regarding the range of punishment is given by someone other than the trial judge,²¹⁴ and where the admonishment describes the wrong range of punishment.²¹⁵ In two cases during the survey period court majorities made questionable use of the article 26.13(c) "substantial compliance" clause.

At the time *Kidd v. State*²¹⁶ was handed down, article 26.13(a)(2) required that a trial judge admonish regarding "the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court."²¹⁷ The en banc majority of the court held that since there was no showing in the record that a plea bargain existed and since the trial court assessed the punishment recommended by the prosecutor, substantial compliance with the statute was indicated by the record. As the dissent correctly pointed out,²¹⁸ not only was there no substantial compliance, there was no compliance at all with the admonishment requirement regarding recommendations of the prosecuting attorney. Absent such compliance, the record did not affirmatively reflect a voluntary guilty plea as required by *Boykin v. Alabama*.²¹⁹

In *Richards v. State*²²⁰ the trial court made no inquiry whether the guilty plea was free and voluntary.²²¹ An appellate court majority held that the trial court's question, "Have you been promised anything to cause you to make this plea?," constituted substantial compliance with this admonishment requirement of article 26.13.²²² According to the dissent the record did not affirmatively show that the plea was voluntary, as constitutionally required. "There was no inquiry as to whether, despite the lack of a promise, . . . [he] was entering his plea because of any duress, fear, undue compulsion, and persuasion or other offers of leniency, improper influence, etc. He was not even asked in . . . a general way if the plea was being freely and voluntarily made."²²³ Because compliance with the requirements of

212. *Id.* art. 26.13(c).

213. *McDade v. State*, 562 S.W.2d 487 (Tex. Crim. App. 1978).

214. *Murray v. State*, 561 S.W.2d 821 (Tex. Crim. App. 1977).

215. *Borrego v. State*, 558 S.W.2d 1 (Tex. Crim. App. 1977).

216. 563 S.W.2d 939 (Tex. Crim. App. 1978).

217. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon Supp. 1978-79). This language remains unchanged in the present provision.

218. 563 S.W.2d at 940.

219. 395 U.S. 238 (1969).

220. 562 S.W.2d 456 (Tex. Crim. App. 1978).

221. TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Supp. 1978-79). This language remains unchanged in the present provision.

222. 562 S.W.2d at 458.

223. *Id.* at 460.

article 26.13 involves only a simple matter of routine, in the words of Judge Onion: "It never ceases to amaze me that this court . . . will not require legally trained judges to properly admonish defendants as to their guilty pleas We have really reached a sad state of affairs."²²⁴

IV. TRIAL

A. *Right to an Interpreter*

It is fundamental that the sixth amendment confrontation clause includes the right of cross-examination.²²⁵ Texas has long held that this constitutional right is denied when the State fails to furnish an interpreter to a non-English speaking defendant because such a defendant cannot understand the testimony of witnesses against him as it is being given, and thus he has no way to react and respond through his attorney with effective cross-examination questions.²²⁶ This sixth amendment right to confrontation and cross-examination was reaffirmed by *Ex parte Nanes*,²²⁷ which held that a non-English speaking defendant was denied that right when an interpreter was only furnished when the defendant was on the stand.

Ferrell v. Estelle,²²⁸ a Fifth Circuit habeas corpus case, introduced fourteenth amendment due process as another possible constitutional basis for requiring an interpreter or some other effective means for enabling a defendant to understand the trial proceedings as they unfold. Due process requires a fair opportunity to defend against the state's accusation. The defendant was a deaf Texas prisoner unable to use sign language or otherwise effectively communicate except by writing. The *Ferrell* court explained that a defendant who cannot comprehend the proceedings is, in effect, not present at his own trial.²²⁹

This due process argument was well summarized by the Supreme Court of Arizona:

A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon an accused's basic "right to be present in the courtroom at every stage of his trial."²³⁰

224. *Id.* at 459.

225. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

226. *Garcia v. State*, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948).

227. 558 S.W.2d 893 (Tex. Crim. App. 1977).

228. 568 F.2d 1128 (5th Cir. 1978). The court granted habeas corpus relief in this case, but recalled its mandate and withdrew its opinion upon being advised of defendant's death. *Ferrell v. Estelle*, 573 F.2d 867 (5th Cir. 1978).

229. *United States ex rel Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *State v. Natividad*, 111 Ariz. 191, 526 P.2d 730 (1974).

230. *State v. Natividad*, 111 Ariz. 191, 526 P.2d 730, 733 (1974). See generally Annot., 36 A.L.R.3d 276 (1971).

B. *Juries—Size and Juror Sources*

Although it is without effect on Texas law, the United States Supreme Court has concluded that the sixth and fourteenth amendments require juries in criminal trials to contain more than five persons because a jury of less than six persons would not constitute a fair cross-section of the community.²³¹ The United States District Court for the Western District of Texas, San Antonio Division, rejected a constitutional challenge to its jury selection plan, which utilized voter registration lists as the initial source of names for potential jurors, in *United States v. Gaona*.²³² The challengers asserted that there was a substantial disparity²³³ between the representatives of a cognizable class, Mexican-Americans, in the population and the voter registration lists; thus, jurors selected under the plan were not being drawn from a fair cross-section of the community. The court rejected the challenge, stating that a successful constitutional challenge requires evidence that a cognizable group has been purposely and systematically excluded. The majority reasoned that, while Mexican-Americans are a cognizable group, as such, the fact that an identifiable group registers to vote in a proportion lower than the rest of the population does not make them a cognizable group for purposes of determining whether the selection process violates the Constitution.²³⁴ Voter registration lists are the sole and mandatory source of potential jurors for Texas courts.²³⁵

C. *Voir Dire—Generally*

When a jury panel is selected for a case and assigned to a specific trial court, that court must honor the unexplained demand of either the State or the defendant for the panel to be shuffled. *Como v. State*²³⁶ holds that denial constitutes reversible error even without a showing of harm. It would appear, however, that a panel shuffle is mandatory only if demand is made before the start of voir dire examination.²³⁷

*Cartwright v. State*²³⁸ established that it is reversible error per se for a trial court to refuse a defendant's request to have a court reporter take down the jury voir dire, pursuant to the rules of criminal procedure.²³⁹ In *Ex parte Jones*²⁴⁰ the court determined that the *Cartwright* rule will be applied prospectively, not retroactively. In reaching this decision, the court took notice of the age old jurisprudential debate between natural law scholars and the pragmatists as to whether law is eternal and merely discovered, sometimes erroneously and sometimes not, the retroactive argu-

231. *Ballew v. Georgia*, 435 U.S. 223 (1978).

232. 445 F. Supp. 1237 (W.D. Tex. 1978).

233. An absolute disparity of 19% was contended.

234. 445 F. Supp. at 1239-40.

235. TEX. REV. CIV. STAT. ANN. art. 2094 (Vernon Supp. 1978-79).

236. 557 S.W.2d 93 (Tex. Crim. App. 1977).

237. *Alexander v. State*, 523 S.W.2d 720 (Tex. Crim. App. 1975).

238. 527 S.W.2d 535 (Tex. Crim. App. 1975).

239. TEX. CODE CRIM. PROC. ANN. art. 40.09(4) (Vernon 1979).

240. 562 S.W.2d 469 (Tex. Crim. App. 1978).

ment, or merely judge made and subject to changes in judicial policy, the prospective argument.²⁴¹ The court, however, pragmatically refused to adopt either viewpoint exclusively, stating that prospective or retroactive operation of an overruling decision depends on the particular circumstances.²⁴² In this instance the court opted for prospective application of *Cartwright* because "[w]e perceive no interest of justice that would be served by giving it retroactive effect, and [defendant] has advanced none."²⁴³

Voir dire in the absence of the defense attorney is no voir dire at all, according to *Eason v. State*.²⁴⁴ Defendant's attorney was late and over defendant's protest the court and the prosecutor conducted the voir dire examination without him. In reversing defendant's conviction for driving while intoxicated, the court of criminal appeals based its decision on the fact "that voir dire examination of a jury panel is a critical stage of a criminal prosecution at which the right to counsel attaches,"²⁴⁵ and also on the fact that both the Texas Constitution²⁴⁶ and the rules of criminal procedure²⁴⁷ provide that an accused person shall have the right of being heard by himself or counsel or both.

The question of when a venireman is subject to challenge for cause by reason of bias or prejudice against the defendant²⁴⁸ was considered in several cases during the survey period. It has long been the law in Texas that a trial judge may, in his discretion, hold a venireman qualified who states he can put aside an opinion that he may have formed regarding the guilt or innocence of a defendant.²⁴⁹ *Williams v. State*²⁵⁰ holds that a trial court has no such discretion with reference to a venireman who is biased or prejudiced against the accused. In *Williams* a venireman admitted prejudice against defendant as a result of business dealings with him, but asserted that he could lay aside his bias and prejudice and base his decision on the evidence and the court's charge.²⁵¹ The trial court's rejection of defendant's challenge for cause was held to be reversible error.

In light of this well-established rule, reaffirmed in *Williams*, that an admittedly biased or prejudiced venireman is disqualified as a matter of law and thus cannot be rehabilitated by a promise to set aside his bias or prejudice, it is difficult to understand the general assertion of the court in *Freeman v. State*²⁵² that a venireman who concedes *past* bias or prejudice against a defendant, but who claims to have no *present* bias or prejudice, is

241. *Id.* at 471 n.1. See generally Annot., 10 A.L.R.3d 1371 (1966).

242. 562 S.W.2d at 471.

243. *Id.*

244. 563 S.W.2d 945 (Tex. Crim. App. 1978).

245. *Id.* at 947.

246. TEX. CONST. art. I, § 10.

247. TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977).

248. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(8) (Vernon Supp. 1978-79).

249. *Id.* art. 35.16(a)(9).

250. 565 S.W.2d 63 (Tex. Crim. App. 1978).

251. *Id.* at 65.

252. 556 S.W.2d 287 (Tex. Crim. App. 1977).

not susceptible to a challenge for cause.²⁵³ If there is a distinction between a venireman who says he was prejudiced against a defendant but no longer is, and a venireman who says he is prejudiced but will put that prejudice aside, then it would appear to be a distinction without a difference.

Bias or prejudice against a defendant can be inferred from a venireman's admitted hostility toward defendant's witnesses or admitted friendship for the State's witnesses.²⁵⁴ Thus, in *Hernandez v. State*,²⁵⁵ a heroin delivery case in which three of the four State's witnesses were police officers, it was held to be reversible error for a trial court to reject defendant's article 35.16(a)(8) challenge for cause²⁵⁶ of a venireman who stated in voir dire: "I don't think a police officer would tell a falsehood from the witness stand."²⁵⁷

In both *Hernandez*²⁵⁸ and *Williams*,²⁵⁹ the court reaffirmed the procedure that must be followed to preserve error for appeal when the trial court improperly rejects a defendant's motion to strike a venireman for cause. The defendant must (1) use a peremptory strike on the venireman he has unsuccessfully challenged for cause, (2) exhaust his remaining peremptory strikes on other veniremen, and (3) then file a motion requesting an additional peremptory challenge for the purpose of striking an additional named venireman who is unacceptable to the defendant.²⁶⁰ Only if the trial court refuses to grant an additional peremptory strike is the trial court's error for having failed to grant defendant's motion to strike for cause preserved on appeal.

D. Voir Dire—Capital Cases

The *Witherspoon* rule²⁶¹ limits exclusion of prospective jurors in a capital murder case to those "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."²⁶² The court of criminal appeals consistently asserts that the *Witherspoon* rule is alive and well in Texas.²⁶³ Nevertheless, in light of the court's death penalty decisions during the survey period and earlier, the *Witherspoon* rule

253. *Id.* at 292-93.

254. See generally 35 TEX. JUR. 2D *Jury* § 211 (1962).

255. 563 S.W.2d 947 (Tex. Crim. App. 1978) (en banc).

256. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(8) (Vernon Supp. 1978-79).

257. 563 S.W.2d at 950.

258. *Id.* at 948.

259. 565 S.W.2d at 65.

260. Beware the different approach to this problem taken by the civil courts. On the civil side an aggrieved party must move for an additional peremptory strike and name the unacceptable venireman *before* striking the jury, not afterwards, and failure to do so waives any error that may have existed by reason of the trial court's rejection of a party's motion to strike for cause. *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

261. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

262. *Id.* at 522 n.21, quoted in *Davis v. Georgia*, 429 U.S. 122, 123 (1976).

263. *Whitmore v. State*, 570 S.W.2d 889, 893 (Tex. Crim. App. 1978) (en banc); *Chambers v. State*, 568 S.W.2d 313, 319 (Tex. Crim. App. 1978) (en banc), cert. denied, 47 U.S.L.W. 3555 (U.S. Feb. 21, 1979) (No. 78-517); *Brock v. State*, 556 S.W.2d 309, 312 (Tex.

appears to be moribund in Texas and in dire need of resuscitation by the United States Supreme Court and the lower federal courts.

The court has permitted Texas prosecutors to develop three effective anti-*Witherspoon* weapons. The most effective of these is provided by the court's rule that even if a prospective juror is qualified under *Witherspoon*, he is still disqualified to be a juror under section 12.31(b) of the Texas Penal Code²⁶⁴ if he states that his reservations about the death penalty would affect his deliberations on the three fact issues submitted to him as required by article 37.071 of the Texas Code of Criminal Procedure.²⁶⁵

Section 12.31(b) provides that "[a] prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."²⁶⁶ At least ten death penalty cases decided during the survey period involved prospective jurors who may have been qualified under the *Witherspoon* rule, but who were nevertheless disqualified under section 12.31(b).²⁶⁷

Judge Robert's dissent in *Shippy v. State*,²⁶⁸ joined by Judge Phillips, makes a telling rebuttal of the majority position:

It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under *Witherspoon*.²⁶⁹

In other words, Texas is excluding *Witherspoon* qualified prospective ju-

Crim. App.), *cert. denied* 434 U.S. 1002 (1977); *Burns v. State*, 556 S.W.2d 270, 275 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977).

264. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974).

265. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1978-79). The Code provides that if all three of the following questions are answered "yes" unanimously then the court must sentence the defendant to death:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. art. 37.071(b).

266. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974).

267. *See, e.g.*, *Whitmore v. State*, 570 S.W.2d 889 (Tex. Crim. App. 1978) (en banc); *Bodde v. State*, 568 S.W.2d 344 (Tex. Crim. App. 1978) (en banc); *Chambers v. State*, 568 S.W.2d 313 (Tex. Crim. App. 1978) (en banc); *Hughes v. State*, 563 S.W.2d 581 (Tex. Crim. App. 1978) (en banc); *Hughes v. State*, 562 S.W.2d 857 (Tex. Crim. App. 1978) (en banc); *Brock v. State*, 556 S.W.2d 309 (Tex. Crim. App.), *cert. denied*, 432 U.S. 1002 (1977); *Freeman v. State*, 556 S.W.2d 287 (Tex. Crim. App.), *cert. denied*, 434 U.S. 1088 (1977); *Burns v. State*, 556 S.W.2d 270 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977); *Shippy v. State*, 556 S.W.2d 246 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977).

268. 556 S.W.2d at 257.

269. *Id.* at 262.

rors for conceding no more than what *Witherspoon* permits, that they have reservations about the death penalty that will affect their deliberations of the three punishment questions,²⁷⁰ but that they are not irrevocably committed to answering the questions so as to preclude the death penalty²⁷¹ regardless of the facts and circumstances that might emerge in the course of the proceedings.

In *Witherspoon* the United States Supreme Court appears to have considered and rejected the very practice Texas espouses:

It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer "yes" or "no" to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require "that there be taken into account the circumstances of the offense together with the character and propensities of the offender," . . . for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. . . . But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct. . . .

One of those requirements, at least, is that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.²⁷²

When a Texas prosecutor is faced with a prospective juror who passes muster on both *Witherspoon* and penal code section 12.31(b) grounds, he can resort to another anti-*Witherspoon* procedural weapon tailored to fit the situation. The prosecutor simply explains to the prospective juror that if the State fails to prove capital murder, the issue then reverts to the lesser included offense of murder, which carries a penalty of not less than two years nor more than life imprisonment. Following this explanation, the prosecutor can usually elicit expression of bias from the prospective juror regarding such a short minimum term for so serious a crime as murder. At this point the prosecutor piously moves that the prospective juror be stricken for cause by reason of Code of Criminal Procedure article 35.16(b)(3), which provides that the State may challenge a prospective juror "[t]hat has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment."²⁷³ The court of criminal appeals will grant the motion to strike for cause²⁷⁴ despite its

270. See note 265 *supra*.

271. In *Brock v. State*, 556 S.W.2d 309, 313 (Tex. Crim. App.), *cert. denied*, 432 U.S. 1002 (1977), the court conceded that a jury "will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment."

272. 391 U.S. at 521 n.20 (citations omitted).

273. TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 1966).

274. *Moore v. State*, 542 S.W.2d 664, 669 (Tex. Crim. App. 1976).

somewhat naive observation that "it is difficult to see why the State would challenge the prospective juror on the basis stated."²⁷⁵

The State's reason is obvious: it wishes to eliminate *Witherspoon* qualified prospective jurors, not eliminated under article 12.31(b), without having to use its peremptory challenges to do so. It would appear that elimination of *Witherspoon* qualified prospective jurors for cause by the use of this subterfuge is constitutionally impermissible.²⁷⁶ Obviously the court does not agree with this conclusion since at least two cases²⁷⁷ during the survey period demonstrate its continued support of the practice.

The third anti-*Witherspoon* weapon is not as readily available to the Texas prosecutor since it requires the failure of the defense attorney to object to the constitutionally improper exclusion of prospective jurors. Yet once such an oversight occurs, the State can successfully contend that waiver has occurred. The issue, therefore, cannot be raised on appeal.²⁷⁸ In his dissent in *Shippy* Judge Roberts took issue with this rule,²⁷⁹ contending that *Davis v. Georgia*²⁸⁰ concerned a *Witherspoon* qualified prospective juror whose rejection for cause was not made the subject of a proper objection under Georgia law. The United States Supreme Court, however, summarily ruled that the improper exclusion of even one *Witherspoon* qualified prospective juror negated any subsequently imposed death penalty.²⁸¹ Despite the strength of Judge Robert's argument, a majority of the court reaffirmed the waiver rule in three cases handed down during the survey period.²⁸²

E. *Guilt-Innocence Stage—Opening Statement, Evidence, Argument, and Jury Deliberations*

Opening Statement. After the State has rested, Texas procedure permits a defendant to state the "nature of the defenses relied upon and the facts expected to be proved in their support."²⁸³ According to *Norton v. State*,²⁸⁴ this does not mean that a defendant can make an opening statement when he intends to rest without putting on any evidence. The defendant's contention in *Norton* that article 36.01, subdivision 5, allows a defense attorney to assert that a defendant is pleading not guilty, and is content to rely on the facts presented by the State was rejected as being

275. *Id.* at 670.

276. *Davis v. Georgia*, 429 U.S. 122, 123 (1976).

277. *Bodde v. State*, 568 S.W.2d 344, 348-49 (Tex. Crim. App. 1978) (en banc); *Chambers v. State*, 568 S.W.2d 313, 318 (Tex. Crim. App. 1978) (en banc).

278. *Bulware v. State*, 542 S.W.2d 677, 682 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977).

279. 556 S.W.2d at 257.

280. 429 U.S. 122 (1976).

281. *Id.*

282. *Chambers v. State*, 568 S.W.2d 313 (Tex. Crim. App. 1978) (en banc); *Hughes v. State*, 562 S.W.2d 857 (Tex. Crim. App. 1978) (en banc); *Shippy v. State*, 556 S.W.2d 246 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977).

283. TEX. CODE CRIM. PROC. ANN. art. 36.01(5) (Vernon 1966).

284. 564 S.W.2d 714 (Tex. Crim. App. 1978).

without merit.²⁸⁵

Evidence. Three decisions of the court of criminal appeals concerning evidence in criminal cases merit comment. Most significant was *Stuart v. State*,²⁸⁶ a five-to-three decision²⁸⁷ wherein the court held that even where evidence of prior criminal conduct would otherwise be admissible under an exception to the rule against admission of extraneous offenses, the double jeopardy clause precludes such use of the evidence where the prior conduct was the subject of a criminal trial that ended in an acquittal.

Stuart was a rape case and under the common scheme and design exception to the rule against admission of extraneous offenses, the State was permitted to introduce evidence of a prior rape even though defendant was acquitted on the previous rape charge. The majority reversed the conviction and remanded the case, concluding "that any application of an exception to the rule against admission of extraneous offenses . . . must necessarily be to an occurrence which has not already been conclusively established by a verdict of acquittal to have not been an extraneous offense in the first place."²⁸⁸ In reaching this conclusion, the majority adopted the persuasive reasoning of the Fifth Circuit, which expanded the *Ashe v. Swenson*²⁸⁹ application of collateral estoppel as a part of the double jeopardy prohibition to include evidentiary as well as ultimate fact issues²⁹⁰ on the rationale that "otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime."²⁹¹

Judge Douglas, writing for the dissent in *Stuart*, argued that *Ashe* should be read to permit the reuse of evidentiary facts rather than to preclude such use, and the Fifth Circuit, therefore, had "erroneously expanded the *Ashe* decision 'beyond double jeopardy, beyond collateral estoppel, and beyond ultimate fact to bar the use of probative evidence about a wholly separate event.'"²⁹²

The problem of "have you heard" cross-examination of a defendant's reputation witness was given consideration by the court in *Moffett v. State*.²⁹³ A vacillating three-to-two majority finally concluded that the following cross-examination question was proper: "Have you heard that on September the 18th of 1973, that he robbed a woman by the name of Francis Tindall at the Globe Cleaners at 2403 North Haskell Avenue with a firearm?"²⁹⁴ The general rule in Texas is that a prosecutor may ask a

285. *Id.* at 718.

286. 561 S.W.2d 181 (Tex. Crim. App. 1978) (en banc).

287. Judge Vollers did not participate.

288. 561 S.W.2d at 182.

289. 397 U.S. 436 (1970).

290. *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972).

291. *Wingate v. Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972).

292. 561 S.W.2d at 184.

293. 555 S.W.2d 437 (Tex. Crim. App. 1977).

294. *Id.* at 440.

character witness if he has heard of a specific act of misconduct, but he may not ask whether the witness had personal knowledge of the act, nor may the question be framed so as to imply that the act has actually been committed.²⁹⁵ The majority pointed out that mere inclusion of details in a "have you heard" question does not in and of itself create an implication of fact, and that in the instant case the details were not so excessive as to imply that the act had actually been committed.²⁹⁶ The dissent, of course, argued that the details in the question were so excessive as to clearly imply that the act had actually occurred.²⁹⁷

Since reputation evidence is based on hearsay, it could be logically argued that the State should be permitted to ask the defendant's reputation witness whether he has heard anything inconsistent with his opinion.²⁹⁸ To permit the inclusion of any specific details in a "have you heard" question, however, does not seem logical since any details at all imply that the act inquired about has actually been committed.

Finally, in *Bright v. State*²⁹⁹ the court ruled that it makes no difference in questioning a reputation witness whether one asks him about a defendant's "reputation" in the community or his "general reputation" in the community; the terms are interchangeable. The *Bright* decision overrules *Edwards v. State*,³⁰⁰ which required that the inquiry be made as to "general reputation."

Argument. In *Villalobos v. State*³⁰¹ a twenty-five-year murder conviction was reversed and remanded because the prosecutor asserted to the jury during argument at the guilt-innocence stage of the trial: "I believe [defendant] is just as guilty as he can possibly be."³⁰² The trial court overruled the objection of defendant's attorney and the appellate court reversed. It is inexcusable for a prosecutor to inject his personal opinion, particularly when it is so easy to use qualifying remarks such as "I think the evidence shows" or "under the evidence."

In *Jones v. State*³⁰³ the prosecutor argued during the punishment stage that the jurors "should, in deliberating as to punishment, discuss how long the defendants would be required to serve in order to satisfy the sentence imposed."³⁰⁴ He then added that, based on his experience, if the jurors did not assess seven to ten years "it won't mean anything."³⁰⁵ Defendant's objection was overruled. The conviction was reversed on appeal since it

295. *Brown v. State*, 477 S.W.2d 617, 619 (Tex. Crim. App. 1972).

296. 555 S.W.2d at 442.

297. *Id.* at 439.

298. *Id.* at 440.

299. 556 S.W.2d 317 (Tex. Crim. App. 1977).

300. 91 Tex. Crim. 196, 237 S.W.933 (1922).

301. 568 S.W.2d 134 (Tex. Crim. App. 1978).

302. *Id.* at 134.

303. 564 S.W.2d 718 (Tex. Crim. App. 1978).

304. *Id.* at 720.

305. *Id.*

was clearly error for the prosecutor to discuss the matter of parole and urge the jury to consider it in assessing punishment.

Jury Deliberations. *Edwards v. State*³⁰⁶ holds that if a trial court persists in giving oral instructions to the jury relative to the cause over the timely objection of the defendant, reversible error is the automatic result. Once a jury has retired to deliberate, any communication by the jury to the trial court relative to the cause must be in writing, and the court must answer any such communication in writing.³⁰⁷ In *Edwards* the jury sent out a note stating, "We are hung."³⁰⁸ Defendant promptly moved for a mistrial, and when his motion was denied, he objected to any oral instructions to the jury. Nevertheless, the trial court gave oral instructions to the jury pertaining to the need for renewed effort on the part of the jurors to resolve their differences.³⁰⁹ Defendant's conviction was reversed on appeal without his having to show harm since, upon timely objection, the article 36.27 requirement that additional instructions to the jury be in writing is mandatory.³¹⁰ Otherwise defendant would be denied his right to examine the additional instructions and urge any objections he might have.

In *Skillern v. State*³¹¹ a death penalty conviction was reversed because the trial court permitted the jury to separate after the charge was read to the jury at the guilt stage of the trial and also after the State's opening argument, over the objection of defendant's counsel. When such a separation occurs in violation of article 35.23,³¹² harm is presumed unless the State rebuts such presumption. In *Skillern* the district attorney made no effort to offer rebuttal evidence since both he and the trial judge were under the erroneous impression that the burden was on defendant to show harm.³¹³

F. Punishment Stage—Evidence and Enhancement

Evidence. At the punishment stage of a trial, whether before a judge or a jury, evidence may be offered as to a defendant's prior criminal record including "any final conviction material to the offense charged."³¹⁴ In a case of first impression, *Chestnut v. State*,³¹⁵ the court concluded that this provision of article 37.07, section 3(a) includes conviction in justice courts and municipal courts, that is, courts not of record.

Chestnut was found guilty of aggravated robbery at the guilt-innocence stage of his trial. During the punishment stage the State introduced evidence of two municipal court convictions for simple assault. The trial

306. 558 S.W.2d 452 (Tex. Crim. App. 1977).

307. TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1966).

308. 558 S.W.2d at 452.

309. *Id.* at 453.

310. *Id.* at 454.

311. 559 S.W.2d 828 (Tex. Crim. App. 1977).

312. TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon 1966).

313. 559 S.W.2d at 833.

314. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1978-79).

315. 567 S.W.2d 1 (Tex. Crim. App. 1978).

court sentenced Chestnut to twenty years. On appeal the court of criminal appeals concluded that because the simple assault convictions were for physical violence against the person, they were material to defendant's current crime of aggravated robbery, which also involved the security of the person.³¹⁶

Enhancement. In Texas life imprisonment is mandatory upon a third conviction for any felony.³¹⁷ Although Penal Code section 12.42(d) does not on its face violate the cruel and unusual punishment clause of the eighth amendment, a Fifth Circuit panel in *Rummel v. Estelle*³¹⁸ ruled that the inflexible application of life imprisonment in a given case can constitute a punishment so grossly disproportionate to the severity of the crime as to become cruel and unusual punishment by reason of length alone. The decision is under en banc review at the present time.³¹⁹

The majority in *Rummel* applied the Fourth Circuit test for determining whether a particular application of a mandatory state enhancement statute constitutes cruel and unusual punishment by reason of punishment length alone.³²⁰ Under this test a court considers cumulatively (1) the nature of the offense, (2) the legislative purpose behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.³²¹

Rummel received an enhanced sentence of life imprisonment in 1973 for the then felony offense of obtaining \$120.75 under false pretenses.³²² His punishment was enhanced on the strength of a 1964 felony conviction of presenting a credit card with intent to commit an \$80 fraud, and a 1969 felony conviction for passing a forged instrument with a face value of \$28.36. The majority assessed defendant's sentence in light of the Fourth Circuit factors and concluded that imposing a life sentence for these three crimes was indeed so grossly disproportionate to the offenses as to constitute cruel and unusual punishment.³²³ In reaching this conclusion, the majority observed that Texas imposed dramatically lower minimum penalties for crimes of violence, and that "Texas now stands virtually alone in its unqualified demand for life imprisonment for a three-time felon even

316. *Id.* at 2.

317. TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

318. 568 F.2d 1193 (5th Cir.), *petition for rehearing en banc granted* (1978).

319. After the survey period ended the Fifth Circuit sitting en banc, in a closely divided opinion, held that there was no violation of the cruel and unusual punishment clause of the eighth amendment. *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (en banc). The en banc majority appears to base its decision on the proposition that Rummel's life sentence is not in fact a life sentence because of Texas good time credit system and the possibility of parole. The dissent, which was the panel majority, responded that if Rummel has a constitutional right to interdict his prison term, then the court had to declare the existence of the right without regard to the possibility that Texas, by an act of executive grace, might grant him parole. The office of Scott J. Atlas, court-appointed attorney for Rummel, advised on Jan. 31, 1979, that application for writ of certiorari would be filed.

320. *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

321. 568 F.2d at 1197.

322. *Id.* at 1195.

323. *Id.* at 1200.

where his convictions were for minor property crimes involving neither violence nor a remote possibility of violence.³²⁴

In *Bouie v. State*³²⁵ the court of criminal appeals held a prosecutor's vindictive use of enhancement allegations on retrial to retaliate for defendant's prior exercise of his right of appeal violated due process. At the first trial Bouie pled guilty to robbery by assault and received ten years; he appealed and obtained a reversal. Subsequently, he was reindicted for the same crime and the new indictment alleged two prior felony convictions for enhancement. Defendant again pled guilty, but pled not true to the enhancement allegations. Finding the allegations true, the trial court was required to fix punishment at life.

On appeal the judgment of conviction was affirmed, but the punishment was set aside and the case remanded for dismissal of the enhancement allegations in the indictment, with proper punishment to be assessed in accordance with the principles of *North Carolina v. Pearce*.³²⁶ *Pearce* teaches that when a defendant has made a successful appellate attack on his first conviction, vindictiveness must not play a part in any sentence the defendant receives after a retrial.³²⁷ This due process prohibition applies to prosecutors as well as to judges.³²⁸ Further, once a defendant enters the same plea on retrial, use of the enhancement statute to increase punishment raises a presumption of prosecutorial vindictiveness that can be dispelled only if the State meets its burden of showing for the record that it had objective information concerning identifiable conduct of the defendant occurring after the time of the original sentencing proceeding.³²⁹ In *Bouie* not only did the prosecutor fail to make such a record, he admitted that he did not base the enhanced indictment on any interim conduct of defendant.³³⁰

Two other decisions concerning punishment enhancement should be noted. In *Joles v. State*³³¹ the court emphasized once again that, "unlike the rule that a prior conviction too remote in time cannot be used for impeachment purposes, a prior conviction may be utilized for enhancement no matter how remote." In *Thompson v. State*³³² the court held that proof of a prior felony conviction during the punishment stage for enhancement purposes could be made by the testimony of a district clerk and a district attorney, absent any objection from the defendant. The court explained that the defendant could have objected on "best evidence" grounds and compelled the State to prove the prior conviction by introduction of the indictment and the authenticated copies of the judgment and sentence.³³³

324. *Id.*

325. 565 S.W.2d 543 (Tex. Crim. App. 1978) (en banc).

326. 395 U.S. 711 (1969).

327. *Id.* at 725.

328. *Blackledge v. Perry*, 417 U.S. 21 (1974).

329. 565 S.W.2d at 546.

330. *Id.* at 546-47.

331. 563 S.W.2d 619, 621 (Tex. Crim. App. 1978).

332. 563 S.W.2d 247 (Tex. Crim. App. 1978).

333. *Id.* at 251.

G. *Punishment Stage—Capital Murder*

Psychiatric Testimony on Dangerousness. Article 37.071 of the Code of Criminal Procedure³³⁴ states that before a defendant can be given a death sentence, the jury must find beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."³³⁵ With some frequency, Texas prosecutors refer incarcerated capital murder defendants for examination by psychiatrists readily prepared to diagnose the accused as an antisocial personality (sociopath)³³⁶ who would be an absolute threat to society.³³⁷ As might be expected, such testimony at the punishment stage of a capital murder trial often results in a death sentence under article 37.071.

If *Smith v. Estelle*,³³⁸ a recent federal district court decision in a habeas corpus case, is not reversed, use of this prosecutorial tactic may be sharply curtailed, if not eliminated. The *Smith* court concluded that the due process clause requires that "when the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant."³³⁹ In order to insure this, the court further held that "defense counsel must be notified that a psychiatric examination will be held on the issue of 'dangerousness' the results of which may be used at the penalty phase of the trial."³⁴⁰ Prior to trial, defense counsel must have meaningful access to the psychiatrist's statutorily required report.³⁴¹ The trial judge can appoint a psychiatrist if he wishes, but the testimony and report of a court-appointed psychiatrist would be equally available to both defense and prosecution, and both sides have the right to obtain additional psychiatric experts either to supplement or challenge the conclusions of the court-appointed psychiatrist.³⁴²

The most significant part of the court's opinion, however, is its holding that in the future, whenever the State or trial court seeks to have a defendant examined by a psychiatric expert on the issue of dangerousness, de-

334. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1978-79).

335. *Id.* art. 37.071(b)(2).

336. THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1968), defines an antisocial personality as that of individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis.

337. *See, e.g.,* Chambers v. State, 568 S.W.2d 313, 324 (Tex. Crim. App. 1978).

338. 445 F. Supp. 647 (N.D. Tex. 1977), *appeal pending*, No. 78-1839. The office of attorney John F. Simmons stated that oral argument was heard in the Fifth Circuit on Feb. 8, 1979.

339. 445 F. Supp. at 657.

340. *Id.*

341. *Id.*

342. *Id.*

fendant must be advised that he has a fifth amendment right to remain silent.³⁴³ In reaching this conclusion, the federal district court reasoned that, unlike psychiatric examinations on crime-time insanity or competency to stand trial, a compelled psychiatric examination on the issue of "dangerousness" involves "not only the *way* the Defendant communicates to the psychiatrist, but also the content of *what* he says that forms the basis of the expert opinion."³⁴⁴ Consequently, if a defendant, upon advise of counsel, elects to remain silent, "he may not be questioned by the psychiatrist for the purpose of determining dangerousness."³⁴⁵ Of course, a defendant can waive his right to remain silent by initiating a psychiatric examination on the issue of dangerousness or by seeking to introduce testimony on the issue, in which event "he can not hide behind his privilege . . . when the court or the prosecutor seek to have him examined by an additional psychiatrist, or when the prosecutor attempts to introduce the testimony by the Defendant's expert, or its own expert at the punishment phase."³⁴⁶

A somewhat unique waiver problem was also addressed by the *Smith* court. If a defendant raises a crime-time insanity defense or a competency issue at the guilt stage of a trial, but is nevertheless found guilty or competent, he may have the jury at the punishment stage consider his psychiatric evidence on insanity as a mitigating factor.³⁴⁷ He waives his privilege against self-incrimination if he follows this course, and the State may have a psychiatrist examine the defendant on the issue of dangerousness and introduce testimony on the issue before the jury.³⁴⁸ Should he elect not to have the insanity evidence considered for mitigation purposes at the punishment stage, the jury will then be so instructed and the fifth amendment will foreclose either a compelled psychiatric examination on dangerousness or evidence from a court-appointed or State psychiatrist on dangerousness learned from a sanity or competency examination.³⁴⁹

Evidence Admissible at the Punishment Stage. The court of criminal appeals made it clear in *Ex parte Granviel*³⁵⁰ that article 37.171 permits virtually any evidence relevant to the two or possibly three statutory special issues submitted at the punishment stage, including mitigating or aggravating circumstances.³⁵¹ This is particularly important since *Jurek v. Texas*³⁵² holds that the constitutionality of the Texas death penalty statute³⁵³ rests upon the opportunity given a defendant to present mitigating

343. *Id.* at 659.

344. *Id.* at 662.

345. *Id.* at 664.

346. *Id.* at 663.

347. *Id.* at 664.

348. *Id.*

349. *Id.*

350. 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc).

351. *Id.* at 516.

352. 428 U.S. 262 (1976).

353. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

circumstances at the punishment stage. Any curtailment of this opportunity, or suppression of such evidence renders a resulting death penalty unconstitutional under the cruel and unusual punishment clause of the eighth amendment.³⁵⁴ In this regard, the jury may properly consider all the evidence adduced during the guilt stage of the trial, including evidence of defendant's mental condition.³⁵⁵

Circumstantial Evidence Charge. It is easy to understand why a defendant would want a circumstantial evidence charge anytime he could obtain one because of its references to "moral certainty."³⁵⁶ It does not appear, however, that such a charge is applicable to the punishment stage issues of Code of Criminal Procedure article 37.071.³⁵⁷ *Bodde v. State*³⁵⁸ and *Shippy v. State*³⁵⁹ are the cases so holding and their reasoning seems sound.

Even at the guilt stage of a trial, a circumstantial evidence charge is required only when circumstantial evidence is used to prove the culpable act, which is a matter of historical fact. In comparison, the charge is not given with regard to a circumstantially proven matter of internal psychological fact such as mens rea.³⁶⁰ Thus, the court reasoned that a circumstantial evidence charge is not applicable at the punishment stage because the jury's evaluation of circumstantial evidence to determine matters of internal psychological fact as they pertain to a defendant are involved.³⁶¹

Life Imprisonment. Once again the court in *Duffy v. State*³⁶² rejected an argument that it is an unconstitutional shifting of the burden of proof to require a defendant to obtain a ten-to-two "no" vote on the special capital punishment issues of article 37.071³⁶³ before he will be entitled to life imprisonment rather than death. The court reasoned that in order to get an acquittal rather than a hung jury at the trial stage, a defendant must receive twelve favorable votes. At the punishment stage "the procedure is the same with the exception that if a defendant has ten votes he receives a favorable verdict instead of a hung jury."³⁶⁴

An argument can be made that the defendant has the burden of proof on the question whether he will receive life imprisonment should the State fail in its bid for the death sentence. The real question, however, is not the validity of the court's reasoning, but why the legislature has not yet

354. *Smith v. Estelle*, 445 F. Supp. 647, 658 (N.D. Tex. 1977).

355. 561 S.W.2d at 516.

356. STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 0.01 (1975).

357. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1978-79).

358. 568 S.W.2d 344, 350 (Tex. Crim. App. 1978) (en banc).

359. 556 S.W.2d 246, 249 (Tex. Crim. App.), cert. denied, 434 U.S. 935 (1977).

360. 568 S.W.2d at 351.

361. *Id.* Although *Bodde* and *Shippy* do not concern special issue (3) of art. 37.071 (whether defendant's killing the deceased was an unreasonable response to provocation), the reasoning of the cases appears equally applicable to this issue.

362. 567 S.W.2d 197, 203 (Tex. Crim. App. 1978).

363. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1978-79).

364. 567 S.W.2d at 204.

amended article 37.071 so that life imprisonment would be automatic upon failure of the State to obtain a death sentence. Retrial of the whole case, guilt stage and punishment stage, because a jury can neither agree unanimously on death nor at least ten-to-two on life imprisonment, simply does not make sense.

Execution by Intravenous Injection of a Lethal Substance. On May 11, 1977, Texas Code of Criminal Procedure article 43.14 was amended to provide that "the sentence of death . . . shall be executed . . . by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death . . . , such execution procedure to be determined and supervised by the Director of the Department of Corrections."³⁶⁵ Just a day earlier Oklahoma became the first jurisdiction to provide for execution by lethal injection with its enactment of a statute requiring that the "punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice."³⁶⁶

Although the weakness of the Texas statute becomes apparent when compared with its Oklahoma counterpart, it withstood attacks on various constitutional grounds in *Ex parte Granviel*.³⁶⁷ The court properly rejected defendant's contentions of cruel and unusual punishment³⁶⁸ and ex post facto legislation;³⁶⁹ however, its rejection of defendant's void for vagueness and unconstitutional delegation of legislative power contentions is questionable.

Granviel asserted that article 43.14 was unconstitutionally vague and indefinite because of its failure to specify the type of lethal substance to be used in the injection,³⁷⁰ and because the director of the department of corrections is left free to choose both the lethal substance and the manner in which the intravenous injection will take place.³⁷¹ Although the court seemed to recognize the need for a more precise statute,³⁷² it rejected defendant's vagueness argument because the "context of the statute is a public statement of the general manner of execution," and "[i]n this sense the statute is sufficiently definite."³⁷³ A strong argument can be made against the court's position.

The eighth amendment provision against cruel and unusual punishment prohibits any method of execution calculated to cause unnecessary pain or

365. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 1979).

366. 1977 Okla. Sess. Law Serv. ch. 41, § 1, at 89.

367. 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc).

368. *Id.* at 508-10.

369. *Id.* at 510-11.

370. *Id.* at 511.

371. *Id.* at 513.

372. *Id.*

373. *Id.*

a lingering death.³⁷⁴ Nowhere in the language of article 43.14 is there any hint of a statutory standard requiring that any lethal substance used must act as quickly and as painlessly as possible. Any statute, such as article 43.14, that does not provide explicit or at least implied standards for those who apply it is void for vagueness under the due process clause of the fourteenth amendment.³⁷⁵ Due process requires this particular void for vagueness rule; otherwise, the individual or individuals obligated or appointed to enforce a vague law would be free to enforce it in an arbitrary and discriminatory manner.³⁷⁶ For example, there are no standards in article 43.14, either expressed or implied, to govern the director of the department of corrections in his exercise of the discretion granted by the article; thus, absent the void for vagueness rule, he is free to arbitrarily choose a lethal substance that would cause an agonizing death and result in the imposition of cruel and unusual punishment, just as defendant asserted in *Granviel*.³⁷⁷

While the court cited several older cases from various jurisdictions in support of its position,³⁷⁸ it can be argued that they no longer have validity in light of the modern void for vagueness rule.³⁷⁹ The unconstitutional vagueness of article 43.14 is not cured by the presumption of the court of criminal appeals that the director will select a quick-acting, painless lethal substance and thus avoid the infliction of cruel and unusual punishment. Assurance that the termination of a human life by the State will be carried out humanely, that is, quickly and with as little pain as possible, should not, cannot, and does not depend on a presumption that the director will do the right thing—even though the possibility of arbitrary or otherwise improper conduct is extremely remote.

If article 43.14 is void for vagueness, it would still be void even without the clause specifically delegating execution authority to the director. This is so because the statute does not provide for expressed or implied minimum standards of humaneness to guide whoever would be called upon to enforce the statute. Thus, article 43.14 is not rendered any less vague or any less void by the incorporation into the statute of a clause delegating to a specific state official the unfettered power to enforce the vague law in whatever manner he may deem appropriate. In fact, the statute's vagueness is compounded by the clause.

The defendant in *Granviel* also asserted article 43.14 to be an invalid delegation of legislative power in violation of Texas Constitution article II,

374. Cf. *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to a prisoner's serious medical needs held to be cruel and unusual punishment).

375. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

376. 408 U.S. at 108-09.

377. 561 S.W.2d at 513.

378. *Wilkerson v. Utah*, 99 U.S. 130 (1878) (considering a Utah territorial statute); *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911 (1953), cert. denied, 346 U.S. 827 (1953); *State v. Gee Jon*, 46 Nev. 418, 211 P. 676 (1923).

379. See authorities cited at note 375 *supra*.

section 1.³⁸⁰ The court rejected this contention, stating that when the legislature amended article 43.14 to provide a new mode of execution by injection of a lethal substance, it declared a policy and fixed a primary standard. Thus, delegation of authority to the director to determine execution procedures was merely the delegation of power to determine details, not the delegation of any legislative power.³⁸¹ The court's conclusion does not appear to be correct.

True enough, if the legislature has prescribed sufficient standards to guide the discretion conferred, then the power is not legislative and the delegation is lawful.³⁸² But in fact, article 43.14 contains no standard requiring that any lethal substance selected by the director must act as quickly and as painlessly as possible, as mandated by the cruel and unusual punishment prohibition of the eighth amendment. With no primary standard for humane executions in the statute, the delegation clause necessarily vests the director with an arbitrary and uncontrolled discretion regarding the conduct of executions. This is clearly a delegation of legislative power in violation of article II, section 1 of the Texas Constitution.³⁸³ Where an execution officer, such as the director of the department of corrections, is charged with the administration of a statute, the legislature must prescribe a standard for his guidance and must not vest him with arbitrary or uncontrolled discretion.³⁸⁴

V. SENTENCING AND POST-TRIAL

A. *Sentencing and Presentence Reports*

Validity of Sentence. Because some trial courts continue to overlook the fact that punishment must be assessed and judgment rendered before sentence can be pronounced, the court of criminal appeals in *Bean v. State*³⁸⁵ carefully described the sequence of steps that must be followed in order for a sentence to be valid. Whenever the trial court is called upon to assess punishment, it must conduct a hearing with the defendant and counsel present wherein appropriate evidence is considered, and, after which, the trial court will assess a definite punishment. Judgment is then rendered pursuant to article 42.01, that is, the judgment shall include a declaration of the court that the defendant will be punished as has been determined.³⁸⁶

380. TEX. CONST. art. II, § 1 provides for division of power between three separate departments: legislature, executive, and judiciary. It further provides: "[N]o person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

381. 561 S.W.2d at 515.

382. *In re Johnson*, 554 S.W.2d 775, 781 (Tex. Civ. App.—Corpus Christi 1977, no writ).

383. *Id.*; *Moody v. City of University Park*, 278 S.W.2d 912 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.); *State v. Society for Friendless Children*, 102 S.W.2d 318 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 130 Tex. 533, 111 S.W.2d 1075 (1907).

384. *In re Johnson*, 554 S.W.2d at 781. See also 16 C.J.S. *Constitutional Law* § 138 n.12 (1956).

385. 563 S.W.2d 819, 821 (Tex. Crim. App. 1978).

386. TEX. CODE CRIM. PROC. ANN. art. 42.01 (Vernon 1979).

As stated in article 42.03, section 1,³⁸⁷ the trial court should then allow the defendant time to file a motion for new trial under article 40.05³⁸⁸ or a motion in arrest of judgment under articles 41.01-.02³⁸⁹ unless such time is waived. After said time has expired or been waived, the trial court should pronounce sentence in accordance with article 42.02.³⁹⁰

Presentence Reports. Judge Onion's concurring opinion in *Bean v. State*³⁹¹ contains a significant reminder for all trial courts about the nature and purpose of presentence reports. He points out that presentence reports must be used only to pass on the issue of probation. Because "[t]hese reports frequently contain hearsay, information concerning inadmissible extraneous offenses, and other matters that would not be admissible at trial," they must not be used to determine the punishment to be assessed.³⁹²

Judge Onion explains that whenever a court defers the assessment of punishment in a case where probation is a possibility and resets the case for the purpose of obtaining a presentence investigation, there is a real danger of presentence reports improperly being used to determine punishment. For this reason, he suggests that whenever it becomes the duty of a trial court to assess punishment, either after a jury finding of guilt where the defendant has elected to have the court determine punishment, or upon a guilty plea, the court should immediately conduct a punishment hearing. Once punishment has been assessed, it will be clear that the subsequently prepared presentence report was used only to pass on the issue of probation.³⁹³

In *Burns v. State*³⁹⁴ the court reminded defense attorneys that although defendants now have the right under article 42.12, section 4³⁹⁵ to see a presentence report prior to the trial court's determination of the probation issue, a probation officer need not provide the report absent a request from the defendant or his attorney.

B. Appeal

Waiver of Right to Appeal. In Texas a defendant has the right to appeal a conviction at his election³⁹⁶ with two exceptions: (1) a death sentence is automatically appealed;³⁹⁷ and (2) a defendant cannot appeal a plea bargained conviction without the permission of the trial court.³⁹⁸ During the survey period the court of criminal appeals appears to have settled on the

387. *Id.* art. 42.03, § 1.

388. *Id.* art. 40.05.

389. *Id.* arts. 41.01-.02.

390. *Id.* art. 42.02.

391. 563 S.W.2d at 821.

392. *Id.*

393. *Id.* at 822.

394. 561 S.W.2d 516 (Tex. Crim. App. 1978).

395. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (Vernon 1979).

396. *Id.* art. 44.02.

397. *Id.* art. 37.071(f) (Vernon Supp. 1978-79).

398. *Id.* art. 44.02 (Vernon 1979).

procedure to be followed when an appeal is attempted after a waiver. A defendant may waive his right to appeal, and once having done so he cannot thereafter appeal unless (1) he obtains the consent of the trial court,³⁹⁹ or (2) he can show that his waiver was not knowingly, intelligently, and voluntarily given.⁴⁰⁰

If, after an alleged waiver, a defendant goes ahead and files notice of appeal within ten days after sentence is pronounced, he should include in the notice allegations of fact that, if proved, would show the waiver was coerced or involuntary.⁴⁰¹ The trial court should conduct a hearing on the allegations and if the trial court rules against the defendant, the matter is forwarded to the court of criminal appeals for a final determination of the issue.⁴⁰² After an alleged waiver, if the defendant does not file a notice of appeal within the ten-day period, he is relegated to filing a post-conviction writ of habeas corpus in the trial court, which again must contain allegations of fact that, if proved, would show the waiver was coerced or involuntary.⁴⁰³

Trial Courts' Duty to Indigent Defendants. Effective May 25, 1977, article 40.09 was amended to transfer from the trial courts to the court of criminal appeals the authority to grant extension of time for filing a transcript of the court reporter's notes and for filing appellate briefs.⁴⁰⁴ Since some trial judges misconceived the change in article 40.09 to mean that they no longer had authority to see that such items are filed, the court went to some lengths in three different cases to impress upon the trial courts their continuing constitutional duty to see that indigent defendants receive effective assistance of counsel and an adequate record on appeal.⁴⁰⁵ In one of these cases, *Guillory v. State*,⁴⁰⁶ the court left no doubt regarding a trial court's duty by stating that court reporters who persist in not preparing and filing a transcription of their notes in indigent cases should be held in contempt, and, if necessary, fired. Addressing the problem of attorneys who fail to file an appellate brief on behalf of their indigent clients, the court suggested contempt proceedings, a report to the appropriate grievance committee, and the preclusion of further court appointments for indigent clients.

Sentence Limit for Bail on Appeal. Although article 44.04 was amended in various ways effective August 29, 1977, the fifteen-year sentence limit provision regarding bail pending appeal remained the same.⁴⁰⁷ Section 4

399. *Johnson v. State*, 556 S.W.2d 816, 818 (Tex. Crim. App. 1977).

400. *Ex parte Hogan*, 556 S.W.2d 352, 353 (Tex. Crim. App. 1977).

401. *Id.*

402. *See Johnson v. State*, 556 S.W.2d 816, 817 (Tex. Crim. App. 1977).

403. *Ex Parte Hogan*, 556 S.W.2d 352, 353 (Tex. Crim. App. 1977).

404. TEX. CODE CRIM. PROC. ANN. art. 40.09, § 16 (Vernon 1979).

405. *Bush v. State*, 557 S.W.2d 772, 773 (Tex. Crim. App. 1977); *Guillory v. State*, 557 S.W.2d 118, 120-21 (Tex. Crim. App. 1977); *Yates v. State*, 557 S.W.2d 115, 117 (Tex. Crim. App. 1977).

406. 557 S.W.2d 118, 121 (Tex. Crim. App. 1977).

407. TEX. CODE CRIM. PROC. ANN. art. 44.04(b) (Vernon 1979).

of article 42.09,⁴⁰⁸ also amended August 29, 1977, specifies that a defendant sentenced to a term of more than ten years who gives notice of appeal is to be transferred to the department of corrections on a commitment pending a mandate from the court of criminal appeals. In 1978, the court of criminal appeals resolved this apparent conflict.

In *Ex parte Briones*⁴⁰⁹ the defendant was convicted of robbery on October 3, 1977, and assessed punishment at thirteen years. The trial court refused bail because of article 42.09, section 4. Defendant sought relief by writ of habeas corpus. The court ruled the conflict between articles 44.04 and 42.09 to be only apparent, not actual, and held that defendant was entitled to bail under the fifteen-year provision of article 44.04(b). Utilizing the construction aids in section 3.03 of the Code Construction Act⁴¹⁰ as a guide, the court presumed that the legislature intended both amendments be given effect and attempted to construe them to produce harmony rather than conflict. The *Briones* court did this by construing article 42.09 as addressing only the manner of delivery of a defendant for confinement, and article 44.04(c) as controlling the determination of whether to confine a defendant.⁴¹¹

Order Granting a Conditional Discharge and Probation on Violations of the Texas Controlled Substances Act. In *George v. State*⁴¹² defendant was convicted of possession of methaqualone, a Class A misdemeanor. Since it was his first offense, the court entered an order granting a conditional discharge and placing defendant on probation for a year, all as prescribed by section 4.12 of the Texas Controlled Substances Act.⁴¹³

Defendant gave notice of appeal, but it was dismissed by the court of criminal appeals because, unlike the provisions of article 42.12⁴¹⁴ and article 42.13⁴¹⁵ of the Code of Criminal Procedure, section 4.12 of the Texas Controlled Substances Act has no provision for appealing an order granting a conditional discharge. The court of criminal appeals noted that the case could not be appealed as a criminal conviction because in granting a conditional discharge, the trial court does not enter a judgment of guilt.⁴¹⁶ Thus, a first offender charged with a violation of the Texas Controlled Substances Act who plans an appeal if convicted, should seek a conviction and probation under either articles 42.12 or 42.13 of the Code of Criminal Procedure rather than a conditional discharge and probation under section 4.12 of the Texas Controlled Substances Act because under it, there is no way to appeal.

408. *Id.* art. 42.09, § 4.

409. 563 S.W.2d 270 (Tex. Crim. App. 1978).

410. TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Vernon Supp. 1978-79).

411. 563 S.W.2d at 273.

412. 557 S.W.2d 787 (Tex. Crim. App. 1977).

413. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.12 (Vernon 1976).

414. TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 1979).

415. *Id.* art. 42.13.

416. 557 S.W.2d at 788.

C. Probation and Revocation

Probation—Consideration of Defendant's Arrest Record, Juvenile Record, and Hearsay Regarding Defendant's Social History and Present Condition. When a trial judge, rather than a jury, determines whether probation should be granted, according to article 42.12, section 4 of the Code of Criminal Procedure,⁴¹⁷ the judge may consider defendant's arrest record,⁴¹⁸ including juvenile arrests,⁴¹⁹ and hearsay⁴²⁰ pertaining to the defendant's social history and present condition. This varied information may come to the attention of the trial court under its article 42.12, section 4 power to order the preparation of a presentence report by a probation officer. If a jury considers probation in conjunction with a determination of punishment, it is limited by Code of Criminal Procedure article 37.07, section 3(a)⁴²¹ to consideration of general reputation and character along with any final convictions on defendant's record, including final convictions in nonrecord courts, such as municipal courts and justice of the peace courts, if such nonrecord court convictions are material to the offense charged.⁴²²

That some confusion still exists among the defense bar regarding this distinction is indicated by *Pitts v. State*,⁴²³ wherein the defendant contended that the trial court violated article 37.07, section 3(a) by considering defendant's previous arrest record, including juvenile arrests, in its determination to reject the defendant's application for probation. The court of criminal appeals, of course, rejected the defendant's contention.⁴²⁴ Trial judges are reminded, however, that presentence report hearsay, including a defendant's arrest record, can only be used in passing on the issue of probation, not on the issue of punishment.⁴²⁵ Also, presentence reports must now be made available to the defendant upon request before the probation issue is decided, so that the defendant may have an opportunity to point out any inaccuracies in the report.⁴²⁶

Restitution for Loss Caused by Offense Charged as Condition for Granting Probation. Code of Criminal Procedure article 42.12, section 6 prescribes as a permissible probation condition the requirement that defendant "make restitution or reparation in any sum that the court shall determine."⁴²⁷ This probation prerequisite withstood constitutional attack in *Thompson v. State*.⁴²⁸ Thompson was convicted of failing to stop and render aid. After his car hit the pedestrian victim, defendant drove on,

417. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (Vernon 1979).

418. *McNeese v. State*, 468 S.W.2d 800 (Tex. Crim. App. 1971).

419. *Walker v. State*, 493 S.W.2d 239 (Tex. Crim. App. 1973).

420. *Brown v. State*, 478 S.W.2d 550 (Tex. Crim. App. 1972).

421. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1978-79).

422. See note 315 *supra*.

423. 560 S.W.2d 691 (Tex. Crim. App. 1978).

424. *Id.* at 692.

425. See notes 391-93 *supra*.

426. See notes 395 & 394 *supra*.

427. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (Vernon 1979).

428. 557 S.W.2d 521 (Tex. Crim. App. 1977).

dragging the victim a considerable distance and causing the victim injuries.⁴²⁹ Defendant pled guilty. The trial court assessed punishment at five years and placed defendant on probation subject to payment of \$12,000 restitution to the victim at the rate of \$200 per month.

On appeal the court said there was no due process violation where restitution was limited, as here, to loss caused by the offense for which defendant was convicted.⁴³⁰ In this regard, the court was careful to point out the trial court's power to set restitution in keeping with defendant's ability to pay and to adjust the payment schedule whenever fluctuations in that ability to pay might occur.⁴³¹ The court specifically raised, but left unanswered, the question whether it would be a denial of due process or otherwise unconstitutional for a trial court to require restitution for injuries unrelated to the offense as a condition to receiving probation.⁴³² The defendant also asserted that making restitution a prerequisite to the granting of probation constituted imprisonment for debt in violation of article I, section 18 of the Texas Constitution. This was easily rejected by the court with the explanation that any imprisonment would be punishment for violation of the criminal law, not for debt.⁴³³

The case was remanded for a hearing to determine the amount of restitution to be ordered because of the State's failure to put on evidence of the amount of damages suffered by the victim. The court of criminal appeals was silent regarding the elements of damage that might be considered by the trial court, but did quote a definition of restitution as including the "act of making good or giving equivalent for any loss, damage or injury; and indemnification."⁴³⁴ This language appears broad enough to encompass any of the traditionally recognized elements of damage for personal injuries. The court's decision in *Thompson* is in keeping with decisions of most other jurisdictions that have considered the question.⁴³⁵

Probable Cause Preliminary Hearings Upon Arrest of Alleged Probation Violator. The probationer in *Whisenant v. State*⁴³⁶ contended that, by reason of *Gagnon v. Scarpelli*⁴³⁷ and *Morrissey v. Brewer*,⁴³⁸ he was absolutely entitled to a preliminary hearing at the time of his arrest and detention to determine whether there was probable cause to believe that he had committed a violation of his probation. Although this is the precise holding of *Morrissey*⁴³⁹ and *Gagnon*,⁴⁴⁰ the Texas Court of Criminal Appeals in *Whisenant* rejected the preliminary hearing requirement, citing several

429. *Id.* at 524.

430. *Id.*

431. *Id.* at 525.

432. *Id.* at 523.

433. *Id.* at 525.

434. *Id.* (quoting BLACK'S LAW DICTIONARY 1477 (4th rev. ed. 1968)).

435. *See* Annot., 79 A.L.R.3d 976 (1977).

436. 557 S.W.2d 102 (Tex. Crim. App. 1977).

437. 411 U.S. 778 (1973).

438. 408 U.S. 471 (1972).

439. *Id.* at 485.

440. 411 U.S. at 781-82.

reasons, none of which are sufficiently on point to even merit extended discussion. For example, the court asserted that there is no reason for a preliminary probable cause hearing because article 42.12, section 8(a)⁴⁴¹ of the Code of Criminal Procedure provides that an arrested probationer not released on bail may move for a hearing on the merits of the State's motion to revoke, which must be heard within twenty days or dismissed.⁴⁴² The specific holding in *Gagnon* is that a probationer

is entitled to two hearings, one a preliminary hearing *at a time of his arrest and detention* to determine whether there is probable cause to believe that he has committed a violation of his [probation], and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.⁴⁴³

Thus, the holding of the Texas Court of Criminal Appeals in *Whisenant* appears to be clearly erroneous.

Probation Revocation Hearing—Judicial Notice of Testimony Offered at Prior Trial to Prove Commission of Offense Made the Basis of Motion to Revoke. A divided court of criminal appeals sitting en banc in *Bradley v. State*⁴⁴⁴ gave continued life to the rule that a trial judge in a probation revocation hearing may take judicial notice of testimony offered at a prior trial at which he also presided to prove commission of the offense made the basis of the State's motion to revoke.

The majority qualified the ruling by requiring the State, in the event of an appeal of the revocation decision, to ensure that the record of the judicially noticed testimony is before the appellate court either as a part of the revocation appeal or as a part of the appellate record in the trial of the crime on which the revocation of probation is based.⁴⁴⁵ The appeal in *Bradley* was abated because the State had failed to do this.⁴⁴⁶

Presiding Judge Onion and Judges Dally and Phillips dissented because they did not believe that testimony in another proceeding was the proper subject of judicial knowledge.⁴⁴⁷ As for Texas civil cases, the weight of authority appears to support their position.⁴⁴⁸ Both Judge Phillips and Judge Dally offered valid solutions for the problem. Judge Phillips would require the State to introduce into evidence the transcription of the court reporter's notes of the prior proceeding, which would afford a probationer an opportunity to rebut and would also, of course, take care of the need for an appellate record in case of an appeal.⁴⁴⁹ Judge Dally suggested that "[w]hen a pending motion to revoke probation alleges as a ground for rev-

441. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8(a) (Vernon 1979).

442. 557 S.W.2d at 105.

443. 411 U.S. at 781-82 (emphasis added).

444. 564 S.W.2d 727 (Tex. Crim. App. 1978) (en banc).

445. *Id.* at 732.

446. *Id.* at 733.

447. *Id.* at 733, 740.

448. *See Continental Oil Co. v. P.P.G. Indus.*, 504 S.W.2d 616, 622 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

449. 564 S.W.2d at 740-41.

ocation an offense . . . alleged in an indictment, the court should announce prior to trial on the indictment that it will at the same time consider that evidence . . . in the motion to revoke."⁴⁵⁰

Probation Revocation—Proof of Conviction for a Crime Committed During the Probation Period. Proof of a conviction for a crime committed by a probationer during the period of his probation is sufficient to support revocation of the probation, provided that the conviction is final, that is, the conviction must not be on appeal at the time.⁴⁵¹ In a case where a hearing on a revocation motion is held concurrently with a trial before the court for the crime made the basis of the motion to revoke, and the defendant pleads guilty to the crime, the resulting criminal conviction will support the court's subsequent but same day revocation of probation based upon that conviction, even if the conviction is subsequently appealed.⁴⁵²

The case of *Haile v. State*⁴⁵³ evoked an unusual application of the two rules set out above. A jury found Haile guilty of a crime that was committed while Haile was on probation, and he immediately gave notice of appeal. The day after defendant's conviction, a hearing was held on the State's motion to revoke probation, with the same attorneys appearing before the same judge. In the revocation proceeding, the State offered proof of Haile's conviction entered the day before. On this showing, the trial court revoked the defendant's probation. The revocation order made on the basis of a conviction being appealed was also appealed by defendant.

Both cases were taken to the court of criminal appeals where the court first affirmed the criminal conviction and then affirmed the probation revocation, explaining that while an appealed conviction cannot be used to support revocation, once the conviction was affirmed it became a final conviction ab initio and rendered nonexistent the defendant's contention of insufficient evidence in the probation revocation case.⁴⁵⁴

Probation Revocation Hearing—Collateral Attack on Conviction Upon Which the Probation is Based. It is well established that in a probation revocation hearing the probationer cannot defend against revocation by collaterally attacking the conviction upon which his probation was based,⁴⁵⁵ except where the contention is that the original conviction is void rather than voidable.⁴⁵⁶ The court had occasion to apply this rule in *Wolfe v. State*.⁴⁵⁷ In *Wolfe* the defendant committed another crime while on probation. Upon pleading true to the State's motion to revoke, the trial court revoked probation and sentenced defendant to five years.

450. *Id.* at 733.

451. *Barrientez v. State*, 500 S.W.2d 474, 475 (Tex. Crim. App. 1973).

452. *Bailey v. State*, 543 S.W.2d 653, 654 (Tex. Crim. App. 1976).

453. 556 S.W.2d 818 (Tex. Crim. App. 1977).

454. *Id.* at 820.

455. *Owens v. State*, 540 S.W.2d 324 (Tex. Crim. App. 1976).

456. *Ex parte Moffett*, 542 S.W.2d 184 (Tex. Crim. App. 1976).

457. 560 S.W.2d 686 (Tex. Crim. App. 1978).

On appeal, defendant attacked the revocation by contending that the conviction on which his probation had been based was void. If the appellate record brought up by defendant had on its face demonstrated this contention, then the probation revocation would have been set aside, but such was not the case. Although the record indicated that the original offense was committed after the return of the indictment, the record did not include a transcript of the court reporter's notes from the original trial. Without the transcription the court was unable to ascertain whether other evidence was introduced to support the conviction.⁴⁵⁸ Thus, defendant's collateral attack failed.

Revocation of Probation as a Consequence of Probation Violation. Trial courts may, at their discretion, continue a defendant's probation despite revocation hearing evidence to the contrary. Due process, moreover, prohibits revocation of probation as an automatic consequence of a subsequent probation violation charge. In *Traylor v. State*⁴⁵⁹ a panel of the court of criminal appeals reminded trial courts of this rule despite failing to apply it. Traylor had been placed on probation after pleading guilty to burglary. On May 11, 1976, the trial court conducted a hearing on the State's motion to revoke probation because the defendant admitted striking a man with his fist. The court did not rule, but rather took the matter under advisement.⁴⁶⁰ Six months later in November 1976, defendant was arrested and charged with possession of heroin, and the State filed another motion to revoke probation. In January 1977 the trial court, with knowledge that defendant had been arrested on the heroin charge but without a hearing on that charge, entered a revocation order on the original revocation motion made in May of 1976.⁴⁶¹

The court of criminal appeals upheld the action of the trial court, stating that even though "the trial court had knowledge of a new offense, there is no showing that the court used such as the basis for revocation."⁴⁶² To reach this conclusion, the court panel had to close its collective eyes to reality. Either intentionally or inadvertently, the trial court in fact denied Traylor's due process right to a hearing on the State's motion to revoke based on the heroin possession charge. There is precious little due process protection afforded by the rule if it can be circumvented by so simple an expedient as a ruling indefinitely held in abeyance.

Probation Without an Adjudication of Guilt. Article 42.12, section 3d(a)⁴⁶³ of the Code of Criminal Procedure grants a trial court discretion to set a probation term without entering an adjudication of guilt. In light of *Walker v. State*,⁴⁶⁴ however, if the trial court elects to do this, the proba-

458. *Id.* at 688.

459. 561 S.W.2d 492 (Tex. Crim. App. 1978).

460. *Id.* at 493.

461. *Id.*

462. *Id.* at 494.

463. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d(a) (Vernon 1979).

464. 557 S.W.2d 785 (Tex. Crim. App. 1977).

tioner would be wise to insist on a final adjudication within thirty days of his guilty plea as provided in article 42.12, section 3d(a).

In *Walker* the defendant pled guilty to a burglary charge and the trial court entered an order deferring further proceedings and placing defendant on probation for eight years. Four months later the State filed a motion asking the trial court to proceed with an adjudication of guilt based upon alleged violations of probation conditions. At the hearing, defendant pled true and the trial court thereupon convicted him of the original charge of burglary and set punishment at eleven years, after first setting aside its prior orders deferring an adjudication of guilt and setting an eight-year probation period.

Defendant asserted on appeal that, under the holding of *North Carolina v. Pearce*,⁴⁶⁵ he was denied due process when his punishment was assessed at eleven years instead of eight. The court rejected this contention for two reasons. First, *Pearce* is only applicable when a heavier sentence is imposed by the court upon a reconvicted defendant who has successfully challenged his first conviction either by appeal or collateral attack. In the instant case the defendant was never reconvicted since he was found guilty and assessed punishment only once.⁴⁶⁶ Further, even if *Pearce* was construed to be applicable here, it permits an increase in punishment where, as here, it affirmatively appears from the record that there is identifiable conduct on the part of the defendant occurring after the time defendant was originally placed on probation justifying the increased penalty.⁴⁶⁷

Section 7 of article 42.12 of the Code of Criminal Procedure⁴⁶⁸ seems to provide the same basic benefits to a successful probationer who has been convicted and assessed punishment as section 3d(c) provides to a successful probationer who receives probation without having been adjudicated guilty and having his punishment assessed. The *Walker* holding, therefore, dictates that a probationer should always avoid serving a section 3d probation.

Among the issues left unanswered by *Walker* is the effect of a plea bargain on a probationer. It is unclear whether the trial court could have done what it did in *Walker* if the eight-year probation had resulted from a plea bargain under article 26.13 of the Code of Criminal Procedure.⁴⁶⁹

D. Habeas Corpus

Federal Habeas Corpus Relief. In the "New Stone Age" without federal habeas corpus relief for fourth amendment violations, state court rulings are starting to diverge from lower federal court rulings. In *Stone v. Powell*⁴⁷⁰ the United States Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment

465. 395 U.S. 711 (1969).

466. 557 S.W.2d at 786.

467. *Id.*

468. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 7 (Vernon 1979).

469. *Id.* art. 26.13 (Vernon Supp. 1978-79).

470. 428 U.S. 465 (1976).

claim, a state prisoner may not be granted federal habeas corpus relief."⁴⁷¹ The majority in *Stone* explained this federal habeas preclusion with the observation that "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."⁴⁷² There are indications, however, that what the *Stone* majority was "unwilling to assume" is nonetheless a fact.

For example, the Supreme Court of Arizona was quick to reassert the validity of its "murder scene" exception to the search warrant requirement of the fourth amendment, once there was "New Stone Age"⁴⁷³ protection against the Ninth Circuit's prior specific rejection of that exception.⁴⁷⁴ Only the writ of certiorari intervention of the United States Supreme Court in *Mincey v. Arizona*⁴⁷⁵ prevented Arizona's reinstatement of the "murder scene" exception over the rejection of the Ninth Circuit. The Supreme Court, however, is in no position to assume the habeas corpus supervision of the fourth amendment formerly performed by the lower federal courts.

As Mr. Justice Marshall's concurring opinion in *Mincey* points out, *Stone* has presented the Supreme Court with the Hobson's choice in cases of less than national significance, "either to deny certiorari and thereby let stand divergent state and federal decisions with regard to Fourth Amendment rights; or to grant certiorari and thereby add to our calendar, which many believe is already overcrowded, cases that might better have been resolved elsewhere."⁴⁷⁶

"New Stone Age" divergence is also taking place between Texas and Fifth Circuit decisions regarding fourth amendment rights. At least three Texas cases have held, without any articulated reason, that where law enforcement officers secured a search warrant based in part on their sworn affidavit professing to have seen "known narcotics users" at defendant's residence, the officers were not required to reveal the identity of the "known narcotics users" to defendant.⁴⁷⁷

In *Curry v. Estelle*⁴⁷⁸ the Fifth Circuit rejected the Texas courts' position and affirmed the federal district court's grant of habeas corpus relief. In *O'Quinn v. Estelle*,⁴⁷⁹ however, a post-*Stone* habeas corpus case presenting

471. *Id.* at 494 (footnote omitted).

472. *Id.* at 494 n.35.

473. This is the term used by Circuit Judge Goldberg in his dissenting opinion in *O'Berry v. Wainwright*, 546 F.2d 1204, 1219 (5th Cir. 1977).

474. *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972).

475. 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). A discussion of this decision can be found in text accompanying notes 19-20 *supra*.

476. 98 S. Ct. at 2420, 57 L. Ed. 2d at 308 (Marshall, J., concurring).

477. *Phenix v. State*, 488 S.W.2d 759 (Tex. Crim. App. 1973); *Curry v. State*, 459 S.W.2d 644 (Tex. Crim. App. 1970); *Bosley v. State*, 414 S.W.2d 468 (Tex. Crim. App.), *cert. denied*, 389 U.S. 876 (1967).

478. 531 F.2d 1260 (5th Cir. 1976).

479. 574 F.2d 1208 (5th Cir. 1978).

facts substantially identical to *Curry*, the Fifth Circuit rejected habeas corpus relief, which in the absence of *Stone* it would have granted. Because of *Stone*, Texas courts are free to continue on a fourth amendment path divergent from that of the Fifth Circuit, with only the remote possibility of a writ of certiorari road block. The longer the "New Stone Age" is permitted to continue, the greater will be the gulf between state and federal decisions regarding the fourth amendment.

United States Supreme Court Evisceration of Federal Habeas Corpus Jurisdiction. In *Wainwright v. Sykes*⁴⁸⁰ the United States Supreme Court continued its curtailment of federal habeas corpus jurisdiction by rejecting the deliberate bypass standard announced in *Fay v. Noia*⁴⁸¹ in favor of a "cause" and "prejudice" test.

Most jurisdictions,⁴⁸² including Texas,⁴⁸³ have contemporaneous objection rules providing that failure to object to the admission of evidence at the time it is offered waives any error. Until *Sykes* was handed down, federal habeas corpus relief was available to vindicate federal constitutional rights of a defendant despite noncompliance with the contemporaneous objection rule, unless defendant or his attorney "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures."⁴⁸⁴

Under *Sykes*, however, failure to make timely objection in state court precludes the opportunity to obtain federal habeas relief, no matter how meritorious the federal constitutional claim, unless defendant makes an adequate showing of cause for the noncompliance with the state contemporaneous objection rule and some showing of actual prejudice.⁴⁸⁵ In *Sykes* the defendant was denied federal habeas relief because the record demonstrated the absence of prejudice; thus the majority did not reach the question of what would constitute adequate cause.

In dissent Mr. Justice Brennan pointed out that "any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel."⁴⁸⁶ He felt that it would be unjust to the habeas corpus applicant to close the federal courthouse door as a result of his lawyer's unintentional errors.⁴⁸⁷ If the *Sykes* majority

480. 433 U.S. 72, 87 (1977).

481. 372 U.S. 391, 438-39 (1963). The Court in *Fay* held that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438.

482. 5 AM. JUR. 2d *Appeal and Error* § 553 n.13 (1962).

483. *Cortez v. State*, 520 S.W.2d 764, 765-66 (Tex. Crim App. 1975); *Weatherspoon v. State*, 501 S.W.2d 909, 911 (Tex. Crim. App. 1973).

484. *Fay v. Noia*, 372 U.S. 391, 439 (1963).

485. 433 U.S. at 84-87.

486. *Id.* at 104.

487. *Id.* at 113.

does intend the requirement for "adequate cause" to be interpreted in this manner then, as Justice Brennan says, it is indeed time to stop indulging the "comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients,"⁴⁸⁸ and to allow federal collateral review of inadequacy of counsel in such situations. A trial counsel certainly cannot procedurally waive his own inadequacy.

The issue of what constitutes "cause" under the new *Sykes* rule is presently before a Texas federal district court in *McDonald v. Estelle*.⁴⁸⁹ In *McDonald* the Fifth Circuit upheld the district court's grant of federal habeas corpus relief from a Texas sodomy conviction because of the State's use of a prior uncounseled conviction against the defendant at the punishment stage of his bifurcated trial.⁴⁹⁰ The United States Supreme Court vacated the judgment and remanded *McDonald* for further consideration in light of *Sykes*.⁴⁹¹ On remand the Fifth Circuit held that the defendant, having already established prejudice, must demonstrate cause for not complying with the contemporaneous rule or be barred from federal habeas corpus relief.⁴⁹² Thus, the case was remanded to the district court for that determination. It will be interesting to see if the federal district court and the Fifth Circuit interpret *Sykes* to be a rejection of unintentional errors or negligence of a defense attorney as adequate cause. The alternative sixth amendment contention of inadequacy of counsel, suggested by Justice Brennan,⁴⁹³ should be asserted as a hedge against such an eventuality.

*Habeas Corpus Attack on Final Misdemeanor Convictions. Ex parte Johnson*⁴⁹⁴ demonstrates again the undue complexity of a habeas corpus attack on a final misdemeanor conviction. Defendant sought relief from two misdemeanor convictions, one for driving while intoxicated and the other for unlawfully carrying a weapon. His punishment was assessed at sixty days for each conviction, and he sought habeas corpus relief on the grounds that he was denied right to counsel and that his guilty pleas were involuntary and improperly induced by the prosecutor.⁴⁹⁵ The judge of the county court in which defendant had been convicted refused to issue a writ and refused to hold a hearing on the issues raised by the writ. Defendant appealed, but the court dismissed the appeal, stating that no appeal would lie where, as here, the trial court denies rather than issues the writ and then

488. *Id.* at 118.

489. The case was remanded to the district court for a determination of cause by 564 F.2d 199 (5th Cir. 1977) (per curiam).

490. *McDonald v. Estelle*, 536 F.2d 667 (5th Cir. 1976), judgment vacated and remanded, 433 U.S. 904 (1977).

491. 433 U.S. at 904.

492. 564 F.2d at 200.

493. 433 U.S. at 118.

494. 561 S.W.2d 841 (Tex. Crim. App. 1978).

495. *Id.* at 841.

denies the relief requested.⁴⁹⁶ The court stated that the petitioner's remedy was to present his application before another trial judge.⁴⁹⁷

The court dismissed the appeal in *Ex parte Johnson*; although the court of criminal appeals has original jurisdiction over all habeas corpus proceedings,⁴⁹⁸ it has elected to exercise that jurisdiction only with habeas corpus attacks on felony convictions.⁴⁹⁹ This is understandable since it is preferable that initial consideration be made by the original trial court where possible,⁵⁰⁰ or by some other trial court where not.⁵⁰¹

Nevertheless, it is difficult to understand why a petitioner who has properly sought but been denied issuance of a writ by an appropriate trial court must continue to search for a trial court that will issue the writ before denying relief. Surely the court should exercise its original jurisdiction; an unconstitutional restraint of a citizen's liberty is no less significant because it stems from a misdemeanor rather than a felony conviction.

The legislature has created a much less cumbersome procedure for habeas corpus attack on final felony convictions.⁵⁰² Since the court of criminal appeals does not seem to be of a mind to help, the legislature should at least make substantially the same procedure applicable to habeas corpus attacks on misdemeanor convictions.

Restraint of Liberty—Prerequisite to Invocation of Habeas Corpus Relief. In *Basaldua v. State*⁵⁰³ the defendant sought habeas corpus relief from a probation condition that required him to submit his person, place of residence, and vehicle to search and seizure at any time of day or night, with or without search warrant, whenever requested to do so by a probation officer or any other law enforcement officer. The court concluded that imposition of conditions of probation that unconstitutionally infringed on freedom of action constitute a "restraint"⁵⁰⁴ within the scope of habeas corpus relief.⁵⁰⁵

Lest defense attorneys be misled by *Basaldua*, Judge Odom wrote a concurring opinion to remind that habeas corpus is not a substitute for appeal. He pointed out that the defendant in *Basaldua* was excused from appealing at the time the probation condition was imposed because at that time the court had not handed down its decision declaring such a condition unreasonable and unenforceable, and defendant should not be faulted for failing to anticipate such a decision.⁵⁰⁶

496. *Id.* at 842.

497. *Id.*

498. TEX. CODE CRIM. PROC. ANN. art. 11.05 (Vernon 1977).

499. *Ex parte Phelper*, 433 S.W.2d 897 (Tex. Crim. App. 1968).

500. *See* TEX. CODE CRIM. PROC. ANN. art. 11.09 (Vernon 1977).

501. *See* note 498 *supra*.

502. TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 1978-79).

503. 558 S.W.2d 2 (Tex. Crim. App. 1977).

504. TEX. CODE CRIM. PROC. ANN. art. 11.23 (Vernon 1977).

505. 558 S.W.2d at 5.

506. *Id.* at 8.

VI. JUVENILE PROCEEDINGS

Juvenile Court Judge's Duty to Explain Child's Privilege Against Self-Incrimination. The Texas Family Code requires the juvenile court judge, at the beginning of the adjudication hearing, to explain to the child and his parent, guardian, or guardian ad litem the child's privilege against self-incrimination.⁵⁰⁷ In *In re N.S.D.*⁵⁰⁸ the State argued that the child had been adequately informed of his right against self-incrimination because the child and his attorney signed a printed form that set out the privilege and that also contained the following sentence: "In the event that any portion of these Instructions and Explanations are not fully understood, do not hesitate to call on the bailiff or the secretary of this Court for further instructions."⁵⁰⁹ The court of criminal appeals rejected the State's argument, finding that the trial court did not explain to the child his privilege against self-incrimination. A juvenile court judge cannot delegate his duty to explain this right to the child. The juvenile court's delinquency finding, therefore, was reversed, and the case was remanded for another hearing.

Summary Judgment Procedure Applicability to Juvenile Case Proceedings. In *State v. L.J.B.*⁵¹⁰ the State charged the juvenile for engaging in delinquent conduct by committing theft. The juvenile filed a motion for summary judgment⁵¹¹ supported by his sworn affidavit. The State did not respond and the juvenile court dismissed the State's petition with prejudice.

Upon the State's appeal, the court of civil appeals reversed and remanded the case for hearing. The appellate court rejected the summary judgment procedure as inapplicable because the issue of whether a juvenile has engaged in delinquent conduct and consequently is in need of supervision or rehabilitation cannot be adequately determined by affidavits. Rather, an evidentiary hearing with witnesses present is necessary so that all parties, including the juvenile court, can ascertain the best interests of the juvenile.⁵¹²

Service of Summons. The Texas Family Code⁵¹³ codifies the common law rule that a minor child is without legal capacity to waive service of process.⁵¹⁴ Consequently, before a juvenile court can have jurisdiction over a juvenile in either a delinquency proceeding or a proceeding to certify a juvenile as an adult for criminal prosecution, the juvenile must actually be served with a summons.⁵¹⁵ In *Grayless v. State*⁵¹⁶ the State filed a

507. TEX. FAM. CODE ANN. § 54.03(b)(3) (Vernon 1975).

508. 555 S.W.2d 807 (Tex. Civ. App.—El Paso 1977, no writ).

509. *Id.*

510. 561 S.W.2d 547 (Tex. Civ. App.—Dallas 1977, no writ).

511. TEX. R. CIV. P. 166-A.

512. 561 S.W.2d at 549.

513. TEX. FAM. CODE ANN. § 53.06(e) (Vernon 1975).

514. *In re W.L.C.*, 562 S.W.2d 454 (Tex. 1978).

515. *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. 1978).

516. *Id.*

delinquency petition and the juvenile was served with a summons. Subsequently the State filed a petition to certify the juvenile as an adult for criminal prosecution, but no summons was ever issued on the latter petition. At the hearing on the petition to certify the juvenile as an adult, the juvenile, his parents, and retained counsel were present, but did not object to the lack of service. The juvenile was thereafter tried for murder as an adult, convicted, and received a twenty-five year sentence.⁵¹⁷

On appeal the court of criminal appeals reversed and remanded the case because the juvenile court never had jurisdiction over the juvenile in the adult certification hearing. Summons was never served in this proceeding and since a juvenile cannot waive service of summons,⁵¹⁸ the appearance of the juvenile at the certification hearing and his failure to object to the lack of a proper summons could not constitute a waiver of the service of summons.⁵¹⁹ Because the juvenile court never had jurisdiction in the certification proceeding, its order waiving juvenile court jurisdiction and certifying the juvenile for criminal prosecution was a nullity.⁵²⁰

Psychiatric Examination. A psychiatric examination is provided by statute to assist in determining whether a juvenile alleged to have engaged in delinquent conduct is responsible for his acts.⁵²¹ According to *In re K. W.E.*⁵²² this section "is not referable to a discretionary transfer proceeding which is concerned with adult responsibility for criminal activity."⁵²³ Once a juvenile is certified as an adult for criminal prosecution, however, he is entitled to all the protection offered by the sanity and competency provisions of the Texas Code of Criminal Procedure.⁵²⁴

Appeal of Juvenile Court Order Transferring a Juvenile to Criminal Court for Prosecution as an Adult. The holding in *L.L.S. v. Wade*⁵²⁵ points up a weakness in the Texas Family Code that should be corrected by the legislature. Section 56.01(c)(1)⁵²⁶ permits a juvenile to appeal a juvenile court order transferring the juvenile to a criminal court for trial as an adult. The criminal court to which the juvenile is transferred may proceed, however, even though the appeal is pending. In *Wade* the juvenile appealed the juvenile court's order transferring him for trial as an adult and then applied to the court of civil appeals for a writ of prohibition to prevent the criminal trial court from proceeding until the interlocutory appeal was decided. The writ was refused by the court of civil appeals because there was no threat to that court's jurisdiction; that is, should the appeals court later

517. *Id.* at 219.

518. TEX. FAM. CODE ANN. § 53.06(e) (Vernon 1975).

519. 567 S.W.2d at 219-20.

520. *Id.* at 220.

521. TEX. FAM. CODE ANN. § 55.05(b) (Vernon 1975).

522. 556 S.W.2d 626 (Tex. Civ. App.—Waco 1977, no writ).

523. *Id.* at 627.

524. TEX. CODE CRIM. PROC. ANN. arts. 46.02, .03 (Vernon 1979).

525. 565 S.W.2d 251 (Tex. Civ. App.—Dallas 1978, no writ).

526. TEX. FAM. CODE ANN. § 56.01(c)(1) (Vernon 1975).

reverse the transfer order of the juvenile court, any conviction in the criminal court would be vacated.⁵²⁷

Even though such an eventuality may not often occur, the Family Code should be amended so as to prevent such an absurd result. A juvenile should not run the gauntlet of a criminal trial so long as a possibility remains that such a trial might become a nullity. The code should be amended to provide that a juvenile's transfer be suspended pending the outcome of the appeal. Moreover, the appeal should be given preference in order to prevent undue delay in making final disposition of the juvenile's case either in juvenile court or in criminal court, depending on the outcome of the appeal.

Right of Juvenile Transferred for Trial as an Adult to an Examining Trial. Despite mandatory statutory language,⁵²⁸ it has long been held that the right to an examining trial is rendered moot and thus terminated by the return of an indictment.⁵²⁹ This is not true, however, for a juvenile who has been transferred from juvenile court to criminal district court for trial as an adult.⁵³⁰ An examining trial is mandatory for a transferred juvenile because of the Family Code, which provides that an "examining trial shall be conducted by the court to which the case was transferred, which may remand the child to the jurisdiction of the juvenile court."⁵³¹

A transferred juvenile thus has a right that regular adults do not have. "It is a valuable right, for it furnishes another opportunity to have the criminal proceedings against the juvenile terminated and the jurisdiction of the juvenile court resumed."⁵³² For this reason the court of criminal appeals in *Menefee v. State*⁵³³ voided an indictment of a transferred juvenile for murder because the trial court failed to conduct an examining trial. It should be noted that according to *Criss v. State*⁵³⁴ the juvenile and his attorney can waive the examining trial if the waiver is in writing and otherwise conforms to the requirements of Family Code section 51.09(a).⁵³⁵

527. 565 S.W.2d at 252.

528. TEX. CODE CRIM. PROC. ANN. art. 16.01 (Vernon 1977).

529. *Bullard v. State*, 533 S.W.2d 812, 816 (Tex. Crim. App. 1976).

530. *Menefee v. State*, 561 S.W.2d 822 (Tex. Crim. App. 1977).

531. TEX. FAM. CODE ANN. § 54.02(h) (Vernon 1975).

532. 561 S.W.2d at 829.

533. 561 S.W.2d 822 (Tex. Crim. App. 1977).

534. 563 S.W.2d 942 (Tex. Crim. App. 1978).

535. TEX. FAM. CODE ANN. § 51.09(a) (Vernon 1975).