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Walter W. Steele Jr.

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PART III: PUBLIC LAW

CRIMINAL LAW AND PROCEDURE

by

Walter W. Steele, Jr.*

DURING this annual survey period several enactments of the Texas Legislature and a few significant decisions by state and federal courts have resulted in interesting developments in Texas criminal law and procedure. Although very few of these developments can fairly be characterized as dramatic, at least the law of crimes and criminal procedure is stabilizing. With the advent of specialization and refined programs of continuing legal education, the overall quality of the issues presented on appeal seems to have increased quite dramatically. Today, many of the arguments presented to the courts are innovative and apparently well briefed—to the point that one wonders if the judges, themselves, fully understood the import of what was before them.

I. STATUTORY AMENDMENTS

This year there have been relatively few amendments to the Texas Penal Code and Code of Criminal Procedure, but several of these statutory amendments will be discussed in later sections.¹

Perhaps the most significant change in the Penal Code is the addition of section 21.13, which requires an in camera hearing before evidence of a victim's past sexual conduct may be introduced. Such evidence is to be admitted only if the court finds "that the evidence is material to a fact at issue . . . and that its inflammatory or prejudicial nature does not outweigh its probative value."²

In another significant enactment the legislature put an end to the confusion surrounding the crime of criminally negligent homicide, a crime which usually arises out of a vehicular collision. Heretofore, such an event could be prosecuted under section 19.07 of the Penal Code, or under section 50A of article 6701d, Texas Civil Statutes.³ Section 50A of article 6701d has been repealed and now *all forms* of criminally negligent homicide are class A misdemeanors, to be prosecuted under section 19.07 of the Texas Penal Code.⁴

Several significant amendments to the Texas Code of Criminal Procedure were adopted this year. Probably the most important of these amendments

* LL.B., Southern Methodist University; LL.M., University of Texas. Professor of Law and Associate Dean for Clinical Education, Southern Methodist University; Attorney at Law, Dallas, Texas.

1. See notes 146-49, 175-80, 195-220 *infra* and accompanying text.

2. Ch. 203, § 21.13, [1975] Tex. Laws 477.

3. See generally *Davis v. State*, 519 S.W.2d 874 (Tex. Crim. App. 1975).

4. Note, however, that a homicide committed by accident or mistake by one operating a vehicle while intoxicated is involuntary manslaughter, not criminally negligent homicide. TEX. PENAL CODE ANN. § 19.05 (1974).

regulates the defenses of incompetency to stand trial and insanity.⁵ Whenever a court appointed expert makes a determination of the defendant's competency to stand trial, the expert's report must be furnished to defense counsel as well as to the prosecution.⁶ If a jury finds the defendant incompetent to stand trial, it must also determine whether there is a substantial probability that the defendant will attain competence within the foreseeable future. If it answers this question negatively, no "criminal" commitment takes place,⁷ and the defendant must either be committed civilly under the Texas Mental Health Code or released.

On the other hand, if the jury believes that there is a substantial possibility that the defendant may regain his competency to stand trial within the foreseeable future, the defendant is committed to the maximum security unit at Rusk State Hospital for not longer than twelve months. If he does not regain his competency within that time, he is recommitted civilly under the Texas Mental Health Code.

Article 46.03 of the Code of Criminal Procedure sets forth the procedure for raising the defense of insanity. Article 46.03 has been amended to provide that the defendant must give ten days written notice of his intention to raise the insanity defense.⁸ Note that this provision forces the defendant to give the state information, but there is no provision for reciprocal discovery (*e.g.*, the state has no corresponding duty to reveal the names of witnesses it will use to refute the insanity defense). Accordingly, this new amendment to article 46.03 may violate the doctrine of reciprocal discovery as established by the United States Supreme Court in *Wardius v. Oregon*.⁹ If the court appoints an expert to make an examination of the defendant, the expert's report must be furnished to defense counsel as well as to the prosecution.¹⁰ If the defendant is found insane at the time of the alleged crime, he will be committed civilly under the provisions of the Texas Mental Health Code, but he will be housed in a maximum security unit so long as he is believed to be "manifestly dangerous."¹¹

Also notable was the amendment of article 36.14 of the Code of Criminal Procedure to permit the dictation of objections to the court's charge to the court reporter in the presence and with the consent of the court, provided the dictation is subsequently transcribed and certified by the court in time to be included in the transcript on appeal.¹²

Article 38.07 of the Code of Criminal Procedure has been amended to allow a conviction for a sexual offense on the uncorroborated testimony of the victim, provided the victim informed someone of the offense within six months.¹³ In the same vein, the statute of limitation for rape has been

5. In addition, the legislature made some significant changes in Texas sentencing laws which are discussed at text accompanying notes 146-49 *infra*.

6. Ch. 415, § 3(d), [1975] Tex. Laws 1096.

7. Ch. 416, §§ 1-8, [1975] Tex. Laws 1103.

8. Ch. 415, § 2(a)(1), [1975] Tex. Laws 1100.

9. 412 U.S. 470, 472 (1973): "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants"

10. Ch. 415, § 3(c), [1975] Tex. Laws 1101.

11. *Id.* § 4(b).

12. Ch. 253, § 1, [1975] Tex. Laws 617-18.

13. Ch. 203, § 6, [1975] Tex. Laws 479.

extended from one year to three years.¹⁴

II. SEARCH AND SEIZURE

Developments in the jurisprudence of search and seizure reflected by the recent Texas Court of Criminal Appeals opinions and United States Fifth Circuit Court of Appeals opinions are spotty. Warrantless searches of automobiles and other containers, such as luggage, continue to present the most interesting cases. In 1974 the United States Supreme Court decided *Cardwell v. Lewis*.¹⁵ *Cardwell* is significant because it continues to expand the right of police to search an automobile without a warrant. The defendant in *Cardwell*, at the request of the police, drove his car to the police station and parked it in a commercial lot. He was then taken to the police station and booked, whereupon the lot claim check and the car keys were taken from him, and the exterior of his car was examined without a warrant. This conduct by the police was upheld by the United States Supreme Court because, *inter alia*, the search of an automobile is not as intrusive of fourth amendment rights as is a search of the person, and, therefore, the Court reasoned that the standard for requiring warrants to search automobiles should not be as strict as the standard for requiring warrants to search persons or personal places.¹⁶

United States v. Anderson,¹⁷ decided by the Court of Appeals for the Fifth Circuit, provides an illuminating contrast to the approach used by the Supreme Court in *Cardwell*. *Anderson* involved a warrantless search of luggage which the defendants had checked with an airline prior to their arrest. After the arrest, the police took the claim checks, retrieved the luggage, and searched it—all without a warrant. The Fifth Circuit held this search to be invalid on the grounds that luggage deposited with an airline which may be retrieved by the presentation of a claim check is safe and secure, and there were no exigent circumstances to justify proceeding to search without a warrant. One can readily discern the difference between the more traditional “exigent circumstances” approach applied by the Fifth Circuit in *Anderson* and the new “degree of intrusion” approach used by the Supreme Court in *Cardwell*.

In those cases where the police do obtain a warrant before searching, an entirely different set of issues arises. These issues arise because the criminal justice system absurdly requires that a police officer draft one of the most sophisticated of all legal documents—a statement of probable cause in an affidavit for a search warrant. Federal procedure attempts to alleviate this problem by allowing a magistrate to examine the officer under oath on the record, and to supplement the content of the affidavit with his statements.¹⁸

14. *Id.* § 5, at 478.

15. 417 U.S. 583 (1974).

16. *Id.* at 591. For a similar argument in connection with the law of arrest see Steele, *A Proposal To Legitimate Arrest For Investigation*, 27 Sw. L.J. 415 (1973).

17. 500 F.2d 1311 (5th Cir. 1974). See *Wood v. State*, 515 S.W.2d 300 (Tex. Crim. App. 1974), for an interesting example of the Texas approach to the warrantless search of automobiles.

18. FED. R. CRIM. P. 41(c) provides in part: “Before ruling on a request for a war-

An interesting problem was presented in *United States v. Acosta*¹⁹ where the magistrate supplemented the affidavit with information within his own personal knowledge. Unfortunately, however, the magistrate did not dictate into the record the fact that he was relying on his own personal knowledge of the facts, so the affidavit, which was inadequate on its face without the inclusion of the facts known to the magistrate, was held to be inadequate in law.

*Pecina v. State*²⁰ is a recent Texas case raising issues about the construction of search warrant instruments. In *Pecina* a warrant was obtained to search the defendant's home and automobile. Consistent with the standard Texas practice, the search warrant also contained an arrest warrant.²¹ The defendant was arrested *before* the search of the house and car which revealed nothing. At book-in a search of the defendant revealed forty-five packets of heroin. At his trial for the possession of heroin defendant argued that the arrest warrant could not become operative unless contraband was discovered during the execution of the search warrant. The court of criminal appeals dismissed this argument out of hand, stating: "The command to arrest . . . is separate and distinct from the command to seize the contraband. It is contained in separate paragraphs of the warrant and includes no limiting phraseology. It is clearly an unconditional command."²² The lawyers in *Pecina* also challenged the validity of the warrant on the grounds that the executing officers had made an erroneous return—they reported that no arrest was made when, in fact, they had arrested and booked the defendant. The court of criminal appeals held that an erroneous return does not vitiate an otherwise valid warrant.

Sometimes third parties are involved in the search and seizure process. A common example is where officer *A* gives officer *B* sufficient information to amount to probable cause to search without telling officer *B* the source of the information. *Bazan v. State*²³ was such a case, and the court of criminal appeals held the fruits of officer *B*'s search inadmissible unless officer *A* either testified about the source of his information, or there was other proof that officer *A*'s source of information was reliable. Another situation in which third persons may be involved in the search and seizure process exists when third persons make the searches. Of course, the restrictions of the fourth amendment apply only to government agents, not to private citizens.²⁴ In *United States v. Mekjian*²⁵ a private citizen supplied the Government with incriminating information about her employer which she had obtained from her employer's private records. During the period in

rant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness he may produce, providing that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit."

19. 501 F.2d 1330 (5th Cir. 1974).

20. 516 S.W.2d 401 (Tex. Crim. App. 1974).

21. TEX. CODE CRIM. PROC. ANN. art. 18.03 (Supp. 1975-76).

22. 516 S.W.2d at 403.

23. 522 S.W.2d 224 (Tex. Crim. App. 1975).

24. *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921).

25. 505 F.2d 1320 (5th Cir. 1975).

which the employee was supplying information, she was in communication with government agents, but they gave her no instructions or advice concerning her breach of the privacy of her employer's records. The Fifth Circuit indicated that such a situation necessarily involves a factual determination of the extent of government involvement in the invasion of the defendant employer's fourth amendment rights. Although the court refused to overturn the district court's determination that there was no government involvement, the court stated that "where federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements."²⁶ *Mekjian* places a heavy burden on the Government whenever it attempts to disassociate itself from the illegitimate acts of cooperating private individuals, and bears careful reading by lawyers with clients who have been the victims of private informants.

III. INDICTMENTS

Only a few of the recently decided cases involving indictments have been notable. The most significant federal case in this area is *United States v. Briggs*,²⁷ where the court discusses the phenomenon of unindicted co-conspirators, a situation which arises almost exclusively in the federal courts. In *Briggs* the Government obtained a conspiracy indictment against seven named defendants and three other named but unindicted persons. Those named but unindicted challenged the authority of the grand jury to place their names in an indictment without actually charging them with a crime. Pointing out that the issue has not been decided by appellate courts, the Fifth Circuit Court of Appeals agreed with the three petitioners and ordered their names expunged from the indictment. In a well-considered opinion, the court indicated how naming a person as a perpetrator in an indictment without actually charging him amounted to accusing that person of a crime without giving him a forum in which to vindicate himself. Such an act is the antipode of the role which the grand jury is supposed to play, *i.e.*, to shield people from the abuse of power by the prosecution.

Texas' forward-looking waiver of indictment procedure²⁸ received an innovative challenge in *Chapple v. State*.²⁹ After agreeing to waive indictment and proceed by information, Chapple challenged his conviction because the information was not based on a sworn complaint, as required by article 21.22 of the Texas Code of Criminal Procedure.³⁰ With two judges

26. *Id.* at 1327.

27. 514 F.2d 794 (5th Cir. 1975).

28. TEX. CODE CRIM. PROC. ANN. art. 11.41 (Supp. 1975-76) provides: "A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony. On waiver as provided in this article, the accused shall be charged by information."

29. 521 S.W.2d 280 (Tex. Crim. App. 1975).

30. TEX. CODE CRIM. PROC. ANN. art. 21.22 (1966) provides:

No information shall be presented until affidavit has been made by some credible person charging the defendant with an offense. The affidavit shall be filed with the information. It may be sworn to before the dis-

dissenting, and one judge concurring, the Texas Court of Criminal Appeals held that a complaint is required only in misdemeanors. Therefore, when a defendant waives a felony indictment and agrees to proceed on an information, no complaint is required. In another case dealing with the sworn complaint described in article 21.22 the court held that no inquiry into the nature and extent of the knowledge of the person who signs a complaint will be permitted if the complaint is adequate on its face.³¹ That holding is altogether consistent with earlier holdings by the court to the effect that an affidavit for a search warrant, if adequate on its face, cannot be challenged on grounds that the affiant had inadequate knowledge.³²

Obviously, the new Penal Code has generated new forms of indictments, some of which are now being tested in the courts. *Gonzalez v. State*³³ reflects an example of these cases. *Gonzalez* changes the long-standing rule that an indictment for burglary with intent to commit theft must allege all of the constituent elements of the theft. In *Gonzalez* the court reasoned that since the various forms of theft have been consolidated in the new Penal Code, there is no reason to continue to require the allegation of all constituent elements of theft in a burglary indictment.³⁴

Seemingly, a different approach was taken in *Jurek v. State*,³⁵ the first case to discuss indictments under Texas' new capital murder statute.³⁶ Each count of this indictment alleged not only a voluntary homicide, but also alleged all of the constituent circumstances necessary to bring the killing under the capital murder statute: namely, that the defendant "voluntarily . . . killed [the victim] by choking . . . and was then and there in the course of committing and attempting to commit kidnapping and forcible rape upon the said [victim]."³⁷ According to the court, the allegation of the constituent elements of capital murder is *essential* to a valid indictment, and the indictment is not duplicitous because the constituent circumstances of capital murder are alleged along with the homicide. Similar reasoning was used in *Woerner v. State*³⁸ where the adequacy of an indictment under the Texas Controlled Substances Act was before the court. Under the Controlled Substances Act both the jurisdiction of the court and the punishment range are keyed to the amount of marijuana possessed, *e.g.*, more than four ounces is a felony of the third degree.³⁹ Woerner challenged his indictment because it merely alleged he possessed "more than four ounces," and did not allege how much he possessed in excess of four ounces. The court of

strict or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths.

31. *Wells v. State*, 516 S.W.2d 663 (Tex. Crim. App. 1974).

32. *E.g.*, *Phenix v. State*, 488 S.W.2d 759 (Tex. Crim. App. 1972).

33. 517 S.W.2d 785 (Tex. Crim. App. 1975).

34. *See also* *Earl v. State*, 514 S.W.2d 273 (Tex. Crim. App. 1974), holding that all of the constituent elements of theft need not be alleged in an indictment for robbery.

35. 522 S.W.2d 934 (Tex. Crim. App. 1975).

36. TEX. PENAL CODE ANN. § 19.03 (1974).

37. 522 S.W.2d at 940-41. Article 19.03(a)(2) makes it capital murder to intentionally commit murder in the course of kidnapping or aggravated rape.

38. 523 S.W.2d 717 (Tex. Crim. App. 1975).

39. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.05 (Supp. 1975-76).

criminal appeals upheld the indictment as sufficient to invoke the jurisdiction of the court and to establish the penalty range, which is tantamount to advising the defendant adequately of the crime with which he is charged. On the other hand, in *Medrano v. State*,⁴⁰ the court overturned a conviction under the Controlled Substances Act even though the error in the indictment was raised for the first time on appeal. *Medrano's* indictment wholly failed to allege any particular amount of marijuana and, therefore, was fatally defective.

Indictments for rape under the new Penal Code were discussed in *Coby v. State*.⁴¹ Section 21.09(a) of the Penal Code defines rape as sexual intercourse with a female under seventeen years; however, section 21.09(b) provides a defense if the female is fourteen years or older and is promiscuous. Under these sections, if an indictment for rape alleges no more than intercourse with a female under seventeen years, does it adequately advise the defendant of the charges, or must the indictment go further and allege the exact age of the victim? *Coby* answers the second question negatively, reasoning that the state is not required in its indictments to negative defenses, such as the one provided by section 21.09(b).⁴²

IV. EXTRADITION

The fact that extradition proceedings have taken on new importance is exemplified by the en banc decision of the Fifth Circuit Court of Appeals in *Prince v. Alabama*.⁴³ Prince complained of the nine-year delay between his indictment and trial on Alabama criminal charges. Alabama's excuse for the delay was that Prince had been incarcerated at length in California. Alabama attempted to establish "good faith" by showing that they wrote to the California authorities about Prince's availability on thirteen different occasions. Furthermore, Alabama contended that it would have been futile to attempt to extradite Prince from the custody of the California prison authorities. The Fifth Circuit Court of Appeals disagreed with the Alabama position. In a strongly worded opinion the court pointed out that a state must take "affirmative action" to secure the return of an indicted defendant for trial, and that "affirmative action" means an attempt at extradition, even though the demanding state speculates that the attempt at extradition will be rebuffed.⁴⁴

The recent landmark Texas decision of *Ex parte Rosenthal*⁴⁵ has simplified the process of extradition in Texas to the point that one wonders what useful function a lawyer for the defendant can serve at extradition proceedings. Expressly overruling *Ex parte Ivey*,⁴⁶ the court of criminal appeals held in *Rosenthal* that a demand for extradition accompanied by an information supported with a sworn complaint is sufficient, even though

40. 524 S.W.2d 719 (Tex. Crim. App. 1975).

41. 518 S.W.2d 829 (Tex. Crim. App. 1975).

42. See generally TEX. PENAL CODE ANN. § 2.03 (1974).

43. 507 F.2d 693 (5th Cir. 1975).

44. *Id.* at 705.

45. 515 S.W.2d 114 (Tex. Crim. App. 1974).

46. 419 S.W.2d 862 (Tex. Crim. App. 1967).

there is no showing that the laws of the demanding state permit prosecution for a felony upon complaint and information. Furthermore, *Rosenthal* holds that the adequacy or sufficiency of the charging papers from the demanding state is not material to the extradition hearing: "The sufficiency of the indictment, information or affidavit as a criminal pleading is not at issue in the asylum state."⁴⁷ Given the holding in *Rosenthal*, it appears that the only remaining issue which a defense counsel could raise at the extradition hearing would be that the subject of the proceeding was not the man wanted by the extraditing state. But in *Ex parte Viduari*⁴⁸ the Texas Court of Criminal Appeals severely limited even that tactic. In the face of Viduari's protestations that he was not the wanted man, the court approved his extradition to Missouri because the state introduced an affidavit from a Missouri detective stating that he had examined the photograph of Viduari forwarded by the Texas prosecutor, and that Viduari was, indeed, the man wanted in Missouri. Obviously, defense counsel is relatively powerless when faced with an ex parte affidavit of an out-of-state witness which is based upon a photograph that defense counsel had no part in taking or sending.

V. MULTIPLE PROSECUTION

Conceptually, multiple prosecution is a difficult area of the law, largely because the legal issues encompassed are multiple. For example: When does jeopardy attach? When does one trial bar another? When can a sentence be increased? Not only is the law of multiple prosecution conceptually difficult, it is also a rapidly developing area of criminal jurisprudence. At the bottom line is the question of when jeopardy attaches. In *Serfass v. United States*⁴⁹ the United States Supreme Court declared: "In the case of a jury trial, jeopardy attaches when the jury is impaneled."⁵⁰ Contrary to the approach taken by the Supreme Court in *Serfass* is the Texas position that jeopardy does not attach in a jury case until after the jury is impaneled and the defendant has entered his plea before that jury.⁵¹

A determination that jeopardy has attached "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial."⁵² Next comes the problem of whether jeopardy actually does shield a defendant from further litigation. There are, in fact, many instances when jeopardy attaches (*e.g.*, defendant has entered his plea before an impaneled jury) and the defendant may, nevertheless, be subjected to more than one possibility of conviction. For example, in *United States v. Wilson*⁵³ the trial judge dismissed the indictment after the defendant had been found guilty. The Government appealed the dismissal, but the defendant contended that the Government's appeal subjected him to double jeopardy. Although jeopardy

47. 515 S.W.2d at 119.

48. 525 S.W.2d 163 (Tex. Crim. App. 1975).

49. 420 U.S. 377 (1975).

50. *Id.* at 388.

51. *Lockridge v. State*, 522 S.W.2d 526 (Tex. Crim. App. 1975).

52. *Illinois v. Somerville*, 410 U.S. 458, 467 (1973).

53. 420 U.S. 332 (1975).

had certainly attached in this case, the United States Supreme Court held that the Government's appeal of the dismissal of the indictment did not violate the concept of double jeopardy, because the defendant would not be tried again even if the Government's appeal were sustained. Since the defendant had been tried and convicted *before* the indictment was dismissed, sustaining the Government's appeal would merely reinstate the conviction; it would not subject the defendant to a second trial.⁵⁴ *Wilson's* doctrine is clarified in *United States v. Jenkins*,⁵⁵ another recent Supreme Court opinion. In *Jenkins* the trial judge dismissed the indictment at the conclusion of a bench trial, but it was not entirely clear if the judge based his dismissal on a point of law or on inadequate evidence of guilt. In contrast to *Wilson*, the Supreme Court denied the Government's appeal in *Jenkins* because sustaining that appeal would force a second hearing in the trial court to resolve the factual issues which were not clearly resolved by the trial judge. Holding a second hearing in the trial court would, indeed, violate the defendant's right not to be placed twice in jeopardy.

In addition to a right not to be subjected to two trials, the right to have the trial completed once it has begun is also a part of the doctrine of multiple prosecution. For example, if a trial judge declares a mistrial after a defendant has entered his plea, jeopardy has clearly attached. But the question remains as to whether the attaching jeopardy will shield the defendant from a second trial? *United States v. Alford*,⁵⁶ decided by the United States Court of Appeals for the Fifth Circuit, contains an excellent discussion of that problem. According to the court:

When the judge declares a mistrial on his own or the prosecutor's motion, a retrial is allowed only if there exists a manifest necessity for the declaration of a mistrial where 'the ends of public justice would otherwise be defeated.' . . . In determining whether there is a manifest necessity for the declaration of a mistrial, the courts are to weigh the 'defendant's valued right to have his trial completed by a particular tribunal' against the 'public's interest in fair trials designed to end in just judgments.'⁵⁷

A mistrial was granted in *Alford* after it was discovered that the United States Attorney had mailed the wrong indictment to the defendant's attorney. "Manifest necessity" won out over the "defendant's valued right to have his trial completed," and the Fifth Circuit held that granting the mistrial did not preclude the Government from re-trying the defendant.

Should the defendant be denied his jeopardy protection when a mistrial results from a prosecutor's blunder, or worse yet, prosecutorial overreaching? Unfortunately, reasonable minds may differ over whether or not a blunder by the prosecutor or the judge is sufficiently serious to merit shielding the

54. "[T]he prohibition against multiple trials [is] the controlling constitutional principle." *Id.* at 346. See also *Breed v. Jones*, 421 U.S. 519, 532 (1975), quoting *Price v. Georgia*, 398 U.S. 323, 329 (1970) ("the Double Jeopardy Clause . . . is written in terms of potential of risk of trial and conviction, not punishment.").

55. 420 U.S. 358 (1975).

56. 516 F.2d 941 (5th Cir. 1975).

57. *Id.* at 944-45.

defendant from a re-trial. We have already seen in *Alford* that mailing the wrong indictment is not so serious a blunder as to bar the Government from re-trying a defendant after a mistrial. In *United States v. Dinitz*,⁵⁸ however, the court decided that a defendant could not be re-tried because the mistrial was the result of the trial judge's summarily discharging a defendant's trial attorney and ordering the attorney removed from the courtroom. Apparently, the answer to the question of when a defendant can be re-tried after a trial lies in a case-by-case examination in which courts attempt to balance society's desire to penalize prosecutorial manipulation or judicial misconduct against the ends of public justice which would be served by re-trying a defendant.⁵⁹

Suppose the defendant deliberately waits until jeopardy attaches before making the court aware of some defect warranting a mistrial. In a way, this problem is the flip side of the one presented above, *i.e.*, if a defendant should not be prejudiced by prosecutorial overreaching, should the prosecution be prejudiced by defense overreaching? For example, should a defendant who knows that the charging paper is defective, but who waits until jeopardy attaches before calling the defect to the court's attention, be protected by jeopardy, thus preventing him from being re-tried on a corrected indictment? That question was answered recently by the Fifth Circuit court in *United States v. Kehoe*⁶⁰ as follows: "We believe that a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained."⁶¹ *United States v. Kehoe* is a well-reasoned opinion, although it may seem a bit shocking at first. One mollifying fact that should not be overlooked is that a charging paper with substantive defects never puts a defendant in jeopardy in the first place, so a mistrial in such an instance could never affect the state's right to re-try the defendant.⁶²

Collateral estoppel is the last multiple prosecution issue to be discussed. Collateral estoppel means that a fact once determined in a trial cannot be relitigated in another trial. For example, in *Johnson v. Estelle*⁶³ the defendant was found not guilty of burglary with intent to commit rape. In a second trial defendant was convicted of assault with intent to commit rape. Both charges arose out of the same episode. The defendant's contention, with which the Fifth Circuit court agreed, was that his acquittal on the burglary charge meant that the jury in the first trial had a doubt as to his identity or as to his intention to commit rape; and consequently, those issues

58. 492 F.2d 53 (5th Cir.), *aff'd*, 504 F.2d 854 (1974) (en banc), *cert. granted*, 420 U.S. 1003 (1975) (No. 74-928).

59. *See generally* *Illinois v. Somerville*, 410 U.S. 458 (1973).

60. 516 F.2d 78 (5th Cir. 1975).

61. *Id.* at 86. *Query*: What would be the result if the record showed that the defendant discovered the defect *for the first time* during the trial?

62. *See generally* *Steele, The Doctrine of Multiple Prosecution in Texas*, 22 Sw. L.J. 567, 574-75 (1968).

63. 506 F.2d 347 (5th Cir.), *cert. denied*, 422 U.S. 1024 (1975).

could not be re-litigated in another trial wherein the charge was assault with intent to rape.

Despite the Fifth Circuit's ruling in *Johnson v. Estelle*, the Texas Court of Criminal Appeals has been less sympathetic to claims of collateral estoppel. In *Warren v. State*⁶⁴ the Texas court denied a claim of collateral estoppel arising out of a conviction for receiving stolen property which occurred after an acquittal of burglary arising from the same episode.

In *Jones v. State*⁶⁵ the court pointed up the distinction between collateral estoppel and the doctrine of prior conviction. Jones had been convicted of rape, and in a second trial was convicted of a burglary that arose from the same episode. As the court correctly concluded, collateral estoppel is applicable only where there is a prior *acquittal*. Where there is a prior *conviction*, the only limitation on a second trial is the doctrine of carving, which was not applicable in *Jones*.⁶⁶

Jones was decided under the old Penal Code, but it suggests an interesting problem under the new Penal Code. As mentioned above, Jones was convicted of burglary with intent to commit rape after being convicted of rape (same episode). According to section 30.02 of the new Penal Code, part of the definition of burglary in the first degree is injury to an occupant of the building. Therefore, it seems likely under the new Code that the doctrine of carving *will* protect a defendant who is convicted of rape (*i.e.*, injury) and then tried and convicted again of burglary in the first degree (*i.e.*, the same injury).

VI. CONFESSIONS

The Texas Code of Criminal Procedure has long required that after arrest a person must be taken before a magistrate for arraignment, warning, and bail setting.⁶⁷ During this period, however, the Texas Court of Criminal Appeals, and consequently the police, have uniformly and pervasively ignored those provisions in the Code of Criminal Procedure. Accordingly, people in Texas can be arrested, jailed, and interrogated—all without seeing or taking to anyone other than the arresting officers. If the arresting officers give *Miranda* warnings, and the person "intelligently" waives his fifth amendment rights, the Texas courts refuse to exclude his confession—despite the fact that the confession may have been obtained as a result of the illegal arrest.⁶⁸ Furthermore, the United States Court of Appeals for the Fifth Circuit has held that failure to follow the Code of Criminal Procedure in such an instance does not constitute error of constitutional dimension. *Whitaker v. Estelle*⁶⁹ is typical of this approach:

It does appear that Whitaker was not taken promptly before a magistrate following his warrantless arrest as required by Texas law. Ver-

64. 514 S.W.2d 458 (Tex. Crim. App. 1974).

65. 514 S.W.2d 255 (Tex. Crim. App. 1974).

66. See generally Steele, *supra* note 62, at 572-74.

67. TEX. CODE CRIM. PROC. ANN. arts. 14.06, 15.17 (Supp. 1975-76).

68. See, e.g., *Simmons v. State*, 504 S.W.2d 465 (Tex. Crim. App.), *cert. denied*, 419 U.S. 829 (1974).

69. 509 F.2d 194 (5th Cir. 1975).

non's Ann. C.C.P., art. 14.06 (Supp. 1974). However, it is well settled that such a defect rises to the level of constitutional error only when it can be shown that the accused's defense has been prejudiced in some manner. Here, the only intimation of prejudice is that Whitaker's confession was in fact obtained during the period of his detention. However, Whitaker does not make, nor would the record support, any claim of a causal connection between the two. The record shows that Whitaker was arrested at approximately 11:00 p.m. on December 10, and made his confession at 10:40 the following morning; moreover, the record further reflects that Whitaker was fully warned of his constitutional rights prior to making the statement.⁷⁰

According to *Whitaker*, and many other state and federal cases like it, all the police need to do is to arrest, jail, and interrogate their suspect, making sure that the *Miranda* warnings are given and that overt efforts at intimidation are avoided, and the suspect's confession will be admissible.

Perhaps the most complimentary remark one can make about such a judicial attitude toward the pervasive phenomenon of illegal arrest-detention-interrogation is that it is naive. Defense counsel, prosecutors, police, and others who live and move in the real world know that a suspect who has received the *Miranda* litany before he confesses never will be able to convince a court that there is any prejudicial connection between his illegal arrest and ultimate conviction, because the courts choose to ignore the obvious—that the prejudice they are looking for is present in the form of the confession itself; a confession that never would have been given had it not been for a custodial interrogation imposed upon a person who has been illegally deprived of his liberty.⁷¹

There may be a light at the end of the tunnel, although it does not emanate from the Texas Court of Criminal Appeals or from the United States Court of Appeals for the Fifth Circuit; instead, it comes from the Supreme Court of the United States in the form of two recent cases. First, in *Gerstein v. Pugh* the Supreme Court held that a person arrested without a warrant, and detained, must be given a probable cause hearing before a magistrate "promptly after arrest."⁷² *Gerstein* is based on the fourth amendment; therefore, we may conclude that the take-before-the-magistrate provisions of the Texas Code of Criminal Procedure⁷³ do, indeed, have

70. *Id.* at 196-97.

71. *E.g.*, *Jurek v. State*, 522 S.W.2d 934, 942 (Tex. Crim. App. 1975).

72. 420 U.S. 103 (1975).

73. TEX. CODE CRIM. PROC. art. 14.06 (Supp. 1975-76) provides:

In each case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

TEX. CODE CRIM. PROC. ANN. art. 15.17 (Supp. 1975-76) provides in part:

The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also

constitutional dimensions, despite holdings to the contrary by the Texas Court of Criminal Appeals and the Fifth Circuit.

*Brown v. Illinois*⁷⁴ is the second recent Supreme Court case that bears on this problem. *Brown* raised the issue of whether or not giving the *Miranda* litany, *per se*, breaks the causal connection between an illegal arrest and a confession. While admitting that a person being held illegally *may* decide to confess as an act of free will, the Supreme Court went further and pointed out:

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving *Miranda* warnings.⁷⁵

Taken together, *Gerstein* and *Brown* mean that if a Texas citizen is arrested by police without a warrant and not taken before a magistrate, a confession by that citizen will not be admissible merely because the *Miranda* warnings were given. But *Gerstein* and *Brown* have an even greater significance; they mean that the Supreme Court is aware of and opposed to the reprehensible police tactic of making an illegal arrest to gain the opportunity to secure a confession, which in turn is used to bootstrap a conviction.⁷⁶ Indeed, such a sequence of events took place in *Brown*, and the court expressly declared that "the purpose and flagrancy of the official misconduct"⁷⁷ is a relevant factor in judging the admissibility of the confession. *Moffett v. Wainwright*,⁷⁸ a recent case, contains a useful list of factors to be considered when determining the connection between an illegal arrest and a subsequent confession. The court considered the following as the most significant:

[W]hether substantial intervening occurrences take place between the time of the illegal arrest and the statements which are sought to be ad-

inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

Note that neither of these articles specifically requires the magistrate to determine that there is probable cause to hold the suspect, although such a determination is clearly called for by the *Gerstein* opinion.

74. 422 U.S. 590 (1975).

75. *Id.* at 602.

76. The conduct of the arresting officers in *Brown* which may be considered typical was described by the Supreme Court in the following manner:

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged in their testimony, that the purpose of their action was 'for investigation' or 'questioning.' . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up.

Id. at 605.

77. *Id.* at 604.

78. 512 F.2d 496 (5th Cir. 1975).

mitted, as for example the opportunity to consult with an attorney, or to terminate interrogation, and secondly, the extent to which the arrest was a gross violation of legal processes as opposed to a failure to comply with technical requirements.⁷⁹

Regardless of whether the initial arrest was legal, waiver of the fifth amendment privilege is obviously the essential question. Whether a waiver is present when the person interrogated is represented by counsel, the police know it, and, nevertheless, proceed to interrogate him outside the presence of his counsel, reflects a difficult problem. Two recent Texas cases deal with this question. In *Harris v. State*⁸⁰ the court placed a heavy burden on the prosecution to establish waiver of the fifth amendment privilege where a suspect has expressed a desire for an attorney or has actually talked to an attorney prior to confessing. The court also stated that the boilerplate waiver language on confession forms was only a factor to be considered, certainly not the controlling factor. In *Self v. State*⁸¹ the court unequivocally held that a suspect under interrogation can waive his right to the presence of counsel, even though that counsel has already been appointed and the police know who he is. However, the court in the *Self* case implies that if counsel instructs the police not to interrogate his client, such instructions might be enforced by the court.

What happens if instead of waiving his fifth amendment privilege, a suspect remains silent? In *United States v. Hale*⁸² the suspect remained silent during his pretrial interrogation but took the stand at trial and testified about an alibi. On cross-examination the prosecutor attempted to impeach the suspect by establishing that he did not mention his alibi while being interrogated. The United States Supreme Court held that the prosecutor's questions were improper, because no inference of guilt can be drawn from a suspect's choice to take advantage of his fifth amendment privilege when it is explained to him in the *Miranda* warnings.

Confusion is still present in Texas over whether a principal's confession is admissible at the trial of his accomplice. At one time there was a well-settled Texas rule that such confessions were admissible, but that rule was thrown into doubt in 1968 when the Texas Court of Criminal Appeals decided *Schepps v. State*.⁸³ *Ex parte Smith*⁸⁴ is the most recent case on the subject, but it does not entirely settle the matter. Smith was on trial as an accomplice and the confession of his principal was admitted over Smith's objection that the confession was hearsay and its admission constituted a violation of Smith's right to confrontation and cross-examination. The Texas Court of Criminal Appeals agreed with Smith, but seemed to leave the door open for the admission of a principal's confession provided all references to

79. *Id.* at 503, citing *Phelper v. Decker*, 401 F.2d 232, 237-38 (5th Cir. 1968).

80. 516 S.W.2d 931 (Tex. Crim. App. 1974).

81. 513 S.W.2d 832 (Tex. Crim. App. 1974).

82. 422 U.S. 171 (1975).

83. 432 S.W.2d 926 (Tex. Crim. App. 1968). For a discussion of the *Schepps* case see Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 229 (1970).

84. 513 S.W.2d 839 (Tex. Crim. App. 1974).

the accomplice are deleted from it. By deleting all references to the accomplice, the prosecutor could still use the principal's confession at the trial of the accomplice to establish the guilt of the principal. Prior to the enactment of the new Penal Code guilt of the principal had to be established at the trial of an accomplice.⁸⁵ With the advent of section 7.03 of the new Penal Code, it may no longer be necessary to establish the guilt of a principal at the trial of an accomplice.⁸⁶ Therefore, the matter is now more confused than ever, and may not be resolved until section 7.03 of the Penal Code is interpreted by the court.

VII. VOIR DIRE

Jury *voir dire* is a focal point for the tension between a judge's desire to keep his docket moving and a lawyer's desire to try his case in a slow and careful fashion. By its nature, *voir dire* is a deliberate and ponderous undertaking, and consequently judges have developed tactics for hurrying lawyers through it. One such tactic is simply to place a time limit on a lawyer's *voir dire*. In *Barrett v. State*⁸⁷ the judge limited a defense attorney to thirty minutes *voir dire* in an aggravated assault case. This tactic was upheld, but the record reflected that many of the questions the defense lawyer wished to propound were not germane.⁸⁸

One of the most common tactics of judges is to ask many of the *voir dire* questions themselves. Judges feel that their method of propounding *voir dire* questions is more efficient and businesslike than those of the lawyer. Thus, in *Smith v. State*,⁸⁹ a murder case, the court qualified the veniremen on the full range of punishment and refused to permit the defense attorney to ask questions about that aspect of the case. Again, the Texas Court of Criminal Appeals upheld the judge's actions because any further questions by the attorney along those lines would have been repetitious.⁹⁰

Another popular tactic for limiting a lawyer's *voir dire* is to deny him the right to ask certain questions. This tactic reduces the amount of time the lawyer spends talking to the panel and also may be used to protect the panel from embarrassing questions. After all, a jury panel seated in an elected judge's courtroom commands respect. For example, in *Burkett v. State*,⁹¹ a

85. *Tucker v. State*, 461 S.W.2d 630 (Tex. Crim. App.), *cert. denied*, 403 U.S. 919 (1971).

86. TEX. PENAL CODE ANN. § 7.03 (1974) provides in part:

In a prosecution in which the actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to its commission, and it is no defense:

(2) that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different type or class of offense, or is immune from prosecution.

87. 516 S.W.2d 181 (Tex. Crim. App. 1974).

88. "This Court does not condone the arbitrary limitations of *voir dire*. However, under the circumstances presented here, we are unable to conclude the trial court abused his discretion in limiting the *voir dire*." *Id.* at 182.

89. 513 S.W.2d 823 (Tex. Crim. App. 1974).

90. *Id.* at 827.

91. 516 S.W.2d 147 (Tex. Crim. App. 1974).

peddling obscenity case, the trial judge refused to permit the defense attorney to ask each venireman this question: "Do you believe that it is morally wrong for an adult person to have magazines or books in their homes that show pictures depicting sexual intercourse and acts of oral sodomy?"⁹² The court of criminal appeals explained in *Burkett* that the question of whether a verdict will be reversed because the trial judge refused to allow particular *voir dire* questions depends upon the reason the question is being asked. If the question is asked in order to exercise a peremptory challenge, the test is not the same as the one applied if the question is asked with a view toward exercising a challenge for cause. When a question is asked in order to exercise peremptory challenges, and its asking is denied, intelligent use of peremptory challenges is lost, so harm is automatically shown.⁹³ Therefore, on appeal an attorney need only show that he sought to ask a relevant question for peremptory challenge purposes, and the judge refused to allow that question.⁹⁴ However, the lawyer in *Burkett* failed to make that showing because he failed to bring forward the *entire* jury *voir dire* into the appellate record, so the Texas Court of Criminal Appeals was unable to determine if the question refused was merely repetitious of other questions asked during the *voir dire*. Therefore, lawyers who are refused permission to ask questions designed to lead to peremptory challenges would be well advised to take an exception, then drop the matter entirely, *i.e.*, they should not seek to rephrase the question. Then, if the record of the entire *voir dire* is brought forward on appeal, reversal would appear to be a relative certainty. On the other hand, if the question sought and refused is one leading to a challenge for cause the procedure is different. In such an instance no reversible error is shown unless the defendant exhausts all peremptory challenges and one or more objectionable jurors sit on the case.

Perhaps *Alexander v. State*⁹⁵ is the epitome of the "hurry-along-counsel" approach to *voir dire* so common in many courtrooms. After the jury list had been prepared, and as the panel was being seated in the courtroom, Alexander filed a *pro se* motion to shake under article 35.11 of the Texas Code of Criminal Procedure.⁹⁶ One can imagine the consternation of the trial judge: the clerk had laboriously prepared the jury list; the bailiff was in the process of seating the jurors; and *now* the defendant files a *pro se* motion

92. *Id.* at 148.

93. [T]he decision as to the propriety of any question is left to the discretion of the trial court and the only review will be for abuse of that discretion. . . . The discretion is abused when a proper question about a proper area of inquiry is prohibited.

Smith v. State, 513 S.W.2d 823, 826-27 (Tex. Crim. App. 1974).

94. See generally *Abron v. State*, 523 S.W.2d 405 (Tex. Crim. App. 1975).

95. 523 S.W.2d 720 (Tex. Crim. App. 1975).

96. The trial judge, upon the demand of the defendant or his attorney, or of the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well-shaken, and the clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case, and write the names as drawn upon two slips of paper and deliver one slip to the State's counsel and the other to the defendant or his attorney.

TEX. CODE CRIM. PROC. ANN. art. 35.11 (1965).

to shake. If the motion is granted, the names will have to be shaken; a new list prepared; and the jurors may have to be removed from their seats and reseated. As might be expected, the judge denied the motion, but he was overruled by the court of criminal appeals because article 35.11 provides an absolute right to have the names shaken at any time prior to the actual *voir dire* examination. Thus, the trial judge's effort to save time resulted in a reversal of the defendant's conviction. Defense counsel might note *Alexander's* teaching that a motion to shake can be filed *after* the jury list is prepared, thus affording defense counsel the additional option of taking the panel in its original order instead of automatically asking to shake in all cases.

VIII. WITNESSES

During the period covered by this *Survey* an unusual number of cases have appeared dealing with the mechanism by which witnesses testify at trial. Several of those cases suggest useful trial strategies, while others point out common pitfalls which ought to be avoided.

Many cases discuss the problems which arise when a defendant appears for trial in jail clothing, but *Thompson v. State*⁹⁷ is unusually instructive in this regard because it deals with the problem from the standpoint of *any* witness who appears in jail clothing. *Thompson* repeats the general rule that the discretion of the trial judge determines whether or not a defendant or a witness should be allowed to appear in jail clothing and/or in shackles.⁹⁸ But, according to *Thompson*, if a judge decides that an appearance in jail clothing and/or shackles is justified, his reasons must be clearly reflected in the record, "not in general terms but with particularity."⁹⁹ Furthermore, the judge must instruct the jury not to consider the clothing or the shackles in determining guilt.

One of the most common episodes involving witnesses arises when one side impeaches a witness by proving that the witness has previously been convicted of a felony or a misdemeanor involving moral turpitude. Until the recent decision of *Poore v. State*¹⁰⁰ the Texas Court of Criminal Appeals had never addressed the question of what happens if a witness denies the finality of the conviction introduced to impeach him. Reasoning that a mere denial of the finality of the conviction was not sufficiently reliable, the Texas Court of Criminal Appeals held that documentary evidence is required to deny the finality of the conviction introduced for impeachment purposes.¹⁰¹

Frequently, a defendant will offer character witnesses who testify that the defendant's reputation for truth and for being a law-abiding citizen is good.

97. 514 S.W.2d 275 (Tex. Crim. App. 1974).

98. "The test on appeal is whether the trial court abused its discretion in requiring the witnesses to appear in jail uniforms and in handcuffs." *Id.* at 278.

99. *Id.*

100. 524 S.W.2d 294 (Tex. Crim. App. 1975).

101. "When the impeaching party has established the fact of conviction, either by the witness' own admission or by tendering the judgment and sentence to the court, the burden should then shift to the party offering the witness to introduce competent, *documentary* evidence showing that the conviction is not final." *Id.* at 297 (emphasis added).

Such testimony is offered to convince the jury that the defendant did not commit the offense because he is generally of good character. *United States v. Leigh*,¹⁰² decided by the United States Court of Appeals for the Fifth Circuit, holds that a defendant is entitled to have the jury instructed that evidence of *good character*, along with other evidence, may create a reasonable doubt about guilt. Instructing the jury to consider evidence of good character as an indication of innocence is not a common practice among Texas courts. Perhaps more lawyers should request such instructions, using the model provided in *Leigh*.

Attempts to bolster one's own witnesses are common in all jurisdictions. The Texas Court of Criminal Appeals recently adopted a very liberal attitude toward bolstering in the case of *Elam v. State*.¹⁰³ In *Elam*, before eliciting any substantive testimony of a police witness, the prosecutor was allowed first to ask: where the witness was born; where he was raised; if he had completed high school; whether he had served in the armed forces; where he had served; the day he was employed by a police agency, and the length of his police service; what his first duties were; the nature and length of training he had undergone; whether he had training in addition to his regular training; and the cities and counties to which he had been assigned. The Texas Court of Criminal Appeals approved this practice on the grounds that it places the witness "in context" for the jury and it "enables both the defendant and the jury to assess the weight to be given to a witness' testimony and to evaluate his credibility."¹⁰⁴ In fact the usefulness of such information in aiding the defendant or jury in evaluating a witness' testimony seems tenuous indeed. On the other hand, in certain cases in some Texas cities one can imagine the prejudicial effect (to the prosecution or to the defendant) of testimony about where a witness was "raised." Furthermore, in light of the homily that "sauce for the goose is sauce for the gander," it is interesting to speculate whether or not the Texas Court of Criminal Appeals would approve a defense lawyer's *cross-examination* of a police witness about the matters listed in *Elam* in a case where the prosecution did *not* raise those matters on direct. Would the Texas Court of Criminal Appeals hold that the cross-examination was relevant because it helped to place the witness "in context" (*e.g.*, the state's witness was raised in New York City; was 4F; was new to the job; and had just moved to town from Las Vegas, Nevada)?

While bolstering one's own witness is commonplace, impeaching one's own witness is generally forbidden, except where the offering attorney can establish surprise. *Brown v. State*¹⁰⁵ presents an up-to-date primer on the law and procedure for establishing surprise as a prerequisite to impeaching one's own witness. First, the record must reflect that the witness' testimony was injurious to the case of the party who presented that witness. Second, that party must demonstrate, outside the presence of the jury, that he was,

102. 513 F.2d 784 (5th Cir. 1975).

103. 518 S.W.2d 367 (Tex. Crim. App. 1975).

104. *Id.* at 369.

105. 523 S.W.2d 238 (Tex. Crim. App. 1975).

indeed, surprised by the witness' testimony. This second element can be established by cross-examining the witness, outside the jury's presence, about prior inconsistent statements. Another approach is for the lawyer or investigator who interviewed the witness to take the stand and reveal earlier contrary statements of the witness. Only when both elements of this test have been satisfied is the court permitted to find surprise and, thereby, to allow the attorney to impeach his own witness in the presence of the jury.

In Texas, the "Gaskin Rule" is another useful technique for impeaching a witness.¹⁰⁶ Although article 39.14 of the Texas Code of Criminal Procedure makes written statements of witnesses in the possession of the state exempt from pre-trial discovery, the "Gaskin Rule" forces the state to produce such statements for inspection and use for cross-examination after the witness has testified in court. Repeatedly, the court of criminal appeals has ruled that the "Gaskin Rule" applies to *all witnesses who testify for the state*.¹⁰⁷ But what about witnesses who testify *for the defense*—does the state have a right to be given copies of written statements made by defense witnesses in the files of defense counsel? In *United States v. Nobles*¹⁰⁸ that very issue was before the United States Supreme Court, and the Court held that the prosecution did, indeed, have a right to see written statements made by defense witnesses after they testify in court.¹⁰⁹ Because *Nobles* was prosecuted in a federal court, it is not clear whether the *Nobles* decision is based on the United States Constitution or on the Court's inherent power to supervise proceedings in lower federal courts. Nevertheless, the Court did go to great lengths to discuss the fifth amendment privilege as well as the work product rule that arises out of the sixth amendment, and to hold that neither prevented the Court's holding that a trial judge has discretion to compel production of a witness' statement in the files of defense counsel after that witness has testified. Undoubtedly, it will surprise some defense counsel to learn that the growth in discovery practice in criminal cases may become a two-way street.

Another way in which witness statements can be discovered by the defendant is through a "*Brady Motion*,"¹¹⁰ requesting the state to produce all exculpatory evidence in its files. Although there is no longer any doubt that a defendant may obtain discovery through the use of a "*Brady Motion*," there is still some question as to the point in a trial at which the state must produce any exculpatory material in its possession. In *Payne v. State*¹¹¹ the defense contended that it was entitled to receive the exculpatory material *prior to trial*. Admitting that several federal jurisdictions do favor the pre-trial disclosure of exculpatory evidence, the Texas Court of Criminal Appeals adopted the following position:

106. *Gaskin v. State*, 353 S.W.2d 467 (Tex. Crim. App. 1961).

107. *E.g.*, *Hoffman v. State*, 514 S.W.2d 248 (Tex. Crim. App. 1974).

108. 422 U.S. 225 (1975).

109. Of course, the *Nobles* ruling would not apply to written statements in defense counsel's file made by the defendant, himself, because such statements are clearly protected by the fifth and sixth amendments to the United States Constitution. *Id.* at 234.

110. *Brady v. Maryland*, 373 U.S. 83 (1963).

111. 516 S.W.2d 675 (Tex. Crim. App. 1974).

Despite the announced policy in these federal jurisdictions, the legislative policy of Texas is to the contrary. Art. 39.14, V.A.C.C.P., specifically exempts written statements of witnesses from pre-trial discovery. We do not feel compelled to expand upon the rule followed in this state since the procedure of disclosing such evidence at trial affords the appellant an opportunity to request a postponement or continuance which adequately satisfies due process requirements¹¹²

Special problems are created both for the state and defense whenever the entrapment defense is raised. In *United States v. Gomez-Rojas*¹¹³ the United States Court of Appeals for the Fifth Circuit held that if a defendant presents a prima facie case of entrapment, the Government must call its entrapping agent as a witness if he is available. If the agent elects to invoke the fifth amendment, the trial court must determine whether the fifth amendment claim is well-grounded; and if the court so finds, it then must consider whether the defendant should be allowed to place the agent on the stand and force him to plead the fifth amendment in the presence of the jury.

If a defendant presents evidence of entrapment, the state is permitted to introduce evidence of the defendant's bad character and reputation. In *United States v. Fink*¹¹⁴ the court allowed the prosecution to introduce evidence of the defendant's bad reputation, but refused to allow the defendant to cross-examine the reputation witness concerning specific events or facts which led the witness to form his opinion, because: "character reputation is established not by what one knows to be fact concerning another, but by what one has heard in the community about the person in question."¹¹⁵ Consequently, the defendant was unable to impeach the character witness who had testified that talking to confidential informants and examining files in a sheriff's office led him to his conclusion, that the defendant had a reputation in his community as a drug smuggler.

As reflected in *Fink*, prosecutors often present police officers to testify about a defendant's bad character, and these officers frequently base their testimony on information which they have received from reading police files and rap sheets while initially investigating the case. In *Mitchell v. State*¹¹⁶ the Texas Court of Criminal Appeals established the following rules to govern the admissibility of such testimony: First, the court indicated that reputation testimony cannot be based solely on what the witness has heard about the current offense.¹¹⁷ The court next noted that a witness who testifies that the defendant's reputation is good need not have discussed the defendant's reputation with anyone in the community.¹¹⁸ Finally, the court stated that a witness who testifies that a defendant's reputation is bad can base that opinion in part on what he learned from police files, but he must also have discussed the defendant's reputation with someone, because bad

112. *Id.* at 677.

113. 507 F.2d 1213 (5th Cir. 1975).

114. 502 F.2d 1 (5th Cir. 1974).

115. *Id.* at 5, citing *Michelson v. United States*, 335 U.S. 469, 482 (1948).

116. 524 S.W.2d 510 (Tex. Crim. App. 1975).

117. *Id.* at 512.

118. *Id.* at 513.

reputation is based on what the witness has heard, not what he knows.¹¹⁹

In reality, there may be little difference between a witness who bases his testimony solely on what he has read, and a witness who bases testimony on what he has read bolstered by what he has discussed. In fact, in both instances, the witness' opinion may arise solely from the investigation of the case and from access to police records, rather than from access to community opinion. To illustrate this point, consider the following scenario:

Detective (talking to himself out loud): "My goodness, this defendant has a rap sheet as long as your arm!" [At this point the detective is not qualified to testify about the defendant's bad character.]

Detective (talking to the sergeant): "Sergeant, I have just read this defendant's rap sheet, and I think he is a bad actor."

Sergeant (responding): "Yes sir, he is a bad actor all right." [At this point, the detective is qualified to testify about the defendant's bad character.]

One of the most difficult problems in the law governing witnesses was presented in *De Luna v. United States*,¹²⁰ decided in 1962. In *De Luna* two co-defendants were denied severance; and at trial, one of the defendants took the stand and the other did not. During jury summation counsel for the testifying co-defendant made an adverse comment about the other co-defendant's failure to testify, thus bringing about a reversal of the non-testifying defendant's conviction. In the recent case of *United States v. Hodges*¹²¹ defense counsel unsuccessfully attempted to extend the *De Luna* doctrine. In *Hodges* several co-defendants were tried together and some testified at trial and some did not. During jury summation counsel for one of the *testifying* defendants commented favorably about *his* client's willingness to testify. On appeal a defendant who did not testify contended that his fifth amendment privilege had been impinged, citing *De Luna*. The United States Court of Appeals for the Fifth Circuit distinguished the two cases with this comment: "A mere favorable comment upon the fact that one of several co-defendants testified does not involve the same potential for prejudice as an adverse comment by counsel upon the failure to testify of the other co-defendant."¹²²

A different problem related to the *De Luna* doctrine was presented in *United States v. Spinella*.¹²³ In *Spinella* co-defendants were denied severance, tried, and convicted. *Spinella*, one of the defendants, moved for a new trial and attached the affidavit of Buchanan, another co-defendant. Buchanan's affidavit related that he would testify so as to exonerate *Spinella* if a new trial were granted. The trial court granted the motion and a new trial was held, but *Spinella* never called Buchanan to testify, whereupon the trial court vacated its order of granting a new trial and attempted to reinstate the original conviction against *Spinella*. The United States Court of Appeals for the Fifth Circuit held that the trial court had no power to revive

119. *Id.*

120. 308 F.2d 140 (5th Cir. 1962).

121. 502 F.2d 586 (5th Cir. 1974).

122. *Id.* at 587.

123. 506 F.2d 426 (5th Cir. 1975).

Spinella's original conviction, which became a nullity when the new trial was granted. Furthermore, since there was no manifest necessity to abort the second trial, jeopardy had attached to Spinella, and he could not be tried again. In effect, Spinella stood acquitted—a free man. Cases like *Hodges* and *Spinella* raise grave doubts about the frequent practice in federal courts of conducting joint trials for co-defendants. The difficulties presented by joint trials may very well outweigh any advantages or economies gained by avoiding the time and expense of trying each defendant separately.

*White v. State*¹²⁴ is one of the most interesting Texas Court of Criminal Appeals opinions ever written on the subject of witnesses. Prior to trial White filed a motion for a continuance, alleging that a witness who was present at the scene of the alleged crime was unavailable because the police had instructed that witness to leave town. The state did not deny that the witness (who was a police informant) was present at the scene of the alleged crime, nor did the state deny the fact that the police had encouraged the witness to leave town (allegedly for his own safety). Reasoning that this action by the state was tantamount to suppressing material evidence, the court initially reversed and remanded the conviction, stating, *inter alia*:

Just as the State's interest in confidentiality of an informer must yield in a proper case, despite its interest in encouraging and protecting him, so too must the informer be made available in a proper case. Other means are available for the protection of a material witness than sending him out of town and rendering him totally unavailable to either party.¹²⁵

On rehearing the court concluded that the conviction should stand because the defendant had not fully developed the record as to whether the witness actually was beyond the reach of a subpoena. Despite the fact that the result in *White* ultimately turned on the technical state of the record, the court's first opinion should be carefully studied whenever a case presents facts involving an informer who was present at the scene of the alleged crime. Undoubtedly, *White* will precipitate more litigation in the future because of the well-known propensity of police to secrete informers after a case is made.

IX. HOMICIDE

Surprisingly, perhaps, very few significant cases dealing with homicide were decided during the period covered by this *Survey*. In a related area, the court of criminal appeals upheld the definition of "bodily injury" in the new Penal Code¹²⁶ against an attack that it was vague and uncertain.¹²⁷ Three other cases were decided which make the previously obscure distinction between non-criminal accidental homicide and criminal negligent homicide more apparent.

124. 517 S.W.2d 543 (Tex. Crim. App. 1974).

125. *Id.* at 548.

126. "Bodily injury means physical pain, illness, or any impairment of physical condition." TEX. PENAL CODE ANN. § 1.07(a)(7) (1974).

127. *Ramirez v. State*, 518 S.W.2d 546 (Tex. Crim. App. 1973).

In *Esparza v. State*¹²⁸ the defendant held his crying child by the legs and swung him about the room, hoping to make the child dizzy so that he would go to sleep. The defendant stated that he, himself, became dizzy and staggered; whereupon the child's head struck some furniture, resulting in a fatal injury. Defendant testified that he did not intend to injure the child and the court gave a charge on accidental homicide, but refused to charge on negligent homicide. The court of criminal appeals reversed on the grounds that the court should have charged on both accidental and negligent homicide. First, the court declared that the distinction between accidental homicide and negligent homicide is that accidental homicide arises from an act *unintentionally* done, while negligent homicide arises from an act *intentionally* done, although there is no intent to kill. *Esparza* testified about *intentionally* swinging the child and *unintentionally* becoming dizzy and staggering. Therefore, he effectively raised both accidental homicide and negligent homicide and was entitled to have the jury instructed on both.¹²⁹

In *Stiles v. State*¹³⁰ the defendant was charged with and convicted of murder. The trial court refused to instruct the jury on negligent homicide, although it did give an instruction on accidental homicide. Stiles picked his child up to eye level and dropped him on the bed, whereupon the child bounced off the bed, sustaining fatal injuries. Stiles testified that he had no intent to harm the child and that his actions were only intended to make the child stop crying. Reversing the conviction, the court of criminal appeals held that Stiles was entitled to a jury instruction on negligent homicide because his conduct was *intentional*. Furthermore, the court of criminal appeals stated: "When charges on both negligent homicide and accidental homicide are requested and there is doubt in the mind of the court as to which should be submitted the proper course is to submit both issues."¹³¹

The final case in the trio is *McKenzie v. State*.¹³² McKenzie, who was charged with and convicted of murder, testified that his child was killed while he and the child were executing an acrobatic maneuver wherein McKenzie would "flip" the child. The trial court gave a jury instruction on accidental homicide, but refused McKenzie's request for an instruction on negligent homicide. Again, the case was reversed and again the court of criminal appeals stated that whenever the evidence shows an intentional act (in this case, the fact that McKenzie intentionally "flipped" the child) a charge on negligent homicide must be given.

128. 520 S.W.2d 891 (Tex. Crim. App. 1975).

129. If the facts raise the issue of negligent homicide, then a charge on that subject, if properly requested, must be given. If the accused requests charges on both accident and negligent homicide, and there is any doubt in the court's mind as to which issue should be submitted, the accused should be given the benefit of that doubt with charges on both being submitted. . . . While ordinarily a clear defense of accident will not raise the issue of negligent homicide, this will not invariably be the case. When the issue is raised, as it was here, the accused is entitled to benefit from a charge on the subject.

Id. at 893.

130. 520 S.W.2d 894 (Tex. Crim. App. 1975).

131. *Id.* at 899.

132. 521 S.W.2d 637 (Tex. Crim. App. 1975).

X. SENTENCING

Sentencing, as a legal process, is attracting more and more attention in the courts. As the sentencing process has come under increased judicial scrutiny, once routine procedures are being questioned and abandoned. Consequently, there appears to be some confusion between new legal sentencing procedures and old illegal ones.

Resentencing, that is, the imposition of a harsher second sentence, is a constant matter of controversy. In *Ward v. United States*¹³³ a trial judge agreed orally to reduce the defendant's sentence, but after the defendant was incarcerated the judge received new sentencing information and changed his mind. The Fifth Circuit Court of Appeals held the judge to his original agreement, pointing out that there is a kind of jeopardy which attaches to a sentence after a defendant is incarcerated, and under this principle a judge cannot impose a harsher sentence after incarceration. Although the judge's pronouncement of sentence was oral in this case, nevertheless, it became final once the defendant was incarcerated.

Appeals from the imposition of sentences occur frequently when a second, harsher sentence is imposed after a defendant has prosecuted an appeal resulting in a reversal of his first conviction. In *Ex parte Bowman*¹³⁴ the defendant's first conviction and seventeen-year sentence was reversed. On retrial the defendant was reconvicted and the judge imposed a twenty-five-year sentence. Increasing the sentence was justified by the judge on the grounds that additional information about the severity of the crime had been adduced at the second trial. On appeal the imposition of the second sentence was reversed, because new information cannot be used to justify a harsher sentence unless the new information concerns conduct that occurred after the original conviction.¹³⁵ A different result was reached in *Llerena v. United States*¹³⁶ where a second, harsher sentence was imposed because the first sentence did not conform to the penalty provisions of the applicable statute, *i.e.*, the first sentence was illegal. In that instance the court has "the duty to correct the sentence so as to comply with the statute even though service of the sentence first imposed has begun, and though the corrected sentence is required to be more onerous."¹³⁷

Routinely, a defendant's past criminal record is considered in setting his sentence.¹³⁸ Frequently, however, questions about the validity of the past criminal record are raised. *Thomas v. Savage*¹³⁹ is a case that may answer some of the questions involving the introduction of prior convictions at a sentencing hearing. Thomas appealed his ninety-nine-year sentence for robbery on the grounds that of the five prior convictions introduced at his sentencing hearing, one conviction was obtained at a time when Thomas was

133. 508 F.2d 664 (5th Cir. 1975).

134. 523 S.W.2d 677 (Tex. Crim. App. 1975).

135. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

136. 508 F.2d 78 (5th Cir. 1975).

137. *Id.* at 81.

138. See generally TEX. CODE CRIM. PROC. ANN. art. 37.07 (Supp. 1975-76).

139. 513 F.2d 536 (5th Cir. 1975).

indigent and without counsel. Convinced that the one prior conviction out of five prior convictions had no effect upon the sentence imposed for the robbery, the Fifth Circuit Court of Appeals held the error to be harmless. A similar result was reached in *Barnes v. Estelle*,¹⁴⁰ where eight prior convictions were introduced at sentencing, two of which resulted from proceedings in which the defendant was not represented by counsel. The sentencing judge in *Barnes* advised the appellate court that he would have imposed the same sentence without the two convictions in question and, consequently, the error of using the convictions was held to be harmless.

Defense attorneys can only speculate over the amount of influence a prosecutor has on the sentences imposed by a judge. Certainly, there is reason to assume that some prosecutors discuss potential sentences with the judge privately and even provide the judge with information outside the record.¹⁴¹ In *United States v. Huff*¹⁴² the defendant discovered a private memorandum from the prosecutor to the sentencing judge which contained numerous statements of "facts" dehors the record (e.g., Huff "hung out with well-known pushers"). The United States Court of Appeals for the Fifth Circuit remanded the case for resentencing, stating, *inter alia*: "The memorandum went beyond the record, and more importantly, the manner of its submission deprived the defendant of his fundamental due process right to hear and rebut all that the prosecution has to say against him bearing on the judgment of sentence."¹⁴³ Note that this ruling seems to be of constitutional dimension. If so, attorneys for defendants in state courts might be well-advised to be more alert for *ex parte*, *sub rosa* communications between the prosecutor and the judge, because such communications may provide grounds for appeal to federal court. A somewhat different problem was presented in *United States v. Rogers*.¹⁴⁴ There the sentencing judge imposed a harsh sentence based, in part, on reports from the prosecutor that the convicted defendant was refusing to name other participants in the crime. Contrary to some other federal circuits, the Fifth Circuit held that a defendant has a fifth amendment right not to discuss his crime, and a harsh sentence may not be imposed to induce a defendant to waive that right.

More litigation has occurred over guilty pleas in the past year than over any other aspect of sentencing. The standard for mental competency to enter a guilty plea has never been precisely determined, and in *Malinauskas v. United States*¹⁴⁵ the defendant contended that the standard for mental competency to enter a guilty plea should be higher than the competency standard for being tried. The Fifth Circuit Court of Appeals disagreed, holding that the standard for judging competency at the time of trial and at the time of entering a guilty plea are the same.

In a series of cases the Texas Court of Criminal Appeals made substantial changes in the law relating to the entry of guilty pleas. Subsequently, the

140. 518 F.2d 182 (5th Cir. 1975).

141. *Ex parte Reynolds*, 462 S.W.2d 605 (Tex. Crim. App. 1970).

142. 512 F.2d 66 (5th Cir. 1975).

143. *Id.* at 71.

144. 504 F.2d 1079 (5th Cir. 1974).

145. 505 F.2d 649 (5th Cir. 1974).

legislature amended article 26.13 of the Texas Code of Criminal Procedure, which requires the judge to make the defendant aware of the consequences of his plea, to bring it more in line with the recent pronouncements of the court of criminal appeals. *Guster v. State*¹⁴⁶ is the most significant of the above-mentioned cases. In *Guster* the Texas Court of Criminal Appeals overruled a number of prior cases and held that "where there is no showing that a defendant was prejudiced or injured by the failure of the trial court to fully comply with article 26.13, supra, and where no objection is made to such failure at the time the plea is accepted or by motion for new trial, that failure to fully comply will not constitute reversible error on appeal."¹⁴⁷

As mentioned above, article 26.13 of the Code of Criminal Procedure has been amended to reflect the holding in *Guster*. Article 26.13 now provides, *inter alia*, that "[i]n admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court."¹⁴⁸ Perhaps *Walker v. State*¹⁴⁹ provides some insight as to how the Texas Court of Criminal Appeals will interpret the phrase "substantial compliance" contained in the amended statute. Walker entered a guilty plea and the judge gave him absolutely no admonishment about the punishment range. In the eyes of the court of criminal appeals this failure amounted to a total disregard of article 26.13, and therefore, the conviction was reversed. Perhaps the most that can be said at this point is that admonishments will not be as significant a part of guilty plea procedure as they have been in the past.

Admonishments are not the only trouble spot in the guilty plea process. Even more problems are raised by the proposition that the plea must be voluntary. Defendants routinely testify that they are pleading guilty voluntarily, when in fact, they are pleading guilty because various promises have been made to them. What happens if these promises are not fulfilled? Should the defendant be allowed to withdraw his plea on the grounds that it was not voluntarily made?¹⁵⁰ In *Walters v. Harris*¹⁵¹ the Fourth Circuit Court of Appeals characterized the problem in the following manner: "Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea. It is well-known that a defendant will sometimes deny the existence of a bargain that has in fact occurred, out of fear that a truthful response would jeopardize the bargain."¹⁵² Unlike the sympathetic attitude expressed by the Fourth Circuit in *Walters*, the Fifth Circuit and the Texas Court of Criminal Appeals

146. 522 S.W.2d 494 (Tex. Crim. App. 1975).

147. *Id.* at 495.

148. TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Supp. 1975-76). See generally Cogan, *Entry of the Plea of Guilty in Texas: Requirements and Post-Conviction Review*, 29 Sw. L.J. 714 (1975).

149. 524 S.W.2d 712 (Tex. Crim. App. 1975).

150. In *Bouchillon v. Estelle*, 507 F.2d 622 (5th Cir. 1975), the court pointed out that *Santobello v. New York*, 404 U.S. 257 (1971), does not require that a defendant be allowed to withdraw his plea.

151. 460 F.2d 988 (4th Cir. 1972).

152. *Id.* at 993. See also *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975).

have adopted a different approach. In *United States v. Barrett*¹⁵³ the Fifth Circuit refused to hear a defendant's contention that he was lying when he stated that he was not coerced, and that his plea was knowing and voluntary. Instead, the Fifth Circuit held that if a plea appears *from the record* to be voluntary, a defendant will not later be allowed to contend that he was lying.¹⁵⁴ A similar position was taken by the Texas Court of Criminal Appeals recently in *Williams v. State*,¹⁵⁵ wherein the court held that the written waiver form executed by the defendant at the time of his plea could be relied upon to prove that the plea was freely and voluntarily made. In the language of the court of criminal appeals:

The Supreme Court's requirement for determination of voluntariness is the consideration of the entire record. The review of the voluntariness of the guilty plea should not be based solely on questions and answers in the statement of facts, but on the record as a whole.

. . . .

When a defendant pleads guilty he surrenders many valuable rights. We have held, however, that he must affirmatively waive trial by jury, or the judge must empanel a jury. For that waiver we accept a written statement signed by the defendant. Why then can't we accept a written statement from the defendant saying that he was uninfluenced by fear, persuasion or delusive hope of pardon as evidence that it plainly appeared to the trial judge that the appellant was uninfluenced by such factors?¹⁵⁶

Of course there are better ways to insure the voluntariness of a guilty plea than relying upon court records which contain pro forma waivers as in the *Williams* case. For example, in *Galvan v. State*¹⁵⁷ the trial judge explained to the defendant in detail that he was not bound by the attorney's recommendation of punishment, and that although he was aware that the defendant had applied for probation, he was not obligated to grant probation. The Texas Court of Criminal Appeals characterized this as "highly desirable practice" and rejected the defendant's contention that it was incumbent on the court to go further to determine the voluntariness of the plea. Consistent with that holding, the recent amendment of article 26.13 of the Texas Code of Criminal Procedure requires judges to admonish a defendant entering a plea of "the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court."¹⁵⁸

Seemingly, the Fifth Circuit has devised an even better solution to the problem. That court now requires that whenever a defendant enters a plea of guilty in a federal district court he must be placed under oath and admonished that plea agreements are permissible and that the defendant and all lawyers have a duty to disclose the existence of any such agreements.¹⁵⁹

153. 514 F.2d 1241 (5th Cir. 1975).

154. *Id.* at 1243; *accord*, *Johnson v. Massey*, 516 F.2d 1001 (5th Cir. 1975); *cf.* *Blackledge v. Perry*, 417 U.S. 21 (1974).

155. 522 S.W.2d 483 (Tex. Crim. App. 1975).

156. *Id.* at 485-86.

157. 525 S.W.2d 24 (Tex. Crim. App. 1975).

158. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Supp. 1975-76).

159. *See generally* *United States v. Maggio*, 514 F.2d 80 (5th Cir. 1975).

XI. POST-CONVICTION RELIEF

One frequently asserted ground for requesting post-conviction relief is that the grand jury which indicted the defendant was improperly formed. To some extent, that tactic was foreclosed in 1973 by the United States Supreme Court's decision in *Tollett v. Henderson*,¹⁶⁰ where the Court held that a guilty plea cuts off the defendant's right to complain subsequently about jurisdictional defects such as an indictment returned by an improperly formed grand jury. However, in *Tollett* the Court expressly reserved the question of "whether the fact that the grand jury was improperly formed might be raised as a basis for obtaining a federal writ of habeas corpus after a plea of not guilty and trial by jury."¹⁶¹ Recently, two different panels of the United States Court of Appeals for the Fifth Circuit examined the question reserved in *Tollett*, only to reach differing conclusions. In *Eggleston v. Estelle*¹⁶² the court remanded to the district court to determine whether under Texas law the defendant had waived his right to challenge the grand jury by not seeking to do so in advance of trial as required by article 19.27 of the Texas Code of Criminal Procedure. In *Dumont v. Estelle*¹⁶³ the court was not so circumspect, holding that under Texas law the right to challenge a grand jury is, indeed, lost if the challenge is not made prior to trial. However, the *Dumont* opinion also examines the question of whether waiver under Texas law constitutes a bar to relief by federal habeas corpus. According to the court, relief by federal habeas corpus is available even if the point is waived under Texas law, but only if the defendant can show meritorious "cause" by showing actual prejudice. No actual prejudice was shown in *Dumont* and the writ was, therefore, dismissed for failure to comply with the Texas law.

Ineffective assistance of counsel is another frequently asserted ground for seeking post-conviction relief in federal court. Where the allegedly ineffective counsel was privately retained there has been considerable conflict among the appellate decisions. One line of decisions reasoned that no state action was involved if privately retained counsel was ineffective, hence there was no denial of due process.¹⁶⁴ Contrary cases held that the standard of effectiveness was the same for both privately retained and court appointed counsel.¹⁶⁵ A recent en banc decision by the Fifth Circuit Court of Appeals, *Fitzgerald v. Estelle*,¹⁶⁶ attempts to settle the controversy. According to the majority opinion in *Fitzgerald* the test for competency of counsel is:

[W]henver the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process

160. 411 U.S. 258 (1973).

161. *Id.* at 260 n.1. It seems curious that the Court would reserve this question in light of its holding in *Davis v. United States*, 411 U.S. 233 (1973), to the effect that a defendant in a federal court must conform with the rules and raise the issue of an improperly formed grand jury prior to trial, and that failure to do so waives the issue.

162. 513 F.2d 758 (5th Cir. 1975).

163. 513 F.2d 793 (5th Cir. 1975).

164. *E.g.*, *Howard v. Beto*, 375 F.2d 441 (5th Cir. 1967).

165. *E.g.*, *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966).

166. 505 F.2d 1334 (5th Cir. 1974).

[has] been violated notwithstanding any kind of specific involvement by a particular state official. If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown.¹⁶⁷

Just how a judge or prosecutor is supposed to "correct" the situation when a defendant's retained counsel is incompetent was not clarified by the court. If a judge declares a mistrial on these grounds, the doctrine of jeopardy may prevent another trial. Furthermore, any interference by the judge or the prosecutor in the attorney-client relationship could later be construed as an interference with the sixth amendment itself.

A provocative issue was raised by the Director of Corrections for Florida who, in *In re Wainwright*¹⁶⁸ complained of a United States Magistrate who released a Florida prisoner on bond while that prisoner's habeas corpus petition worked its way through the federal courts. The Fifth Circuit court confirmed the proposition that a federal district court (and consequently the federal magistrate) has the inherent power to release a state prisoner on bond pending hearing on habeas corpus. Although this decision is undoubtedly a correct one, this power of federal judges to free state prisoners on bond previously has been largely hidden or ignored. One may only speculate whether this will remain the case once the *Wainwright* decision becomes common knowledge among jail-house lawyers.

XII. PROBATION AND REVOCATION

Statutory amendments and recent court opinions relating to probation are making the law in this area absurdly arcane. For example, the well established rule in Texas had been that when a jury assessed a fine and a prison term in a felony and then recommended probation, *both* the fine and the prison term were automatically suspended, and the court could not require that the fine be paid as a condition of the probation.¹⁶⁹ Now section 3a of article 42.12 of the Texas Code of Criminal Procedure has been amended to provide, *inter alia*, that "When the jury recommends probation, it may also assess a fine applicable to the offense for which the defendant was convicted."¹⁷⁰ Thus, although the language is not as explicit as it could be, the legislature appears to have given the jury the power in a felony case to suspend both fine and punishment, or to impose a fine and suspend only punishment. However, for some inexplicable reason the legislature did not make corresponding amendments in article 42.13 of the Texas Code of Criminal Procedure which covers misdemeanor probation. Therefore, *Faugh v. State*,¹⁷¹ holding that a defendant on probation cannot be ordered

167. *Id.* at 1338.

168. 518 F.2d 173 (5th Cir. 1975).

169. *E.g.*, *Shappley v. State*, 520 S.W.2d 766 (Tex. Crim. App. 1974).

170. Ch. 110, § 1, [1975] Tex. Laws 264.

171. 481 S.W.2d 412 (Tex. Crim. App. 1972).

to pay part of his fine as a condition of probation, stands as the law in misdemeanor cases. This inexplicable difference between probation in felony cases and probation in misdemeanor cases is carried a step further by the addition of section 6b to article 42.12 of the Texas Code of Criminal Procedure.¹⁷² New section 6b gives a court in a felony case the power to probate a sentence, but as a condition of that probation the court may require the defendant to "submit to a period of detention in a penal institution or to serve a term of imprisonment not to exceed 30 days or 1/3 of the sentence whichever is lesser."¹⁷³ Once again, however, the result is different for misdemeanors. In the recent case of *Lee v. State*¹⁷⁴ it was held that a trial court is without authority to probate a portion of the jail sentence and order confinement as to the remainder following a misdemeanor conviction.

Another legislative change that adds to the confusion in this area is the addition of section 3d to article 42.12 of the Texas Code of Criminal Procedure.¹⁷⁵ Curiously, new section 3d is limited to pleas of guilty or *nolo contendere* before the court in a felony case. In such an event the court may "defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms as the court may prescribe"¹⁷⁶ If the defendant violates a reasonable term of his probation the court may, for the first time, enter an adjudication of guilt for the original offense, whereupon "all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation and defendant's appeal continue as if the adjudication of guilt had not been deferred."¹⁷⁷

This statute raises a number of questions. For example, does limiting the favorable provisions of this statute to pleas of guilty before the court violate the doctrine of *United States v. Jackson*,¹⁷⁸ wherein the United States Supreme Court struck down a statute permitting imposition of the death penalty only if recommended by a jury, because such a scheme discouraged the defendant's exercise of his right to seek a jury trial? Also, if a defendant accepts the benefits of this statute and then violates a condition of his probation, may he then ask for a jury to assess his punishment? May he seek probation *from the jury* under article 42.12, section 3a?

Another amendment to the statutes allows a defendant who is in jail on a probation violation charge to petition the court and to receive a hearing within twenty days.¹⁷⁹ If alleged probation violators learn of this new right to a "speedy trial" they will be able to protect themselves to some extent from the abuse of being jailed and held for unreasonable periods of time while awaiting a hearing on the revocation of their probation. However, we

172. Ch. 341, § 4, [1975] Tex. Laws 909-10.

173. *Id.*

174. 516 S.W.2d 151 (Tex. Crim. App. 1974).

175. Ch. 231, § 1, [1975] Tex. Laws 572-73.

176. *Id.*

177. *Id.*

178. 390 U.S. 570 (1968).

179. Ch. 467, § 1, [1975] Tex. Laws 1243-44, amending TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8(a) (1966).

must assume that, on the whole, incarcerated persons will remain ignorant of their rights, and since this new statute requires a motion from the defendant before the twenty days begins to run, little real change can be expected.

One statutory amendment does have a beneficial effect on misdemeanor probation. It allows a court to grant probation in a misdemeanor case regardless of the fact that the defendant has been on probation within the last five years, provided the prior probation was not for a "like offense."¹⁸⁰

Unfortunately, the new cases in the area of probation are comparable in degree of complexity to the legislation discussed above. For example, the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit apparently have differing viewpoints concerning the quantum of proof necessary to revoke probation. In *United States v. Francischine*¹⁸¹ the Fifth Circuit declared: "All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation."¹⁸² On the other hand, in *Scamardo v. State*¹⁸³ the Texas Court of Criminal Appeals, after admitting that "[t]his court has not delineated definitively the quantum of evidence necessary to support an order of revocation of probation,"¹⁸⁴ chose to hold that "an order revoking probation must be supported by a preponderance of the evidence; in other words, that greater weight of the creditable evidence which would create a reasonable belief that the defendant has violated a condition of his probation."¹⁸⁵

Differences between the federal approach and the Texas approach also extend to the question of whether or not the validity of the underlying conviction can be raised at a hearing to revoke probation. In *United States v. Francischine*¹⁸⁶ the defendant contended that the validity of the underlying conviction is jurisdictional and may be raised at any time in any proceeding, including a hearing to revoke probation. But the Fifth Circuit ruled that the validity of a conviction should play no part in determining whether an alleged probation violation should result in the revocation of a probated prison term, until that conviction is judicially nullified.¹⁸⁷ The court reasoned that "the sentencing court and those charged with the control and custody of a convicted prisoner should remain free to supervise the terms of the sentence without being baggaged with concern as to the validity of the conviction."¹⁸⁸

On the other hand, in *Standley v. State*¹⁸⁹ the Texas court reaffirmed its prior position that a conviction which is fundamentally defective can, indeed, be challenged for the first time at the probation revocation proceeding.

180. Ch. 341, § 5, [1975] Tex. Laws 910, amending TEX. CODE CRIM. PROC. ANN. art. 42.13, § 3 (1966).

181. 512 F.2d 827 (5th Cir. 1975).

182. *Id.* at 829.

183. 517 S.W.2d 293 (Tex. Crim. App. 1975).

184. *Id.* at 297.

185. *Id.* at 298.

186. 512 F.2d 827 (5th Cir. 1975).

187. *Id.* at 828.

188. *Id.* at 829.

189. 517 S.W.2d 538 (Tex. Crim. App. 1975). See also *Thomas v. State*, 525 S.W.2d 172 (Tex. Crim. App. 1975).

Perhaps the Texas viewpoint is more sensible, since reviewing the validity of the underlying conviction along with the alleged violation of probation maximizes judicial resources by consolidating the two cases.

In *Wright v. State*¹⁹⁰ the majority of the Texas Court of Criminal Appeals apparently held that a violation of probation may be established merely by introducing documentary evidence of a conviction for another offense during the probationary period, without the necessity of going forward to prove that the person convicted and the probationer are one and the same. However, there is a strong dissent in *Wright* by Judge Onion, joined by Judge Roberts, and *Wright* may be in for further clarification as similar cases are appealed. Another issue of some interest was raised in *Cotton v. State*,¹⁹¹ where the court held that probation can be revoked upon proof of the commission of another offense, even though prosecution for that offense is barred by limitations. Although there is no necessity for a conviction of the subsequent offense prior to revoking probation,¹⁹² the holding in *Cotton* seems unreasonable if statutes of limitations are designed in part to protect courts from stale, and thus unreliable, proof. In effect, the court is saying that probation can be revoked on the basis of proof too stale to obtain a conviction in the first instance.

Two other cases are worthy of mention. In *Franklin v. State*¹⁹³ the Texas Court of Criminal Appeals held that a defendant whose conviction in case one is on appeal is eligible for probation in case two; but a defendant whose probation revocation is on appeal is not eligible for probation in another case. In *Dorsche v. State*¹⁹⁴ the court of criminal appeals in a footnote indicated that imposition of a curfew would be a reasonable condition of probation in some cases.

XIII. JUVENILE DELINQUENCY

Probably the most significant recent developments in the law of juvenile delinquency are the amendments to the Texas Juvenile Code passed by the Sixty-Fourth Legislature.¹⁹⁵ Of these, the most dramatic is the amendment of title III, section 51.09, which deals with the waiver of rights by juveniles. The new amendment to section 51.09 deals with the waiver of the fifth amendment privilege against self-incrimination (*i.e.*, confessions given by a juvenile as a result of custodial interrogation). Apparently, the legislature intended to make it legally possible for a child—without the benefit of counsel—to waive his fifth amendment privileges *provided*: first, that certain warnings detailed in the amendment are given to the child by a magistrate; second, that the confession is in writing;¹⁹⁶ and third, that the

190. 523 S.W.2d 704 (Tex. Crim. App. 1975).

191. 523 S.W.2d 673 (Tex. Crim. App. 1975).

192. *E.g.*, *Farmer v. State*, 475 S.W.2d 753 (Tex. Crim. App. 1972).

193. 523 S.W.2d 947 (Tex. Crim. App. 1975).

194. 514 S.W.2d 755 (Tex. Crim. App. 1974).

195. TEX. FAM. CODE ANN. §§ 51.01-56.02 (1974).

196. Paragraph (b)(2) was added to section 51.09 in an apparent attempt to allow oral confessions in juvenile court if the confession leads to evidence, in a fashion similar to TEX. CODE CRIM. PROC. ANN. art. 38.22, § 1(e) (Supp. 1975-76). Read literally, paragraph (b)(2) of section 51.09 would allow such an oral confession even though it

confession is signed outside the presence of any law enforcement officer and in the presence of a magistrate, who must certify that the child made an intelligent waiver.

Although the legislative intent of this amendment is obvious, the language of the amendment leads to the conclusion that it may be an unconstitutional violation of the principles espoused in *Miranda v. Arizona*.¹⁹⁷ Read together, paragraphs (b)(1)(A), (B), and (C) of the amendment may not have the effect of fully and adequately advising a child of his right to have an attorney appointed if he cannot afford one.¹⁹⁸ Advice about the right to a court-appointed attorney has been held by both Texas and federal courts to be an absolute prerequisite to the validity of a confession.¹⁹⁹ Accordingly, even if the procedure set forth in the amendment to section 51.09 is meticulously followed, there will remain serious questions about the admissibility of the confession.

Whenever a confession by the juvenile is offered, trial courts would be well advised to follow the procedure outlined in *Sims v. Georgia*,²⁰⁰ and enter a specific finding of voluntariness into the record. Apparently, the issue of voluntariness will have to be decided on a case-by-case basis.²⁰¹ One can speculate that the presence or absence of parents at the time the confession is given will be very significant, if not crucial.²⁰² Lawyers representing a child should pay close attention to the legality of the arrest leading to the confession, since an illegal arrest may taint a confession, even if proper *Miranda* warnings are given.²⁰³ In particular, lawyers representing children should be familiar with sections 52.01 and 52.02 of the Juvenile Code which establish rigorous guidelines for the arrest of children and their disposition after arrest. It should be noted at this point, that the Texas Court of Criminal Appeals has made it clear that the admissibility of a juvenile's confession will be tested by the special standards of the Juvenile Code, even though the juvenile has been certified and is on trial as an adult.²⁰⁴

was not preceded by *Miranda* warnings. Obviously, however, any confession (written or oral) taken during custodial interrogation must be preceded by *Miranda* warnings. See generally Steele, *Developments in the Law of Interrogations and Confessions*, 1 NAT'L J. CRIM. DEFENSE 111 (1975).

197. 384 U.S. 436 (1966).

198. (A) he may remain silent and not make any statement at all and that any statement he makes may be used in evidence against him;

(B) he has the right to have an attorney present to advise him either prior to any questioning or during the questioning;

(C) if he is unable to employ an attorney, he has the right to have an attorney to counsel with him prior to or during any interviews with peace officers or attorneys representing the state;

Ch. 693, § 9, [1975] Tex. Laws 2154.

199. *United States v. Cassell*, 452 F.2d 533 (7th Cir. 1971); *Burns v. State*, 486 S.W.2d 310 (Tex. Crim. App. 1972).

200. 385 U.S. 538 (1967); *accord Husk v. State*, 305 So. 2d 19 (Fla. Dist. Ct. App. 1974).

201. *Haley v. Ohio*, 332 U.S. 596 (1948), is a bench mark for standards of voluntariness relating to a juvenile's confession.

202. See *Theriault v. State*, 66 Wis. 2d 33, 223 N.W.2d 850 (1974), holding that confession by a juvenile must be considered under the prevailing test of totality of the circumstances, with the absence of a parent or guardian as only one factor to be taken into consideration.

203. See notes 67-86 *supra* and accompanying text.

204. *Lovell v. State*, 525 S.W.2d 511 (Tex. Crim. App. 1975).

The Sixty-Fourth Legislature made numerous other amendments to title III of the Family Code, but only those most significant to practicing lawyers will be noted here. The definition of "delinquent conduct" in section 51.03(a) and the definition of "conduct indicating a need for supervision" in section 51.03(b) have both been broadened. "Delinquent conduct" now includes violation of a "reasonable and lawful order of a juvenile court entered under section 54.04 or 54.05 of this code" (probation order).²⁰⁵ "Conduct indicating a need for supervision" now includes violating the penal laws prohibiting driving while under the influence of intoxicating substances.²⁰⁶ In effect, these definitional changes, plus the repeal of section 54.04(g),²⁰⁷ make it possible to commit a child to the Texas Youth Council for violating a probation order that arose from an earlier finding of conduct in need of supervision (e.g., runaway). However, the legislature also provided by amendment that a child committed to the Texas Youth Council because he violated a probation order that arose from an earlier finding of conduct in need of supervision cannot be institutionalized with "true" delinquents.²⁰⁸

The amendments reestablish the power of the juvenile courts to suspend an order committing a child to the Texas Youth Council.²⁰⁹ Experience in other states indicates that the practice of suspending a commitment order leads to abuses. Specifically, many judges will suspend an order on the condition that the child behave in such a fashion as to avoid any negative report by the police or by the probation department. Subsequently, if a negative report is received the judge revokes the suspension and the child is committed without any further hearing. In essence, then, the child is committed because of the conduct alleged in the subsequent report—conduct about which no hearing is ever held. Obviously, such a practice violates the due process of law.²¹⁰ Hopefully, Texas judges will not engage in this abusive use of their power to suspend commitment orders.

Provisions for sealing and expunging files and records in juvenile matters have been further liberalized by an amendment giving a person whose files and records have been sealed the right to deny his past juvenile record in "any proceeding or in any application for employment, information, or licensing."²¹¹ Hopefully, the legislature's willingness to adopt such a liberal stance for the benefit of juvenile offenders portends parallel statutory relief for adult offenders. At present, however, Texas remains among a shrinking number of states without any statutory provisions for removal of an adult criminal record.²¹²

On February 18, 1975, the United States Supreme Court decided the case of *Gerstein v. Pugh*.²¹³ The essence of that opinion is contained in the

205. Ch. 693, § 2, [1975] Tex. Laws 2153.

206. *Id.* § 3, at 2153.

207. *Id.* § 23, at 2158.

208. *Id.* § 25, at 2159.

209. *Id.*

210. *In re C.R.N.*, 501 S.W.2d 545 (Mo. Ct. App. 1973).

211. Ch. 693, § 13, [1975] Tex. Laws 2156.

212. See generally, Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J. LAW REFORM 32 (1972).

213. 420 U.S. 103 (1975).

following quote from the case: "Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."²¹⁴ Consequently, it is now clearly the law of the land that a person cannot be jailed unless a magistrate finds that there is probable cause for doing so. How do the provisions of the Texas Juvenile Code square with the doctrine announced in *Gerstein*? The answer to this question is that the Texas Juvenile Code violates the *Gerstein* doctrine.²¹⁵ Section 53.01 of the Juvenile Code provides that probable cause shall be determined by "the intake officer, probation officer, or other person authorized by the court." Obviously, that provision violates *Gerstein's* command that probable cause be determined by a magistrate. According to the Texas Juvenile Code, a detention hearing for all juveniles confined must be held not later than the "second working day after [the child] is taken into custody."²¹⁶ Unfortunately, however, section 54.01 which describes the procedure at the detention hearing does not require the judge to determine probable cause, and, in fact, many judges around the state do not determine probable cause at a detention hearing. That precise issue was litigated at a constitutional level in a Florida federal district court case styled *Moss v. Weaver*.²¹⁷ There the state argued that the only proper issue at a detention hearing was the welfare of the child—not probable cause—and that even an innocent child might be detained if detention were necessary for his welfare. The court responded that "[t]his concern for the welfare of the juvenile is laudable, but detention absent a probable cause showing is not constitutional where the juvenile was taken into custody by an arm of the government for an alleged violation of law."²¹⁸

All codes contain provisions allowing prosecution of juveniles as adults under certain circumstances. The Texas provisions are typical, allowing juveniles between fifteen and seventeen years of age, who are accused of a felony, to be "transferred," after a hearing, from juvenile court to criminal district court for prosecution as an adult.²¹⁹ According to the Code, six different factors must be considered by a judge making a transfer decision: (1) whether the offense was against property or person, (2) whether the offense was aggressive and premeditated, (3) whether there is evidence to justify an indictment, (4) the sophistication and maturity of the child, (5) the child's record, and (6) the adequacy of juvenile services and facilities to rehabilitate the child and to protect the public.²²⁰ Upon transfer the court must state "in the order its reasons for waiver."²²¹

214. *Id.* at 114.

215. One Texas case has raised the constitutionality of holding a child in detention without a probable cause hearing, but the issue was declared moot on appeal because by the time the appeal was heard the child had been certified as an adult, *Stephenson v. State*, 515 S.W.2d 362 (Tex. Civ. App.—Dallas 1974, writ dismissed).

216. Ch. 693, § 14, [1975] Tex. Laws 2156.

217. 383 F. Supp. 130 (S.D. Fla. 1974).

218. *Id.* at 133.

219. TEX. FAM. CODE ANN. § 54.02 (1974).

220. *Id.* § 54.02(f).

221. *Id.* § 54.02(h). This theme of clearly articulating the reasons for a court order is repeated throughout the Code, e.g., *id.* § 54.05(i) Hearing to Modify Disposition: "The court shall specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child."

In the recent case of *In re J.R.C.* a juvenile court entered a transfer order which may be viewed as typical: "[T]he Court after diagnostic study, social evaluation and full investigation, is of the opinion that it is contrary to the best interest of said child and to the public to retain jurisdiction."²²² On appeal the transfer was reversed because: (1) the court did not fulfill its mandatory duty to consider and file findings concerning *all six* factors listed in section 54.02(f); and (2) the court failed to set forth the *reasons* (*i.e.*, motive) for the transfer as required by section 54.02(h). The *J.R.C.* opinion should have a very salutary effect on the administration of juvenile justice. It will facilitate the process of appellate review by forcing trial judges to reveal their thought processes completely in written orders. Furthermore, *J.R.C.* forces a judge to consider all six of the criteria for transfer, thus militating against any tendency to transfer a child simply because of hostile attitudes toward him among juvenile court personnel.

Precisely because *J.R.C.* forces the judge to make a thorough and thoughtful investigation of all the facts at a transfer hearing, another difficult problem arises. Suppose a judge hears all of the testimony (including testimony on the issue of whether there is sufficient evidence to justify an indictment) and then decides *not* to transfer the child. Is that judge legally capable of giving unbiased consideration to the same evidence when the case comes before him on the merits?²²³ Recently, the United States Supreme Court raised that very issue, but unfortunately did not decide it.²²⁴

Another issue in connection with transfer hearings arises out of the fact that filing an appeal of a transfer order does not suspend the order.²²⁵ What result, then, if the person appealing is prosecuted as an adult while the appeal of the transfer order is pending? That problem has been discussed by the Texarkana court of civil appeals in *In re J.R.C.*²²⁶ Due to the significance of the decision, and because the opinion is unpublished, an edited version is set forth below:

PER CURIAM

This is an original application for a Writ of Prohibition to prevent the District Court of Harrison County, Texas, from proceeding to try relator on a criminal charge of murder.

Relator is a sixteen year old male. He allegedly committed an act of murder when he was fifteen years of age. The District Attorney of Harrison County, Texas, petitioned the Juvenile Court of that county

222. 522 S.W.2d 579, 580 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.).

223. The question of how much evidence of the alleged criminal transaction should be introduced at a transfer hearing was discussed by the Supreme Court of the United States in *Breed v. Jones*, 421 U.S. 519, 536 n.16, 537 n.17, 538 n.18 (1975), holding that the criteria and evidence required for transfer were not matters of constitutional dimension, and should be left to the states.

224. *Breed v. Jones*, 421 U.S. 519, 536-37 (1975) (emphasis added), states that: To the extent that evidence concerning the alleged offense is considered relevant, it may be that, in these cases where transfer is considered and rejected, some added burden will be imposed on the juvenile courts by reason of duplicative proceedings. *Finally, the nature of the evidence considered at a transfer hearing may in some States require that, if transfer is rejected, a different judge preside at the adjudicatory hearing.*

225. See TEX. FAM. CODE ANN. §§ 56.01(c)(1), (g) (1974).

226. No. 8257 (Tex. Civ. App.—Texarkana, Sept. 24, 1974).

to waive its jurisdiction over relator as a juvenile, . . . the Juvenile Court entered its certification order waiving jurisdiction and transferring the relator to the District Court.

. . . .

We are required to decide if the District Court should be prohibited from proceeding to a trial of relator until the appeal of the certification order is determined on the merits.

Although Sec. 56.01g provides that the appeal does not suspend the order of the Juvenile Court, it is clear that if our appellate jurisdiction is to have any effect, all criminal proceedings which might be conducted during the pendency of the appeal will be without force or effect should the appeal result in a determination that the certification order was invalid.

. . . .

A Writ of Prohibition will properly issue not only to prohibit a court from the exercise of unauthorized jurisdiction, but also on equitable principles and to prevent interference with the efficient enforcement of an appellate court judgment. 73 C.J.S. Prohibition, Sec. 8; *City of Dallas v. Dixon*, 365 S.W.2d 919 (Tex. 1963); *Bray v. Schultz*, 376 S.W.2d 82 (Tex. Civ. App.—Amarillo 1963, no writ); *City of Palestine v. City of Houston*, 262 S.W. 215 (Tex. Civ. App.—Texarkana 1924, no writ); *Cattlemen's Trust Co. of Fort Worth v. Willis*, 179 S.W. 1115 (Tex. Civ. App.—Fort Worth 1915, no writ). The writ will also issue to prevent a conflict of jurisdiction between two courts having concurrent jurisdiction, or to prevent dual trials. 73 C.J.S. Prohibition Sec. 11c; *Oklahoma Turnpike Auth. v. Dist. Court*, 222 P.2d 514 (Sup. Court Oklahoma 1950); *Gorman v. Superior Court*, 72 P.2d 774 (Dist. Court of App. 4th Dist. California 1937). However, it is not necessary for us to determine at this point whether or not the writ should issue under the circumstances existing here, because relator has produced no evidence that the action he fears is imminently threatened or is actually about to take place.

. . . .

In the event that a trial of relator becomes imminently threatened prior to our decision, we can at that time consider a renewed application for prohibition.

Apparently, therefore, if the prosecution as an adult is about to commence while the transfer order is being appealed, counsel for the child would be wise to seek a writ of prohibition from the appellate court.

Since juveniles often commit offenses in groups, use of accomplice testimony is important in juvenile proceedings. Article 38.14 of the Texas Code of Criminal Procedure prohibits a conviction on the sole, uncorroborated, testimony of an accomplice, but article 38.14 is limited in application to adult criminal proceedings. The matter is not addressed in the Juvenile Code, but the recent case of *In re S.J.C.*²²⁷ holds that a juvenile may be adjudicated a delinquent on the uncorroborated testimony of an accomplice, even though the Code of Criminal Procedure prohibits conviction in adult court on such evidence.

227. 521 S.W.2d 286 (Tex. Civ. App.—El Paso 1975, writ granted). A contrary result was reached by the Oklahoma Court of Criminal Appeals in *Smith v. State*, 525 P.2d 1251 (Okla. Crim. App. 1974), although the court admitted that there was no constitutional requirement for its decision.

Evidentiary questions have also arisen at the disposition stage of juvenile proceedings. First, *Tyler v. State* holds that a juvenile probation officer's report containing hearsay may be considered by the court at the disposition stage of juvenile proceedings.²²⁸ Equally important is an earlier case from the court of criminal appeals styled *Walker v. State*.²²⁹ *Walker* raises for the first time the question of whether a judge at the sentencing stage of an adult's criminal trial may consider that adult's prior juvenile record. *Walker* holds that the prior juvenile record can be considered.

For some reason the Code's explicit provisions requiring service of a summons on all parties in interest prior to hearings²³⁰ are continuing to be ignored, thus resulting in unfortunate reversals of cases.²³¹ Hopefully, all court personnel are beginning to take the Code provisions regarding summons literally. For example, section 54.02 provides that prior to a transfer hearing a summons must be served stating "that the hearing is for the purpose of considering discretionary transfer to criminal court."²³² A case was reversed because the summons omitted the phrase: "to criminal court."²³³ Another case was reversed because the summons did not have attached all of the pleadings filed by the state at the time the summons was issued.²³⁴ Furthermore, the cases make it clear that a child's lawyer cannot waive defects in the child's right to have a proper summons properly served, although the lawyer can waive his own right to receive a proper summons.²³⁵

XIV. MISCELLANEOUS

Although they do not fit any pattern or fall conveniently under any single rubric, several recent court opinions are worthy of individual discussion.

Articles 1.03(b) and 6.02 of the Texas Penal Code, read together, might lead one to the conclusion that strict liability crime (*i.e.*, crime without a *mens rea* element) no longer exists in Texas unless the statute defining the crime plainly dispenses with any mental element. Although articles 1.03(b) and 6.02 are not models of clarity, they do create doubt about the continuing validity of such strict liability offenses as traffic violations and driving while intoxicated. Accordingly, the defendant in *Ex parte Jerry Lee Ross*²³⁶ contended that his conviction for driving while intoxicated was invalid because the state failed to allege or prove *mens rea*. Denying the validity of the defendant's argument, the court of criminal appeals held that driving

228. 512 S.W.2d 46 (Tex. Civ. App.—Beaumont 1974, no writ).

229. 493 S.W.2d 239 (Tex. Crim. App. 1973).

230. TEX. FAM. CODE ANN. §§ 53.06, 53.07 (1974).

231. *E.g.*, *In re M.W.*, 523 S.W.2d 513 (Tex. Civ. App.—El Paso 1975, no writ), where summons for the child was served on the child's attorney, thus necessitating a reversal of a transfer order. However, because the child was 18 by the time the appeal was heard, the case had to be dismissed by the court of civil appeals rather than remanded to the juvenile court.

232. *See* TEX. FAM. CODE ANN. § 54.02(b) (1974).

233. *R.K.M. v. State*, 520 S.W.2d 878 (Tex. Civ. App.—San Antonio 1975, no writ).

234. *In re K.W.S.*, 521 S.W.2d 890 (Tex. Civ. App.—Beaumont 1975, no writ).

235. *Compare In re K.W.S.*, 521 S.W.2d 890 (Tex. Civ. App.—Beaumont 1975, no writ), with *In re C.E.H.*, 516 S.W.2d 25 (Tex. Civ. App.—Texarkana 1974, no writ).

236. 522 S.W.2d 214 (Tex. Crim. App. 1975).

while intoxicated is a well-recognized strict liability offense, and if the legislature had intended to change the strict liability nature of driving while intoxicated it would have done so more directly than merely enacting the general provisions in articles 1.03(b) and 6.02 of the Texas Penal Code. In the same case, the court of criminal appeals considered the question of whether allowing non-attorney judges to maintain jurisdiction over criminal cases constitutes a denial of due process, a question already decided by the California Supreme Court.²³⁷ In contrast to the California decision, the court found that trial of a criminal case before a non-attorney judge was not a violation of due process.

Another case raising interesting issues involving the construction of the new Penal Code is *Watts v. State*,²³⁸ which dealt with the distinction between robbery and attempted robbery. Watts confronted his victim and demanded money at gunpoint, but fled before any money was taken. Declaring that the actual commission of theft is not prerequisite to commission of robbery, the court of criminal appeals held that Watts was properly convicted of the crime of robbery and that the trial court did not commit error by refusing to charge on the law of attempted robbery.

*Branson v. State*²³⁹ is another case which considers issues arising out of the construction of the new Penal Code. In *Branson* the defendant, who was charged with jail escape, defended on the ground that his escape was justified because of sordid jail conditions.²⁴⁰ Although the court recognized that this was a case of first impression and admitted that necessity was available as a defense to the crime of escape at common law, the court nevertheless held that intolerable living conditions in prison did not justify escape.²⁴¹ Curiously, neither the court nor the attorney for the defense specifically discussed article 9.22 of the Texas Penal Code—a new section which expressly codifies the common law defense of necessity.

The fact that careful tactics and a thorough understanding of the applicable law are necessary when objections are made to an opponent's jury argument is demonstrated by two recent cases. In the first case, *Rodriguez v. State*,²⁴² defense counsel objected to a prejudicial jury argument made by the state, and his objection was overruled. On appeal, the court of criminal appeals held that when an objection to a prejudicial jury argument is overruled, the defense attorney does not have to move for a mistrial in order to preserve that point for appeal. *Rodriguez* should be contrasted with the court of criminal appeals' holding in *Kennedy v. State*.²⁴³ Kennedy's lawyer objected to a prejudicial jury argument made by the state and his objection was *sustained*. However, because he neglected to go further, and move for a mistrial, his appeal was *denied* since he received all of the relief

237. *Gordon v. People*, 525 P.2d 72 (Cal. 1974).

238. 516 S.W.2d 414 (Tex. Crim. App. 1974).

239. 525 S.W.2d 187 (Tex. Crim. App. 1975).

240. For a full discussion see G. DIX & M. SHARLOT, *CRIMINAL LAW CASES AND MATERIALS* 1035-44 (1973).

241. *Cf. People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974).

242. 520 S.W.2d 778 (Tex. Crim. App. 1975).

243. 520 S.W.2d 776 (Tex. Crim. App. 1975).

he requested from the trial court, and there was no *adverse* ruling to complain of on appeal.

Several holdings by federal courts may have some impact on the criminal jurisprudence of Texas—particularly those dealing with the right to counsel which arises out of the sixth amendment to the United States Constitution.²⁴⁴ Once, one could predict with reasonable certainty that whenever a person was charged with an offense carrying a jail or penitentiary sentence as potential punishment, that person was entitled to a lawyer at any adversary stage of the proceedings where lawyers necessarily function as advocates.²⁴⁵ *Kirby v. Illinois* changed all of that by holding that the sixth amendment right to counsel was triggered, not by the need for an advocate, but by the commencement of “adversary judicial proceedings.”²⁴⁶ For example in *Kirby*, the “adversary judicial proceeding” was the return of the indictment, and the Supreme Court held that the defendant was not entitled to counsel at a line-up prior to the return of the indictment.²⁴⁷

Now, the Supreme Court has returned to the approach that counsel is required whenever there is a significant job for counsel to do—regardless of the state of the “judicial proceedings.” This most recent trend is reflected in *Gerstein v. Pugh*²⁴⁸ where the Supreme Court held that a *judicial* determination of probable cause is a prerequisite to placing a person in jail after arrest. At the same time, however, the Court held that counsel is not required at the judicial determination of probable cause, because it is not a “critical stage in the prosecution.”²⁴⁹ The defendant in *Gerstein* was charged with a misdemeanor and an information had been filed. Surely, “adversary judicial proceedings” have begun when a person stands charged with a misdemeanor by information just as “adversary judicial proceedings” have begun in a felony case by returning the indictment as held in *Kirby*. Nevertheless, the Supreme Court overlooked its earlier reasoning in *Kirby* and based its decision in *Gerstein* on an analysis of what services a lawyer could perform at the time of the probable cause hearing.

One might speculate about what kind of unfair advantage the state could gain at a hearing to determine probable cause where the defendant is under arrest and without counsel. For example, would the state be allowed to introduce evidence acquired during the arrest or as a result of the arrest and

244. U.S. CONST. amend. VI provides that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

245. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), states that: “[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial.” As to the “functional approach” to the question of when a lawyer is constitutionally necessary, see Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488 (1969); cf. Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 Mo. L. REV. 193 (1971).

246. “[A] person’s sixth and fourteenth amendment right to counsel attaches only at or after the time that the adversary judicial proceedings have been initiated against him” *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

247. See generally Steele, *Kirby v. Illinois: Counsel at Lineups*, 9 CRIM. L. BULL. 49 (1973).

248. 420 U.S. 103 (1975).

249. *Id.* at 122. It is interesting to note that *Kirby v. Illinois* was not cited by the Court in its *Gerstein v. Pugh* opinion.

thus "bootstrap" itself into convincing the magistrate that there was probable cause for the arrest in the first place?

Another nebulous problem in the area of the constitutional right to counsel is the question of the adequacy of counsel's performance. In *Kallie v. Estelle*²⁵⁰ an attorney who had been retained learned that his fee for appeal would not be paid by the now indigent defendant. Consequently, the attorney abandoned the appeal without notice to the defendant or to the court. Similar fact situations appear rather frequently in appellate court opinions, and the Fifth Circuit Court of Appeals had "no trouble characterizing these actions of Kallie's retained counsel as well below the minimum standards imposed upon a criminal lawyer in protecting his client's interests."²⁵¹ Furthermore, the Fifth Circuit court characterized such conduct as ineffective assistance as a matter of law.²⁵² However, because Kallie's offending counsel was retained, the court concluded that there was insufficient state action to declare that Kallie was denied fundamental fairness *by the state*. Given the unfortunate frequency with which situations like the one in *Kallie* occur, it is interesting to speculate what might happen if convicts begin to file malpractice actions with the same vigor and frequency as they have filed writs of habeas corpus over the past years.

XV. CONCLUSION

Although there were few dramatic developments during this annual survey period, the enactments of the Sixty-Fourth Legislature and judicial developments in the law related to witnesses in criminal cases and juvenile delinquency are certainly noteworthy. Also, the United States Supreme Court's decision in *Gerstein v. Pugh*²⁵³ will probably have a continuing impact on the ability of the state to detain its citizens without a probable cause hearing. It is hoped that this *Survey* will provide a helpful update of Texas criminal law and procedure to both the student and practitioner.

250. 515 F.2d 588 (5th Cir. 1975).

251. *Id.* at 590.

252. *Id.* at n.4.

253. 420 U.S. 103 (1975).