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CRIMINAL PROCEDURE

by

Walter W. Steele, Jr. *

CASES decided during the survey period fine tune several well-established processes, but little in the way of new law or drastically altered procedure has been added. As will be discussed, the United States Supreme Court made several noteworthy pronouncements in the areas of search and confession procedures, and the Texas Court of Criminal Appeals handed down some significant interpretations of the Texas Speedy Trial Act.

I. ARREST

During the survey period cases from the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit contributed significantly to the law governing arrest. A lingering question was settled in *Payton v. New York*¹ when the United States Supreme Court held that a nonconsensual, nonexigent entry of a suspect's home for the purpose of arrest cannot be made without a warrant.²

In *United States v. Crews*³ the Supreme Court dealt with another long-standing issue: If the defendant's initial arrest was illegal, can an in-court identification of the defendant by the victim be barred as fruit of that illegal arrest?⁴ The Court stated that three distinct aspects of the in-court identification must be examined to determine whether the identification has been tainted by the preceding illegal arrest.⁵ Initially, the Court inquired whether the victim became known to the police as a result of the illegal arrest.⁶ The Court found that this aspect of the identification was unaffected by the illegal arrest because the victim had contacted the police *sua sponte*.⁷ Secondly, the Court examined whether the illegal arrest improved the victim's ability to make an identification in court.⁸ In the instant case the Court determined that it did not because the victim already had formed a mental image of her assailant at the time of the robbery at

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1. 445 U.S. 573 (1980).

2. *Id.* at 589-90.

3. 445 U.S. 463 (1980).

4. In *Crews* the government conceded that a photographic identification and a later line-up identification were both fruits of the illegal arrest. Thus, the only issue was the admissibility of the in-court identification. *Id.* at 468 n.5.

5. *Id.* at 471.

6. *Id.*

7. *Id.* at 471-72.

8. *Id.* at 472.

issue.⁹ Finally, the Court asked whether the presence of the defendant in the courtroom was a fruit of the preceding illegal arrest.¹⁰ The Court found the answer to be no, reasoning that the defendant's presence at trial was the result of the trial's being held rather than the result of the defendant's illegal arrest.¹¹ The Court concluded that the in-court identification was admissible.¹²

The balance of the significant arrest cases concerns the critical but ambiguous issues of what constitutes a seizure of a person under the fourth amendment and what quantum of knowledge must be held by the police before making a seizure. *United States v. Mendenhall*¹³ precipitated a chain of cases. In a plurality opinion written by Justice Stewart, the *Mendenhall* Court held that a person was seized, and thus subject to fourth amendment protections, only if, in view of all the circumstances, a reasonable person would believe that he was not free to leave the presence of the investigating officers.¹⁴ Subsequently, the Court decided *Reid v. Georgia*,¹⁵ which dealt with the issue of the quantum of knowledge necessary before the police can stop a person for investigation. *Reid* reiterated the test applied in previous decisions that no investigation can be made without reasonable and articulable police suspicion that the person being stopped is engaging in criminal activity.¹⁶

Mendenhall and *Reid* have caused considerable confusion. A plausible argument can be made that *Mendenhall*, a plurality opinion, is not binding precedent.¹⁷ Moreover, the *Mendenhall* test, which focuses on the subjective impressions of the suspect, is somewhat at odds with the *Reid* test, which focuses on the objective facts available to the police officer. To complicate matters further, no useful test defines the line between a "stop," which is permissible under *Mendenhall* or *Reid*, and an "arrest," which requires probable cause, a quantum of evidence much greater than mere suspicion.¹⁸ The time is ripe for the Supreme Court to render some definitive decisions on these critical matters.

II. SEARCH

Significant recent developments in the ever-churning law of search and seizure include drastic changes in the doctrine of standing and hints of a change in the permissible scope of automobile searches. In *Lewis v. State*¹⁹ the defendant objected to the admission of stolen property found

9. *Id.*

10. *Id.* at 474.

11. *Id.*

12. *Id.* at 477.

13. 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

14. *Id.* at 1877, 64 L. Ed. 2d at 509.

15. 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980).

16. *Id.* at 2753, 65 L. Ed. 2d at 893-94; *see, e.g.*, *Ebarb v. Slate*, 598 S.W.2d 843, 844 (Tex. Crim. App. 1979).

17. *See United States v. Robinson*, 625 F.2d 1211, 1215 (5th Cir. 1980).

18. *See United States v. Hill*, 626 F.2d 429, 434 (5th Cir. 1980).

19. 598 S.W.2d 280 (Tex. Crim. App. 1980).

as the result of an allegedly illegal search of a codefendant's house. The only evidence of the defendant's interest in the codefendant's house was that the defendant had permission to spend one night there. The record showed, however, that the allegedly illegal search was made before the defendant arrived at the house; hence, the court held that the defendant's privacy interest in the house, if any, had not accrued at the time the search was made and, thus, that the defendant had no standing to complain of the allegedly illegal search.²⁰ *United States v. Payner*,²¹ decided by the United States Supreme Court shortly after *Lewis v. State*, lends credence to the *Lewis* opinion. In *Payner* the Court held that a defendant lacked standing to suppress evidence seized from another person during an admittedly illegal search.²² In the language of the Supreme Court: "[T]he defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party."²³

Since 1960 persons accused of crimes of possession have had "automatic standing" to challenge the legality of the search that produced the contraband items.²⁴ "Automatic standing" was abandoned by the Supreme Court in *United States v. Salvucci*.²⁵ The facts of a companion case, *Rawlings v. Kentucky*,²⁶ best illustrate the point. Rawlings had placed contraband items in the purse of his friend, Cox. A subsequent allegedly illegal search of Cox's purse by the police resulted in the contraband being seized and Rawlings being charged with its possession. Because the evidence in the record was insufficient to demonstrate that Rawlings had any reasonable expectation of privacy in his friend's purse, the Supreme Court held that he lacked standing to complain about the allegedly illegal search.²⁷ According to the Court, the fact that Rawlings owned the property seized was not enough, in itself, to give Rawlings standing to complain.²⁸

Following the theme that standing is triggered only by a defendant's legitimate expectations of privacy in the place or thing searched, courts are now carefully examining cases in which a defendant, suddenly confronted by the police, hurriedly abandons the contraband in the hope of escape. In *United States v. Bush*²⁹ the defendant was denied standing to object to the allegedly illegal search of a paper bag. The court found that when the defendant hurled the bag to the ground as officers approached, he abandoned it, and, therefore, had no reasonable expectation of privacy in it.³⁰

20. *Id.* at 283-84.

21. 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980).

22. *Id.* at 2444, 65 L. Ed. 2d at 474.

23. *Id.* (emphasis in original).

24. See *Jones v. United States*, 362 U.S. 257 (1960).

25. 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).

26. 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

27. *Id.* at 2562, 65 L. Ed. 2d at 642.

28. *Id.*

29. 623 F.2d 388 (5th Cir. 1980).

30. *Id.* at 391.

Similarly, the defendant was denied standing in *United States v. Canady*,³¹ a case in which the defendant disclaimed ownership of a suitcase when officers stopped and questioned him in an airport. The suitcase subsequently was searched, and the defendant was charged with possessing the drugs found therein. Although these cases seem to present an issue as to the voluntariness of such abandonment, that issue was not discussed in either opinion.

Another major development in the law of search concerns searches of automobiles. Two recent cases from the Texas Court of Criminal Appeals indicate that the court may be adopting a more conservative approach to the admissibility of incriminating evidence that follows from a traffic arrest. One of the recent cases, *Howard v. State*,³² illustrates the typical fact pattern. Two policemen arrested Howard for failing to give a proper left turn signal, a charge denied by Howard at the time of the trial. According to the police, Howard dipped down in the seat as he brought his car to a halt. Once Howard was out of his car and standing with one of the police at the back of his car, the other policeman shined his flashlight into Howard's car and saw a bottle of pills on the floorboard. This policeman seized the bottle, opened it, decided the pills were contraband, and arrested Howard for possession of contraband.

The facts in *Howard* are typical of hundreds of traffic-arrest-engendered contraband cases flowing through the Texas courts. Although the lessons from the *Howard* opinion are not new, the opinion does provide several important statements of Texas law on automobile searches:

1. A traffic offense committed in an officer's view gives probable cause to make a warrantless custodial arrest.³³
2. Once the custodial arrest is made, the officer has an unqualified right to search the person of the suspect.³⁴
3. An arrest for a traffic offense, without more, does not give rise to a right to search the offender's vehicle.³⁵
4. If, while questioning a motorist regarding the operation of his vehicle, an officer sees evidence of a criminal violation in open view, or in some other manner acquires probable cause on a more serious charge, he may arrest for that offense and, incident thereto, conduct an additional search for physical evidence.³⁶
5. Furtive gestures will not supply probable cause to search a vehicle because of the ambiguous and potentially innocent nature of such movements.³⁷
6. Items seen in plain view may not be seized and inspected unless the incriminating nature of the item is immediately apparent from the plain

31. 615 F.2d 694 (5th Cir. 1980).

32. 599 S.W.2d 597 (Tex. Crim. App. 1980).

33. *Id.* at 599-600.

34. *Id.* at 600.

35. *Id.*

36. *Id.* at 600 n.8 (citing *Taylor v. State*, 421 S.W.2d 403, 407 (Tex. Crim. App. 1967)).

37. 599 S.W.2d at 604.

view, without further inspection.³⁸

A slightly different approach to the same fact situation was taken by the Texas Court of Criminal Appeals in *Branch v. State*.³⁹ Much like *Howard*, the facts in *Branch* involved the search of a car after a traffic arrest while the suspect was out of the car and spread-eagled on its trunk. The *Branch* court, however, relied on the *Chimel* doctrine, limiting a "search incident to arrest" to the area within the arrestee's immediate control,⁴⁰ to deny the police the right to search the car.⁴¹ According to the court: "With appellant detained . . . at the rear of his vehicle, the area of its front interior was simply not within his immediate control."⁴²

Similar problems frequently arise when police attempt to search containers found inside automobiles. The United States Supreme Court has allowed the search of automobiles under circumstances that would not allow a search of some other place. The Court's reasoning is that, as a matter of law, persons have a diminished expectation of privacy in an automobile.⁴³ The Court has held, however, that the diminished expectation of privacy does not extend to containers located inside the automobile.⁴⁴ Accordingly, in *Araj v. State*⁴⁵ the Texas Court of Criminal Appeals denied police the right to search an attaché case taken from the back seat of an automobile, even though the officers had probable cause to stop the automobile and arrest the driver.⁴⁶

Although the case did not involve an automobile, the reasoning of the Texas Court of Criminal Appeals in *Brown v. State*⁴⁷ follows the holding in *Araj* and may signal a more restrictive approach by the Texas court to issues involving the search of containers. After making a lawful custodial arrest of Brown, the police searched her purse, an act clearly authorized as a search incident to arrest. While searching the purse, however, the police also searched a wallet contained therein. The court concluded that while the warrantless search of the wallet was illegal under the doctrines announced by the United States Supreme Court in *United States v. Chadwick*,⁴⁸ it could not apply *Chadwick* retroactively, and thus affirmed the conviction.⁴⁹

An implicit modification of the exclusionary rule has occurred recently. Bona fide and reasonable good faith on the part of the officer is now an integral part of the decision whether to suppress evidence under the exclu-

38. *Id.* at 603.

39. 599 S.W.2d 324 (Tex. Crim. App. 1980).

40. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

41. 599 S.W.2d at 327.

42. *Id.*

43. *See United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

44. *See Arkansas v. Sanders*, 442 U.S. 753 (1979).

45. 592 S.W.2d 603 (Tex. Crim. App. 1979).

46. *Id.* at 604.

47. 594 S.W.2d 86 (Tex. Crim. App. 1980).

48. *Id.* at 87; *see United States v. Chadwick*, 433 U.S. 1 (1977).

49. 594 S.W.2d at 88.

sionary rule. In *Michigan v. DeFillippo*⁵⁰ the United States Supreme Court held that when an officer has probable cause to believe that a presumptively valid statute is being violated, the arrest is valid and its fruits are admissible even though the statute subsequently is declared invalid.⁵¹ This notion of the right of an officer to rely on the statutory law was extended somewhat by the Fifth Circuit in *United States v. Williams*,⁵² wherein the court held en banc:

[W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones.⁵³

Because *Williams* allows good faith mistakes of fact as well as good faith mistakes of law, the *Williams* decision extends beyond the Supreme Court holding in *DeFillippo*. No one knows what the full impact of *Williams* will be, but one reasonably might expect that police will soon learn of the significance of being pure of heart while violating the Bill of Rights.

Another limitation on the exclusionary rule occurred in *United States v. Havens*,⁵⁴ wherein the Supreme Court held that the fruit of an unlawful search may be used to impeach a defendant's false trial testimony.⁵⁵ The unusual aspect of this case is that the defendant's false testimony did not come on direct examination, but rather on cross-examination by the government. Thus, as a result of *Havens*, the government is allowed to use illegally obtained evidence to impeach statements by the defendant that the government itself solicits on cross-examination.

Curiously, little new law was made during the survey period regarding the adequacy of the search warrant process. In *Ybarra v. Illinois*⁵⁶ the United States Supreme Court held that a warrant to search a place does not authorize a frisk or a search of persons in that place.⁵⁷ Of course, the police are authorized to frisk if they can demonstrate fear,⁵⁸ but the point of *Ybarra* is that the warrant power itself is limited to a search of the premises and does not include the persons within the premises.

In a case of first impression, *Walthall v. State*,⁵⁹ the Texas Court of Criminal Appeals adopted the so-called "rule of severability." The court held that if some clauses of a warrant are defective, a search may proceed nevertheless under that warrant as to items described in other clauses of

50. 443 U.S. 31 (1979).

51. *Id.* at 40.

52. 622 F.2d 830 (5th Cir. 1980).

53. *Id.* at 840.

54. 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

55. *Id.* at 1917, 64 L. Ed. 2d at 566.

56. 444 U.S. 85 (1979).

57. *Id.* at 92.

58. *Id.* at 92-93.

59. 594 S.W.2d 74 (Tex. Crim. App. 1980).

the warrant that are not defective.⁶⁰

III. CONFESSIONS

Recent developments in the law of confessions refine some existing doctrines. In *Rhode Island v. Innis*⁶¹ the United States Supreme Court for the first time defined the precise meaning of the word "interrogation" as applied in the *Miranda* rule, which prohibits custodial interrogation unless preceded by the *Miranda* litany.⁶² The *Innis* Court did not limit its definition of interrogation to mere express questioning, but also applied it "to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."⁶³ As the Court itself noted, this latter portion of its definition focuses primarily upon the perceptions of the suspect, rather than on the intent of the police.⁶⁴ Thus, as a result of *Innis*, interrogation will include any conduct reasonably designed to be the functional equivalent of directly asking questions. On the other hand, actions by the police normally attendant to the arrest and booking process that serendipitously produce an incriminating statement from the suspect are not interrogation and need not be preceded by the prophylactic *Miranda* warning in order for the incriminating statement to be admissible.

One must not confuse a suspect's fifth amendment rights and the corresponding procedural protocols with a suspect's sixth amendment right to counsel and its corresponding procedural protocols, a point well illustrated by the Supreme Court opinion in *United States v. Henry*.⁶⁵ Henry made incriminating statements to a government informer planted in his cellblock. At that time Henry had been charged and was awaiting trial. Arguably, such incriminating statements could have been excluded using an *Innis* fifth amendment rationale,⁶⁶ assuming that planting an informer with a suspect is the functional equivalent of an interrogation. Instead of following that reasoning, however, the Court chose to rely on the sixth amendment right to counsel, ruling that Henry had the right to counsel because he had been charged.⁶⁷ As the *Henry* opinion reiterated, the sixth amendment right to counsel includes the right not to have incriminating statements deliberately elicited by government agents outside counsel's presence.⁶⁸ Hence, the admissions made by Henry to the informant were held not admissible.⁶⁹

60. *Id.* at 79.

61. 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

62. *Id.* at 1689, 64 L. Ed. 2d at 307-08; see *Miranda v. Arizona*, 384 U.S. 436 (1966).

63. 100 S. Ct. at 1689, 64 L. Ed. 2d at 308 (footnotes omitted).

64. *Id.* at 1689-90, 64 L. Ed. 2d at 308.

65. 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

66. See notes 61-64 *supra* and accompanying text.

67. 100 S. Ct. at 2189, 65 L. Ed. 2d at 125; see *Kirby v. Illinois*, 406 U.S. 682 (1972), discussed in text accompanying notes 96-97 *infra*.

68. 100 S. Ct. at 2189, 65 L. Ed. 2d at 125.

69. Interestingly, in footnote 9 of the *Henry* opinion the Court pointed out that it was not dealing with a situation in which a defendant's right to counsel is overridden by an

A more difficult set of issues is presented when the government seeks to use a suspect's prearrest silence as an indication of guilt.⁷⁰ In *Jenkins v. Anderson*⁷¹ the defendant took the stand in a murder case and testified that the killing was in self-defense. On cross-examination the prosecutor brought out the fact that the defendant had remained silent for two weeks after the killing before communicating with the police about the alleged defense. The United States Supreme Court reasoned that if the defendant elects to take the stand, he in effect chooses to face the truth-testing process of cross-examination, which includes reasonable inferences from the defendant's failure to report to the police.⁷² Thus, the Court held that the defendant's prearrest silence may be introduced on cross-examination in those situations in which silence is indicative of guilt.⁷³

An important point about confessions, but one easily overlooked, was emphasized again by the Supreme Court in *Tague v. Louisiana*.⁷⁴ *Tague* held that the burden of showing a waiver of fifth or sixth amendment rights by a confessing defendant rests with the state.⁷⁵ In *Tague* the arresting officer testified that *Miranda* warnings were given prior to receipt of the confession, but the officer could not state that he tested the defendant's comprehension of those warnings. The state argued that comprehension can be assumed, absent some evidence to the contrary. The Supreme Court reversed the conviction because the state had not sustained its burden of proving that the confession was admissible.⁷⁶ A similar burden is imposed on the state when there is evidence that the confession is involuntary.⁷⁷ Involuntariness of the confession cannot be waived by defense counsel's oversight, at least not when the record clearly reflects a question of voluntariness.⁷⁸ If evidence of involuntariness exists, the court must hold a hearing on the matter on its own motion.⁷⁹

electronic bug placed in his cell, or by a government agent planted in the cell who makes no effort to stimulate conversations concerning the client's charge. *Id.* at 2187 n.9, 65 L. Ed. 2d at 123 n.9.

70. Post-arrest silence cannot be used as an incriminating fact. *See Moree v. State*, 147 Tex. Crim. 564, 183 S.W.2d 166 (1944), in which the court stated:

Ordinarily, the rule is that when a statement is made in the presence of an accused which he understands, and it calls for a reply on his part, his silence or acquiescence may be shown as a confession. An exception to the rule is that it has no application when the accused is under arrest, for, under such circumstances, he is under no burden of replying.

Id. at 569, 183 S.W.2d at 169. *See also* R. RAY, TEXAS LAW OF EVIDENCE § 1153 (Texas Practice 3d ed. 1980).

71. 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

72. *Id.* at 2129, 65 L. Ed. 2d at 94-95.

73. *Id.* The decision in *Jenkins v. Anderson* should be contrasted with the Supreme Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), wherein the Court found that the fact of silence after arrest, and after *Miranda* warnings had been given, could not be used on cross-examination as an impeaching inference of guilt. *Id.* at 619.

74. 444 U.S. 469 (1980).

75. *Id.* at 470-71.

76. *Id.* at 471.

77. *See United States v. Renteria*, 625 F.2d 1279, 1283 (5th Cir. 1980).

78. *Id.* at 1282-83.

79. *Id.* at 1283.

One Texas confession case is also worthy of mention. In *Marini v. State*⁸⁰ the Texas Court of Criminal Appeals decided that an oral confession, admissible under article 38.22,⁸¹ includes all of the oral statement, that part made prior to the finding of the corroborating facts and any part made subsequent to the finding of the corroborating facts.⁸² The court stated:

[W]e hold that the term "confession", in addition to appellant's initial offer at the police station to lead the officers to the money and narcotics, must be broadly construed to include his incriminating outburst and detailed account of the crime, all of which occurred after the money was found. The later declarations constituted part of one continuous confession which began at the police station.⁸³

IV. DISCOVERY

Because formal discovery plays only a minor role in Texas criminal procedure, it is not surprising that few significant cases were decided recently in this area. One noteworthy case decided during the survey period was *Quinones v. State*.⁸⁴ *Quinones* involved capital murder, and the defendant therein made a pretrial motion for discovery of all the recorded statements alleged to have been made by him.⁸⁵ On appeal the Texas Court of Criminal Appeals examined the propriety of the trial court's denial of that motion. In addition to holding that recorded statements made by the defendant are "objects or tangible things" within the meaning of article 39.14 of the Texas Code of Criminal Procedure⁸⁶ and, thus, subject to pretrial discovery upon specific request,⁸⁷ the court also noted that article 39.14 provides that the decision on what is discoverable is within the discretion of the trial court.⁸⁸

Although the holding in *Quinones* may seem surprising, a careful reading of article 39.14 reveals that it does, indeed, provide that the trial court has discretion to order the state to produce.⁸⁹ Furthermore, readers should be reminded of the holding by the United States Supreme Court in *United States v. Agurs*⁹⁰ to the effect that the constitutional right of discovery in criminal cases is limited to evidence that creates a reasonable doubt as to the defendant's guilt. In the language of the Court: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'material-

80. 593 S.W.2d 709 (Tex. Crim. App. 1980).

81. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979).

82. 593 S.W.2d at 713.

83. *Id.*

84. 592 S.W.2d 933 (Tex. Crim. App. 1980).

85. *Id.* at 937.

86. TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).

87. 592 S.W.2d at 939-40.

88. *Id.* at 940.

89. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).

90. 427 U.S. 97 (1976).

ity' in the constitutional sense."⁹¹

The case-made "use before the jury" rule⁹² received an interesting application in *Hoffpauir v. State*.⁹³ On cross-examination of a witness, the prosecutor read from a transcript of that witness's grand jury testimony. The court of criminal appeals held that "use before the jury" includes reading portions of a document aloud before the jury,⁹⁴ and that, accordingly, the defendant's timely request to inspect the grand jury minutes after they were read to the trial court should have been granted.⁹⁵

V. RIGHT TO COUNSEL

In 1972 the United States Supreme Court in *Kirby v. Illinois*⁹⁶ made it abundantly clear that a defendant's sixth amendment right to counsel does not attach until adversary judicial proceedings have been initiated.⁹⁷ The Fifth Circuit, however, in a curiously worded opinion in *McGee v. Estelle*,⁹⁸ hinted that the right to counsel might attach at the point of arrest if the prosecution is aware of the arrest and of the charges ultimately to be filed.⁹⁹ This statement, if indeed it was the court's intention that it be a holding, could mean that defendants arrested in the notorious "roundups" and "crackdowns" that result from extended investigation by various special police and prosecution units or teams might be entitled to a lawyer at the moment of their arrest, or at least within a reasonable time thereafter.

Another somewhat anomalous recent opinion by the Fifth Circuit is *Wilson v. Estelle*,¹⁰⁰ decided in September 1980. *Wilson* held that a prior uncounselled misdemeanor conviction can be used to enhance the punishment in a subsequent criminal trial,¹⁰¹ a holding that is counter to the April 1980 ruling of the United States Supreme Court in *Baldasar v. Illinois*.¹⁰²

When defendants waive their right to counsel, the burdensome problem of supplying counsel to a seemingly endless stream of indigent defendants is alleviated. In the recent case of *Geeslin v. State*,¹⁰³ however, the Texas

91. *Id.* at 109-10.

92. The "use before the jury" rule entitles the defendant to inspect, upon request, any document or statement the state has used before the jury in a manner that makes its contents an issue. See *Mendoza v. State*, 552 S.W.2d 444, 449 (Tex. Crim. App. 1977).

93. 596 S.W.2d 139 (Tex. Crim. App. 1980).

94. *Id.* at 141.

95. *Id.* at 142.

96. 406 U.S. 682 (1972).

97. *Id.* at 688.

98. 625 F.2d 1206 (5th Cir. 1980).

99. *Id.* at 1208. The court stated: "We hold that an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest." *Id.*

100. 625 F.2d 1158 (5th Cir. 1980).

101. *Id.* at 1159.

102. 446 U.S. 222 (1980). The Fifth Circuit distinguished *Baldasar* by noting that it involved the upgrading of a subsequent misdemeanor to a felony. 625 F.2d at 1159 n.1. The evidence in *Wilson*, in contrast, was used to convince the jury to impose a longer sentence for the felony already charged. See *id.*

103. 600 S.W.2d 309 (Tex. Crim. App. 1980).

Court of Criminal Appeals laid down quite stringent requirements for waiving the right to counsel. Specifically, two requirements are set forth: (1) the waiver must be knowing and intelligent; and (2) the defendant must be made aware of the disadvantages of self-representation.¹⁰⁴ On their face, these two requirements do not appear burdensome, and, indeed, many courts in this state use standard waiver of counsel forms to accomplish that result. Such forms contain a detailed litany of the knowing and intelligent act of the defendant who waives counsel when he signs the form. Apparently, *Geeslin* will bring this practice to a halt in that it requires the trial court to make an inquiry on the record into the defendant's background, age, and experience before any waiver of counsel is accepted as voluntary.¹⁰⁵ Consequently, merely signing a mimeographed waiver of counsel form no longer will suffice, no matter how carefully worded the form might be.

VI. CHARGING INSTRUMENTS

Over the years advances in technology have vastly improved the flow of paperwork through the courts, but despite the plethora of computers, automatic typewriters, and copying machines, simple but fatal mistakes continue to be made in the drafting of charging instruments. A prosecutor faced with the prospect of drafting an indictment from scratch in an unusual case calling for an instrument not found in a standard form book might gain our sympathy. Little excuse, however, exists for filing a charging instrument that omits the magic phrase: "In the name and by the authority of The State of Texas."¹⁰⁶ Nevertheless, that particular omission continues to occur.¹⁰⁷ Other inexcusable pleading errors also abound. For example, indictments for theft will sometimes fail to allege "without the owner's effective consent,"¹⁰⁸ or allege only "property" without descriptive averment of class and nature of property,¹⁰⁹ or cite an incorrect date of offense.¹¹⁰ As all of these errors are fundamental in nature, they result in reversal of conviction, sometimes years after the event.¹¹¹ Clearly, the administration of justice in this state leaves much to be desired when inexcusable errors of such serious consequence are so frequently committed.

On occasion a mistake in a charging instrument is brought to the attention of the trial court prior to conviction. Each time this happens the trial court is forced to decide whether the pleading error can be corrected immediately, or whether it is so gross in nature that the charging instrument

104. *Id.* at 313.

105. *Id.*

106. TEX. CODE CRIM. PROC. ANN. art. 21.02 (Vernon 1966) provides: "An indictment shall be deemed sufficient if it has the following requisites: 1. It shall commence, 'In the name and by the authority of The State of Texas'."

107. *See Ex parte Cooper*, 589 S.W.2d 130, 131 (Tex. Crim. App. 1979).

108. TEX. PENAL CODE ANN. § 31.03(b)(1) (Vernon 1980); *see Thomas v. State*, 589 S.W.2d 129, 130 (Tex. Crim. App. 1979).

109. *See Harris v. State*, 587 S.W.2d 429, 430 (Tex. Crim. App. 1979).

110. *See Ex parte Chance*, 601 S.W.2d 356, 356 (Tex. Crim. App. 1980).

111. *See notes 106-10 supra.*

must be quashed. This dilemma is articulated in article 28.10 of the Texas Code of Criminal Procedure: "Any matter of form in an indictment or information may be amended at any time before an announcement of ready for trial upon the merits by both parties, but not afterward. No matter of substance can be amended."¹¹² Accordingly, if the pleading error is one of form, corrections can be made by amendment in the trial court; but if the pleading error is one of substance, no amendment is possible, and the state must restart the proceedings with a new charging instrument. The difficulty lies in discerning the difference between an error of form and an error of substance. Light was shed on this problem recently by the Texas Court of Criminal Appeals in *Brasfield v. State*,¹¹³ which contains an excellent review and categorization of many of the prior cases on point. According to the court in *Brasfield*, substantive and descriptive allegations concerning the offense itself cannot be amended, but clerical allegations such as the term of court can be amended.¹¹⁴

VII. VENUE

Recent cases reiterate some basic lessons about venue and demonstrate the significant tactics involved in a motion to change venue. Unlike jurisdiction, improper venue may be waived by a defendant's failure to object at trial.¹¹⁵ Once a defendant files a pretrial motion to change venue, and controverting affidavits are filed by the state, however, there must be a hearing. Failure to hold a hearing on the issue is error.¹¹⁶ If no controverting affidavit is filed by the state, the defendant is as a matter of law entitled to a change of venue without a hearing because there is no issue of fact to be resolved.¹¹⁷ If the defendant acquiesces to a hearing despite the absence of the state's controverting affidavit, the defendant waives the per se right to have the venue changed, and the defendant will be bound by whatever proper venue decision the court makes at the conclusion of the hearing.¹¹⁸

Keeping these principles in mind, consider the following typical fact situation. A defendant files a motion for change of venue in a case of considerable local notoriety. Instead of setting a hearing, the judge announces that he will carry the motion along pending jury selection. After a jury is selected the judge announces that he is overruling the motion for change of venue. Reversible error is committed in cases like the one above, because once a defendant files a motion for change of venue, one of two things must happen: (1) the motion is granted by operation of law if the state fails to file a controverting affidavit; or (2) a hearing must be held and

112. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1966).

113. 600 S.W.2d 288 (Tex. Crim. App. 1980).

114. *Id.* at 301-02.

115. See *Ex parte Watson*, 601 S.W.2d 350, 351 (Tex. Crim. App. 1980).

116. *Cf. Hussey v. State*, 590 S.W.2d 505, 506 (Tex. Crim. App. 1979) (defendant was entitled to change of venue when the state failed to contest his application).

117. See *McManus v. State*, 591 S.W.2d 505, 516 (Tex. Crim. App. 1980).

118. *Id.*

evidence taken if the state does file a controverting affidavit.¹¹⁹

VIII. SPEEDY TRIAL

Like many states, Texas adopted speedy trial legislation¹²⁰ under the assumption that passing a law would accelerate the process of docketing and disposing of criminal cases. Now that law is being tested and probed in the court of criminal appeals, and, as one might suspect, it is a toothless tiger.

One of the first tests of the Speedy Trial Act¹²¹ came in *Fraire v. State*.¹²² There the court held in a somewhat perfunctory opinion that if there is no challenge to the veracity of the state's announcement of ready, it will be presumed that the state is in fact ready for trial.¹²³ Once the state is ready for trial, the time limits under the Speedy Trial Act are tolled.¹²⁴ The holding in *Fraire* was explicated somewhat in *Barfield v. State*.¹²⁵ The court in *Barfield* stated that the defendant can refute the state's announcement of ready "by evidence . . . demonstrating that the State was not ready for trial during the Act's time limits."¹²⁶ The court continued:

This evidence can be from any source including cross-examination of those responsible for preparing the State's case, and may consist of, among other things, a demonstration that the State did not have a key witness or piece of evidence available by the last day of the applicable time limit so that the State was not ready for trial within that time limit.¹²⁷

This language from *Barfield* gives rise to some interesting speculation. Given the fact that pretrial discovery is almost nonexistent in Texas criminal cases,¹²⁸ one would assume that in most cases the defendant will not know what the key prosecution evidence is, or who the key prosecution witnesses are. Accordingly, it seems curious for the court to suggest that, after filing a motion for dismissal under the Speedy Trial Act, the defendant has the right to put the prosecutor on the stand and force him to reveal facts that heretofore have been secrets zealously protected by the Texas statute and by Texas courts.

Barfield also held that delay due to congested court calendars does *not* entitle a defendant to dismissal.¹²⁹ Furthermore, *Barfield* stated that no announcement of ready need be made by the state until the defendant first triggers the process by filing a motion under the Speedy Trial Act.¹³⁰

119. See *O'Brient v. State*, 588 S.W.2d 940, 941 (Tex. Crim. App. 1979).

120. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Supp. 1980-1981).

121. *Id.*

122. 588 S.W.2d 789 (Tex. Crim. App. 1979).

123. *Id.* at 791.

124. See TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 1 (Vernon Supp. 1980-1981).

125. 586 S.W.2d 538 (Tex. Crim. App. 1979).

126. *Id.* at 542.

127. *Id.*

128. See text accompanying notes 84-88 *supra*.

129. 586 S.W.2d at 541.

130. *Id.* at 542.

The consequences of these holdings, together with the language of the Speedy Trial Act, combine to create several postulates about speedy trial in Texas. The state is not required to file an announcement of ready unless prompted to do so by a defendant's motion for dismissal under the Speedy Trial Act. Whenever the state files an announcement of ready, it is prima facie proof that the state was ready within the time period prescribed by the statute. The burden of rebuttal is on the defendant. If the state is ready, but the court calendar will not accommodate trial, the defendant has no recourse under the Speedy Trial Act.

*Luna v. State*¹³¹ drives perhaps the final nail into the coffin of speedy trial. In what the dissent described as an "erroneous" and "counter-productive" interpretation of section 3 of the Act,¹³² *Luna* held that the entry of a guilty plea waives any rights under the Speedy Trial Act.¹³³

Problems of speedy trial also frequently occur when motions are filed to revoke probation, but because revocation proceedings are not initiated by complaint or by indictment, the Speedy Trial Act is inapplicable.¹³⁴ Section 8(a) of article 42.12 of the Texas Code of Criminal Procedure,¹³⁵ however, provides that a defendant who is being held for probation revocation has the right to demand a hearing within twenty days. In language that may be largely a dictum, the court of criminal appeals in *Williams v. State*¹³⁶ stated: "We decline to hold that a probationer may trip the timetable provided by filing a motion for speedy revocation hearing prior to the filing of the State's motion to revoke" ¹³⁷ Because a person confined on a warrant to revoke probation¹³⁸ is entitled to bail only in the discretion of the court,¹³⁹ it follows from *Williams* that a person could be arrested and held in jail for an indeterminate length of time without a hearing to revoke probation, as long as the state fails to file a motion to revoke the probation.¹⁴⁰

IX. SANITY

During the survey period there was a desirable explication of some of the complex issues relating to both the substantive defense of incompe-

131. 602 S.W.2d 267 (Tex. Crim. App. 1980).

132. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Supp. 1980-1981) provides: "The failure of a defendant to move for discharge under the provisions of the article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article."

133. 602 S.W.2d at 267.

134. See *Champion v. State*, 590 S.W.2d 495, 498 (Tex. Crim. App. 1979).

135. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8(a) (Vernon Supp. 1980-1981).

136. 590 S.W.2d 709 (Tex. Crim. App. 1979).

137. *Id.* at 710.

138. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8(a) (Vernon Supp. 1980-1981) (regarding the issuance of a warrant to arrest and confine a person prior to revoking probation).

139. See *Ex parte Ainsworth*, 532 S.W.2d 640, 641 (Tex. Crim. App. 1976).

140. Of course such a person would have a constitutional right to a speedy trial, but the constitutional right to a speedy trial never has been defined in precise temporal terms. See *Barker v. Wingo*, 407 U.S. 514, 521-22 (1972).

tency at the time of the act and the procedural defense of incompetency at the time of trial. In broadest terms the new cases fall into two categories: one category dealing primarily with procedures for raising sanity issues and another category concerning the fifth amendment implications of statements made to a psychiatrist by a defendant during a pretrial psychiatric examination.

Competency of the defendant to stand trial may be raised in at least three ways: (1) by written motion filed before trial; (2) by the court sua sponte at the pretrial stage; and (3) during trial by the court sua sponte.¹⁴¹ If the evidence raises a bona fide doubt about competency to stand trial, competency becomes an issue, and a hearing with a jury must be held to resolve the issue.¹⁴² Competency is the sole issue before the court at such a hearing, and error occurs when the state is allowed to introduce evidence of the offense itself or to argue the seriousness of the offense charged.¹⁴³

Because a competency hearing is somewhat disruptive of the ordinary flow of the pretrial and trial processes, some judges try to avoid conducting these hearings by taking the position that insufficient evidence has been presented to raise a bona fide doubt about the defendant's competency. In *Sisco v. State*¹⁴⁴ the Texas Court of Criminal Appeals for the first time decided what standards shall be used by trial judges to decide whether adequate evidence has been offered to require a hearing on the matter of competency at the pretrial stage.¹⁴⁵ *Sisco* stated: "[T]he trial court is to assay just that evidence tending to show incompetency, putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency."¹⁴⁶ In other words, at the pretrial stage, the question for the trial court is whether with respect to incompetency there is "any evidence" or whether there is "no evidence." If there is any evidence of incompetency, the court must proceed to a full hearing on that matter before proceeding with a trial on the merits.

Obviously, questions will arise as to just what constitutes any evidence, so as to require a full hearing on competency. A very interesting answer was supplied to that question by the Fifth Circuit in *Lokos v. Capps*.¹⁴⁷ There, a conviction was reversed because the trial judge failed to take into consideration an out-of-state psychiatrist's letter (admittedly hearsay) that discussed the defendant's life history, institutionalization, and treatments. The court noted:

[The] indicia of a defendant's incompetence to be tried, sufficient to

141. See TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2 (Vernon 1979).

142. See *Drope v. Missouri*, 420 U.S. 162 (1975); TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4 (Vernon 1979).

143. *Callaway v. State*, 594 S.W.2d 440, 443 (Tex. Crim. App. 1980).

144. 599 S.W.2d 607 (Tex. Crim. App. 1980).

145. The *Sisco* opinion is expressly limited to standards for competency hearings held at the pretrial stage of proceedings. Standards for sufficiency of evidence to trigger the necessity of a mid-trial hearing on competency continue to divide the court. See *id.* at 613.

146. *Id.*

147. 625 F.2d 1258 (5th Cir. 1980).

raise a doubt so as to require the judge to make further inquiry, need not be presented in a formal motion nor argued by defense counsel *nor be presented to the judge in the form of admissible evidence*.¹⁴⁸

Competency creates somewhat arcane burden of proof issues when the case involves the substantive defense of insanity at the time of the crime, for then the court must determine what effect evidence of insanity has on the so-called presumption of sanity. Put another way, who has what burden when the defense is insanity? In a lengthy opinion, the Texas Court of Criminal Appeals answered this question in *Madrid v. State*,¹⁴⁹ holding that the accused bears both the burden of producing evidence and the burden of persuasion.¹⁵⁰ The court concluded that there is no presumption of sanity in the criminal jurisprudence of this state.¹⁵¹ Accordingly, the court approved a prosecutor's argument to the jury that the state was under no obligation to bring forward evidence that the defendant was sane at the time of the offense; the court held that the burden of proof as to the insanity defense was entirely on the defendant.¹⁵²

The question of proper use of statements made by a defendant during a psychiatric examination continues to plague the courts. Recently, the court of criminal appeals made clear the proposition that either side is free to contract with a psychiatrist without first moving for the appointment of that psychiatrist by the trial court under the provisions of articles 46.02¹⁵³ or 46.03¹⁵⁴ of the Texas Code of Criminal Procedure.¹⁵⁵ The facts in *Parker v. State*¹⁵⁶ exemplify the problem. Parker applied to the court for a psychiatric examination, and in response the court appointed Dr. Coons, who in due course examined the defendant and reported that the defendant was insane at the time of the offense. Obviously dissatisfied with that diagnosis, the state proceeded to contract privately with Dr. Holbrook, who examined the defendant and reported to the state that the defendant was sane at the time of the act. Parker did not receive a copy of Dr. Holbrook's report until the morning of the trial although he had sought it earlier. Thereafter, Parker objected to the introduction of Dr. Holbrook's testimony because the doctor had not been appointed by the court as had Dr. Coons. The court of criminal appeals ruled that there is no requirement that an examining psychiatrist be appointed in order for his testimony to be admissible.¹⁵⁷

Still somewhat cloudy is the issue of whether an examining psychiatrist may testify at trial about incriminating statements made by the defendant

148. *Id.* at 1260 (emphasis added).

149. 595 S.W.2d 106 (Tex. Crim. App. 1979).

150. *Id.* at 111.

151. *Id.* at 117.

152. *Id.* at 111.

153. TEX. CODE CRIM. PROC. ANN. art. 46.02 (Vernon 1979).

154. *Id.* art. 46.03.

155. See *Brandon v. State*, 599 S.W.2d 567, 576 (Tex. Crim. App. 1980); *Parker v. State*, 594 S.W.2d 419, 423 (Tex. Crim. App. 1980).

156. 594 S.W.2d 419 (Tex. Crim. App. 1980).

157. *Id.* at 423.

during the course of the examination. In *United States v. Leonard*¹⁵⁸ a federal prosecutor sought to avoid the problem by attempting to use such statements for impeachment of the defendant, thus skirting the fifth amendment problems inherent in asking the psychiatrist to testify directly. The court refused the evidence, even for impeachment purposes, stating that exclusion would protect "the integrity and reliability of the psychiatric interview" and would prevent infringement of the patient-defendant's fifth amendment rights.¹⁵⁹

Of even greater interest is the impact of article 5561h of the Texas Revised Civil Statutes¹⁶⁰ on this problem. Clearly a defendant in a criminal case interviewed for diagnostic purposes is included within the ambit of this statute.¹⁶¹ Equally clear is the fact that this statute mandates confidentiality between patient and practitioner.¹⁶² The only applicable exception seems to be section 4(a) of the statute, which states:

Exceptions to the privilege in court proceedings exist:

(4) when the judge finds that the patient/client after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's/client's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's/client's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure.¹⁶³

This language has not yet been construed. Furthermore, several questions come to mind: (1) What if the examination in question was not court ordered? (2) What if the patient was not "previously informed that communications would not be privileged"? (3) May a psychiatrist make disclosures of any kind under this statute without a court order? (4) If a psychiatrist may make disclosures, to whom and under what circumstances?

X. JURIES

*Sattiewhite v. State*¹⁶⁴ settled a narrow but distinctly significant issue regarding the proper wording of a jury charge. It is well-established that when a person, place, or thing is described in an indictment with unneces-

158. 609 F.2d 1163 (5th Cir. 1980).

159. *Id.* at 1167.

160. TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1980-1981).

161. *Id.* § 1(b) provides: " 'Patient/Client' means any person who consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and other drug addiction."

162. *Id.* § 2(a) states that "[c]ommunication between a patient/client and a professional is confidential and shall not be disclosed except as provided in Section 4 of this Act."

163. *Id.* § 4(a)(4).

164. 600 S.W.2d 277 (Tex. Crim. App. 1980).

sary particularity, the state must prove all aspects of the description, precisely as alleged.¹⁶⁵ The question arises whether it is necessary that the court's charge likewise contain all of the unnecessarily descriptive details. *Sattiewhite* answered that question in the negative, holding that as long as the proof established all of the particular details as described in the indictment, the charge need do no more than require the jury to find the essential elements of the offense.¹⁶⁶

In *Eads v. State*¹⁶⁷ the nature of the jury charge in capital murder cases was scrutinized. According to article 37.071(d) of the Texas Code of Criminal Procedure, jurors in a capital case must be instructed that they cannot answer any of the three special issues "yes" unless they unanimously agree to do so, and at the same time they cannot answer any of the three special issues "no" unless ten or more jurors agree.¹⁶⁸ Therefore, if the jury should be split along lines of six-to-six, for example, one could safely assume that the jurors would not answer the special issues at all, and that is precisely what occurred in *Eads*. Because there was not a unanimous affirmative finding on all three special issues, the trial court sentenced the defendant to life in accordance with article 37.071(e), which provides that if the jury returns a "negative finding" on any issue, the court shall sentence the defendant to confinement in prison for life.¹⁶⁹ In reversing, the Texas Court of Criminal Appeals held that failure to answer a special issue must be construed as an incomplete jury verdict rather than as a negative finding.¹⁷⁰ As a result of *Eads*, if the jury fails to answer one of the three special issues, a mistrial must be declared.

Qualifications of jurors also were addressed during the survey period. Article 36.29 of the Texas Code of Criminal Procedure provides that if one juror in a felony case becomes disabled, a verdict can be rendered by the remaining eleven.¹⁷¹ In *Carrillo v. State*¹⁷² the word "disabled" was limited to physical, emotional, or mental reasons for excusing the juror. The state argued in *Carrillo* that a juror could be excused as disabled under article 36.29 because she realized during trial that she had a personal acquaintance with the defendant's relatives that might prejudice her. While holding that bias was not a disability that would excuse a juror under article 36.29, the court of criminal appeals stated that the trial court could have allowed the defendant to make an election to continue with the trial with the juror in question or to ask for a mistrial.¹⁷³

Perhaps the most significant rulings regarding juror qualifications deal

165. See *Smith v. State*, 107 Tex. Crim. 511, 512, 298 S.W. 286, 286 (1927) (when crime was alleged to have occurred within city limits of a certain city, that fact must be proved, even though such allegation was not a necessary element of the offense).

166. 600 S.W.2d at 285.

167. 598 S.W.2d 304 (Tex. Crim. App. 1980).

168. TEX. CODE CRIM. PROC. ANN. art. 37.071(d) (Vernon Supp. 1980-1981).

169. *Id.* art. 37.071(e).

170. 598 S.W.2d at 307-08.

171. TEX. CODE CRIM. PROC. ANN. art. 36.29 (Vernon 1966).

172. 597 S.W.2d 769 (Tex. Crim. App. 1980).

173. *Id.* at 771.

with the issue of qualifying prospective jurors in capital murder cases. *Witherspoon v. Illinois*¹⁷⁴ set forth a two-pronged test for determining whether venire persons should be disqualified because of their reluctance to assess the death penalty. The Fifth Circuit, in adopting this test, ruled that the state may exclude only those who (1) would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) could not reach an impartial decision as to the defendant's guilt because of their bias against the death penalty.¹⁷⁵

Seizing on the second prong of the *Witherspoon* test, Texas adopted section 12.31(b) of the Texas Penal Code, which states: "A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."¹⁷⁶ In *Adams v. Texas*¹⁷⁷ the United States Supreme Court ruled that this statute goes beyond the second prong of *Witherspoon* and is void.¹⁷⁸ According to the Court, section 12.31(b) "excluded jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected."¹⁷⁹

XI. JUDGMENT AND SENTENCE

Questions frequently arise about proportionality between the harshness of the sentence and the harmfulness of the crime. For the most part these issues are cast in terms of the eighth amendment's prohibition against cruel and unusual punishment. The Texas habitual offender statute,¹⁸⁰ mandating a life sentence after a third felony conviction, was recently examined in the context of the eighth amendment by the United States Supreme Court in *Rummel v. Estelle*.¹⁸¹ *Rummel* held that the Texas statute does not violate the eighth amendment.¹⁸² The issue of disproportionate sentences is still very much alive, however, as exemplified by the post-*Rummel* opinion of the Fifth Circuit in *Terrebonne v. Blackburn*.¹⁸³ *Terrebonne* contains this revealing statement about the Supreme Court's *Rummel* opinion:

[T]he Supreme Court's opinion might lead one to conclude that a sentence cannot be disproportionate to the severity of the punished offense solely because of the sentence's length. . . . However, because the Court qualified such blanket statements, . . . and because numer-

174. 391 U.S. 510, 522-23 (1968).

175. *Burns v. Estelle*, 626 F.2d 396, 398 (5th Cir. 1980).

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

177. 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

178. *Id.* at 2528, 65 L. Ed. 2d at 592.

179. *Id.* at 2529, 65 L. Ed. 2d at 593.

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

181. 445 U.S. 263 (1980). See generally Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063 (1981).

182. 445 U.S. at 285.

183. 624 F.2d 1363 (5th Cir. 1980).

ous other passages of the opinion, . . . belie this conclusion, we believe that the proportionality principle remains applicable to challenges to length of sentence.¹⁸⁴

After making this comment, the Fifth Circuit proceeded to set forth three tests for concluding that a sentence is, indeed, a violation of the eighth amendment: (1) the nature of the crime must be examined to assess the moral turpitude and the degree of danger to society involved; (2) the sentence imposed must be compared with that available in other jurisdictions for the same offense; and (3) the sentence imposed must be compared with punishment imposed on other criminals generally.¹⁸⁵

In what may be construed as an effort to modernize, the Texas Legislature has provided trial judges with an unusually broad range of sentencing alternatives; so broad, in fact, that troublesome questions have arisen concerning what sentencing options may be exercised under what circumstances. In addition, a virtual stream of decisions is emanating from the Texas Court of Criminal Appeals, compounding the confusion about sentencing in this state. A few of the more or less profound decisions will be discussed at this point, but the reader should be forewarned that the discussion to follow is not complete and may not even be fairly representative of the plethora of recent Texas cases on this subject.

Article 42.12, section 3e(a) of the Texas Code of Criminal Procedure allows the trial court to grant probation to a defendant already under a sentence of confinement, provided that the grant occurs after the expiration of sixty days but prior to the expiration of 120 days from the date the sentence was begun.¹⁸⁶ This statutory practice has come to be known as "shock probation." Certain offenses, including criminal homicide, are excluded from eligibility for shock probation. Section 3c of the same statute, however, provides: "Nothing herein shall limit the power of the court to grant a probation of sentence regardless of the . . . prior conviction of the defendant."¹⁸⁷ Therefore, the question arises whether the trial court has the discretion to override the statutory exceptions to eligibility for shock probation. In *Hury v. Morgan*¹⁸⁸ the court of criminal appeals allowed the state to petition by mandamus and agreed with the state's contention that the trial court is without authority to grant shock probation for the excluded crimes.¹⁸⁹

"Deferred adjudication" is a statutory sentencing option provided for in section 3d of article 42.12 of the Texas Code of Criminal Procedure.¹⁹⁰ Although limited to pleas of guilty or nolo contendere, deferred adjudica-

184. *Id.* at 1366-67.

185. *Id.* at 1368.

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

187. *Id.* § 3c.

188. 601 S.W.2d 717 (Tex. Crim. App. 1980).

189. *Id.* at 718; see *United States v. DiFrancesco*, 49 U.S.L.W. 4022 (U.S. Dec. 9, 1980) (no jeopardy implications in allowing states to appeal from sentence); *United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979) (mandamus by the government is proper remedy when trial court's sentence was clearly illegal).

190. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d (Vernon 1979).

tion allows the court to place a defendant on probation without actually entering a judgment of guilt.¹⁹¹ While this option may seem appealing, *Williams v. State*¹⁹² demonstrates that the defendant pays a heavy price for a deferred adjudication. The *Williams* court held that a defendant who pleads guilty and receives a deferred adjudication has no right to appeal that action, nor does he have a right to appeal the action of the trial court in subsequently revoking the probation should that eventuality occur.¹⁹³ Furthermore, under the statutory procedure a defendant may receive one term of probation under a deferred adjudication and eventually be sentenced to an increased term in the penitentiary if that probation subsequently is revoked. In *Williams*, upon revocation of his four-year term of probation under deferred adjudication, the defendant was sentenced to ten years in the penitentiary.¹⁹⁴

The act of revoking probation, while not new to the statutory scheme of sentencing, has drawn increased attention by the court of criminal appeals. In *Ex parte Feldman*¹⁹⁵ the court noted that trial judges have three options once the judge finds that probation conditions have been violated by the defendant: (1) to revoke probation; (2) to continue probation; or (3) to continue the hearing without entering any judgment.¹⁹⁶ If the court chooses the third option and continues the hearing, it may revoke the probation at some later date, without any further hearing, apparently based on consideration of subsequent misconduct by the defendant.¹⁹⁷ In *Frazier v. State*¹⁹⁸ the court went even further, holding that hearsay evidence, if not objected to, has probative value at a revocation hearing and can constitute sufficient evidence to revoke probation.¹⁹⁹ As Judge Onion commented in his dissent in *Frazier*: "Where do we go from here?"²⁰⁰

By far the most common form of judgment and sentence in criminal cases is that entered as the result of a negotiated guilty plea. As with the law of sentencing generally, the law of entering and perhaps appealing from a guilty plea is, likewise, becoming exceedingly complex. Texas makes the unique requirement in article 1.15 of the Texas Code of Criminal Procedure that a person charged in a felony case shall not be convicted upon his guilty plea unless the state introduces into the record sufficient evidence to substantiate the plea.²⁰¹ Recently, in an entirely different con-

191. *Id.* § 3d(a).

192. 592 S.W.2d 931 (Tex. Crim. App. 1979).

193. *Id.* at 932-33 (citing TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d(b) (Vernon 1979)).

194. 592 S.W.2d at 932 n.1.

195. 593 S.W.2d 720 (Tex. Crim. App. 1980).

196. *Id.* at 721.

197. *Id.*

198. 600 S.W.2d 271 (Tex. Crim. App. 1980).

199. *Id.* at 274. See also *Long v. State*, 590 S.W.2d 138 (Tex. Crim. App. 1979) (jail booking sheet that drew hearsay objection from defendant, when admitted, was sufficient proof as to identity of defendant so as to revoke probation).

200. 600 S.W.2d at 275.

201. See TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977).

text, the United States Supreme Court held in *Burks v. United States*²⁰² that when a case is reversed on appeal for insufficient evidence, the double jeopardy clause forbids a second trial.²⁰³ The Court reasoned that to try the defendant again would be tantamount to affording the prosecution another opportunity to supply evidence that it failed to produce at the first trial.²⁰⁴ Now the Texas Court of Criminal Appeals has discovered a logical nexus between the requirement in article 1.15 that the state substantiate pleas of guilty in felony cases and the ruling on jeopardy in the *Burks* case. The court concluded in *Thornton v. State*²⁰⁵ that jeopardy bars a retrial of a guilty plea when the evidence introduced by the state fails to constitute sufficient evidence to prove the offense as a matter of law.²⁰⁶

Basic to the subject of guilty pleas is the doctrine that a voluntary plea of guilty, once made, waives all nonjurisdictional defects in the proceeding, including claims relating to illegal arrest, search, or other procedures occurring prior to the entry of the plea.²⁰⁷ Article 44.02 of the Texas Code of Criminal Procedure amends that rule and allows appeal if permission to appeal is obtained from the trial court, or if the appeal is on a matter raised by written motion filed prior to the entry of the plea.²⁰⁸ Apparently article 44.02 was passed in order to encourage defendants to enter guilty pleas and thus expedite the processing of their case while, at the same time, preserving their valuable right to appeal from some claimed denial of federal due process. Article 44.02 has proved to be quite intricate, however, and has spawned a number of cases interpreting its provisions.

Initially, article 44.02 applies only to cases in which there was a plea bargain, for example, the punishment assessed by the court did not exceed that recommended by the prosecutor and agreed to by the defendant. Consequently, if a defendant enters a plea without a preceding bargain, he has waived his right to appeal anything but jurisdictional issues.²⁰⁹ Furthermore, it is now clear that even though motions to suppress are filed before trial, there can be no appeal of these motions after the entry of a guilty plea unless evidence complained of in the motions was actually used to substantiate the plea.²¹⁰ Thus, there can be no appeal from motions filed prior to the entry of a negotiated plea if the plea is substantiated by a judicial confession.²¹¹

202. 437 U.S. 1 (1978).

203. *Id.* at 16-18.

204. *Id.* at 11.

205. 601 S.W.2d 340 (Tex. Crim. App. 1980).

206. *Id.* at 348.

207. *See Helms v. State*, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972).

208. *See TEX. CODE CRIM. PROC. ANN.* art. 44.02 (Vernon 1979).

209. *See Ex parte Sterling*, 595 S.W.2d 536, 537 (Tex. Crim. App. 1980).

210. *See Mitchell v. State*, 586 S.W.2d 491, 495-96 (Tex. Crim. App. 1979).

211. *See Prochaska v. State*, 587 S.W.2d 726, 729 (Tex. Crim. App. 1979).