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# CRIMINAL PROCEDURE: ARREST, SEARCH, AND CONFESSIONS

by

S. Michael McColloch\*

**D**URING the most recent Survey period the Texas Court of Criminal Appeals issued a number of important, and several surprising, rulings. Of particular note are decisions involving the standard for probable cause to stop and search and a new standard for determining the point at which a defendant has a right to counsel. Another decision of interest involved the court's refusal to follow the federal rule allowing the use of a defendant's post-arrest, pre*Miranda* silence to impeach the defendant. In most decisions in this area, however, the court continued its recent trend of adopting minimum federal constitutional safeguards in construing state constitutional procedural law.

## I. PROBABLE CAUSE

### A. *Automobile Searches*

In what may well become its most significant opinion of the Survey period, if not of this decade, the court of criminal appeals in *Osban v. State*<sup>1</sup> simultaneously emasculated the standard of probable cause and the independent vitality of article I, section 9 of the Texas Constitution.<sup>2</sup> *Osban* involved a Dallas police officer who stopped the defendant's vehicle for driving with a suspended license. The officer placed the defendant under arrest and proceeded to search the passenger compartment of the vehicle. The officer noticed what appeared to be a controlled substance in the ashtray. In addition, he found over \$3,000 in cash in the car. The officer then took the keys from the ignition and unlocked the trunk, in which he discovered handguns that were later identified as stolen and for which the defendant was prosecuted. The Dallas court of appeals held the handguns inadmissible, finding no probable cause to search the locked trunk.<sup>3</sup> The Dallas court

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1. No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

2. TEX. CONST. art. I, § 9 provides:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

3. *Osban v. State*, 648 S.W.2d 790, 791 (Tex. App.—Dallas 1983).

relied on *Gill v. State*,<sup>4</sup> in which the court of criminal appeals had held only two years before that the finding of a small quantity of contraband in the passenger compartment of an automobile did not alone amount to probable cause to search the trunk.<sup>5</sup>

The court of criminal appeals overruled *Gill*<sup>6</sup> and in so doing, set forth a new, diluted definition of probable cause that renders the concept virtually indistinguishable from mere reasonable suspicion. Specifically, the court held that the probable cause requirement is met in this context if "a man of reasonable caution would be warranted in the belief that other contraband items *may* be located in the trunk of the car."<sup>7</sup> The court explained that a search of the trunk would be permissible if it were "reasonable to *assume* that an automobile driver or passenger *presumably* possessing an illegal controlled substance *might* be hiding more of the substance in the automobile trunk."<sup>8</sup> The court determined that the discovery of a small quantity of a suspected controlled substance, coupled with the finding of a rather large amount of cash, would suffice to suggest that the driver of the car "might be involved in the sale of controlled substances and might possess larger quantities of such substances in the trunk."<sup>9</sup> The majority's startling holding, that mere possibilities are sufficient to constitute probable cause, predictably evoked several bitter dissents. One judge complained that the majority's holding "flies in the face of common sense;"<sup>10</sup> another pointed out that it will always be reasonable to presume that an alleged violator might be concealing weapons or contraband.<sup>11</sup> Indeed, it would be fair to say that the court has impermissibly attempted to transform probable cause into possible cause, thus leaving open the ultimate resolution of the meaning of this critical search and seizure standard.

Of equal import was the *Osban* majority's gratuitous pronouncement that Texas courts are to interpret article I, section 9 of the Texas Constitution precisely as the United States Supreme Court interprets the fourth amendment to the Constitution of the United States. Although unnecessary to its holding,<sup>12</sup> the majority took the opportunity to adopt *New York v. Belton*<sup>13</sup> as a matter of state constitutional law. The United States Supreme Court held in *Belton* that a search incident to a valid custodial arrest of persons who are in, or recently have been in, an automobile extends to all passengers and containers located there.<sup>14</sup> The Texas Court of Criminal Appeals ob-

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4. 625 S.W.2d 307 (Tex. Crim. App. 1981).

5. *Id.* at 311. While this holding did not draw a single dissent in 1981, a majority of the court of criminal appeals now finds it both illogical and unsupportable. No. 368-83, slip op. at 5.

6. No. 368-83, slip op. at 3.

7. *Id.* (emphasis in original) (citing *Texas v. Brown*, 460 U.S. 730 (1983)).

8. *Id.* (emphasis added).

9. *Id.*

10. *Id.* at 5 (Teague, J., dissenting).

11. *Id.* at 9 (Miller, J., dissenting).

12. The issue giving rise to this dramatic declaration was not raised or discussed in the courts below.

13. 453 U.S. 454 (1981).

14. No. 368-83, slip op. at 8 (citing *New York v. Belton*, 453 U.S. 454, 460 (1981)).

served that the *Belton* rationale justified the officer's initial intrusion into the passenger compartment of the vehicle.<sup>15</sup> The court then took the opportunity to make the following remarkable statement, quoting from a 1983 plurality opinion in *Brown v. State*: "[T]his Court has opted to interpret our Constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment. We shall continue on this path until such time as we are statutorily or constitutionally mandated to do otherwise."<sup>16</sup> Contrary to the emerging trend of other states, a majority of the Texas Court of Criminal Appeals has effectively abrogated the heretofore recognized right of Texas courts to interpret their constitution as they see fit, even if that means affording greater protections of constitutional liberties than the United States Supreme Court recognizes at the federal level. Despite a spirited cry for independence by Judge Miller in his dissent,<sup>17</sup> the majority apparently concluded that a historical pattern of fairly harmonious interpretations justified a per se rule for complete uniformity in the future.

### B. Custodial Arrest Exception to Warrant Requirement

In *Williams v. State*<sup>18</sup> the court of criminal appeals dramatically expanded the application of the search incident to custodial arrest exception to the warrant requirement,<sup>19</sup> essentially setting out a new search incident to probable cause exception. A police officer in *Williams* observed the defendant's truck parked on the wrong side of the street and saw the defendant leave the driver's seat. The officer approached the truck and observed a brown paper bag on the floor board. He looked inside the bag, reached into it, moved a shirt that was hiding a second sack, and saw a gun barrel protruding from the second sack. The officer recovered two handguns, which formed the basis for the defendant's prosecution for unlawfully carrying a handgun. Immediately upon conclusion of the search, the police officer arrested the defendant.

A bare majority of the court of criminal appeals upheld the *Williams* search as incident to a lawful custodial arrest<sup>20</sup> despite the fact that this doctrine was not raised in the courts below<sup>21</sup> nor was evidence adduced that the officer intended to arrest the defendant when he conducted the search.<sup>22</sup> The majority nevertheless held that, because the officer *could* have made a

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15. *Id.*, slip op. at 8.

16. *Id.* (quoting *Brown v. State*, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983)).

17. *Id.*, slip op. at 1. Judge Miller labelled the majority's abdication "abominable" and "ludicrous." *Id.* at 29 (Miller, J., dissenting).

18. No. 140-85 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

19. *Id.*, slip op. at 5. The search incident to custodial arrest exception was clearly established in *Chimel v. California*, 395 U.S. 752, 763 (1969), and *United States v. Robinson*, 414 U.S. 218, 235 (1973), wherein the Court held "that in the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a 'reasonable' search under that amendment." *Id.*

20. No. 140-85, slip op. at 4.

21. The issue upon which review was granted involved the court of appeals' holding that the officer had probable cause to search because of his suspicions that a controlled substance transaction was taking place. *Id.* at 1-4; see also *id.* at 4 (Clinton, J., dissenting).

22. *Id.* at 2-4. The government has the burden of proof in cases involving warrantless

custodial arrest of the defendant for the traffic violation of parking on the wrong side of the street,<sup>23</sup> he technically had probable cause to arrest for the parking violation.<sup>24</sup> The court allowed the search because the defendant was in fact arrested immediately afterward although apparently only for the offense revealed by the fruits of the search itself.<sup>25</sup> The court of criminal appeals appears to be in conflict on this point with the United States Supreme Court's 1973 decision in *Gustafson v. Florida*.<sup>26</sup> The Court held in *Gustafson* that automobile searches based upon traffic violations are authorized only where the officer is lawfully effectuating an arrest for the traffic violation.<sup>27</sup>

### C. *Violation of Vehicle Inspection Standards: Probable Cause to Search*

The discretionary authority of officers to stop and search vehicles was further enhanced during the Survey period by the court of criminal appeals in *Vicknair v. State*.<sup>28</sup> An officer observed the defendant driving a vehicle with a cracked taillight lens. On that basis, the officer stopped the defendant and asked him to produce his driver's license, which he was unable to do. The officer arrested the driver and subsequently discovered a quantity of marijuana in plain view in the car. Once again ignoring the appellate court's analysis and resolution of the issues,<sup>29</sup> the court of criminal appeals embraced an expansive view of the authority of the police to enforce the Motor Vehicle Inspection Act.<sup>30</sup> The *Vicknair* majority discovered certain provisions in the Rules and Regulations for Official Vehicle Inspection Stations and Certified Inspectors promulgated by the Department of Public Safety that require inspectors during routine motor vehicle inspections to reject and replace cracked lenses that allow any white light to be emitted. Because of the statutory requirement that all motor vehicles be operated "in good working order and adjustment as required in this Act,"<sup>31</sup> the majority concluded that an officer's observance of a defect that would require adjustment or repair under the Department of Public Safety's criteria for inspections estab-

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searches and arrest. *Gonzales v. State*, 588 S.W.2d 355, 360 (Tex. Crim. App. 1979); *Brown v. State*, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972).

23. This offense is proscribed by TEX. REV. CIV. STAT. ANN. art. 6701d, § 96(a) (Vernon 1975). *Id.* § 153 authorizes any peace officer to arrest without a warrant any person found committing a violation of any provision of art. 6501d.

24. No. 140-85, slip op. at 4.

25. *Id.* at 5.

26. 414 U.S. 260 (1973).

27. *Id.* at 264-65.

28. No. 036-84 (Tex. Crim. App. Sept. 17, 1986) (not yet reported, motion for rehearing granted).

29. *Vicknair v. State*, 670 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1983). The Houston court of appeals held that a cracked taillight emitting white light is not a violation of TEX. REV. CIV. STAT. ANN. art. 6701d, § 111 (Vernon 1975) because the statute requires only that a plainly visible red light be emitted and does not prohibit the emission of light of another color. Since the evidence established that the defendant's taillight did emit a visible red light at all times, the court of appeals ruled the initial stop of the defendant invalid and that the fruits thereof should have been suppressed. 670 S.W.2d at 288.

30. TEX. REV. CIV. STAT. ANN. art. 6701d, §§ 140-142A (Vernon Supp. 1987).

31. *Id.* § 141(d) (Vernon Supp. 1987).

lishes probable cause to stop and search.<sup>32</sup> In short, any person who drives with a cracked taillight is not operating the vehicle in "good working order," is thereby guilty of a misdemeanor, and may be stopped and arrested.<sup>33</sup> In the wake of *Vicknair* officers in Texas will now be permitted to stop and arrest anyone if they have probable cause to believe that the automobile has some condition that would cause it to fail vehicle inspection. Read in conjunction with *Williams*,<sup>34</sup> the presence of such apparent defects or conditions will empower officers to search such vehicles, including all of their contents, even if the officer manifests no intention of actually arresting the driver.

## II. REASONABLE SUSPICION STANDARD FOR INVESTIGATIVE DETENTION

In two cases during the Survey period the court of criminal appeals reaffirmed the requirement of reasonable suspicion as the prerequisite to a valid investigative detention.<sup>35</sup> In *Comer v. State*<sup>36</sup> the defendant and a companion were sitting in the cab of a pick-up truck in a restaurant parking lot early on a Saturday evening. Police officers approached in their squad car, noted that the truck's dome light was on, and observed the two men engaging in activity on the seat. The truck began to pull away, and the officers initiated an investigatory stop. After the defendant emerged from the truck, he dropped a syringe onto the street and tried to push it under the truck. The syringe was ultimately found to contain heroin. The officers later testified that the vicinity in which the incident occurred was a high crime area. The court of criminal appeals unanimously held that these facts were insufficient to give rise to a reasonable suspicion that criminal activity was involved.<sup>37</sup> It is well-established that an officer may temporarily detain a suspicious person, whether a pedestrian or a passenger in a vehicle, for the purpose of verifying the person's identity or checking for additional information.<sup>38</sup> In order to justify such a stop, however, the officer must have "specific articulable facts which, in light of his experience and personal knowledge, together with other inferences from those facts, would reasonably warrant the intrusion on the freedom of the citizen detained for further investigation. Detention based on a hunch is illegal."<sup>39</sup> These specific articulable facts must

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32. No. 036-84, slip op. at 7-8. TEX. REV. CIV. STAT. ANN. art. 6701d, § 140(g) (Vernon Supp. 1987) provides:

Any person operating a vehicle on the highways of this State . . . in violation of the provisions of this Act or without displaying a valid inspection certificate or having equipment which does not comply with the provisions of Article XIV of this Act is guilty of a misdemeanor and on conviction shall be punished as provided in Section 143 of this Act.

33. No. 036-84, slip op. at 7-8.

34. No. 140-85, slip op. at 5-6; see *supra* text accompanying notes 18-26.

35. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

36. No. 265-84 (Tex. Crim. App. Apr. 9, 1986) (not yet reported).

37. *Id.*, slip op. at 3.

38. See *Adams v. Williams*, 407 U.S. 143, 145 (1972).

39. *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983) (citing *Williams v. State*, 621 S.W.2d 609, 612 (Tex. Crim. App. 1981)).

create in the individual officer's mind a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime."<sup>40</sup> The court in *Comer* utilized one frequently applied litmus test for determining whether the facts known to the officer give rise to reasonable suspicion for purposes of conducting an investigative detention: whether or not the circumstances are as consistent with innocent activity as with criminal activity.<sup>41</sup> The court concluded that an individual's presence in a high crime area, engaging in some activity in the front seat of a vehicle, and getting out of the vehicle do not add up to reasonable suspicion to believe that criminal activity has or is occurring; such facts are as consistent with innocent as with criminal activity.<sup>42</sup>

The court of criminal appeals adopted an approach similar to its *Comer* analysis and reached a similar result in *Daniels v. State*.<sup>43</sup> *Daniels* involved an airport detention of a man believed to fit a drug courier profile. Two narcotics officers observed the defendant and another man deplane at the Houston Intercontinental Airport from a nonstop flight from Miami. The officers followed the men to the baggage claim area; one of the officers stopped the defendant in the parking garage. During the detention<sup>44</sup> the officer obtained the defendant's consent to search his luggage. To justify the detention, the state offered the following facts concerning the behavior of the defendant: the defendant had just flown in from Miami; he manifested several suspicious eye movements while approaching the baggage claim area; he walked separately at one point from his apparent companion; he became nervous when the officer identified himself as a narcotics officer; and he possessed an airline ticket with an initial different from that reflected on his driver's license. The court of criminal appeals, with only one dissent,<sup>45</sup> firmly held that these facts were insufficient to give rise to a reasonable suspicion justifying an investigative detention.<sup>46</sup> The court deemed the circumstances to indicate innocence as much as guilt.<sup>47</sup> Because the consent to search the luggage was the fruit of the illegal stop, the search and subsequent arrest flowing therefrom were violative of the fourth amendment of the United States Constitution.<sup>48</sup>

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40. *Johnson*, 658 S.W.2d at 626.

41. No. 265-84, slip op. at 3; see also *Johnson*, 658 S.W.2d at 626; *Shaffer v. State*, 562 S.W.2d 853, 855 (Tex. Crim. App. 1978); *Tunnell v. State*, 554 S.W.2d 697, 698 (Tex. Crim. App. 1977).

42. No. 265-84, slip op. at 3.

43. 718 S.W.2d 702 (Tex. Crim. App.), cert. denied, 107 S. Ct. 277, 93 L. Ed. 2d 252 (1986).

44. The state conceded that a detention took place since the evidence made manifest that a reasonable person in the suspect's position "would have believed he was not free to leave." *Id.* at 706 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

45. *Id.* at 708 (McCormick, J., dissenting without opinion).

46. *Id.*

47. *Id.* at 707.

48. *Id.* While a consent to search often cures other fourth amendment violations, a consent is considered invalid when it has been obtained by virtue of an illegal detention and is thus fatally tainted by the illegality. See *United States v. Glass*, 741 F.2d 83, 86 (5th Cir. 1984); *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978).

## III. SUFFICIENCY OF SEARCH AND ARREST WARRANTS

Until the United States Supreme Court decided the case of *Illinois v. Gates*,<sup>49</sup> the Court's approved standard for assessing the adequacy of search or arrest warrant affidavits was set forth in *Aguilar v. Texas*<sup>50</sup> and in *Spinelli v. United States*.<sup>51</sup> *Aguilar* established the traditional two-prong test under which affidavits were required to contain both evidence of the credibility of the informant and a sufficient statement of the facts on which the informant relied. The Court referred to these components as the "credibility" and "basis of knowledge" prongs.<sup>52</sup> The *Aguilar/Spinelli* test was rigidly applied, rendering inadmissible the fruits of arrest or search based on a warrant invalidated by violation of either part of the test.<sup>53</sup> *Illinois v. Gates* vitiated this doctrine, replacing it with a much more relaxed totality of the circumstances test.<sup>54</sup> Under the new standard, the search or arrest warrant affidavit will be deemed sufficient if it evidences a reasonable likelihood that the contraband or other evidence is located at a certain place, or that an offense has indeed been committed.<sup>55</sup> The court of criminal appeals has since adopted the *Gates* standard as a matter of Texas statutory law.<sup>56</sup>

The amorphous nature of the *Gates* approach<sup>57</sup> has predictably led courts to seek recourse in the old familiar *Aguilar/Spinelli* mode of analysis,<sup>58</sup> as demonstrated by two cases during the Survey period. In *Ware v. State*<sup>59</sup> the court of criminal appeals confronted a "bare bones" affidavit used to support the issuance of an arrest warrant. While the affidavit described the affiant as the informant with personal knowledge of the facts alleged and the affidavit contained sufficient averments to satisfy each element of the offense, the affidavit contained no information as to the means by which the affiant obtained the information or the underlying circumstances surrounding its acquisition. In essence the affidavit was merely conclusory. The court analyzed the affidavit under the traditional *Aguilar* approach and concluded that the affidavit

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49. 462 U.S. 213 (1983).

50. 378 U.S. 108, 112-12 (1964).

51. 393 U.S. 410, 411-12 (1969).

52. 378 U.S. at 114.

53. See *Stoddard v. State*, 475 S.W.2d 744, 747 (Tex. Crim. App. 1972).

54. 462 U.S. at 238.

55. *Id.* Although *Gates* involved a search warrant, its probable cause rationale is equally applicable to arrest warrant affidavits. See *Whitely v. Warden*, 401 U.S. 560, 564 (1971). The court of criminal appeals has long held that the standards used to assess the showing of probable cause are the same for both arrest and search warrants. See *Evens v. State*, 530 S.W.2d 932, 939 (Tex. Crim. App. 1975). The court specifically applied the *Gates* approach to the arrest warrant context in *Bellah v. State*, 653 S.W.2d 795, 796 (Tex. Crim. App. 1983).

56. See *Hennessy v. State*, 660 S.W.2d 87, 91 (Tex. Crim. App. 1983).

57. See *McColloch*, *Criminal Procedure, Annual Survey of Texas Law*, 38 Sw. L.J. 529, 531 (1984).

58. Although the United States Supreme Court in *Gates* alleged that its formulation was a "flexible, easily applied standard," 462 U.S. at 239, it conceded that "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." *Id.* at 238 n.11.

59. No. 0346-85 (Tex. Crim. App. Dec. 17, 1986) (not yet reported).



was insufficient under either *Aguilar* or *Gates*.<sup>60</sup> Significantly, the court noted that "*Gates* . . . did not dispense with the two requirements used in the *Aguilar/Spinelli* test. Rather, the Supreme Court simply held that the prongs should not be applied too rigorously, and that the entire affidavit should be examined to determine whether, as a whole, probable cause is established."<sup>61</sup>

In *Cassias v. State*<sup>62</sup> the search warrant affidavit failed to contain sufficient facts to provide a substantial basis in support of the magistrate's determination of probable cause. Once again, the court of criminal appeals analyzed the affidavit under *Aguilar's* progeny and concluded that, regardless of which test was applied, the information included in the affidavit was "too disjointed and imprecise" to warrant a man of reasonable caution in believing that the contraband would be found at the described premises.<sup>63</sup> The court stressed that, while it could make reasonable inferences from the facts alleged in such affidavits, it could not uphold the magistrate's probable cause determination when it could supply certain critical facts only by speculation.<sup>64</sup>

#### IV. RIGHT TO COUNSEL

During the Survey period the court of criminal appeals determined whether a DWI arrestee in Texas has a sixth amendment right to counsel<sup>65</sup> before deciding whether to provide a breath sample for an intoxilizer test.<sup>66</sup> The previous year two courts of appeals had issued directly conflicting opinions on this issue. The Fort Worth court of appeals in *Forte v. State*<sup>67</sup> upheld the right to counsel in this context,<sup>68</sup> while the Houston [1st District] court of appeals in *McCambridge v. State*<sup>69</sup> held that no right to counsel could attach.<sup>70</sup> The United States Supreme Court has consistently held that the sixth amendment right to counsel attaches only upon or after formal

60. *Id.*, slip op. at 3 n.2. The court specifically reserved the question of whether the *Gates* test would be adopted as a matter of Texas constitutional law. *Id.*

61. *Id.* at 3 n.2.

62. No. 629-83 (Tex. Crim. App. Nov. 19, 1986) (not yet reported).

63. *Id.*, slip op. at 11.

64. *Id.* at 1-11.

65. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

66. *McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986); *Forte v. State*, 707 S.W.2d 89 (Tex. Crim. App. 1986).

67. *Forte v. State*, 686 S.W.2d 744 (Tex. App.—Fort Worth 1985), *aff'd in part, rev'd in part*, 707 S.W.2d 89 (Tex. Crim. App. 1986).

68. 686 S.W.2d at 745. The court of appeals concluded that an arrestee's decision of whether to provide a breath sample was a "critical pretrial stage" that triggered a limited right to counsel. *Id.* at 753-54. In reaching its decision, the court of appeals quoted *United States v. Wade*, 388 U.S. 218, 226 (1967), for the proposition that the right to counsel can attach "at any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial." *Forte*, 686 S.W.2d at 753.

69. *McCambridge v. State*, 698 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1985), *vacated*, 712 S.W.2d 499 (Tex. Crim. App. 1986).

70. 698 S.W.2d at 394. The Houston appellate court relied upon a string of United States Supreme Court opinions that had held that the sixth amendment right to counsel only attaches when the government has initiated formal adversary proceedings against the accused. *See*

initiation of judicial proceedings.<sup>71</sup> Initiation of such proceedings occurs at the time of filing of a formal complaint, information, or indictment, or at a preliminary hearing or arraignment.<sup>72</sup> Because the demand for a breath sample in *Forte* and *McCambridge* occurred prior to the filing of formal complaints, as happens in virtually all such cases,<sup>73</sup> the court of criminal appeals concluded that the sixth amendment right to counsel did not attach and did not thereby render the results of the breath testing inadmissible.<sup>74</sup>

## V. SELF-INCRIMINATION

During the Survey period, the court of criminal appeals addressed the self-incrimination aspects of a DWI arrestee's refusal to submit to a breath test, counseled or not.<sup>75</sup> In 1984 the legislature amended article 67011-5<sup>76</sup> to include a specific provision providing that a suspect's refusal to provide a breath or blood sample "may be introduced into evidence at the person's trial."<sup>77</sup> This amendment followed quickly on the heels of the United States Supreme Court's 1983 decision in *South Dakota v. Neville*.<sup>78</sup> In *Neville* the Court held that the admission into evidence of a defendant's refusal to take a chemical test for alcohol concentration did not violate the fifth amendment of the federal Constitution.<sup>79</sup> The Court based its holding on the ground that a suspect's refusal to submit to the test involves no impermissible coercion, regardless of the form of refusal.<sup>80</sup> Prior to *Neville* and the 1984 statutory amendment, Texas courts deemed the refusal inadmissible because of fifth amendment concerns.<sup>81</sup> In the wake of these developments, however,

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Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); United States v. Wade, 388 U.S. 218, 226-27 (1967); Schmerber v. California, 384 U.S. 757, 765-66 (1966).

71. See *supra* note 70. The United States Supreme Court has deviated from the bright line rule established for attachment of the sixth amendment right to counsel in two cases, *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964), but the Court has subsequently limited the constitutional basis for these decisions to the fifth amendment. See *Moran v. Burbine*, 106 S. Ct. 1135, 1143, 89 L. Ed. 2d 410, 423 (1986); *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984).

72. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

73. The police normally request a breath sample as soon as the arrestee arrives at the station house and usually file a formal complaint several hours or days thereafter.

74. *McCambridge v. State*, 712 S.W.2d 499, 502 (Tex. Crim. App. 1986); *Forte v. State*, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986). In both cases, the intermediate appellate courts failed to address the issue under the state constitutional right to counsel provision, TEX. CONST. art. I, § 10, and the due course of law clause, *id.* § 19, even though the appellants in both cases had also invoked those provisions as independent grounds for reversal. The court of criminal appeals remanded the cases to the courts of appeals for consideration of the state constitutional arguments. *McCambridge*, 712 S.W.2d at 503; *Forte*, 707 S.W.2d at 92-93.

75. *Thomas v. State*, No. 267-85 (Tex. Crim. App. Nov. 19, 1986) (not yet reported).

76. Act of June 16, 1983, ch. 303, § 29, 1983 Tex. Gen. Laws 1568. This amendment became effective on Jan. 1, 1984.

77. TEX. REV. CIV. STAT. ANN. art. 67011-5, § 3(g) (Vernon Supp. 1987).

78. 459 U.S. 553 (1983).

79. *Id.* at 560.

80. *Id.* at 562.

81. See *Dudley v. State*, 548 S.W.2d 706, 707 (Tex. Crim. App. 1977); *cf.* *Gresset v. State*, 669 S.W.2d 748, 749-50 (Tex. App.—Dallas 1983) (court recognized that refusal would not have been admissible under *pre-Neville* rationale), *aff'd*, 723 S.W.2d 695 (Tex. Crim. App. 1986).

the question of whether the state constitutional protections against self-incrimination embodied in article I, section 10 of the Texas constitution<sup>82</sup> might nonetheless render the refusal inadmissible in Texas courts remained open.

In *Thomas v. State*<sup>83</sup> the court of criminal appeals put this issue to rest, adopting the rationale of *Neville* as a matter of state constitutional law.<sup>84</sup> In so doing the court shed some light on its current policy trend towards embracing federal interpretations of corresponding constitutional protections.<sup>85</sup> The court indicated that its approach to such questions will require an independent examination of the history, policy, and precedents surrounding the relevant state law in issue.<sup>86</sup> If the historical evidence fails to indicate an original intent that the state provision provide broader protection, if the development of case authority on the point does not reflect a pattern of distinction, and if the courts can discern no strong countervailing policy considerations, then the federal construction of the privilege will be adopted for state law purposes.<sup>87</sup> The court in *Thomas* could find no justification for any distinction created by previous opinions or by any other historical evidence.<sup>88</sup> Furthermore, the *Thomas* majority could discern no countervailing policy considerations for developing a broader meaning of compulsion under the Texas constitution than is present under current construction of the federal constitution by the United States Supreme Court.<sup>89</sup> The Court in *South Dakota v. Neville*<sup>90</sup> noted that courts limit the fifth amendment to prohibiting government from either physically or morally compelling the person as-

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82. TEX. CONST. art. I, § 10 provides: "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself . . ." See also TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977) (contains identical language).

83. No. 267-85 (Tex. Crim. App. Nov. 19, 1986).

84. *Id.*, slip op. at 15-16.

85. In recent years the court of criminal appeals has had three opportunities to examine the differences and similarities between the privilege against self-incrimination under the fifth amendment to the United States Constitution and under art. I, § 10 of the Texas Constitution. In *Olson v. State*, 484 S.W.2d 756, 762 (Tex. Crim. App. 1969), the court held that compelling a handwriting sample from a defendant does not violate the privilege under art. I, § 10, and observed that the latter was comparable in scope to the fifth amendment. In *Ex parte Shorthouse*, 640 S.W.2d 924, 928 (Tex. Crim. App. 1982), the court reversed a long line of precedents in holding that the grant of mere use immunity is sufficient to compel the testimony of a witness over a claim of the self-incrimination privilege under art. I, § 10. The court adopted the United States Supreme Court's reasoning in *Kastigar v. United States*, 406 U.S. 441, 453 (1972). *Ex parte Shorthouse*, 640 S.W.2d at 928. In *Sanchez v. State*, 707 S.W.2d 575, 580-81 (Tex. Crim. App. 1986), however, the court parted ways with the United States Supreme Court's opinion in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), concluding that the admission into evidence of a defendant's post-arrest, pre-*Miranda* silence to impeach the defendant's testimony violates the art. I, § 10 privilege.

86. No. 267-85, slip op. at 11.

87. *Id.* at 14.

88. *Id.* But see *Trammel v. State*, 162 Tex. Crim. 543, 544, 287 S.W.2d 487, 488 (1956) (collection of blood sample without consent of defendant violates art. I, § 10); *Beachem v. State*, 144 Tex. Crim. 272, 278-79, 162 S.W.2d 706, 709 (1942) (demand for voice sample violates art. I, § 10); *Anodaca v. State*, 140 Tex. Crim. 593, 595, 146 S.W.2d 381, 381-82 (1940) (introduction into evidence of coordination and urine tests given to intoxicated defendant violates art. I, § 10).

89. No. 267-85, slip op. at 14-16.

90. 459 U.S. 553 (1983).

serting the privilege to perform an act.<sup>91</sup> Since the government legitimately presented the suspect with the choice of providing a breath or blood sample or having his refusal used against him, the Court concluded that the government had not coerced the defendant and that the defendant could not assert fifth amendment protection.<sup>92</sup> The Constitution does not protect the suspect from being required to provide physical evidence of his intoxication; the Constitution protects the compulsion of testimonial evidence.<sup>93</sup> The state, therefore, can persuade a defendant to provide evidence of his intoxication through the nonphysical threat of his refusal being used as evidence against him.<sup>94</sup> The court of criminal appeals in *Thomas* found this analysis both appropriate and dispositive, observing that the state's mere presentation of difficult options to a suspect does not necessarily create compulsion for a particular choice.<sup>95</sup>

*Sanchez v. State*<sup>96</sup> manifests the sole exception to the court of criminal appeals' consistent adherence to federal interpretations of corresponding state constitutional provisions during the Survey period. As noted in last year's Survey issue,<sup>97</sup> the court of criminal appeals recently indicated in dictum<sup>98</sup> that it would decline to follow the holding of the United States Supreme Court in *Fletcher v. Weir*.<sup>99</sup> The decision in *Fletcher*<sup>100</sup> permits a prosecutor, as a matter of federal constitutional law, to impeach a defendant with the defendant's silence after his arrest, but before receiving warnings pursuant to *Miranda v. Arizona*.<sup>101</sup> The court in *Sanchez* analyzed the historical evolution of article I, section 10 of the Texas Constitution<sup>102</sup> in this context and concluded that the state's protection against self-incrimination barred the use of a defendant's post-arrest, pre-*Miranda* silence for any purposes, including impeachment.<sup>103</sup> The *Sanchez* majority specifically looked to cases on this point decided prior to the United States Supreme Court's

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91. *Id.* at 563; see *Fisher v. United States*, 425 U.S. 391, 397 (1976). Physical compulsion includes such obvious force as physical torture or extended deprivation of food and water. See *United States v. Carnigan*, 342 U.S. 36, 40 (1951). Moral or mental compulsion includes the more subtle force associated with offering a suspect two choices, one of which results in a penalty or other detriment from which the defendant is entitled to be free and the other in self-incrimination. See *South Dakota v. Neville*, 459 U.S. at 563. If the state exerts either physical or mental pressure on the defendant, the Court will find the defendant's decision to incriminate himself not to be a voluntary decision. *Carnigan*, 342 U.S. at 41.

92. 459 U.S. at 562-64.

93. *Schmerber v. California*, 384 U.S. 757, 761 (1966); *Rodriguez v. State*, 631 S.W.2d 515, 517 (Tex. Crim. App. 1982).

94. *South Dakota v. Neville*, 459 U.S. at 564.

95. No. 267-85, slip op. at 17.

96. 707 S.W.2d 575 (Tex. Crim. App. 1986).

97. McCulloch, *Criminal Procedure: Arrest, Search, and Confessions, Annual Survey of Texas Law*, 40 Sw. L.J. 537, 563-64 (1986).

98. *Samuel v. State*, 688 S.W.2d 492, 495-96 (Tex. Crim. App. 1985).

99. 455 U.S. 603 (1982) (per curiam).

100. *Id.* at 607.

101. 384 U.S. 436 (1966). The court of criminal appeals in *Samuel* considered the United States Supreme Court's holding in *Fletcher* to be illogical and indicated that it would continue to adhere to its prior precedents, which prohibit the use of all post-arrest silence against a defendant for any purpose. 688 S.W.2d at 496-97 n.7.

102. TEX. CONST. art. I, § 10.

103. 707 S.W.2d at 580.

applying the fifth amendment to the states.<sup>104</sup> In each of those cases the court had held that a defendant has an unqualified right to remain silent as of the moment of his arrest and that the state may not use the fact of such silence for any purpose against the defendant at trial.<sup>105</sup> Since the court determined that these decisions had necessarily been grounded in the Texas constitutional protection, it saw no obligation to adopt the United States Supreme Court's *Fletcher* rationale.<sup>106</sup> The court concluded that, once arrested, a defendant has the right to remain silent and the right not to have that silence used against him, even for impeachment purposes.<sup>107</sup> The court also held that, aside from the constitutional impediments, post-arrest, pre-*Miranda* silence was inadmissible for impeachment as a matter of Texas evidentiary law.<sup>108</sup> When the prosecution refutes the defendant's explanation at trial by showing that the defendant remained silent at the time of his arrest, the state impeaches the defendant by pointing out his prior inconsistent conduct.<sup>109</sup> Because a series of old decisions establish that post-arrest silence does not prove prior inconsistent conduct,<sup>110</sup> the rules of evidence also preclude the admission of such silence into evidence, even for impeachment purposes.<sup>111</sup>

In *Edwards v. Arizona*<sup>112</sup> the United States Supreme Court held that, once an accused has invoked his right to have counsel present during custodial interrogation, the accused does not waive that right by responding to interrogation, even if the police have advised him of his rights.<sup>113</sup> After an accused has expressed his desire to communicate with the police only through counsel, police may not subject him to further interrogation until counsel is available to him, unless the defendant himself initiates the communication with the police.<sup>114</sup> The question of waiver thus turns on whether the state has met its heavy burden of establishing a conscious waiver of a known

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104. *Id.* at 578-79. In *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964), the Supreme Court held that U.S. CONST. amend. V applies to the states.

105. *Redding v. State*, 149 Tex. Crim. 576, 577, 197 S.W.2d 357, 357 (1946); *Weatherred v. State*, 129 Tex. Crim. 514, 518, 89 S.W.2d 212, 217 (1935); *Johnson v. State*, 100 Tex. Crim. 215, 217, 272 S.W. 783, 784 (1925); *Skirlock v. State*, 100 Tex. Crim. 178, 179, 272 S.W. 782, 783 (1925).

106. 707 S.W.2d at 579.

107. *Id.* at 580. The suspect has these rights from the moment of arrest, regardless of when the police inform him of these rights. *Id.*

108. *Id.*

109. *Id.*

110. Courts have long held that a lawyer may use a witness's prior silence as to a fact to which he has testified for impeachment purposes during cross-examination if the silence occurred when the court would have expected the witness to speak. *See Williams v. State*, 607 S.W.2d 577, 579 (Tex. Crim. App. 1980); *Franklin v. State*, 606 S.W.2d 818, 825 (Tex. Crim. App. 1978) *aff'd*, 693 S.W.2d 420 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1238, 89 L. Ed. 2d 346 (1986). The courts have also held, however, that a court should not necessarily expect a defendant, once placed under arrest, to speak out. *See Moree v. State*, 147 Tex. Crim. 564, 569, 183 S.W.2d 166, 169 (1944); *Thompson v. State*, 88 Tex. Crim. 29, 30, 224 S.W. 892, 893 (1920); *Gardner v. State*, 34 S.W. 945, 946 (Tex. Crim. App. 1896).

111. 707 S.W.2d at 578.

112. 451 U.S. 477 (1981).

113. *Id.* at 484.

114. *Id.* at 484-85.

right.<sup>115</sup> A court must decide this issue based upon the facts and circumstances of each case.<sup>116</sup> Since *Edwards* the Texas Court of Criminal Appeals has consistently held that the state has not met this burden unless the evidence clearly shows that the accused himself initiated the conversation that resulted in the incriminating statement at issue.<sup>117</sup> When the record is silent or unclear as to which party initiated the exchange, the court will find no waiver.<sup>118</sup>

The court of criminal appeals may have significantly undermined this bright line approach during the Survey period. The accused in *Freeman v. State*,<sup>119</sup> while being detained in custody, invoked his right to have counsel present during any interrogation.<sup>120</sup> A police detective subsequently approached him in the jail kitchen and struck up a friendly conversation with him.<sup>121</sup> The detective testified that they were "just talking," not about the case.<sup>122</sup> They spoke for some time, and the defendant finally told the detective that "he had been unable to eat or sleep since 'it happened,'" and that he wanted to talk about the offense, "to get it off [his] chest."<sup>123</sup> He then gave a full written confession. Despite the state's failure to prove that the defendant himself initiated the conversation that resulted in the confession, the court of criminal appeals held the confession admissible because it was the defendant who initiated further discussion about the offense itself by stating that he wanted to confess.<sup>124</sup> Apparently the majority was moved to this surprising conclusion because of its observation that the detective had only initiated a friendly conversation not related to the offense itself.<sup>125</sup> In a substantial number of such cases, however, the police/prisoner dialogue can be categorized as friendly, and one in which the defendant usually first brings up the subject of the crime by stating that he wants to confess.<sup>126</sup> Indeed, the court of criminal appeals has recognized this fact in several recent cases. Most notably, in *Bush v. State*<sup>127</sup> the court confirmed that any further com-

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115. *Id.* at 482.

116. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Some of the relevant circumstances include "the background, experience, and conduct of the accused." *Id.* (citing *Johnson*, 304 U.S. at 464).

117. See *Phifer v. State*, 651 S.W.2d 774, 780-81 (Tex. Crim. App. 1983); *Coleman v. State*, 646 S.W.2d 937, 940-41 (Tex. Crim. App. 1983).

118. See *Phifer v. State*, 651 S.W.2d at 780-81; *Coleman v. State*, 646 S.W.2d at 940-41.

119. No. 632-85 (Tex. Crim. App. Nov. 26, 1986).

120. The accused invoked his right to the presence of counsel both personally and through his attorney. *Id.*, slip op. at 2, 9.

121. The detective testified that he initiated the conversation by asking the defendant if he wanted a cup of coffee. *Id.* at 9.

122. *Id.*

123. *Id.* at 10.

124. *Id.* at 12.

125. *Id.* at 11.

126. Courts have long recognized that many such exchanges constitute subtle interrogation designed to coerce a defendant into confessing. See *Brewer v. Williams*, 430 U.S. 387, 399 (1977). The court of criminal appeals in *Freeman* likened the conversation to the "bare inquiry" type of dialogue noted in *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), "which are 'routine incidents of the custodial relationship' and which do not constitute 'initiation' in the sense forbidden in *Edwards*." No. 632-85, slip op. at 11.

127. 697 S.W.2d 397 (Tex. Crim. App. 1985).

munication initiated by the police after the suspect invoked his right to counsel, whether or not such discussions originally related directly to the offense itself and regardless of who first mentioned the crime, would render the resultant confession inadmissible under *Edwards*.<sup>128</sup> Because the majority in *Freeman* has arguably *sub silentio* overruled this latter line of cases,<sup>129</sup> the court has thrown, perhaps inadvertently, the test for determining *Edwards* violations into disarray. If the courts follow *Freeman* in the future, *Freeman* will require the courts to attempt to discern, from all of the facts and circumstances in each case, the officer's intent for engaging in discussion with the accused.<sup>130</sup> In addition, the courts will have to determine when in the course of such conversation the subject turns to the offense and which party initiates that segment of the dialogue.<sup>131</sup> On the other hand, the elusive nature of these factors may prove so cumbersome to the courts that they may likely return to the previous mode of analysis.

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128. *Id.* at 402-03. In *Bush* an officer was discussing a magazine article with the defendant when the defendant told the officer he would make him a hero by telling him the location of the murder weapon; the confession was held inadmissible under *Edwards* because the officer had initiated the discussion. *Id.* at 402-03; *see also* *Green v. State*, 667 S.W.2d 528, 531-32 (Tex. Crim. App. 1984) (police detective summoned accused to his office just "to talk" and the accused confessed during discussion; confession held obtained in violation of *Edwards*); *Wilkinson v. State*, 657 S.W.2d 784, 791-93 (Tex. Crim. App. 1983) (accused met with officers and expressed his desire to talk about offense; confession held inadmissible under *Edwards*), *cert. denied*, 470 U.S. 1008 (1985); *Phifer v. State*, 651 S.W.2d 774, 778-81 (Tex. Crim. App. 1983) (accused told sheriff during meeting he wanted to talk to a particular deputy, to whom he then willingly submitted to questioning and confessed; statement held in violation of *Edwards*).

129. No. 632-85, slip op. at 11-12.

130. *Id.* at 11. If the court believes that the officer's true intentions involved an effort to elicit an incriminating statement from the accused, the court would still find the statement inadmissible. *Id.* at 13.

131. *Id.* at 11.