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## Criminal Procedure

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# CRIMINAL PROCEDURE

by  
*The Board of Editors*

## I. INVESTIGATION TO INDICTMENT

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

*Temporary Investigative Detention.* Under *Terry v. Ohio* and its progeny the United States Supreme Court recognized that under certain circumstances a brief investigatory detention of an individual may be allowable under the fourth amendment notwithstanding a lack of probable cause.<sup>1</sup> The detention is only justified, however, if it is based on specific reasonable inferences that the police officer is entitled to draw from the facts in light of his experience.<sup>2</sup>

In *Rodriguez v. State*<sup>3</sup> an officer had sought to detain a pedestrian on the sole basis that the pedestrian had glanced over his shoulder at the passing police car. The pedestrian was subsequently arrested and convicted for evading arrest. The Texas Court of Criminal Appeals held that there was no lawful basis for the attempted detention because it was not founded on specific reasonable inferences that the officer was entitled to draw from the facts in light of his experience.<sup>4</sup> Since a crucial element of evading arrest is that the attempted arrest was lawful,<sup>5</sup> the defendant's conviction was overturned.

In *Davis v. State*<sup>6</sup> the Texas Court of Criminal Appeals issued a reminder that while a brief frisk for weapons may accompany a legitimate investigative detention absent probable cause, before making such a frisk the police officer must at least be able to point to specific and articulable facts that warrant his belief that either his safety or that of others is in danger.<sup>7</sup> In *Davis* a police officer made a legitimate investigative stop and asked the defendant to produce from his pocket an object making a round bulge about half the size of a man's fist. The court reversed the subsequent conviction for possession of marijuana because the state produced no evi-

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1. *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause."

2. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). In the words of the Texas Court of Criminal Appeals: "There must be a reasonable suspicion by the law enforcement officer that some activity out of the ordinary is or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to the crime." *Armstrong v. State*, 550 S.W.2d 25, 31 (Tex. Crim. App. 1977).

3. 576 S.W.2d 419 (Tex. Crim. App. 1979).

4. *Id.* at 420.

5. *Id.* at 419.

6. 576 S.W.2d 378 (Tex. Crim. App. 1979).

7. *Id.* at 380-81; see *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968).

dence of specific and articulable facts that would support a conclusion that the bulge was a weapon, that the defendant was armed and dangerous, or that the officer believed his safety or that of others was in danger.<sup>8</sup>

The United States Supreme Court handed down three significant decisions concerning investigative detention during the survey period. In *Dunaway v. New York*<sup>9</sup> the Court held that detention for custodial interrogation upon less than probable cause for arrest violates the fourth amendment. The Court stressed that the exceptions to the general rule requiring probable cause, such as those enunciated in *Terry v. Ohio* and its progeny,<sup>10</sup> were allowed only because the intrusions in those cases fell far short of the kind of intrusion associated with arrest.<sup>11</sup> In *Dunaway* the defendant was taken into custody, driven to police headquarters, placed in an interrogation room, and questioned after being read *Miranda* warnings. He was not told, however, that he was under arrest. The Court held that his treatment was virtually indistinguishable from a traditional arrest, and that the degree of intrusion demanded a showing of probable cause.<sup>12</sup>

*Brown v. Texas*<sup>13</sup> involved the constitutional validity of a conviction under a Texas Penal Code provision that makes it a crime to refuse to identify oneself to a police officer upon request.<sup>14</sup> In *Brown* two police officers stopped the defendant in an area noted for a high incidence of drug traffic and asked him to identify himself. The officers testified that they had stopped the defendant only because he looked suspicious and they had not seen him in the area before. When the defendant refused to identify himself, he was arrested for violation of section 38 of the Texas Penal Code.<sup>15</sup> In a unanimous decision, the Court held the application of the statute to the defendant violated the fourth amendment because the officers lacked any reasonable suspicion to believe that defendant was engaged or had engaged in criminal conduct.<sup>16</sup> The Court did not hold that the statute was unconstitutional on its face, however, and expressly declined to decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop that satisfies fourth amendment requirements.<sup>17</sup>

In *Delaware v. Prouse*<sup>18</sup> a patrolman stopped a car occupied by the defendant and subsequently arrested him for possession of marijuana that was in plain view as the patrolman approached the car. The patrolman testified, however, that he had observed neither traffic violations nor suspi-

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8. 576 S.W.2d at 381.

9. 99 S. Ct. 2248, 2258, 60 L. Ed. 2d 824, 828 (1979).

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

11. 99 S. Ct. at 2256, 60 L. Ed. 2d at 835.

12. *Id.* at 2258, 60 L. Ed. 2d at 838.

13. 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

14. TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974) provides: "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a police officer who has lawfully stopped him and requested the information."

15. *Id.*

16. 99 S. Ct. at 2641, 61 L. Ed. 2d at 363.

17. 99 S. Ct. at 2641 n.3, 61 L. Ed. 2d at 363 n.3.

18. 440 U.S. 648 (1979).

cious activity, but that he had made the stop only to check the driver's license and registration. In an eight-to-one decision, the Supreme Court held that except where there is at least an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping the automobile and detaining the driver in order to check his driver's license and the registration of the car are unreasonable under the fourth amendment.<sup>19</sup> The Court was careful to point out, however, that a state is not precluded from using roadblock-type stops to question all oncoming traffic or to develop alternative spot check methods that involve less intrusion or that do not involve the unconstrained exercise of discretion.<sup>20</sup>

*Detention for Issuance of Traffic Ticket not an Arrest.* In *Thomas v. State*<sup>21</sup> the defendant was stopped for making an illegal turn. The officer had him sit in the back seat of the patrol car while the officer wrote out a ticket. While this was being done, another officer searched a coat lying on the seat of the defendant's car and discovered illegal drugs. The Texas Court of Criminal Appeals held that since the defendant was not in custody at the time of the search, but merely under temporary detention for the issuance of a traffic ticket, the search was not incident to an arrest.<sup>22</sup> Because the court found that there was no probable cause to justify the search, the case was reversed and remanded.

*Search Warrant—Blood.* It is now clearly established that the taking of a defendant's blood is a search and seizure under the Texas Constitution.<sup>23</sup> Further developing this issue, the court of criminal appeals in *Ferguson v. State*<sup>24</sup> held that either a warrant or the defendant's consent must be obtained before a blood sample may be taken from a defendant in custody. The opinion ignored the Supreme Court's ruling in *Schmerber v. California*<sup>25</sup> that would allow the taking of a blood sample without consent in exigent circumstances. The Texas Court of Criminal Appeals has yet to address the question of whether blood is to be construed as either "property" or an "item" under recently amended article 18.02(10) of the Texas Code of Criminal Procedure.<sup>26</sup> If blood does not fall within the meaning

19. *Id.* at 663.

20. *Id.* The Texas Court of Criminal Appeals anticipated *Prouse* in *White v. State*, 574 S.W.2d 546 (Tex. Crim. App. 1978).

21. 572 S.W.2d 507 (Tex. Crim. App. 1978) (en banc).

22. *Id.* at 509.

23. TEX. CONST. art. I, § 9.

24. 573 S.W.2d 516, 520 (Tex. Crim. App. 1978) (en banc).

25. 384 U.S. 757 (1966). In *Schmerber* the exigent circumstance was that a delay in taking the blood sample would allow the alcohol content of the blood to diminish thus destroying the evidence needed to prove the offense of driving under the influence of intoxicating liquor. *Id.* at 770-71. In *Ferguson*, however, a delay would not have been harmful; the defendant was accused of murder and the blood sample was needed to compare blood types with blood found on the defendant's clothing and on a knife alleged to be the murder weapon. 573 S.W.2d at 520.

26. TEX. CODE CRIM. PROC. ANN. art. 18.02 (Vernon 1977) defines permissible grounds

of subdivision 10, then the only circumstances under which blood may be taken from an individual in custody is if there is voluntary consent.<sup>27</sup>

*Search Warrant Affidavit—Truthfulness Challenge.* In 1978 the United States Supreme Court held that if a defendant subsequent to the ex parte issuance of a search warrant makes a substantial preliminary showing that an affiant, knowingly and intentionally, or with reckless disregard for the truth, included a false statement in his affidavit for a search warrant, the fourth amendment requires a hearing if the alleged false statement was necessary to the finding of probable cause.<sup>28</sup> During this survey period the Texas Court of Criminal Appeals adopted and gave retroactive effect to this holding in *Ramsey v. State*.<sup>29</sup> *Ramsey* thus sounds the death knell for the long-standing Texas rule that a challenge to the affidavit's statement of probable cause could not go behind the face of the affidavit.<sup>30</sup>

*Standing.* In *Rakas v. Illinois*<sup>31</sup> the United States Supreme Court significantly redefined the scope of personal fourth amendment interests. The defendant in *Rakas* sought to prevent the introduction of evidence seized from a car in which he was riding, even though he owned neither the car nor the shotgun and shells that were confiscated in the search and introduced as evidence at his trial. In a five-to-four decision the Supreme Court affirmed the defendant's conviction on the grounds that the defendant's fourth amendment rights could not have been infringed by the search, and in so doing, clarified the formula for the determination of fourth amendment "standing."<sup>32</sup>

The defendant sought to have the Court adopt the "target" theory of

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for issuance of a search warrant. Prior to the 1977 amendment of this article, the court of criminal appeals had held that a search warrant could not be issued for blood because blood was not listed in the article. *Smith v. State*, 557 S.W.2d 299 (Tex. Crim. App. 1977). Effective May 25, 1977, however, subdivision (10) was added to art. 18.02 and reads: "A search warrant may be issued to search for and seize: . . . (10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense."

27. Since blood type remains constant throughout life, a blood sample cannot be taken to prevent "destruction of evidence." *Smith v. State*, 557 S.W.2d 299, 302 (Tex. Crim. App. 1977). Likewise, search for blood cannot be justified on the basis of endangerment of the officer, or as an incident to a lawful arrest. *Id.* This reasoning again ignores the type of situation exemplified by *Schmerber* in which delay will result in the destruction of evidence. See note 25 *supra*.

28. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

29. 579 S.W.2d 920 (Tex. Crim. App. 1979).

30. See, e.g., *Oubre v. State*, 542 S.W.2d 875, 877 (Tex. Crim. App. 1976).

31. 439 U.S. 128 (1978).

32. The Court devoted an entire section of its opinion to the propriety of the use of the word "standing" in this context. The Court held that in the light of the long standing insistence that fourth amendment rights are personal rights, the issue of whether an individual may challenge evidence on fourth amendment grounds is more properly placed within the purview of substantive fourth amendment law than within the theoretically separate area of standing. Properly the first inquiry is thus whether the disputed search and seizure infringed an interest of the defendant that the fourth amendment was designed to protect, not whether an individual has standing to challenge the evidence. 439 U.S. at 139-40. Nevertheless, for purposes of brevity and consistency, this article will continue to refer to this area of inquiry as fourth amendment standing.

fourth amendment standing, whereby a person may challenge the legality of a search in order to suppress evidence if the search was directed against him.<sup>33</sup> The Court rejected this approach, stressing that fourth amendment rights are personal rights,<sup>34</sup> and that the mere fact that a person is aggrieved by the introduction of evidence procured by a search will not allow that person to challenge the evidence if the search only infringed upon the fourth amendment rights of a third party.<sup>35</sup>

While recognizing that a proprietary interest in the premises searched is not essential to the existence of personal fourth amendment rights, the Court refused to abide by the criteria enunciated in *Jones v. United States*.<sup>36</sup> In *Jones*, the Court had stated that "anyone legitimately on premises where a search occurs" may challenge the introduction of evidence procured by the search.<sup>37</sup> In place of the "legitimacy on premises" test of fourth amendment standing, the *Rakas* court held that the proper test is whether the person who claims the protection of the fourth amendment had a legitimate expectation of privacy in the invaded place.<sup>38</sup>

*Legislative Modification of the State's Right to Issue a Search Warrant.* In 1977 the legislature amended article 18.02 of the Texas Code of Criminal Procedure by adding subdivision (10), which allows issuance of a search warrant for "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense."<sup>39</sup> The 1979 legislature has both clarified and modified this provision. First the legislature has provided that a search warrant may not be issued pursuant to subdivision (10) unless the sworn affidavit asserts

(1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.<sup>40</sup>

This amendment also only permits judges at the county court level and

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33. This argument was based on language appearing in *Jones v. United States*, 362 U.S. 257, 261 (1960).

34. *Alderman v. United States*, 394 U.S. 165 (1969).

35. 439 U.S. at 134.

36. 362 U.S. 257 (1960).

37. *Id.* at 267.

38. The Court relied on *Katz v. United States*, 389 U.S. 347, 353 (1967) for this test. In a biting dissent, Justice White, joined by Justices Brennan, Marshall, and Stevens, asserted the majority holding to be "that the Fourth Amendment protects property, not people." 439 U.S. at 156-57. Justice White further pointed out that no matter how "unlawful stopping and searching a car may be, absent a possessory or ownership interest, no 'mere' passenger may object, regardless of his relationship to the owner." *Id.* at 157. This author believes that Mr. Justice White accurately asserts that "the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense." *Id.*

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

40. *Id.* art. 18.01(c) (Vernon Supp. 1980).

above to issue subdivision (10) warrants. Moreover, the legislature completely excluded applicability of subdivision (10) to newspapers, news magazines, television stations, and radio stations.<sup>41</sup>

### B. *Confessions and Admissions*

*Miranda Defects—Waiver.* In *Ochoa v. State*<sup>42</sup> the defendant was arrested for the murder of a police officer, read his *Miranda* rights, and brought to the local jail. Upon interrogation, the defendant mentioned that he thought he should speak to an attorney, but he did not press the issue. After this statement the police officers continued to talk with the defendant, and eventually the defendant signed a confession to the murder. At trial, defendant objected that the confession was obtained in violation of *Miranda v. Arizona*.<sup>43</sup> The defendant testified to substantially the same facts as contained in his confession, but interjected a claim of self-defense. During cross-examination the defendant admitted that he had signed the confession voluntarily.

Upon appeal from a guilty verdict, the defendant challenged the admission of the confession. The court of criminal appeals agreed that the confession was obtained in violation of *Miranda*, and was therefore inadmissible, because interrogation continued after the defendant had mentioned his desire to speak to an attorney.<sup>44</sup> The court held that if a defendant indicates in any way that he desires to invoke his right to counsel, *Miranda* requires that interrogation must cease.<sup>45</sup> The state contended that defendant had waived any *Miranda* defect when he testified to substantially the same facts as contained in his confession. The court, while acknowledging that a defendant waives a claim of harm when he testifies in his own behalf and admits the truth of the objectionable testimony, nevertheless held that such a waiver does not occur if he introduces rebutting testimony in an attempt to meet, destroy, or explain the evidence offered against him.<sup>46</sup> Finally, the court held that the defendant's admission that he had voluntarily signed the confession did not make the confession admissible in the prosecution's case in chief, if it was not taken in compliance with *Miranda*.<sup>47</sup>

*The Meaning of Custody for Oral Confession Purposes.* In *Stone v. State*<sup>48</sup> the defendant, the suspect in a rape case, was requested to appear at the police station for questioning. After requesting a polygraph test, the defendant was taken before a magistrate and given the statutory warnings

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41. *Id.* art. 18.01(e) (Vernon Supp. 1980).

42. 573 S.W.2d 796 (Tex. Crim. App. 1978).

43. 384 U.S. 436 (1966).

44. 573 S.W.2d at 800.

45. *Id.*

46. *Id.*

47. *Id.* at 801. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 5 (Vernon 1979) provides that such a confession may be used for impeachment.

48. 583 S.W.2d 410 (Tex. Crim. App. 1979).

normally concomitant to an arrest.<sup>49</sup> The defendant then took the test, was told that he had failed and would probably be charged, and was asked to wait in another room at the station. At this time the defendant orally confessed to a private investigator.

At the time of the trial, article 38.22 of the Texas Code of Criminal Procedure<sup>50</sup> provided that unless the confession leads to tangible evidence of guilt, an oral confession is inadmissible if the confessor was in the custody of an officer at the time of the confession. The *Stone* court held that because the defendant went to the police station voluntarily and in his own car, and was at no time prior to his confession told he was under arrest or that he could not leave the police station, he was not in custody for the purposes of old article 38.22.<sup>51</sup> Therefore, the court held that the trial court had not erred in admitting the confession.<sup>52</sup>

The majority in *Stone* drew a close parallel to *Oregon v. Mathiason*,<sup>53</sup> in which the United States Supreme Court held that a defendant who voluntarily met with a police officer at the police station, was told that he was not under arrest, confessed after a brief conversation, and was allowed to leave, was not in custody. Judge Roberts dissented, arguing that the majority's reliance on *Oregon v. Mathiason* was poorly placed. Judge Roberts distinguished *Stone* from *Mathiason* on the basis that in *Stone*, the defendant was taken before a magistrate and read his rights, and having been informed that he had failed the polygraph test, was told to wait in a room, thereby having his freedom of movement restricted.<sup>54</sup> Because the court held in *Maldonado v. State*<sup>55</sup> that an arrest is complete whenever a person's liberty is restricted or restrained, the denial of defendant's request for a rehearing en banc is surprising.

*Confession Obtained by Promising Benefit.* The defendant in *Washington v. State*<sup>56</sup> was indicted on charges of burglary and theft and during plea negotiations requested the opportunity to take a polygraph examination. The prosecutor agreed to allow this examination on the condition that the defendant first sign a stipulation admitting that he had committed the burglary. The prosecutor promised that if the defendant passed the examination, the state would move for a new trial. The defendant claimed that the prosecutor had also promised to disregard the stipulation if the test was passed. Defendant agreed and passed the test, but after a new trial was

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49. TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon 1977) enunciates the admonitory procedure that must follow every arrest "without unnecessary delay."

50. 1965 Tex. Gen. Laws, ch. 722, § 1, at 469.

51. 583 S.W.2d at 413.

52. *Id.* The court qualified its holding by referring to art. 38.22 as it read at the time of trial. The present version of this statute is at TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979 & Supp. 1980).

53. 429 U.S. 492 (1977).

54. 583 S.W.2d at 418.

55. 528 S.W.2d 234 (Tex. Crim. App. 1975).

56. 582 S.W.2d 122 (Tex. Crim. App. 1979).



granted he was reindicted for theft, and the stipulation was introduced at trial.

The Texas Court of Criminal Appeals held that the stipulation was inadmissible under the Texas rule that renders inadmissible confessions obtained by promise of benefit.<sup>57</sup> The four part test for application of this rule is that the promise must: "(1) be of some benefit to the defendant; (2) be positive; (3) be made or sanctioned by a person in authority; and, (4) be of such character as would be likely to influence the defendant to speak untruthfully."<sup>58</sup> As applied to *Washington*, the benefit was the opportunity to take the polygraph test and the possible discharge if he passed it; the promise was positive rather than equivocal; and the prosecutor making the promise was a person "in authority."<sup>59</sup> Because the prosecutor had allegedly promised to disregard the stipulation if the test was passed, a defendant convinced of his innocence had nothing to lose by signing the stipulation, and therefore the promise was of such a character as would be likely to influence the defendant to speak untruthfully.<sup>60</sup>

## II. PRETRIAL PROCEDURE

### A. Extradition

In October of 1978, the United States Supreme Court decided *Michigan v. Doran*,<sup>61</sup> in which the defendant had been arrested in Michigan for possession of a stolen truck driven from Arizona. Upon notification of the defendant's arrest in Michigan, an Arizona justice of the peace issued a warrant for defendant's arrest. The defendant was arraigned in Michigan as a fugitive. The Governor of Arizona issued a requisition for extradition and the defendant's extradition was ordered. Defendant petitioned the Michigan court for a writ of habeas corpus, contending that the extradition warrant was invalid for failure to comply with the Uniform Criminal Extradition Act.<sup>62</sup> The Michigan court twice denied the writ, and the Michigan Court of Appeals dismissed the defendant's complaint. The Supreme Court of Michigan reversed the trial court's extradition order, but the United States Supreme Court reversed, holding that under the extradition clause of the United States Constitution,<sup>63</sup> "once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state."<sup>64</sup> The court reasoned that "[t]o allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by article IV, sec-

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57. *Id.* at 123; see *Fisher v. State*, 379 S.W.2d 900, 902 (Tex. Crim. App. 1964).

58. 582 S.W.2d at 124.

59. *Id.*

60. *Id.*

61. 439 U.S. 282 (1978).

62. MICH. COMP. LAWS §§ 780.1 to .31 (1975).

63. U.S. CONST. art. IV, § 2, cl. 2.

64. 439 U.S. at 290.

tion 2."<sup>65</sup>

This precise question was presented to the Texas Court of Criminal Appeals in 1979 in *Ex parte Moore*.<sup>66</sup> There, the defendant appealed from the denial of his asserted right to challenge the probable cause for the warrant issued by the state of Florida during a Texas habeas corpus hearing. The court of criminal appeals affirmed, holding that in light of *Doran*, the defendant's right to challenge probable cause to arrest in Florida, the demanding state, only arises if the documents supporting the Florida governor's warrant are insufficient to establish that a judicial determination of probable cause has been made in the demanding state.<sup>67</sup>

### B. *Indictment and Information*

The Texas Code of Criminal Procedure provides that "[a] person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony."<sup>68</sup> This section of the code was interpreted in *Lackey v. State*,<sup>69</sup> where the defendant based his appeal from a conviction for burglary with intent to kidnap on the ground that the trial court had erroneously proceeded to trial without an effective waiver of indictment and thus with a void information. Although the trial record was devoid of evidence that the defendant had waived the indictment, the state argued that no error existed because the appellant had not been harmed. According to the state, lack of detriment to the appellant was shown in that appellant never affirmatively objected to the use of the information rather than the indictment.

The court of criminal appeals reversed defendant's conviction and remanded the case, holding that a defendant must personally waive the right to be accused by indictment.<sup>70</sup> Reiterating its prior holding in *King v. State*,<sup>71</sup> the court held that an effective waiver must be given intelligently, voluntarily, and knowingly by the accused while represented by counsel.<sup>72</sup> The court further held that a defendant's remaining silent and voicing no objection to being tried by information does not constitute an effective waiver.<sup>73</sup> Since a felony information acts in lieu of an indictment, its validity is essential to the court's jurisdiction; however, an information only becomes valid upon an effective waiver of indictment.<sup>74</sup> Finding no effective waiver by defendant, the court held that reversal was mandated, since the trial court never acquired jurisdiction of the case.<sup>75</sup>

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65. *Id.*

66. 579 S.W.2d 475 (Tex. Crim. App. 1979).

67. *Id.* at 477.

68. TEX. CODE CRIM. PROC. ANN. art. 1.141 (Vernon 1977).

69. 574 S.W.2d 97 (Tex. Crim. App. 1978).

70. *Id.* at 100.

71. 473 S.W.2d 43 (Tex. Crim. App. 1971).

72. 574 S.W.2d at 100.

73. *Id.*

74. 473 S.W.2d at 48-49, 51-52.

75. 574 S.W.2d at 100.

### C. Right to Counsel

In the 1972 case of *Argersinger v. Hamlin*<sup>76</sup> the United States Supreme Court announced that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial.<sup>77</sup> Because the rule applies only to actual sentencing and not the possibility of imprisonment, *Argersinger* presents judges with the dilemma of having to decide in advance of trial whether to discard a possible punishment of imprisonment or to appoint counsel and retain this discretion.<sup>78</sup>

The decisions of Texas courts have been unclear about the scope of the *Argersinger* holding and have differed substantially in their resolution of the question left open by that opinion. In the 1976 case of *Ex parte Herrin*,<sup>79</sup> in which the defendant's actual sentence involved imprisonment in addition to a fine, the court of criminal appeals cited *Argersinger* for the proposition that "criminal defendants in misdemeanor cases are entitled to counsel if there exists a possibility that imprisonment may be imposed."<sup>80</sup> The court could find no evidence of a knowing, intelligent waiver of defendant's right to counsel, and thus voided the defendant's convictions. During the survey period, however, *Emphy v. State*<sup>81</sup> reversed *Herrin* on this point. In *Emphy*, defendant, who was not represented by counsel at trial, was punished by fine only for conviction of a misdemeanor, although imprisonment was a potential punishment under the statute.<sup>82</sup> The defendant contended, on the basis of *Herrin*, that the judgment was void because, when he entered his plea of guilty without representation by counsel, there existed a possibility that his punishment would include imprisonment. The *Emphy* court rejected this contention, and overruled *Herrin* to the extent of its erroneous interpretation of *Argersinger*. The court stated that the trial judge knew of the proper holding in *Argersinger* and knew that when he accepted the defendant's plea of guilty he could not assess punishment of imprisonment, but could only assess a fine if the appellant was not represented by counsel. The court rejected the argument that article 26.04<sup>83</sup> of the Texas Code of Criminal Procedure requires the appointment of counsel in any case in which imprisonment is a possible penalty under the applicable statute.<sup>84</sup> The *Emphy* court read *Argersinger*

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76. 407 U.S. 25 (1972).

77. *Id.* at 37.

78. *Id.* at 53.

79. 537 S.W.2d 33 (Tex. Crim. App. 1976).

80. *Id.* at 35.

81. 571 S.W.2d 526 (Tex. Crim. App. 1978).

82. Defendant's misdemeanor, theft of more than \$20.00 but less than \$200.00, was classified as a class A misdemeanor, and therefore his sentence could have included up to one year imprisonment. TEX. PENAL CODE § 12.21(2) (Vernon 1974).

83. "Whenever the court determines at an arraignment or at any time prior to arraignment that an accused charged with a felony or a misdemeanor punishable by imprisonment is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him." TEX. CODE CRIM. PROC. art. 26.04 (Vernon 1966) (emphasis added).

84. The court construed art. 26.04 to comply with *Argersinger's* holding;

Although this statute antedates *Argersinger* . . . , we construe it in light of

to say that under these circumstances, the trial court was not required to appoint an attorney to represent the defendant.<sup>85</sup> Thus, *Emphy* holds that if only a fine actually is assessed in a misdemeanor case, the judgment is not void when the indigent defendant is not represented by counsel and is convicted under a statute that includes imprisonment as a possible punishment.<sup>86</sup>

Four judges dissented to the *Emphy* holding, based on their belief that, as a constitutional principal, "any criminal defendant faced with a *possible* term of imprisonment, regardless of the charge's classification, is entitled to the appointment of counsel when indigent. The penalty ultimately assessed would be immaterial."<sup>87</sup> The dissenters also based their opinion on the anomaly that would result if an indigent defendant who was charged with an offense carrying a possible prison sentence but not represented by counsel were nevertheless given a punishment of imprisonment. In such a case, there would be no one to advise the defendant that, under *Argersinger*, the trial court had not been empowered to impose a prison sentence upon defendant and that such imposition constitutes a denial of defendant's sixth amendment rights.<sup>88</sup>

The position of the *Emphy* dissent finds support in the Fifth Circuit opinions that have considered the question. In *Thomas v. Savage*<sup>89</sup> the Fifth Circuit stated that "[t]he necessity for counsel is judged by the maximum penalty the defendant *may* receive."<sup>90</sup> The court acknowledged that "[i]n this respect the cases of this circuit go beyond the Supreme Court's decision in *Argersinger v. Hamlin* . . . , which would only require the appointment of counsel when a sentence of imprisonment is imposed."<sup>91</sup> The view of the Fifth Circuit and the *Emphy* dissent appears to comport more realistically with the purposes of the sixth amendment and avoids the obvious problem presented by the *Emphy* majority's opinion: the dilemma of an unrepresented defendant who, despite *Argersinger*, is erroneously sentenced to prison and has no attorney to advise him of the sentence's unconstitutionality. It is hoped that the Texas Court of Criminal Appeals will reconsider the implications of its decision and overrule it at the earliest opportunity. Alternatively, future defendants without counsel penalized under *Emphy* should petition the United States Supreme Court, which,

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*Argersinger* . . . to require the appointment of counsel only when the court knows it will assess punishment including imprisonment or when the trial is before a jury where the possible punishment authorized includes imprisonment. A defendant is not *punishable* by imprisonment if he is unrepresented by counsel unless he waives counsel.

571 S.W.2d at 528 (emphasis by the court).

85. 571 S.W.2d at 528.

86. *Id.*

87. 571 S.W.2d at 535, (Phillips, J., dissenting) (emphasis in original). Judges Orion, Roberts and Davis also dissented.

88. *Id.* at 536.

89. 513 F.2d 536 (5th Cir.), *cert. denied*, 424 U.S. 924 (1975).

90. *Id.* at 537 (emphasis in original). See also *Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976).

91. 513 F.2d at 537 (citation omitted).

when faced squarely with this question, is likely to settle this dispute in favor of the Fifth Circuit's position.

#### D. *Speedy Trial*

During the survey period, the court of criminal appeals was called upon to construe its power, under the Texas Speedy Trial Act,<sup>92</sup> to issue writs of mandamus against trial judges who fail to set aside indictments of criminal defendants who are not tried within the statutorily prescribed periods. Although the court of criminal appeals apparently possesses the power to issue writs of mandamus to compel speedy trial under the Texas constitution,<sup>93</sup> the court has taken an extremely restrictive approach to the issuance of these writs to petitioners seeking to enforce their rights under the Speedy Trial Act.

In *Ordunez v. Bean*,<sup>94</sup> the defendant had moved the trial court to set aside its indictment for felony theft on the grounds that he had not been brought to trial within 120 days as required by the Speedy Trial Act.<sup>95</sup> The court of criminal appeals reversed the writ on two grounds. First, the court found that the trial judge's determination, that overcrowded dockets were an "exceptional circumstance" within the meaning of the Speedy Trial Act,<sup>96</sup> was an exercise of "judicial discretion" to which mandamus was not available.<sup>97</sup> Next, the court held that petitioner had not fulfilled his burden of demonstrating that no adequate remedy, other than mandamus, was available at law. The court noted that appeal was available to the petitioner, in the event of his conviction, to test any asserted denial of his right to a speedy trial on both statutory and constitutional bases.<sup>98</sup> The

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92. TEX. CODE CRIM. PROC. ANN. arts. 32A.01, 32A.02 (Vernon Supp. 1980). Article 32A.01 provides: "Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions." Article 32A.02 requires the court to grant a motion to set aside an indictment if the time elapsed before trial exceeds the maximum stipulated by the article for the offense charged. During the survey period, the legislature increased the number of days for which an alleged misdemeanor can be held before being brought to trial from 30 to 60. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Supp. 1980).

93. TEX. CONST. art. 5, § 5 was amended in 1977 to provide: "Subject to such regulations as may be prescribed by law, regarding criminal matters, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writs of habeas corpus, mandamus, procedendo, prohibition . . . ." Prior to this amendment, only the Supreme Court of Texas had been empowered to issue writs of mandamus to compel speedy trials. In *Thomas v. Stephenson*, 561 S.W.2d 845 (Tex. Crim. App. 1978), the courts acknowledged this recent grant of mandamus power and issued a writ to compel a speedy trial for the petitioner.

94. 579 S.W.2d 911 (Tex. Crim. App. 1979).

95. TEX. CODE CRIM. PROC. ANN. art. 32A.02 § 1(1) (Vernon Supp. 1980).

96. TEX. CODE CRIM. PROC. ANN. art. 32A.02 § 4(10) provides that in computing the time by which the state must be ready for trial, any "reasonable period of delay that is justified by exceptional circumstances" is to be excluded.

97. 579 S.W.2d at 913. In the dissenting portion of Judge Phillip's opinion he points out that mandamus was certainly available to correct abuses of discretion, and it seems clear that a trial judge's arbitrary refusal to enforce art. 32A.02 would be an abuse of discretion. *Id.* at 914-15.

98. *Id.* at 913-14.

court cited the United States Supreme Court opinion of *United States v. McDonald*<sup>99</sup> in support of the proposition that allowing appeals of pretrial orders denying motions to dismiss for violation of the right to speedy trial would serve only to delay trial further.<sup>100</sup>

Similarly, in *Hazen v. Pickett*,<sup>101</sup> the court of criminal appeals refused the petitioner, whose waiting period also allegedly had exceeded the statutory maximum, a writ of mandamus against the judge who had denied petitioner's motion to set aside his indictment. Citing *Ordunez* as controlling, the court found that the petitioner had not sustained his burden of proof under the "traditional two-step test." Since the petitioner had an "adequate remedy by appeal" if he were convicted, the court held that he had failed to demonstrate entitlement to relief by mandamus.<sup>102</sup> Finally, in *Ex parte Delbert*,<sup>103</sup> the court of criminal appeals refused a petition for a writ of habeas corpus to discharge the petitioner, who had not been brought to trial within the statutorily prescribed period. Relying again upon *Ordunez*, the court held that post-conviction appeal constitutes an adequate remedy for violation of the right to speedy trial.<sup>104</sup> The court made clear that *Ordunez* was none the less applicable because the petitioner sought a writ of habeas corpus rather than mandamus.

In holding that post-conviction appeal is an adequate alternative remedy for denial of the right to speedy trial and that relief by mandamus is available only to one who proves that no other adequate remedy exists, the court of criminal appeals has emasculated the Speedy Trial Act and turned its back on the power to grant extraordinary writs specifically granted it by the legislature. The court's interpretation of the Speedy Trial Act compels the criminal defendant to wait until after trial, no matter how egregious the delay, to vindicate his rights under the sixth amendment of the United States Constitution and the Texas Speedy Trial Act. The court's certainty that post-conviction appeal is an adequate remedy is unfounded, in view of the fact that the right to speedy trial attaches to all those accused, whether they are ultimately convicted or acquitted. The court's interpretation, moreover, promises to congest dockets further, as many defendants, whether convicted or acquitted, will return to the courts to vindicate the former abridgment of their right to a speedy trial. It is hoped that the court will reconsider seriously its position on this issue and develop a more rational, functional approach toward future petitioners before too many unnecessary trials have occurred.

### E. Double Jeopardy

*Attachment of Double Jeopardy in Jury Trials.* The double jeopardy clause

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99. 435 U.S. 850 (1978).

100. 579 S.W.2d at 914.

101. 581 S.W.2d 694 (Tex. Crim. App. 1979).

102. *Id.*

103. 582 S.W.2d 146 (Tex. Crim. App. 1979).

104. *Id.* at 147.

of the United States Constitution<sup>105</sup> prohibits multiple prosecution by a single sovereign for a single offense. Thus it must be determined when double jeopardy first attaches during criminal trials. In *Crist v. Bretz*,<sup>106</sup> the United States Supreme Court held that double jeopardy attaches when the jury is empaneled and sworn, and that this federal rule "is an integral part of the constitutional guarantee against double jeopardy."<sup>107</sup> The Texas Court of Criminal Appeals applied this rule of attachment in *McLendon v. State*,<sup>108</sup> dismissing the reindictment of a defendant whose first trial, following the empanelling of a jury, had been dismissed upon the motion of the state that had failed to secure a necessary witness. The court held that once defendant goes forward with sufficient evidence to establish a claim of double jeopardy, the burden shifts to the state to prove that the defendant consented to the state's motion to dismiss.<sup>109</sup> Since the state failed to fulfill this burden the reindictment was dismissed.

*Appellate Finding of Legally Insufficient Evidence.* Recently the United States Supreme Court held in *Burks v. United States*<sup>110</sup> and *Greene v. Massey*<sup>111</sup> that where an appellate court determines that the evidence produced by the state at trial is insufficient as a matter of law, the double jeopardy clause of the Constitution prohibits the remanding of the cause for retrial. The court made clear in *Burks* that the prosecutor's failure to muster sufficient evidence in the first proceeding in no way entitled the prosecution to another opportunity to try a defendant when the state gains access to additional evidence, because the appellate court's determination of insufficiency as a matter of law operates as a resolution of factual issues.<sup>112</sup> *Burks* also held that it is immaterial whether a defendant has sought a new trial as one of his remedies, or even as his sole remedy, because a motion for new trial cannot be said to waive the right to a judgment of acquittal that vests in a defendant upon an appellate finding of insufficient evidence to convict.<sup>113</sup>

In two cases decided during the survey period,<sup>114</sup> the Texas Court of Criminal Appeals adhered to the teachings of *Burks* and *Greene* and held that retrial following an appellate determination of insufficient evidence violates the double jeopardy clause. In one of these cases, *Chase v. State*,<sup>115</sup> the defendant had been convicted upon retrial, following an appellate determination of insufficient evidence at the first proceeding. Reversing the conviction and ordering the entry of judgment of acquittal, the

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105. U.S. CONST. amend. V.

106. 437 U.S. 28 (1978).

107. *Id.* at 31.

108. 583 S.W.2d 777 (Tex. Crim. App. 1979).

109. *Id.* at 779-80.

110. 437 U.S. 1, 18 (1978).

111. 437 U.S. 19, 24 (1978).

112. 437 U.S. at 17.

113. *Id.*

114. *Chase v. State*, 573 S.W.2d 247 (Tex. Crim. App. 1978); *Damron v. State*, 570 S.W.2d 933 (Tex. Crim. App. 1978).

115. 573 S.W.2d 247 (Tex. Crim. App. 1978).

*Chase* court also spelled out the standard applicable in Texas for determining legal insufficiency at both the trial and appellate levels:

The standard for review . . . on sufficiency of the evidence is not to consider whether or not [the court] believes or disbelieves any witness, but merely to determine whether or not, in looking at the evidence in a light most favorable to sustain the verdict, there is any evidence which the jury could have believed in arriving at such a verdict.<sup>116</sup>

The Supreme Court in *Burks* made a special effort to emphasize the distinction between the double jeopardy implications of retrial after a determination of insufficient evidence, as opposed to retrial after finding of trial error. The court stated that the double jeopardy clause presents no bar to retrial after an appellate determination of trial error, because reversal for error does not constitute a decision to the effect that the government has failed to prove its case; as such it implies nothing with respect to the guilt or innocence of the defendant.<sup>117</sup> "When [a finding of trial error] occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."<sup>118</sup> The court of criminal appeals applied this distinction in *Ex parte Duran*,<sup>119</sup> where the defendant had won reversal of his conviction upon the appellate court's determination that the trial court erred in admitting a stipulation to which the defendant had not consented. Defendant was retried and again convicted, but the court adhered to the *Burks* distinction and thus rejected defendant's claim that the retrial following reversal for trial error had placed him in double jeopardy.<sup>120</sup>

A probationer in *Davenport v. State*<sup>121</sup> claimed that the double jeopardy clause, as well as the doctrine of res judicata, rendered invalid a second probation revocation hearing, where the first hearing had been lost by the state due to insufficient evidence. The court of criminal appeals held that neither the doctrine of double jeopardy nor res judicata applied, because the supervision of probation is an administrative function of the court, rather than a judicial one, and thus no determination of guilt or innocence within the meaning of *Burks* had occurred.<sup>122</sup> Three judges dissented vigorously to the court's "administrative function" exception, emphasizing the point made in *Burks* and *Greene* that the state's failure to gather sufficient evidence in one proceeding does not entitle it to subject an individual to further risk of punishment for the same act.<sup>123</sup>

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116. *Id.* at 249 n.1.

117. 437 U.S. at 15.

118. *Id.*

119. 581 S.W.2d 683 (Tex. Crim. App. 1979).

120. *Id.* at 686.

121. 579 S.W.2d 73 (Tex. Crim. App. 1978).

122. *Id.* at 75-76.

123. *Id.* at 77-82.



### F. *Discovery*

The Texas Code of Criminal Procedure provides that "[i]t shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused."<sup>124</sup> The case of *Ex parte Lewis*<sup>125</sup> represents a broad, purposeful application of this provision to the disclosure of potentially exculpatory evidence of which the defense is unaware. In *Lewis*, the defendant had pled guilty to murder at trial and brought a post-conviction application for habeas corpus relief. Relief was requested on the grounds that before and during the defendant's trial, the district attorney possessed a letter from a psychiatrist who had examined the defendant in prison, and who stated in the letter that defendant was in his opinion a paranoid schizophrenic who "does not appear to comprehend the seriousness of the crime that he has been charged with."<sup>126</sup> The letter further stated that the defendant's psychosis caused a "marked impairment to comprehend much of what is going on about him. . . . It is doubtful that this man can be held accountable for his behavior. . . ." <sup>127</sup> Despite the obvious importance of this evidence to the issue of defendant's competency to stand trial, the prosecutor never made the existence of the letter known to the defense. The court of criminal appeals held that the state's failure to disclose the existence of evidence of such substantial value to the defense constituted a denial of due process, and reversed the conviction.<sup>128</sup> The court stated that elemental fairness required the disclosure even without a specific request from the defense, despite the accused's plea of guilty to the charge.<sup>129</sup>

### G. *Incompetency to Stand Trial*

*Test for Determining Competency to Stand Trial.* In *Dusky v. United States*<sup>130</sup> the United States Supreme Court stated that the test for determining whether the defendant is competent to stand trial must be: "[w]hether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceeding against him."<sup>131</sup> Despite the fact that the court of criminal appeals has often recognized the *Dusky* test when incompetency is alleged by reason of insanity,<sup>132</sup> the

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

125. 587 S.W.2d 697 (Tex. Crim. App. 1979).

126. *Id.* at 700.

127. *Id.*

128. *Id.* at 703.

129. *Id.* at 701.

130. 362 U.S. 402 (1960).

131. *Id.*

132. See, e.g., *Ex parte Hagans*, 558 S.W.2d 457 (Tex. Crim. App. 1977); *Ainsworth v. State*, 493 S.W.2d 517 (Tex. Crim. App. 1973); *Sandlin v. State*, 477 S.W.2d 870 (Tex. Crim. App. 1972).

court upheld the validity of a different test in *Corley v. State*.<sup>133</sup> "To establish insanity at the present time it must be established by a preponderance of the evidence that the defendant is laboring under such mental disease or defect of the mind as to be rendered incompetent to make a rational defense to the charges against him."<sup>134</sup> Corley objected to this test and contended that the federal constitution required application of the *Dusky* test.<sup>135</sup> The court rejected this argument on the ground that the Supreme Court has never held *Dusky* to be constitutionally mandated.<sup>136</sup> It would appear that the use of either *Dusky* or the *Corley* test would be permissible in Texas<sup>137</sup> for determining the competency of a defendant. The Fifth Circuit, however, regards the *Dusky* test as constitutionally required by the due process clause of the fifth amendment.<sup>138</sup> Moreover, a subsequent Texas criminal appeals case has held that the proper test is the standard announced in *Dusky*.<sup>139</sup> Thus it seems doubtful the *Corley* test will be applied to any great extent.

*Waiver of Competency Hearing By Defendant.* In *Ex parte Locklin*<sup>140</sup> the state sought to sustain the defendant's conviction for burglary on the ground that he had waived his defense of incompetency when he failed to file for a separate trial on that issue. The court rejected this contention stating that to sustain the conviction without a trial on the issue of Locklin's competency would be a violation of his due process rights.<sup>141</sup> Quoting *Pate v. Robinson*,<sup>142</sup> the court stated that the waiver argument had been answered: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his capacity to stand trial."<sup>143</sup>

### III. PLEA BARGAINING AND GUILTY PLEAS

#### A. Plea Bargaining

In *Morano v. State*<sup>144</sup> the court of criminal appeals stated that a defend-

133. 582 S.W.2d 815 (Tex. Crim. App. 1979) (en banc) (Odom, Roberts, Phillips, & Clinton, JJ., dissenting).

134. *Id.* at 817.

135. The dissent agreed with Corley that he was constitutionally entitled to have his competency judged by the standard announced in *Dusky*. *Id.* at 822.

136. *Id.* at 818.

137. The statutory test of competency uses virtually the identical language as that in the *Dusky* test. An important distinction between the two tests is that *Dusky* is phrased in the conjunctive while the Texas statute is phrased in the disjunctive. Compare *Dusky v. United States*, 362 U.S. 402, 402 (1960) with TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(a) (Vernon 1979).

138. See, e.g., *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973); *Daugherty v. Beto*, 388 F.2d 810 (5th Cir. 1968).

139. *Ex parte Locklin*, 583 S.W.2d 787, 789 (Tex. Crim. App. 1979).

140. 583 S.W.2d 787 (Tex. Crim. App. 1979).

141. *Id.* at 788.

142. 383 U.S. 375, 384 (1966).

143. 583 S.W.2d at 788.

144. 572 S.W.2d 550 (Tex. Crim. App. 1978).

ant does not have an absolute right to plea bargain.<sup>145</sup> The trial judge may refuse to permit plea bargaining and recommendations by the prosecutor concerning the punishment to be assessed.<sup>146</sup> Moreover, the trial judge may disallow plea bargaining before a defendant enters a plea of guilty where the defendant and his attorney were aware of the possibility of such denial.<sup>147</sup>

When plea bargaining is permitted and the prosecutor enters into an agreement with the defendant, the federal constitution requires the prosecutor to uphold his end of the agreement.<sup>148</sup> Thus in *Bass v. State*,<sup>149</sup> in which the defendant entered a plea of guilty before the court pursuant to a plea bargaining arrangement, the defendant was able to withdraw his guilty plea when it was shown that the prosecutor had not lived up to his part of the agreement.<sup>150</sup> The court stated the prosecutor's breach of the agreement raised doubt as to whether the defendant's plea truly could be considered voluntary.<sup>151</sup>

### B. Guilty Pleas

*Guilty Plea by a Defendant Asserting Innocence.* In *North Carolina v. Alford*<sup>152</sup> the United States Supreme Court held that a trial judge may accept a plea of guilty despite the defendant's protestations of innocence. The Court stated that although a criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted, the states may confer such a right by statute or otherwise.<sup>153</sup> The Texas Court of Criminal Appeals adopted the *Alford* approach in *Moon v. State*.<sup>154</sup> This decision overturned a long line of cases that had held that the court was required to withdraw a defendant's plea of guilty upon the court's own volition if evidence was introduced that reasonably and fairly raised an issue of fact as to the defendant's innocence.<sup>155</sup> The effect of *Moon* is to place the acceptance or withdrawal of a guilty plea within the discretion of the trial court. In a partial dissent, Judge Roberts pointed out that the majority failed to note that the Supreme Court in *Alford* emphasized that a trial judge may accept a guilty plea only after a careful determination has been made that the plea was knowingly and voluntarily made.<sup>156</sup> When

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145. *Id.* at 551.

146. *Id.*

147. *Id.*

148. *Santobello v. New York*, 404 U.S. 257, 259 (1971).

149. 576 S.W.2d 400 (Tex. Crim. App. 1979).

150. 576 S.W.2d at 401. The statutory requirements for entering a guilty plea are set out in TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1980).

151. 576 S.W.2d at 401.

152. 400 U.S. 25 (1970).

153. *Id.* at 38 n.11.

154. 472 S.W.2d 681 (Tex. Crim. App. 1978).

155. See, e.g., *Malone v. State*, 548 S.W.2d 908 (Tex. Crim. App. 1977); *Woodberry v. State*, 547 S.W.2d 629 (Tex. Crim. App. 1977); *Sanchez v. State*, 543 S.W.2d 132 (Tex. Crim. App. 1976); *Cooper v. State*, 537 S.W.2d 940 (Tex. Crim. App. 1976).

156. 400 U.S. at 31. See also *Boykin v. Alabama*, 395 U.S. 238 (1969); *Machibroda v. United States*, 368 U.S. 487 (1962); *Kercheral v. United States*, 274 U.S. 220 (1927).

the evidence raises an issue concerning the defendant's innocence, Judge Roberts suggested that the trial court should be required to stop the guilty plea hearing to determine whether the plea is voluntary and whether the accused is aware of the conflict between his plea and the evidence.<sup>157</sup>

*Plea-Bargaining Guilty Plea in Capital Murder Case.* In *Ex parte Dowden*<sup>158</sup> the defendant was charged with capital murder. By plea bargaining with the defendant, the state obtained a guilty plea in exchange for a waiver of the death penalty. After the guilty plea was accepted by the trial court and punishment was set at life imprisonment, the defendant filed a writ of habeas corpus to set aside the guilty plea. Relying on section 12.31 of the penal code,<sup>159</sup> which makes capital murder a separate offense, punishable by a mandatory sentence of death or life imprisonment, the appellate court held that the state cannot waive the death penalty in a capital murder case.<sup>160</sup> The court also held that a defendant cannot waive his right to trial by jury in a capital felony case.<sup>161</sup> In a concurring opinion, Judge Roberts pointed out that the state was not precluded from dismissing the capital felony indictment in order to proceed on an indictment or information for a lesser offense. By prosecuting the defendant for a non-capital murder, the state could avoid section 12.31 of the penal code and thereby plea bargain a sentence of life imprisonment in exchange for a guilty plea.<sup>162</sup>

#### IV. TRIAL

##### A. *Right to an Interpreter*

*Ferrell v. Estelle*<sup>163</sup> involved a habeas corpus proceeding that reviewed the murder conviction of a deaf defendant. The defendant became deaf shortly before trial and as a result could not communicate effectively except by writing.<sup>164</sup> At trial, defense counsel demanded that a stenographer simultaneously translate the proceedings for the defendant.<sup>165</sup> The court denied the request but informed the defendant's attorney that unlimited recesses would be granted. Only two recesses were demanded and both were granted. Based on these facts, the defendant challenged the validity of his conviction.<sup>166</sup> The Fifth Circuit found that Ferrell's due process

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157. 572 S.W.2d at 688.

158. 580 S.W.2d 364 (Tex. Crim. App. 1979).

159. TEX. PENAL CODE ANN. art. 12.31 (Vernon 1974).

160. 580 S.W.2d at 366.

161. *Id.* A defendant in a criminal prosecution for any offense may waive any of his rights except the right of trial by jury in a capital felony case. TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon 1977).

162. 580 S.W.2d at 367.

163. 568 F.2d 1128 (5th Cir. 1978).

164. *Id.* at 1129.

165. In *Ralph v. Georgia*, 124 Ga. 81, 52 S.E. 298 (1905), the Supreme Court of Georgia stated that such a procedure would be impractical. The Fifth Circuit rejected this dictum. 568 F.2d at 1133 n.6.

166. The defendant alleged that his rights to confront witnesses and to assist in his own defense under art. I, § 10 of the Texas Constitution were violated. 568 F.2d at 1130.

rights to confront witnesses and to assist counsel in his own defense had indeed been violated.<sup>167</sup> The court reasoned that "such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic right to be present in the courtroom at every stage of trial."<sup>168</sup> The court remanded the case for retrial stating that Ferrell was entitled to a stenographer if he was unable to learn to communicate in any way other than writing.<sup>169</sup>

The Texas Legislature, probably as a result of *Ferrell*, has expanded the statutory provisions safeguarding a deaf defendant's procedural rights to be informed at trial. As previously written, article 38.31 of the code of criminal procedure provided that all deaf defendants were entitled to a qualified interpreter in a criminal prosecution.<sup>170</sup> The amended article now specifies that upon a motion by the defendant, the court shall appoint a qualified interpreter to "interpret in a language that the defendant can understand, including but not limited to sign language, communications concerning the case."<sup>171</sup>

### B. *Voir Dire*—Capital Cases

The United States Supreme Court, in *Witherspoon v. Illinois*,<sup>172</sup> declared that a venireman can be removed for cause only if he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."<sup>173</sup> The Texas Court of Criminal Appeals has asserted that the *Witherspoon* rule is effectively followed in Texas when, in fact, it is in dire need of revitalization.<sup>174</sup> In two recent decisions, *Burns v. Estelle*<sup>175</sup> and *Jurek v. Estelle*,<sup>176</sup> the Fifth Circuit provided some of the needed rejuvenation.

In *Burns* the court held that a prosecutor cannot disqualify a prospective juror simply by eliciting a concession from the person that he has reservations about the death penalty that would effect his deliberation on any issue of fact concerning punishment.<sup>177</sup> The court also narrowed the interpretation of section 12.31(b) of the penal code.<sup>178</sup> This section allows disqualification unless the juror states under oath that the death penalty or life imprisonment will not affect his consideration of any issue of fact. The court stated that in a situation in which the juror might be hesitant in the

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167. The Fifth Circuit based its decision on authority from the sixth amendment of the United States Constitution. *Id.* at 1132.

168. *Id.* (quoting *Arizona v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (en banc)).

169. *Id.* at 1133.

170. 1967 Tex. Gen. Laws, ch. 105, § 1, at 195.

171. TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 1980).

172. 391 U.S. 510 (1968).

173. *Id.* at 522 n.21.

174. Hippard, *Criminal Procedure, Annual Survey of Texas Law*, 33 Sw. L.J. 505, 538 (1979).

175. 592 F.2d 1297 (5th Cir. 1979).

176. 593 F.2d 672 (5th Cir. 1979).

177. 592 F.2d at 1301.

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

sense that he would desire to be sure of the facts where the death penalty might apply, a statute permitting removal on this ground would render the statute impermissibly broad.<sup>179</sup> The effect of *Burns* is to limit the prosecution's ability to manipulate the composition of the jury.

The *Witherspoon* rule has also been diluted by the prosecutorial practice of asserting waiver when a defense attorney fails to object to the constitutionality of an improper exclusion of a prospective juror. In *Wainwright v. Sykes*,<sup>180</sup> the Supreme Court held that the defendant's failure to object prevents him from raising a claim in a federal habeas corpus proceeding unless he can show cause for his failure to object and that prejudice resulted from that failure.<sup>181</sup> Applying this test in *Jurek v. Estelle*,<sup>182</sup> the Fifth Circuit held that the defendant was able to show both cause and prejudice, and therefore his *Witherspoon* claim was not barred.<sup>183</sup> The court found cause to exist for two reasons. First, the court stated that attorney misfeasance could constitute cause under *Sykes*. Moreover, the court concluded that an attorney's ignorance of *Witherspoon* was a serious form of misfeasance.<sup>184</sup> Secondly, the court stated that there was cause due to the fact that Texas procedures were insufficiently hospitable to federal *Witherspoon* claims:

By specifying that objections to improper challenges must be made immediately, Texas established a procedural requirement which obviously cannot be met by an attorney unaware of *Witherspoon*. Then Texas licensed just such an attorney and appointed him to represent Jurek. In this particular case, then, Texas made it effectively impossible for Jurek to assert his *Witherspoon* claim.<sup>185</sup>

The court found prejudice a less complex matter. Relying on *Davis v. Georgia*<sup>186</sup> and *Marion v. Beto*,<sup>187</sup> the court felt compelled<sup>188</sup> to hold that the exclusion of even one juror in violation of *Witherspoon* was prejudicial. It would appear from the holdings in *Burns* and *Jurek* that circumvention of *Witherspoon* will prove difficult in the future.

### C. Guilt-Innocence Stage: Evidence, Jury Charge, Jury Misconduct

*Evidence.* Article 46.02, section 3 and article 46.03, section 3 of the code of criminal procedure<sup>189</sup> provide for the appointment, by the court, of experts to examine the defendant with regard to his competency to stand trial and also his sanity or insanity if the insanity defense is submitted. Section 3(g)

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179. 572 F.2d at 1301.

180. 433 U.S. 72 (1977).

181. *Id.* at 97.

182. 593 F.2d 672 (5th Cir. 1979).

183. *Id.* at 684.

184. *Id.* at 683.

185. *Id.* at 684.

186. 429 U.S. 122 (1976).

187. 434 F.2d 29 (5th Cir. 1970), *cert. denied*, 401 U.S. 906 (1971).

188. The Fifth Circuit stated that *Davis* and *Marion* make it clear that this sort of *Witherspoon* violation is regarded as prejudicial. 593 F.2d at 684.

189. TEX. CODE CRIM. PROC. ANN. arts. 46.02, § 3 & 46.03, § 3 (Vernon 1979).

of article 46.03<sup>190</sup> further provides that the same experts may be used for both examinations. Article 46.02, section 3(g),<sup>191</sup> though, states that "[n]o statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding." In *DeRusse v. State*<sup>192</sup> a psychiatrist was appointed to make the dual purpose examination described in article 46.03, section 3(g). The doctor subsequently was permitted to testify at the guilt stage of the trial regarding statements made by the defendant during the examination. The defendant contended that article 46.02, section 3(g) precluded the doctor from testifying at the guilt stage of the trial as to statements made by the defendant during his competency examination. This case points out the hole created by articles 46.02 and 46.03 as article 46.03 does not contain a provision similar to article 46.02, section 3(g). The issue, then, was whether the article 46.02, section 3(g) exclusion applies to the dual purpose hearing authorized in article 46.03, section 3(g). The court held that the statements made by the defendant at a combined competency and sanity hearing were admissible because such testimony is highly probative and closely relates to the insanity defense.<sup>193</sup> In so holding, the court stated that obtaining psychiatric testimony concerning the accused's sanity at the time of the offense would be impossible if article 46.02, section 3(g) applied and as a result, the jury would be deprived of valuable evidence regarding the defendant's insanity defense.<sup>194</sup> Moreover, the court reasoned that the defendant, who has been examined in a combined competence and sanity examination, is in the same position as an individual who was examined only with regards to an insanity defense, thus the result should be the same.<sup>195</sup>

*Charge to the Jury.* Article 36.14 of the code of criminal procedure permits a defendant to dictate objections to the court reporter in the presence of and with the consent of the court.<sup>196</sup> This article also requires that the objections be transcribed, endorsed with the court's ruling and official signature, and filed with the clerk in time to be included in the transcript.<sup>197</sup> In *Dirck v. State*<sup>198</sup> the defendant's attorney, with the consent of the court, orally dictated his objections to the jury charge to the court reporter and obtained a ruling from the court. The dictation and ruling were included in the court reporter's notes, which were filed with the clerk and subsequently approved by the court. The state contended that the defense's failure to have the objections transcribed, endorsed, and officially signed was

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190. TEX. CODE CRIM. PROC. ANN. art. 46.03, § 3(g) (Vernon 1979).

191. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 3(g) (Vernon 1979).

192. 579 S.W.2d 224 (Tex. Crim. App. 1979).

193. *Id.* at 230.

194. *Id.*

195. *Id.* Compare *Ballard v. State*, 519 S.W.2d 426, 427 (Tex. Crim. App. 1975) with TEX. CODE CRIM. PROC. ANN. art. 46.02, § 3(g) (Vernon 1979).

196. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1979).

197. *Id.*

198. 579 S.W.2d 198 (Tex. Crim. App. 1979).

fatal to the preservation of the objections for appeal. The court of criminal appeals held, after recognizing the liberal procedures used in civil courts, that there was substantial compliance by the defendant and that the objections were properly preserved for appeal.<sup>199</sup> In so ruling, the court expressly overruled<sup>200</sup> *Smith v. State*.<sup>201</sup> In this regard, the legislature recently has enacted article 36.15 of the code of criminal procedure,<sup>202</sup> which includes the same transcribing requirements as article 36.14.<sup>203</sup> It is assumed that the more informal procedure approved in *Dirck* will also be permitted under article 36.15.

*Jury Misconduct.* Until *Hollins v. State*,<sup>204</sup> the court of criminal appeals never had occasion to pass on the specific question of the propriety of note taking by a juror at trial. The court, after a detailed analysis of authorities on the subject,<sup>205</sup> held that it would not conclude anything regarding the permissibility of note taking by Texas jurors.<sup>206</sup> The court did mention, however, that even if note taking were to be considered improper, no reversible error was created by the very limited note taking involved in this particular case.<sup>207</sup>

#### D. Punishment Stage: Enhanced Sentencing

The Texas habitual criminal statute provides that anyone convicted of a felony three times shall receive life imprisonment upon his third conviction.<sup>208</sup> The defendant in *Rummel v. Estelle*<sup>209</sup> was accordingly given an enhanced sentence of life imprisonment after his conviction for the felony offense of obtaining \$120.75 under false pretenses. The indictment showed that Rummel had two prior felony convictions: a 1964 presentation of a credit card with intent to commit an \$80.00 fraud and a 1969 passing of a

199. *Id.* at 202.

200. *Id.*

201. *Smith v. State*, 415 S.W.2d 206 (Tex. Crim. App. 1967). In *Smith*, the court stated that a request to charge must be in writing and that the written requirement was not dispensed with when notes were taken and included in the official transcript. *Id.* at 207.

202. TEX. CODE CRIM. PROC. ANN. art. 36.15 (Vernon Supp. 1980).

203. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1980).

204. 571 S.W.2d 873 (Tex. Crim. App. 1978).

205. Most authorities do not view the taking of trial notes by jurors as jury misconduct. *Toles v. United States*, 308 F.2d 590 (9th Cir. 1962); *Goodloe v. United States*, 188 F.2d 621 (D.C. Cir. 1950), *cert. denied*, 342 U.S. 819 (1951); *United States v. Carlisi*, 32 F. Supp. 479 (D.C.N.Y. 1940); *Watkins v. State*, 216 Tenn. 545, 393 S.W.2d 141 (1965).

206. 571 S.W.2d at 883.

207. *Id.* Three of the twelve jurors were taking notes when they were admonished by the court. None of the notes taken were used by the jurors in deliberation, and the notes were made part of the record after the trial judge had permitted the jurors to be interrogated.

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

209. 568 F.2d 1193 (5th Cir. 1978). The defendant was sentenced under article 63 of the old Texas Penal Code. The new penal code is essentially the same:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement . . . for life.

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



forged instrument with a face value of \$28.36.<sup>210</sup> The defendant appealed on the ground that the life sentence constituted cruel and unusual punishment and therefore violated the eighth amendment.<sup>211</sup> The court noted that, on its face, the statute relied upon did not violate the eighth amendment. The court then used a four prong test to determine whether the statute, as applied to the defendant, was unconstitutional. The court's analysis considered: "(1) the nature of the offense, (2) the legislative purpose behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction."<sup>212</sup> The Fifth Circuit panel then concluded that imposing a life sentence for these three crimes was so grossly disproportionate to the offenses as to constitute cruel and unusual punishment, and observed that "Texas now stands virtually alone in its unqualified demand for life imprisonment for a three-time felon even where his convictions were for minor property crimes involving neither violence nor a remote possibility of violence."<sup>213</sup>

The Fifth Circuit reconsidered the *Rummel* case in a rehearing en banc.<sup>214</sup> Unlike the panel majority, the en banc majority believed that the Texas good time credit system and the possibility of parole must be considered<sup>215</sup> in any effort "to look at the system realistically."<sup>216</sup> Although the court rejected the second prong of the test used by the panel majority, the analysis of legislative objective, it did apply the other three prongs of the test, and concluded that Rummel's sentence did not constitute cruel and unusual punishment.<sup>217</sup> Defendant's application for writ of certiorari has been granted and the case is now pending in the Supreme Court.

#### E. *Punishment Stage: Psychiatric Testing*

Article 37.071 of the Code of Criminal Procedure, which sets out the procedure for giving a death sentence in Texas, provides that the jury must

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210. 568 F.2d at 1195.

211. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

212. 568 F.2d at 1197. The court adopted the test used in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

213. 568 F.2d at 1200.

214. *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (en banc). Judge Thornberry, who had dissented from the original panel opinion, authored the opinion for the en banc majority.

215. The court explained the good time credit system in some detail, and concluded that Rummel could be eligible for parole within 12 years. *Id.* at 657-59.

216. *Id.* at 657.

217. *Id.* at 660-61. The majority believed that application of the test would prove too impractical to be accurate or helpful. The court also considered the state's argument that Rummel's failure to object to his sentence at the punishment stage of his trial barred his appeal. The court noted that "it is apparent that the Texas Court of Criminal Appeals has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute," and that no state interest would be served by requiring Rummel to make a "futile gesture" at his trial. *Id.* at 653. The court also pointed out that Texas law apparently does not require a contemporaneous objection when the constitutionality of the statute under which the defendant was convicted is being challenged. *Id.* at 653-54.

find that the defendant would commit violent acts constituting "a continuing threat to society."<sup>218</sup> A prosecutor could conceivably strengthen his case by having an incarcerated capital murder defendant examined by a psychiatrist who is predisposed to diagnose the accused as a sociopath who constitutes an absolute threat to society. Last year's *Survey* pointed out that a federal district court decision, *Smith v. Estelle*,<sup>219</sup> had sharply curtailed this practice.<sup>220</sup>

During the current survey period, the Fifth Circuit, in *Smith v. Estelle*,<sup>221</sup> not only upheld, but broadened the district court's holding. Approximately six weeks after Smith's arrest for capital murder, the state trial judge asked the prosecutor to have Smith examined by Dr. Grigson, a psychiatrist. Dr. Grigson examined Smith for ninety minutes and concluded that Smith was competent to stand trial. The defense attorneys were never informed of the examination, nor did Dr. Grigson's name appear on the prosecutor's pre-trial witness list. The prosecution nevertheless called the psychiatrist to testify, not on the defendant's competence, but on the violent nature of his character.<sup>222</sup> Following *Gardner v. Florida*,<sup>223</sup> the Fifth Circuit held that the defense counsel's inability to challenge the evidence effectively under the circumstances required setting aside the conviction.<sup>224</sup> The court also held that the defendant has a right to remain silent during such psychiatric examinations<sup>225</sup> and that a defendant in custody must be warned of this right.<sup>226</sup> A defendant has no constitutional right to have an

218. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1980). Before a defendant may be sentenced to death, the jury must also find that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result," and "if raised by the evidence, [that] the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Id.* art. 37.071b(1)-(3).

219. 445 F. Supp. 647 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979).

220. Hippard, *supra* note 174, at 547.

221. 602 F.2d 694 (5th Cir. 1979). See *Smith v. State*, 540 S.W.2d 693 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 922 (1977) (affirming Smith's original conviction); *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977) (federal habeas corpus case). The federal district court held (1) that the defendant was denied due process of law, (2) that he was unfairly denied the right to present complete testimony regarding mitigating factors relating to his alleged personality disorder, (3) that he was denied the right to counsel in this case, although there is no right to the presence of counsel at a psychiatric examination, and (4) that the defendant was not advised of his "right to remain silent at the psychiatric examination on dangerousness where he did not seek to introduce psychiatric testimony on the issue himself at the punishment stage or at the guilt/innocence stage and where he did not initiate a psychiatric examination on the issue." 445 F. Supp. at 664.

222. 602 F.2d at 696-97.

223. 430 U.S. 349 (1977).

224. The court noted that if the defense attorneys had not been surprised by Grigson's testimony, their defense would have been much more effective. 602 F.2d at 698-703, 699 n.7.

225. The state had argued that the evidence the psychiatrist relied on was "non-testimonial" and therefore not within the protection of the fifth amendment privilege. The court rejected this argument, however, noting that the psychiatrist's diagnosis was based "on comments Smith made and failed to make. . . . Plainly then, Dr. Grigson—and therefore the prosecution when it called him as a witness—used the content, not the non-testimonial aspects of Smith's statements." 602 F.2d at 704. See *Schmerber v. California*, 384 U.S. 757 (1966) (explaining the distinction between testimonial and non-testimonial evidence).

226. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fifth Circuit concluded that

attorney present during a psychiatric evaluation of his dangerousness; he does, however, have a constitutional right to counsel at the pre-trial stage, and should be allowed to consult an attorney before deciding whether to submit to the examination.<sup>227</sup>

## V. POST TRIAL

### A. Appeal

*Permission to Appeal after Plea of Guilty or Nolo Contendere.* If a defendant in a criminal case has been convicted upon his plea of guilty or of nolo contendere, and if the court has assessed a punishment that does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the defendant may not appeal without the permission of the trial court except on those matters that have been raised by written motion filed prior to trial.<sup>228</sup> Two recent cases held that this statutory restriction, contained in article 44.02 of the Code of Criminal Procedure, does not apply to a defendant who did not personally agree to the punishment recommended by the prosecutor. In *Decker v. State*<sup>229</sup> the Texas Court of Criminal Appeals held that the statutory requirement that the sentence be agreed to "by the defendant and his attorney" means that the defendant must personally agree to the recommended punishment. In both *Decker* and *Broggi v. Curry*<sup>230</sup> the court held that where the record failed to reflect personal consent by the defendant, the defendant was entitled to appeal without permission of the trial court.

A recent change in article 26.13 of the Code of Criminal Procedure<sup>231</sup> is designed to eliminate situations like those in *Decker* and *Broggi*. In its new form, article 26.13 requires that prior to accepting a plea of guilty or nolo contendere, the court shall "admonish the defendant" of:

- (1) the range of the punishment attached to the offense;
- (2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. . . .
- (3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the

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since the defendant was in custody during the examination, he was constitutionally entitled to the warning.

227. The court cited several Supreme Court cases that discuss the vital need for counsel at the pre-trial stage of criminal proceedings. See *Brewer v. Williams*, 430 U.S. 387 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970). The court summarized its holding as follows:

We therefore hold that at the sentencing phase of a capital trial, Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination.

602 F.2d at 709.

228. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

229. 570 S.W.2d 948 (Tex. Crim. App. 1978).

230. 571 S.W.2d 940 (Tex. Crim. App. 1978).

231. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1980).

defendant before he may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial.<sup>232</sup>

*Permission to Appeal Unnecessary in Habeas Corpus Proceedings.* The defendant in *Ex parte Barcelo*<sup>233</sup> entered into a plea bargain on a felony indictment but later attempted to appeal his conviction. After being sentenced to prison, he filed a writ of habeas corpus asserting that the indictment did not charge a felony offense. The state contended that the defendant was not entitled to relief because he had not obtained the trial court's permission to appeal as required by article 44.02.<sup>234</sup> The appellate court summarily rejected the state's argument, observing that "[a]s we construe article 44.02 it does not apply to habeas corpus proceedings."<sup>235</sup>

### B. Probation and Probation Revocation

*Effect of Jury's Recommendation.* In *Franklin v. State*<sup>236</sup> the defendant was found guilty of driving while intoxicated; the jury assessed his punishment at three days in jail and a \$100 fine, with a recommendation that the jail term be probated. The court of criminal appeals reversed the conviction, however, on the grounds that the statute relating to misdemeanor probation<sup>237</sup> does not permit the jury to recommend probation for only part of the defendant's sentence. This conclusion followed the court's earlier holding in *Taylor v. State*,<sup>238</sup> which determined that article 42.13 allows the jury to recommend probation, but such probation must extend to the entire penalty, whether fine, jail time, or both. The court recognized the *Taylor* finding that the express language of the statute requires that no judgment be entered on a misdemeanor probation and that no finding of guilt become final unless the probation is revoked.<sup>239</sup> Two other cases during the survey period, *Pointer v. State*<sup>240</sup> and *Puente v. State*,<sup>241</sup> followed the *Franklin* holding.

The 1979 revision of article 42.13, the misdemeanor probation statute,<sup>242</sup>

232. *Id.* The omitted portion of art. 26.13(a)(2) deals with the special procedures to be followed if there are any plea bargaining agreements.

233. 577 S.W.2d 499 (Tex. Crim. App. 1979).

234. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979).

235. 577 S.W.2d at 500. The court then set aside the defendant's conviction because the allegations of the indictment were insufficient to allege a felony, despite the fact that the evidence presented at trial apparently supported a felony conviction. *Id.*

236. 576 S.W.2d 621 (Tex. Crim. App. 1978) (en banc).

237. TEX. CODE CRIM. PROC. ANN. art. 42.13 (Vernon Supp. 1980).

238. 549 S.W.2d 722 (Tex. Crim. App. 1977).

239. 576 S.W.2d at 622. The dissent in *Franklin*, which would have overruled *Taylor*, argued that the statutory requirement that the defendant must satisfy all the requirements of art. 42.13(3)(d) before receiving a probated sentence, authorizes the split probation used by the *Franklin* jury: "Among those requirements are that the defendant has paid all costs of his trial and so much of any fine imposed as the court directs. The court may order that all or part of such a fine be paid as a condition of probation." *Id.* at 627 (emphasis in original) (citations omitted).

240. 577 S.W.2d 736 (Tex. Crim. App. 1979).

241. 579 S.W.2d 237 (Tex. Crim. App. 1979) (en banc).

242. The title of the article has been changed from "Misdemeanor Probation Law" to

will apparently change the rule set forth in *Franklin*. The new statute specifically allows the court to "place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided."<sup>243</sup> The statute further provides that "[w]hen the jury recommends probation, it may recommend that the imprisonment or fine or both such fine and imprisonment found in its verdict may be probated."<sup>244</sup> Although a complete analysis of the extensive changes made in article 42.13 is beyond the scope of this survey article, it should be noted that several of the changes are major ones. The statute provides, for example, that, under certain conditions, a defendant may be placed on "community-service probation."<sup>245</sup> The new statute also suggests several new conditions for probation, including the requirements that the probationer participate in a community-based program on alcohol and drug abuse, reimburse the county for the defendant's appointed counsel, and pay a percentage of his income to the victim of the offense.<sup>246</sup>

*Conditions for "Shock Probation."* In *Houlihan v. State*<sup>247</sup> the defendant was granted probation for his felony marijuana conviction. His probation was later revoked and he began serving his sentence. Pursuant to article 42.12B, section 3e of the Texas Code of Criminal Procedure, the trial judge may, after the expiration of 60 days and before the expiration of 120 days from the date execution of the sentence actually begins, on his own motion, or on written motion of the defendant, suspend further execution of a felony sentence and place the defendant on probation, provided the defendant has never before been confined in a penitentiary for a felony offense.<sup>248</sup> The defendant in *Houlihan* moved that he be considered for this shock probation. The trial court refused to grant the motion and stated, as one of its reasons, that the defendant had been granted probation earlier and was therefore ineligible for shock probation under section 3e.

The appellate court dealt first with the question of jurisdiction, and held that, in the circumstances of this case, affirmance by the court of criminal appeals of the trial court's order revoking probation and pronouncing sentence did not preclude subsequent assertion of authority by the trial court to hear the defendant's motion for shock probation.<sup>249</sup> The appellate court

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"Misdemeanor Adult Probation and Supervision Law." 1979 Tex. Gen. Laws, ch. 807, § 1, at 2062.

243. TEX. CODE CRIM. PROC. ANN. art. 42.13, § 3 (Vernon Supp. 1980).

244. *Id.* at § 3a.

245. *Id.* at § 3B. This section provides a list of specific information and requirements applicable to the program.

246. *Id.* at §§ 6(10), (11), (14).

247. 579 S.W.2d 213 (Tex. Crim. App. 1979) (en banc) The court explained that since § 3e is silent as to a right of appeal from a refusal to grant "shock probation," the court lacked authority to entertain a direct appeal such as that brought by appellant. The court therefore treated the appeal "as an application for the extraordinary writ of mandamus." *Id.* at 216-17.

248. TEX. CODE CRIM. PROC. ANN. art. 42.12B, § 3e (Vernon 1979).

249. 579 S.W.2d at 217.

then rejected the trial court's analysis of the defendant's eligibility for probation under section 3e, and explained that:

Nothing in the section can be read to mean that one who has been previously granted probation is ineligible for consideration for "shock probation"—neither one who has successfully completed a term of probation in some other case nor one who "flunked" and had his probation revoked in the same case.<sup>250</sup>

The diligent defense attorney should, therefore, always consider filing a motion for shock probation within the 120 day period, even if his client is in prison because of a prior probation revocation on the same offense.

*Effect of a Plea of True.* At her probation revocation hearing, the probationer in *Cole v. State*<sup>251</sup> pled true to the charge of violating her probation. Despite her testimony, which raised defensive issues, the trial court revoked her probation. Defendant appealed, arguing that the trial court should have withdrawn her plea of true when defensive issues were raised. The appellate court held, however, that the court was correct in not withdrawing the plea of true, and that a probationer's plea of true, standing alone, is sufficient to support the revocation of probation.<sup>252</sup> The court reasoned that in probation revocations, just as in trials, in which the defendant waives his right to a jury trial and then pleads guilty, the trial court is the sole trier of the facts and must make its findings after considering all the evidence presented, including any defensive issues. Thus, the trial court should not withdraw the defendant's plea of true even if he later presents defensive issues.<sup>253</sup>

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250. *Id.* at 218. The court nonetheless refused to direct the trial court to consider the case on the merits, since the trial court's ruling did not come within the 120 day period prescribed by the statute. Although appellant had argued that the 120 days refers only to the filing of a motion rather than the ruling of the court, the appellate court held that the 120 days is jurisdictional, and that the trial court's power to act did not extend beyond that time.

251. 578 S.W.2d 127 (Tex. Crim. App. 1979).

252. *Id.* at 127. The court overruled *Roberson v. State*, 549 S.W.2d 749 (Tex. Crim. App. 1977). *Roberson* held that the trial court should have withdrawn a plea of true when the probationer took the stand and raised a defensive issue, and allowed the defendant to challenge the sufficiency of the evidence supporting the parole violation.

253. The court pointed out the similarity of this situation to the one in *Moon v. State*, 572 S.W.2d 681 (Tex. Crim. App. 1978) (en banc). The *Moon* court held that where the defendant had waived a jury trial and plead guilty before the trial court, the trial court had no duty to withdraw the guilty plea sua sponte even if the evidence raised defensive issues. See discussion of *Moon v. State* at text accompanying notes 154-57 *supra*.

