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## Criminal Law and Procedure

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# PART III: PUBLIC LAW

## CRIMINAL LAW AND PROCEDURE

by  
*Vincent W. Perini\**

**T**HE drama of the death penalty dominated criminal jurisprudence in 1976. The high stakes alone make the subject breathtaking for those who touch it, but there was much more than that to make the capital punishment debate interesting to Texas lawyers. The United States Supreme Court surprised no one by its decision that capital punishment is not unconstitutional per se, but the Court's approval of the Texas death penalty procedure raised a cloud of questions likely to remain unsettled for a long time. In the Texas Court of Criminal Appeals the polemics were characterized by shifts of opinion, dissents filed and withdrawn, and a commitment of energy and thoroughness, especially concerning jury selection in capital cases, not always characteristic of our supreme court for criminal matters.

### I. CAPITAL PUNISHMENT

The United States Supreme Court ended the long period of doubt over the constitutionality of capital punishment with its decision in *Gregg v. Georgia*.<sup>1</sup> In addition, it upheld the Texas death penalty procedure enacted in 1973 by affirming *Jurek v. Texas*.<sup>2</sup> The Supreme Court discussed the Texas procedure in capital cases<sup>3</sup> in light of the Georgia and Florida statutes which were simultaneously upheld,<sup>4</sup> while at the same time it struck down the Louisiana and North Carolina statutes for failure to permit sufficient consideration of mitigating circumstances.<sup>5</sup> In focusing on the three death penalty "special issues" employed in the Texas system after a finding of guilt,<sup>6</sup> the Supreme Court explained that the constitutionality of the Texas procedure turned on whether the enumerated questions would allow consideration of specific mitigating factors. One of those special issue questions had been the center of debate by the court of criminal appeals when it decided *Jurek v. State*.<sup>7</sup>

The controversy in *Jurek* was created by the majority's approval of Special Issue No. 2 which asks the jury to answer "yes" or "no" to whether a

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1. 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

2. 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

3. TEX. PENAL CODE ANN. § 12.31 (Vernon 1974); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1976-77).

4. Proffitt v. Florida, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *Gregg v. Georgia*, 96 S. Ct. 2909, 49 L. Ed. 2d 929 (1976).

5. Robert v. Louisiana, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976); Woodson v. North Carolina, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

6. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1976-77).

7. 522 S.W.2d 934 (Tex. Crim. App.), *aff'd*, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

probability exists that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.<sup>8</sup> Concurring in part and dissenting in part,<sup>9</sup> Judge Odom quoted authorities on statistics in reaching his conclusion that the question was too vague.<sup>10</sup> Judge Roberts, dissenting, went even further in his analysis of the word "probability," and concluded that probability as measured and defined in mathematical or statistical terms meant a "chance—however large or small,"<sup>11</sup> and therefore he was also of the opinion that Special Issue No. 2 was vague and overbroad. He reasoned that the issue could never be answered in favor of the defendant because the question by its terms would be answered in the affirmative for all individuals, no matter how "saintly." He would have severed Special Issue No. 2 from the statute, but he found the remainder constitutionally acceptable.

In its plurality opinion in *Jurek* delivered by Justice Stevens, the Supreme Court pointed to examples where judges, other sentencing authorities, and parole authorities must often predict a person's future conduct and concluded: "The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice."<sup>12</sup> The Court applauded the Texas procedure for permitting the defendant to call to the jury's attention whatever mitigating circumstances he might be able to show.<sup>13</sup> Indeed, when Texas Attorney General John Hill argued the case before the Supreme Court he pointed out that anything may be introduced by either side at the punishment phase of a capital murder trial in Texas, subject to constitutional limitations.<sup>14</sup> The Court stressed the importance of putting before the jury all possible relevant information about the individual defendant whose fate it must determine. In the cases decided that same day the Supreme Court indicated a clear preference for the bifurcated trial procedure used in Texas.<sup>15</sup>

*Complicity.* In *Smith v. State*,<sup>16</sup> the only other Texas capital murder case affirmed before the Supreme Court's opinion in *Jurek*, the court of criminal appeals held that a defendant can receive the death sentence under Texas law even though he himself did not commit the murder.<sup>17</sup> The language of Special Issue No. 1 raises the possibility of an opposite result, however, because it speaks of "the conduct of the defendant that caused the death of the deceased . . . ."<sup>18</sup> According to the undisputed evidence in *Smith*, the defendant's

8. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1976-77).

9. Judge Odom agreed with the majority that the death penalty is not unconstitutional, but he disagreed with the court's interpretation of TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1976-77). 522 S.W.2d at 943.

10. See, e.g., R. YOUNG & D. VELDMAN, INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES (1972).

11. 522 S.W.2d at 948.

12. 96 S. Ct. at 2958, 49 L. Ed. 2d at 940-41.

13. *Id.* at 2956-57, 49 L. Ed. 2d at 939.

14. 19 CRIM. L. REP. (BNA) 4007 (1976).

15. See the opinions in *Gregg*, *Proffitt*, *Roberts*, and *Woodson*, notes 4-5 *supra* and accompanying text.

16. 540 S.W.2d 693 (Tex. Crim. App. 1976).

17. *Id.* at 696.

18. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon Supp. 1976-77).

accomplice had shot and killed the victim. There was evidence, however, that the defendant would have shot the night clerk had his pistol been working, and that he had actively encouraged his accomplice to shoot by shouting, "Get him, Howie!"<sup>19</sup>

Following *Jurek* and *Smith*, any remaining questions about complicity in the Texas death penalty statute were foreclosed in *Livingston v. State*<sup>20</sup> which was decided in October after the Supreme Court had affirmed *Jurek*. *Livingston* was outside the store when his accomplice murdered three attendants, and there was no evidence that he sought their deaths or even knew what was happening inside. Even though *Smith* was decided under the former law of principals<sup>21</sup> and *Livingston*'s case came under the new Penal Code,<sup>22</sup> the majority did not construe sections 7.01 and 7.02 to require a different result.

*Sufficiency of Evidence—Special Issue Number Two.* The complicity issue was raised in *Livingston* on the ground of insufficient evidence, and dissenting Judge Roberts said the same argument was applicable to Special Issue No. 2.<sup>23</sup> He reasoned that since the evidence in the guilt phase of the trial failed to show any participation by this defendant in the murders, the evidence was insufficient to support an affirmative answer that he would commit crimes of violence in the future, whether he was legally guilty of the crime in question or not. The only other evidence to support this finding was the testimony of two psychiatrists, which, Judge Roberts argued, should have been held inadmissible because the testimony was so ethereal and speculative that it fell within the court's holding in *Hopkins v. State*<sup>24</sup> that "the benefit to be gained from such testimony is not great enough to offset the disadvantages."<sup>25</sup>

The court of criminal appeals dealt squarely with the issue of psychiatric testimony at the punishment stage in *Moore v. State*<sup>26</sup> which was decided the same day as *Livingston*. In holding the psychiatric evidence admissible,<sup>27</sup> the majority quoted article 37.071, which governs the punishment proceedings, that "evidence may be presented as to any matter that the court deems relevant to sentence." Concerning the issue of sufficiency of evidence to

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19. 540 S.W.2d at 696 n.3.

20. 542 S.W.2d 655 (Tex. Crim. App. 1976).

21. Under the "law of principals," "[w]here several people are acting together in pursuit of an unlawful act, each one is liable for collateral crimes, even though unplanned and unintended, committed by other principals if those crimes are the foreseeable, ordinary and probable consequences of the preparation or execution of the unlawful act." *Thompson v. State*, 514 S.W.2d 275, 276 (Tex. Crim. App. 1974).

22. The Texas Penal Code went into effect Jan. 1, 1974, and the offense for which *Livingston* was convicted occurred on May 11, 1974, so his case was governed by the provisions of TEX. PENAL CODE ANN. §§ 7.01-.02 (Vernon 1974).

23. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1976-77).

24. 480 S.W.2d 212 (Tex. Crim. App. 1972).

25. *Id.* at 220. *Hopkins* held inadmissible psychiatric testimony favorable to the defendant in the punishment part of a trial. In the *Smith* case, however, psychiatric testimony predicting dangerousness was admitted. In its opinion in *Jurek* the United States Supreme Court mentioned the psychiatric testimony in *Smith* without comment, but implicitly with approval. 96 S. Ct. at 2957, 49 L. Ed. 2d at 939.

26. 542 S.W.2d 664 (Tex. Crim. App. 1976).

27. *Id.* at 676.

support an affirmative answer to Special Issue No. 2, the court held that the testimony of two psychiatrists, coupled with the evidence of the offense itself which was admitted at the guilt stage of the trial, was sufficient. The court did not discuss the sufficiency point in *Livingston*, but held by implication that considerably less evidence than that produced in *Moore* will suffice.<sup>28</sup> In *Livingston* the defendant had not participated in the killing, and only two psychiatrists testified. Objection was made in *Livingston* to the psychiatric testimony on the grounds that it violated the defendant's fifth and sixth amendment rights because the psychiatric opinion of one of the psychiatrists was based on what the defendant had revealed during interviews outside the presence of counsel. The court rejected this argument because the trial court had scrupulously prevented any testimony by the psychiatrist concerning his conversations with the defendant, citing *United States v. Williams*,<sup>29</sup> and reaffirming other cases such as *United States v. Smith*.<sup>30</sup>

*Smith v. State*<sup>31</sup> also gave the court an opportunity to consider the sufficiency of such psychiatric testimony. Although the opinion does not explain if any objections were made to such testimony, when discussing Special Issue No. 2 the court recited the evidence at the punishment stage of the trial, which consisted of the testimony of a single psychiatrist for the state. He testified that the defendant was suffering from an incurable personality disorder characterized by a lack of remorse which stemmed from his participation in the offense on trial as well as his probation for possession of marijuana and his resulting difficulty in obtaining employment. Since the expert testimony emphasized that defendant's entire conduct as a participant in the crime had been calculated and was without remorse, the majority held that the jury was justified in finding the defendant to be a continuing threat to society.

What was remarkable about this aspect of the *Smith* case was not the majority opinion but the dissents, which were withdrawn in the interim pending appellant's motion for rehearing and during which time the United States Supreme Court ruled on the death penalty. Judge Roberts reiterated his earlier dissent in *Jurek* while Judge Odom's dissent thoroughly probed, to a much greater extent than the majority opinion, the sufficiency of evidence to support an affirmative finding to Special Issue No. 2,<sup>32</sup> as well as the court's ruling concerning the applicability of the law of principals.<sup>33</sup> In regard to the psychiatric testimony, Judge Odom excoriated the majority in his original dissent for not questioning such evidence which he deemed inadmissible

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28. 542 S.W.2d 655, 658-60 (Tex. Crim. App. 1976).

29. 456 F.2d 217 (5th Cir. 1972).

30. 436 F.2d 787 (5th Cir. 1971). *Smith* held that the advantages of unencumbered psychiatric examination outweigh the dangers of self-incrimination.

31. 540 S.W.2d 693 (Tex. Crim. App. 1976). See note 16 *supra* and accompanying text for discussion of the complicity aspects of *Smith*.

32. No. 49,809 (Tex. Crim. App., July 14, 1976). See the court records for the original opinions in *Smith*. Judge Odom argued that the prior conviction and probation for possession of marijuana were without probative value on Special Issue No. 2 and that he believed the circumstances of the instant offense, standing alone, were insufficient as a matter of law to prove beyond a reasonable doubt that the offender would probably commit criminal acts of violence that would constitute a continuing threat to society.

33. See the original opinions filed with the court. No. 49,809 (Tex. Crim. App., July 14, 1976).

under any theory of law and "prejudicial beyond belief."<sup>34</sup> He cited *Romero v. State*<sup>35</sup> and *Frye v. United States*,<sup>36</sup> which concerned the admission of polygraph examinations, and reminded the majority that the test in those cases had been applied to evidence derived from other scientific theories and devices and that there was no reason not to apply it to scientific theories in the field of psychiatry as well. Citing *Hopkins v. State*,<sup>37</sup> he concluded:

While it is true that the profession of psychiatry has much to contribute to that of law, and on certain issues the evidence of the psychiatrist can be of great assistance to the trial of a case, in view of numerous speculations made on the single determination that appellant lacked a sense of remorse for the commission of the offense for which he was on trial, in view of the issue upon which those speculations were presented, and in view of the weight which those speculations by an expert undoubtedly carried, I am unable to find that much of the testimony offered was from this side of the twilight zone. The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trial at the punishment stage.<sup>38</sup>

*Voir Dire.* Three cases are noteworthy. First, *Boulware v. State*,<sup>39</sup> which overruled *Hovila v. State*,<sup>40</sup> held that constitutional error in excusing scrupled jurors under the doctrine of *Witherspoon v. Illinois*<sup>41</sup> could be waived. Second, *Moore v. State*<sup>42</sup> held that even if the excusal of a scrupled juror would have been error under an unqualified application of the *Witherspoon* doctrine, it is not unconstitutional if the juror is excused pursuant to questioning in accordance with section 12.31(b) of the Texas Penal Code.<sup>43</sup> That section requires a juror to state under oath that the "mandatory penalty of death or imprisonment for life will not affect his deliberations on the issue of fact," and was designed to eliminate the opportunity for jurors to exercise discretion in the imposition of the death penalty, which the legislature thought was required by *Furman v. Georgia*.<sup>44</sup> By making the death penalty questions issues of fact and by requiring jurors to swear that the result would not affect those answers, it was thought that *Furman's* standards would be satisfied. Compared with the *Witherspoon* test, the section 12.31(b) standard is more favorable to the prosecution. The *Witherspoon* test would preclude dismissal of a juror for cause unless the juror unqualifiedly stated that he would automatically vote against the death penalty regardless of the facts before him. The new Texas test enunciated in *Moore* questions whether the juror's performance would be affected, not whether he would automatically vote "no" on one or all of the death penalty questions regardless of the facts.

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34. *Id.* Following the Supreme Court's ruling in *Jurek* Judge Odom withdrew his original dissent. 540 S.W.2d at 700.

35. 493 S.W.2d 206 (Tex. Crim. App. 1973).

36. 293 F. 1013 (D.C. Cir. 1923).

37. 480 S.W.2d 212 (Tex. Crim. App. 1972).

38. *Id.* at 221.

39. 542 S.W.2d 677 (Tex. Crim. App. 1976).

40. 532 S.W.2d 293 (Tex. Crim. App. 1976).

41. 391 U.S. 510 (1968).

42. 542 S.W.2d 664 (Tex. Crim. App. 1976).

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

44. 408 U.S. 238 (1972).

Nowhere is the turmoil surrounding capital punishment procedure better illustrated than in the case of *White v. State*.<sup>45</sup> It is the third in the trilogy of 1976 death penalty voir dire cases, along with *Moore* and *Boulware*, that rewrite the law in Texas. All three of these cases indicate careful analysis and a conscious effort by the court of criminal appeals to follow federal precedent, at least by analogy.<sup>46</sup> In *White* the court held that a juror who has doubts about his ability to "take an active part in the consideration and assessment of the death penalty in a given case could be excused because the answer showed he could not be an impartial juror in a case in which the range of punishment included death."<sup>47</sup> Presiding Judge Onion filed a vigorous and thorough dissent when the opinion was first delivered July 14, 1976. By the time the motion for rehearing was overruled on October 6, 1976, however, Judge Onion had withdrawn that dissent and had proposed in the majority opinion of *Moore v. State*<sup>48</sup> that the section 12.31 (b) standard become the court's escape from the *Witherspoon* dilemma. Commissioner Dally's opinion in *White*, which the court adopted, made no effort to enunciate a new approach. Instead, and entirely within the framework of *Witherspoon*, the court concluded that the doctrine had evolved to the point where it was no longer viable. Citing its own holding in *Tezeno v. State*,<sup>49</sup> the court stated as follows: "We cannot believe that *Witherspoon v. Illinois* . . . requires certain formal answers and none other. We surely feel that the test of *Witherspoon* is 'not to be applied with the hypertechanical and archaic approach of a 19th century pleading book, but with realism and rationality.'"<sup>50</sup> The court then concluded that after a "careful search and consideration of the record we find that neither of the cited venireman . . . was excused in violation of the standards of *Witherspoon*."<sup>51</sup>

Another subject of interest in death penalty voir dire is the disqualification of jurors on the ground that they cannot consider the *minimum* possible punishment. Prior to 1965 the defense could challenge veniremen on the ground that they could not consider the death penalty, but changes in the 1965 Code of Criminal Procedure apparently were aimed at eliminating such abuse. Cases decided subsequent to the 1965 revision, but prior to the new death penalty procedure, have held that the amended voir dire procedure precludes the defense from challenging for cause on the ground of scruples against the maximum punishment, but that it does not stop the state from challenging unfavorable jurors on the ground that they are unable to consider the minimum punishment possible in the case.<sup>52</sup> In *Moore v. State*<sup>53</sup> the court

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45. 543 S.W.2d 104 (Tex. Crim. App. 1976).

46. The history of these three opinions prior to publication reflects considerable debate among members of the Texas high court. This Article has already noted Judge Roberts' and Judge Odom's withdrawal of their dissenting opinions in *Smith* following the Supreme Court's affirmation of *Jurek*. See notes 31-38 *supra* and accompanying text.

47. 543 S.W.2d at 108.

48. 542 S.W.2d 664 (Tex. Crim. App. 1976).

49. 484 S.W.2d 374 (Tex. Crim. App. 1974).

50. 543 S.W.2d at 108.

51. *Id.* at 109.

52. See Morrison, *Interpretative Commentary*, TEX. CODE CRIM. PROC. ANN. art. 35.17 (1966).

53. 542 S.W.2d 664 (Tex. Crim. App. 1976).

indicated the state may excuse such jurors even when they are unable to consider the minimum punishment for what amounts to a lesser includible offense.

## II. CONFESSIONS

*Fifth Amendment.* The fifth amendment rights of persons accused of white collar crimes have been narrowed. In two taxpayer cases the United States Supreme Court held that an accountant's work papers which had been transferred by the taxpayer to his attorney could be subpoenaed from the attorney and used against the taxpayer,<sup>54</sup> and that incriminating information which a gambler put on his tax return could be used against him.<sup>55</sup> In the first case, *Fisher v. United States*,<sup>56</sup> the Court explained that the case did not present the issue of whether a taxpayer has a right to refrain from producing his own tax records because the papers subpoenaed were not Fisher's private papers and did not contain his own testimonial declarations. In the second case, *Garner v. United States*,<sup>57</sup> the Court did not qualify its prior opinion in *United States v. Sullivan*<sup>58</sup> which held that the right of a taxpayer to claim the fifth amendment privilege exists, but only if claimed at the time the tax return is filed. And in *Andresen v. Maryland*<sup>59</sup> it was held that personal papers and records, which might not have been subject to compulsory production by subpoena because of possible violation of the fifth amendment, were nevertheless subject to seizure pursuant to a valid warrant without violating the fourth amendment.

In a recent federal criminal case the United States Supreme Court held that the fact of defendant's silence at the time of arrest and his decision to invoke his fifth amendment right to remain silent could not be used at his trial to impeach him on cross-examination.<sup>60</sup> When confronted with a similar issue raised in a state court proceeding, the Court enforced the same rule through the due process clause of the fourteenth amendment.<sup>61</sup> The case, *Doyle v. Ohio*,<sup>62</sup> is a classic study of the fundamental views concerning the fifth amendment right to remain silent. Is it to be generously bestowed, a windfall even to those who may be guilty of serious crimes, or should it be limited to its essence? In *Doyle* the defendants came forward at trial with an explanation of events which would make it difficult for anyone to understand why they did not immediately explain their situation to arresting police. A dissent filed by

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54. *Fisher v. United States*, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), noted in 30 Sw. L.J. 788 (1976).

55. *Garner v. United States*, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

56. 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976).

57. 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

58. 274 U.S. 259 (1972).

59. 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). For further discussion of *Andresen* see notes 168-70 *infra* and accompanying text.

60. *United States v. Hale*, 421 U.S. 171 (1974).

61. *Doyle v. Ohio*, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). For further discussion of *Doyle* see note 313 *infra* and accompanying text.

62. *Id.*



three justices<sup>63</sup> would have allowed the prosecuting attorney on cross-examination to ask the defendants why they chose to remain silent at time of arrest.<sup>64</sup>

*Admissibility of Confessions.* One of a prisoner's *Miranda*<sup>65</sup> rights is the prerogative to terminate interrogation. After his doing so, is the subsequent prisoner's confession admissible if the interrogators come back two hours later and prove successful in their second attempt? While warning police against "persisting in repeated efforts to wear down [a prisoner's] resistance and make him change his mind," the Supreme Court approved the police actions before it in *Michigan v. Moseley*<sup>66</sup> because the second round of interrogation concerned another crime unrelated to the first, two hours had elapsed, and fresh warnings were given prior to the second round. In a case consistent with *Moseley* but illustrating its limits, the Texas Court of Criminal Appeals reversed a conviction where the subject was persuaded "bit by bit to change his mind" after initially invoking his right not to talk with the investigator.<sup>67</sup>

In *McGilvery v. State*<sup>68</sup> the court interpreted the requisites of the Texas confession statute<sup>69</sup> and reaffirmed an earlier holding that incriminating remarks made to a cellmate must be corroborated as required by subsection (e)<sup>70</sup> just as if the remarks were an oral confession made to an officer.<sup>71</sup> Moreover, *McGilvery* provides a lesson on the meaning and application of the corroboration requirement. The opinion by Judge Odom distinguishes between statements to a cellmate about items belonging to the crime victim, which had already been found by the police, and a statement about "another dude" which led the police to conduct new laboratory tests which revealed that a second man had been involved in the robbery-rape-murder. The latter statement, according to Judge Odom, was new information previously unknown to the police and was incriminating when the law of principals was considered.<sup>72</sup>

The doctrine of *Bruton v. United States*<sup>73</sup> precludes admitting into evidence in a joint trial a confession by a co-defendant which implicates another co-defendant as a denial of the sixth amendment right to cross-examine. If the

63. Justice Stevens wrote the dissent, joined by Justices Blackmun and Rehnquist.

64. *Doyle* was cited and followed in a recent Fifth Circuit case, *United States v. Luna*, 539 F.2d 417 (5th Cir. 1976).

65. *Miranda v. Arizona*, 384 U.S. 436 (1966).

66. 96 S. Ct. 321, 46 L. Ed. 2d 313 (1976).

67. *Hearne v. State*, 534 S.W.2d 703 (Tex. Crim. App. 1976).

68. 533 S.W.2d 24 (Tex. Crim. App. 1976).

69. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon Supp. 1976-77).

70. *Id.* art. 38.22(1)(e) provides:

The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:

It be made orally and the defendant makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.

71. *Easley v. State*, 493 S.W.2d 199 (Tex. Crim. App. 1973).

72. 533 S.W.2d at 26.

73. 391 U.S. 123 (1968).

co-defendant takes the stand, however, no constitutional right to confront and cross-examine is lost to the other co-defendant.<sup>74</sup> In *Thomas v. State*<sup>75</sup> a co-defendant's confession was used for impeachment when the co-defendant took the stand and testified in a manner inconsistent with the confession. On cross-examination, the prosecutor asked him about the inconsistencies between his testimony and his confession, but did not introduce the confession into evidence, and there was a limiting charge that the language was to be considered only for impeachment purposes. In addition, none of the questions that were asked on cross-examination implicated the other co-defendant and therefore the court held that the *Bruton* doctrine was inapplicable.<sup>76</sup>

*"Custody," "Focus," and "Volunteered Statements."* Both the *Miranda* case and the Texas confessions statute use the word "custody," but cases indicate that the word is not to be taken literally. Nevertheless, the trend is in that direction, which means that the question of when the obligation to give warnings and when the confessions statute begins its application will be left to the investigating police, who may be inclined to prolong investigation and delay arrest, as the following cases seem to indicate.

The current members of the United States Supreme Court, including two of the dissenters in the Court's five-to-four *Miranda* decision,<sup>77</sup> seem to favor narrowing the time when the *Miranda* rule is applicable. Conversely, the Court is enlarging the prerogatives of police to question persons suspected of crime without first cautioning them that what may appear to be routine paperwork is a subtle process of focused interrogation calculated to elicit an incautious incriminating remark. For example, *Beckwith v. United States*,<sup>78</sup> another taxpayer case,<sup>79</sup> held that no *Miranda* warnings were required even though the focus of the Internal Revenue Service investigation may have been on the taxpayer at the time he was interviewed. The opinion of Chief Justice Burger for a six-Justice majority emphasized the lack of literal custody; the agents came to the suspect's house, and later he went to their office. It is important to note that the taxpayer did not go entirely without warnings from his interrogators, but the warnings they gave were not complete *Miranda* warnings.<sup>80</sup> Nevertheless, this holding is a precursor for what may prove to be

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74. *Nelson v. O'Neil*, 402 U.S. 622 (1972).

75. 533 S.W.2d 796 (Tex. Crim. App. 1976).

76. *Id.* at 798. For other *Bruton* doctrine sixth amendment cases see notes 128-33 *infra* and accompanying text.

77. Justices Stewart and White.

78. 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976).

79. See notes 54-57 *supra* and accompanying text.

80. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court set forth the premise that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, he must be warned prior to any questioning that:

- (1) he has the right to remain silent;
- (2) anything he says can be used against him in a court of law;
- (3) he has the right to the presence of an attorney; and
- (4) if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

an even more portentous decision, the Supreme Court's review of an Oregon case which perhaps may eliminate "focus" from the *Miranda* lexicon.<sup>81</sup>

In light of this United States Supreme Court trend, is the Texas Court of Criminal Appeals applying a moribund standard? *Creeks v. State*<sup>82</sup> marked the line in the hazy area between investigation and custody beyond which the Texas court would not permit withholding the application of *Miranda* requirements and those of article 38.22.<sup>83</sup> Reversing an order revoking the defendant's probation, the court held inadmissible Creeks' admission to a police polygraph examiner that he was guilty of the suspected theft. At the time he was requested to consent to a lie detector test Creeks was not under arrest nor had he been given the *Miranda* warning. Summarizing the testimony the court stated as follows:

[T]he investigation of the theft had focused upon the Appellant at the time he was brought to the polygraph office . . . and that he was taken in custody from the polygraph office to the jail, where he was booked for theft. One of the more significant factors to determine whether or not the accused was in custody was whether or not the focus of the investigation had centered upon the accused at the time he was interrogated.<sup>84</sup>

In the same case an oral confession made to Creeks' probation officer was held inadmissible under article 38.22, notwithstanding the argument that the probationer was not under arrest or in custody at the time. The court noted that (1) the probation officer had already filed a motion to revoke on the basis of the crime in question, (2) he had caused a warrant to issue for the arrest of the probationer, and (3) he had notified the police to come to the probation office to make the arrest.<sup>85</sup> Under these circumstances the court held there was sufficient custody for the application of article 38.22, even though it was not literal custody.

The author of the *Creeks* opinion, Commissioner Brown, also wrote the majority opinion in *Bailey v. State*,<sup>86</sup> which preceded *Creeks* by about nine months. In *Bailey* a woman had been found in her home bludgeoned to death, and several persons, including the defendant, were nearby when she was discovered. The opinion carefully sets out the testimony of the various officers at the scene to whom the defendant made exculpatory remarks. This is important because the degree of police suspicion was at issue.<sup>87</sup> The defendant, who was apparently related to the deceased, was permitted to leave. During the investigation at the scene the officers found a metal pipe covered with blood and flesh and a coat with a pair of blood-stained gloves in

81. *Oregon v. Mathiason*, 275 Ore. 1, 549 P.2d 673, *rev'd per curiam*, No. 76-201 (U.S. Jan. 25, 1977); see 20 CRIM. L. REP. (BNA) 4137 (1977).

82. 542 S.W.2d 849 (Tex. Crim. App. 1976). For further discussion of *Creeks* see notes 136-37 *infra* accompanying text.

83. *Id.* at 851, *citing* *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971).

84. *Id.*

85. *Id.* On rehearing, Presiding Judge Onion added an opinion reversing his prior stance. *Id.* at 851. Judge Douglas wrote a forceful dissent, in which he reminded the majority that the gravamen of *Miranda* was the accused's awareness of the coercive aspects of being held prisoner and interrogated, which he believed were not at work when Creeks confessed to his probation officer. *Id.* at 854-55.

86. 532 S.W.2d 316 (Tex. Crim. App. 1976).

87. *Id.* at 319.

one pocket.<sup>88</sup> The captain in charge left the scene but then received a radio call that the defendant had returned and wished to talk to him. At the house he found the defendant seated at a table with another officer and said, "I understand that you wanted to talk with me." Defendant replied, "Yes, I did not tell you the whole or the exact truth about everything." "Like what?" the captain asked. The defendant replied, "I hid the murder weapon, a jacket, and the gloves."<sup>89</sup> In holding that the admission of the confession was proper, although no *Miranda* warnings had been given, the court stated as follows:

[T]he fact that the accused and police officers are together will not render a statement inadmissible if the circumstances do not fall within the definition of custodial interrogation. *The fact that Appellant had been free to go and had chosen to return in order to speak with Captain Edge removed this case from the proscription of Miranda.*<sup>90</sup>

The opinion quotes language in *Miranda* that defines custodial interrogation not only in terms of the fact of custody or arrest, but also as to whether the questioning was initiated by the police. The key factor in the eyes of the court, however, was the defendant's initiative. "We find the Appellant's statement was *voluntarily* given to Captain Edge and was, therefore, admissible."<sup>91</sup> The court easily distinguished *Ancira v. State*,<sup>92</sup> where an armed, uniformed policeman in a police vehicle went to defendant's house and asked to talk to him and then drove him around in the car until he confessed to possession of heroin. The court cited *Brown v. State*<sup>93</sup> as on point, but incorrectly stated that in *Brown* the defendant had initiated the conversation which led to the statement;<sup>94</sup> in fact he had been called down to the district attorney's office to talk with them, so the *Brown* case must lie somewhere in between *Ancira* and *Bailey*.<sup>95</sup>

In *Lovel v. State*<sup>96</sup> the court affirmed a conviction which seems contrary to

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88. Unfortunately the opinion does not make clear whether the evidence showed that these items were connected to the defendant before he returned and confessed.

89. *Id.* at 320.

90. *Id.* at 321 (emphasis added).

91. *Id.* (emphasis added). The court noted that if the police officers had begun to focus their investigation after the defendant had initiated the resumed conversation, the court would have been presented with a different problem; here, however, the defendant "made the statement after only one question, which could hardly be described as directed toward eliciting an incriminating response." *Id.* Since the *Bailey* decision, the watchword "voluntary statement" has appeared more frequently. See, e.g., *Allen v. State*, 536 S.W.2d 364 (Tex. Crim. App. 1976); *Craig v. State*, 533 S.W.2d 827 (Tex. Crim. App. 1976).

92. 516 S.W.2d 924 (Tex. Crim. App. 1974). In *Ancira* the court stated that "the questioning of Appellant by the officer in the police vehicle cannot be characterized as a general investigation into an unsolved crime, nor was the questioning made under circumstances to bring it within the ambit of general on-the-scene investigatory process." *Id.* at 926.

93. 475 S.W.2d 938 (Tex. Crim. App. 1971).

94. 532 S.W.2d at 321.

95. The record in *Brown* reflected that the district attorney and the officers were making a general investigation into an unsolved crime and were checking on all sources of information about the deaths involved, so it was only natural for the district attorney to want to talk to the man who had discovered the bodies. The defendant was informed at the time of the interview that he was not under arrest and the investigations into the deaths had to start somewhere. The defendant, accompanied by his uncle, had gone voluntarily to the prosecutor's office and left with his uncle when the interview was concluded. 475 S.W.2d at 951.

96. 538 S.W.2d 630 (Tex. Crim. App. 1976).

its 1971 decision in *Tilley v. State*<sup>97</sup> even though the court in *Lovel* stated that the "identical contention" had been considered in *Tilley* and found to be without merit.<sup>98</sup> Both cases affirmed misdemeanor convictions for driving while intoxicated, and both dealt with oral statements which were held not subject to *Miranda* nor to the requirements of article 38.22. In *Tilley* the policeman investigating a traffic collision approached the defendant at the scene for basic identity information and his version of the accident. Noticing the odor of alcohol, he asked the defendant how much he had been drinking, and the defendant made an incriminating statement which was the subject of the appeal. In *Lovel*, however, the interview took place at the hospital emergency room presumably after the two officers had completed their investigation at the scene. When defendant vomited in the presence of the officers while being sutured, the officers testified that the surgeon jumped back and said, "you drunk son-of-a-gun."<sup>99</sup> Moreover, the surgeon then immediately suggested an alcohol content blood test.<sup>100</sup> The test was rendered, and it showed defendant to be legally intoxicated. Although the opinion does not reveal whether the interview followed the test and its results, it is fair to assume that the officers asked the defendant "what happened out there?"<sup>101</sup> after the stitching, vomiting, and the comments by the physician. His incriminating response was the basis for the point on appeal. The officers testified that they asked the question while merely concluding their investigation of the collision and that the defendant was not in custody or under arrest.<sup>102</sup> Based on that testimony the court held that the case was removed from both *Miranda* and the Texas confession statute.<sup>103</sup>

The factual details alone clearly show the two cases are not identical, and *Lovel* should have been harder for the court to decide. Can there be any doubt that the two police officers had already decided, at least in their own minds, that they would at some time charge this person with the crime of driving while intoxicated and that, at the moment they approached him to ask him what happened, they knew his remarks might help them make their case? The two cases are further distinguishable because in *Tilley* the court stated that the remark in question was "res gestae,"<sup>104</sup> which removed the case from operation of article 38.22, and there was no mention of this important distinction in the *Lovel* opinion. In withdrawing from the *Miranda* doctrine, the courts are over emphasizing *Miranda*'s concern with the coercive effect of custody, which fails to consider the important policy question concerning waiver of *known* rights.

*Warning by a Magistrate.* Despite the mandatory language of article 15.17

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97. 462 S.W.2d 594 (Tex. Crim. App. 1971).

98. 538 S.W.2d at 633.

99. *Id.* at 632.

100. *Id.*

101. *Id.*

102. *Id.*

103. If the officers testified as to the precise time and place of the arrest, it is not shown in the opinion.

104. 462 S.W.2d at 595.

of the Code of Criminal Procedure,<sup>105</sup> there has been no change in the blatant failure of many Texas peace officers to follow its mandate, and the court of criminal appeals regards compliance with this statute unimportant so long as someone at some time gives a *Miranda* warning. Although it is still too soon to measure the full significance of the United States Supreme Court's decision in *Gerstein v. Pugh*,<sup>106</sup> which held that a person arrested must be given a probable cause hearing promptly after arrest, no Texas case has yet indicated any impact of the decision.

In one Texas case during the past year the state sought to excuse the delay in bringing the defendant before a magistrate because other prisoners were being processed when the defendant was brought to the police station.<sup>107</sup> The court found the defendant's initial arrest illegal for lack of evidence, yet it upheld the admission of his confession:

[T]he record does not reflect, nor is it contended, that any action was taken by the officers which tended in any way to deprive appellant of his capacity for self-determination. We conclude that the confessions taken from appellant were not obtained by the exploitation of an illegal arrest.<sup>108</sup>

And in another case the court had no qualms about approving a confession taken after a period of on and off interrogation lasting thirty-three hours, although the prisoner had not been taken before a magistrate.<sup>109</sup>

*Jackson v. Denno Hearing.* Both federal constitutional law and the Texas Code of Criminal Procedure require a hearing outside the presence of the jury to determine admissibility of a confession.<sup>110</sup> If the confession is then admitted into evidence, the Texas statute further requires that the court "must enter an order stating its findings, which order shall be filed among the papers of the cause."<sup>111</sup> When faced with the failure of the trial court to enter an order with sufficient findings of fact to enable the appellate court to rule on the issues, the Texas Court of Criminal Appeals has previously been divided

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105. TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon 1966) provides that:

In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. 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.

106. 420 U.S. 130 (1975). See also Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 30 Sw. L.J. 315, 316 (1976).

107. *Dowdy v. State*, 534 S.W.2d 336 (Tex. Crim. App. 1976). The prosecution's argument in *Dowdy* can also be applied in the reverse, however, since the officers could have easily taken the defendant before a magistrate while waiting to book the defendant in jail.

108. *Id.* at 339-40.

109. *Skidmore v. State*, 530 S.W.2d 316 (Tex. Crim. App. 1975). The defendant was arrested in Los Angeles for a robbery-murder which occurred in El Paso. The court makes no mention, and apparently the issue was never raised, whether such a prolonged interrogation prior to a magistrate's warning was in derogation of California law. See CALIF. PENAL CODE ANN. § 849 (West Supp. 1976).

110. *Jackson v. Denno*, 378 U.S. 368 (1964). See also TEX. CODE CRIM. PROC. ANN. art 38.22 (2) (Vernon Supp. 1976-77) which provides: "In all cases where a question is raised as to the voluntariness of a confession or statement, the court must make an independent finding in the absence of the jury as to whether the confession or statement was made under voluntary conditions."

111. TEX. CODE CRIM. PROC. ANN. art. 38.22(2) (Vernon Supp. 1976-77).

over whether the appeal should be abated to allow the making of such findings or reversed.<sup>112</sup> The issue was resolved in 1976 when a unanimous court in two separate cases determined that such an appeal will be abated to enable the trial court to file belatedly its written fact findings, whether the trial judge had failed to make any findings altogether<sup>113</sup> or whether he made findings deemed insufficient by the appellate court.<sup>114</sup>

The state usually has to show very little in order to justify a finding by the trial court that a confession is voluntary, but in the total absence of prosecution evidence to contradict defense evidence that the confession was coerced, the appellate court has no choice but to reverse. For example, in *Sherman v. State*<sup>115</sup> the defendant testified that he was held incommunicado for two and one-half months before his requests for appointment of counsel were met and also that his confession was coerced by the threat that his refusal to sign would mean either conviction as an habitual criminal or the death penalty. Neither of the two officers who testified could contradict defendant's story that he was threatened, since neither had been present when the supposedly coercive statement was made. The principal interrogating officer inexplicably failed to testify. Stressing the importance of the absent key witness, the court stated that as little as an explanation of the witness' absence could have justified the trial court in disbelieving the defendant.<sup>116</sup>

*Harmless Error.* After finding the confession involuntary in *Sherman v. State*<sup>117</sup> the court had no reason to examine whether failure to appoint counsel was in violation of the doctrine of *Escobedo v. Illinois*.<sup>118</sup> If the court had found an *Escobedo* violation, it then would have had to determine whether the violation rendered the confession involuntary or merely unlawful. This was the holding of the Fifth Circuit Court of Appeals in *Smith v. Estelle*,<sup>119</sup> in which the court rejected the argument that the harmless error rule is never applicable to rectify a confession held to have been admitted erroneously.<sup>120</sup> The Fifth Circuit drew a distinction between "the genus of unlawful confessions and the species of involuntary or coerced unlawful confessions . . ." by noting: "[A]lthough both types constitute very damaging evidence against the accused, an unlawful confession may not be nearly as untrustworthy in determining the defendant's guilt or innocence, or nearly as shocking to our notions of fundamental due process, as an involuntary confession certainly is."<sup>121</sup> In the *Smith* case, the Fifth Circuit found that the confession was unlawful but not involuntary, thus making the harmless error rule applicable

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112. *Davis v. State*, 499 S.W.2d 303 (Tex. Crim. App. 1973).

113. *McKittrick v. State*, 535 S.W.2d 873 (Tex. Crim. App. 1976).

114. *Hester v. State*, 535 S.W.2d 354 (Tex. Crim. App. 1976).

115. 532 S.W.2d 634 (Tex. Crim. App. 1976).

116. *Id.* at 636 n.2. In *Dowdy v. State*, 534 S.W.2d 336, 339 (Tex. Crim. App. 1976), the court similarly bemoaned the failure of the record to show information justifying the defendant's arrest, leading the court to the inexorable conclusion that the arrest was illegal.

117. 532 S.W.2d 634 (Tex. Crim. App. 1976); see notes 115-16 *supra* and accompanying text.

118. 378 U.S. 478 (1964).

119. 527 F.2d 430 (5th Cir. 1976).

120. *Id.* at 431.

121. *Id.*

to the case. The court remanded the case, however, for a fact finding to determine whether the defendant had taken the stand because of the unlawfully obtained confession, in which case the harmless error doctrine would not save the conviction from reversal.

In *Harper v. State*<sup>122</sup> the Texas Court of Criminal Appeals found the admission into evidence of the defendant's lie to the arresting officer to be harmless. Defendant had told the policeman that the stolen car he was driving belonged to his sister. The majority found that both the *Miranda* doctrine and article 38.22 applied,<sup>123</sup> but that the conviction would not be reversed because the evidence of guilt was overwhelming.<sup>124</sup> Judge Roberts, concurring, argued that the lie was neither a confession nor the result of a custodial interrogation but was merely a "simple exculpatory statement."<sup>125</sup> Presiding Judge Onion took issue with both opinions. Quoting from a 1917 case<sup>126</sup> which described a confession as a statement made by the accused "which the State seeks to use to prove his guilt," he urged in his dissent that the lie would never have been offered by the state unless it tended to show guilt.<sup>127</sup> And since the state clearly offered it to bolster its case, he argued that its admission was not harmless beyond a reasonable doubt and the conviction should have been reversed.

Two cases during the survey period discussed the harmless error rule in cases involving violations of the *Bruton* doctrine,<sup>128</sup> which forbids admission in a joint trial of a co-defendant's confession which incriminates another co-defendant. One case was reversed because the co-defendant's confession supplied the indispensable missing links in the other defendant's own confession which tied him to the crime in question.<sup>129</sup> The court could not conclude that the objectionable confession was "merely cumulative of other evidence or that it did not add anything new to the statement made by appellant."<sup>130</sup> In the second case, the robbery convictions of three co-defendants were also reversed, but with more difficulty, as the court divided three to two on the question of whether the *Burton* errors were harmless.<sup>131</sup> One of the defendants, Coleman, had been the driver of the car but had been picked up by the other two midway through their evening's spree in Houston. All of the defendants had sought severance, and all objected to the admission of the others' confessions. Coleman's conviction was reversed because the confessions of the other two, who had actually perpetrated the robbery while he waited in the car, contained information compromising his theory that he was not guilty under the law of principals. The court concluded that the prosecu-

122. 533 S.W.2d 776 (Tex. Crim. App. 1976).

123. See *Miranda v. Arizona*, 384 U.S. 436 (1966); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon Supp. 1976-77).

124. 533 S.W.2d at 777.

125. *Id.* at 778.

126. *Dover v. State*, 81 Tex. Crim. 545, 197 S.W. 192 (1917).

127. 533 S.W.2d at 780.

128. *Bruton v. United States*, 391 U.S. 123 (1968).

129. *Evans v. State*, 534 S.W.2d 707 (Tex. Crim. App. 1976). The co-defendant's confession supplied the time, date, and place of the offense.

130. *Id.* at 711.

131. *Bass v. State*, 527 S.W.2d 556 (Tex. Crim. App. 1975).



tion's case against him would have been less persuasive without the benefit of his co-defendant's confessions.<sup>132</sup> The convictions of the other two were reversed because Coleman's confession contained evidence of two extraneous offenses, which the court noted could not properly have been brought before the jury otherwise. Therefore, the majority, represented by Presiding Judge Onion, could not conclude that the *Bruton* error was harmless beyond a reasonable doubt.<sup>133</sup>

*Parolees and Probationers.* Two recent cases make it clear that a probation officer holds no exalted status and his probationer no inferior status in deciding whether a probationer's confession to his probation officer will be admitted into evidence. Noting that it had held the fourth amendment applicable to probationers during the same term,<sup>134</sup> the Texas Court of Criminal Appeals held in *Dowdy v. State*<sup>135</sup> that the same underlying rationale dictates that a probationer is also not deprived of his fifth amendment rights. In *Creeks v. State*<sup>136</sup> the court enforced those rights, but only by a three-to-two majority.<sup>137</sup>

The United States Supreme Court left unresolved the question of whether parole officers are required to advise parolees of their *Miranda* rights prior to interrogating them. The Court remanded a pending case to the Ohio trial court for a determination of whether the Ohio court had ruled the confession inadmissible on the grounds of local law or the United States Constitution.<sup>138</sup>

### III. SEARCH AND SEIZURE

During the past year the Texas Court of Criminal Appeals has been protective of the right of privacy under the fourth amendment while the United States Supreme Court has demonstrated a continued willingness to erode this right. In fact, Justice Brennan has noted that recent decisions by the Burger Court have marked "the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures."<sup>139</sup>

*Motor Vehicle Searches.* The law concerning searches of motor vehicles was given significant treatment during the survey period by both the United States Supreme Court and the Texas Court of Criminal Appeals. Exemplary is an auto search case decided by the Texas Court of Criminal Appeals and reversed by the United States Supreme Court. In *Texas v. White*<sup>140</sup> the Texas

132. *Id.* at 563.

133. *Id.* at 562.

134. *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976).

135. 534 S.W.2d 336 (Tex. Crim. App. 1976). For other discussion of *Dowdy*, see note 116 *supra* and accompanying text.

136. 542 S.W.2d 849 (Tex. Crim. App. 1976). For other discussion of *Creeks*, see notes 82-85 *supra* and accompanying text.

137. 542 S.W.2d at 853.

138. *Ohio v. Gallagher*, 96 S. Ct. 1438, 47 L. Ed. 2d 722 (1976).

139. *United States v. Martinez-Fuertes*, 96 S. Ct. 3074, 3084, 49 L. Ed. 2d 1116, 1134 (1976). For further discussion of *Martinez-Fuertes* see notes 153-57 *infra* and accompanying text.

140. 423 U.S. 67 (1975). *White* is a landmark case procedurally: in derogation of TEX. CONST. art. V, § 6 the state appealed the decision of the court of criminal appeals and the Supreme Court granted certiorari. On remand the Texas Court of Criminal Appeals commented:

court examined what type of circumstances in an automobile search would be so exigent as to permit dispensing with the warrant requirement. Although the court admitted that there was probable cause to search White's vehicle, it found that justification for a warrantless search dissipated when the defendant was placed in custody at the police station and his motor vehicle secured in the breezeway of the station house. In an attempt to follow the leading Supreme Court case in this area, *Chambers v. Maroney*,<sup>141</sup> the Texas court excluded the evidence seized pursuant to this warrantless search, holding the search to be unreasonable because the state had failed to demonstrate any exigent circumstances to justify a warrantless search. The United States Supreme Court reversed the decision in a three-paragraph per curiam opinion.<sup>142</sup> Despite the securing of the defendant's person and his motor vehicle, the Supreme Court found the warrantless search reasonable because probable cause was present, and the majority made no mention of whether the circumstances were so exigent as to justify the failure of the state to obtain a warrant. Justices Marshall and Brennan dissented, asserting that the factual circumstances in *White* were far less compelling than those held to justify a warrantless search in *Chambers*.

Prior to the *White* decision, automobile search cases were not per se exceptions to the fourth amendment warrant requirement, but rather, as evidenced by the Supreme Court's definitive opinion in *Chambers*,<sup>143</sup> the reasonableness of the search depended upon surrounding circumstances: the time of day, the physical location of the motor vehicle, the number of officers present and other factors relating to the need for an immediate search of the car. One question raised by the short per curiam opinion in *White* is whether the Court is rejecting the factual analysis of *Chambers* which has heretofore been relied upon. The answer to that question lies in subsequent decisions.

Two such decisions demonstrate the distinction between the manner in which the Supreme Court and the court of criminal appeals deal with inventory searches of motor vehicles. Both cases involved the seizure of marijuana pursuant to an inventory search of the owner's glove compartment, and although the facts seem quite similar, the bases for the decisions differ substantially. In the case before the Supreme Court, the defendant's car was inventoried at the police pound after being towed away for parking violations, while in the Texas case the defendant's car was inventoried at the scene of an auto accident prior to its being towed away. Both searches were made pursuant to routine police procedures. The refinement of the concept of privacy is reflected in the Supreme Court's opinion in *South Dakota v.*

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We reiterate that we do not challenge the Supreme Court's holding in *Texas v. White*; rather, we accord it its full binding effect. However, we do hold as a matter of Texas criminal procedure that the State is, in the future, precluded from appealing a criminal case—by certiorari or otherwise—from this Court to the United States Supreme Court.

543 S.W.2d 366, 369 (Tex. Crim. App. 1976) (citations omitted).

141. 399 U.S. 42 (1970).

142. *Texas v. White*, 423 U.S. 67 (1975). Justice Marshall's dissent strongly resembled the majority opinion of the Texas Court of Criminal Appeals. *Id.* at 68.

143. See also *United States v. Mitchell*, 525 F.2d 1275 (5th Cir. 1976), in which the notion that an automobile search does not involve exigent circumstances per se is reiterated.

*Opperman*,<sup>144</sup> upholding the warrantless search. The tenor of the Court's opinion is that persons protected by the fourth amendment have a diminished expectation of privacy with respect to their automobiles because of the multitude of governmental controls over motor vehicles and their operation. In addition, the Court placed heavy emphasis upon routine police procedure to inventory vehicles in order to protect the owner's property and to shield police from civil liability for losses. Although the opinion of the court of criminal appeals in *Robertson v. State*<sup>145</sup> appears to rely upon the *Opperman* rationale, such reliance is misplaced because the Texas court found that an inventory is not a search as contemplated by the fourth amendment.

The distinction in the analyses in *Opperman* and *Robertson* is a logical outgrowth of the difference in the definition of "search" employed by Texas and by federal courts. A recent example of the Texas view is contained in *Long v. State*,<sup>146</sup> where the court defined a search as follows: "A search means, of necessity, a quest, a looking for, or a seeking out of that which offends against the law. This implies a prying into hidden places for that which is concealed."<sup>147</sup> In its most recent statement of what constitutes a search, the Fifth Circuit Court of Appeals ruled that a search occurs when the government, in seeking out information not otherwise available, invades a citizen's right of personal security, personal liberty, and private property, thereby violating the privacy upon which he justifiably relies.<sup>148</sup> A comparison of these state and federal interpretations clearly shows that the Texas view is much more restrictive. Hence, the *Robertson* and *Opperman* decisions reach the same results, but the Texas court found no search to have taken place, while the Supreme Court held that a motor vehicle inventory, although admittedly a search, is reasonable if conducted pursuant to routine police procedures. The heavy emphasis placed upon routine police procedures by both courts presents another troublesome aspect of these cases because this may open the door for police agencies to bootstrap their way into valid seizures by merely expanding the scope of their routine inventory into the trunks of automobiles and other areas.

*Search of Person Incident to Lawful Traffic Arrest.* In recent years the Supreme Court has ruled that a search of the person incident to a lawful traffic arrest is valid,<sup>149</sup> and the Texas Court of Criminal Appeals dealt with the scope of such a search under the *Chimel v. California* doctrine<sup>150</sup> in *Beck v. State*.<sup>151</sup> The facts of this case recur so frequently that they are worthy of detailed reproduction here. The arresting officers observed the defendant make a turn without signalling and pulled him over to the roadside. As the vehicles were

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144. 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

145. 541 S.W.2d 608 (Tex. Crim. App. 1976).

146. 532 S.W.2d 591 (Tex. Crim. App. 1976).

147. *Id.* at 594.

148. *United States v. Burnett*, 526 F.2d 911 (5th Cir. 1976).

149. *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973).

150. *Chimel v. California*, 395 U.S. 752 (1969).

151. No. 50,498 (Tex. Crim. App., July 7, 1976). Motion for rehearing had been granted. No. 50,498 (Tex. Crim. App., July 20, 1976).

coming to a halt, the officers observed the defendant make a move toward the glove compartment of his vehicle. After stopping, the defendant exited his truck and remained near the driver's door. At this point, one arresting officer searched the defendant while the other examined the glove compartment of the vehicle and found marijuana. Holding the search unreasonable, the court emphasized the fact that the glove compartment was outside the physical scope of the defendant's reach, and thereby outside the legal scope of a search incident to a lawful arrest.

The physical distance between the defendant and the glove compartment should have been sufficient basis upon which to rest the decision, but the court went further, observing that the arrest took place at dusk rather than late at night and did not occur in a high crime area. The court also noted that the officers outnumbered the defendant, that the officers did not fear danger to themselves, and that the defendant did not appear to be intoxicated. These factors were totally unnecessary for an analysis of this search problem. They would more properly be determinative, however, in a stop and frisk confrontation.<sup>152</sup>

*Crossing International Borders.* A survey of search and seizure law would be remiss if it did not mention the intrusion upon a citizen's privacy when crossing international borders. The Supreme Court significantly diluted protection against these intrusions in a trilogy of cases in this area.<sup>153</sup> In *United States v. Martinez-Fuertes*<sup>154</sup> the Court acknowledged that any stop of a motor vehicle is a seizure within the purview of the fourth amendment, but the Court further held that the stopping at a permanent checkpoint of every vehicle when traveling on a primary artery at or near the border is not an unreasonable intrusion upon the privacy of citizens. Moreover, the Court approved a "secondary" investigation of each motor vehicle and its passengers even if the patrol officers have less than reasonable suspicion that a vehicle contains illegal aliens, thereby lessening the test announced in *United States v. Brignoni-Ponce*.<sup>155</sup> The Court conducted its usual balancing test, weighing the governmental interest in preventing the influx of illegal aliens against the supposed minimal intrusion upon the freedom of citizens.

The expectation of privacy still appears to be an important factor here, however, because the checkpoints must display significant signs and warnings that an intrusion is about to occur. Second, the Court placed heavy emphasis not only upon the administrative expertise of the border patrol but

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152. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968). For a recent Fifth Circuit decision upholding the frisk of motor vehicle passengers after the driver has been arrested see *United States v. Thorpe*, 536 F.2d 1098 (5th Cir. 1976), reversing the original decision of the three-judge bench.

153. See *United States v. Ortiz*, 422 U.S. 891 (1975) (officers at inland traffic checkpoints may not search private vehicles without probable cause); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (investigative stops by roving patrols approved under *Terry* rationale when reasonable suspicion exists that vehicle contains illegal aliens); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (probable cause required prior to searches conducted by roving border patrol officers).

154. 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).

155. 422 U.S. 873 (1975).

also upon statistics showing the increase in influx of illegal aliens during recent years, The rule emanating from *Martinez-Fuertes* seems to be based upon the rationales of the regulatory inspection cases<sup>156</sup> and the stop and frisk cases.<sup>157</sup> The need for inspection, determined by the expertise of the border patrol, is coupled with the reasonable suspicion of the law enforcement agencies that illegal activity will occur on the public highway where the checkpoint is established, and on the basis of *Martinez-Fuertes*, further refinement of the law of search and seizure regarding border related confrontations can be expected.

*Seizure of the Person.* During recent months two cases involving the warrantless arrest of a person based upon probable cause when officers had full opportunity to procure a warrant were rendered, one by the Fifth Circuit Court of Appeals and the other by the United States Supreme Court. Notwithstanding an inability to rely upon Supreme Court decisions which would soon be forthcoming, the Fifth Circuit in a per curiam opinion quickly disposed of the issue of whether such a warrantless arrest violates fourth amendment privacy rights.<sup>158</sup> During the same time period the United States Supreme Court ruled in *United States v. Watson*<sup>159</sup> that a warrantless arrest by postal inspectors in a public place was based on probable cause and was not violative of the fourth amendment despite a five-day period during which the inspectors could have obtained a warrant.<sup>160</sup> The true import of the *Watson* decision was difficult to discern since the Court relied upon a specific statute granting postal inspectors special authority to arrest,<sup>161</sup> while at the same time taking great pains to trace the historical development of the common law right to arrest without a warrant. The opinion seemed further tempered by emphasis upon the fact that the arrest occurred in a public place. Several months later, however, the Supreme Court removed all doubts as to the impact of the *Watson* decision in *United States v. Santana*.<sup>162</sup> The Court in a single sentence made clear that any warrantless arrest based on probable cause which occurs in a public place is reasonable, regardless of the presence or absence of a special statutory authorization.<sup>163</sup> Thus, a dichotomy within the law of search and seizure has been crystallized by the *Santana* and *Watson* decisions. The warrantless seizure of one's person in a public place based upon probable cause is condoned despite the ability of the arresting officers to obtain a warrant, while the sanctity of one's home or office is preserved by the general requirement of a probable cause determination by a neutral and detached magistrate. It therefore seems that the United States

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156. See, e.g., *See v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

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

158. *United States v. Burnett*, 526 F.2d 911 (5th Cir. 1976).

159. 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

160. 96 S. Ct. at 824, 46 L. Ed. 2d at 602.

161. 18 U.S.C. § 3061(a) (1970).

162. 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). The *Santana* decision is additionally important because it illustrates a revitalization of the "hot pursuit" doctrine of *Warden v. Hayden*, 387 U.S. 294 (1967).

163. 96 S. Ct. at 2409, 49 L. Ed. 2d at 305.

Supreme Court has judicially determined that the fourth amendment extends more protections to the sanctity of one's home than to that of his person.

*Privacy.* The Fifth Circuit Court of Appeals displayed precocity in ruling that a grand jury subpoena to a bank requesting the defendant's financial statement is not violative of the fourth amendment.<sup>164</sup> Less than two months later the Supreme Court in *United States v. Miller*<sup>165</sup> ruled that even a defective subpoena issued by a United States Attorney for checks and other bank records of the defendant was not an unreasonable intrusion under the fourth amendment.<sup>166</sup> According to the Court, a citizen has no reasonable expectation of privacy as to his own checks and deposit slips, copies of which the bank maintains pursuant to the Bank Secrecy Act.<sup>167</sup> The language of the Court in *Miller* seems to leave a person's protection of his or her private papers intact. Later in the term, however, the Court in *Andresen v. Maryland*<sup>168</sup> approved a warrant to search an attorney's office which gave the officers general authority to seize certain documents "together with other fruits, instrumentalities and evidence of crime at this time unknown."<sup>169</sup> Historians of fourth amendment development would be particularly disturbed by the import of this decision as it condones the use of general authority to search as well as to seize a citizen's private papers.<sup>170</sup> The Court tempered its approval of general authority in the warrant in question by pointing out that the wording of a warrant's purpose always dictates its scope, but *Andresen* nevertheless represents another reflection of the growing erosion of the right to privacy within the federal system.

The Texas Court of Criminal Appeals recently has exhibited a more solicitous attitude toward this right. In considering the open fields exception to the "curtilage" doctrine,<sup>171</sup> the court recognized that the physical location of shrubbery surrounding a rural residence is indicative of the occupant's expectation of privacy.<sup>172</sup> Thus, while finding the open fields exception applicable to the case at bar, the court took pains to discuss examination of a photograph of the defendant's residence in order to ascertain the precise location of the foliage as well as the vantage point of the observing officers in determining the owner's right to privacy. In a case even more protective of that right the court ruled that the lessee of a mini-warehouse has a reasonable expectation of freedom from governmental intrusion.<sup>173</sup> Finally, in a case of first impression the court held that a waiver of fourth amendment rights

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164. *United States v. Sahley*, 526 F.2d 913 (5th Cir. 1976).

165. 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).

166. *Id.* at 1624, 48 L. Ed. 2d at 79.

167. 12 U.S.C. § 1829b(d) (Supp. 1976).

168. 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). See further discussion of *Andresen*, note 59 *supra* and accompanying text.

169. 96 S. Ct. at 2748, 49 L. Ed. 2d at 642.

170. See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION* (1937); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* (1966); A. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

171. See *Hester v. United States*, 265 U.S. 57 (1924).

172. *Ochs v. State*, 543 S.W.2d 355 (Tex. Crim. App. 1976).

173. *Kolb v. State*, 532 S.W.2d 87 (Tex. Crim. App. 1976).

contained in an agreement specifying conditions of probation was too broad, and, therefore, violated the probationer's right of privacy.<sup>174</sup> In its opinion the court noted that there is a split of authority in the United States concerning the validity of such waivers, but it nevertheless decided to exert a more protective attitude than some courts toward the somewhat diminished right of a probationer to expect privacy.

*The Exclusionary Rule.* During the survey period the United States Supreme Court considered the exclusionary rule in two important cases.<sup>175</sup> In *United States v. Janis*<sup>176</sup> the Court held the exclusionary rule inapplicable to a civil tax proceeding even though evidence of the matter was admittedly tainted. In *Stone v. Powell*<sup>177</sup> the habeas corpus jurisdiction of the federal courts to entertain collateral attacks on state convictions based upon illegally seized evidence was severely restricted because the Court ruled that there is no constitutional requirement for the federal court to extend habeas corpus relief to a state prisoner even though illegally seized evidence was introduced at his trial, if the state court system has provided him a full and fair opportunity to litigate his fourth amendment claim. Although *Janis* and *Stone* admittedly differ in their factual and procedural contexts, the analysis in both opinions reflects a balancing test of the presumed deterrent effect of the exclusionary rule versus the detriment to societal interests when the rule is applied. The impact of the *Stone* opinion is unclear, however; it may merely be concerned with the construction of a federal statute<sup>178</sup> or it may portend the ultimate demise of the exclusionary rule in both state and federal proceedings. Nevertheless, we can take solace in the Texas court's willingness to extend application of the exclusionary rule to proceedings collateral to an actual criminal trial.<sup>179</sup>

#### IV. DISCOVERY

Although not the first case to enunciate the constitutional doctrine bearing its name,<sup>180</sup> the 1963 case of *Brady v. Maryland*<sup>181</sup> began a period of increased litigation about a prosecuting attorney's obligation to disclose evidence favorable to the defense. This was characterized by uncertainty over the test for determining prejudicial error<sup>182</sup> and the mechanics for determining whether that rule had been violated.<sup>183</sup>

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174. *Tamez v. State*, 534 S.W.2d 686 (Tex. 1976). *Contra*, *People v. Mason*, 5 Cal. 3d 759, 488 P.2d 630, 98 Cal. Rptr. 728 (1971).

175. *Stone v. Powell*, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *United States v. Janis*, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976).

176. 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976).

177. 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

178. 28 U.S.C. § 2254 (1970) (federal habeas corpus remedy for state court actions).

179. The Texas Court of Criminal Appeals' decisions concerning probation revocation are particularly noteworthy because the applicability of the exclusionary rule to such proceedings is not questioned by the court. *See, e.g.*, *Ablon v. State*, 537 S.W.2d 267 (Tex. 1976); *Tamez v. State*, 534 S.W.2d 686 (Tex. 1976), *discussed in* note 174 *supra* and accompanying text.

180. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).

181. 373 U.S. 83 (1963).

182. *See, e.g.*, *Moore v. Illinois*, 408 U.S. 786 (1972).

183. *See, e.g.*, *Fernandez v. State*, 516 S.W.2d 677 (Tex. Crim. App. 1974).

The symbol of this debate was a quaint document known as the "Brady Motion" which demanded production of all evidence favorable to the accused. Because of the United States Supreme Court opinion in *United States v. Agurs*<sup>184</sup> the Brady Motion is only of historical interest now, and much of the prior uncertainty of the preceding thirteen years is ended as well.

One may quarrel with the spiritual direction of the seven member majority who have bridled the *Brady* doctrine,<sup>185</sup> but it is difficult to criticize the care with which the junior member of the Court, Justice Stevens, enunciated in *Agurs* the majority's perception of the doctrine. He classified the three kinds of suppression cases, then laid down three corresponding standards of materiality. The first is those cases where it was discovered after trial that the prosecution case included perjured testimony;<sup>186</sup> the second category includes those cases in which the prosecuting attorney had failed or refused to reveal material evidence which had been specifically requested by the defense;<sup>187</sup> and in the third are those cases in which there is only a general request for exculpatory information, or no request at all.<sup>188</sup>

The *Agurs* case fell into the third category. The defendant was a prostitute convicted of killing a man in a cheap hotel room, where employees discovered her and the decedent, already stabbed, in a struggle over the knife. She claimed self-defense, and the basis of her appeal under the *Brady* doctrine was the prosecution's failure to volunteer knowledge that the decedent had a prior conviction record for assault and carrying deadly weapons.<sup>189</sup>

The Supreme Court explained how different standards of materiality apply to each of the three types of *Brady* cases. In those fundamentally unfair cases where the prosecution used perjured testimony, a "strict standard of materiality" would apply because such cases "involve a corruption of the truth-seeking function of the trial process." In the second category, where the defense had requested specific information which was denied it, the test is whether the suppressed evidence "might have affected the outcome of the trial."<sup>190</sup> In the least offensive form of *Brady* violation, the third category, the court pondered what standard of materiality should be applied. In arriving at its conclusion the Court put to rest the notion that the outcome would turn on the culpability of the prosecutor,<sup>191</sup> and rejected the "might affect" standard:

For a jury's appraisal of a case 'might' be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate

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184. 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

185. Justices Marshall and Brennan dissented.

186. The Court regards this first category as the most egregious type of *Brady* case.

187. The *Brady* case itself fell into this category. In *Brady* a co-defendant's exculpatory statement was kept from the defense.

188. 96 S. Ct. at 2399, 49 L. Ed. 2d at 351-52.

189. *Id.* at 2395-96, 49 L. Ed. 2d at 348. It is unfortunate that a major case in this area should involve the suppression of evidence which is readily obtainable and obviously material. The defendant's prior criminal record in a self-defense case is not a typical example of evidence found improperly suppressed under *Brady* doctrine cases.

190. *Id.* at 2398, 49 L. Ed. 2d at 350.

191. The Court noted that "if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* at 2400, 49 L. Ed. 2d at 353.



doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.<sup>192</sup>

The Court also specifically rejected the customary "harmless error" standard characterized by *Kotteakos v. United States*,<sup>193</sup> requiring the reviewing judge to set aside the conviction unless he is certain that the error either did not influence the jury or affected it only slightly. "Unless every nondisclosure is regarded as automatic error," Justice Stevens said, "the constitutional standard of materiality must impose a higher burden on the defendant."<sup>194</sup>

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record . . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.<sup>195</sup>

Justices Marshall and Brennan dissented, complaining of the majority's narrow definition of material evidence because, they contended, it will create "an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment."<sup>196</sup>

One effect of the decision is to make worthless the customary general demand for evidence helpful to the defense. In its opinion the Court points out that no significant difference exists between cases in which merely a general request for exculpatory matter is made and cases in which no request at all is made.<sup>197</sup> Instead, it now becomes very important that a defendant make a specific demand if at all possible because on appeal his burden will be easier if it can be shown that the prosecutor suppressed something specifically requested. Thus, "specificity," the nemesis of discovery efforts under article 39.14,<sup>198</sup> the anemic Texas discovery statute, now burdens defense efforts to invoke *Brady* as well. Will it satisfy the specificity requirements of *Agurs* to file a "shotgun" motion, specifically setting forth every item of evidence within a defense lawyer's imagination? The answer is probably not, unless the record shows some additional effort to put prosecuting attorneys on notice.<sup>199</sup>

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192. *Id.* at 2400, 49 L. Ed. 2d at 352-53.

193. 328 U.S. 750, 764 (1946).

194. 96 S. Ct. at 2401, 49 L. Ed. 2d at 354.

195. *Id.* at 2401-02, 49 L. Ed. 2d at 354-55 (footnotes omitted).

196. *Id.* at 2404, 49 L. Ed. 2d at 358.

197. *Id.* at 2399, 49 L. Ed. 2d at 351-52.

198. TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1966).

199. How properly to apply the reasonable doubt test to mitigating evidence is an issue raised by the Court's decision in *Agurs*. This issue is especially vexing in states with bifurcated jury trials. The problem of how to enforce the defense's mandate also remains unsettled. For example, should defense counsel routinely call prosecuting attorneys as witnesses in post-trial hearings to ask about their knowledge of suppressed evidence?

Although the Court's extremely difficult test for materiality dispels any hope for an expansion of the *Brady* doctrine, it is not inconsistent with the developing trends known to Texas practitioners. The Fifth Circuit has made clear its reluctance to reverse except where the effect of missing evidence on a jury's decision would be "considerably above the level of speculation."<sup>200</sup> The Texas Court of Criminal Appeals has followed suit in finding suppression harmless after considering its effect on the outcome of the trial,<sup>201</sup> which is the standard uniformly applied in Texas cases. It is interesting to contemplate what effect the *Agurs* decision might have had on two leading Texas cases which were reversed under the *Brady* doctrine. In both *Crutcher v. State*<sup>202</sup> and *Ridyolph v. State*<sup>203</sup> the court applied the "may have had an effect on the outcome" standard, which under *Agurs* is reserved only for those cases where prosecuting attorneys had been put on notice by specific requests. In each no specific request had been made and the defense did not know about the information suppressed until after the trial. *Ridyolph* involved failure to disclose to the defense a witness who could have corroborated the defensive theory of negligent homicide. Without reviewing all of the evidence in the case, it is impossible to say whether the court would have reversed also had it applied the test of whether there arose a reasonable doubt of guilt that did not otherwise exist. It should be noted, however, that both the trial judge and the prosecuting attorney had entirely overlooked the evidence which led to reversal, so it is certainly plausible that that case would have been affirmed had it been decided after *Agurs*. *Crutcher* involved suppression of an important prior inconsistent statement of a prosecution witness. Since it merely involved a matter of impeaching that witness, *Crutcher* too would likely have been affirmed had the reasonable doubt test been applied. That case, however, could be said to fall within the Supreme Court's category of perjured testimony cases with its strict definition of materiality. If so, the result would have been the same.

The decision of an appellate court can be subjective regardless of the test applied. The 1976 case of *Love v. State*,<sup>204</sup> decided before *Agurs*, applied the "may have had an effect" test. Since there was a specific request for particular information concerning dying declarations of the decedent, the "might affect" test would seem to have been the proper test even under *Agurs*. The *Brady* case is itself an example of a specific request, and the test of materiality in such a case remains what it was under *Brady*: whether the evidence "might have affected the outcome of the trial."<sup>205</sup> Despite applicability of the test more favorable to the appellant, the Texas court affirmed, finding that the evidence of Love's guilt was overwhelming and that the suppressed evidence would not have changed the result.

If federal constitutional law fails him, a defendant, convicted without the benefit of evidence which might have helped him, can file a grievance against

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200. *Ross v. Texas*, 474 F.2d 1150, 1153 (5th Cir. 1973).

201. *Hill v. State*, 504 S.W.2d 484 (Tex. Crim. App. 1974).

202. 481 S.W.2d 113 (Tex. Crim. App. 1972).

203. 503 S.W.2d 276 (Tex. Crim. App. 1973).

204. 533 S.W.2d 6 (Tex. Crim. App. 1976).

205. *United States v. Agurs*, 96 S. Ct. 2392, 2398, 49 L. Ed. 2d 342, 350 (1976).

the prosecuting attorney, invoking Disciplinary Rule 7-103(b) of the Code of Professional Responsibility<sup>206</sup> which requires a public prosecutor to disclose to the defendant the existence of evidence tending to negate or mitigate the offense. But he need not bother filing a civil suit against the prosecutor for a violation of his civil rights, since the United States Supreme Court held in 1976 that under section 1983<sup>207</sup> a public prosecutor enjoys absolute immunity from civil suit in suppression of evidence cases.<sup>208</sup>

There is little encouragement in recent cases for defense counsel trying to prepare a criminal case for trial. The decisions appear to reward prosecution chicanery or, at the most, to chasten the prosecution with language such as "while we do not condone" and "although fairness required,"<sup>209</sup> but at the same time affirming the convictions. To say that a sporting theory of justice prevails in Texas criminal cases is euphemistic. There is nothing sporting about the gauntlet which the defense must run in its efforts to be prepared to present to the fact finders the evidence and argument most favorable to the defendant. In *Florio v. State*<sup>210</sup> the defense requested all scientific tests, including blood tests. The opinion does not make clear, unfortunately, the exact form of the motion, the state's response, or whether the court refused to disclose tests which were available or whether the defense was actively misled into thinking there were none. After the defendant himself had placed a pistol in evidence, however, evidence of blood on the butt of the pistol was brought out to defendant's detriment. He complained on appeal that he never would have introduced the gun in the first place had he known of the blood evidence. The court also failed to make plain its precise reason for rejecting the complaint on appeal. *Brady* doctrine law apparently was applied, since the court cited *Means v. State*<sup>211</sup> and said that failure to disclose the evidence prior to trial "was not so prejudicial as to warrant reversal."<sup>212</sup>

The *Florio* case illustrates still another growing practice: the police and sometimes the prosecution secrete witnesses or isolate them from defense contact. For example, while finding that the assistant district attorney had instructed the witness who knew about the blood on the butt of the pistol not to talk to defense counsel although requests for contact had been made and an appointment arranged but not met, the court of criminal appeals merely admonished the prosecution in *Florio* for behavior which was "not to be condoned."<sup>213</sup> A similar complaint was raised in *Sigard v. State*,<sup>214</sup> a heroin sale case which involved the question of whether the San Antonio police had procured the absence of an informer witness. After cataloguing the good faith efforts of the police to find the witness to serve him with the defendant's trial subpoena, the court resolved the case by concluding that the sixth amend-

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206. TEX. REV. CIV. STAT. ANN. art. 320a-1 (Vernon 1973).

207. 42 U.S.C. § 1983 (1970).

208. *Imbler v. Pachtman*, 96 S. Ct. 984, 46 L. Ed. 2d 35 (1976).

209. *Florio v. State*, 532 S.W.2d 614, 616-17 (Tex. Crim. App. 1976).

210. *Id.*

211. 429 S.W.2d 490 (Tex. Crim. App. 1968).

212. 532 S.W.2d at 616.

213. *Id.* at 617.

214. 537 S.W.2d 736 (Tex. Crim. App. 1976).

ment does not require the state to be successful in subpoenaing witnesses. The court so ruled despite evidence that the police had given the witness \$75 and may have invited him to disappear. Judge Odom dissented, noting that a recitation of the diligence used by the state to find the witness missed the point, since their failure to do so only served to demonstrate all the more dramatically how successful the disappearance was in the first place.<sup>215</sup> This case would be less remarkable but for the 1974 case of *White v. State*,<sup>216</sup> a similar San Antonio case which, on rehearing, finally turned on the failure of the defense to put the correct address on his subpoena application. It was a sale of heroin case, as was *Sigard*, and it also involved the absence of an informer witness who had received money from the police with the recommendation that he leave town for his own safety. Judge Odom dissented in that case also. It seems the San Antonio narcotics police have discovered a way to avoid the mandate of *Roviaro v. United States*<sup>217</sup> that the identity of informers who are also witnesses be revealed for use by the defense as fact witnesses.

#### V. MULTIPLE OFFENSES

The Texas Court of Criminal Appeals was asked frequently during the survey period to determine whether multiple convictions arising from identical or largely overlapping fact situations violate the state constitution's ban on multiple jeopardy.<sup>218</sup> While the basic rule to be applied remains well established,<sup>219</sup> the more difficult cases evidence a certain degree of confusion over the law. The simpler appeals, on the other hand, seem to arise either from an excess of zeal or a lack of due care on the part of some prosecutors.

Most of the cases are easily explained under the settled rule that the state may carve as large an offense out of a single transaction as possible, but it must cut only once.<sup>220</sup> This "carving doctrine" has been recently applied in several cases to multiple offenses arising from such single transactions as robbery by assault and subsequent theft of victim's car,<sup>221</sup> simultaneous seizure of heroin and narcotics paraphernalia,<sup>222</sup> simultaneous seizure of marijuana and heroin,<sup>223</sup> sexual assaults upon and subsequent robberies of three teenage girls,<sup>224</sup> robbery by firearms and murder with malice,<sup>225</sup> and robbery by assault and assault with intent to murder.<sup>226</sup> An interesting variation is provided in the dictum of *McCaleb v. State*,<sup>227</sup> a case arising from

215. *Id.* at 739.

216. 517 S.W.2d 543 (Tex. Crim. App. 1974), *cert. denied*, 421 U.S. 1014 (1975).

217. 353 U.S. 53 (1957).

218. TEX. CONST. art. I, § 14.

219. "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person again be put on trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." *Id.*

220. *Douthit v. State*, 482 S.W.2d 155 (Tex. Crim. App. 1972).

221. *Ex parte Evans*, 530 S.W.2d 589 (Tex. Crim. App. 1975).

222. *Ex parte Santillan*, 532 S.W.2d 638 (Tex. Crim. App. 1976).

223. *Ex parte Adams*, 541 S.W.2d 440 (Tex. Crim. App. 1976).

224. *Tatum v. State*, 534 S.W.2d 678 (Tex. Crim. App. 1976).

225. *Ex parte Thomas*, 538 S.W.2d 622 (Tex. Crim. App. 1976); *Ex parte Farris*, 538 S.W.2d 134 (Tex. Crim. App. 1976); *Ex parte Jewel*, 535 S.W.2d 362 (Tex. Crim. App. 1976).

226. *Ex parte Hilliard*, 538 S.W.2d 135 (Tex. Crim. App. 1976).

227. 537 S.W.2d 728 (Tex. Crim. App. 1976).

an extended con game. There the court noted that "where one scheme has been relied upon and all of the transactions have been proved and where there has not been an election, the State cannot prosecute upon the individual transactions in subsequent cases . . . ." <sup>228</sup> In this instance the "scheme" is apparently the "transaction."

Excess reliance on the "single transaction" test often will prove misplaced, however, and several cases which appear on their faces to come within the "single transaction" test have been held to fall outside it as the court applied various other tests. For example, on two recent occasions the court of criminal appeals has held that if the first offense is "complete" before the second is initiated, the two incidents are not part of the same transaction. Thus, in *Hawkins v. State*<sup>229</sup> separate convictions for possession of a sawed-off shotgun and for a robbery committed with the gun were upheld because the possession offense was complete before the commission of the robbery occurred.<sup>230</sup> Similarly, in *Robinson v. State*<sup>231</sup> convictions for criminal trespass and for theft of a bicycle from the University of Houston campus were separate transactions since the trespass was "complete as soon as the defendant entered the grounds."<sup>232</sup> A comparison of *Robinson* with *Ex parte Evans*,<sup>233</sup> where the defendant robbed and shot the victim, forced him to run away, and then stole his car, is instructive. In *Evans* the court of criminal appeals held the robbery and theft to be parts of the same transaction because "the time sequence of events was continuous;"<sup>234</sup> thus, the distinguishing feature was that "continuous . . . assaultive action"<sup>235</sup> was used to accomplish both the robbery and the car theft. It may not be possible to predict the outcome of a given case, however, even by combining the "same transaction" and "continuous assaultive action" tests. This is illustrated by *Ex parte Caldwell*<sup>236</sup> where separate convictions of a defendant for robbery and for rape were affirmed. The defendant had robbed a hamburger chain employee at gunpoint in one room of the drive-in, then raped her in another, and the court of criminal appeals reasoned "that the robbery and the rape did not occur in a single transaction, or in the same place or at the same time."<sup>237</sup>

When two offenses are proved with essentially the same evidence, some very complex problems can arise, as *Wilson v. State*<sup>238</sup> indicates. The defendant in *Wilson* had set a fire in his jail cell, and the deputy sheriff while removing him suffered smoke inhalation and was attacked by the defendant and wounded with a knife. Although the knifing was introduced into evidence and proved at the defendant's trial for arson, a subsequent prosecution for attempted capital murder of a peace officer was held not to be barred by prior

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228. *Id.* at 731.

229. 535 S.W.2d 359 (Tex. Crim. App. 1976).

230. *Id.* at 362.

231. 530 S.W.2d 592 (Tex. Crim. App. 1975).

232. *Id.* at 593.

233. 530 S.W.2d 589 (Tex. Crim. App. 1975).

234. *Id.* at 592.

235. *Id.*

236. 537 S.W.2d 265 (Tex. Crim. App. 1976).

237. *Id.* at 266.

238. 541 S.W.2d 174 (Tex. Crim. App. 1976).

jeopardy. The court reasoned that because the knife attack was not *required* to be proven to aggravate the arson from a second to a first degree felony,<sup>239</sup> the second conviction for causing bodily injury and aggravated assault could stand also. Another approach to the "same evidence" problem was taken by Judge Onion in his concurrence in *Graves v. State*.<sup>240</sup> In that case the defendant was convicted for driving while intoxicated ("DWI") after his vehicle jumped a curb and struck a thirteen-year-old girl. Following his DWI conviction, the girl died, and the defendant was indicted and convicted for involuntary manslaughter despite his plea of prior jeopardy. Judge Onion, in considering the contention that DWI is a lesser offense included within automobile manslaughter,<sup>241</sup> reasoned that by definition a lesser included offense "is established by proof of the same or less than all the facts required to establish the commission of the offense charged."<sup>242</sup> Since a DWI conviction requires proof that the offense occurred on a public road or highway, and involuntary manslaughter has no such requirement, DWI is not a lesser offense included in the drunk-driving manslaughter charge.

One question pertinent to almost all of the cases discussed is why did the prosecutor fail to make an election of charges. In *Ex parte Thomas*,<sup>243</sup> for example, the court felt compelled to set aside the defendant's murder conviction simply because the robbery charge arising from the same incident bore a lower degree indictment. In *Ex parte Adams*<sup>244</sup> the same situation caused reversal of a heroin conviction while the defendant's marijuana conviction was affirmed.<sup>245</sup>

Prior jeopardy is an error considered so fundamental that it cannot be waived, expressly or constructively. In *Ex parte Jewel*<sup>246</sup> the defendant's second conviction arising from a robbery-murder was set aside in a habeas corpus proceeding even though the defendant had pleaded guilty to the second charge without pleading prior jeopardy and had taken no appeal. In *Ex parte Caldwell*<sup>247</sup> the court took notice of the error even though the petitioner's application for habeas corpus failed to raise the issue.

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239. TEX. PENAL CODE ANN. § 28.02(b) (Vernon 1974) increases the second degree felony of arson to a first degree felony if any bodily injury is caused by the fire. The smoke inhalation here was deemed a bodily injury sufficient to increase the arson felony. The knife attack could not have been used to aggravate the arson offense since it was not connected to the fire itself.

240. 539 S.W.2d 890 (Tex. Crim. App. 1976).

241. TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).

242. TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon Supp. 1976-77). The court's difficulty in reaching a result in this case is illustrated by the judges' inability to agree on a line of reasoning supportive of the decision. Judge Douglas concurs with Judge Odom's reasoning only to the extent that "separate and distinct offenses were shown" when the defendant continued driving down the road some distance after striking the girl. 539 S.W.2d at 894. Judge Morrison relied on cases dating back to *Curtis v. State*, 3 S.W. 86 (Tex. Civ. App. 1886), in his majority opinion. In *Curtis* the court held that where a victim of an offense dies subsequent to the defendant's conviction for that offense, prosecution for the death is not barred by prior jeopardy. The defendant could not have been prosecuted for the "same offense" before death that existed after death. 539 S.W.2d at 891. Of the three opinions in *Graves*, only Judge Morrison discusses the "same transaction" problem.

243. 538 S.W.2d 622 (Tex. Crim. App. 1976); see note 225 *supra* and accompanying text.

244. 541 S.W.2d 440 (Tex. Crim. App. 1976); see note 223 *supra* and accompanying text.

245. See also *Valdez v. State*, 543 S.W.2d 658 (Tex. Crim. App. 1976).

246. 535 S.W.2d 362 (Tex. Crim. App. 1976); see note 225 *supra* and accompanying text.

247. 537 S.W.2d 265 (Tex. Crim. App. 1976); see note 236-37 *supra* and accompanying text.

## VI. ENHANCEMENT

In the past year the court of criminal appeals decided several challenges to the validity of the new felony sentence enhancement<sup>248</sup> statute, and clarified a wide variety of problems concerning its application. Perhaps the most predictable constitutional challenge is that enhancement on the basis of an offense committed prior to the new code's enactment<sup>249</sup> violates the federal prohibition against *ex post facto* laws.<sup>250</sup> However, this argument was made and rejected in *Shaw v. State*<sup>251</sup> on the authority of *Graham v. West Virginia*.<sup>252</sup>

A more interesting constitutional contention was raised in *Armendariz v. State*,<sup>253</sup> where the defendant argued that the enhancement statute was being selectively and arbitrarily applied, violating both the due process clause of the fourteenth amendment and the eighth amendment prohibition against cruel and unusual punishment as elaborated in *Furman v. Georgia*.<sup>254</sup> Conceding that the unavailability of penitentiary papers in some cases as well as the invalidity of prior convictions in others makes it impossible to apply the enhancement statute to all offenders with prior convictions, the court of criminal appeals held that the facts fell short of showing the "intention and purposeful discrimination"<sup>255</sup> which would be required to set aside the statute on fourteenth amendment grounds. Concerning the cruel and unusual punishment argument, the court quoted *Thrash v. State*<sup>256</sup> that "the enhanced penalty statutes have been held valid against all constitutional attack,"<sup>257</sup> and concluded that the new statute also will be upheld despite challenges.

Several well established rules interpreting the prior enhancement statute have now been reinforced as applicable to the new statute. In *Carvajal v. State*<sup>258</sup> the court provided an instructive discussion of the new statute's legislative history in applying the rule that "using the same two prior convictions to enhance punishment more than once is clearly error."<sup>259</sup> Nor can a prior conviction which was used successfully for enhancement purposes under the old Penal Code be used again under the new code. The exception to this rule, moreover, which allows a prior conviction used once for second-offense enhancement to be used again in a habitual offender case, is also carried forward. Further, discussion of the mandatory life penalty in an habitual felon case during *voir dire* or trial is still prohibited.<sup>260</sup>

One novel theory advanced against enhancement was rejected by the court, but in so doing the court suggested that under the proper set of facts it would

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248. TEX. PENAL CODE ANN. § 12.42 (Vernon 1974).

249. The Texas Penal Code went into effect January 1, 1974.

250. U.S. CONST. art. I, § 10.

251. 529 S.W.2d 75 (Tex. Crim. App. 1976).

252. 224 U.S. 616 (1912).

253. 529 S.W.2d 525 (Tex. Crim. App. 1975).

254. 408 U.S. 238 (1972).

255. 529 S.W.2d at 528.

256. 500 S.W.2d 834 (Tex. Crim. App. 1973).

257. 529 S.W.2d at 527.

258. 529 S.W.2d 517 (Tex. Crim. App. 1975).

259. *Id.* at 521.

260. *Ex parte White*, 538 S.W.2d 417 (Tex. Crim. App. 1976).

consider the theory again. In *Watson v. State*<sup>261</sup> the defendant contended that section 29.03 of the Penal Code<sup>262</sup> is a special enhancement statute relating only to robbery, and controls in robbery cases over the general provisions of section 12.42. The court rejected the argument in *Wilson*, but specifically reserved the question of whether section 31.03 of the code<sup>263</sup> might be interpreted as special enhancement provisions controlling theft cases.

If attacks on the validity of the new enhancement statute are to be without merit, however, there is at least fertile ground for defense attorneys to attack the prior convictions that are alleged for purposes of enhancement by the prosecution. Perhaps the most common defect to be found in prior convictions is the state's failure to provide indigent defendants with counsel in cases tried prior to *Gideon v. Wainwright*.<sup>264</sup> The court of criminal appeals reviewed the basic premises in *Bray v. State*,<sup>265</sup> and held that the defendant bears the burden of showing that he was indigent, without counsel and did not waive counsel voluntarily. Where the defendant offers evidence that he was indigent and without counsel, however, the burden shifts to the state to prove waiver, which "cannot be presumed from a silent record."<sup>266</sup> *Bray* involved a prior conviction which originally resulted in a probated sentence, and lack of counsel at a probation revocation hearing was held equally as fatal for enhancement purposes to the later conviction as was lack of counsel at the trial itself. Similarly, absence of counsel at sentencing renders a prior conviction invalid for enhancement purposes where it is found that there was a real probability that presence of counsel might have resulted in probation or suspension of sentence.<sup>267</sup>

Two recent cases illustrate the extent to which this reasoning can sometimes be applied. In *Ex parte Woodard*<sup>268</sup> the enhancement allegation of a felony DWI conviction was held invalid where the defendant was not represented by counsel at his misdemeanor DWI trial for which conviction was a prerequisite to the felony second offense. And in *McDonald v. Estelle*<sup>269</sup> introduction of an uncounselled felony conviction was held to warrant reversal and new trial even though the prior conviction had not been alleged

261. 532 S.W.2d 619 (Tex. Crim. App. 1976).

262. TEX. PENAL CODE ANN. § 29.03 (Vernon 1974) provides: "(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he: (1) causes serious bodily injury to another; or (2) uses or exhibits a deadly weapon. (b) An offense under this section is a felony of the first degree."

263. TEX. PENAL CODE ANN. § 31.03 (Vernon 1974) provides:

(d) An offense under this section is:

(2) Class B misdemeanor if:

(B) the value of the property stolen is less than \$5 and the defendant has previously been convicted of any grade of theft;

(4) a felony of the third degree if:

(C) the value of the property stolen is less than \$200 and the defendant has been previously convicted two or more times of any grade of theft.

264. 372 U.S. 335 (1963).

265. 531 S.W.2d 633 (Tex. Crim. App. 1976).

266. *Id.* at 634.

267. *Davis v. Estelle*, 529 F.2d 437 (5th Cir. 1976). *See also Gutierrez v. Estelle*, 474 F.2d 899 (5th Cir. 1973).

268. 541 S.W.2d 187 (Tex. Crim. App. 1976).

269. 536 F.2d 667 (5th Cir. 1976).



for enhancement, but merely introduced during the punishment phase as evidence of the defendant's "prior criminal record."<sup>270</sup> The Court held that such error was not "harmless beyond a reasonable doubt."<sup>271</sup> Where the only objection, however, is that the prior sentence does not reflect that the defendant was represented by counsel, and neither a motion to quash the indictment which alleges the prior conviction nor an objection to its introduction was made by defense counsel, the court would find no error.

Section 12.42(d) of the Penal Code requires that the second of two prior convictions alleged in an habitual felon case must have been committed after conviction of the first has become final. This requirement has proved a trap for careless prosecutors on at least two recent occasions. Even though the first and second offenses alleged for enhancement were separated by ten years in *Tyra v. State*,<sup>272</sup> and thirteen years in *Wiggins v. State*,<sup>273</sup> the state's failure in each case to offer proof that the first conviction was final before the second offense occurred was held to render the sentences invalid. In both of these cases sentence had been imposed by the court rather than the jury, so that only the issue of punishment had to be retried, but the legal issue is clear. There are, however, limits to this requirement. Strict proof is not required—the state can allege in an indictment that the first of two prior convictions alleged resulted in a final conviction before the commission of the second and the absence of specific dates will not be fatal to the indictment.<sup>274</sup>

When prosecutors experience delays in obtaining the penitentiary papers needed to prove prior convictions for enhancement, another procedural problem can develop, as illustrated in *Henson v. State*.<sup>275</sup> In that case the defendant was indicted for burglary, and counsel was appointed for him. Three days before trial defendant was re-indicted on the same charge, but as an habitual offender. The case went to trial as scheduled. Although defendant did not raise the point, it was held on appeal that the defendant had been denied effective assistance of counsel because his appointed counsel had not been given ten days to prepare for the trial, as mandated by article 26.04 of the Code of Criminal Procedure, to defend against the enhancement allegations. In the absence of an express waiver of the preparation period, the court ordered a re-hearing on punishment.

Other procedural errors have been treated more leniently in the enhancement area. The absence of a written waiver of jury trial from a penitentiary packet will not, of itself, overcome the "presumption of regularity" accorded a prior judgment which did recite that jury trial had been waived.<sup>276</sup> Similarly, failure of the trial court to sign or approve an agreement to waive confrontation of witnesses and stipulate evidence in a prior conviction was held essentially a question of the sufficiency of the evidence to support that

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270. *Id.* at 671.

271. *See Garcia v. State*, 541 S.W.2d 428, 430 (Tex. Crim. App. 1976).

272. 534 S.W.2d 695 (Tex. Crim. App. 1976).

273. 539 S.W.2d 142 (Tex. Crim. App. 1976).

274. *Hernandez v. State*, 530 S.W.2d 563 (Tex. Crim. App. 1975).

275. 530 S.W.2d 584 (Tex. Crim. App. 1975).

276. *McCoy v. State*, 529 S.W.2d 538 (Tex. Crim. App. 1975).

conviction, and thus not subject to collateral attack.<sup>277</sup> An indictment giving the wrong district court number in alleging a prior conviction will not be fatally defective *if* the prior conviction was entered in a county with only one district court; such a variance is material only if it prevents the defendant from being able to find the record so that he can prepare to try any issues concerning the prior conviction.<sup>278</sup>

As to prior convictions in other states, if it can be shown that the defendant was sentenced to and served time in the penitentiary, a prior felony conviction will be held proved, as was done in *Almand v. State*.<sup>279</sup> Two other minor procedural points are covered in this case. First, where the penitentiary packet proving a prior conviction for enhancement has been omitted from the record on appeal, the court may properly order the packet made part of the record before deciding the appeal. Second, although the trial court should expressly find that the defendant has been convicted of a prior felony when entering an enhanced sentence, a judgment which fails to do so may be reformed on appeal if the record reflects that the prior conviction was proven. A trial court's mistake was reformed in *Phillips v. State*,<sup>280</sup> where, after the jury had returned a minimum enhanced sentence of fifteen years, the judge applied the indeterminate sentencing law in error, and entered a sentence of "not less than five or more than 15 years."<sup>281</sup>

A careless job of "proving-up" the prior conviction forced a remand for rehearing on sentence in *Bullard v. State*.<sup>282</sup> The state properly introduced two sets of "jail card business records" in lieu of "penitentiary packets" to prove-up two prior felony convictions. A deputy sheriff who specialized in fingerprinting was called, and testified that the prints on one jail card matched prints taken from the defendant that day, but he was not asked about the prints on the second card. Although the court of criminal appeals found the jail cards admissible evidence, it held that the proof was simply inadequate on the prior convictions.

Federal enhancement statutes are not without their pitfalls, either. In fact, the procedures prescribed in at least one type of case<sup>283</sup> have been held to require keeping the trial judge unaware of a notice of enhancement until after conviction or guilty plea even though the notice must be filed with the court clerk and served on the defendant.<sup>284</sup> Furthermore, the same federal statute dictates a "ritual" for assessment of enhanced sentences which must be

277. *Owens v. State*, 540 S.W.2d 324 (Tex. Crim. App. 1976); see notes 265-66 *supra* and accompanying text.

278. *Bray v. State*, 531 S.W.2d 633 (Tex. Crim. App. 1976); see notes 265-66 *supra* and accompanying text. In *Plessinger v. State*, 536 S.W.2d 380 (Tex. Crim. App. 1976), an indictment alleging a prior conviction as "in the Superior Court of Maricopa County, Arizona, in Cause No. 51926 . . . styled *The State of Texas v. Plessinger*" was also held to constitute harmless error because the defendant did not show surprise, nor was he misled to his prejudice. *Id.* at 381.

279. 536 S.W.2d 377 (Tex. Crim. App. 1976).

280. 538 S.W.2d 116 (Tex. Crim. App. 1976).

281. *Id.* at 119. Under TEX. PENAL CODE ANN. § 12.42(c) (Vernon 1974), since the defendant had two prior felony convictions, but no capital conviction, his minimum enhanced sentence was fifteen years.

282. 533 S.W.2d 812 (Tex. Crim. App. 1976).

283. 18 U.S.C. § 3575 (Supp. 1976).

284. *United States v. Bailey*, 537 F.2d 845 (5th Cir. 1976).

followed no matter how clearly the record demonstrates that the sentence is proper.<sup>285</sup>

## VII. JURY ARGUMENT

*Invited Argument.* Every experienced defense lawyer knows the sickening feeling of hearing counsel for the state make a damaging argument which would have been subject to objection if not made in reply to an argument of defense counsel. Recent cases are instructive as to the manner and extent of such a reply, which are by no means without limitation. Even after the court's in-depth analysis in *Garrison v. State*,<sup>286</sup> a careful prosecutor may have difficulty deciding how to respond, although he clearly is entitled to do so. Writing for the majority in *Garrison*, Judge Roberts found an emerging pattern in cases concerning response to defense assertions that the defendant had a clean record. The rule first enunciated in the 1921 case of *Pounds v. State*<sup>287</sup> is that the state may respond in its argument to defense contentions that defendant has a good character. This is particularly true when the argument by defense counsel is misleading, overbroad, outside the record, or an incorrect statement of the law. In responding, however, the state "cannot show specific misdeeds" which it could not otherwise have gotten into evidence at all. Nor can the state exceed the bounds of defense counsel's invitation.<sup>288</sup> In *Garrison* defense counsel made the misleading argument that since the state had offered no evidence after defendant had proved his eligibility for probation, that this meant that "if the State knew anything about Joe Garrison that was bad, they would present it, and could have opened it and told you exactly why he should not be granted probation . . . ."<sup>289</sup> In response the prosecuting attorney argued that defense counsel knew that the state could not ask the defendant whether it was true that two or three months earlier he had committed adultery many times, tried to molest young waitresses, and otherwise abused his wife.<sup>290</sup> The court said that the state could have presented witnesses to attest to defendant's bad reputation, but "could not have elicited all of the specific misdeeds of which they were aware except in the form of 'Have you heard' questions directed at character witnesses for the defendant, of which there were none. . . . The prosecutor thus exceeded the limits of proper invited argument in recounting all of defendant's misdeeds before the jury."<sup>291</sup> The fair import of the prosecutor's argument was to assert the misdeeds as *facts*, which the state could not have done even in a "have you heard" question.<sup>292</sup> However, the opinion fails to instruct the prosecution as to how they should have responded, if not in the manner found

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285. *Id.* United States v. Cevallos, 538 F.2d 1132 (5th Cir. 1976). Parallel provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 851 (1970), have been found equally inflexible. See United States v. Garcia, 526 F.2d 958 (5th Cir. 1976).

286. 528 S.W.2d 837 (Tex. Crim. App. 1975).

287. 89 Tex. 273, 230 S.W. 683 (1921).

288. 528 S.W.2d at 841.

289. *Id.* at 840.

290. *Id.* at 839.

291. *Id.* at 841-42.

292. Webber v. State, 472 S.W.2d 136 (Tex. Crim. App. 1971).

improper. In his dissent Judge Douglas argues that "from the tenor of the majority opinion, the new rule about invited argument is that the prosecutor is only invited to discuss what he has always had a right to argue—the evidence in the case."<sup>293</sup>

In related cases the court addressed itself to the *manner* in which the prosecution may make its response when the defense argument raises the subject of parole. A defense argument implying that the defendant could remain in prison for as long as the jury decides is an invitation to the prosecutor to respond. The response should be in kind, however, not through a reading of the formula for parole eligibility.<sup>294</sup> In *Garrison* the prosecutor's argument was doubly objectionable, since he read the old statute which has since been amended. Nevertheless, the opinion seems to indicate that even if the reading of the statute had not been a misstatement of the law, such an argument would have been improper, although apparently a general statement by the prosecutor concerning parole eligibility would have been acceptable.

*Clanton v. State*<sup>295</sup> concerned an invitation to discuss parole as well, but it was reversed because the state's argument was clearly an attempt to sidestep the court's instructions. Reiterating the court's instructions to the jury not to discuss among themselves how long the defendant would be required to serve any sentence, the prosecutor then told the jury, "but you can, if you know yourselves, base your decision, your verdict upon that."<sup>296</sup> Moreover, he argued, the admonition in the charge that parole was of "no concern" to the jury bothered him because "it is a concern of yours . . ."<sup>297</sup> The state's effort to portray these statements as invited argument was clearly an afterthought, but the court's reply was instructive in regard to the manner and extent of proper reply. The state's argument went much further than to merely respond to remarks of defense counsel and was a direct attack upon the court's instructions, and the court noted that "the State was entitled to reply . . . by referring to the court's charge and by an explanatory statement showing the inaccuracy of remarks of defense counsel."<sup>298</sup>

To invite a damaging reply from the state which might otherwise have been improper, the defense argument does not have to be improper itself. When it is improper, however, it can have the effect of enlarging the perimeter within which the state may reply. For instance, in *Bailey v. State*<sup>299</sup> the court of criminal appeals reversed a conviction because the prosecutor had argued outside the record that an important witness was a prisoner in the penitentiary and had refused to testify for the state. Defense counsel had asked rhetorically where the witness was and why he had not been called by the prosecution previously, and further stated that the jury had a right to assume from his absence that his testimony would not have been favorable to the state. On

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293. 528 S.W.2d at 842.

294. TEX. CODE CRIM. PROC. ANN. art. 42.12(c) (Vernon 1966).

295. 528 S.W.2d 250 (Tex. Crim. App. 1975).

296. *Id.* at 252.

297. *Id.*

298. *Id.* at 255.

299. 531 S.W.2d 628 (Tex. Crim. App. 1976).

appeal the state sought to justify its argument by citing a case apparently on point, *Meadows v. State*.<sup>300</sup> In the opinion approved by the court, however, Commissioner Dally found *Meadows* distinguishable from *Clanton* because the defense counsel in *Meadows* had first gone outside the record, thus permitting the prosecutor to respond by going outside the record. In the instant case the defendant's argument was not objectionable and the perimeter of the state's response was accordingly smaller. A reply that the absent witness was equally available to the defense and to the prosecution would have been the appropriate response according to the court.

*Comment on Defendant's Failure to Testify.* This rule is illustrated by two recent cases, one resulting in an affirmance and the other in a reversal. In the first case, *Hargett v. State*,<sup>301</sup> the conviction was upheld despite defense objection that the prosecutor's use of the phrase "undisputed evidence" referred to the defendant's silence.<sup>302</sup> The court rejected this argument because statements that the evidence is uncontroverted are not improper where the record shows that a witness other than the defendant might have offered contradictory evidence. The second case, *Dubose v. State*,<sup>303</sup> involved a robbery conviction in which the key witness testified that she had been alone in the store with the defendant throughout the period of time which was the subject of her testimony. Because there was no other witness to the robbery the court of criminal appeals reversed the defendant's conviction, finding that from the perspective of the jury, the prosecution argument based on the testimony of this sole witness became even more clearly a comment on the failure of the defendant to take the stand.

Actions can speak as loudly as words, as the following cases show. The court of criminal appeals may be able to protect the defendant's constitutional and statutory right to remain silent at trial, but unusual challenges to defense counsel in preserving error for appellate review are presented in situations where the prosecutor's "comment" is in sign language, which is not customarily reflected in the court reporter's notes. In *Bird v. State*<sup>304</sup> a capital murder case involving a gun with a silencer, defense counsel took the stand to make a bill of exception to the prosecutor's closing argument, in which the prosecutor had made reference to the silencer and then "turned, leaned over and looked directly at the appellant and stated, '. . . where did you get it?'"<sup>305</sup> At no time did the prosecution dispute or refute defense counsel. The court did not qualify the informal bill of exception, but stated that it would make no findings and would let the record speak for itself, and the record was subsequently approved without objection. The conviction was reversed because the court felt that the nature of the prosecutor's language and actions constituted a comment on the defendant's failure to testify. Judge Onion's opinion in *Bird* summarizes the rule concerning failure to testify: "The test

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300. 368 S.W.2d 203 (Tex. Crim. App. 1963).

301. 534 S.W.2d 909 (Tex. Crim. App. 1976).

302. *Id.* at 911.

303. 531 S.W.2d 330 (Tex. Crim. App. 1975).

304. 527 S.W.2d 891 (Tex. Crim. App. 1975).

305. *Id.* at 893.

employed is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify."<sup>306</sup> Before the language used in reference to failure to testify can be held "harmless error," the court must determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,"<sup>307</sup> since the right to remain silent is a federal constitutional right.

*Hicks v. State*<sup>308</sup> presented the court with a more difficult problem because the argument of the prosecutor was ambiguous in the context of the case ("but there is somebody that we haven't heard from in this case. And I think you all know who it is.").<sup>309</sup> Second, the defense counsel did not have himself sworn in to testify for his bill of exception as did counsel in *Bird*. Instead, as part of his objection to the argument, he stated that at the time the prosecuting attorney was making his remarks, he stood right behind the defendant and looked down at him.<sup>310</sup> As in *Bird*, the court of criminal appeals noted that the statement was undisputed by the prosecutor and unquestioned and unqualified by the court. The record was approved and certified by the court reporter. In this case, however, the prosecuting attorney had followed the defense objection with his own explanation for the record: "[L]et the record clearly reflect that I was talking about the medical testimony . . .," which, in the context, meant he was not referring to the defendant's failure to testify.<sup>311</sup> The conviction was reversed because, as Presiding Judge Onion explained, the state had the right to comment on the accused's failure to call a certain witness to support his defensive theory but it could not use such a statement as a comment on the defendant's failure to testify, nor could the prosecutor then excuse such a statement by claiming that he was referring to someone else. Each judge filed a separate opinion, however, because of their disagreement as to what rules govern disputes over the record.<sup>312</sup>

Regarding the defendant's right to remain silent, the Supreme Court held that an accused's silence at the time of his arrest and the administration of the *Miranda* warning cannot be used to impeach him at trial when he gives an explanation which he failed to give at such time.<sup>313</sup>

## VIII. EVIDENCE

*Scientific Evidence and Business Records.* In *Roberts v. State*<sup>314</sup> the court of criminal appeals reversed an order revoking probation after it was shown that the evidence of morphine in the probationer's urine, which was the grounds

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306. *Id.* at 894.

307. *Id.* at 895; see *Chapman v. California*, 336 U.S. 18 (1965).

308. 525 S.W.2d 177 (Tex. Crim. App. 1975).

309. *Id.* at 178.

310. *Id.* at 182.

311. *Id.* at 178.

312. Judges Morrison and Douglas dissented. Judge Douglas filed a lengthy, thorough opinion complaining that the majority had "elevated an unsworn statement of counsel to the heights of evidence," contrary to precedent in the area. *Id.* at 182.

313. *Doyle v. Ohio*, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

314. 537 S.W.2d 461 (Tex. Crim. App. 1976).

for revocation, was hearsay. The laboratory supervisor of the Travis County probation office, whose own emit spectrophotometer analysis was shown to be inconclusive, took the urine sample to Houston where he observed another person analyze it on a spectrofloremeter, a machine he could not operate. He admitted he had no expertise on the machine and he relied on the other's explanation. Holding the testimony to be inadmissible hearsay, the court said:

It is not the mere fact that Gleason did not personally operate the machine that rendered his testimony inadmissible. Rather, his lack of expertise with respect to the machine and his reliance upon the assumed expertise of others deprived appellant of any meaningful cross-examination upon the accuracy of the machine.<sup>315</sup>

Another kind of modern technology was the basis for reversal of *Gassett v. State*,<sup>316</sup> an opinion which provides an initial determination of the status of National Criminal Information Center (N.C.I.C.) computer records in Texas criminal trials. In a Dallas murder trial the decedent's prior criminal record came into issue when his ex-wife testified about his indictments and arrests. The state called a district attorney office investigator who testified that the N.C.I.C. computer revealed no record of arrests or indictments concerning the deceased. In this case of first impression the court of criminal appeals reversed by a three-to-two margin, concluding that the state had failed to satisfy the requisites of article 3737e<sup>317</sup> governing the applicable business records exception to the hearsay rule. The witness was not the person who entered the information, custodian of the records, or otherwise qualified to give the testimony as required by section 2.<sup>318</sup> Judges Morrison and Douglas, both of whom filed dissenting opinions, considered the error harmless because the decedent's criminal record had been raised by incompetent evidence in the first place.

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315. *Id.* at 463.

316. 532 S.W.2d 328 (Tex. Crim. App. 1976).

317. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1976-77) provides:

Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

- (a) It was made in the regular course of business;
- (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
- (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter. . . .

Section 3. Evidence to the effect that the records of a business do not contain any memorandum or record of an alleged act, event or condition shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such memoranda or records of all such acts, events or conditions at the time or within reasonable time thereafter and to preserve them.

318. TEX. REV. CIV. STAT. ANN. art. 3737e, § 2 (Vernon Supp. 1976-77) provides:

Section 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

Where will the other shoe fall? Unanswered is the admissibility of N.C.I.C. records per se. Would the case have been affirmed if the prosecution had called the sheriff's office employee who operates the N.C.I.C. computer terminal, or if the state had proved that the investigator knew enough of the N.C.I.C. computer record system to be a qualified witness himself under article 3737e, section 2.<sup>319</sup> The court remarked on the absence of such additional proof,<sup>320</sup> yet the majority opinion by Judge Roberts notably casts doubt on the probative value of N.C.I.C. computer records generally.<sup>321</sup>

*Extraneous Offenses.* *Halliburton v. State*<sup>322</sup> and *Cameron v. State*<sup>323</sup> are recent battles in the war over admission of extraneous offenses under an exception to the general rule excluding such prejudicial evidence.<sup>324</sup> *Halliburton* affirmed a murder conviction where self-defense had been raised. The defendant testified that she had no intent to kill the decedent, her common-law husband. The majority thought proper the admission into evidence of testimony concerning a shooting incident which occurred five weeks after the murder, in which the defendant had accosted a man who owed her money and had wounded him with a pistol when he said he had no money. The majority cited *Lolmaugh v. State*,<sup>325</sup> the trial of a husband for shooting his wife's lover. In that case evidence that the defendant had shot another of his wife's lovers was permitted for the purpose of attacking his assertion he was motivated only by self-defense. In his dissent in *Halliburton*, however, Judge Roberts says the rule stated in *Lolmaugh* is aimed at violence towards members of a class of persons, such as a wife's lovers, and the two shooting victims in the *Halliburton* case, he argued, were not of the same class.<sup>326</sup> In his second dissent on motion for rehearing he added his concern that the majority's decision creates a rule which forces an accused to an unconstitutional choice between testifying to a defense and having a trial free of evidence that he possesses general criminal tendencies.<sup>327</sup>

In *Cameron*, which was reversed, the extraneous offense was offered to prove identity in a robbery case in which the defense was an alibi. There was no question that identity was an issue. The case turned on the similarity between the offense on trial and the extraneous offense offered to prove identity. The court found too many disparate characteristics to agree with the trial court's admission of evidence of one offense to show commission of the other. The similarities included black males in both offenses, pistols, and instructions to the clerk to put the money in a bag, while the dissimilarities included disguise, number of robbers, type of business establishment robbed,

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319. *Id.*

320. 532 S.W.2d at 331.

321. *Id.* See, e.g., *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973), for the court's similar view toward the admissibility of polygraph examinations.

322. 528 S.W.2d 216 (Tex. Crim. App. 1975).

323. 530 S.W.2d 841 (Tex. Crim. App. 1975). Both *Halliburton* and *Cameron* were decided by 3-2 votes, and dissents were filed in each.

324. See, e.g., *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972).

325. 514 S.W.2d 758 (Tex. Crim. App. 1974).

326. 528 S.W.2d at 218.

327. *Id.* at 220.



mode of approaching the cashier, and sending the cashier to lie down in the back room.<sup>328</sup> Judge Douglas, the author of the majority opinion affirming *Halliburton*, wrote a dissenting opinion in *Cameron* joined by Presiding Judge Onion. He argued that the decision was retrogressive because it disregarded the 1974 case of *Ransom v. State*<sup>329</sup> in which the court opinion diminished the importance of similarities and dissimilarities.

*Cross-Examination of Reputation Witness.* During cross examination of defense reputation witnesses in a criminal trial, it is not reversible error for the prosecuting attorney to bring to the jury's attention other accusations against the defendant so long as the prosecutor does so by the oblique ritual of asking whether the witness "has heard" of the other offense.<sup>330</sup> On rehearing in *Carey v. State*,<sup>331</sup> the court of criminal appeals restated the prohibition against departing from the prescribed language but clarified the law concerning whether such an infraction may be mere harmless error. In the case before the court the state's attorney asked the witness "was there an incident sometime in August of 1974, wherein a pistol was exhibited?"<sup>332</sup> This question was found to be improper because it implied the commission of another offense; nevertheless, the court affirmed the lower court decision. After praising the trial judge for his thorough and earnest instruction to the jury to disregard the question,<sup>333</sup> the court reviewed the case and found no harm was done because the instruction was sufficient to cure the error. The opinion explicitly overrules<sup>334</sup> language in *Parasco v. State*<sup>335</sup> which said such error could not be harmless: "Whenever a question is asked which amounts to an assertion of fact and implies the commission of another offense, its harmfulness cannot be cured by the answer or failure to answer, or by any instruction which the court may give, and reversible error is reflected thereby."<sup>336</sup> The concurring judges, Roberts and Odom, joined in the decision to overrule the broad language in *Parasco* but stressed that the court's decision fell within a very limited exception, properly set forth by language in *McNaulty v. State*<sup>337</sup> as follows:

Some [questions] may be harmless and some may be made harmless by a negative answer, but whenever the question is so stated that it amounts to an assertion of fact under the conditions here under discussion and it implies the commission of another offense, it may be said that its harmfulness cannot be cured by the answer and seldom by an instruction which the court is able to give to the jury.<sup>338</sup>

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328. Judge Douglas enumerates the similarities in his dissent, 530 S.W.2d at 845; the latter three dissimilarities listed in the text were not singled out for comment by the majority or dissenting opinions.

329. 503 S.W.2d 810 (Tex. Crim. App. 1974).

330. See, e.g., *Brown v. State*, 477 S.W.2d 617 (Tex. Crim. App. 1972).

331. 537 S.W.2d 757 (Tex. Crim. App. 1976).

332. *Id.* at 758.

333. *Id.*

334. *Id.* at 759.

335. 168 Tex. Crim. 89, 323 S.W.2d 257 (1959).

336. *Id.* at 91, 323 S.W.2d at 259.

337. 138 Tex. Crim. 317, 135 S.W.2d 987 (1940).

338. *Id.* at 320, 136 S.W.2d at 988-89.

The same objection was raised in *Odum v. State*<sup>339</sup> when the state's attorney cross-examined the defendant's wife as follows: "Isn't it true that you were with your husband back on December the 1st, 1972, out here at McDonald's at Fillmore and Northeast Eighth when he tried to cut a kid's throat?"<sup>340</sup> The court of criminal appeals rejected the argument that the question was proper because the witness' testimony made her a reputation witness<sup>341</sup> and reversed the conviction on the grounds that "the State may not ask whether the witness has personal knowledge of the act, nor may its questions be so framed as to *imply that the act has actually been committed.*"<sup>342</sup>

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339. 533 S.W.2d 1 (Tex. Crim. App. 1976).

340. *Id.* at 2.

341. During the guilt-innocence trial the defendant's wife testified on direct examination that under "normal" circumstances her husband "would kid around" and was "pretty good natured," but on the occasion of the crime charged he acted scared and turned white. *Id.* In its opinion the court of criminal appeals said this "testimony was not geared toward a showing of good, lawful character or reputation, but was directed at proof of appellant's conduct and appearance at a particular time." *Id.* at 4.

342. *Id.* at 4 (emphasis added).

