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## Criminal Procedure

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# CRIMINAL PROCEDURE

by

William J. Bridge\*

## I. COURTS

The most important development for the Texas criminal law practitioner was the adoption of legislation that vested criminal appellate jurisdiction in the fourteen courts of appeals.<sup>1</sup> The legislation was designed to lighten the burden on the court of criminal appeals by giving that court discretionary control over its own docket, except in capital cases.<sup>2</sup> No cases from the courts of appeals were reported during the survey period, but Texas lawyers may expect a proliferation of authority, and inevitable conflicts among the supreme judicial districts.

The division of the United States Court of Appeals for the Fifth Circuit, effective October 1, 1981, should also be noted.<sup>3</sup> The purpose, as with the state judicial reorganization, was to remedy the case overload in the former Fifth Circuit. The "new" Fifth Circuit includes only Texas, Mississippi, Louisiana, and the District of the Canal Zone, while Alabama, Florida, and Georgia comprise the Eleventh Circuit.<sup>4</sup>

## II. ARREST, SEARCH, AND SEIZURE

Not every confrontation between law enforcement and civilians can be characterized as an arrest.<sup>5</sup> Even a brief investigatory stop, however, constitutes a seizure of the person and, therefore, is subject to fourth amendment scrutiny.<sup>6</sup> In *United States v. Cortez*<sup>7</sup> the Supreme Court reviewed the constitutional standards of search and seizure as applied to the stop of a camper truck that resulted in a prosecution for transporting illegal aliens.<sup>8</sup> The Court held that "[b]ased upon [the] whole picture the detain-

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1. TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.03, 4.04 (Vernon 1982). The legislation implemented a constitutional amendment approved November 4, 1980. See TEX. CONST. art. V, §§ 5, 6.

2. TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2 (Vernon 1982).

3. See Pub. L. No. 96-452, 95 Stat. 1994 (1980) (to be codified at 28 U.S.C. §§ 1, 41); Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687 (1981).

4. See Baker, *supra* note 3, at 687.

5. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

6. *Id.* at 16. The Court stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.*

7. 449 U.S. 411 (1981).

8. See 8 U.S.C. § 1324(a) (1976 & Supp. IV 1980).

ing officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."<sup>9</sup> This standard initially requires that a determination must be made on the totality of the circumstances, including objective observation, and knowledge of the mode of operation of certain kinds of law breakers. Such facts may support inferences by a trained officer, more than inferences drawn by a lay person. In addition, the facts and inferences must raise a particularized suspicion concerning the person being stopped.<sup>10</sup>

Police officers must not only be able to articulate the facts which support reasonable suspicion, but their actions also must remain within the authorized scope of *Terry v. Ohio*.<sup>11</sup> The mere report of a "disturbance," for example, does not authorize a stop near the place of the reported trouble, nor does it permit an accompanying vehicle search.<sup>12</sup> The types of police action that constitute a stop also have been considered by the court of criminal appeals. In *Merideth v. State* the court held that an officer's approaching and knocking on the window of a pickup truck was not a stop.<sup>13</sup> The officer's subsequent observation of the odor of marijuana, therefore, was permissible, without examining the basis for his approach to the truck.<sup>14</sup> Judge Phillips, concurring in the result, disagreed, noting that a "stop" may occur whether the person is moving or not when approached.<sup>15</sup> He agreed with the majority's result, however, finding that Merideth's presence in a parking lot in a high crime area at 3 a.m. justified his detention by police.<sup>16</sup> If the person approached by the officers voluntarily cooperates, and there is no restraint,<sup>17</sup> then no fourth amendment constraints are implicated. An officer in such a situation observes from a legitimate vantage point and, therefore, anything he sees in plain view may be seized.<sup>18</sup>

In *Payton v. New York* the United States Supreme Court held that an

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9. 449 U.S. at 418. See also *Hull v. State*, 613 S.W.2d 735 (Tex. Crim. App. 1981).

10. 449 U.S. at 418.

11. 392 U.S. 1 (1968). The Court in *Terry* held that the officer must demonstrate "specific and articulable facts" that would indicate to a reasonable person that such action was appropriate. *Id.* at 21-22. Furthermore, "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Id.* at 29. In *McMillan v. State*, 609 S.W.2d 784 (Tex. Crim. App. 1980), an officer's conclusions that taillights of a car he had stopped were similar to those of a car that he had been following previously and that "it was probably the same vehicle" were held insufficient to justify a stop. *Id.* at 786. The court stated that an "inarticulate hunch, suspicion, or good faith" would not be enough to warrant the stop. *Id.* See also *Baldwin v. State*, 606 S.W.2d 872, 874 (Tex. Crim. App. 1980) (detention based on suspicious person call absent evidence of traffic violation was nothing more than a "mere hunch" of potential criminal activity).

12. *Rodriguez v. State*, 613 S.W.2d 491, 494 (Tex. Crim. App. 1981).

13. 603 S.W.2d 872, 873 (Tex. Crim. App. 1980).

14. *Id.*

15. *Id.* at 873-74 (Phillips, J., concurring).

16. *Id.* at 873.

17. See *Terry v. Ohio*, 692 U.S. 1, 19 n.16 (1968).

18. *Galitz v. State*, 617 S.W.2d 949 (Tex. Crim. App. 1981) (officer noticed pistol through slit in defendant's jacket as defendant voluntarily accompanied officers out of bar). See also *Brown v. State*, 617 S.W.2d 196 (Tex. Crim. App. 1981) (officer must be in legitimate position to view, and evidentiary value must be "immediately apparent").

arrest warrant was required to enter the home of the person to be arrested.<sup>19</sup> Whether an officer has the authority to enter the home of a third person in order to arrest a suspect, however, was left undecided by *Payton*.<sup>20</sup> Last term, in *Steagald v. United States*, the Court held that, absent exigent circumstances, a search warrant is required in order to enter a house to arrest someone who does not live there.<sup>21</sup>

When a warrant is issued for either an arrest or a search probable cause must be established.<sup>22</sup> The affidavit must provide an independent basis from which the magistrate can make a determination of probable cause.<sup>23</sup> If the affidavit includes assertions from an unidentified informer, both the informer's credibility and the basis of his information must be demonstrated to the magistrate.<sup>24</sup> In *Carmichael v. State* the court of criminal appeals reversed a marijuana possession conviction because, although the informer's credibility had been sufficiently established, the underlying circumstances for his conclusion were not detailed.<sup>25</sup> The court noted that corroboration of the informant's statements was required in addition to a showing of the informant's reliability.<sup>26</sup> This corroboration was missing in the officer's affidavit. The inclusion of detailed information as to the location of the contraband did not save the affidavit because no statements were made regarding the circumstances of the informer's knowledge of that fact.<sup>27</sup>

An affidavit containing false statements, made either knowingly or with reckless disregard of the truth, must be evaluated without those statements.<sup>28</sup> The false statement must be made by the affiant; therefore if the affidavit includes a false statement by the informer, no fourth amendment violation has occurred if the affiant had no reason to believe that the information was false.<sup>29</sup>

The standard of probable cause is at least as stringent for warrantless searches as it is for the issuance of a warrant. In *Barber v. State*<sup>30</sup> the state

19. 445 U.S. 573, 601-02 (1980). See also TEX. CODE CRIM. PROC. ANN. art. 14.03(b) (Vernon Supp. 1982) (authorizing arrest without a warrant for assault resulting in bodily injury, where there is probable cause to believe there is immediate danger of further bodily injury).

20. 445 U.S. at 583.

21. 101 S. Ct. 1642, 1648, 68 L. Ed. 2d 38, 48 (1981).

22. *Spinelli v. United States*, 393 U.S. 410, 417 n.5 (1969).

23. *Green v. State*, 615 S.W.2d 700, 706 (Tex. Crim. App. 1981) (capital murder conviction reversed; affidavit merely conclusory).

24. See *Spinelli v. United States*, 393 U.S. 410, 415 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

25. 607 S.W.2d 536, 539 (Tex. Crim. App. 1980).

26. *Id.* at 538.

27. *Id.* at 538-39. Because the affidavit underlying the warrant was insufficient, the introduction of the marijuana seized under the warrant was error and the convictions were reversed. *Id.* at 539.

28. *Franks v. Delaware*, 438 U.S. 154, 156 (1978).

29. *Taylor v. State*, 604 S.W.2d 175 (Tex. Crim. App. 1980). The court noted that the credibility of the witnesses contesting the affidavit is an issue for the trial court to determine. *Id.*

30. 611 S.W.2d 67 (Tex. Crim. App. 1981).

argued that the following facts constituted probable cause to search: (1) a citizen's report of suspicious activity, (2) defendant's attempt to leave after the officers began to question, (3) an outstanding traffic warrant, (4) a claim that the trunk key was lost, and (5) the subsequent discovery of the key. The court of criminal appeals concluded, however, that these facts were not adequate justification for a warrantless search.<sup>31</sup>

Searches without a warrant are legal under the fourth amendment if they fall within an established exception to the warrant requirement.<sup>32</sup> Several of these exceptions were considered by federal and Texas courts during the survey period. Administrative searches are permissible without a warrant meeting the most stringent fourth amendment requirements, so long as the regulatory scheme provides adequate substitute protection.<sup>33</sup> Last Term, in *Donovan v. Dewey*,<sup>34</sup> the Supreme Court approved warrantless inspections of mines under the Federal Mine Safety and Health Act of 1977.<sup>35</sup> The Court noted that owners of mines have a lesser expectation of privacy, and that an important federal interest in regulating a hazardous industry existed.<sup>36</sup>

A search incident to a lawful arrest is also permissible without a warrant.<sup>37</sup> A search of the person of the arrestee is justified,<sup>38</sup> as is a search of the area within the arrestee's immediate physical control.<sup>39</sup> In *New York v. Belton* a plurality of the Supreme Court announced a *per se* rule that, incident to the arrest of occupants of an automobile, its passenger compartment may be searched.<sup>40</sup> Any container may be searched, since it is within the Court's *per se* definition of the area within the arrestee's immediate control. Although Belton and others were outside the car, the Court approved the search of a zippered pocket of Belton's jacket that was in the back seat of the car.<sup>41</sup> When a search exceeds the scope of the arrestee's immediate physical control, it cannot be legitimated as a search incident to arrest. The search of other rooms of an apartment in which an arrest has taken place is permissible for the arresting officer's protection, if for exam-

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31. *Id.* at 68.

32. See *Katz v. United States*, 389 U.S. 347, 357 (1967). See also *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976) (Powell, J. concurring); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). See generally 2 & 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978).

33. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

34. 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981).

35. *Id.* at 2536, 69 L. Ed. 2d at 267. The Act is codified at 30 U.S.C. §§ 801-962 (Supp. III 1979).

36. 101 S. Ct. at 2539, 69 L. Ed. 2d at 271. The Court cited the legislative history of the Act that recognized the need for unannounced inspections in order to encourage compliance with federal regulations. *Id.* at 2540, 69 L. Ed. 2d at 271.

37. *Chimel v. California*, 395 U.S. 752, 763 (1969).

38. *Id.*; *United States v. Robinson*, 414 U.S. 218, 224 (1973).

39. See *Chimel v. California*, 395 U.S. 752, 763 (1969). The rationale for this rule is the prevention of the defendant seizing a weapon or destroying evidence. *Id.*

40. 101 S. Ct. 2860, 2865, 69 L. Ed. 2d 768, 775 (1981).

41. *Id.* at 2864, 69 L. Ed. 2d at 776.

ple, the officer has reason to believe accomplices are present.<sup>42</sup>

When police have probable cause to believe that an automobile contains evidence, generally it may be searched without a warrant.<sup>43</sup> In *Montez v. State* a panel of the court of criminal appeals held that the search of a parked automobile was improper because "exigent circumstances have not been shown to exist."<sup>44</sup> The officer had taken the keys to the car, and anyone who might move it or remove evidence from it was in custody. The en banc court reversed, holding that the automobile exception did apply because the search was authorized and sufficient exigent circumstances existed.<sup>45</sup>

The legitimacy of searches of containers found within an automobile is uncertain. In *United States v. Chadwick* the Supreme Court held that a locked footlocker could not be searched without a warrant once it was securely in police control.<sup>46</sup> Two years later, in *Arkansas v. Sanders*, the same result was reached in a case involving the seizure of luggage from the trunk of a car.<sup>47</sup> Last year, in *Robbins v. California*, the Court adhered to the same reasoning, and invalidated the search of containers seized from the trunk of a car stopped for speeding.<sup>48</sup> After the stop the officer noted the odor of marijuana, and searched the entire car, seizing two opaque packages from the trunk and opening them.

In 1978, the Supreme Court refused to recognize a "murder scene exception" to the warrant requirement.<sup>49</sup> The court of criminal appeals concluded that the decision rejecting that exception should not be applied retroactively, and accordingly upheld the search of a murder scene pursuant to previous Texas authority.<sup>50</sup>

42. *Brown v. State*, 605 S.W.2d 572, 576 (Tex. Crim. App. 1980). The standard applied is whether a reasonable person would believe that his safety or the safety of others was threatened. *Id.*

43. See *Colorado v. Bannister*, 449 U.S. 1 (1980) (automobile stopped for speeding; contents in plain view); *Chambers v. Maroney*, 399 U.S. 42 (1970) (automobile searched after arrest of occupants for armed robbery); *Carroll v. United States*, 267 U.S. 132 (1925) (automobile searched on highway based on official's information that it contained whiskey). But see *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (automobile searched several times long after defendant's arrest).

44. 608 S.W.2d 211, 216 (Tex. Crim. App. 1980).

45. *Id.* at 218. On rehearing, the court discussed extensively the recent Supreme Court case *Colorado v. Bannister*, 449 U.S. 1 (1980), in which the warrantless search of a car was upheld because the officer had probable cause to believe that it contained evidence of a crime. 608 S.W.2d at 217-18. Other factors that weighed in the *Montez* court's decision included the expectancy that the appellant would leave in a short time, the fact that officers already had a warrant to search his residence and to arrest him, and the reliability of the informant who gave them information. *Id.* at 217.

46. 433 U.S. 1, 11 (1977). The Court stated that "[n]o less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment warrant clause." *Id.*

47. 442 U.S. 753, 766 (1979). See also *United States v. Rigales*, 630 F.2d 364 (5th Cir. 1980).

48. 101 S. Ct. 2841, 2847, 69 L. Ed. 2d 744, 752 (1981). The *Robbins* decision has been effectively overruled by the Court's recent decision in *United States v. Ross*, 50 U.S.L.W. 4580 (U.S. June 1, 1982).

49. *Mincey v. Arizona*, 437 U.S. 385, 395 (1978).

50. *Swink v. State*, 617 S.W.2d 203, 210 (Tex. Crim. App. 1981).

A search performed with valid consent relieves the prosecution from the strictures of the fourth amendment.<sup>51</sup> The state must show, however, that consent was voluntary and not mere acquiescence to authority.<sup>52</sup> The display of a weapon by the officer "requesting" consent is a significant factor in assessing voluntariness.<sup>53</sup>

If there is a fourth amendment violation, any evidence obtained by exploitation of the violation must be excluded.<sup>54</sup> The taint of an illegal detention is not removed merely by the recital of *Miranda* warnings.<sup>55</sup> In *Green v. State*,<sup>56</sup> after concluding that the arrest was illegal, the court of criminal appeals analyzed the connection between Green's arrest and his later incriminating statements. The court did not disturb the trial court's finding that the statements were voluntary, but held that no intervening events affected the connection between the illegality of the arrest and the subsequent statements.<sup>57</sup> Accordingly, the court held that the admission of the statements into evidence was error.<sup>58</sup> In dissenting on the issue of rehearing, Judge McCormick argued that suppression was not required because the good faith of the officers, together with the *Miranda* warnings, was "sufficient to purge the taint of the illegal arrest."<sup>59</sup>

As a matter of federal law, exclusion of evidence is not required if it be seized pursuant to an arrest under a statute later held unconstitutional.<sup>60</sup> In *Howard v. State* the court of criminal appeals ordered the suppression of evidence in such a case, on two grounds.<sup>61</sup> First, the court reasoned that *Michigan v. DeFillippo*<sup>62</sup> had left open the possibility of suppression when the law was "grossly and flagrantly unconstitutional."<sup>63</sup> The court of criminal appeals held that the Austin ordinance prohibiting loitering was such an unconstitutional law because of its overbreadth and vagueness.<sup>64</sup> Alternatively, the court ordered suppression "as a matter of state law, independently of the standard announced in *DeFillippo*."<sup>65</sup> The court, both in its original en banc opinion, and in its opinion denying the state's motion for

51. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

52. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). See *Martin v. State*, 610 S.W.2d 491, 492 (Tex. Crim. App. 1980).

53. *Clemons v. State*, 605 S.W.2d 567, 571 (Tex. Crim. App. 1980).

54. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

55. *Dunaway v. New York*, 442 U.S. 200, 217 (1979); *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975).

56. 615 S.W.2d 700 (Tex. Crim. App. 1981); see note 23 *supra* and accompanying text.

57. 615 S.W.2d at 709. The court found the only intervening occurrence to be that police drove the defendant around for two hours after his arrest, before taking him to the jail. *Id.*

58. *Id.*

59. *Id.* at 712 (McCormick, J., dissenting from denial of leave to file motion for rehearing). See also *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

60. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

61. 617 S.W.2d 191, 193 (Tex. Crim. App. 1979).

62. 443 U.S. 31 (1979).

63. 617 S.W.2d at 192 (quoting 443 U.S. at 38).

64. 617 S.W.2d at 192.

65. *Id.* at 193; see *Baker v. State*, 478 S.W.2d 445 (Tex. Crim. App. 1972).

rehearing, relied upon the Texas Constitution<sup>66</sup> and upon the state's own statutory exclusionary rule enacted in 1925.<sup>67</sup> Counsel prosecuting and defending criminal cases are well advised to note the applicability of state law.<sup>68</sup>

Electronic eavesdropping is now approved for certain areas of law enforcement in Texas. House Bill 360,<sup>69</sup> approved June 1, 1981, authorized the issuance of an order permitting the interception of wire or oral communications when there is probable cause to believe that the communications will provide evidence of commission of a felony under either the Texas Controlled Substances Act<sup>70</sup> or the Texas Dangerous Drug Act.<sup>71</sup> Electronic eavesdropping previously had been permitted only when one of the parties to the conversation consented.<sup>72</sup>

### III. CONFESSIONS

Article 38.22 of the Code of Criminal Procedure has been amended by each of the last three legislatures. The most recent amendment removes the requirement that an electronically recorded statement be witnessed by at least two persons.<sup>73</sup> In addition to complying with statutory provisions, a defendant's statement must also satisfy constitutional restrictions to be admissible. A confession must be voluntary, and if the defendant makes uncontroverted allegations of coercion, the confession is automatically inadmissible.<sup>74</sup> A confession may be involuntary because of inducement as well as coercion. If the confession is the product of inducement, any evidence discovered as a result of it, and any subsequent confession that is the product of the initial illegal confession, must be suppressed.<sup>75</sup>

Besides the voluntariness requirement, a statement by a suspect must be taken in compliance with *Miranda v. Arizona*.<sup>76</sup> The protections guaranteed by *Miranda* apply to pretrial psychiatric interviews, even when the statements are introduced only at the penalty stage of the trial. In *Estelle v. Smith*, the Supreme Court invalidated a Texas death sentence, because

66. TEX. CONST. art. I, §§ 9, 19.

67. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979). See 617 S.W.2d at 193.

68. See *White v. State*, 543 S.W.2d 366 (Tex. Crim. App. 1976) (refusing to rule on state law question since it had not been urged at trial).

69. TEX. CODE CRIM. PROC. ANN. art. 18.20 (Vernon Supp. 1982). The bill also amended the Penal Code, by adding unlawful electronic eavesdropping as a second degree felony. See TEX. PENAL CODE ANN. art. 16.02 (Vernon Supp. 1982). The statute expires on September 1, 1985.

70. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon 1976 & Supp. 1982). Felony possession of marijuana is specifically excluded by the eavesdropping statute. See TEX. CODE CRIM. PROC. ANN. art. 18.20, § 4 (Vernon Supp. 1982).

71. TEX. REV. CIV. STAT. ANN. art. 4476—14 (Vernon 1976 & Supp. 1982).

72. *Rovinsky v. State*, 605 S.W.2d 578, 582 (Tex. Crim. App. 1980).

73. See TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(5), *repealed*, 1981 Tex. Sess. Law Serv. ch. 271, § 1, at 711. The new version of article 38.22 also provides that the recording must be preserved until the conviction is final, direct appeals are exhausted, or the statute of limitations has expired.

74. *Barton v. State*, 605 S.W.2d 605, 607 (Tex. Crim. App. 1980).

75. *Pitts v. State*, 614 S.W.2d 142, 143 (Tex. Crim. App. 1981).

76. 384 U.S. 436, 478-79 (1966).



statements made by Smith to a psychiatrist at a pretrial competency examination were the basis for the psychiatrist's later testimony that the defendant posed "a continuing threat to society."<sup>77</sup> The psychiatrist had not advised Smith of his right to remain silent, nor had he sought permission from Smith's attorneys to conduct the interview. The Court held that statements to the psychiatrist were testimonial, and that psychiatric interviews were not insulated from fifth amendment protection.<sup>78</sup> Interrogation of a suspect may also violate the sixth amendment if adversary judicial proceedings have been instituted.<sup>79</sup> Although the attorney may not have the right to be present at a psychiatric examination,<sup>80</sup> he must be notified in advance and given the opportunity to advise his client whether to submit, and to limit the use of the results of the examination.<sup>81</sup>

Although *Smith* indicated the vitality of *Miranda* even outside the stationhouse, in another case last Term the Supreme Court summarily reversed a California appellate court's reversal of a conviction for failure to comply precisely with *Miranda*.<sup>82</sup> In that case, the Supreme Court ruled that the exact formulation of the warnings need not be recited, as long as the substance of the rights is adequately conveyed.<sup>83</sup>

The fifth amendment rights under *Miranda* may of course be waived, but "a heavy burden" is placed on the prosecution to establish waiver.<sup>84</sup> Waiver need not be explicit, nor is a finding of waiver precluded by the fact that the accused is already represented by counsel. In *Stone v. State*<sup>85</sup> defendant surrendered in the presence of his lawyer, who obtained an agreement from the chief deputy sheriff that there would be no interrogation in the lawyer's absence. Several hours after his arrest, Stone was removed from his cell and taken to a wooded area where authorities were searching for the body of an alleged murder victim.<sup>86</sup> The district attorney was present, but was not told of the agreement that the defendant not be interrogated in the absence of his lawyer. The prosecutor again advised the defendant of his rights and inquired whether he wished to waive them. Without expressly waiving his rights or relinquishing reliance on the

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77. 101 S. Ct. 1866, 1870-71, 68 L. Ed. 2d 359, 366 (1981); see TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1982).

78. 101 S. Ct. at 1873-74, 68 L. Ed. 2d at 370.

79. See *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

80. 101 S. Ct. at 1877 n.14, 68 L. Ed. 2d at 374 n.14; see *Estelle v. Smith*, 602 F.2d 694, 708 (5th Cir. 1979).

81. 101 S. Ct. at 1877, 68 L. Ed. 2d at 374.

82. *California v. Prysock*, 101 S. Ct. 2806, 2809, 69 L. Ed. 2d 696, 702 (1981). The Court noted that the *Miranda* opinion stated that its prescribed language or a functional equivalent would suffice to preserve fifth amendment protections.

83. 101 S. Ct. at 2810, 68 L. Ed. 2d at 100. The defendant had argued that the advice did not clearly include the right to have appointed counsel at the interrogation. 101 S. Ct. at 2809, 68 L. Ed. 2d at 702.

84. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). See also *North Carolina v. Butler*, 441 U.S. 369 (1979) (explicit waiver not required).

85. 612 S.W.2d 542, 546 (Tex. Crim. App. 1981).

86. Police had been denied the lawyer's permission to include the defendant in the search. *Id.* at 544.

agreement, the defendant nonetheless directed the searchers to the body.<sup>87</sup> The court of criminal appeals held that a valid waiver of the fifth amendment right to counsel had not been established.<sup>88</sup> Stone had invoked his right to counsel, subsequent interrogation took place, and no valid waiver was shown; therefore, the conviction was reversed.<sup>89</sup>

Which specific *Miranda* rights are invoked by the defendant significantly affects the finding of a waiver. If the suspect asserts the right to remain silent, he may again be questioned and give a valid waiver.<sup>90</sup> If the accused requests counsel, however, a later response to questioning alone will not establish a valid waiver.<sup>91</sup> Further, if a request for counsel is made, questioning must cease, and cannot be recommenced unless initiated by the accused.<sup>92</sup>

After an accused is advised of the rights under *Miranda* and invokes them, his silence cannot be used to impeach his testimony at trial.<sup>93</sup> Also, if an accused testifies at a pretrial hearing in order to assert a constitutional right, he cannot be held to have waived fifth amendment rights, nor may he be compelled to surrender one set of rights in order to assert another.<sup>94</sup> In *Franklin v. State* the en banc court of criminal appeals reversed a capital murder conviction because the prosecutor impeached the defendant with the defendant's failure to relate an exculpatory story at the pretrial hearing.<sup>95</sup> The court relied upon the law of evidence as well as constitutional principles, and upon Texas constitutional and statutory law, as well as the United States Constitution.<sup>96</sup> The court held that silence could impeach only if it occurred in a context in which the witness would have been expected to speak, and that a pretrial hearing for a limited purpose was not such a context.<sup>97</sup> The principle of *Simmons v. United States*<sup>98</sup> was also held to apply, and failure to testify beyond the proper scope of the pretrial hearing was considered an invocation of fifth amendment rights.<sup>99</sup> Fi-

87. *Id.*

88. *Id.* at 545; see *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980) (policies underlying fifth amendment protections different from sixth amendment right to counsel). In *Castillo v. State*, 616 S.W.2d 620 (Tex. Crim. App. 1981), the defendant was arrested, and requested appointed counsel when advised of his rights by the magistrate. Nonetheless he was interrogated after his request. Although it was unclear whether the request for counsel was for trial or interrogation, the court found that, at best, silence was the only response to the question of waiver. Silence, the court held, was not enough. *Id.* at 622.

89. The *Stone* court rejected the argument that the error was harmless. 612 S.W.2d at 547-48. See also *Germany v. Estelle*, 639 F.2d 1301, 1302-03 (5th Cir. 1981).

90. *Michigan v. Moseley*, 423 U.S. 96, 104 (1975).

91. *Edwards v. Arizona*, 101 S. Ct. 1880, 1884, 68 L. Ed. 2d 378, 386 (1981).

92. 101 S. Ct. at 1885, 68 L. Ed. 2d at 386.

93. See, e.g., *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *Cuellar v. State*, 613 S.W.2d 494, 495 (Tex. Crim. App. 1981).

94. *Simmons v. United States*, 390 U.S. 377 (1968).

95. 606 S.W.2d 818, 832 (Tex. Crim. App. 1979).

96. *Id.* at 835, 848-50; see TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1979).

97. 606 S.W.2d at 848-49. See also *id.* at 835 (Phillips, J., dissenting from panel opinion, adopted by reference by the en banc majority).

98. 390 U.S. 377 (1968).

99. 606 S.W.2d at 849; see *id.* at 836 (Phillips, J., dissenting from panel opinion).

nally, the court found the *Doyle v. Ohio*<sup>100</sup> opinion persuasive even though *Doyle* had expressly reserved the question of impeachment by silence at a pretrial hearing.<sup>101</sup> The court of criminal appeals noted that, unlike *Doyle*, fifth amendment rights clearly were exercised in *Franklin*.<sup>102</sup>

An accused may be impeached by silence or failure to mention exculpatory facts, if such a failure occurs before arrest and advice of rights.<sup>103</sup> He may also be impeached by statements made after he has been advised of his rights that do not include the later added exculpation.<sup>104</sup> When a defendant chooses to speak, no reliance may be placed on the right to remain silent, nor is his silence "insolubly ambiguous."<sup>105</sup> If the defendant is not faced with a tension between constitutional rights, he can be expected to speak, and if he does not, his silence is probative, and admissible.<sup>106</sup>

#### IV. IDENTIFICATION

Two federal constitutional provisions impose restrictions upon identification procedures: the due process clause of the fourteenth amendment and the sixth amendment right to counsel.<sup>107</sup> The due process clause requires that an identification be reliable, and reliability depends in part upon the suggestiveness of the identification procedure.<sup>108</sup> The Fifth Circuit has established a two-part inquiry for testing identification procedures; first, whether the procedure was unnecessarily suggestive, and second, whether the identification was reliable.<sup>109</sup> Reliability depends upon several factors, including the witness's opportunity to observe the criminal, the witness's degree of attention, the accuracy of prior descriptions, the level of the witness's certainty, and the time lapse between the offense and the identification.<sup>110</sup>

A defendant has no constitutional right to demand a corporeal lineup rather than a photographic array, even though the former is considered to be more reliable.<sup>111</sup> A post-indictment photographic display may be conducted in the absence of defense counsel, in part because the array can be

100. 426 U.S. 610 (1976).

101. *Id.* at 616 n.6.

102. 606 S.W.2d at 849. The court also noted that this form of impeachment infringed upon the accused's exercise of fifth amendment rights. *Id.*; see *Griffin v. California*, 380 U.S. 609, 615 (1965).

103. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

104. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). See also *Ayers v. State*, 606 S.W.2d 936 (Tex. Crim. App. 1980).

105. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976).

106. *Williams v. State*, 607 S.W.2d 577, 579 (Tex. Crim. App. 1980).

107. See *Kirby v. Illinois*, 406 U.S. 682, 690-91 (1972) (sixth); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (fourteenth); *Gilbert v. California*, 388 U.S. 263, 272 (1967) (sixth); *United States v. Wade*, 388 U.S. 218, 239-40 (1967) (sixth).

108. See *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

109. *McGee v. Estelle*, 632 F.2d 476, 477 (5th Cir. 1980).

110. *Preacher v. Estelle*, 626 F.2d 1222, 1224 (5th Cir. 1980). See also *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

111. *Branch v. Estelle*, 631 F.2d 1229, 1234 (5th Cir. 1980).

preserved and its fairness reviewed by the court.<sup>112</sup> When the police fail to preserve the array, "there shall exist a presumption that the array is impermissibly suggestive."<sup>113</sup> Despite its suggestivity, an out-of-court identification may still be reliable, and evidence of it admissible.<sup>114</sup> An in-court identification may be permissible if it has a source independent of the illegal identification procedure.<sup>115</sup>

No federal constitutional requirement mandates that an evidentiary hearing on identification testimony be conducted outside the presence of the jury.<sup>116</sup> Since admissibility is dependent upon reliability, cross-examination can test it and effectively preserve the defendant's rights.<sup>117</sup> Excluding the jury during the determination of the admissibility of identification evidence is a prudent practice, and Texas has followed this practice for over a decade.<sup>118</sup>

## V. RIGHT TO COUNSEL

The right to be represented by counsel includes the right to the effective assistance of counsel, whether counsel is appointed or retained.<sup>119</sup> The assistance provided must be "reasonably effective" in order to comply with the sixth and fourteenth amendments of the federal constitution<sup>120</sup> and with the Texas Constitution.<sup>121</sup> Counsel must make an independent investigation of the facts of the case, including seeking and interviewing potential witnesses.<sup>122</sup> The lawyer should present all available evidence and arguments in defending his client.<sup>123</sup> In *Ex parte Duffy*<sup>124</sup> the counsel conferred with his client only twice in more than three months, failed to interview potential defense or state witnesses, failed to present an available insanity defense, did not adequately prepare the defendant to testify, and introduced damning evidence at the penalty hearing.<sup>125</sup> The court, in a thorough and thoughtful opinion, had little difficulty in invalidating the conviction.<sup>126</sup>

When counsel undertakes joint representation of more than one defend-

112. *United States v. Ash*, 413 U.S. 300, 317-21 (1973).

113. *Branch v. Estelle*, 631 F.2d 1229, 1234 (5th Cir. 1980).

114. *Manson v. Braithwaite*, 432 U.S. 98, 116-17 (1977).

115. *Branch v. Estelle*, 631 F.2d 1229, 1235 (5th Cir. 1980). *See also* *Gilbert v. California*, 388 U.S. 263, 272 (1967).

116. *Watkins v. Sowders*, 449 U.S. 341, 348-49 (1981).

117. *Id.* at 349.

118. *Martinez v. State*, 437 S.W.2d 842, 848 (Tex. Crim. App. 1969) (recommending hearing outside of presence of jury). *See also* *Britton v. State*, 611 S.W.2d 421, 422 (Tex. Crim. App. 1980) (hearing outside jury's presence).

119. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Powell v. Alabama*, 287 U.S. 45 (1932); *Jones v. Estelle*, 632 F.2d 490 (5th Cir. 1980). *See also* *Hurley v. State*, 606 S.W.2d 887 (Tex. Crim. App. 1980).

120. *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978).

121. TEX. CONST. art. I, § 10.

122. *Ex parte Duffy*, 607 S.W.2d 507, 516-18 (Tex. Crim. App. 1980).

123. *Id.* at 518. *See also* *Thomas v. State*, 550 S.W.2d 64 (Tex. Crim. App. 1977).

124. 607 S.W.2d 507 (Tex. Crim. App. 1980).

125. *Id.* at 516-25. Counsel apparently had solicited the representation. *Id.* at 510, 525.

126. *Id.* at 527.

ant, counsel has the responsibility to advise clients of possible conflicts of interest.<sup>127</sup> A conflict of interest requiring reversal often will exist if one defendant stands to gain from arguments or evidence that damage another.<sup>128</sup> The right to effective assistance of counsel also is implicated when the lawyer discovers that the client intends to perjure himself. In *Maddox v. State* the court affirmed a conviction in which defense counsel, fearing the defendant intended to commit perjury, withdrew from representation with respect to the testimony.<sup>129</sup> The use of hybrid representation, which is permissible but not constitutionally required, is one possible solution to this thorny problem.<sup>130</sup>

A defendant electing to represent himself must be permitted to do so.<sup>131</sup> Self-representation is not equivalent to waiver of the right to counsel, which must be knowing and voluntary in order to be valid.<sup>132</sup> The court of criminal appeals recently affirmed the conviction and jail sentence of a 76-year old defendant with a fifth-grade education and impaired vision, holding that a voluntary waiver appeared from the record.<sup>133</sup> The court overruled *Lisney v. State*,<sup>134</sup> which required a warning of the dangers of self-representation.<sup>135</sup> Holding that a waiver of representation resulted from the defendant's guilty plea rather than from self-representation, the court affirmed the conviction for unlawful possession of intoxicating liquors in a dry county.<sup>136</sup>

## VI. CHARGING INSTRUMENTS

As usual, many decisions during this survey period invalidated convictions because the indictments were defective.<sup>137</sup> Competent drafting requires careful reading of the Texas Code of Criminal Procedure<sup>138</sup> and of the Texas Penal Code,<sup>139</sup> and sometimes more.<sup>140</sup> An indictment must set

127. State Bar of Texas, Rules and Code of Professional Responsibility DR 5-105, TEX. REV. CIV. STAT. ANN. tit. 14 app. (Vernon Supp. 1982). A conflict of interest also may arise if an attorney defends in a case, and later prosecutes in a probation revocation. *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981).

128. *See Gonzales v. State*, 605 S.W.2d 278, 280-82 (Tex. Crim. App. 1980). *See also Ex parte Parham*, 611 S.W.2d 103, 105 (Tex. Crim. App. 1981).

129. 613 S.W.2d 275, 277 (Tex. Crim. App. 1981).

130. *Id.* at 286 (opinion on rehearing); *id.* at 287 (Teague, J., concurring). *See also Phillips v. State*, 604 S.W.2d 904, 907-08 (Tex. Crim. App. 1980) (if "full representation" by counsel is coupled with partial self-representation, detailed advice of dangers of the latter not required).

131. *Faretta v. California*, 442 U.S. 806, 819-20 (1975).

132. *Johnson v. State*, 614 S.W.2d 116 (Tex. Crim. App. 1981).

133. *Id.* at 122.

134. 574 S.W.2d 144 (Tex. Crim. App. 1978).

135. 614 S.W.2d at 121.

136. *Id.* at 119-20.

137. *See Steele, Criminal Procedure, Annual Survey of Texas Law*, 35 Sw. L.J. 527, 537 (1981).

138. TEX. CODE CRIM. PROC. ANN. art. 21.02 (Vernon 1966).

139. *See* TEX. PENAL CODE ANN. § 1.07(a)(13) (Vernon 1974).

140. *See Moore v. State*, 605 S.W.2d 24 (Tex. Crim. App. 1980). In *Moore*, a prosecution for aggravated sexual abuse, the indictment failed to include an allegation that the threatened harm was imminent. The court relied, *inter alia*, on the practice commentary to

forth the offense, including all of its essential elements.<sup>141</sup> When a criminal omission is charged, the elements alleged must include a legal duty,<sup>142</sup> and valid custody must be alleged when an escape is charged.<sup>143</sup>

Most of the indictments that contaminated convictions, however, failed to allege a culpable mental state.<sup>144</sup> If an indictment contains an allegation that property was taken with intent to deprive the owner of it, no further allegation that the property was taken intentionally or knowingly is necessary.<sup>145</sup> Inexcusably, indictments and informations continue to be drafted that fail to conclude with the words, "[a]gainst the peace and dignity of the State."<sup>146</sup> Informations are also fundamentally defective if they fail to allege the date of the offense.<sup>147</sup>

The allegations in an indictment also must meet standards of specificity and accuracy. In *Compton v. State*<sup>148</sup> the court, en banc, construed the term "ownership" in reviewing an indictment for theft over \$10,000.<sup>149</sup> The majority approved the practice of identifying a natural person as the owner of property alleged to be stolen from a corporation,<sup>150</sup> and held that "ownership" includes a greater right to possession than that of the defendant's.<sup>151</sup>

another section of the Penal Code. *Id.* at 925. See also *Ex parte Holbrook*, 609 S.W.2d 541, 543-44 (Tex. Crim. App. 1980) (allegation of statutory language coupled with averment of means is sufficient).

141. See TEX. PENAL CODE ANN. § 1.07(a)(13) (Vernon 1974) (element includes conduct, culpability, result, and the negation of any exception); see also *Ex parte Pruitt*, 610 S.W.2d 782, 783 (Tex. Crim. App. 1981) (Clinton, J., concurring).

142. *Smith v. State*, 603 S.W.2d 846, 847 (Tex. Crim. App. 1980).

143. *Ex parte Walling*, 605 S.W.2d 621, 622 (Tex. Crim. App. 1980). See also *Ex Parte Childress*, 606 S.W.2d 926, 927 (Tex. Crim. App. 1980) (unlawful control over property; must allege absence of owner's effective consent).

144. See, e.g., *Ex parte Luddington*, 614 S.W.2d 427, 428 (Tex. Crim. App. 1981) (robbery; must allege intent to appropriate); *Ex parte Lightfoot*, 612 S.W.2d 935, 936 (Tex. Crim. App. 1981) (entry of a building; must allege intent to commit felony or theft within); *Ex parte Perez*, 612 S.W.2d 612, 613 (Tex. Crim. App. 1981) (aggravated rape; must allege culpable mental state); *Ex parte Pruitt*, 610 S.W.2d 782, 783 (Tex. Crim. App. 1981) (aggravated kidnapping; must allege intent to prevent liberation); *Ex parte Pullin*, 608 S.W.2d 935, 936 (Tex. Crim. App. 1980) (tampering with witness; must allege intent to influence witness); *Ex parte Holbrook*, 606 S.W.2d 925, 926 (Tex. Crim. App. 1980) (unlawful possession of forged driver's license; must allege intent to use); *Ex parte Santellana*, 606 S.W.2d 331, 331-32 (Tex. Crim. App. 1980) (aggravated robbery; must allege intentional or knowing force or threat). See also *id.* at 334 (Douglas, J., dissenting) (calling for legislation to prevent relief when the offense is "properly identified"); *Koah v. State*, 604 S.W.2d 156, 160 n.1 (Tex. Crim. App. 1980) (distinction between knowing and intentional is between reasonably certain result will occur and desiring result).

145. *Minx v. State*, 615 S.W.2d 748, 750 (Tex. Crim. App. 1981).

146. *Ex parte Warnell*, 606 S.W.2d 923 (Tex. Crim. App. 1980). See TEX. CONST. art. V, § 12; TEX. CODE CRIM. PROC. ANN. arts. 21.02(8), 21.21(8) (Vernon 1966); Steele, *supra* note 137, at 537 n.107.

147. *Ex parte Hyett*, 610 S.W.2d 787, 789 (Tex. Crim. App. 1981) (indictment must give day, month, and year of commission of offense).

148. 607 S.W.2d 246 (Tex. Crim. App. 1980).

149. *Id.* at 249; see TEX. PENAL CODE ANN. § 1.07(a)(24) (Vernon 1974). Compton was convicted of cashing a check that had been mistakenly drawn for \$400,000 more than the intended amount. 607 S.W.2d at 248.

150. 607 S.W.2d at 250. See *Eaton v. State*, 533 S.W.2d 33, 34-35 (Tex. Crim. App. 1976).

151. 607 S.W.2d at 250-51, *overruling McGee v. State*, 572 S.W.2d 723 (Tex. Crim. App.

The manner of alleging violations of the narcotics laws has presented several problems during the survey period. Before the 1979 amendments to the Controlled Substances Act,<sup>152</sup> for example, the drafter was required to allege why cocaine was a controlled substance.<sup>153</sup> Indictments after August 27, 1979, need only mention cocaine;<sup>154</sup> however, indictments before the effective date of the Act were not revitalized by the amendment.<sup>155</sup> Similarly, an indictment for a dangerous drug offense, if a substance is not listed as a dangerous drug, must allege that the drug is one that bears a specific warning about legal restrictions.<sup>156</sup> An indictment for felony possession of marijuana with intent to deliver must allege either that the delivery,<sup>157</sup> if any, was for remuneration or the amount of the remuneration.<sup>158</sup>

When an indictment alleges prior convictions for the purpose of enhancing punishment, it need not meet the same requirements of particularity as one charging an original offense.<sup>159</sup> If the accused has notice of the prior conviction relied upon by the state, minor inaccuracies will not taint the sentence.<sup>160</sup> If a motion to quash an indictment is raised in the trial court, the indictment will be reviewed more strictly than if it is challenged for the first time on appeal.<sup>161</sup> In the latter instance, an indictment will be invalidated only if it is so fundamentally defective as to state no offense at all.<sup>162</sup>

An indictment, even if correctly drafted, is invalid if it is handed up by a grand jury that does not represent fully all segments of the community.<sup>163</sup> In *Espinoza v. State*<sup>164</sup> the defendant unsuccessfully challenged the composition of the grand jury. The court held that, although he had adduced evidence about previous grand juries, he had not shown that the composi-

1978). See also *Johnson v. State*, 606 S.W.2d 894, 896 (Tex. Crim. App. 1980), *overruling* *Commons v. State*, 575 S.W.2d 518 (Tex. Crim. App. 1979).

152. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon Supp. 1982).

153. *Id.*; see *Crowl v. State*, 611 S.W.2d 59, 60-61 (Tex. Crim. App. 1981) (cocaine). See also *Ex parte Tipton*, 617 S.W.2d 262, 263 (Tex. Crim. App. 1981) (hashish); *Ex parte Holbrook*, 609 S.W.2d 541, 544-45 (Tex. Crim. App. 1980) (Preludin).

154. See *Turnipseed v. State*, 609 S.W.2d 798, 799 (Tex. Crim. App. 1980).

155. See *Ex parte Perez*, 618 S.W.2d 770, 771 (Tex. Crim. App. 1981).

156. TEX. REV. CIV. STAT. ANN. art. 4476—14(a)(2) (Vernon Supp. 1982). See *Parrish v. State*, 614 S.W.2d 161, 162 (Tex. Crim. App. 1981).

157. See TEX. REV. CIV. STAT. ANN. art. 4476—15, § 4.05 (Vernon Supp. 1982).

158. See *Tovar v. State*, 612 S.W.2d 616, 618 (Tex. Crim. App. 1981).

159. *Cole v. State*, 611 S.W.2d 79, 82 (Tex. Crim. App. 1981) (variance in the cause number not fatal). See also *Hall v. State*, 619 S.W.2d 156, 157 (Tex. Crim. App. 1980) (opinion on rehearing) (indictment alleged previous conviction "upon an indictment," while it had been upon information only), *overruling* *Boone v. State*, 450 S.W.2d 614 (Tex. Crim. App. 1970), and *Melancon v. State*, 367 S.W.2d 690 (Tex. Crim. App. 1963).

160. *Cole v. State*, 611 S.W.2d 79, 82 (Tex. Crim. App. 1981), *overruling* *Colvin v. State*, 357 S.W.2d 390 (Tex. Crim. App. 1962), and *Green v. State*, 153 Tex. Crim. 273, 219 S.W.2d 687 (1949).

161. Compare *Ellis v. State*, 613 S.W.2d 741 (Tex. Crim. App. 1981) (motion to quash made at trial) with *Griffin v. State*, 606 S.W.2d 901 (Tex. Crim. App. 1980) (motion to quash not filed at trial).

162. *Franklin v. State*, 607 S.W.2d 574, 576 (Tex. Crim. App. 1980); *American Plant Food Corp. v. State*, 508 S.W.2d 598 (Tex. Crim. App. 1974), *appeal dismissed*, 419 U.S. 1098 (1975).

163. *Hernandez v. Texas*, 347 U.S. 475 (1954).

164. 604 S.W.2d 908 (Tex. Crim. App. 1980).

tion of the grand jury that indicted him was improper.<sup>165</sup>

## VII. MISCELLANEOUS PRETRIAL ISSUES<sup>166</sup>

### A. Discovery

Material exculpatory evidence in the possession of the prosecution<sup>167</sup> must be revealed to the defense upon request.<sup>168</sup> In *Iness v. State* a divided court of criminal appeals rejected a challenge to a rape conviction.<sup>169</sup> The victim was brain damaged and some uncertainty arguably existed about the nature of the assault upon her. The majority held that the information was either known by or accessible to defense counsel, and further that it was neither exculpatory, material, nor admissible.<sup>170</sup> One dissenter noted that the defense had made a request, the evidence would have been favorable, and that the issue was crucial to the conviction.<sup>171</sup> A second dissent observed that the requested report would have been of assistance in the cross-examination of the prosecuting witness.<sup>172</sup>

### B. Bail

All prisoners are entitled to bail except those charged with a capital offense "when the proof is evident."<sup>173</sup> The state must establish that the evidence is clear and strong, that the accused is the guilty party, and that the jury would return findings requiring a death sentence.<sup>174</sup> When bail is set, its primary purpose is to secure the defendant's appearance at trial.<sup>175</sup> The ability of the defendant to make bail is not the sole criterion in setting the

165. *Id.* at 909-10. *But see id.* at 910-14 (Clinton, J., dissenting) (state did not overcome appellant's prima facie showing of discrimination).

166. Several recent legislative changes in this area are worthy of brief note. TEX. CODE CRIM. PROC. ANN. art. 13.04 (Vernon Supp. 1982) was amended to permit the prosecution of offenses committed at any jointly operated airport situated in two counties in either of the counties. The legislature also established priorities for the trials of cases, thus affecting, without amending, the Speedy Trial Act. *Id.* art. 32A.01. Hearings on temporary injunctions take precedence over criminal cases. TEX. REV. CIV. STAT. ANN. art. 2168a, § 1(a) (Vernon Supp. 1982). The requirement that rape cases take precedence in all cases has been repealed. TEX. CODE CRIM. PROC. ANN. art. 13.15 (Vernon Supp. 1982). A defendant need no longer personally swear to a motion for continuance; any person with personal knowledge of the underlying facts may do so. *Id.* art. 29.08.

167. *See* *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980).

168. *Brady v. Maryland*, 373 U.S. 83 (1963) (failure to disclose co-defendant's statement that co-defendant strangled victim). *See also* *United States v. Agurs*, 427 U.S. 97 (1976) (due process violated by failure to disclose evidence of substantial value to defense).

169. 606 S.W.2d 306, 315 (Tex. Crim. App. 1980).

170. *Id.* at 308. The suppressed evidence must meet all three criteria before reversal is appropriate. *Id.*

171. *Id.* at 318-19 (Davis, J., dissenting).

172. *Id.* at 324 (Clinton, J., dissenting). Unlike Judge Davis, Judge Clinton did not consider significant the questions indicating that the jury had particular difficulty with the cross-examination of the victim. *Id.* at 324.

173. TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 1.07 (Vernon 1977).

174. *Ex parte Alexander*, 608 S.W.2d 928, 930 (Tex. Crim. App. 1980). The burden is on the state to meet this test. *Id.*

175. *Ex parte Vance*, 608 S.W.2d 681, 683 (Tex. Crim. App. 1980). Bail should not be so high as to be oppressive. *Id.*



amount; also to be considered are his criminal record, the nature of the offense, and his community ties.<sup>176</sup> While bail may be increased if a change in circumstances occurs, a continuance alone is not sufficient grounds to order an increase.<sup>177</sup>

Bail pending a motion for new trial or an appeal is subject to more restrictions than pretrial bail.<sup>178</sup> In *Mayo v. State* the court vacated an order increasing bail from \$5,000 cash to \$10,000 when the defendant had been unable to make the pretrial bond.<sup>179</sup> The court reviewed the punishment assessed (the maximum of ten years) and the accused's financial situation<sup>180</sup> and concluded that the state had not met its burden of showing that the original amount was insufficient to protect its "ambiguous interests."<sup>181</sup> At the same time, the court refused to reduce the original bail in the absence of formal motion or proof.<sup>182</sup>

### C. Former Jeopardy

No area of criminal procedure has become more complex or received more attention from the United States Supreme Court in the past several years than the double jeopardy clause of the fifth amendment.<sup>183</sup> This attention has caused major adjustments in state criminal procedure.<sup>184</sup> Jeopardy attaches in a jury trial when the jury is sworn.<sup>185</sup> The court of criminal appeals has held that the federal rule of attachment is fully retroactive, and that double jeopardy principles prohibit re prosecution even if the conviction became final before the rule was explicitly applied to the states.<sup>186</sup>

After jeopardy has attached, no new trial may be held if the first trial is aborted, unless the defendant consents or the first trial is terminated for "manifest necessity."<sup>187</sup> Consent to a mistrial is not established by a mo-

176. *Id.* (reduced \$100,000 bail on each of two indictments to \$10,000 each).

177. *Ex parte King*, 613 S.W.2d 503, 504 (Tex. Crim. App. 1981) (continuance mandatory since defense counsel was member of legislature).

178. See TEX. CODE CRIM. PROC. ANN. art. 44.04(b)-(e) (Vernon Supp. 1982). Article 44.04 was amended by two separate acts of the 67th Legislature. Chapter 268 requires revocation of bail when the defendant is convicted a second time for offenses violating the Controlled Substances Act. *Id.* art. 44.04(b). Chapter 291 adds the motion for new trial to the section. *Id.* art. 44.04(c).

179. 611 S.W.2d 442, 445 (Tex. Crim. App. 1981).

180. *Id.* at 444. Ability of the accused to make bail is a factor to be considered but is not controlling. Punishment assessed is one of the most important factors. *Id.*

181. *Id.* The interests asserted by the state were the "interests of society" and assurance that "justice will be met." *Id.* at 443.

182. *Id.* at 444-45. Appellant did not formally move to lower the original bail set by the trial court. *Id.*

183. U.S. CONST. amend. V.

184. The clause applies to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1968).

185. *Crist v. Bretz*, 437 U.S. 28, 35 (1978).

186. *Ex parte Myers*, 618 S.W.2d 365, 369 (Tex. Crim. App. 1981). See *Illinois v. Somerville*, 410 U.S. 458 (1973).

187. *Ex parte Myers*, 618 S.W.2d 365, 369 (Tex. Crim. App. 1981).

tion for a mistrial made later in the case for a different reason<sup>188</sup> nor is it implied solely by a failure to object to the court's ruling.<sup>189</sup> A judge's declaration of a mistrial must be supported by the circumstances.<sup>190</sup> When a jury is deadlocked, a mistrial may be declared with the consent of the parties, or when the court determines that the likelihood that the jury will reach a verdict is "altogether improbable."<sup>191</sup> The consent required is the personal consent of the defendant, not that of his lawyer,<sup>192</sup> however, personal consent is not required when defense counsel requests the discharge.<sup>193</sup>

The double jeopardy provision generally prohibits appeal by the prosecution after an acquittal, but prosecution appeals may be permitted on a question of law.<sup>194</sup> If a state criminal proceeding is removed to federal court,<sup>195</sup> the state's appellate rights are defined by state law.<sup>196</sup> Retrial after a successful defense appeal or motion for new trial is not barred unless relief was granted because of insufficiency of the evidence.<sup>197</sup>

### VIII. PLEAS OF GUILTY

Article 44.02 of the Code of Criminal Procedure permits a defendant who has been convicted on a plea of guilty, on the basis of a plea bargain accepted by the court, to appeal only on matters raised by written pretrial motion or with permission of the trial court.<sup>198</sup> The focus of several opinions during the survey period was upon the relationship between article

188. *Torres v. State*, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981) (basis for mistrial was not appellant's prior motion for mistrial).

189. *Id.* at 441-42. Before defendant's failure to object to mistrial may be construed as consent, he must be given adequate opportunity to object to the court's motion. *Id.*

190. *Id.* at 442-43.

191. TEX. CODE CRIM. PROC. ANN. art. 36.31 (Vernon Supp. 1982).

192. *Hipple v. State*, 80 Tex. Crim. 531, 537, 191 S.W.1150, 1153 (1917).

193. *Bowles v. State*, 606 S.W.2d 875, 876 (Tex. Crim. App. 1980).

194. *See United States v. Scott*, 437 U.S. 82, 93 (1978). *See also* TEX. CODE CRIM. PROC. ANN. art. 44.04(h) (Vernon Supp. 1982) (amendment permitting state to seek discretionary review in the court of criminal appeals); notes 298-300 *infra* and accompanying text; TEX. CONST. art. V, § 26. A state may permit prosecution to appeal the sentence, since the controlling concern is to protect against multiple trials. *United States v. DeFrancesco*, 449 U.S. 117 (1980). If the sentencing proceeding resembles a trial on guilt or innocence, where specific facts must be proven, however, an appeal may not be permitted. *Bullington v. Missouri*, 101 S. Ct. 1852, 1861, 68 L. Ed. 2d 270, 283 (1981).

195. 28 U.S.C. §§ 1442(a)(1), 1443 (1976).

196. *Arizona v. Manypenny*, 101 S. Ct. 1657, 1664, 68 L. Ed. 2d 58, 68 (1981). *See also* *Faulder v. Hill*, 612 S.W.2d 512, 515 (Tex. Crim. App. 1980) (state constitutional and statutory prohibition on state's right to appeal in criminal cases does not bar state petition for certiorari in United States Supreme Court); notes 288-97 *infra* and accompanying text.

197. *See Hudson v. Louisiana*, 450 U.S. 40 (1981); *Burks v. United States*, 437 U.S. 1, 16 (1978).

198. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979). The same provision applies after a plea of *nolo contendere*. *Id.* *See Brown v. State*, 617 S.W.2d 196 (Tex. Crim. App. 1981) (pre-trial motion to suppress preserved defendant's right to appeal). The accused must be advised of this restriction before pleading. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(3) (Vernon Supp. 1982). *See Prochaska v. State*, 587 S.W.2d 726 (Tex. Crim. App. 1979) (plea of guilty waived claimed deprivation of constitutional guarantees against unreasonable search and seizure).

44.02 and the Speedy Trial Act,<sup>199</sup> which provides that a plea of guilty waives the rights guaranteed by the Act. The court determined that a defendant's statutory rights to a speedy trial were waived by his plea, while his constitutional speedy trial rights were not.<sup>200</sup>

## IX. MISCELLANEOUS TRIAL ISSUES

### A. *Right to Transcripts*

When a first trial ends in a mistrial, an indigent defendant must be provided a transcript for a second trial, if it is needed for an effective defense.<sup>201</sup> A transcript of the testimony of the state's witnesses normally will suffice, unless a particular need for testimony of defense witnesses is shown.<sup>202</sup> The request for transcript must be timely.<sup>203</sup> A defendant does not bear the burden of showing a particularized need for the transcript, nor of showing that the alternatives are inadequate.<sup>204</sup> If the state decides to oppose the request, it bears the burden of proof to show lack of need.<sup>205</sup>

### B. *Jury Qualifications and Selection*

In federal court the trial judge has considerable discretion over the conduct of voir dire examination.<sup>206</sup> No *per se* rule exists requiring inquiry as to racial prejudice, unless racial issues are intimately involved in the trial.<sup>207</sup> Failure to permit inquiry is reversible error only when there is a "reasonable possibility that racial or ethnic prejudice might have influenced the jury."<sup>208</sup>

Although the court has discretion to control voir dire and to impose reasonable restrictions upon its conduct, that discretion is not unlimited.<sup>209</sup> A time limitation can be a reasonable restriction, but it cannot be unrealistic.<sup>210</sup> Time limits are impermissible, however, if no apparent effort was being made merely to prolong the process, and if the questions to be asked

199. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Supp. 1982).

200. *Wooten v. State*, 612 S.W.2d 561, 563 (Tex. Crim. App. 1981) (holding no plea conditioned on the right to appeal a Speedy Trial Act violation should be accepted); see *Flores v. State*, 606 S.W.2d 859 (Tex. Crim. App. 1981) (guilty plea waives statutory right to speedy trial unless right otherwise preserved).

201. *Britt v. North Carolina*, 404 U.S. 226, 230 (1971).

202. *Billie v. State*, 605 S.W.2d 558, 565 (Tex. Crim. App. 1980). This limitation on the right to a transcript has been questioned. See *Cook v. State*, 611 S.W.2d 83, 86 n.3 (Tex. Crim. App. 1981).

203. *Cook v. State*, 611 S.W.2d 83, 87 (Tex. Crim. App. 1981) (request at third continuance too late); *Billie v. State*, 605 S.W.2d 558, 561-62 (Tex. Crim. App. 1980) (ten days after mistrial and three months before second trial timely).

204. *Armour v. State*, 606 S.W.2d 891, 894 (Tex. Crim. App. 1980).

205. *Id.* at 894.

206. FED. R. CRIM. P. 24.

207. *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976) (rejecting *per se* rule); see *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (special circumstances required asking racial prejudice questions). See generally *Gaba, Voir Dire of Jurors: Constitutional Limits on the Right of Inquiry into Prejudice*, 48 COLO. L. REV. 525 (1977).

208. *Rosales-Lopez v. United States*, 101 S. Ct. 1629, 1636, 68 L. Ed. 2d 22, 30 (1981).

209. *Clark v. State*, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980).

210. *Id.* at 669.

were proper.<sup>211</sup> The amount of time necessary to conduct the voir dire examination depends upon the facts of each case.<sup>212</sup> If a time limitation precludes the asking of a proper question, thereby preventing the intelligent use of a peremptory challenge, the limitation cannot be harmless error.<sup>213</sup>

The problem of disqualifying jurors who express reservations about the death penalty continues to plague Texas courts.<sup>214</sup> A prospective juror who acknowledges having scruples against capital punishment and who even admits that his deliberation will be affected cannot be challenged for cause on that ground alone.<sup>215</sup> The court of criminal appeals has ruled that, in order to claim erroneous disqualification on appeal, a very specific objection must be made on that particular ground at the time of the challenge.<sup>216</sup> An objection based upon the statute that governs juror selection in capital cases will not preserve the error.<sup>217</sup>

When jurors have been disqualified erroneously because of expressed hesitations about the death penalty, the court of criminal appeals will reverse the conviction; it cannot simply reduce the sentence.<sup>218</sup> The error will not be held harmless even if the prosecution failed to exercise all of its peremptory challenges.<sup>219</sup> Of course jurors may be disqualified for cause if doubts about the death penalty would lead them to fail to follow the court's instructions or to violate the oath.<sup>220</sup>

### C. Prosecutorial Misconduct

An improper comment or argument by the prosecutor can be reversible

211. *Id.*

212. Compare *id.* (30-minute limit improper) with *Barrett v. State*, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974) (30-minute limit reasonable).

213. 608 S.W.2d at 670.

214. See *Steele*, *supra* note 137, at 544-45.

215. See *Durrrough v. State*, 620 S.W.2d 134, 142 (Tex. Crim. App. 1981). See also *Adams v. Texas*, 448 U.S. 38, 47-50 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 519-23 (1968); *Granviel v. State*, 655 F.2d 673, 677-78 (5th Cir. 1981).

216. *May v. State*, 618 S.W.2d 333, 349 (Tex. Crim. App. 1981) (error not preserved by objection under the statute); see TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974); *Crawford v. State*, 617 S.W.2d 925 (Tex. Crim. App. 1980) (opinion on rehearing). See also *Granviel v. State*, 655 F.2d 673, 678-79 (5th Cir. 1981).

217. See TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). Considerable question exists whether the *May* decision is consistent with *Adams v. Texas*, 448 U.S. 38 (1980). See *id.* at 48; *May v. State*, 618 S.W.2d 333, 349-50 (Tex. Crim. App. 1981) (Clinton, J., dissenting).

218. *Evans v. State*, 614 S.W.2d 414, 417-18 (Tex. Crim. App. 1980). See also *Grijalva v. State*, 614 S.W.2d 420, 425 (Tex. Crim. App. 1980); *Loudres v. State*, 614 S.W.2d 407, 409 (Tex. Crim. App. 1980); *Pierson v. State*, 614 S.W.2d 102, 107 (Tex. Crim. App. 1980).

The *Evans* court based its holding on TEX. CODE CRIM. PROC. ANN. art. 44.24(b) (Vernon Supp. 1982) empowering the court of criminal appeals to make various decisions. 614 S.W.2d at 417. The 1981 amendments to the Texas Code of Criminal Procedure may grant the court the authority to reduce the sentence without reversing the conviction. See TEX. CODE CRIM. PROC. ANN. art. 44.24(b) (Vernon Supp. 1982). (amendment added "or may enter any other appropriate order" to the options granted the appellate courts).

219. *Grijalva v. State*, 614 S.W.2d 420, 423-25 (Tex. Crim. App. 1980).

220. *Ex parte Chambers*, 612 S.W.2d 572 (Tex. Crim. App. 1981); see *Adams v. Texas*, 448 U.S. 38, 44 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

error. In *Hawkins v. State*<sup>221</sup> the defendant had been found competent to stand trial, and after proper advice from the court, elected to represent himself.<sup>222</sup> The jury was selected carefully and instructed not to consider the self-representation in any way.<sup>223</sup> When Hawkins objected during the testimony of a rebuttal witness who was a psychiatrist, the prosecutor asked the witness to evaluate the mental state of the defendant, and the witness did so over defendant's objection. The court held that "it is error of constitutional dimension for the prosecutor or a witness to comment adversely concerning the mental attitude of the accused" who is exercising the right of self-representation.<sup>224</sup>

If a prosecutor uses or refers to inadmissible evidence, reversible error will be found only if there was a timely objection. In *Johnson v. State*<sup>225</sup> no defense objection was made to testimony about a pistol nor to identifying and displaying it to the jury. The pistol was later ruled inadmissible, yet the prosecutor continued to refer to it and display it. The court held that the objection and request for a mistrial was made too late.<sup>226</sup>

Comment on a defendant's failure to testify is prosecutorial misconduct and a violation of the right against self-incrimination.<sup>227</sup> Such a comment, however, must have been "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify."<sup>228</sup>

A good faith basis is a prerequisite to impeachment by prior convictions.<sup>229</sup> Bad faith, concerning witness impeachment, has been defined as actual knowledge that a conviction is not final.<sup>230</sup> When a prosecutor relied on an FBI report, he was held not to have such actual knowledge, even though informed by the defense that the conviction was dismissed, since he was free to disbelieve such assertions in the absence of documentary proof.<sup>231</sup>

#### D. Instructions

Frequently, a trial judge is required to give an instruction, if requested.

221. 613 S.W.2d 720 (Tex. Crim. App. 1981).

222. *Id.* at 724-25.

223. *Id.* at 725.

224. *Id.* at 729. The court went on to hold the error harmless beyond a reasonable doubt. *Id.* at 729-30. A prosecutor may also force a mistrial if he attempts to prejudice a defendant by impugning the integrity of his lawyer. *Bell v. State*, 614 S.W.2d 122, 123 (Tex. Crim. App. 1981) (prosecutor argued that defense lawyer's "duty is to see that his client gets off even if it means putting on witnesses who are lying"; held jury instruction insufficient; error to deny mistrial); see *Summers v. State*, 147 Tex. Crim. 519, 521, 182 S.W.2d 720, 722 (1944) ("striking at the appellant over the shoulders of his counsel" was held to be a denial of fair trial).

225. 604 S.W.2d 128 (Tex. Crim. App. 1980).

226. *Id.* at 131 (noting that the incident "reflects no credit on the prosecuting attorney").

227. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). See TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1977).

228. *Nickens v. State*, 604 S.W.2d 101, 104 (Tex. Crim. App. 1980).

229. *Van Sickle v. State*, 604 S.W.2d 93, 97 (Tex. Crim. App. 1980).

230. *Id.* at 97-98.

231. *Id.*

In *Carter v. Kentucky*<sup>232</sup> the Supreme Court held that the fifth and fourteenth amendments required the trial judge to honor a defense request to instruct the jury that no adverse inference could be drawn from the defendant's failure to testify.<sup>233</sup> The defendant also is entitled to an instruction on his theory of the case if it is supported by evidence from any source, regardless of whether the evidence is disputed or not credible.<sup>234</sup> This principle includes the right to an instruction on lesser included offenses.<sup>235</sup> The defense raised need not be explicitly recognized by statute. In *Garcia v. State*<sup>236</sup> the defendant testified that the killing was accidental. The court held that such testimony raised the issue of voluntariness,<sup>237</sup> and even though the requested instruction was couched in terms of accident rather than voluntariness, the court had erred in refusing it.<sup>238</sup>

An instruction must include all essential elements of the offense as alleged in the indictment.<sup>239</sup> A jury charge cannot omit an essential element of the offense. For example, in *Williams v. State*<sup>240</sup> the defendant was indicted for robbery by "placing" the victim in fear, while the jury was charged that they could convict if they found that he "threatened or placed" the victim in fear.<sup>241</sup> The deviation from the allegations in the indictment was held to be fundamental error.<sup>242</sup> Although the court of criminal appeals will reverse on unassigned error if such error is fundamental,<sup>243</sup> the prudent practice is to make a timely objection on the record to the charge.<sup>244</sup> In another case the court construed a statute to include

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232. 450 U.S. 288 (1981).

233. *Id.* at 302-03.

234. *See* *Horne v. State*, 607 S.W.2d 556, 557-58 (Tex. Crim. App. 1980) (self-defense raised by testimony of two witnesses); *Gavia v. State*, 488 S.W.2d 420, 421 (Tex. Crim. App. 1972). The accused's own testimony may be sufficient. *Jackson v. State*, 548 S.W.2d 685, 695-96 (Tex. Crim. App. 1977).

235. *Cf.* *Kuykendall v. State*, 609 S.W.2d 791 (Tex. Crim. App. 1980) (criminally negligent homicide lesser included offense of felony murder; defendant not entitled to a charge when issue not raised by the evidence). *See also* *Campbell v. State*, 614 S.W.2d 443, 445 (Tex. Crim. App. 1981).

236. 605 S.W.2d 565 (Tex. Crim. App. 1980).

237. *Id.* at 566; *see* TEX. PENAL CODE ANN. § 6.01(a) (Vernon 1974).

238. 605 S.W.2d at 566; *cf. id.* at 566-67 (Douglas, J., dissenting from denial of rehearing).

239. *See* *Deitch v. State*, 617 S.W.2d 695, 696 (Tex. Crim. App. 1981) (error to include lesser included offense of voluntary manslaughter on theory not alleged in indictment); *Johnson v. State*, 615 S.W.2d 753, 734 (Tex. Crim. App. 1981) (indictment for operating a vehicle while under the influence of a drug; instruction for being under the influence so as to be rendered incapable of safely driving). *See also* *Porter v. State*, 605 S.W.2d 553, 554 (Tex. Crim. App. 1979) (failure to include culpable mental state). In a strong dissent from the denial of a rehearing, Judge Douglas observed that the charge, taken as a whole, adequately covered the element. *Id.* at 554-58. *See* *Evans v. State*, 606 S.W.2d 880, 883 (Tex. Crim. App. 1980) (aggravated robbery charge must include "in the course of committing theft").

240. 612 S.W.2d 934 (Tex. Crim. App. 1981).

241. *Id.* at 935.

242. *Id.* *See also* *Mims v. State*, 612 S.W.2d 933, 934 (Tex. Crim. App. 1981); *Moore v. State*, 612 S.W.2d 932, 933 (Tex. Crim. App. 1981); *Infante v. State*, 612 S.W.2d 603 604-05 (Tex. Crim. App. 1981).

243. *See* *Cumbie v. State*, 578 S.W.2d 732, 733-35 (Tex. Crim. App. 1979).

244. *See* TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15 (Vernon 1982) (objection must

the element of knowledge so as to hold the statute constitutional.<sup>245</sup> The court reversed the conviction for failure to include that element in the charge.<sup>246</sup> The elements of an offense must be included in the instruction on each theory of conviction, both in the portion of the charge applying the law to the facts as well as in the abstract portion.<sup>247</sup>

When the prosecution's evidence of one of the elements of an offense is only circumstantial the court must include an instruction on circumstantial evidence.<sup>248</sup> The instruction is not necessary if direct evidence is presented or if "the proven facts are so closely related to the ultimate fact . . . so as to be the equivalent of direct evidence."<sup>249</sup> An instruction also must state correctly the applicable law. In *Rains v. State*<sup>250</sup> the court used a form instruction on self-defense that complied with the current penal code.<sup>251</sup> The offense, however, occurred before the effective date of that code, and it was, therefore, held to be error to charge on the basis of inapplicable law.<sup>252</sup>

### E. Jury Deliberations

When a jury, after retiring to deliberate, receives other evidence, a new trial must be granted.<sup>253</sup> In *Hunt v. State*<sup>254</sup> at the hearing on a motion for new trial a juror testified that another juror had asserted personal knowledge about the cause of death. Although other jurors could not remember the comment, the failure to remember was held not to controvert the first juror's testimony.<sup>255</sup> Since cause of death was an issue that presented a problem for some jurors, the court held that receipt of the "other evidence" was detrimental to the defendant, and ordered a new trial.<sup>256</sup>

## X. SENTENCING

In an appropriate case the court may defer further proceedings and

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be written, or dictated into the record before charge delivered, but need no longer be endorsed).

245. *Ferguson v. State*, 610 S.W.2d 468 (Tex. Crim. App. 1979); see TEX. PENAL CODE ANN. § 42.02 (Vernon 1974).

246. 610 S.W.2d at 471.

247. *Medrano v. State*, 612 S.W.2d 576, 577-78 (Tex. Crim. App. 1981) (criminal responsibility for failure to prevent offense by another only if legal duty to prevent commission). Failure to include the element in the application section must be preserved as error by objection. *Id.* at 578 n.2. It need not be so preserved if the instruction is erroneous, rather than merely incomplete. *Id.*

248. *Rodriguez v. State*, 617 S.W.2d 693, 695 (Tex. Crim. App. 1981).

249. *Id.*

250. 604 S.W.2d 118 (Tex. Crim. App. 1980).

251. *Id.* at 119; see TEX. PENAL CODE ANN. § 9.32 (Vernon 1974); P. McCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 96, 96-97 (1976).

252. 604 S.W.2d at 119.

253. TEX. CODE CRIM. PROC. ANN. art. 40.03(7) (Vernon 1977); *Trevino v. State*, 582 S.W.2d 111, 112 (Tex. Crim. App. 1979).

254. 603 S.W.2d 865 (Tex. Crim. App. 1980).

255. *Id.* at 868.

256. *Id.* at 868-69.

place the defendant on probation without an adjudication of guilt.<sup>257</sup> Since no judgment is entered, the deferral decision is not appealable.<sup>258</sup> The Texas Constitution prohibits the grant of probation before conviction, while the Code of Criminal Procedure permits it.<sup>259</sup> In *McNew v. State* the court of criminal appeals avoided the obvious conflict by holding that "probation" as defined in the statute was not equivalent to "probation" as defined in the constitution.<sup>260</sup> The 67th Legislature amended the probation statutes, and reorganized the Board of Pardons and Paroles.<sup>261</sup> One of the amendments permits a sentence be served so as to allow the defendant not only to work, but also to seek employment or to obtain medical or psychological treatment.<sup>262</sup>

The Texas parole statute has survived a constitutional challenge in federal court. In *Williams v. Briscoe* the Fifth Circuit held that the Texas system did not create an "expectancy of release,"<sup>263</sup> distinguishing it from the Nebraska provisions recently invalidated by the Supreme Court.<sup>264</sup> A constitutionally protected interest can be created only by statute or rule; it does not arise solely from past practice.<sup>265</sup>

Texas prison inmates brought a class action challenging the operation of Texas prisons in *Ruiz v. Estelle*.<sup>266</sup> Although the Texas prison case resembles prison cases brought in other states, the *Ruiz* case differs in that the defendant Texas Department of Corrections ("TDC") officials persisted in denying each allegation of unconstitutional prison practice. Consequently, in its opinion the federal district court cited detailed and extensive findings of fact to substantiate its conclusion that certain TDC operations violated the Constitution. The court in *Ruiz* found that overcrowding,<sup>267</sup> unsatis-

257. TEX. CODE CRIM. PROC. ANN. arts. 42.12, § 3d(a) & 42.13, § 3d(a) (Vernon Supp. 1982). The amendment permits the imposition of a fine as condition of probation. *Id.* art. 42.12, § 3d(a). Another amendment provides for community service restitution probation. *Id.* art. 42.12, § 6. Deferred adjudication is not authorized for certain violations of the Controlled Substances Act. *Id.* art. 42.12, § 3f(c).

258. *Richardson v. State*, 617 S.W.2d 267, 268 (Tex. Crim. App. 1981).

259. See TEX. CONST. art. IV, § 11-A; TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 2b, 3d(a) (Vernon Supp. 1982).

260. 608 S.W.2d 166, 172 (Tex. Crim. App. 1978). See *id.* at 174, 177 (opinion on rehearing).

261. TEX. CODE CRIM. PROC. ANN. arts. 42.12, § 2 & 42.13 (Vernon Supp. 1982).

262. *Id.* art. 42.03, § 5.

263. 641 F.2d 274, 276-77 (5th Cir. 1981); see TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 1979 & Supp. 1982).

264. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979).

265. *Connecticut Board of Pardons v. Dumschat*, 101 S. Ct. 2460, 2464, 69 L. Ed. 2d 158, 165-66 (1981).

266. 503 F. Supp. 1256 (S.D. Tex. 1980), *partial stay granted pending appeal*, 650 F.2d 555 (5th Cir. 1981).

267. 503 F. Supp. at 1277-88. The Supreme Court addressed the issue of prison overcrowding as manifested by double celling in *Rhodes v. Chapman*, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981). In *Rhodes* the Court held that double celling at the Southern Ohio Correctional Facility did not result in a failure to meet the prisoners' food, medical care, and sanitation needs, nor did it cause or increase prison violence. 101 S. Ct. at 2399, 69 L. Ed. 2d at 69-70. Thus, the Court found no violation of the eighth amendment prohibition against cruel and unusual punishment on the *Rhodes* facts. *Id.*



factory security practices and inmate supervision,<sup>268</sup> and substandard health care<sup>269</sup> in Texas prisons violated the eighth amendment prohibition against cruel and unusual punishment.<sup>270</sup> The court concluded that TDC operations violated the prisoners' fourteenth amendment right to adequate disciplinary hearing procedures under the due process clause.<sup>271</sup> Furthermore, the court found that the TDC restricted the inmates' access to the courts as guaranteed by the fourteenth amendment due process right and the first amendment right to petition for the redress of grievances.<sup>272</sup> Finally, the *Ruiz* court held that prison practices violated the inmates' state statutory rights to adequate fire safety, sanitation, work safety, and work hygiene conditions.<sup>273</sup> In shaping relief for the plaintiff class, the court ordered the development of a comprehensive prison remedial plan.<sup>274</sup> The court indicated that the plan should provide for the alleviation of the constitutional and statutory violations,<sup>275</sup> prescribe structural changes to prison facilities,<sup>276</sup> and mandate organizational changes in the prison system.<sup>277</sup> To ensure the successful implementation of the remedial plan and the enforcement of present and future injunctive relief, the court provided for the appointment of one or more special masters.<sup>278</sup>

#### XI. APPEAL AND POST-CONVICTION RELIEF<sup>279</sup>

An appeal may be taken for any assigned error, and for unassigned error

268. 503 F. Supp. at 1288-1307.

269. *Id.* at 1307-46.

270. U.S. CONST. amend. VIII. The cruel and unusual punishment clause of the eighth amendment was made applicable to the states through the fourteenth amendment in *Robinson v. California*, 370 U.S. 660, 664-66 (1962).

271. 503 F. Supp. at 1346-58. The due process clause provides that no state shall "deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1. See *Hughes v. Rouse*, 449 U.S. 5 (1980) (prisoner's complaint that his due process right had been violated by his placement in segregation without prior disciplinary hearing should not have been dismissed).

272. 503 F. Supp. at 1367-73. The first amendment provides against congressional interference in the right "to petition the government for a redress of grievances." U.S. CONST. amend. I. This portion of the first amendment was made applicable to the states in *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 513 (1939).

273. 503 F. Supp. at 1373-83. The court also found that the TDC's failure to provide adequate fire safety programs violated the inmates' eighth amendment rights. *Id.* at 1382-83.

274. *Id.* at 1390.

275. *Id.* at 1387.

276. *Id.* at 1388-89.

277. *Id.* at 1387-89.

278. *Id.* at 1389-90.

279. Counsel should note carefully the legislation that conferred jurisdiction over criminal appeals to the fourteen courts of appeals, and amended, *inter alia*, the appellate procedure sections of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. arts. 4.01, .03 (Vernon Supp. 1982). See also Texas Rules of Criminal Appeals following TEX. CODE CRIM. PROC. ANN. art. 44.33 (Vernon Supp. 1982).

One interim measure is worthy of particular comment. Formerly, extensions of time for the filing of transcripts, bills of exception and briefs were granted by the court of criminal appeals or a judge thereof. Tex. Code Crim. Proc. Ann. art. 40.09(16) (Vernon 1977) (repealed). On May 14, 1981, effective that date, the legislature amended the provision to allow the trial court the power to grant extensions. 1981 Tex. Gen. Laws, ch. 144, § 1, at 361.

if such appeal is "in the interest of justice."<sup>280</sup> In *Bell v. State* the en banc court of criminal appeals granted the state's motion for rehearing, and overruled the panel opinion that considered unassigned error.<sup>281</sup> The panel had held that a point of error raised by Bell in his *pro se* brief required reversal even though the brief was not timely filed.<sup>282</sup> The claimed error was impeachment of the defendant with a misdemeanor conviction for possession of marijuana.<sup>283</sup> The en banc court held that the error was neither of "constitutional dimension nor such a serious question of law that 'justice' require[d] its discussion."<sup>284</sup>

An appeal may be dismissed voluntarily only upon the sworn motion of the appellant himself.<sup>285</sup> In *Ex parte Trisler*<sup>286</sup> the court refused to grant a voluntary dismissal, even though the motion was signed by the appellant and his attorney.<sup>287</sup>

The state's power to appeal sharply divided the court of criminal appeals during the survey period. In *Faulder v. Hill*<sup>288</sup> the defendant sought a writ of prohibition to prevent the state from filing a petition for a writ of certiorari in the United States Supreme Court on the grounds that such a petition violated the Texas constitutional ban on state appeals in criminal cases.<sup>289</sup> Eight opinions were filed in the case. The prevailing opinion<sup>290</sup> held that a writ of prohibition was the appropriate remedy to seek and was not barred by the supremacy clause of the United States Constitution.<sup>291</sup> The opinion went on to hold that a petition for a writ of certiorari is an

On June 8, 1981, effective September 1, 1981, the legislature conferred the extension of authority on the appellate court (or a judge thereof) in which the case will be filed. TEX. CODE CRIM. PROC. ANN. art. 40.09(13) (Vernon Supp. 1982). Presumably the later amendment repeals the earlier one by implication.

280. See TEX. CODE CRIM. PROC. ANN. art. 40.09(13) (Vernon 1977). This provision was deleted by the legislature in 1981. The deletion may have been inadvertent. See *Bell v. State*, 620 S.W.2d 116, 123 n.1 (Tex. Crim. App. 1981) (characterizing the deletion as a "blunder").

281. 620 S.W.2d 116 (Tex. Crim. App. 1981).

282. *Id.* at 118.

283. *Id.*

284. *Id.* at 126. The author of the panel opinion, in dissent, commented that "what is reviewable 'in the interest of justice' seems to depend on the particular collective judgment of the affected members of the Court at any given moment . . ." *Id.* at 127-28 (Clinton, J., dissenting).

285. *Ex parte Trisler*, 605 S.W.2d 619, 619 (Tex. Crim. App. 1980).

286. *Id.*

287. *Id.* at 619-20. The court considered the appeal on the merits and affirmed. *Id.* Four members of the court dissented from the refusal to dismiss the appeal, noting that the requirement of a sworn motion was now a creature of case law and not a rule of court. *Id.* at 620-21 (Odom, J., dissenting); see TEX. CODE CRIM. PROC. ANN. art. 44.33 (Vernon Supp. 1982).

288. 612 S.W.2d 512 (Tex. Crim. App. 1980).

289. *Id.* at 513; see TEX. CONST. art. V, § 26; TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 1982).

290. See 612 S.W.2d at 516 n.3 (Roberts, J., concurring and dissenting) (noting that only three judges concurred in the "plurality" opinion).

291. *Id.* at 514 (federal law governs jurisdiction of the United States Supreme Court, while state law governs power of state to invoke that jurisdiction). Judge Douglas disagreed on this point. *Id.* at 515.

appeal.<sup>292</sup> Finally, the opinion concluded that the Texas constitutional provision prohibited appeals only within the Texas judicial system, and did not prevent a petition for review in the United States Supreme Court.<sup>293</sup> The Court thereby overruled *White v. State*.<sup>294</sup> Judge Roberts disagreed with the limited prohibition embraced by the prevailing opinion. Relying on other articles of the Constitution and on the intent of the adopters, he concluded that the state should have no right to petition for a writ of certiorari.<sup>295</sup>

In his comprehensive dissent, Presiding Judge Onion first criticized the prevailing opinion for deciding the state constitutional question without focusing on the statutory prohibition of appeal.<sup>296</sup> He also discussed the constitutional question, and castigated the majority for its exercise of "raw judicial power—pure muscle" in limiting the appeal prohibition to proceedings within the state system.<sup>297</sup>

Eight judges of the court of criminal appeals agreed that a petition for a writ of certiorari is an "appeal," as that word is used in the Texas Constitution.<sup>298</sup> This conclusion casts considerable doubt upon the constitutionality of the 1981 amendment to article 44.01 of the Code of Criminal Procedure.<sup>299</sup> The amendment provides that the statutory prohibition of state appeals "shall not be construed to prevent the State from petitioning the Court of Criminal Appeals to review a decision of a court of appeals in a criminal case, on its own motion."<sup>300</sup> If a petition for a writ of certiorari is an appeal, then certainly a petition for discretionary review is also.

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292. *Id.* at 514 ("review of the case, whether denominated an appeal, a writ of error, a writ of certiorari, or any other name is still an appeal"). Judge Dally expressed doubt on this point. *Id.* at 516, 526 (Dally, J., concurring in denial of rehearing).

293. *Id.* at 514-15.

294. 543 S.W.2d 366 (Tex. Crim. App. 1976).

295. 612 S.W.2d at 516-17.

296. *Id.* at 517, 519 (Onion, P.J., dissenting).

297. *Id.* at 522 n.7. Dissenting from the denial of rehearing, Judge Onion challenged the precedential value of the decision, since, he contended, it had been mooted by the Supreme Court's denial of the State's petition. *Id.* at 528 n.1; see 449 U.S. 874 (1980) (denial of petition for writ of certiorari); 611 S.W.2d 630 (Tex. Crim. App. 1979).

298. See 612 S.W.2d at 514 (plurality opinion); *id.* at 515 (Douglas, J., concurring); *id.* at 516 (Roberts, J. concurring and dissenting); *id.* at 518-19 (Onion, P.J., dissenting); *id.* at 525 (Clinton, J., dissenting). See also TEX. CONST. art. V, § 26.

299. See TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 1982).

300. *Id.*