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Arrest to Indictment

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II. ARREST TO INDICTMENT

by

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Confessions, Bail, Extradition, Grand Jury and Counsel

A. *Confessions*

Interrogation—Right to Counsel. During this survey year the Supreme Court announced two decisions concerning the self-incrimination and right to counsel clauses of the United States Constitution. In the first, *Oregon v. Mathiason*,[194] the Court provided a much narrower definition of "custodial interrogation"[195] than delineated in its opinions of the previous decade.[196] The decision, however, is a continuation of a trend of the current Court recognized in last year's Survey toward defining custody literally.[197] In summarily reversing a judgment by the Oregon Supreme Court,[198] the Court in *Mathiason* held that a police officer who invited a parolee suspected of burglary to the police station was not required to give the suspect *Miranda*[199] warnings before questioning him about the crime. The per curiam opinion held that the interrogation was not custodial, stating:

> police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the stationhouse, or because the questioned person is one whom the police suspect.[200] Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.[201]

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194. 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

195. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court stated: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. By footnote to the above sentence the opinion stated: "This is what we meant in *Escobedo* [Escobedo v. Illinois, 378 U.S. 478 (1964)] when we spoke of an investigation which had focused on an accused." 384 U.S. at 444 n.4.

196. *See* Orozco v. Texas, 394 U.S. 324 (1969) (interrogation occurred in the suspect's house after he had been arrested and was not free to leave); Mathias v. United States, 391 U.S. 1 (1968) (Court refused to follow government's contention that *Miranda* was applicable only to one who was "in custody" in connection with the very case under investigation).

197. Perini, *Criminal Law and Procedure, Annual Survey of Texas Law*, 31 Sw. L.J. 393, 401-02 (1977).

198. State v. Mathiason, 275 Ore. 1, 549 P.2d 673 (1976).

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

200. In Creeks v. State, 542 S.W.2d 849 (Tex. Crim. App. 1976), a case discussed in last year's survey, Perini, *supra* note 197, at 402, a probationer was held to be entitled to *Miranda* warnings where he was at the probation office voluntarily and was suspected by the police. In that case, however, an arrest warrant had already been issued for the probationer and the probation officer had already summoned the police to arrest him when the inculpatory statements were made.

201. 97 S. Ct. at 714, 50 L. Ed. 2d at 719.

The Court also held that a false statement made by the interrogator to the accused that his fingerprints were found at the scene of the crime was irrelevant to the custody issue.[202]

The second case was the much publicized opinion of *Brewer v. Williams*[203] in which an officer's ruse[204] led to the reversal of a murder conviction. The accused had surrendered pursuant to arrangements made by his attorneys, both of whom advised him not to talk to the police.[205] After arraignment, as the accused was transferred from one city to another, the officer persuaded the accused to take him to the place where the body was located.[206] The Supreme Court, in a five-to-four decision, held that the interrogation of the accused without a showing of a waiver of his right to counsel was improper. In delivering the opinion, Justice Stewart recognized that the facts presented in the instant case were constitutionally indistinguishable from those of *Massiah v. United States*[207] and stated:

> the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments.
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> . . . .
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> Despite Williams' express and implied assertions of his right to counsel, [the officer] proceeded to elicit incriminating statements from Williams. [The officer] did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right.[208]

Chief Justice Burger dissented, contending that the exclusionary rule should not be applied to non-egregious police conduct.[209]

One of the issues in *Brewer* was whether or not the officer's "Christian burial speech" was a form of interrogation. Mr. Justice Stewart's opinion held that, because the speech was a deliberate and designed effort to elicit information, it was legally equivalent to formal interrogation.[210] Applying that holding, the United States Court of Appeals for the Fifth Circuit reversed the conviction in *United States v. Jordan*.[211] The arresting officer in *Jordan* knew the accused was operating a motor vehicle without a proper license. He had also received information, sufficient to establish probable cause, that the accused possessed a sawed-off shotgun. Upon stopping the accused for the traffic violation, the officer told the accused about the

202. *Id.*
203. 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).
204. The officer knew that the accused was a deeply religious former mental patient. The officer gave what was termed the "Christian burial speech," urging the accused to locate the body of the deceased before an approaching storm caused several inches of snow to fall. *Id.* at 1236, 51 L. Ed. 2d at 432-33.
205. *Id.* at 1235, 51 L. Ed. 2d at 431.
206. *Id.* at 1236, 51 L. Ed. 2d at 433.
207. 377 U.S. 201 (1964).
208. 97 S. Ct. at 1240-41, 1243, 51 L. Ed. 2d at 438, 440-41.
209. *Id.* at 1250-54, 51 L. Ed. 2d at 450-56. Justices Blackmun, White and Rehnquist also dissented but did not join the Chief Justice.
210. *Id.* at 1239-40, 51 L. Ed. 2d at 436-37.
211. 557 F.2d 1081 (5th Cir. 1977).

information concerning the shotgun that he had received.[212] Because of the accused's reaction to this statement, the officer searched the automobile, finding the shotgun under the front seat. Citing *Brewer* the Fifth Circuit held that the officer's statement to the accused was the equivalent of interrogation[213] and therefore the *Miranda* warnings should have been given before advising the accused of the information concerning the shotgun.[214]

Prior to the decision in *Brewer* the Texas Court of Criminal Appeals delineated the standard for waiver of counsel who has already been retained in *McKittrick v. State*.[215] The court held that the accused had made a lawful waiver of counsel before signing a confession, even though she had retained counsel before doing so. The opinion stated:

> This court, however, has never interpreted *Miranda* to mean that once counsel has been requested or obtained, the same forever bars law enforcement officers from interrogating an accused provided the prosecution sustains its heavy burden of showing an affirmative waiver. And this is particularly true where the accused initiates the conversation with the officers.[216]

The court found that McKittrick was a twenty-three year old woman who had a prior criminal record and some experience with law enforcement officers.[217] She had also been warned by a magistrate prior to making the confession, the written confession had the standard "boiler plate" *Miranda* recitations, and the totality of the circumstances indicated a knowing and intelligent waiver of counsel.[218]

The Texas Court of Criminal Appeals also refused to extend present law to require the appointment of counsel in a "serious" case before a confession could be obtained. In *Woodkins v. State*,[219] a capital murder case, the court held that, absent a request, the failure of the magistrate to sua sponte appoint counsel would not void the subsequently obtained confession.[220]

Coerced Confessions. In *Smith v. State*[221] the accused testified that his confession to FBI agents was the product of physical coercion by New Orleans police officers.[222] The FBI agents stated that they did not coerce the accused but could not say what the New Orleans officers did.[223] No New Orleans officers testified. The court of criminal appeals stated "it has long been the law of this State that whenever the testimony of the accused as to

212. *Id.* at 1082.
213. Judge Simpson's opinion stated: "Certainly the police may not circumvent a constitutional requirement by using the 'technique' of posing a question in a declaratory fashion." *Id.* at 1085 (footnote omitted).
214. *Id.* at 1085-86.
215. 541 S.W.2d 177 (Tex. Crim. App. 1976).
216. *Id.* at 183 (citations omitted).
217. *Id.*
218. *Id.* at 184.
219. 542 S.W.2d 855 (Tex. Crim. App. 1977).
220. *Id.* at 858.
221. 547 S.W.2d 6 (Tex. Crim. App. 1977).
222. *Id.* at 7-8.
223. *Id.* at 8.

the alleged coercive acts is undisputed, then as a matter of law the confession is inadmissible."[224]

Oral Confessions—Legislation. During this survey year the Texas Legislature completely redrafted articles 38.21 and 38.22 of the Code of Criminal Procedure, the confession statutes,[225] but made only one major change. Article 38.22 was changed to permit the admission of an oral statement against the accused "for the purpose of impeachment only,"[226] when: (1) the statement is visually recorded; (2) the accused is advised that the recording is being made; (3) the accused is properly warned pursuant to statute and lawfully waives his rights; (4) the recording device operates correctly, the operator is competent, and the recording is accurate and is not altered; (5) the statement is witnessed by at least two persons; and (6) all the voices on the recording are identified.[227] As amended, the statute substantially modifies *Butler v. State*[228] which reiterated the long standing rule that an oral statement not admissible as original evidence was also inadmissible for impeachment purposes.[229]

The visual recording provision, however, is not applicable to any statement which contains assertions of facts or circumstances that are found to be true and which tend to establish the guilt of the accused.[230] Thus, statements leading to the fruits of the offense or the instrument used to commit the offense are still admissible.[231] As a corollary, a harsh penalty is provided for any person who testifies falsely to facts which, if true, would render the statement admissible.[232]

The amended statute also provides that it does not preclude the use "of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness . . . ."[233] Whether this provision is intended to permit the use of statements not taken in compliance with *Miranda* or to permit in limited circumstances the use of oral statements not taken in compliance with the statute must be left to judicial interpretation. Significantly, the legislature specifically provided that the amended statute applies only to confessions taken on or after August 29, 1977.[234]

224. *Id.* (quoting Farr v. State, 519 S.W.2d 876, 880 (Tex. Crim. App. 1975)).
225. TEX. CODE CRIM. PROC. ANN. arts. 38.21, .22 (Vernon Supp. 1978).
226. *Id.* art. 38.22, § 3(a).
227. *Id.* § 3(a)(1)-(6).
228. 493 S.W.2d 190 (Tex. Crim. App. 1973).
229. The court refused to hold that the opinion in Harris v. New York, 401 U.S. 222 (1971) compelled an abandonment of the long established precedent. *Harris* held that a failure to comply with *Miranda* would not prohibit the use of a confession for impeachment purposes.
230. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon Supp. 1978).
231. For an example of the circumstances in which such a statement is admissible, see Chase v. State, 508 S.W.2d 605 (Tex. Crim. App. 1974).
232. The statute provides a presumption that the person "acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code" and prohibits probation if a conviction results. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 4 (Vernon Supp. 1978).
233. *Id.* § 5.
234. *Id.* § 3.

Oral Confessions—Cases. In *Presswood v. State*[235] and *Newberry v. State*[236] convictions were reversed because the answers of the accused to preliminary questions asked shortly after arrest had been admitted. The officer in *Presswood* found a small amount of marijuana in a car and asked "Whose is it?"[237] In *Newberry* the officer asked the accused the number of drinks he had consumed and the places where he had been.[238] In both cases the investigation had begun to focus on the accused, the accused had been placed in restraint, no *Miranda* warnings had been given, and the answers were clearly inculpatory.[239]

In *Dudley v. State*[240] a three-judge majority[241] held that it was improper for the State to elicit testimony before the jury, over objection, that the accused had been offered a breathalyzer test but had refused to take it.[242] Judge Phillips, writing the majority opinion, based his decision on the reasoning in *Doyle v. Ohio*,[243] the requirements on article 38.22 of the Code of Criminal Procedure, and the fifth and fourteenth amendments to the Constitution.[244] Judge Douglas concurred, relying solely on *Doyle*.[245] Presiding Judge Onion's lengthy concurring opinion was based not only upon article 38.22 and the decision in *Doyle*, but also upon the fact that the accused has the statutory right[246] to refuse to take the test, and the fact that the probative value of the evidence was too small to offset the prejudicial effect.[247] Although he did not reach the constitutional grounds, the judge noted that courts in three other jurisdictions have held that such evidence of refusal constitutes compulsory self-incrimination.[248]

Jackson v. Denno Hearing.[249] In *Roberts v. State*[250] the accused argued that once he objected to the voluntariness of a confession at trial the State

235. 548 S.W.2d 398 (Tex. Crim. App. 1977).
236. 552 S.W.2d 457 (Tex. Crim. App. 1977).
237. 548 S.W.2d at 399.
238. 552 S.W.2d at 458-60.
239. 548 S.W.2d at 399; 552 S.W.2d at 461.
240. 548 S.W.2d 706 (Tex. Crim. App. 1977).
241. Judges Roberts and Odum dissented.
242. *See also* Hitt v. State, 548 S.W.2d 732 (Tex. Crim. App. 1977); Boney v. State, 548 S.W.2d 730 (Tex. Crim. App. 1977); Sutton v. State, 548 S.W.2d 720 (Tex. Crim. App. 1977); Martinez v. State, 548 S.W.2d 719 (Tex. Crim. App. 1977); Clinard v. State, 548 S.W.2d 716 (Tex. Crim. App. 1977).
243. 426 U.S. 610 (1976). In that case the Court held that the fact of the accused'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 for impeachment purposes.
244. Judge Phillips stated: "Though not expressly stated heretofore, the decisions construing art. 38.22 . . . reveal that, in practical application, said statute has been held to prohibit any act, silence or oral statement of an accused while in custody which has communicative or testimonial characteristics, substantially the same as the Fifth Amendment." 548 S.W.2d at 708.
245. *Id.* at 715.
246. TEX. REV. CIV. STAT. ANN. art. 6701*l*-5 (Vernon 1977).
247. 548 S.W.2d at 709, 711, 712, 714.
248. *Id.* at 714-15 (citing Gay v. City of Orlando, 202 So.2d 896 (Fla. Dist. Ct. App. 1967); Johnson v. State, 125 Ga. App. 607, 188 S.E.2d 416 (1972); State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973)).
249. Jackson v. Denno, 378 U.S. 368 (1964) requires a hearing outside the presence of the jury to determine the admissibility of a confession. *See also* TEX. CODE CRIM. PROC. ANN. art. 38.22(b) (Vernon Supp. 1978). The 1977 amendments to art. 38.22 did not change the procedure. *See* notes 225-27 *supra* and accompanying text.
250. 545 S.W.2d 157 (Tex. Crim. App. 1977).

had to show that the arrest was lawful, even though this issue was decided at a pre-trial hearing. The court held that since a defendant, to preserve error on appeal, need not renew during trial an objection made at a pre-trial hearing on a motion to suppress,[251] the corollary rule is that the State may rely upon the evidence showing probable cause heard during the motion to suppress and need not again offer the evidence at trial.[252]

Two cases discussed aspects of cross-examination at the *Jackson v. Denno* hearing. *Masters v. State*[253] held that the accused was entitled to testify solely on the issue of voluntariness of the confession without subjecting himself to unlimited cross-examination on other issues at a hearing on a motion to revoke probation. *Myre v. State*[254] held that the accused was entitled to the statements of a witness who testified at the *Jackson v. Denno* hearing, even though the statement had not been used by the witness during trial to refresh his memory.[255] This opinion clearly indicates that the *Gaskin*[256] rule is applicable in all situations in which a prosecution witness testifies.

False Statements. In *Leary v. United States*[257] the celebrated Dr. Timothy Leary[258] was unable to convince the Fifth Circuit that his false declarations at a United States customs inspection station were tainted by a violation of his right against compulsory self-incrimination. The court held that the self-incrimination privilege does not protect a person making a false response to a required declaration.[259]

Juvenile Proceedings. On appeal from the retrial of *Ridyolph v. State*[260] the appellant contended that the admissibility of his pre-Family Code[261] confession should have been governed by the limitations on obtaining a confession stated in the Family Code.[262] The court, however, held that the admissibility of the confession was governed by the law in effect at the time the confession was given.[263]

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251. *Id.* at 158 (citing Riojas v. State, 530 S.W.2d 298 (Tex. Crim. App. 1975), and Graves v. State, 513 S.W.2d 57 (Tex. Crim. App. 1974)).
252. 545 S.W.2d at 158.
253. 545 S.W.2d 180 (Tex. Crim. App. 1977).
254. 545 S.W.2d 820 (Tex. Crim. App. 1977).
255. The conviction was not reversed in *Myre* because the statement was given to counsel later during the trial and he could have recalled the witness. *Id.* at 823.
256. Gaskin v. State, 172 Tex. Crim. 7, 353 S.W.2d 467 (1962) (pretrial statements given by prosecution witness who testifies at trial must be given to defense counsel).
257. 544 F.2d 1266 (5th Cir. 1977).
258. Leary v. United States, 395 U.S. 6 (1969); Leary v. United States, 383 F.2d 851 (5th Cir. 1967).
259. *See* note 295 *infra* and accompanying text for a comparison with false statements before the grand jury.
260. 545 S.W.2d 784 (Tex. Crim. App. 1977). A previous conviction was reversed in Ridyolph v. State, 503 S.W.2d 276 (Tex. Crim. App. 1973) for the suppression of evidence.
261. The Family Code was effective September 1, 1973.
262. TEX. FAM. CODE ANN. § 51.09 (Vernon 1975). Prior to amendment on September 1, 1975, that section provided that an accused must have counsel at the time of the confession. *See* Lovell v. State, 525 S.W.2d 511 (Tex. Crim. App. 1975). The 1975 amendment permits admission of a confession without counsel under certain limited circumstances. TEX. FAM. CODE ANN. § 51.09(b) (Vernon Supp. 1978).
263. 545 S.W.2d at 786. "Prior to the enactment of the Family Code, a minor could waive his right to counsel before making an extrajudicial statement." *Id.* at 787.

Civil Contempt. In *Ex parte Stringer*[264] the husband had been incarcerated for failure to make payments to his former wife pursuant to a divorce decree. The court held that once counsel asserted relator's privilege against compulsory self-incrimination, the husband should not have been sworn and compelled to answer questions. The court stated, "[i]t has long been the law in this State that witnesses in a purely civil proceeding may claim their constitutional privilege against self-incrimination."[265]

Plea Negotiations. In *Hutto v. Ross*[266] the Supreme Court considered the admissibility of a confession made subsequent to an agreed-upon plea bargain which did not require the confession when the defendant later withdrew from the plea bargain and demanded a jury trial. Holding the confession admissible, the per curiam opinion concluded that since the defendant could have enforced the plea agreement whether or not he gave the confession, the confession was not the result of any promises or coercion on the part of the prosecution and hence was not involuntary.[267]

B. *Bail*

Amount. In several opinions the court of criminal appeals stated the principle that, while bail should be sufficiently high to give reasonable assurance that the accused will comply with the undertaking, the power to require bail is not to be used so as to make it an instrument of oppression.[268]

Legislation. Article 11a of the Texas Constitution was amended at the November 8, 1977, election to give the district court discretion to deny bail to a person who (1) has been indicted for a felony while on bail for another felony or (2) has been accused of a felony less than capital involving the use of a deadly weapon after being convicted of a felony.[269] The amendment further provides that the order denying bail will be automatically set aside if the accused is not accorded a trial within sixty days, provided the accused does not obtain a continuance.

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264. 546 S.W.2d 837 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

265. *Id.* at 840 (citing Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944)). The opinion also cited Kastigar v. United States, 406 U.S. 441, 444 (1972), in which it was stated that the privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. . . ."

266. 97 S. Ct. 202, 50 L. Ed. 2d 194.

267. *Id.* at 203-04, 50 L. Ed. 2d 196-98. *But see* United States v. Albano, 414 F. Supp. 67 (S.D.N.Y. 1976), in which a possibly incriminating letter written incidental to the plea by the defendant to the court was not admissible at trial after the plea negotiations failed. *See generally* FED. R. CRIM. P. 11. *See also* Santobello v. New York, 404 U.S. 495 (1971) which left open the question of whether or not a plea agreement could be enforced.

268. *Ex parte* Branch, 553 S.W.2d 380 (Tex. Crim. App. 1977) ($500,000 bail set for charged offense of heroin possession held excessive and reduced to $20,000); *Ex parte* Bufkin, 553 S.W.2d 116 (Tex. Crim. App. 1977) ($150,000 bail set for charged offense of conspiracy to commit capital murder held excessive). *See also* TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon 1965).

269. TEX. CONST. art. I, § 11a(2), (3). TEX. CONST. art. I, § 11 denies bail where the defendant is charged with a capital offense and the proof is evident that the accused will probably be convicted and receive the death penalty. TEX. CONST. art. I, § 11a(1), adopted Nov. 6, 1956, also denies bail to a person accused of a felony less than capital who has twice before been convicted of a felony.

Appeal Bond. The Texas Legislature also amended article 44.04 of the Code of Criminal Procedure.[270] Denial of bail to persons whose punishment exceeds fifteen years is retained.[271] In addition, however, the trial court may now deny bail if there exists good cause to believe that the defendant would not appear when the conviction became final or that the defendant is likely to commit another offense while on bail.[272] The amendment permits the court to impose reasonable conditions on the bail and, upon a finding on a preponderance of the evidence that the condition has been violated, to revoke the bail.[273] In *Ex parte August*[274] the court stated that if a petitioner files a writ of habeas corpus contending the appeal bond is excessive, the trial court must have a hearing on that issue. The new amendment to article 44.04 provides an appeal as of right for review of any order setting bail pursuant to the statute.[275]

Setting Bail—Misdemeanor Case. *Hokr v. State*[276] held that a peace officer may take bail in a misdemeanor case before the accused is charged. The decision also held that the peace officer could set the amount of bail if no magistrate was available.[277]

Surrender by Surety. The surety in *McConathy v. State*[278] filed an affidavit to surrender his principal, but the trial court refused to issue a warrant. The court of criminal appeals held that the trial court could not refuse to issue a warrant for the principal when requested by the surety pursuant to article 17.19 of the Code of Criminal Procedure.[279]

Extradition. In *Ex parte Quinn*[280] the court of criminal appeals overruled a 1976 Attorney General's opinion[281] and held that a petitioner/appellant is entitled to bail pending appeal of a habeas corpus judgment, notwithstanding the issuance of a governor's warrant.[282]

C. *Extradition*

Right to Counsel. Article 51.13, section 25a of the Code of Criminal Procedure[283] sets forth the procedure by which a person arrested in Texas

270. TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon Supp. 1978).
271. *Id.* art. 44.04(b).
272. *Id.* art. 44.04(c).
273. *Id.*
274. 552 S.W.2d 169 (Tex. Crim. App. 1977).
275. TEX. CODE CRIM. PROC. ANN. art. 44.04(g) (Vernon Supp. 1978).
276. 545 S.W.2d 463, 464 (Tex. Crim. App. 1977).
277. *Id.* at 465. These changes in procedure were permitted by the 1971 amendments to arts. 17.05 and 17.20, thus reversing the decision in Mayberry v. State, 168 Tex. Crim. 537, 330 S.W.2d 203 (1959).
278. 545 S.W.2d 166 (Tex. Crim. App. 1977).
279. *Id.* at 168-69.
280. 549 S.W.2d 198 (Tex. Crim. App. 1977).
281. TEX. ATT'Y GEN. OP. NO. H-803 (1976). That opinion concluded that a person held for extradition may not be admitted to bail after issuance of the governor's warrant pending determination of an appeal from a remand to custody.
282. The court's opinion was based upon the fact that TEX. CODE CRIM. PROC. ANN. art. 44.35 (Vernon 1965) permits bail on the appeal of any habeas corpus judgment, and art. 51.13, § 16 permits bail in extradition cases except capital cases where the proof is evident.
283. 549 S.W.2d at 199-200. TEX. CODE CRIM. PROC. ANN. art. 51.13, § 25(a) (Vernon 1965).

but charged in another state can waive extradition proceedings and consent to return to the demanding state. The statute provides that the waiver must be executed in writing before a judge or any court of record. In *Ex parte Medieros*[284] the fugitive argued that his waiver was ineffective because he did not receive the advice of counsel prior to the waiver. Rejecting this contention, the court of criminal appeals held that the record conclusively demonstrated that the trial court adhered to the requirements of article 51.13[285] and informed the fugitive of his statutory rights.[286] Since it was the judge and not counsel who was to advise the individual of his rights, the fact that the fugitive was not advised by counsel was not a controlling issue.[287]

Pleadings. In *Ex parte Flores*[288] the Alabama affidavits upon which the requests for a governor's warrant was based failed to state the date of the offense. Applying former cases concerning the failure of an indictment from a demanding state to contain the date of the offense,[289] the Texas court held that the matter of the sufficiency of the criminal pleadings in the demanding state is no concern of the asylum state.[290]

D. *Grand Jury*

Self-incrimination Privilege. In two cases decided during this survey year the Supreme Court narrowed the protections afforded a witness before a grand jury. In *United States v. Washington*[291] the defendant contended that his testimony before the grand jury should have been suppressed because he had not been advised in advance of his testimony that he was a putative defendant. The Court held that since the target witness status neither enlarged nor diminished the constitutional protection against compulsory self-incrimination "potential defendant warnings add nothing of value" to those rights.[292] The Court stated that the true test was whether or not the witness had been compelled to give self-incriminating testimony.[293] Finding no compulsion, the Court rejected the defendant's claim of compelled self-incrimination.[294]

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284. 552 S.W.2d 156, 157 (Tex. Crim. App. 1977).

285. TEX. CODE CRIM. PROC. ANN. art. 51.13 (Vernon 1965) is the Texas version of the Uniform Extradition Act. Section 10 of the Act provides that no person arrested pursuant to a governor's warrant shall be delivered to the demanding state until first taken before a judge of a court of record. The judge must inform him of the demand, the nature of the offense against him, and his right to demand or procure counsel.

286. Nothing in the reported opinion in *Medieros* indicates whether the fugitive was advised of his right to counsel. 552 S.W.2d 156-58.

287. No mention was made as to whether the hearing before the magistrate was a critical stage of the proceedings, *see* Coleman v. Alabama, 399 U.S. 1 (1970); whether the right to counsel was dependent upon a request for counsel, *see* Swenson v. Bosler, 386 U.S. 258 (1967); or whether the fugitive voluntarily, intelligently and understandingly waived counsel, *see* Barker v. Wingo, 407 U.S. 514 (1972).

288. 548 S.W.2d 31 (Tex. Crim. App. 1977).

289. *Ex parte* Woodland, 146 Tex. Crim. 616, 177 S.W.2d 62 (1943); Pearce v. State, 32 Tex. Crim. 301, 23 S.W. 15 (1893), *aff'd sub nom.* Pearce v. Texas, 155 U.S. 311 (1894).

290. 548 S.W.2d at 33.

291. 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977).

292. *Id.* at 1820, 52 L. Ed. 2d at 246.

293. *Id.* at 1819, 52 L. Ed. 2d at 245.

294. In United States v. Doe, 541 F.2d 490 (5th Cir. 1976) the court held that the fact that a witness may be the subject of the grand jury investigation was not grounds for quashing a grand jury subpoena.

The defendant in *United States v. Wong*[295] was indicted for perjury before the grand jury. She claimed that the testimony should have been suppressed because, due to her limited command of the English language, she had not comprehended the prosecutor's explanation of the fifth amendment privilege and thought she was required to answer all the questions.[296] Following *United States v. Mandujano*,[297] the Court held that the fifth amendment privilege does not condone perjury.[298] Thus, even if the witness was not effectively informed as to the nature of the privilege, "perjury [was] not a permissible way of objecting to the Government's questions."[299]

In this survey year the Fifth Circuit reaffirmed the power of the grand jury to compel witnesses to submit to the taking of voice exemplars,[300] fingerprints, palm prints, and photographs.[301] To quash the subpoena the witness must assert that the grand jury has lost the independence which is essential to the historical assumption of neutrality that underlies the grand jury process.[302]

Composition. The defendant in *Bouchillon v. State*[303] sought to quash the indictment due to the disqualification of two of the grand jurors returning the indictment because the "anti-nepotism" statute[304] rendered the grand jurors morally unfit under article 19.08 of the Code of Criminal Procedure.[305] In that case a grand jury commissioner had appointed her daughter-in-law and her husband's niece as grand jurors. The court of criminal appeals first held that the challenge to the array was untimely.[306] Further, the court found no merit in the defendant's contention,[307] apparently holding that grand jury commissioners are not State officers within the scope of the anti-nepotism statute.

Procedure. In *Owens v. State*[308] the indictment was signed by another grand juror whom the foreman had authorized to sign his name.[309] The court rejected the objection to the indictment on that ground, stating that since the

295. 97 S. Ct. 1823, 52 L. Ed. 2d 231.
296. *Id.* at 1825, 52 L. Ed. 2d at 234.
297. 426 U.S. 905 (1975).
298. 97 S. Ct. at 1825, 52 L. Ed. 2d at 235.
299. *Id.* at 1827, 52 L. Ed. 2d at 237.
300. United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977).
301. *In re* Grand Jury Proceedings, 558 F.2d 1177 (5th Cir. 1977).
302. *Id.* at 1179 (quoting United States v. Doe, 541 F.2d 490, 492 (5th Cir. 1976)).
303. 540 S.W.2d 319 (Tex. Crim. App. 1976).
304. TEX. REV. CIV. STAT. ANN. art. 5996a (Vernon 1951). The statute provides that no state, county, or municipal official can appoint any person related to him within the second degree by affinity and the third degree by consanguinity.
305. TEX. CODE CRIM. PROC. ANN. art. 19.08 (Vernon 1977).
306. 540 S.W.2d at 323. Article 19.27 of the Code of Criminal Procedure provides that all challenges to the array of grand jurors must be made before the grand jury has been impaneled. *See also* Connelly v. State, 93 Tex. Crim. 295, 248 S.W. 340 (1923). Judicial interpretation has expanded the rule to permit a later objection if the accused has never been accorded the chance to object because he was indicted after impanelment. *See e.g.*, Garret v. State, 66 Tex. Crim. 480, 146 S.W.930 (1912).
307. 540 S.W.2d at 323.
308. 540 S.W.2d 324 (Tex. Crim. App. 1976).
309. The Code of Criminal Procedure provides that the indictment "shall be signed officially by the foreman of the grand jury." TEX. CODE CRIM. PROC. ANN. art. 21.02(9) (Vernon 1965).

failure of the foreman to sign the indictment would not vitiate the instrument it was permissible for another member of the grand jury to sign the indictment in the foreman's stead.[310]

E. *Counsel*

Right to Counsel. The Supreme Court's decision in *Brewer v. Williams*[311] was based upon the sixth amendment right to counsel clause. Since the adversary proceedings in *Brewer* had already begun and there was no showing that the accused waived his right to counsel before the police began their interrogation, the Court held that the testimony elicited in the absence of counsel should have been excluded.[312] The opinion was based upon "the clear rule of Massiah[313] . . . that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[314] As previously noted, the court of criminal appeals explained the Texas requirements for waiver of the right to counsel in *McKittrick v. State*.[315]

Effectiveness of Retained Counsel. During this survey year the Texas Court of Criminal Appeals continued to recognize two differing standards for evaluating the effectiveness of counsel: (1) the "reasonably effective assistance" standard, generally applied to claims of ineffective *appointed* counsel;[316] and (2) the "breach of legal duty" standard, generally applied to claims of ineffective *retained* counsel.[317] In both *Ewing v. State*[318] and *Harrison v. State*[319] the court held that the retained counsel had not breached their legal duty[320] and affirmed the convictions by a three-judge majority.[321] Nevertheless, the dissenting opinions in these cases suggest that a single standard may evolve in the future. Judge Roberts, dissenting in both cases,[322] stated that the right to due process should be the same whether

310. 540 S.W.2d at 326.
311. 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). See notes 203-10 *supra* and accompanying text.
312. *Id.* at 1239, 51 L. Ed. 2d at 436-37.
313. Massiah v. United States, 377 U.S. 201 (1964). See text accompanying note 207 *supra*.
314. 97 S. Ct. at 1240-41, 51 L. Ed. 2d 438.
315. 541 S.W.2d 177 (Tex. Crim. App. 1976). See notes 215-18 *supra* and accompanying text.
316. *See Ex parte* Gallegos, 511 S.W.2d 510 (Tex. Crim. App. 1974), in which the court reaffirmed the "reasonably effective assistance" standard defined in MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), and rejected the "farce and mockery of justice" standard which had appeared in several cases.
317. *See* Hunnicutt v. State, 531 S.W.2d 618 (Tex. Crim. App. 1976).
318. 549 S.W.2d 392 (Tex. Crim. App. 1977).
319. 552 S.W.2d 151 (Tex. Crim. App. 1977).
320. In *Harrison* the majority opinion held that neither standard was breached. *Id.* at 152.
321. The difference between the standards is best illustrated in Stutes v. State, 530 S.W.2d 309 (Tex. Crim. App. 1975), in which the court stated:

> It is true that where an appointed counsel has an actual conflict of interest a defendant is denied his right to effective representation without a showing of specific prejudice. But where counsel is retained, there is no ineffectiveness on such grounds unless the attorney's representation was fettered or restrained by his commitments to others, and such commitments were unknown to the defendant.

Id. at 313 (citations omitted).
322. 549 S.W.2d at 396; 552 S.W.2d at 153. Judge Phillips dissented separately in *Ewing*, 549 S.W.2d at 396, on the grounds that a breach of legal duty had been committed, but concurred in Judge Roberts' dissent in *Harrison*, 552 S.W.2d at 153.

counsel is appointed or retained.[323] That standard, the judge concluded, should be whether counsel was "reasonably competent."[324]

Self-representation. In 1976 the court of criminal appeals held that a trial court may not force a defendant to accept an attorney if he wishes to waive representation and defend himself,[325] a "correlative" constitutional right recognized in *Faretta v. California*.[326] The court warned, however, that the trial court should take care to ascertain that the accused fully understands the consequences of waiving the right to counsel.[327] In *Barbour v. State*[328] the court held that before permitting an accused the right of self-representation the record must show a knowing waiver, including an inquiry into indigency and a warning as to the wisdom or practical consequences of the choice.[329]

Time to Prepare. Article 26.04 of the Code of Criminal Procedure provides that a court-appointed attorney has a mandatory ten days to prepare for trial.[330] In *Munoz v. State*[331] counsel was appointed to represent the defendant in a sale of narcotics case; the defendant also had an enhanced theft indictment pending. Over defendant's objection, counsel was forced to go to trial on the theft case, the trial court noting that it was the local practice to appoint the same attorney to represent the accused charged with multiple indictments.[332] The court of criminal appeals reversed because there was

323. The judge reasoned that when the court appoints a lawyer to represent a defendant, he simply fulfills the constitutional mandate, but does not by this action create a standard of competency different from that applicable when the individual has the wherewithal to hire the lawyer. Thus, "[w]hile economic status may differ from individual to individual, the right to due process should remain the same." 549 S.W.2d at 396.

324. 549 S.W.2d at 396 (citing *Ex parte* Gallegos, 511 S.W.2d 510 (Tex. Crim. App. 1974)). *But see* Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), in which the Fifth Circuit held that only when counsel's ineffectiveness is so blatant as to render the whole trial "fundamentally unfair" does a violation of fourteenth amendment due process result. While recognizing that the sixth amendment right to effective assistance of counsel precludes a greater range of counsel errors than the fourteenth amendment, the court held that "[t]he circumstances in which the state will be bound by *retained* counsel's [errors] must be assessed more strictly lest we place a procedurally intolerable . . . burden on trial judges, who have no control over the selection of counsel retained by a defendant." *Id.* at 1336-37 (emphasis added). Thus, the court required a showing of state involvement in the retained counsel's conduct. *Id.* at 1337. Three examples were given: (1) If the trial judge or prosecutor knew that a particular defendant was receiving incompetent representation and took no remedial action; (2) if they directly participated in the incompetency; or (3) if the incompetency is so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it. *Id. See* Maxon v. Estelle, 418 F. Supp. 922 (S.D. Tex. 1976), *rev'd*, 558 F.2d 306 (5th Cir. 1977), for an example of how *Fitzgerald* is applied.

325. Webb v. State, 533 S.W.2d 780 (Tex. Crim. App. 1976).

326. 422 U.S. 806 (1975). In *Faretta* the Court held that an accused in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.

327. 533 S.W.2d at 785.

328. 551 S.W.2d 371 (Tex. Crim. App. 1977).

329. *Id.* at 372. The opinion concluded that "the record does not reflect that the appellant was made aware of the dangers and disadvantages of self-representation, so as to establish that the appellant knew what he was doing and that his choice was made with his 'eyes open'." *Id.* at 373.

330. TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 1965).

331. 542 S.W.2d 173 (Tex. Crim. App. 1976).

332. *Id.* at 174.