
January 1984

Criminal Procedure

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Recommended Citation

Mike McColloch, *Criminal Procedure*, 38 Sw L.J. 529 (1984)
<https://scholar.smu.edu/smulr/vol38/iss1/20>

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CRIMINAL PROCEDURE

by

Mike McColloch*

THIS Article reviews the most significant developments in Texas constitutional and statutory criminal procedure during the last year as reflected in opinions from the United States Supreme Court, the Texas Court of Criminal Appeals, and the various state courts of appeals. Decisions in the survey period involved subtle refinements in some areas and brought about substantial revisions in others. Particularly revealing was judicial construction by the state courts of several salient provisions of the Texas Constitution. These decisions manifested an increased inclination to follow the federal courts' lead in defining the scope of the state's police power and the rights of an accused.

I. ARREST AND SEARCH

The paramount decision in the arrest and search area during the survey period came out of the United States Supreme Court in *Illinois v. Gates*.¹ This decision unexpectedly brought about the demise of the conventional *Aguilar* two-pronged test² as the sine qua non for assessing the probable cause sufficiency of an arrest or search warrant affidavit.³ Twenty years ago in the landmark opinion of *Aguilar v. Texas*⁴ the Court established the test for the sufficiency of an informant's information relied upon in seeking a warrant. Under this test a magistrate must be informed of both some of

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1. 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

2. *Aguilar v. Texas*, 378 U.S. 108 (1964).

3. The Court in *Gates* apologized for not addressing the issue of a good faith exception to the exclusionary rule. After receiving briefs and hearing oral arguments on the issues addressed, the Court issued an order on Nov. 29, 1982, requesting the parties to address the question:

[W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

103 S. Ct. 436, 7 L. Ed. 2d 595 (1982). After entertaining briefs and arguments on this issue, however, the Court determined that since this issue was "not pressed or passed upon" below, it should not exercise its certiorari jurisdiction to decide the question. *Id.* at 2322, 76 L. Ed. 2d at 532; see *Hill v. California*, 401 U.S. 797, 805-06 (1971); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945). The Court, therefore, concluded that it was constrained to reserve consideration of engrafting a good faith exception onto the fourth amendment exclusionary rule. 103 S. Ct. at 2325, 76 L. Ed. 2d at 540.

4. 378 U.S. 108 (1964).

the underlying circumstances from which the informant concluded that contraband was located where he claimed it was, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information was reliable.⁵ These requirements became popularly known as the basis of knowledge prong and the reliability or credibility prong. *Spinelli v. United States*⁶ refined the *Aguilar* analysis by holding that self-verifying detail contained within an informant's tip, or independent police corroboration, could permit the magistrate to find that the informant's conclusion was probably correct, and thus cure an otherwise deficient showing under *Aguilar*'s first prong requirement.⁷ Two decades of voluminous litigation ensued, and numerous corollaries, often contradictory, evolved among the state courts and the federal circuits. While each jurisdiction's set of rules on probable cause affidavits became more technical and rigid, officers, magistrates, and attorneys were at least provided with a helpful degree of concrete and specific guidance on these otherwise elusive determinations.

*Illinois v. Gates*⁸ vitiated the entire *Aguilar-Spinelli* body of law. In *Gates* the Court decided to abandon the two-pronged test and replace it with a totality of the circumstances analysis as suggested in opinions issued prior to *Aguilar* and *Spinelli*.⁹ The Court explained the new standard as

5. *Id.* at 114.

6. 393 U.S. 410 (1969).

7. *Id.* at 416. The Court specifically held that if the tip concerning *Spinelli* had contained sufficient detail to allow the magistrate to conclude "that he [was] relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," then the magistrate could properly rely upon it. The Court, however, concluded that the tip in *Spinelli* did not contain sufficient detail to warrant such reliance. *Id.* at 416-17.

8. 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The tip in *Gates* came from an anonymous informant in the form of a letter received by the Bloomingdale, Illinois, police department on May 3, 1973. The letter stated that Sue and Lance Gates lived on a certain street in Bloomingdale and bought drugs in Florida. The letter alleged that Sue drove the car to Florida with some regularity, where she left it to be loaded with drugs. Lance would fly to Florida and drive the car back to Illinois. The letter further stated that on May 3 Sue would drive to Florida again and that Lance would fly down a few days later to drive the car back. The informant's letter concluded that Lance would have over \$100,000 in drugs in the trunk of the car during the drive back from Florida, and that a similar amount of drugs could be presently found in their Illinois basement. The police pursued the tip and found that an Illinois driver's license was issued to one Lance Gates, residing at an address in Bloomingdale. It was further discovered that a reservation had been made by an "L. Gates" on a flight two days later from Chicago to Florida. Surveillance showed that Gates made the flight, and that upon arrival in Florida took a taxi to a nearby motel where he went to a room registered to one Susan Gates. Lance and an unidentified woman left the motel the next morning in an automobile bearing Illinois license plates and heading northward. In addition, a Drug Enforcement Agency (DEA) agent informed the police that the license plate number on the northbound automobile was registered to another car owned by Gates. These facts were set forth in the warrant affidavit to search the Gates's residence and automobile. Rather than immediately executing the warrant, the police awaited the Gates's arrival in Bloomingdale. Upon their arrival the police searched the trunk of the car and uncovered approximately 350 pounds of marijuana. A search of the Gates's home revealed marijuana, weapons, and other contraband. The Illinois circuit court ordered all of these items suppressed. Its decision was affirmed by the Illinois appellate court and by a divided vote of the Supreme Court of Illinois. *Id.* at 2319, 76 L. Ed. 2d at 533.

9. *See* *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (test is commonsensical

follows:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.¹⁰

While the Court declared that the *Gates* formulation was a "flexible, easily applied standard," it conceded that "[t]here are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another."¹¹ The Court's solution for this predicament is perhaps revealed in its recitation of the traditional rule that a magistrate's "determination of probable cause should be paid great deference by reviewing courts"¹² and that "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."¹³

Gates, however, did not render the principles set forth in *Aguilar* and its progeny completely useless. On the contrary, the *Aguilar* principles, though not independently analyzed elements, are still highly relevant considerations in the probable cause determination. A deficiency in one element may be compensated for by a strong showing as to the other, or by other indicia of reliability.¹⁴ While the *Aguilar* rule is no longer the exclusive litmus test for these types of probable cause equations, it remains a logical starting place for the bench and bar in making such determinations. The essence of *Gates*, then, is that the *Aguilar* analysis should be applied in a slightly less exacting manner; a technical deficiency in one or both prongs should not necessarily be an absolute bar to a finding of validity if corroboration, self-verifying detail, or similar circumstances are present to buttress the conclusion that the affidavit's information is reliable.¹⁵

and realistic); *Jones v. United States*, 362 U.S. 257, 271 (1960); see also *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (court looked to "factual and practical considerations of everyday life").

10. 103 S. Ct. at 2332, 76 L. Ed. 2d at 548.

11. *Id.* at 2332 n.11, 76 L. Ed. 2d at 548 n.11.

12. *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

13. 103 S. Ct. at 2331 n.10, 76 L. Ed. 2d at 547 n.10; see *United States v. Ventresca*, 380 U.S. 102, 109 (1965). The *Gates* decision reflects both a "desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case." 103 S. Ct. at 2331 n.10, 76 L. Ed. 2d at 547 n.10.

14. 103 S. Ct. at 2329, 76 L. Ed. 2d at 545.

15. The Court's opinion was penned by Justice Rehnquist, and was joined by four other members of the Court. Justice White concurred in the judgment, objecting to the Court's refusal to consider and adopt a good faith exception to the exclusionary rule. 103 S. Ct. at 2336-51, 76 L. Ed. 2d at 553-71. Justice Brennan, joined by Justice Marshall, dissented, on the ground that the rejection of the two-pronged test was "unjustified and ill advised." 103 S. Ct. at 2351-59, 76 L. Ed. 2d at 571-82. Justice Stevens, also joined by Justice Brennan, dissented on the basis that the warrant was defective even under the Court's new totality of the circumstances approach, and complained that the Court should have merely vacated the

How the Texas courts will interpret and apply *Gates* is difficult to predict. Only two recent cases provide any guidance. The court of criminal appeals' per curiam opinion in *Bellah v. State*¹⁶ followed closely upon the heels of *Gates*. The arrest warrant affidavit¹⁷ in *Bellah* stated that an unnamed informant told the police officer affiant that the defendant had confessed the details of his involvement in a killing to the informant the morning after the murder had occurred. The details described matched other information in the officer's possession concerning the cause of death. The court, unfortunately, offered little enlightenment on its approach to *Gates*. It merely concluded that, "[g]iven [the officer's] statements and others in the affidavit, as set out in the opinion by the court of appeals, and taking the 'totality of the circumstances approach' endorsed in *Gates*, we find no Fourth Amendment violation."¹⁸

The fact that *Bellah* was decided strictly on federal constitutional grounds left open the question of whether the *Gates* approach would be adopted as a matter of Texas statutory or constitutional law. State courts and legislatures are free to accept federal holdings or set for themselves whatever standards they deem appropriate so long as the state action does not fall below the minimum standards of protection provided by the federal constitution.¹⁹ In the past, the State of Texas has established more liberal and protective restrictions, such as enacting a statutory exclusionary rule long before the federal exclusionary rule was made applicable to the states.²⁰ Texas constitutional protection against unreasonable searches and seizures is embodied in article I, section 9 of the Texas Constitution,²¹ with identical language carried over into article 1.06 of the Code of Crimi-

judgment of the Illinois Supreme Court and remanded the case for reconsideration in light of the Court's intervening decision in *United States v. Ross*, 456 U.S. 798 (1982). Under the *Ross* holding the search of *Gates*'s car might have been valid if the officers had probable cause after the *Gates*es arrived home. 103 S. Ct. at 2361-62, 76 L. Ed. 2d at 584-85 (Stevens, J., dissenting).

16. 653 S.W.2d 795 (Tex. Crim. App. 1983).

17. Although *Gates* involved a search warrant, its probable cause rationale is equally applicable to arrest warrant affidavits. See *Whiteley v. Warden*, 401 U.S. 560, 564 (1971).

18. 653 S.W.2d at 796. The court in *Bellah* made it clear that its decision applying *Gates* was based solely on fourth amendment grounds and was not rendered as a matter of state constitutional or statutory law. The court determined that the defendant had not attacked the affidavit on state grounds, despite the fact that he had cited the appropriate Texas constitutional and statutory provisions in his motion to suppress in the trial court and in his brief on appeal. *Id.* at 795.

19. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

20. The federal exclusionary rule was held applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). Other protections in Texas law that are more extensive than the corresponding federal provisions are the right to a jury trial in all criminal cases, afforded by TEX. CONST. art. I, section 10, and the requirement of unanimity in criminal jury verdicts, embodied in TEX. CODE CRIM. PROC. ANN. arts. 37.04-.05 (Vernon 1981). The Supreme Court has held that the federal constitution does not mandate a jury trial for certain misdemeanors, see *Baldwin v. New York*, 399 U.S. 66, 68 (1970), and that unanimous jury verdicts are no longer constitutionally required, see *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972).

21. TEX. CONST. art. I, § 9.

nal Procedure.²² Moreover, the legislature enacted specific rules for the issuance of search warrants, which are also contained in the Code of Criminal Procedure.²³

In *Hennessey v. State*,²⁴ however, a two-judge panel issued an opinion basing its decision on *Gates* in applying Texas statutory law. The defendant in *Hennessey* specifically relied on article 18.01(b) of the Code of Criminal Procedure as well as the fourth amendment of the federal constitution. The court held, again with little discussion, that the totality of the circumstances analysis of *Illinois v. Gates* should be used.²⁵ *Hennessey* demonstrated, however, that the *Aguilar* mode of analysis remains viable despite the court's apparent decision to adopt the *Gates* approach as a matter of Texas statutory law. While claiming to execute the totality of the circumstances approach, the Texas court extensively analyzed the affidavit in question using familiar principles that had evolved under the two-pronged test.²⁶ The *Hennessey* court implied that the *Aguilar-Spinelli* doctrine had not been abolished in *Gates*, observing that the Supreme Court had merely criticized its strict application.²⁷

The notion that the state constitutional provisions in article I, section 9 might provide greater protection against unreasonable searches and seizures than that required by the federal constitution was dealt a potentially fatal blow by the court of criminal appeals in *Brown v. State*.²⁸ The court's original opinion, holding a police officer's seizure of opaque balloons impermissible under the fourth amendment plain view doctrine,²⁹ was reversed by the United States Supreme Court.³⁰ On remand, the appellant requested the court of criminal appeals to determine whether article I, section 9 would nevertheless provide an independent basis to support suppression.³¹ The result was a sweeping pronouncement that sharply divided the court. A plurality declared that it is "not the function of the judiciary" to interpret the state constitution any differently than the Supreme Court has interpreted the federal constitution, at least with regard to search and seizure issues.³² This revelation was said to have resulted from the plurality's belief that because the Texas courts had interpreted the state constitu-

22. TEX. CODE CRIM. PROC. ANN. art. 1.06 (Vernon 1977).

23. *Id.* arts. 18.01-.20 (Vernon 1977 & Supp. 1984). *Id.* art. 18.01(b) (Vernon 1977) provides:

No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

24. No. 63,270 (Tex. Crim. App. Oct. 12, 1983).

25. *Id.*, slip op. at 3.

26. *Id.* at 3-8. The court would likely have reached the same result prior to *Gates*.

27. *Id.* at 2.

28. No. 65,431 (Tex. Crim. App. Sept. 14, 1983).

29. *Brown v. State*, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981).

30. *Texas v. Brown*, 103 S. Ct. 1535, 1544, 75 L. Ed. 2d 502, 515 (1983).

31. No. 65,431, slip op. at 1.

32. *Id.* at 2. The opinion was written by Judge McCormick and was joined by Judges W.C. Davis, T. Davis, and Campbell.

tion in substantial harmony with the Supreme Court's opinions interpreting the fourth amendment for many years, any additional (or different) search and seizure protections could be obtained only through constitutional amendments and legislative enactments.³³ To hold otherwise, according to the opinion, would permit the "judiciary to engraft such changes upon our Constitution."³⁴

The plurality's opinion, which would destroy any independent meaning or purpose to article I, section 9, predictably evoked bitter responses from other members of the court. The dissent complained that the plurality had reduced the court of criminal appeals to "the role of being nothing more than mimicking court jesters of the Supreme Court of the United States."³⁵ The concurring opinion rebuked the plurality for "irrationally" and unnecessarily arriving at a "dangerous abdication of judicial duties and responsibilities as Judges of this Court."³⁶ The precedential value of *Brown* is unclear, however, because the court has never before indicated that it would construe article 1, section 9 to mean only what the fourth amendment means,³⁷ and because this novel precept is apparently maintained by only four members of the court. *Brown's* potential implications are extensive.³⁸ Its underlying thesis sharply contrasts with the court's past expressions of judicial independence concerning state constitutional standards.³⁹ Nevertheless, in light of *Hennessey* and *Brown*, it is probably safe to conclude that the Texas Constitution does not require any stricter interpretation of probable cause than the totality of the circumstances approach to the fourth amendment now mandated by the Supreme Court.

The Supreme Court's pre-remand opinion in *Brown* is of considerable significance in its own right with regard to the plain view exception to the warrant requirement.⁴⁰ Generally, the plain view doctrine permits the

33. *Id.* The court cited as its sole precedent *Crowell v. State*, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944). *Crowell*, never previously cited, contained the dictum, "Art. I, Sec. 9, of the Constitution of this State, and the 4th Amendment to the Federal Constitution are, in all material aspects, the same." *Id.* at 304, 180 S.W.2d at 346.

34. No. 65,431, slip op. at 2.

35. *Id.* at 7 (Teague, J., dissenting).

36. *Id.* at 102 (Clinton, J., concurring).

37. See Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 215 (1981).

38. Implicit in the court's holding is the notion that the judiciary must abstain from ever altering a previously established rule of construction of the state constitution. The broad language contained in the opinion is certainly susceptible to the interpretation that the court has adopted an unqualified and absolute doctrine of *stare decisis*. One can only speculate as to how long the court could operate under such self-imposed restriction, in this or any other context.

39. While federal constitutional safeguards applicable to the states do establish a minimum standard for state courts, such courts are not limited to those standards in construction of federal or state rights. They may go further and provide greater safeguards. . . . [A]s to the true scope of the Texas Constitution, we must ultimately follow our own lights. "This approach is more desirable than simply second-guessing future supreme court decisions."

Olson v. State, 484 S.W.2d 756, 762 (Tex. Crim. App. 1969) (quoting Baernstein, *Criminal Law and Procedure*, 21 Sw. L.J. 237, 241 (1967)).

40. *Brown v. State*, 617 S.W.2d 196 (Tex. Crim. App. 1981).

warrantless seizure of property by police if three requirements are satisfied: (1) the police officer must be engaged in a lawful initial intrusion or otherwise properly be in a position from which he can view the object to be seized; (2) the officer must discover the object inadvertently; and (3) it must be immediately apparent to the officer that the object he observes may be evidence of a crime, contraband, or otherwise subject to seizure.⁴¹ The Supreme Court dealt with the third requirement of the plain view doctrine in *Texas v. Brown*.⁴²

A Fort Worth police officer lawfully stopped Brown's automobile at night at a routine driver's license checkpoint, and asked for the defendant's license. The officer shined his flashlight into the car and saw an opaque, green party balloon, knotted near the tip, fall from the defendant's hand to the seat beside him. The officer testified that because of his previous experience in arrests for drug offenses, he was aware that drugs were frequently packaged in balloons like the one in the defendant's hand. When the officer saw the balloon, he shifted position to obtain a better view of the interior of the glove compartment, which the defendant had opened to look for his driver's license. The glove compartment contained several small plastic vials, quantities of a loose white powder, and an open bag of party balloons. The officer seized the balloon, which turned out to contain heroin. The court of criminal appeals reversed the defendant's conviction on the ground that the "immediately apparent" requirement of the plain view doctrine had not been met because the officer did not "know" that "incriminatory evidence was before him when he seized the balloon."⁴³

In reversing the court of criminal appeals, the United States Supreme Court observed that its earlier use of the phrase "immediately apparent" was "very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine."⁴⁴ The Court thus held that there is no need for the officer to know that an item is contraband or fruits of a crime in order to permit a seizure under the plain view doctrine.⁴⁵ If under all of the circumstances the officer's observations, coupled with his prior knowledge and experience, are sufficient to lead to the reasonable conclusion that the object is probably contraband, the immediately apparent requirement is satisfied. The fact that the officer in *Brown* could not see through the opaque balloon was of no constitutional significance, since his experience vested him with knowledge that balloons tied in that manner were frequently used to carry narcotics, and because the contents of the glove compartment re-

41. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-69 (1971) (quoting *DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977)).

42. 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

43. *Brown v. State*, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981).

44. 103 S. Ct. at 1542, 75 L. Ed. 2d at 513. The Court thereby reaffirmed the rule set forth in *Payton v. New York*, 445 U.S. 573, 587 (1980), that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."

45. 103 S. Ct. at 1543, 75 L. Ed. 2d at 514.

vealed "further suggestions that Brown was engaged in activities that might involve possession of illicit substances."⁴⁶

The court of criminal appeals reached the same result under a similar analysis in another balloon case. In *Gonzales v. State*⁴⁷ the court held that an officer is authorized to rely on his knowledge and training, whether gained from on-the-job training, formal training, or personal experience in the field.⁴⁸ The defendant in *Gonzales* was involved in a minor automobile accident. Two police officers, while questioning the defendant, noticed that he appeared under the influence of some kind of intoxicant, though they could not smell liquor on his breath. The officers observed several tiny, tied-off balloons under the defendant's tongue. Believing that the defendant was in possession of heroin, the officers seized both the defendant and his balloons. The officers testified at the suppression hearing that, although they had never arrested a person under such circumstances before, their police department training taught them that heroin is often carried under the tongue in tiny balloons so that the evidence can be swallowed in the event of police apprehension.⁴⁹ The court held that the officers' observations of the defendant and his attempt to hide the balloons in his mouth, "coupled with their knowledge of the use of balloons to carry heroin in the manner observed, were sufficient to authorize [the defendant's] immediate arrest and the contemporaneous seizure of the balloons," under the plain view doctrine.⁵⁰

Although the courts generally have wrestled with balloon seizures under the troublesome plain view requirements, the validity of these recurring seizures might be more appropriately resolved pursuant to other recognized exceptions to the warrant requirement. The inherent problem of the plain view doctrine was revealed at its inception in *Coolidge v. New Hampshire*⁵¹ when the Supreme Court observed that "it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal."⁵² Because the imme-

46. *Id.*, 75 L. Ed. 2d at 514. Justice Rehnquist, writing for the majority, characterized the fact that the officer could not see through the balloon as "all but irrelevant." *Id.*

47. 648 S.W.2d 684 (Tex. Crim. App. 1983).

48. *Id.* at 687.

49. *Id.* The court of appeals, relying on the original opinion in *Brown* as well as *Sullivan v. State*, 626 S.W.2d 58 (Tex. Crim. App. 1982) (officer must have specialized knowledge), and *DeLao v. State*, 550 S.W.2d 289 (Tex. Crim. App. 1977) (officer failed to testify he was cognizant of drug practice), held the warrantless seizure of the balloon illegal because of the officer's lack of any personal experience with this type of drug packaging. The court of appeals found no suspicious facts and circumstances to further justify the seizure. *Gonzales v. State*, No. 04-81-00129-CR (Tex. App.—San Antonio, June 30, 1982).

50. 648 S.W.2d at 687. Although the court in *Gonzales* did not expressly dispose of this issue under the plain view doctrine, its discussion of the court of appeals' opinion and the dissent by Judge Clinton clearly indicate that the holding was based on the court's interpretation of the immediately apparent aspect of the doctrine.

51. 403 U.S. 443 (1971).

52. *Id.* at 465 (emphasis in original).

diately apparent aspect requires a showing of probable cause,⁵³ or at least reasonable suspicion,⁵⁴ cases such as *Gonzales* might be more appropriately analyzed in light of exceptions involving the automobile search,⁵⁵ search incident to arrest,⁵⁶ exigent circumstances,⁵⁷ or stop and frisk.⁵⁸ Since the police officers in *Gonzales* had probable cause to arrest the defendant and, in fact, had arrested him at the moment the balloons were taken, the seizure could be justified as a search incident to arrest, regardless of the fact that the balloons were in the officers' plain view.⁵⁹

Not surprisingly, stops and searches of automobiles continue to be a primary source of revision of fourth amendment principles by courts at all levels. In *Terry v. Ohio*⁶⁰ the Supreme Court authorized the limited "stop-and-frisk" or "pat-down" search of persons an officer reasonably suspects of criminal activity in circumstances where the officer has a reasonable fear for his safety. *Terry* was limited by its own terms to searches for weapons, and authorized intrusion only into the outer clothing of persons reasonably believed to be presently dangerous.⁶¹ The Court has now extended this concept to permit, in essence, a "frisk" of the interior of an automobile out of which such a person has just emerged. In *Michigan v. Long*⁶² two police officers on night patrol in a rural area observed a car traveling erratically and at an excessive speed. The car swerved into a ditch and the officers stopped to investigate, finding the defendant the sole occupant of the car. The defendant appeared to the officers to be under the influence of something, and failed to respond to the officers' initial request to produce his license and registration. The defendant began

53. See *Colorado v. Bannister*, 449 U.S. 1, 2-3 (1980); *Payton v. New York*, 445 U.S. 573, 602-03 (1980).

54. See *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). The Supreme Court has never addressed the issue of whether a degree of suspicion less than probable cause would, in some circumstances, be a sufficient basis for a seizure under the plain view doctrine. *Texas v. Brown*, 103 S. Ct. at 1542 n.7, 75 L. Ed. 2d at 513-14 n.7.

55. See *United States v. Ross*, 456 U.S. 798 (1982).

56. See *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

57. See *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

58. See *Terry v. Ohio*, 392 U.S. 1 (1968).

59. See 648 S.W.2d at 687-88 (Clinton, J., dissenting). For other search incident to arrest cases, see *New York v. Belton*, 453 U.S. 454 (1981) (drugs discovered during search of car and occupants); *United States v. Watson*, 423 U.S. 411 (1976) (warrantless arrest by postal officers of suspected credit card thief).

60. 392 U.S. 1 (1968).

61. The Court expressed its holding as follows:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear of his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

62. 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

walking toward the open door of the car, apparently to get his registration. The officers followed the defendant and observed a hunting knife on the floorboard of the car. The officers then stopped the defendant and subjected him to a *Terry* frisk, which revealed no weapons. One of the officers then shined his flashlight into the interior of the vehicle to look for other weapons, and noticed that an object was protruding from under the armrest on the front seat.⁶³ He then entered the vehicle and lifted the armrest. This revealed an open pouch of marijuana on the front seat. The Court decided that these facts, the principles established in *Terry*, and the recognition that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers,"⁶⁴ compelled the following conclusion:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. . . .

. . . . "[T]he balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous.⁶⁵

The adoption of an area search rule is a significant illustration of the Court's current gravitation toward minimizing restrictions on police conduct in the fourth amendment context. The Court found justification for the area search rule in precedents establishing the authority to search incident to arrest, permissible only subsequent to a valid arrest on probable cause.⁶⁶ The result in *Long* is ostensibly a logical evolutionary expansion of *New York v. Belton*,⁶⁷ in which the Court recently held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" for weapons or evidence.⁶⁸ In *Terry*, however, the Court expressly recognized the difference between a

63. This action did not constitute a search. The Court has long held that the "use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *United States v. Lee*, 274 U.S. 559, 563 (1927); *see also* *United States v. Lara*, 517 F.2d 209, 211 (5th Cir. 1974) (use of searchlight does not preclude application of plain view doctrine).

64. 103 S. Ct. at 3479, 77 L. Ed. 2d at 1218; *see* *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (citizen's personal safety governs invasion of privacy); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (reasonableness under the circumstances).

65. 103 S. Ct. at 3480-81, 77 L. Ed. 2d at 1220-21 (footnotes omitted).

66. *See* *Chimel v. California*, 395 U.S. 752, 755 (1969) (presume arrest valid before determining proper scope of search incident to arrest).

67. 453 U.S. 454 (1981).

68. *Id.* at 460 (footnotes omitted).

search incident to arrest and the limited search for weapons involved in a frisk based merely on a reasonable suspicion.⁶⁹ The Court in *Long* stressed that the instant search was not unreasonable because it was conducted to insure that no other weapons were within the defendant's immediate grasp or immediate control.⁷⁰ Nevertheless, the Court pronounced an expanded rule allowing a "search incident to reasonable suspicion" of the entire passenger compartment of the automobile. Indeed, the limitation expressed by the majority suggests little restriction at all: the search is allowed to extend to all "those areas in which a weapon may be placed or hidden."⁷¹

II. CONFESSIONS

In 1981 the United States Supreme Court in *Estelle v. Smith*⁷² held that the State's use of psychiatric testimony at the punishment phase of a capital murder trial violated the accused's fifth and sixth amendment rights when *Miranda* warnings were not administered at the psychiatric examination.⁷³ The Court reasoned that the principles underlying *Miranda v. Arizona*⁷⁴ applied equally to court ordered pretrial psychiatric examinations as well as to custodial interrogations. In holding that the fifth amendment applies to both the penalty and guilt phases of a trial, the Court reasoned that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' . . . it protects him as well from being made the 'deluded instrument' of his own execution."⁷⁵ The Court also concluded that the defendant's sixth amendment right to effective assistance of counsel was denied because the ultimate significance of the psychiatric interview, which proved to have occurred at a critical stage of the aggregate proceedings, was not disclosed to the defendant.⁷⁶ The Court explained that "the decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult . . . even for an attorney' [A] defendant should not be forced to resolve such an important issue without the 'guiding hand of counsel.'"⁷⁷

Subsequent to *Smith* it became popular for prosecutors to address hypothetical questions to psychiatrists in proving up the special issue on future dangerousness. The expert's opinion would thereby not be directly based on the defendant's uncounseled statements made during the prior inter-

69. 392 U.S. at 25.

70. 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220-21.

71. *Id.* at 3480, 77 L. Ed. 2d at 1220.

72. 451 U.S. 454 (1981).

73. *Id.* at 473. The psychiatric testimony in question concerned the issue of future dangerousness, even though the original purpose of the psychiatric examination was to ascertain the defendant's competency to stand trial.

74. 384 U.S. 436 (1966).

75. 451 U.S. at 462 (citations omitted).

76. 451 U.S. at 470.

77. *Id.* at 471 (quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979)).

view. *White v. Estelle*,⁷⁸ however, placed significant limitations on this practice. White, the petitioner, complained of the use of hypothetical questions answered by two doctors who had previously examined him to determine his competence to stand trial.⁷⁹ White was not advised of his right to remain silent before or after the psychiatric examinations.⁸⁰ The testimony elicited at the punishment phase of the trial clearly indicated that each doctor had examined the defendant.⁸¹ The facts contained in the hypothetical questions propounded to each doctor recited exactly the facts of the defendant's criminal history and, in one of the questions, White's name was used. The federal district court held that "[a] hypothetical is not a hypothetical just because it is initiated by the word 'assume' or 'if.'"⁸² The court concluded that "the jurors were incapable of distinguishing between the hypothetical and the case of petitioner before them,"⁸³ because the doctors' responses to the hypothetical questions could appear to be influenced by pre-trial evaluations.⁸⁴ The court maintained that if the jury is unable to make the distinction between the hypothetical and fact, and the inability is not fortuitous but a result of the prosecution's deliberate actions, then the accused is compelled against himself in abrogation of the fifth amendment.⁸⁵ The court further held that the use of hypothetical questions and the admission of the answers before the jury denied the defendant his sixth amendment right to assistance of counsel.⁸⁶ The record reflected that, at most, the appointed counsel merely advised the defendant in general terms about possible future psychiatric examinations. The sixth amendment requirements were not met since there was "no showing that the kind of well thought-out, individually-tailored counselling session between attorney and petitioner mandated by the Supreme Court and Fifth

78. 554 F. Supp. 851 (S.D. Tex. 1982).

79. *Id.* at 852-53. Petitioner's conviction had been affirmed by the Texas Court of Criminal Appeals in *White v. State*, 610 S.W.2d 504, 508 (Tex. Crim. App. 1981).

80. In contrast to *Estelle v. Smith*, White's attorneys were notified in advance that the psychiatric examinations would be conducted. 554 F. Supp. at 853 n.8.

81. The trial court ordered the psychiatric evaluations of White on the state's motion, even though defense attorneys had not put into issue his competency to stand trial. *Id.* at 855.

82. *Id.* at 856.

83. *Id.*

84. *Id.* At the evidentiary hearing on the writ, one of the doctors stated that he could not say that the examination of the defendant had not influenced his testimony.

85. *Id.*

86. *Id.* at 858. Although the need for sixth amendment protection does not require the presence of counsel during the psychiatric interview itself, *Smith v. Estelle*, 602 F.2d at 708; *United States v. Cohen*, 530 F.2d 43, 48 (5th Cir. 1976), the Supreme Court has recognized that a defendant has a right to consult with his attorney before the interview. *Estelle v. Smith*, 451 U.S. at 470-71. In *Gholson v. Estelle*, 675 F.2d 734 (5th Cir. 1982), the court overruled the government's contention that the defendant's sixth amendment rights remained intact because the defendant's attorney may have advised his client in general terms about possible future psychiatric examination. The *Gholson* court stated that "[t]he sixth amendment's protection contemplates more than a casual discussion between attorney and client regarding the vague possibility that the client may be examined at some indefinite time in the future for the purpose of aiding in the determination of whether he should be executed." 675 F.2d at 743 n.9.

Circuit preceded the examination.”⁸⁷

The principles enunciated in *Smith* apparently do not apply to court ordered presentence interviews. In *Trimmer v. State*⁸⁸ the defendant entered a plea of nolo contendere to a robbery charge and filed a motion for probation, at which time the court properly admonished her regarding the effect of her plea. As is customary, the state introduced Trimmer’s written judicial confession in which she waived the appearance, confrontation, cross-examination of witnesses, and her right against self-incrimination. The trial court ordered the probation department to conduct a presentence investigation and file a report, cautioning the defendant that the report would be used in assessing punishment. At the hearing on punishment, the only evidence introduced was the presentence report containing both the police and the defendant’s versions of the events pertaining to the charged offense.⁸⁹ The court entered a finding of guilt, and assessed punishment at twelve years confinement.⁹⁰ Trimmer contended on appeal that the use of the presentence report to assess punishment violated her fifth amendment privilege against self-incrimination because she was not admonished as to her rights and waiver thereof. Although “[t]he mere finding of guilt does not terminate the privilege against self-incrimination,”⁹¹ *Estelle v. Smith*, the court held, did not require admonishing a defendant of his or her fifth amendment rights prior to the defendant’s participation

87. 554 F. Supp. at 858. In a dictum, the court expressed serious reservations regarding the use and validity of psychiatric predictions based on hypotheticals when the doctor has had no previous contact with the defendant. The court pointed out that the psychiatric community itself does not generally accept such long-range predictions on future dangerousness. *Id.*; see *Estelle v. Smith*, 451 U.S. 454 (1981); Brief amicus curiae of the American Psychiatric Ass’n 11-17, *White v. Estelle*, 554 F. Supp. 851 (S.D. Tex. 1982). The *White* court also observed that any opinion as to a person’s future penchant for violence that does not follow extensive examination and is not based on a great deal of complex information is a lay opinion rather than a professional one. The court noted, however, that when such lay opinions are elicited from a witness who is a doctor, their impact on juries is much greater than it ought to be. 554 F. Supp. at 858.

88. 651 S.W.2d 904 (Tex. App.—Houston [1st Dist.] 1983, pet. ref’d).

89. Presentence reports are authorized by TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(d), art. 42.12, § 4 (Vernon 1979 & Vernon Supp. 1984). *Id.* art. 37.07, § 3(d) (Vernon Supp. 1984) provides:

When the judge assesses the punishment, he may order an investigative report as contemplated in section 4 of Article 42.12 of this code and after considering the report, and after the hearing of the evidence herein above provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.

Id. art. 42.12, § 4 (Vernon 1979) provides, in part:

When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be afforded an opportunity to see a copy of the report upon request.

90. 651 S.W.2d at 905.

91. *Brumfield v. State*, 445 S.W.2d 732, 741 (Tex. Crim. App. 1979). The privilege against self-incrimination “ceases only when liability to punishment no longer exists.” *Id.*

in a routine presentence investigation interview.⁹² In so holding the court relied primarily on *Baumann v. United States*⁹³ in which the Ninth Circuit held that "neither *Estelle* [*v. Smith*] itself, nor the general principles announced in *Miranda*, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview."⁹⁴

The courts continue to be presented frequently with questions involving the sufficiency of evidence produced by the state to meet its heavy burden of proof that an accused knowingly and intentionally waived his previously invoked right to counsel under the fifth amendment.⁹⁵ The United States Supreme Court held in *Edwards v. Arizona*⁹⁶ that once an accused has invoked his right to have counsel present during custodial interrogation "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."⁹⁷ The Court further held that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."⁹⁸ The question of waiver thus turns on whether the state has met its heavy burden of establishing a "knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"⁹⁹ In *Phifer v. State*¹⁰⁰ the court of criminal appeals specifically held that the burden on the state at the suppression hearing is to prove that the accused initiated the communication with the police in which the inculpatory statement is obtained.¹⁰¹ The defendant in *Phifer* was a poorly educated twenty-eight-year-old black male with an I.Q. of 69, who was unable to read or write except to sign his name. He was arrested at his home for murder and was placed in the Fannin County jail. When representatives from two sheriff's departments arrived at his cell the next day to interrogate him, Phifer indicated that he wanted an attorney. Phifer's appointed attorney obtained an express agreement with the Fannin County sheriff that Phifer was not to be questioned by anyone except in the pres-

92. 651 S.W.2d at 906.

93. 692 F.2d 565 (9th Cir. 1981).

94. *Id.* at 576.

95. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (waiver not presumed from defendant's silence after warning); see also *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979) (quoting *Miranda*); *Stone v. State*, 612 S.W.2d 542, 546 (Tex. Crim. App. 1981) (state has burden to prove waiver); *Faulder v. State*, 611 S.W.2d 630, 641 (Tex. Crim. App. 1980), *cert. denied*, 449 U.S. 974 (1980) (waiver is question of federal constitutional law).

96. 451 U.S. 477 (1981).

97. *Id.* at 484.

98. *Id.* at 484-85.

99. *Id.* at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

100. 651 S.W.2d 774 (Tex. Crim. App. 1983).

101. *Id.* at 780.

ence of defense counsel. Nevertheless, the sheriff initiated a conversation with Phifer two days later and further interrogation ensued.¹⁰² When appointed defense counsel discovered the violation of the agreement, he complained to the trial court and to the county attorney. The court ordered the sheriff not to permit any more questioning of Phifer without the presence of counsel. Four days later, a meeting between the sheriff and Phifer took place, during which Phifer asked to see a particular sheriff's deputy whom he knew. The record did not reflect who initiated this meeting. Again without informing defense counsel, the sheriff permitted several interrogation sessions to take place, during which Phifer stated that he no longer wanted his attorney present. The defendant signed a statement later that day that formed the foundation of the state's case against him. The court of criminal appeals held that even though Phifer stated that he wanted to see the officer who eventually took the confession, and even though he said that he no longer desired to have his lawyer present, the statement was inadmissible.¹⁰³ The state maintained the burden of proving at the suppression hearing that the defendant initiated the final meeting at which he gave his statement. The record was silent on whether the defendant initiated the meeting and, because of this failure to prove, the court deemed it irrelevant that at some time during the meeting the defendant stated that he did not wish his attorney to be present. The court reasoned that it would not "fashion a rule that the police may violate a prisoner's Fifth Amendment right to the presence of counsel as long as they eventually obtain from him during the interrogation a statement that he does not wish counsel to be present while he confesses."¹⁰⁴

The right to counsel issue was more easily resolved in *Coleman v. State*¹⁰⁵ in which the defendant, duly informed of his *Miranda* rights, was arrested and taken before a magistrate just shortly after midnight. The defendant expressly invoked his right to counsel, and the magistrate informed him that "because of the lateness of the hour" he would not be able to appoint an attorney until "later that morning."¹⁰⁶ The defendant was immediately taken to the sheriff's office where, after four hours of questioning alone with the sheriff, he confessed to four burglaries, for one of which he was prosecuted. The court of criminal appeals found that it was just this type of case that the Supreme Court was concerned with in *Edwards v. Arizona*,¹⁰⁷ and held that the heavy burden placed on the state to

102. A statement by the defendant, however, was not obtained at this time.

103. 651 S.W.2d at 781.

104. *Id.* at 780. The court concluded the following:

[T]he record as a whole shows that the authorities repeatedly and flagrantly ignored their agreement with counsel, violated the mentally impaired prisoner's right to counsel, and did their best to conceal the interrogation from defense counsel and the county attorney, until they broke appellant's will to resist and obtained a signed statement. If the Fifth Amendment right to counsel serves any purpose, it is to prohibit such police conduct.

Id. at 780-81 (footnotes omitted).

105. 646 S.W.2d 937 (Tex. Crim. App. 1983).

106. *Id.* at 939.

107. 451 U.S. 477 (1981).

show a knowing and intelligent waiver of the right to counsel was not met.¹⁰⁸ The confession was thus inadmissible, and the conviction was reversed.

Another recurring issue of critical importance in determining the admissibility of an accused's statement is whether the statement stemmed from custodial interrogation.¹⁰⁹ Whether the defendant was actually in custody and whether interrogation took place are questions that must be reviewed on the particular facts and circumstances of each case.¹¹⁰ The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."¹¹¹ *McCrory v. State*¹¹² is illustrative of the problems inherent in this deceptively simple formulation and the admissibility determination. In *McCrory* a murder suspect was taken to a polygraph examiner by several enforcement officers prior to his arrest. While the officers observed the examination behind a one-way mirror, the defendant failed the examination and was then subjected to a post-exam interview by the polygrapher. The defendant stated, within the hearing of the officers, that he committed the murder. The officers then arranged for a forensic psychiatrist to go into the room with the defendant to elicit a full confession from him. After some questioning by the psychiatrist, the defendant made an oral confession, which was introduced into evidence at the defendant's subsequent trial. A sharply divided court of criminal appeals held that the defendant was both in custody and under interrogation at the time the statement was given.¹¹³ Since no *Miranda* warnings were ever administered to the defendant, the court reversed the conviction.¹¹⁴ The majority first reiterated the four most significant factors that should be considered in determining whether or not a defendant is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant.¹¹⁵ Although the police involved testified at the suppression hearing that they did not formally "arrest" the defendant until after the statement was given, the totality of the circumstances revealed that neither the officers nor the defendant could have reasonably

108. 646 S.W.2d at 940-41.

109. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon Supp. 1984) provides that "[n]o oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding" unless it is electronically recorded with the accused's consent. *Id.* art. 38.22, § 5 (Vernon 1979) provides, as to written confessions, that "[n]othing in this article precludes the admission . . . of a statement that does not stem from custodial interrogation"

110. *See Ancira v. State*, 516 S.W.2d 924, 927 (Tex. Crim. App. 1974) ("[W]e find it difficult to formulate a general rule to distinguish custodial interrogation from noncustodial interrogation. A case-by-case approach in which the evidence is reviewed in the light of *Miranda* and subsequent decisions is deemed necessary.")

111. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

112. 643 S.W.2d 724 (Tex. Crim. App. 1982).

113. *Id.* at 734.

114. *Id.*

115. *Id.* at 733. *See generally* Annot., 31 A.L.R. 3d 565, 578 (1970) (custodial interrogations and *Miranda*).

believed that McCrory was free to leave after he admitted the crime to the polygraph examiner.¹¹⁶ Moreover, any deficiencies in a determination of probable cause to believe that the defendant was guilty vanished when he exclaimed, "I did it; I killed her."¹¹⁷ The officers admitted that the defendant was the focus of the investigation at that time.¹¹⁸ The court held that the confession was obtained from interrogation even though no showing was made that the psychiatrist had asked the defendant any questions.¹¹⁹ The court found an interrogation because the record as a whole clearly established that the defendant's statement resulted from a calculated practice that the officers present knew was "reasonably likely to evoke an incriminating response."¹²⁰

An analysis similar to that in *McCrory* led to the opposite conclusion in *LaPoint v. State*¹²¹ in which a police officer was found to have no probable cause to arrest at the time the incriminating declaration was made.¹²² The police officer, on duty in the middle of the morning, drove by his own house and noticed an unfamiliar bicycle parked nearby and the back gate of his fence open. The officer drew his revolver and walked in to his backyard where he observed a black male standing a few feet away from the house holding a knife. The police officer asked the man what he was doing there, and the man responded, "I am burglarizing, sir."¹²³ The officer then placed the defendant under arrest. Subsequent investigation revealed that a screen was missing from one of the windows next to the back door. The court of criminal appeals held that it was only after the defendant's incriminating statement that the officer's general suspicion "particularized and focused on" the defendant.¹²⁴ Indeed, the defendant's statement gave the

116. 643 S.W.2d at 734. The majority opined that "it strains credulity to suggest appellant himself thought he could admit commission of this capital murder to [the polygraph examiner], shake hands around, glance at his watch as he informed the group he was late for another appointment, and walk out the door!" *Id.* at 733.

117. *Id.*

118. This case is thus distinguishable from cases involving only a general investigation into an unsolved crime, such as *Brown v. State*, 475 S.W.2d 938, 940 (Tex. Crim. App. 1971) (double murder); *Jones v. State*, 442 S.W.2d 698, 699-700 (Tex. Crim. App. 1969) (murder); those involving statements made during a general on-the-scene investigatory stop, such as *Harper v. State*, 533 S.W.2d 776 (Tex. Crim. App. 1976); and those in which the defendant is affirmatively told that he is not under arrest or is even permitted to leave the company of the officers to go about his business, *see, e.g.*, *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (defendant left police interview without hindrance); *Brooks v. State*, 580 S.W.2d 825, 828-29 (Tex. Crim. App. 1979) (voluntary appearance at police station).

119. 643 S.W.2d at 734. This lack of questioning was the basis of the dissent, which read *Rhode Island v. Innis*, 446 U.S. 291 (1980), as standing for the proposition that there can be no interrogation without "questioning initiated by law enforcement officers." 643 S.W.2d at 735 (quoting *Innis*, 446 U.S. at 298).

120. *Id.* at 734 (quoting *Innis*, 446 U.S. at 301); *see also* *Wyrick v. Fields*, 103 S. Ct. 394, 396, 74 L. Ed. 2d 214, 218 (1982) (polygraph interrogation). The Supreme Court spoke of the need for fifth amendment enforcement to combat psychologically oriented interrogation techniques as early as *Miranda v. Arizona*, 384 U.S. at 467.

121. 650 S.W.2d 821 (Tex. Crim. App. 1983).

122. *Id.* at 824.

123. *Id.* at 825.

124. *Id.* at 824.

officer probable cause to believe a burglary was in progress.¹²⁵ The subjective intent of the officer was categorized by the court as involving little more than mere curiosity. The court considered the subjective belief of the defendant as nothing more than the thought that it would be in his best interest to tell the truth since he had clearly been caught.¹²⁶ All of the facts and circumstances applied in conjunction with the four significant factors analysis led the court to the conclusion that the defendant was not in custody at the time of his inculpatory declaration.¹²⁷

III. FORMER JEOPARDY

During the survey period the court of criminal appeals decided that a defendant may raise and "appeal" a double jeopardy claim before the commencement of the subsequent trial. In *Ex parte Robinson*¹²⁸ Robinson was discharged in an examining trial for lack of probable cause, but was indicted later for the same offense. After posting bond, Robinson filed an application for writ of habeas corpus in the district court, alleging that the double jeopardy doctrine of collateral estoppel barred his prosecution under the indictment and that he was, therefore, being unlawfully restrained. In reaching the ultimate issue raised by the accused, the court of criminal appeals first resolved the procedural issue of "whether the appellant may raise and appeal his double jeopardy claim before the trial of the indictment which he attacks."¹²⁹

In 1977 the Supreme Court of the United States held in *Abney v. United States*¹³⁰ that a pretrial denial of a motion to dismiss an indictment in federal court on double jeopardy grounds was immediately appealable. The language of *Abney* is unclear as to whether the decision was grounded on the construction of the federal jurisdictional statute¹³¹ or the constitutional requirements of the fifth amendment.¹³² The Court did state, however, that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."¹³³ The Beaumont court of appeals subsequently held in *Spradling*

125. *Id.* at 824-25; see *Wussow v. State*, 507 S.W.2d 792 (Tex. Crim. App. 1974) (on-the-scene confession).

126. 650 S.W.2d at 825. Curiously, the court in *LaPointe* apparently holds that being "caught" by a uniformed officer brandishing a revolver is somehow distinguishable from being seized or in custody within the meaning of the fourth amendment. The court defines "in custody" as a circumstance in which "a reasonable person would have believed he was not free to leave." *Id.* at 825 n.3 (quoting *United States v. Mendenhall*, 446 U.S. 544, 545 (1980) (Stewart, J., concurring)).

127. 650 S.W.2d at 825.

128. 641 S.W.2d 552 (Tex. Crim. App. 1982).

129. *Id.* at 554.

130. 431 U.S. 651, 656-62 (1977).

131. 28 U.S.C. § 1291 (1976) permits an appeal only from a final decision.

132. U.S. CONST. amend. V.

133. 431 U.S. at 660. The Court noted that it "has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punish-

*v. State*¹³⁴ that *Abney* did not provide constitutional authority to confer appellate jurisdiction on a court of appeals to hear an interlocutory appeal from a state trial court's denial of a plea of former jeopardy.¹³⁵ The court noted in a dictum that the holding in *Abney* was "not grounded upon a constitutional provision"¹³⁶ and refused to accept the appeal because neither the state constitution¹³⁷ nor the Code of Criminal Procedure¹³⁸ confer interlocutory appellate jurisdiction on the Texas appellate courts.¹³⁹ Any uncertainty about the federal constitutional significance of *Abney* was eliminated in *United States v. Hollywood Motor Car Co.*¹⁴⁰ The Supreme Court in that case found that the constitutional right not to be exposed to double jeopardy was probably the most important of *Abney's* relevant factors, and that factor would be significantly undermined by postponement of review until after conviction. The Court then held that freedom from double jeopardy was a constitutional right that encompasses "a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all."¹⁴¹

In light of *Abney* and *Hollywood Motor Car*, the court of criminal appeals in *Robinson* was "compelled to hold that there is a Fifth Amendment right not to be exposed to double jeopardy, and that it must be reviewable before that exposure occurs."¹⁴² The court further held that the appellant, unlike *Spradling*, had "invoked the proper procedure to challenge one of the incidents of such exposure," by filing a writ application in the trial court and by taking an appeal therefrom to the court of criminal appeals.¹⁴³ The court in *Robinson* thus gave Texas defendants the functional equivalent of an interlocutory appeal from a trial court's denial of a plea in bar based on jeopardy grounds. Today, however, the appeal from the denial of the writ application would be to a court of appeals and not directly to the court of criminal appeals.¹⁴⁴

Since the Supreme Court decisions in *Burks v. United States*¹⁴⁵ and *Greene v. Massey*¹⁴⁶ that a defendant may not be retried after his conviction.

ments. It is a guarantee against being twice put to trial for the same offense." *Id.* at 660-61 (emphasis in original).

134. 643 S.W.2d 89 (Tex. App.—Beaumont, no pet.), cert. denied, 455 U.S. 971 (1982).

135. 634 S.W.2d at 90-91.

136. *Id.* at 90.

137. See TEX. CONST. art. V, § 6 (courts of appeals).

138. See TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 1984) (court of criminal appeals).

139. 634 S.W.2d at 91.

140. 102 S. Ct. 3081, 3083, 73 L. Ed. 2d 754, 757 (1982).

141. *Id.* at 3084, 73 L. Ed. 2d at 758 (quoting *United States v. McDonald*, 435 U.S. 850, 860-61 (1978)).

142. 641 S.W.2d at 555.

143. *Id.*

144. TEX. CONST. art. V, § 5 (1891, amended 1978) and the former version of TEX. CODE CRIM. PROC. ANN. art. 44.34 (1973 Tex. Gen. Laws, ch. 465, § 1, at 1270) gave the court of criminal appeals jurisdiction over habeas corpus appeals. But see TEX. CONST. art. V, § 6; TEX. CODE CRIM. PROC. ANN. art. 44.34 (Vernon Supp. 1984) that now vests the courts of appeals with such jurisdiction.

145. 437 U.S. 1, 18 (1978).

146. 437 U.S. 19, 26-27 (1978).

tion was reversed by an appellate court for insufficiency of the evidence, appellate courts have been required to assess the sufficiency of the evidence even if a conviction is reversed on other grounds.¹⁴⁷ The question persisted, however, as to whether an accused's jeopardy protections were offended by a retrial if the first prosecution was based upon a fundamentally defective indictment or information. Prior to *Burks* and *Greene*, original proceedings were void and the prior conviction resulting therefrom did not bar a retrial for the same offense,¹⁴⁸ since a fundamentally defective pleading does not vest the trial court with jurisdiction.¹⁴⁹ Whenever a person in Texas was validly convicted and appealed his case to the court of criminal appeals, and that court ruled that the evidence was insufficient to sustain the conviction, the maximum relief an appellant could receive on appeal was reversal and remand to the trial court for a new trial.¹⁵⁰

In *Foster v. State*¹⁵¹ the defendant was convicted of possession of cocaine on a fundamentally defective indictment.¹⁵² On original submission, a panel of the court of criminal appeals reversed the conviction, but refused to enter an order of acquittal under *Burks* and *Greene* because the trial court did not have jurisdiction of the particular offense and, therefore, jeopardy could not have attached.¹⁵³ The court, therefore, refused to consider the sufficiency of the evidence.¹⁵⁴ On motion for rehearing the court held that even if the pleading on which the prosecution is based is fundamentally defective, article I, section 14 of the Texas Constitution bars retrial upon a finding of insufficient evidence to sustain the conviction.¹⁵⁵ The court explained that jeopardy and trial are different matters, and reasoned that even if it were possible that a fundamentally defective indictment did not place one in jeopardy under the first clause of article I,

147. See, e.g., *Froyd v. State*, 633 S.W.2d 884, 885 (Tex. Crim. App. 1982); *Hooker v. State*, 621 S.W.2d 597, 598 (Tex. Crim. App. 1981); *Watson v. State*, 605 S.W.2d 877, 880 (Tex. Crim. App. 1979).

148. *Andrews v. State*, 436 S.W.2d 546, 549 (Tex. Crim. App. 1969); *Whitehead v. State*, 162 Tex. Crim. 507, 508, 286 S.W.2d 947, 948 (1956).

149. *Daniels v. State*, 573 S.W.2d 21, 23-24 (Tex. Crim. App. 1978); *Standley v. State*, 517 S.W.2d 538, 541 (Tex. Crim. App. 1975).

150. Both the United States Supreme Court and the Texas Court of Criminal Appeals have long held, however, that a verdict of acquittal is a bar to retrial for the acquitted offense, even if the indictment charging the offense was fundamentally defective. See *Crist v. Bretz*, 437 U.S. 28, 30 (1978) (statute repealed before indictment); *Finch v. United States*, 433 U.S. 676, 677 (1977) (failure to state an offense); *Lee v. United States*, 432 U.S. 23, 25 (1977) (lack of allegation of necessary element); *Illinois v. Sommerville*, 410 U.S. 458, 459 (1973) (lack of allegation of necessary element); *Ball v. United States*, 163 U.S. 662, 664 (1896) (no legal indictment); *Mixon v. State*, 35 Tex. Crim. 458, 34 S.W. 290 (1896) (original indictment faulty).

151. 635 S.W.2d 710 (Tex. Crim. App. 1982).

152. At the time of the indictment, which described the substance as merely "cocaine," that substance was not specifically named in the penalty group of the Controlled Substances Act. Such pleadings, therefore, failed to allege an offense and were fundamentally defective. *Crowl v. State*, 611 S.W.2d 59, 60-61 (Tex. Crim. App. 1981).

153. 635 S.W.2d at 711.

154. *Id.*

155. *Id.* at 714. TEX. CONST. art. I, § 14 provides that "[n]o person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."

section 14, the second clause bars retrial as long as an appropriate court entered a verdict of not guilty.¹⁵⁶ Specifically, a finding of insufficient evidence on appeal is equivalent to a verdict of not guilty and prevents retrial for the same offense charged.¹⁵⁷ The court concluded by holding that "though the judgment of conviction must be reversed because of a fatally defective indictment, [the appellate court] will examine and decide the contention that the evidence is insufficient as a matter of law to support the judgment."¹⁵⁸

Jeopardy problems frequently arise when a trial court declares a mistrial after jeopardy has attached.¹⁵⁹ To permit retrial, a termination of a criminal trial after jeopardy attaches can only be proper when required by "manifest necessity" or the "ends of public justice."¹⁶⁰ In *Schaffer v. State*¹⁶¹ the court of criminal appeals emphasized that trial judges and prosecutors must ensure that the record clearly reflects that the jeopardy requirements are met, preferably by explicit findings of fact and conclusions of law, in order to save the case for retrial. After a jury had been impaneled and sworn at Schaffer's trial, one of the jurors informed the court that he felt he was disqualified because of his discussion about the case with another person and the possibility that he had formed an opinion about the case. The record did not reflect any further examination to determine whether the juror was absolutely disqualified under article 35.16 of the Code of Criminal Procedure.¹⁶² The trial court sua sponte declared a mistrial without the consent of the defendant. The case was set for trial,

156. 635 S.W.2d at 714-15.

157. The court's interpretation of the second clause of § 14 of the Texas Bill of Rights was adopted almost a century ago in *Anderson v. State*, 24 Tex. App. 705, 7 S.W. 40 (1886).

158. 635 S.W.2d at 717. The court went on to find the evidence insufficient to sustain the appellant's conviction for cocaine possession, and accordingly ruled that the defendant could not be prosecuted further. *Id.* at 720.

159. Jeopardy attaches after the jury has been selected and sworn. See *Crist v. Bretz*, 437 U.S. 28, 37 (1978); *Illinois v. Somerville*, 410 U.S. 458, 469 (1973); *McElwee v. State*, 489 S.W.2d 455, 458 (Tex. Crim. App. 1979).

160. *Arizona v. Washington*, 434 U.S. 497, 516 (1978); *Illinois v. Somerville*, 410 U.S. 458, 469 (1973); *United States v. Jorn*, 400 U.S. 470, 485 (1971); *Torres v. State*, 614 S.W.2d 436, 443 (Tex. Crim. App. 1981); *Chvojka v. State*, 582 S.W.2d 828, 830 (Tex. Crim. App. 1979). In *Somerville* the Court wrote:

A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

410 U.S. at 464.

161. 649 S.W.2d 637, 639 (Tex. Crim. App. 1983).

162. *Id.* at 639 n.4. TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (Vernon Pam. Supp. 1966-1983) sets out the eleven permissible categories for challenges for cause by either side, only three of which constitute absolute disqualification: that the juror is insane, has been convicted, or is under indictment for theft or any felony. The fact that the juror in *Shaffer* formed a conclusion about the case that could influence his verdict would have provided a basis for excusal for cause under art. 35.16(a)(10), but this ground is not an absolute disqualification and can be waived. The trial court should not excuse prospective jurors on its own motion unless the jurors are absolutely disqualified. *Esquivel v. State*, 595 S.W.2d 516, 524

the defendant's former jeopardy plea overruled, and the defendant convicted. The court of criminal appeals reversed and entered an order of acquittal on the grounds that the record did not demonstrate any manifest necessity or show that the end of public justice would have been defeated if the mistrial had not been granted.¹⁶³ The court observed that the trial court failed to enter findings or offer any explanation in the record as to the reasons for the mistrial decision.¹⁶⁴ Because of these record deficiencies the plea of former jeopardy should have been granted.¹⁶⁵

Finally, in *Garza v. State*¹⁶⁶ the court of criminal appeals held that the state's abandonment of one or more counts in a multicount indictment constitutes a jeopardy bar to further prosecution of the abandoned charges even when no adjudication of guilt on the remaining counts exist.¹⁶⁷ The defendant in *Garza* was charged originally with aggravated assault and felony riot in a two-count indictment. At the close of the evidence in the first trial, the state abandoned the riot count and elected to proceed to the jury on the aggravated assault charge. The trial resulted in a hung jury and declaration of a mistrial. At the second trial on the same indictment, the state elected to proceed on the riot count, on which the defendant was convicted. The court of criminal appeals en banc decided that the former jeopardy provisions of both the federal and state constitutions barred the retrial on the riot count that was abandoned before the mistrial on the assault count.¹⁶⁸ The court reasoned that the state's decision to abandon a count is in itself tantamount to the declaration of a mistrial without manifest necessity.¹⁶⁹ The fact that the remaining count did not result in a conviction or acquittal was deemed irrelevant.¹⁷⁰

IV. SPEEDY TRIAL ACT

The court of criminal appeals confirmed in *Cole v. State*¹⁷¹ that the government cannot circumvent the Speedy Trial Act¹⁷² by filing a new indictment or information in a case if the applicable time limit has run on the

(Tex. Crim. App. 1980); *Valore v. State*, 545 S.W.2d 477, 481 (Tex. Crim. App. 1977), cert. denied, 449 U.S. 986 (1980).

163. 649 S.W.2d at 639-40.

164. *Id.* at 639. In *Arizona v. Washington*, 434 U.S. 497, 517 (1978), the Supreme Court advised that the review of any trial court decision is facilitated by findings and by an explanation supporting the decision granting the mistrial.

165. 649 S.W.2d at 639-40.

166. 658 S.W.2d 152, 159 (Tex. Crim. App. 1982).

167. The court explained that its holding was merely an application of the long-established general rule that failure to submit a count is tantamount to a dismissal thereof, and if jeopardy has attached, the defendant cannot on a subsequent trial be prosecuted on the abandoned count. *Id.* at 158; see *Scelles v. State*, 511 S.W.2d 300, 301 (Tex. Crim. App. 1974); *Parish v. State*, 145 Tex. Crim. 117, 120, 165 S.W.2d 748, 750 (1942); *Deisher v. State*, 89 Tex. Crim. 467, 469, 233 S.W. 978, 979 (1921); *Mizell v. State*, 83 Tex. Crim. 305, 306, 203 S.W. 49, 51 (1918).

168. 658 S.W.2d at 159; see U.S. CONST. amend. V; TEX. CONST. art. I, § 14.

169. 658 S.W.2d at 155-56.

170. *Id.* at 159.

171. 650 S.W.2d 818 (Tex. Crim. App. 1983).

172. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1966-1983).

original charging instrument. The prosecution in *Cole* dismissed the information against the defendant as to which the time period had already expired and filed another information containing identical allegations on the same date under a new cause number. The trial court denied the defendant's motion to dismiss the information under the Speedy Trial Act. The state maintained that the trial court properly overruled the defendant's motion because the defendant failed to prove that the dismissal of the first cause and the commencement of the second cause were initiated to circumvent the Speedy Trial Act. The court of criminal appeals concluded that the motive for changing cause numbers is immaterial in determining compliance with the Act.¹⁷³ Section 4(7) of the Act provides that any time between the dismissal of a previous charge and the commencement of subsequent charge arising out of the same transaction is excluded in computing the time by which the state must be ready for trial.¹⁷⁴ The court, therefore, held that the time that elapsed under the first charging instrument had to be included in computing the time limits applicable to the subsequent charging instrument.¹⁷⁵

The court also recently held in *Durrough v. State*¹⁷⁶ that a defendant should not be permitted to include in this computation any time that expired during periods of continuance that he requested while the previous charge was pending.¹⁷⁷ In *Durrough* the state obtained a new indictment charging the defendant with the same offense without previously dismissing the original indictment. Because of several continuances and speedy trial waivers filed by the defendant under the original indictment, less than 120 days of nonexcludable time had elapsed. The reindictment, however, was not filed until after 120 days from the commencement of the action. The defendant claimed that his speedy trial waivers in the original cause were not applicable to the reindictment. The court found that section 4(7) implies a continuing relationship between the time periods covered by the previous indictment and the subsequent one. The court thus held that the periods of delay resulting from continuances and resultant speedy trial waivers in the previous cause, granted at the request of the defendant, were properly excluded from the computation of time in the subsequent cause, and that the trial court had correctly "transferred" the waivers.¹⁷⁸

173. 650 S.W.2d at 820.

174. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(7) (Vernon Pam. Supp. 1966-1983), provides that in computing the time by which the state must be ready for trial, the following shall be excluded:

[I]f the charge is dismissed upon motion of the state or the charge is disposed of by a final judgment and the defendant is later charged with the same offense or another offense arising out of the same transaction, the period of delay from the date of dismissal or the date of the final judgment to the date the time limitation would commence running on the subsequent charge had there been no previous charge

175. 650 S.W.2d at 820.

176. 620 S.W.2d 134 (Tex. Crim. App. 1981).

177. *Id.* at 140.

178. *Id.* at 139-40.

The time that elapses under a previous cause now clearly counts against the state in computing the time periods applicable under a subsequent charging instrument, at least if the charges under both are identical. Likewise, periods of time that can be excluded by the state because of continuances¹⁷⁹ or other waivers by the defendant under the previous cause can be excluded by the state in determining the time by which the state must be ready in a subsequent cause. The court has not, however, adequately addressed those issues where the prior and subsequent charging instruments allege different offenses or otherwise include materially different legal or factual allegations.

The court of criminal appeals also had occasion during the survey period to define further what constitutes prosecutorial delay under the Act. In *Lyles v. State*¹⁸⁰ the court held that unnecessary delay by law enforcement officials in obtaining the defendant's presence is not an "exceptional circumstance" excludable by the state if the exercise of due diligence by the prosecuting authority could have secured the presence of the defendant for trial.¹⁸¹ In *Lyles* the defendant's presence was not secured until 228 days after the commencement of the case due to an inexplicable rejection of the bail bond posted by the defendant in another county. As a result, the defendant was carried in a nonarrest status and his case was never set for trial. The state made no showing that the defendant was attempting to avoid prosecution or that the state was unaware of his location. When the prosecutor became aware of the situation, he obtained a setting for the case and issued a summons for the defendant's appearance. Because the prosecutor could easily have taken these steps prior to the expiration of the Act's time limits, the court of criminal appeals found that the state had failed to exercise due diligence in obtaining the defendant's presence.¹⁸² Although the court has consistently held that the Speedy Trial Act refers to the preparedness of the prosecutor for trial and does not encompass the judicial process as a whole,¹⁸³ "[t]he prosecutor cannot excuse a lack of due diligence on his part by pointing the finger at the Sheriff or other law enforcement agency."¹⁸⁴ In so holding, the court reiterated the principle set down in *Newton v. State*¹⁸⁵ that "the defendant's presence is a readiness burden which falls upon the State."¹⁸⁶ The fact that the speedy trial tolling

179. Periods of delay resulting from continuances granted at the request, or with the consent, of the defendant are generally excluded from computation of the applicable time limitation under the Act pursuant to TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(3) (Vernon Pam. Supp. 1966-1983).

180. 653 S.W.2d 775 (Tex. Crim. App. 1983).

181. *Id.* at 779; see TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(10) (Vernon Pam. Supp. 1966-1983).

182. 653 S.W.2d at 779.

183. See *Barfield v. State*, 586 S.W.2d 538, 541 (Tex. Crim. App. 1979); *Ordunez v. Bean*, 579 S.W.2d 911, 913 (Tex. Crim. App. 1979); see also *McMahon v. State*, 630 S.W.2d 730, 736 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd) (standard for dismissal depends on prosecutor's not trial court's readiness).

184. 653 S.W.2d at 779.

185. 641 S.W.2d 530, 531 (Tex. Crim. App. 1982).

186. 653 S.W.2d at 778.

exceptions contained in section 4 of the Act include three instances in which the state will not be charged with delays due to the defendant's absence clearly justifies the court's interpretation.¹⁸⁷ In situations, therefore, where a case is not docketed because of delays resulting from disapproval of a bond or other similar circumstances, the state will carry a very heavy burden at a subsequent speedy trial hearing to prove that the defendant's presence could not have been obtained had the prosecution exercised due diligence.¹⁸⁸

Other aspects of the Speedy Trial Act continue to provide a fertile source of litigation as the courts wrestle with such evasive terms as "ready for trial"¹⁸⁹ and "exceptional circumstances."¹⁹⁰ Of utmost significance to the practitioner is the court of criminal appeals' holding in *Martin v. State*¹⁹¹ that a plea of guilty does *not* constitute a waiver of the rights afforded under the Act.¹⁹² A panel opinion of the court in *Ramirez v. State*¹⁹³ inexplicably held in 1979 that rights under the Speedy Trial Act are waived by virtue of a guilty plea.¹⁹⁴ The *Ramirez* court cited the language of section 3, which merely provides that these rights are waived if a defendant fails to file a speedy trial motion prior to trial or to entering a guilty plea.¹⁹⁵ The subsequent decisions in *Luna v. State*¹⁹⁶ and *Flores v. State*¹⁹⁷ reached the same result, citing *Ramirez* without discussion. This implausible conclusion drew vigorous dissent and sharply divided the court, with four members complaining that the fundamental precepts of

187. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(4), (5) (Vernon Pam. Supp. 1966-1983) provides that the state may exclude:

(4) a period of delay resulting from the absence of the defendant because his location is unknown and:

(A) he is attempting to avoid apprehension or prosecution; or

(B) the state has been unable to determine his location by due diligence;

(5) a period of delay resulting from the unavailability of the defendant whose location is known to the state but whose presence cannot be obtained by due diligence or because he resists being returned to the state for trial

188. The court in *Lyles* expressly overruled the opinion of the Dallas court of appeals in *McPeters v. State*, 624 S.W.2d 375 (Tex. App.—Dallas 1981, no pet.), in which the trial delay was due to a mistake in the sheriff's office in processing the bond made by *McPeters*. 653 S.W.2d at 778-79. The Dallas court of appeals held that such a delay constituted an exceptional circumstance that justified tolling the time period under the Speedy Trial Act. 624 S.W.2d at 377.

189. A speedy trial motion must be granted and the prosecution dismissed if the state is not ready for trial within specified time periods after commencement of the case. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 1 (Vernon Pam. Supp. 1966-1983).

190. This blanket tolling provision, found at TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(10) (Vernon Pam. Supp. 1966-1983), allows the state to exclude "any other reasonable period of delay that is justified by exceptional circumstances."

191. 652 S.W.2d 777 (Tex. Crim. App. 1983).

192. *Id.* at 779.

193. 590 S.W.2d 509 (Tex. Crim. App. 1979).

194. *Id.* at 510.

195. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Pam. Supp. 1966-1983) provides that "[t]he failure of a defendant to move for discharge under the provisions of this article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article."

196. 602 S.W.2d 267, 267 (Tex. Crim. App. 1980).

197. 606 S.W.2d 859, 860 (Tex. Crim. App. 1980).

English grammar and the legislative history of the Act clearly mandated the opposite result.¹⁹⁸ Nevertheless, the *Ramirez* interpretation prevailed for several years until an almost unanimous court finally decided in *Martin* that "such rights claimed by an accused under the Act are not lost by a subsequent plea of guilty."¹⁹⁹

V. VENUE

No dramatic developments in the established law on venue materialized during the survey period, although several instructive opinions were handed down regarding procedural requisites and sufficiency of proof.²⁰⁰ In *Black v. State*²⁰¹ the only evidence bearing on venue was the testimony of two investigating police officers who testified that as employees of the Tyler police department and while on duty on a specified block and street, they arrested the defendant for possession of marijuana. Neither the city nor the county where the offense was committed, however, was expressly placed into evidence. The information alleged that the offense occurred in Smith County.²⁰² After the state rested, the defendant made a timely motion for acquittal premised upon the state's failure to prove venue that was overruled by the trial court.²⁰³ Despite the fact that in criminal cases venue need only be proven by a preponderance of the evidence²⁰⁴ and may be demonstrated by either direct or circumstantial evidence,²⁰⁵ the court of criminal appeals reversed, finding no evidence to connect the county of the offense to the county alleged in the indictment.²⁰⁶ The court considered mere reference to the name of the police department with whom the officers were employed and to the name of the street where the offense took place wholly insufficient to satisfy the state's burden of proof.²⁰⁷ The dissent considered the evidence sufficient for the fact finder reasonably to

198. 602 S.W.2d at 267-68 (Clinton, J., dissenting); 606 S.W.2d at 860-61 (Phillips, J., & Clinton, J., dissenting).

199. 652 S.W.2d at 779. *Martin* was a 7-1-1 decision. The doctrine of stare decisis notwithstanding, this is actually the second time the court has switched positions on this issue. Six months prior to *Ramirez* the court of criminal appeals ruled in *Riggall v. State*, 590 S.W.2d 460 (Tex. Crim. App. 1979) (en banc), that the defendant's "guilty plea did not waive his pretrial motion to dismiss for denial of a speedy trial." *Id.* at 462 (on motion for rehearing). *Riggall* was ignored by the majority in *Flores, Luna*, and the panel opinion in *Ramirez*, but was urged as controlling authority by the dissent in *Flores*. 606 S.W.2d at 860 (Clinton, J., dissenting).

200. The statutory rules on venue in Texas criminal cases are codified in ch. 13 of the Code of Criminal Procedure.

201. 645 S.W.2d 789 (Tex. Crim. App. 1983).

202. All informations must set forth the county or district in which the offense is charged to have been committed so that the case is within the jurisdiction of the court where the information is filed. TEX. CODE CRIM. PROC. ANN. art. 21.21(5) (Vernon 1966). This rule likewise applies to indictments. *Id.* art. 21.02(5).

203. 645 S.W.2d at 790. The defense made no motion for instructed verdict because *Black* was tried before a judge, not a jury.

204. See *Banks v. State*, 530 S.W.2d 940, 943 (Tex. Crim. App. 1975).

205. See *Haynes v. State*, 140 Tex. Crim. 52, 55, 143 S.W.2d 617, 619 (1940).

206. 645 S.W.2d at 791.

207. *Id.*

conclude that the offense was committed in Smith County as alleged.²⁰⁸ It relied on prior case authority that allowed courts to take judicial notice that a certain city or town is within a particular county.²⁰⁹

The court's opinion in *Black* fortuitously points to other venue issues of critical procedural importance. Article 44.24(a) of the Code of Criminal Procedure provides that venue shall be presumed on appeal unless made "an issue in the court below."²¹⁰ The court held in *Black*, however, that the mere entry of the defendant's plea of not guilty automatically put "in issue" the allegations of venue, so that the state must prove the allegations for the conviction to stand.²¹¹ The court reiterated the corollary principle that the defendant need not put venue in issue either by special plea or by introducing evidence to negate the allegation.²¹² Confusion understandably results, however, from the many cases holding that under article 44.24(a) the venue issue is waived for purposes of appellate review because no issue of venue was made in the trial court, even though it was put "in issue" by the defendant's plea of not guilty.²¹³ The distinction appears to lie in the difference in meaning between making an issue of venue and placing venue in issue at trial. The entry of a not guilty plea accomplishes the latter, and merely requires the state to prove venue by a preponderance of the evidence. On the other hand, venue is "made" an issue, and is thereby preserved for appeal, by a motion for instructed verdict of acquittal for failure to prove venue, or by evidence negating the venue allega-

208. 645 S.W.2d at 793 (Onion, J., dissenting). The court had previously held that evidence on venue was sufficient if the jury could reasonably conclude that the offense was committed in the county alleged in the indictment or information. See *Edwards v. State*, 427 S.W.2d 629, 634 (Tex. Crim. App. 1968); *Rippee v. State*, 384 S.W.2d 717, 718 (Tex. Crim. App. 1964); *Curtis v. State*, 167 Tex. Crim. 536, 538, 321 S.W.2d 587, 589 (Tex. Crim. App. 1959).

209. 645 S.W.2d at 793. For example, in *Moore v. State*, 151 Tex. Crim. 542, 544, 209 S.W.2d 193, 194 (Tex. Crim. App. 1948), judicial notice of the fact that Lubbock is the county seat of Lubbock County was permitted. Similarly, in *Monford v. State*, 35 Tex. Crim. 237, 239, 33 S.W. 351, 351 (1896), the court held that judicial notice could be taken of the fact that the city of Galveston is in Galveston County. See generally R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE § 193 (1980) (location of cities and towns). Some civil case authority arguably goes even further, permitting courts to take judicial notice that a particular street address within its jurisdiction is located in a certain county. See, e.g., *Harper v. Killion*, 162 Tex. 481, 485, 348 S.W.2d 521, 523 (1961) (city of Jacksonville in Cherokee County); *LaSora v. Burr*, 516 S.W.2d 265, 268 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (intersection of highways); *Evans Associated Indus., Inc. v. Evans*, 493 S.W.2d 547, 548 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (street address).

210. TEX. CODE CRIM. PROC. ANN. art. 44.24(a) (Vernon Supp. 1984) provides in part that "[t]he courts of appeals and the Court of Criminal Appeals shall presume that the venue was proved in the court below . . . unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record."

211. 645 S.W.2d at 790; accord *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981); *Shelton v. State*, 27 Tex. App. 443, 444, 11 S.W. 457, 458 (1889); *Tucker v. State*, 25 Tex. App. 653, 653-54, 8 S.W. 813, 813 (1888); *West v. State*, 21 Tex. App. 427, 428, 2 S.W. 810, 811 (1886).

212. 645 S.W.2d at 790.

213. See, e.g., *Clark v. State*, 558 S.W.2d 887, 891 (Tex. Crim. App. 1977); *Grant v. State*, 507 S.W.2d 732, 735 (Tex. Crim. App. 1974); *Vasquez v. State*, 491 S.W.2d 173, 175 (Tex. Crim. App. 1973); *McCoy v. State*, 478 S.W.2d 480, 481 (Tex. Crim. App. 1972).

tions.²¹⁴ The defendant in *Black* obtained appellate review by meeting both requirements: he pled not guilty and he moved for judgment of acquittal after the state had rested. Failure to have made such a motion would have resulted in waiver of the issue on appeal by permitting the appellate court to presume that venue was proven pursuant to article 44.24(a) of the Code of Criminal Procedure.²¹⁵

The court's ultimate disposition of *Black* raises an intriguing question that the court totally failed to address. Since the state failed to prove venue, the court concluded that the trial court improperly denied the appellant's motion for acquittal. The court, however, did not reverse and dismiss, but merely reversed and remanded.²¹⁶ Because a finding of insufficient evidence on appeal, like an acquittal in the trial court, now precludes retrial on double jeopardy grounds,²¹⁷ and since the court of criminal appeals routinely enters orders of acquittal or directs the trial court to do so in such cases, the *Black* court's manner of disposition is difficult to reconcile or justify. Whether venue, limitations, and other such issues that are a part of the state's proof, though not strictly considered elements of the offense, should subject a case to a *Burks/Greene* analysis is a significant question that the court of criminal appeals has yet expressly to resolve.²¹⁸

In another case the court further illuminated the rule that failure to file a motion for change of venue by the date set for the pretrial hearing does not waive the motion, despite the requirement to that effect contained in article 28.01 of the Code of Criminal Procedure.²¹⁹ In *Revia v. State*²²⁰ a pretrial hearing was held two months prior to trial. Just before the commencement of the voir dire examination of the jury panel, the defendant presented his motion for a change of venue for the first time. The trial court denied this motion on the ground that it was untimely filed.²²¹ The state never controverted the motion, and no hearing was held thereon. On appeal the court reversed the conviction, holding that the limitations of article 28.01 could no longer bar consideration of a motion for change of venue in light of several Supreme Court decisions giving venue questions constitutional di-

214. See *Martin v. State*, 385 S.W.2d 260, 261 (Tex. Crim. App. 1964). In bench trials, a motion for judgment of acquittal is the proper motion.

215. See *supra* note 210 and accompanying text.

216. 645 S.W.2d at 791.

217. See *supra* notes 145-58 and accompanying text.

218. See *Edwards v. State*, 427 S.W.2d 629, 634 (Tex. Crim. App. 1968) (circumstantial evidence of venue held sufficient).

219. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1 (Vernon Pam. Supp. 1966-1983) provides that "[t]he court may set any criminal case for a pre-trial hearing . . . [which] shall be to determine any of the following matters: . . . (7) Motions for change of venue by the State or the defendant . . ." Section 2 provides that matters not filed or raised by the pretrial hearing will generally be waived: "When a criminal case is set for such pre-trial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown . . ." *Id.* § 2.

220. 649 S.W.2d 625 (Tex. Crim. App. 1983).

221. *Id.* at 626.

mension.²²² The court did not expressly hold the applicable portions of article 28.01 unconstitutional insofar as they bar venue motions subsequent to pretrial hearings, but did hold that these statutory provisions are to be disregarded in determining whether a motion for change of venue is properly filed.²²³

VI. JURY SELECTION

The court of criminal appeals continues routinely to reverse death penalty cases when prospective jurors are excluded in violation of the proscriptions laid out by the United States Supreme Court in *Witherspoon v. Illinois*²²⁴ and *Adams v. Texas*.²²⁵ *Witherspoon* held that a prospective juror may not be excluded by the trial court for cause unless the juror clearly indicates that (1) he would automatically vote against the imposition of the death penalty without regard to any evidence that might be introduced at the trial of the case, or (2) his attitude toward capital punishment would prevent him from making an impartial decision as to the defendant's guilt.²²⁶ A death sentence, consequently, cannot stand if the jury was chosen by excluding veniremen for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."²²⁷ In *Adams* the Court held that section 12.31(b) of the Texas Penal Code,²²⁸ which disqualifies a prospective juror unless he can state that the death penalty will not "affect" his deliberations, was violative of the sixth and fourteenth amendments if used to exclude jurors on grounds broader than those established by *Witherspoon* and its progeny.²²⁹ The *Adams* court explained that "to exclude all jurors

222. See *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963). *Revia* was soon relied on in *Biegajski v. State*, 653 S.W.2d 624, 627 (Tex. App.—San Antonio 1983, pet. ref'd), to reach the same result.

223. 649 S.W.3d at 626. Courts should, therefore, look primarily to TEX. CODE CRIM. PROC. ANN. art. 31.03 (Vernon Pam. Supp. 1966-1983) (defendant's motion for change of venue). See *Biegajski v. State*, 653 S.W.2d 624, 627 (Tex. App.—San Antonio 1983, pet. ref'd); *Hussey v. State*, 590 S.W.2d 505, 506 (Tex. Crim. App. 1979); *McManus v. State*, 591 S.W.2d 505, 516 (Tex. Crim. App. 1979); *Stapleton v. State*, 565 S.W.2d 532, 533-34 (Tex. Crim. App. 1978); *Enriquez v. State*, 429 S.W.2d 141, 142 (Tex. Crim. App. 1968); see also *Henley v. State*, 576 S.W.2d 66, 73 (Tex. Crim. App. 1978) (refusal of hearing on controverted motion for change of venue held deprivation of due process).

224. 391 U.S. 510 (1968).

225. 448 U.S. 38 (1980).

226. 391 U.S. at 522-23 n.21.

227. *Id.* at 522.

228. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974) provides:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. 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.

229. 448 U.S. at 50-51; see also *Lockett v. Ohio*, 438 U.S. 586, 595-97 (1978) (exclusion of jurors not violative of *Witherspoon*); *Boulden v. Holman*, 394 U.S. 478, 481-84 (1969) (jury not selected in accordance with *Witherspoon*). The *Adams* decision overturned sub silentio several Texas cases holding that section 12.31(b) could be used to exclude prospective jurors, independently of *Witherspoon*. See, e.g., *Huges v. State*, 563 S.W.2d 581, 583 (Tex. Crim. App. 1978), cert. denied, 440 U.S. 950 (1979) ("[W]hen a juror is disqualified under Sec.

who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."²³⁰ Thus, if any veniremen aver that they will consider and decide the facts impartially and will conscientiously apply the law as charged by the court, they may not be excluded for cause merely because they frankly concede that the potentially lethal consequences of their decision would "invest their deliberations with greater seriousness and gravity or would involve them emotionally."²³¹

In *Hartfield v. State*²³² the court of criminal appeals translated the *Witherspoon/Adams* rules by stating their converse: a juror may be properly excluded when, but only when, "he is not willing to accept that death may be a punishment in certain circumstances or . . . he is not willing and able to answer the statutory questions impartially, without conscious distortion or bias."²³³ The trial court in *Hartfield* excluded a venirewoman under section 12.31(b) because of her voir dire admission that her deliberations might be affected by her knowledge of the possible penalty. On appeal the case was reversed because she had further stated that she could vote "yes" to the special issues if the evidence revealed "a real bad murder."²³⁴ The venirewoman had thus indicated that she would base her verdict on the evidence, as required, even though the potential penalty would affect her deliberations. The same result was reached in *Graham v. State*²³⁵ in which the prospective juror admitted that his deliberations would be affected, but also testified that he thought capital punishment was justified under certain conditions, and that he "probably could" vote to impose the death penalty in a proper case. The court held that the juror's mere conscientious reservations against capital punishment were an insufficient basis for exclusion.²³⁶ In *Cuevas v. State*²³⁷ the excluded venireman told the trial court that he had conscientious scruples against the death penalty and that under no circumstances could he participate as a juror in returning a verdict that would require the court to assess the death penalty. Upon subsequent questioning by defense counsel, however, the prospective juror stated that he could follow the law and base his deci-

12.31(b), supra, we do not need to consider his qualifications under *Witherspoon*."); *Freeman v. State*, 556 S.W.2d 287, 297 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088 (1978) (juror disqualified solely on the basis of § 12.31(b)); *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim. App.), cert. denied, 431 U.S. 949 (1976) (*Witherspoon* not considered because jurors were disqualified under § 12.31(b)).

230. 448 U.S. at 50.

231. *Id.* at 49-50. Although the jury in Texas does not directly vote on whether to impose the death penalty or life imprisonment, affirmative answers to the special issues submitted under TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981) require the trial court to assess punishment at death.

232. 645 S.W.2d 436 (Tex. Crim. App. 1980) (opinion on original submission).

233. *Id.* at 438.

234. *Id.* at 440.

235. 643 S.W.2d 920 (Tex. Crim. App. 1981) (on original submission).

236. *Id.* at 923-24.

237. 641 S.W.2d 558 (Tex. Crim. App. 1982).

sion on the evidence, despite his feeling that the potential death penalty would affect his deliberations. This latter testimony required the reversal of the conviction.²³⁸ Rehabilitation by defense counsel was similarly successful in *Mead v. State*.²³⁹ The excluded venireman in *Mead* initially appeared disqualified. Upon further questioning, however, he claimed he could "truthfully" answer the special issues and base his answers on the evidence.

In *Hernandez v. State*²⁴⁰ the court of criminal appeals confronted the troublesome problem of the "equivocating venireman" whose ambiguous and noncommittal answers during voir dire do not readily lend themselves to application of the *Witherspoon* analysis. Several prospective jurors in *Hernandez* would go no further than to state that they "didn't think" they could vote to assess the death penalty. Their exclusion was upheld on appeal because *Witherspoon* does not require specific formalized answers and because the trial judge can best determine whether a particular venireman is in fact unequivocally committed to vote against imposition of the death penalty.²⁴¹ The court of criminal appeals ruled that if the prospective juror equivocates and serious doubt is cast on his ability to be a fair and impartial juror, the trial court's decision to excuse the juror for cause will be reviewed on an abuse of discretion standard.²⁴²

In noncapital cases several appellate decisions issued during the survey period dealt with limitations on the length and scope of voir dire. In *Whitaker v. State*²⁴³ the trial court placed a fifty-minute time limit on the defendant's voir dire examination. Out of thirty-two members of the jury panel, defense counsel was unable to complete his questioning beyond the twenty-fifth panel member. The Corpus Christi court of appeals reversed, holding that while the trial court may impose reasonable restrictions on voir dire, including reasonable time limitations,²⁴⁴ the judge in the instant case had allowed only an average of two minutes per prospective juror. The court of appeals, therefore, concluded that the time limitation was unreasonable.²⁴⁵ The court noted that defense counsel made no attempt to prolong the voir dire, and that all questions asked and tendered were pertinent.²⁴⁶ The court of criminal appeals, however, reached the opposite conclusion. A plurality ruled that the trial court's limitation did not reflect an abuse of discretion because the defense was provided with completed juror information forms twenty-five minutes prior to voir dire, which gave coun-

238. *Id.* at 563.

239. 645 S.W.2d 279 (Tex. Crim. App. 1983).

240. 643 S.W.2d 397 (Tex. Crim. App. 1982).

241. *Id.* at 406.

242. *Id.* For other cases dealing with equivocating jurors, see *Villarreal v. State*, 576 S.W.2d 51, 63 (Tex. Crim. App. 1978); *Granviel v. State*, 552 S.W.2d 107, 114 (Tex. Crim. App. 1976); *Tezeno v. State*, 484 S.W.2d 374, 383 (Tex. Crim. App. 1972).

243. 653 S.W.2d 781 (Tex. Crim. App. 1983).

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

245. *Whitaker v. State*, 654 S.W.2d 4, 6 (Tex. App.—Corpus Christi 1982, pet. granted).

246. *Id.*

sel a "head start" in obtaining information.²⁴⁷ The court also held that no harm was shown since the record did not reflect whether the jury was composed of any venireman that defense counsel had not examined individually.²⁴⁸

A restriction on the scope of voir dire necessitated reversal in *Gonzales v. State*²⁴⁹ in which the trial court refused to allow defense counsel to ask whether any of the prospective jurors had ever served on a grand jury. The court of appeals noted that the permissible areas of panel questioning are broad, in order to permit counsel to utilize peremptory challenges effectively. The court then reiterated the general principle that denial of a proper question is always harmful error.²⁵⁰ Because the court considered a question concerning prior grand jury service proper, the trial court's refusal required reversal.²⁵¹

VII. COMPETENCY TO STAND TRIAL

In *Williams v. State*²⁵² the court of criminal appeals declared that the standard for determining whether to hold a competency hearing during a trial is the same as that used when the issue is raised prior to trial.²⁵³ Article 46.02 of the Code of Criminal Procedure²⁵⁴ requires a trial court, generally on motion of defense counsel, to conduct a competency hearing before a jury in advance of trial "if the court determines there is evidence to support a finding of incompetency."²⁵⁵ A mere showing of "some evidence, more than none or a scintilla," is sufficient to force the trial judge to empanel a jury for a separate hearing on competency prior to the trial on the merits.²⁵⁶ When the issue is raised during the trial, however, article 46.02 provides for a special section 2(b) inquiry hearing by the judge for the purpose of deciding whether or not a full-fledged competency hearing must be held before another jury panel.²⁵⁷ The court of criminal appeals

247. 653 S.W.2d at 782.

248. *Id.* at 781; *cf.* *De La Rosa v. State*, 414 S.W.2d 668, 672 (Tex. Crim. App. 1967) (conviction reversed on ground that trial court's 30-minute voir dire limitation was unreasonable because it did not permit defense counsel to question individually all members of panel); *Barrett v. State*, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974) (30-minute restriction on voir dire upheld, since defense counsel spent over 20 minutes explaining law to jury panel and tendered 26 pages of proposed individual questions to court, many of which were deemed impertinent).

249. 638 S.W.2d 132 (Tex. App.—Corpus Christi 1982, no pet.).

250. *See Mathis v. State*, 576 S.W.2d 835, 836-37 (Tex. Crim. App. 1979).

251. 638 S.W.2d at 133; *see Clark v. State*, 608 S.W.2d 667, 670 (Tex. Crim. App. 1980).

252. No. 098-83 (Tex. Crim. App. Jan. 18, 1984).

253. *Id.*, slip. op. at 3-4.

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

255. *Id.* § 2(a). Generally, criminal prosecutions cannot proceed if the defendant is incompetent to stand trial, in that he does not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [or he lacks] a rational as well as factual understanding of the proceedings against him." *Id.* § 1(a)(1)-(2).

256. *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. 1980).

257. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(b) (Vernon 1979) provides:

If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of

previously construed this provision to require a much greater and uncontradicted evidentiary showing of incompetency before the inquiry hearing was mandated. In *Johnson v. State*²⁵⁸ for example, the court fashioned the rule that a trial court need not even hold an inquiry hearing under section 2(b) when the competency issue is raised during trial unless, from all of the evidence, a "bona fide doubt" exists in the judge's mind as to whether the defendant is competent to stand trial.²⁵⁹ The court's apprehension of the prospect of baseless incompetency claims interrupting a trial on the merits and unnecessarily halting the proceedings to determine competency separately apparently motivated this interpretation.²⁶⁰

In overturning *Johnson* and its progeny²⁶¹ the *Williams* court observed that article 46.02 does not require an immediate halting of the trial on the merits whenever the issue is raised. Rather, the section 2(b) inquiry hearing may be conducted after the close of evidence and the separate competency hearing may be held at any time prior to sentencing.²⁶² Because the statutory language regarding the evidentiary showing needed to trigger a midtrial incompetency hearing is identical to that used concerning pretrial incompetency,²⁶³ the court found that little basis existed for imposition of the stricter bona fide doubt standard for midtrial determinations.²⁶⁴

Therefore, whenever any evidence, from any source, comes to the attention of the trial court during trial that tends to show, and thus adequately raises, the issue of incompetency, the trial court must conduct a section 2(b) inquiry hearing. The trial court must determine whether some evidence, a quantity more than none or a scintilla, is shown that rationally may lead to a conclusion of incompetency, by considering only "that evidence tending to show incompetency" and "putting aside all competing indications of competency."²⁶⁵ If some evidence exists under this standard, a competency hearing before a separate jury must be held sometime prior to sentencing.²⁶⁶

the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

258. 564 S.W.2d 707 (Tex. Crim. App. 1978) (on motion for rehearing).

259. *Id.* at 710-11.

260. *Id.* at 710. The bona fide doubt standard was adopted by the court prior to the legislature's enactment of § 2(b) in 1975, and apparently was derived from dictum gleaned from *Pate v. Robinson*, 383 U.S. 375, 385 (1966). See *Ex parte Halford*, 536 S.W.2d 230, 231 (Tex. Crim. App. 1976); *Wilborn v. State*, 491 S.W.2d 432, 433 (Tex. Crim. App. 1973); *Townsend v. State*, 427 S.W.2d 55, 59-63 (Tex. Crim. App. 1968).

261. See *Hawkins v. State*, 628 S.W.2d 71, 77 (Tex. Crim. App. 1982); *Mata v. State*, 632 S.W.2d 355, 358 (Tex. Crim. App. 1982); *Thompson v. State*, 612 S.W.2d 925, 927 (Tex. Crim. App. 1981); *Garcia v. State*, 595 S.W.2d 538, 541 (Tex. Crim. App. 1980); *Burch v. State*, 654 S.W.2d 65, 66 (Tex. App.—Fort Worth 1983, no pet.); *Williams v. State*, 653 S.W.2d 574, 579-80 (Tex. App.—Tyler 1983, pet. ref'd).

262. No. 098-83, slip op. at 3.

263. Both sections mandate a competency hearing if the court determines "there is evidence to support a finding of incompetency to stand trial." TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(a), (b) (Vernon 1979).

264. No. 098-83, slip op. at 2, 4.

265. *Id.* at 2; see *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. 1980).

266. No. 098-83, slip op. at 3-4. All competency hearings must be conducted before a jury different from that selected to hear the trial on the merits. See TEX. CODE CRIM. PROC.

The trial court's failure or refusal to hold a section 2(b) inquiry hearing, however, will not necessarily constitute reversible error. The court has consistently evaded any resolution of the difficult yet crucial distinction between the standard of proof necessary to trigger the midtrial inquiry hearing and the standard that compels the trial court to hold an actual competency hearing.²⁶⁷ The *Williams* opinion implicitly suggests that both standards are the same, but neglects to state expressly how the issue can be "raised" in the first place during trial. A trial court's refusal to conduct an inquiry hearing presumably could be revealed as erroneous only if "some evidence" were in the record by proffer, bill of exception, or otherwise, showing that the provisions of section 2(b) were implicated. Perhaps, however, a mere motion or request for a competency hearing is sufficient to raise the issue.

The whole purpose of an inquiry hearing, however, is to determine whether "some evidence" exists. If only well-grounded claims require an inquiry hearing, then a competency hearing necessarily would follow, rendering the inquiry a meaningless and useless formality.²⁶⁸ Thus, despite the apparent evidentiary prerequisite contained in the statutory language of section 2(b), a midtrial motion for a competency hearing logically would suffice to obligate the trial court to conduct the inquiry hearing.²⁶⁹ One can only speculate, however, as to the nature and quantity of proof that might suffice in the absence of an affirmative request.

VIII. SELF-INCRIMINATION AND IMMUNITY

In another demonstration of judicial accession to minimum federal standards of protection, the court of criminal appeals held in *Ex parte Shorthouse*²⁷⁰ that the Texas constitutional privilege against self-incrimination²⁷¹ will henceforth be construed as providing no broader degree of protection than that of the fifth amendment of the United States Constitution.²⁷² This pronouncement afforded the court in *Shorthouse* with its singular justification for overruling an extensive body of case law and for

ANN. art. 46.02, § 4(a), (f) (Vernon 1979) (incompetency hearing). *Id.* § 4(c) expressly provides that a competency issue raised during trial may be heard at any time prior to sentencing.

267. See *Williams*, No. 098-83, slip op. at 2-3 (court unable to find any indication legislature intended construction of identical standard to depend on when issue raised). Indeed, the court has indicated that there is no distinction at all. See *Mata v. State*, 632 S.W.2d 355, 358 (Tex. Crim. App. 1982); *Torres v. State*, 593 S.W.2d 717, 719 (Tex. Crim. App. 1980); *Dinn v. State*, 570 S.W.2d 910, 913-14 (Tex. Crim. App. 1978).

268. See *Johnson*, 564 S.W.2d at 712-13 (Odom, J., dissenting) (less showing for inquiry than hearing).

269. It appears that a motion filed by defense counsel after the verdict but before sentencing was sufficient to raise the issue of incompetency in *Williams*. The trial court, however, also had before it substantial evidence of mental retardation that was introduced during trial pursuant to the defendant's insanity defense. *Williams v. State*, 628 S.W.2d 848, 850-51 (Tex. App.—Amarillo 1982), *aff'd*, No. 098-83 (Tex. Crim. App. Jan. 18, 1984).

270. 640 S.W.2d 924 (Tex. Crim. App. 1982).

271. TEX. CONST. art. 1, § 10.

272. 640 S.W.2d at 928; see U.S. CONST. amend. V.

holding that transactional immunity is no longer mandated by article I, section 10 of the state constitution, and that mere use immunity will be sufficient to compel testimony over a claim of the privilege.²⁷³ Transactional immunity provides complete protection from prosecution for any offenses relating to the witness's testimony.²⁷⁴

Texas courts traditionally have required the granting of transactional immunity to overcome the privilege against compulsory self-incrimination.²⁷⁵ Such immunity has been required whether granted pursuant to statutory provision²⁷⁶ or a prosecutor's general power to grant immunity with the approval of the court, conferred by the statutory provisions of *nolle prosequi*.²⁷⁷ Because virtually all Texas case authority requiring transactional immunity was decided before the fifth amendment privilege was made applicable to the states,²⁷⁸ the immunity requirement clearly was based on Texas's own constitutional privilege.²⁷⁹ In 1972 the United States Supreme Court held in *Kastigar v. United States*²⁸⁰ that the fifth amendment only requires the granting of "use" or "derivative use" immunity.²⁸¹ Use immunity provides a lesser degree of protection to the witness, in that it only prevents the government from using the compelled

273. 640 S.W.2d at 928.

274. See *Kastigar v. United States*, 406 U.S. 441, 443, 451-52 (1972) (distinguishing and explaining transactional immunity).

275. 640 S.W.2d at 928.

276. See, e.g., *Dendy v. Wilson*, 142 Tex. 460, 470-71, 179 S.W.2d 269, 275 (1944) (transactional immunity for juveniles under statute); *Ferrantello v. State*, 158 Tex. Crim. 471, 481, 256 S.W.2d 587, 595 (1953) (transactional immunity for witnesses at legislative hearing under statute); *Ex parte Muncy*, 72 Tex. Crim. 541, 550, 562, 163 S.W. 29, 38, 44 (1913) (transactional immunity under prosecutorial discretion statute); see also *Ex parte Joseph*, 172 Tex. Crim. 355, 358, 356 S.W.2d 789, 790-91 (1962) (transactional immunity also covers distinct offenses connected with crime).

277. See, e.g., *Ex parte Copeland*, 91 Tex. Crim. 549, 557, 240 S.W. 314, 317 (1922) (prosecutor could grant transactional immunity); *Ex parte Barnes*, 73 Tex. Crim. 583, 584, 166 S.W. 728, 729 (1914) (transactional immunity within court's and prosecutor's joint power); *Ex parte Muncy*, 72 Tex. Crim. 541, 542, 163 S.W. 29, 41 (1913) (witness compelled to testify after prosecutor grant of immunity approved by court); *Ex parte Napoleon*, 65 Tex. Crim. 307, 309, 144 S.W. 269, 270 (1912) (witness not given immunity from prosecution did not have to testify); cf. *Carlisle v. State*, 138 Tex. Crim. 530, 532-33, 137 S.W.2d 782, 783 (1940) (error to refuse introduction of evidence of prosecutor's promise of immunity).

The prosecutor's power to grant immunity is conferred by the statutory provisions of *nolle prosequi*. Although Texas courts and prosecutors have no inherent power to grant immunity, see *Ex parte Muncy*, 72 Tex. Crim. 541, 542, 163 S.W. 29, 44-45 (1914) the *nolle prosequi* statutes have long been recognized as a legitimate basis for such authority. See, e.g., *Ex parte Joseph*, 172 Tex. Crim. 355, 357, 356 S.W.2d 789, 790-91 (1962) (authority derived from *nolle prosequi* statute); *Camron v. State*, 32 Tex. Crim. 180, 181, 22 S.W. 682, 682-83 (1893) (conviction overturned on defendant's plea of immunity pursuant to prosecution agreement under *nolle prosequi*); *Bowden v. State*, 1 Tex. Crim. 137, 145 (1876).

278. The fifth amendment was not made applicable to the states until the decision in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

279. See *Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1972), in which the court observed that "pre-*Malloy* questions as to the scope of 'self-incrimination' provisions were wholly matters of state law." *Id.* at 762.

280. 406 U.S. 441 (1972).

281. *Id.* at 453; see also *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 475 (1972) (constitutionality of a state use immunity statute upheld same day as *Kastigar*).

testimony or evidence derived therefrom in subsequent criminal proceedings, but does not bar prosecution for offenses revealed by the testimony.²⁸²

In *Shorthouse* the court of criminal appeals was, for the first time, squarely presented with a challenge to the validity of a statute conferring only use immunity under the state constitution.²⁸³ While most Texas immunity statutes require the conferral of some degree of transactional immunity,²⁸⁴ or a combination of use and transactional immunity,²⁸⁵ two statutes allow only use immunity.²⁸⁶ Section 71.04 of the Penal Code, for example, provides that one accused of engaging as a party in organized criminal activity may be required to furnish evidence or testify in return for use immunity.²⁸⁷ It was this statute that the government invoked in *Shorthouse*. In adopting the *Kastigar* rationale and concluding that section 71.04 is "co-extensive with the scope of self-incrimination as provided in article I, § 10 of the State Constitution,"²⁸⁸ the court announced the sweeping decree that the state constitutional privilege is henceforth to be construed as synonymous in meaning and application to the federal privilege contained in the fifth amendment.²⁸⁹ The court relied heavily on dictum in *Olson v. State*²⁹⁰ in which the court, in a different context, observed that the state privilege was "similar" to the federal privilege, in that they both have "common ancestry."²⁹¹ The court in *Shorthouse* went one step

282. 406 U.S. at 442, 453. In such subsequent prosecution, the government has a heavy burden of proving that the evidence it proposes to use was derived from independent sources. *Id.* at 461.

283. The statute was attacked under art. I, § 10 of the state constitution. The Supreme Court of Texas has had one occasion to make a similar assessment. In *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944), the court held a provision of the juvenile delinquency act that only conferred use immunity insufficient to compel the minor defendants to testify on the ground the state constitution requires transactional immunity. *Id.* at 471-72, 179 S.W.2d at 274-75.

284. See TEX. REV. CIV. STAT. ANN. art. 4015c (Vernon Supp. 1984) (prosecutions for unauthorized use of passes, franks, and transportation); *id.* art. 5205 (Vernon 1971) (employment discrimination investigations); *id.* art. 5221b-9(h) (Unemployment Compensation Commission proceedings); *id.* art. 5429f(13) (Vernon Supp. 1984) (testimony before state legislature); TEX. BUS. & COM. CODE ANN. § 15.20 (Vernon 1968) (investigations concerning antitrust and other corporate violations); *id.* § 23.22 (proceedings in assignment for creditors); TEX. CODE CRIM. PROC. ANN. art. 52.05 (Vernon 1979) (courts of inquiry); TEX. ELEC. CODE ANN. § 15.16 (Vernon Supp. 1984) (prosecutions for payment of an endorsing editorial); TEX. INS. CODE ANN. § 5.48-2 (Vernon 1981) (violations of fire insurance laws).

285. See TEX. REV. CIV. STAT. ANN. art. 4505c (Vernon 1976) (prosecutions for solicitation of patients by doctors); TEX. PENAL CODE ANN. § 43.06(b) (Vernon 1974) (prostitution cases); *id.* § 47.09(b) (gambling cases).

286. See TEX. REV. CIV. STAT. ANN. art. 6471 (Vernon 1926) (proceedings before Railroad Commission); TEX. PENAL CODE ANN. § 71.04(b) (Vernon Supp. 1984) (organized crime prosecutions).

287. TEX. PEN. CODE ANN. § 71.04(b) (Vernon Supp. 1984) provides: "No evidence or testimony required to be furnished under the provisions of this section nor any information directly or indirectly derived from such evidence or testimony may be used against the witness in any criminal case, except a prosecution for aggravated perjury or contempt."

288. 640 S.W.2d at 928.

289. *Id.*

290. 484 S.W.2d 756 (Tex. Crim. App. 1972) (opinion on motion for rehearing).

291. *Id.* at 772. The *Olson* court determined that compelling a handwriting exemplar

further, and thus clearly indicated that it intends to follow the precise dictates of the United States Supreme Court as to both federal and state constitutional law in the area of self-incrimination as well as search and seizure.

IX. GUILTY PLEAS

The most fundamental requisite to the validity of a guilty plea is that it be voluntarily and knowingly made. A plea of guilty necessarily involves the waiver of several vital constitutional rights.²⁹² The waiver, therefore, must not only be free and voluntary, but must also consist of "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."²⁹³ The court of criminal appeals applied this basic tenet of due process in *Ex parte Young*.²⁹⁴ In *Young* the petitioner pled guilty and was sentenced pursuant to a plea bargain agreement providing for punishment of fifteen years confinement in the Texas Department of Corrections. The record showed, however, that his attorney advised him prior to the entry of the plea that he would be eligible for parole after three years, while in fact he would not be eligible until he had served five years.²⁹⁵ The court determined that the petitioner had relied heavily on this misinformation in reaching his decision to enter the plea, and found these facts sufficient to invalidate the conviction.²⁹⁶ Even though eligibility for parole is a collateral consequence of the entry of a guilty plea, and a defendant is not entitled to be informed of such eligibility by the trial court,²⁹⁷ the court decided that "if the defendant is grossly misinformed about his parole eligibility date by his attorney, and the defendant relies upon that misinformation to the extent that it induces him to

does not constitute compelling an accused to give evidence against himself in violation of the Texas constitutional privilege embodied in TEX. CONST. art. I, § 10.

292. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). In *Boykin* the United States Supreme Court stated:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third is the right to confront one's accusers.

Id. (citations omitted).

293. *Brady v. United States*, 397 U.S. 742, 748 (1970). This underlying principle is embodied in TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Pam. Supp. 1966-1983), which provides: "No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary."

294. 644 S.W.2d 3 (Tex. Crim. App. 1983). The appellant attacked his conviction by way of a post-conviction writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1984).

295. Because petitioner was convicted of aggravated robbery, he was ineligible for credit for good time under the provisions of TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(b) (Vernon 1979).

296. 644 S.W.2d at 4.

297. See *Rose v. State*, 465 S.W.2d 147, 149 (Tex. Crim. App. 1971).

plead guilty or nolo contendere, his plea may be rendered involuntary."²⁹⁸

The court of criminal appeals has increasingly attached the incidents of ordinary contractual agreements to plea bargains. Following the lead of the federal courts, the court has held that plea bargaining, the process by which the prosecution makes concessions such as lower punishment recommendations, reduction of counts, or dismissal of other charges in exchange for the defendant's guilty plea, "flows from 'the mutuality of advantage'"²⁹⁹ to both sides, who in essence become parties to a "contract."³⁰⁰ Once the trial court announces that it will abide by the agreement, both the state³⁰¹ and the defendant³⁰² are bound to carry out their respective sides. The court of criminal appeals has thus remarked that when a plea bargain is not kept, the proper relief is either withdrawal of the plea or specific enforcement of the agreement, depending on the circumstances in each case.³⁰³ Opinions issued by the court of criminal appeals during the survey period indicate, however, that defendants may derive little benefit from this peculiar brand of contract law. In *Ex parte Williams*³⁰⁴ the court invoked the maxim that parties to a contract are presumed to deal at arm's length and thus the terms of their agreements will not be disturbed unless these terms appear manifestly unjust.³⁰⁵ The petitioner in *Williams* pled guilty to felony theft under a plea bargain agreement that provided for ten years' probation if he would pay \$10,000 in restitution and fines prior to sentencing. If the petitioner failed to make the payment, the agreement called for ten years' imprisonment. The petitioner was unable to make the payment in time, and at sentencing requested the court to allow him to withdraw his plea. The trial court denied the request and imposed a ten-year sentence.³⁰⁶ A divided court of criminal appeals dismissed Williams's equal protection claim,³⁰⁷ observing that "[e]qual protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision."³⁰⁸ The court also overruled the petitioner's challenges based on due process, lack of voluntariness, and violation of public policy, noting that he arguably possessed relatively equal bargaining power in striking his deal with the

298. 644 S.W.2d at 5.

299. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). See generally *Blackledge v. Allison*, 431 U.S. 63 (1977) (discussing collateral attack of guilty pleas).

300. See *Santobello v. New York*, 404 U.S. 257, 260 (1971); *Jones v. Estelle*, 584 F.2d 687, 689 (5th Cir. 1978).

301. See *Santobello v. New York*, 404 U.S. 257, 262 (1971); *DeRusse v. State*, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979).

302. *Joiner v. State*, 578 S.W.2d 739, 741 (Tex. Crim. App. 1979).

303. *Id.*

304. 637 S.W.2d 943 (Tex. Crim. App. 1982).

305. *Id.* at 948.

306. *Id.* at 945.

307. The petitioner specifically contended that the plea bargain created a disparity in sentence between an indigent and a person financially capable of paying the fine and restitution. *Id.* at 948; see *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977), *vacated as moot*, 439 U.S. 1041 (1978) (unconstitutionality of conditioning sentence on immediate payment of bargained-for fine); U.S. CONST. amend. XIV.

308. 637 S.W.2d at 948 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 226 (1978)).

state, and ultimately got what he bargained for.³⁰⁹

Breach of a plea bargain "contract" by the state provided the petitioner with a seemingly hollow victory in *Ex Parte Green*.³¹⁰ Green pled guilty under a plea bargain agreement that included a promise by the state not to prosecute his brother. After the petitioner entered his plea and was duly convicted, the state nevertheless proceeded to prosecute his brother. The court determined that the state had violated the express terms of the agreement, but only set aside the petitioner's conviction and remanded for further prosecution.³¹¹ The court's determination did not affect the validity of the brother's conviction.

X. RIGHT TO COUNSEL

The Supreme Court's landmark decision in *Estelle v. Smith*³¹² continues to have a significant impact in the areas of the right to counsel as well as the right against self-incrimination. In *Smith* the United States Supreme Court held, among other things, that a defendant represented by an attorney is denied his sixth amendment right to counsel when he is given a pretrial psychiatric interview without notice to his attorney.³¹³ The Court reasoned that when the results of such an interview are later used in an attempt to obtain the death penalty, the defendant should have his attorney's assistance in deciding whether to submit to the interview.³¹⁴

In *Parker v. State*³¹⁵ the court of criminal appeals considered the application of *Estelle v. Smith* to a noncapital case³¹⁶ wherein the defendant also raised the defense of insanity.³¹⁷ In *Parker* the appellant's attorney requested a psychiatric evaluation of his client on the issues of competency to stand trial and sanity at the time of the offense.³¹⁸ The trial court appointed Dr. Richard Coons to examine the appellant. Dr. Coons reported that Parker was competent to stand trial, but insane at the time of the commission of the offense. After Dr. Coons's report, the state had the appellant examined in jail by Dr. John Holbrook, without a court order or notice to appellant's counsel. Contrary to Dr. Coons, Dr. Holbrook found the appellant to have been sane at the time of the offense. Prior to trial the appellant filed a motion to suppress Dr. Holbrook's testimony. The trial court denied the motion, but ordered the state to provide appellant with a copy of Dr. Holbrook's report. The state delivered the report on the day of

309. 637 S.W.2d at 948-52.

310. 644 S.W.2d 9 (Tex. Crim. App. 1983).

311. *Id.*

312. 451 U.S. 454 (1981).

313. *Id.* at 471.

314. *Id.* at 469-71.

315. 649 S.W.2d 46 (Tex. Crim. App. 1983) (opinion on remand from United States Supreme Court, 453 U.S. 902 (1981)).

316. Appellant was charged with burglary of a habitation in violation of TEX. PENAL CODE ANN. § 30.02(a)(1) (Vernon 1974).

317. *Id.* § 8.01; TEX. CODE CRIM. PROC. ANN. art. 46.03, § 2 (Vernon 1979).

318. *See* TEX. CRIM. CODE PROC. ANN. art. 46.02, § 3(a), art. 46.03, § 3(a) (Vernon 1979) (examination of defendant for incompetency and insanity).

trial, claiming that it had just been received. During the trial, appellant called Dr. Coons to testify that in his opinion Parker was insane. In rebuttal, the state called Dr. Holbrook, who was allowed to testify over objection. No objections, however, were made on fifth or sixth amendment grounds.

The court of criminal appeals held that the appellant waived his fifth amendment protection for the psychiatric interview by offering testimony on the defense of insanity.³¹⁹ The court then considered whether the sixth amendment right to counsel had been violated. After quoting at length from *Estelle v. Smith*, the court found that appellant was denied his right to counsel because the interview was conducted after appellant had been indicted, and without any notice to his attorney.³²⁰ The court, however, found that this denial of counsel did not constitute reversible error.³²¹ Appellant's counsel knew of the Holbrook interview because he moved to suppress Dr. Holbrook's testimony. Parker's counsel also received a copy of Dr. Holbrook's report two days before his testimony. With notice of the content of Dr. Holbrook's testimony, appellant proceeded to raise the defense of insanity by expert testimony. Based upon these factors the court held that "[i]t would be absurd to hold that appellant waived his Fifth Amendment rights but he could still use the denial of his Sixth Amendment right to counsel to protect his Fifth Amendment right to prevent the State from using rebuttal testimony arising out of the flawed interview."³²²

The court of criminal appeals apparently held that the appellant was not harmed by the denial of his sixth amendment right to counsel. This conclusion would be correct had Dr. Holbrook's interview been court-ordered.³²³ In that situation the appellant would have no legitimate right to refuse to submit to the examination or limit the use of the psychiatrist's findings because the denial of his attorney's assistance as to whether to submit and as to what ends the evidence could be used could cause appellant no harm.³²⁴ In *Parker*, however, the court did not authorize Dr. Holbrook's interview. Without a court order the appellant was not obliged to allow Dr. Holbrook to examine him. His attorney, had he been properly notified, could have advised Parker of his right to refuse, and thus prevent Dr. Holbrook from obtaining the evidence ultimately used in defeating his client's insanity defense. This analysis evidences the harm in denying appellant his sixth amendment right to counsel.³²⁵

319. 649 S.W.2d at 52. The court declined to attach any significance to the fact that Dr. Holbrook examined the appellant without any court authorization. The lack of court authorization should perhaps require a different result since the appellant could have refused to submit to the examination in the absence of a court order. Dr. Holbrook's examination as an agent of the state arguably involved custodial interrogation as defined in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), thereby requiring warnings as to Parker's right to remain silent and his right to counsel. *Id.*

320. 649 S.W.2d at 52-53.

321. *Id.* at 53.

322. *Id.*

323. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 3(a), art. 46.03, § 3(a) (Vernon 1979).

324. *United States v. Cohen*, 530 F.2d 43, 48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976).

325. The court also held that appellant's failure to object on fifth and sixth amendment

The court of criminal appeals more clearly applied the holding of *Smith* and the right to counsel in *Mays v. State*,³²⁶ a capital murder case. At the time of his examination by Dr. James Grigson, the appellant was represented by counsel just as was the defendant in *Smith*. In contrast, however, Dr. Grigson conducted his interview pursuant to a court order issued after a hearing. Also unlike *Smith*, Mays raised issues as to his competency to stand trial and his sanity at the time of the crime. The court did not find these differences controlling since appellant's counsel, although notified of Dr. Grigson's examination, was not told that the examination would involve evidence of appellant's future dangerousness for use at the punishment phase of appellant's capital trial.³²⁷

The State argued that *Smith* did not apply because Dr. Grigson did not actually give an opinion as to appellant's future dangerousness, or the probability that appellant would continue to commit acts of violence. The court rejected this argument, finding that Dr. Grigson's testimony characterizing appellant as a high degree incurable sociopath conveyed his opinion as to Mays's future dangerousness.³²⁸ The real import of the sixth amendment right in *Smith* was notice to the defendant's attorney of the issues that would be encompassed in the psychiatric examination. In *Mays* the appellant's attorney knew that his client would be examined for competency and sanity, but did not know that the state also intended to use Dr. Grigson to prove that the appellant deserved the death penalty. This violation of Mays's sixth amendment rights required the reversal of his conviction.³²⁹

The right to counsel also encompasses the right to effective assistance by counsel.³³⁰ In *Ex parte McCormick*³³¹ the court of criminal appeals held that two jointly tried capital murder defendants were denied effective assistance because their representation involved a conflict of interest that adversely affected their attorneys' performance.³³² The two defendants, McCormick and McMahon, retained the same attorneys to represent them in the capital murder trial. The attorneys never explained the possible

grounds failed to preserve the error, if any, even though under Texas law the objection would have been futile. 649 S.W.2d at 55; see *ex parte English*, 642 S.W.2d 482 (Tex. Crim. App. 1982) (judgment reversed even though appellant failed to preserve error); *Ex parte Demouquette*, 633 S.W.2d 879, 881 (Tex. Crim. App. 1982) (reversal, though no contemporaneous objection at trial). The court found that under *Engle v. Isaac*, 456 U.S. 107 (1982) futility of the objection alone did not excuse a failure to voice a contemporaneous objection. 649 S.W.2d at 54. To the *Parker* court, the *Engle* holding indicated that a defendant could waive rights established by *Smith*. *Id.* at 54-55.

326. 653 S.W.2d 30 (Tex. Crim. App. 1983).

327. *Id.* at 33.

328. *Id.* at 34.

329. *Id.* at 35.

330. *Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980); *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

331. 645 S.W.2d 801 (Tex. Crim. App. 1983).

332. *Id.* at 806. The court relied upon *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), in which the Supreme Court of the United States held that a defendant is deprived of his sixth amendment right to counsel when he shows that his attorney's representation of multiple clients creates a conflict of interest that adversely affected the attorney's performance.

conflicts inherent in the joint representation and successfully opposed the state's motion for separate trials, which would have required the attorneys to withdraw and refund a portion of their fees.³³³

During trial the state introduced only McMahan's confession, thus precluding the defensive strategy of attacking both defendants' confessions as invalid. The attorneys had planned to argue that McCormick's confession was the result of a promise not to seek the death penalty, and that McMahan's confession was made after being shown McCormick's tainted confession that implicated him. When the prosecution only admitted McMahan's confession, the attorneys decided to help McMahan by eliciting the fact of McCormick's confession. To help McCormick, though, they argued that he had not received any substantial remuneration in this murder for hire case, leaving the clear implication that McMahan had received most of the payment. The defense attorneys also failed to individualize jury consideration of the defendants' culpability and propensity for continuing dangerousness.³³⁴ These examples of how the joint representation adversely affected the defendants entitled them to postconviction habeas corpus relief.³³⁵

Another case demonstrating the denial of the effective assistance of counsel is *Ex parte Dunham*.³³⁶ Dunham was charged with unauthorized use of a motor vehicle,³³⁷ enhanced by two prior felonies.³³⁸ His attorney convinced him to waive trial by jury because the attorney was physically and mentally exhausted after several jury trials and was unprepared to voir dire the jury panel. At the habeas corpus evidentiary hearing the attorney admitted that he knew at the time of trial this was in no way advantageous to Dunham. The court stated that such bad legal advice on a matter as important as the right to a jury trial could never be considered a matter of trial strategy. The court therefore held that such abdication of attorney responsibility to protect his client's best interest sufficiently constituted unconstitutionally ineffective assistance of counsel.³³⁹

A similar, though more appalling, situation occurred in *Miles v. State*.³⁴⁰ In *Miles* the appellant was convicted of attempted murder and received a sentence of fifteen years and one day. The appellant's court-appointed counsel inexplicably failed to ask a single question of the jury panel during voir dire. The El Paso court of appeals found that this failure could only

333. 645 S.W.2d at 803-04.

334. Such a jury argument would have aided the jury in answering the death penalty special issues set out in TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981).

335. 645 S.W.2d at 806.

336. 650 S.W.2d 825 (Tex. Crim. App. 1983).

337. TEX. PENAL CODE ANN. § 31.07 (Vernon 1979).

338. *Id.* § 12.42(d) provides:

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

339. 650 S.W.2d at 827.

340. 644 S.W.2d 23 (Tex. App.—El Paso 1982, no pet.).

be evidence of ineffective assistance of counsel.³⁴¹ The court, however, did not rest the reversal of the appellant's conviction solely on this ground. The appellant's attorney also opened the door at the punishment stage of the trial to proof by the state of the appellant's arrest record, of which his counsel was apparently unaware. The attorney also waived argument on punishment even though appellant was eligible for probation and had a family to support. The court determined that these actions or inactions by the appellant's attorney denied the appellant the reasonably effective assistance of counsel to which he was entitled under the sixth amendment.³⁴²

XI. SENTENCING

Problems in sentencing often arise regarding the evidence presented to a judge or jury to aid them in making their decision. Sometimes more than the usual concern of admissibility is involved. *Tamminen v. State*³⁴³ presents such a situation. In *Tamminen* the appellant, a former member of the Bandidos motorcycle gang, was convicted by a jury of aggravated rape, and elected to have the judge assess his punishment. Before sentencing, the prosecutor provided the trial judge with a confidential Department of Public Safety report on the Bandidos that contained appellant's name. The judge refused to allow the appellant's attorneys to review the report when they discovered it in the judge's office. At sentencing the judge explicitly disclaimed any reliance on the report and, instead, insisted that the ninety-nine-year sentence was based solely on the testimony of the two complainants.³⁴⁴

The San Antonio court of appeals vacated the sentence and remanded for sentencing by another district judge.³⁴⁵ In its opinion the court severely rebuked the prosecutor and the trial judge for their actions regarding the Bandidos report. The court labeled the prosecutor's ex parte act of providing the report to the judge as "reprehensible prosecutorial misconduct"³⁴⁶ and described the judge's acceptance of the document as judicial misconduct.³⁴⁷ The court then held that this misconduct violated the appellant's right of confrontation and right to a public trial.³⁴⁸ Even accepting the trial court's disclaimer at sentencing, the court determined that in order to maintain the appearance that justice had been done, the sentence must be vacated and the resentencing performed by another judge.³⁴⁹

341. *Id.* at 24.

342. *Id.* at 25.

343. 644 S.W.2d 209 (Tex. App.—San Antonio 1982), *rev'd in part, aff'd in part*, 653 S.W.2d 799, 803 (Tex. Crim. App. 1983).

344. 644 S.W.2d at 218.

345. *Id.*

346. *Id.* at 217.

347. *Id.*

348. *Id.*

349. *Id.* at 218.

Both the state and the appellant successfully petitioned the court of criminal appeals to review the court of appeals' decision. The court's plurality opinion left undisturbed the court of appeals' findings of prosecutorial and judicial misconduct.³⁵⁰ The court of criminal appeals, however, refused to hold that the judge's misconduct denied the appellant his due process rights.³⁵¹ The court noted that substantial evidence of the Bandidos organization and the appellant's past association therewith had been offered at the punishment phase of the trial. The court also noted that no evidence was presented indicating that the trial judge read the classified report. The court, therefore, found it unjustified to conclude that the trial judge conducted an elaborate charade by claiming not to have considered the report.³⁵²

Presiding Judge Onion, joined by Judge W.C. Davis, concurred wholly in the result, but used a different analysis to reach that result. He found that error, if any, was not preserved because there was no evidence that the trial court considered the report, no evidence to overcome the presumption that the court disregarded inadmissible evidence, no objection at the penalty hearing, and the complaint on motion for new trial differed from that urged on appeal.³⁵³ Further, any error was rendered harmless by the other evidence concerning the Bandidos that was admitted without objection, as well as by common knowledge of the reputation of the Bandidos.³⁵⁴ Judge Onion dissented from the approval of the court of appeals' findings of judicial misconduct because no showing was made that the judge improperly considered the report.³⁵⁵ Judge Teague dissented in a strongly worded opinion that fully endorsed the court of appeals' holding as necessary to ensure the appearance that justice was accomplished in the sentencing of appellant.³⁵⁶

A more common evidentiary question at punishment occurred in *Acosta v. State*.³⁵⁷ In *Acosta* the appellant challenged the admission of two prior California felony convictions used to support the enhancement allegations in his indictment on the ground that the state failed to prove that the convictions were the result of a valid waiver of indictment. The court of appeals accepted the appellant's claim that the convictions were void under Texas law without proof of a valid waiver of indictment³⁵⁸ and that California law, absent contrary evidence, was presumed to be the same.³⁵⁹

350. *Tamminen v. State*, 653 S.W.2d 799, 802 (Tex. Crim. App. 1983). Judge Clinton wrote for the plurality.

351. *Id.*

352. *Id.* at 803.

353. *Id.* at 806-07.

354. *Id.* at 807.

355. *Id.* at 808.

356. *Id.* at 808-09.

357. 654 S.W.2d 12 (Tex. App.—Corpus Christi 1982), *rev'd*, 650 S.W.2d 827 (Tex. Crim. App. 1983).

358. 654 S.W.2d at 14; *see* TEX. CODE CRIM. PROC. ANN. art. 1.141 (Vernon 1977) (waiver of indictment for noncapital felony).

359. *See* *Hall v. State*, 619 S.W.2d 156, 158 (Tex. Crim. App. 1980).

On the state's petition for discretionary review, a sharply divided court of criminal appeals reversed and affirmed the conviction.³⁶⁰ Judge W.C. Davis, writing for a three-man plurality, held the California convictions admissible since the appellant failed to prove the prior convictions void because they were tried on informations rather than indictments.³⁶¹ Presuming California and Texas law to be the same, the court stated that the appellant could have been tried on an information after a valid waiver of indictment. In this collateral attack, however, the appellant had the burden of demonstrating the lack of valid waiver.³⁶²

Presiding Judge Onion filed a concurring opinion joined by Judge Campbell.³⁶³ After reviewing several cases dealing with the validity of prior convictions used for enhancement, Judge Onion found that the prior convictions were not void in the absence of proof by appellant that the previous convictions lacked valid waivers of indictment.³⁶⁴ Furthermore, the appellant's objection concerning one of the exhibits lacked merit since waiver was not a prerequisite to the admission of the judgment.³⁶⁵

Judge Clinton, in his concurring opinion, viewed the court of appeals' holding as based on the state's failure to prove its enhancement allegations, rather than on the inadmissibility of the exhibits proving the prior convictions.³⁶⁶ If Texas law was presumed the same as California law, the state would be required to prove valid waivers of indictment to demonstrate that the information was legally pending in a court with jurisdiction. Because the question of whether the information is legally pending is a question of law, however, and because appellate courts could ascertain with reasonable certainty the law of another state, the court could determine, by looking at California law, that all charges in California may be prosecuted by information without a waiver of indictment. Judge Clinton thus concluded that the rebuttable presumption that the law of other states is the same as Texas law should no longer be applied, and that because a waiver of indictment is unnecessary under California law, the failure to prove such a waiver did not, in this case, render the evidence on the enhancement counts insufficient.³⁶⁷

The dissent, written by Judge Miller, found the court of appeals' decision correct because the prosecution failed to show that the appellant had validly waived indictment.³⁶⁸ The dissent argued that to attack the conviction, Texas law required the appellant to prove that he was not tried upon an indictment and that he did not waive his constitutional right to indictment.³⁶⁹ The state's exhibits affirmatively demonstrated that the appellant

360. 650 S.W.2d 827, 829 (Tex. Crim. App. 1983).

361. *Id.* at 828-29.

362. *Id.*

363. *Id.* at 829.

364. *Id.* at 834.

365. *Id.* at 832-33.

366. *Id.* at 834-36. Judge Clinton was joined in his concurrence by Judge McCormick.

367. *Id.* at 837.

368. *Id.* at 838. Judge Teague joined the dissent.

369. *Id.* at 838 (citing *Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1983)); *Chancy*

was convicted on an information, not an indictment. The appellant introduced California court records, devoid of evidence of a waiver, to prove he had not waived the indictment. Relying on *Carnley v. Cochran*,³⁷⁰ Justice Miller stated that a waiver of a constitutional right could not be presumed on a silent record. He concluded that the appellant had therefore met his burden of proving the convictions constitutionally defective and that the court of appeals should thus have been affirmed.³⁷¹

In the penalty stage of a criminal trial the order of procedure is the same as at the guilt/innocence stage.³⁷² The first step taken at the punishment stage when enhancement allegations are involved, therefore, is the reading of the indictment to the jury and the entry of the defendant's plea of "true" or "not true" to the allegations therein.³⁷³ In *Welch v. State*³⁷⁴ the court of criminal appeals discussed the impact of the state's introduction of critical evidence in the enhancement allegations before the defendant has pled to the indictment. The jury in *Welch* convicted the appellant of aggravated rape.³⁷⁵ At the punishment phase of the trial the state called two witnesses before noticing that it had failed to read the enhancement allegations to the jury and have the appellant enter his plea. The trial court then read the enhancement allegations, but the appellant moved to strike the testimony of the state's witnesses given before the entry of appellant's plea of not true. The trial court overruled the motion to strike.³⁷⁶ The court of criminal appeals reversed the appellant's conviction because of the trial court's failure to grant the motion to strike and its failure to require the state to reintroduce or obtain a stipulation of the evidence so that the evidence would be properly before the jury.³⁷⁷ The court determined that the jury's consideration of the improperly presented evidence was harmful because that evidence was the only testimony matching Welch's fingerprints to those in the exhibit proving one of his prior convictions.³⁷⁸

Judge McCormick's dissent³⁷⁹ criticized the majority for failing to rely on *Bush v. State*.³⁸⁰ In *Bush* the court of criminal appeals approved the trial court's finding of the truth of the enhancement allegations based solely on evidence from the guilt phase of the trial.³⁸¹ The dissent would have followed the *Bush* holding and affirmed the conviction.³⁸² It failed,

v. State, 614 S.W.2d 446 (Tex. Crim. App. 1981); *Tinney v. State*, 578 S.W.2d 137 (Tex. Crim. App. 1979); *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1977)).

370. 369 U.S. 506, 516 (1962) (waiver of right to counsel may not be presumed from a silent record).

371. 650 S.W.2d at 839.

372. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(b) (Vernon 1981).

373. *Id.* art. 36.01(1).

374. 645 S.W.2d 284 (Tex. Crim. App. 1983).

375. *Id.*

376. *Id.* at 285.

377. *Id.* For a discussion of the correct procedure, see *Trammell v. State*, 445 S.W.2d 190, 193-94 (Tex. Crim. App. 1969).

378. 645 S.W.2d at 285.

379. *Id.* at 286.

380. 642 S.W.2d 787 (Tex. Crim. App. 1982).

381. *Id.* at 789.

382. 645 S.W.2d at 286.

however, to realize that the enhancement evidence in *Bush* was presented during the trial on guilt or innocence. In *Welch* the evidence in question was not presented during either phase of the trial since the prosecution entered it after the guilty verdict but before the enhancement plea. These trial references of plea and verdict mark the boundaries within which the jury may consider the evidence.³⁸³

XII. EXTRADITION

The court of criminal appeals decided a question of first impression in *Ex parte Sanchez*,³⁸⁴ in holding that Texas courts can go behind the governor's rendition warrant and make their own determination as to whether probable cause exists in the demanding state, at least when the record fails to reflect that such determination was previously made.³⁸⁵ Under section 3 of the Uniform Criminal Extradition Act,³⁸⁶ adopted in Texas as article 51.13 of the Code of Criminal Procedure,³⁸⁷ the executive authority and courts of an asylum state may honor a demanding state's requisition only if the accused is "substantially charge[d] . . . with having committed a crime under the law of that State."³⁸⁸ Extradition can only be contested by writ of habeas corpus and a hearing limited to the legality of the extradition proceeding itself. Inquiry into issues dealing with the guilt or innocence of the accused is not permitted.³⁸⁹ In *Michigan v. Doran*³⁹⁰ the United States Supreme Court implicitly required some judicial determination of probable cause before an accused found in an asylum state may be extradited.³⁹¹ In *Doran* a justice of the peace of the demanding state had issued a warrant ostensibly based on probable cause, but had failed to set out sufficient facts to support that conclusion. The Michigan Supreme Court sustained the accused's habeas challenge to the proceeding.³⁹² In reversing the Michigan court, the United States Supreme Court observed that the courts of the asylum state are bound to accept the demanding state's determination of probable cause since "the proceedings of the demanding state are clothed with the traditional presumption of regularity."³⁹³ This ruling, consistent with the constitutional and statutory

383. *Id.* at 285 n.1.

384. 642 S.W.2d 809 (Tex. Crim. App. 1982).

385. *Id.* at 812.

386. 18 U.S.C. § 3182 (1982); *see* U.S. CONST. art. IV, § 2, cl. 2 (privileges and immunities).

387. TEX. CODE CRIM. PROC. ANN. art. 51.13 (Vernon 1979).

388. *Id.* § 3.

389. *Ex parte Jennings*, 434 S.W.2d 673, 674 (Tex. Crim. App. 1968); *see* TEX. CODE CRIM. PROC. ANN. art. 51.13, § 20 (Vernon 1979) (prohibiting the asylum state from considering guilt or innocence of the accused).

390. 439 U.S. 282 (1978).

391. *Id.* at 290; *see also* *Cuyler v. Adams*, 449 U.S. 433, 449 (1981) (remedial provisions of the Interstate Agreement on Detainers give prisoners a limited right to a judicial hearing on the receiving state's custody request).

392. *People v. Doran*, 401 Mich. 235, 258 N.W.2d 406, 413 (1977).

393. 439 U.S. at 290. The Court specifically ruled that:

[W]hen a neutral judicial officer of the demanding state has determined that

purposes of extradition proceedings, left open the question of the asylum state court's authority to make a probable cause inquiry when no such determination of probable cause is shown to have been rendered in the demanding state.

In *Sanchez* the court of criminal appeals found nothing in the record to show affirmatively that a judicial determination of probable cause had been made in the demanding state.³⁹⁴ The court also found no prohibition in *Doran* precluding Texas courts from making that determination themselves³⁹⁵ if the issue was timely and properly raised by the accused.³⁹⁶ Thus, a person upon whom extradition is sought will now be entitled to discharge from custody if the Texas habeas court finds that probable cause in the demanding state does not exist, or that sufficient evidence on which to make the determination is not available.³⁹⁷

The Dallas court of appeals subsequently reached the same result in a different way in *Ex parte Blankenship*.³⁹⁸ The Dallas court struck down a warrant issued upon an affidavit made before a district attorney instead of a magistrate.³⁹⁹ The state introduced the warrant at the habeas hearing to establish its prima facie case for extradition.⁴⁰⁰ The state, however, destroyed that showing by also introducing supporting papers that revealed the insufficiency of the warrant issued in the demanding state.⁴⁰¹ Without

probable cause exists, the courts of the asylum state are without power to review the determination. . . .

. . . [O]nce the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state.

Id.

394. 642 S.W.2d at 811.

395. *Id.* at 812. The court found support for its conclusion in *State v. Uttech*, 31 Wis. 2d 664, 143 N.W.2d 500, 505, *cert. denied*, 385 U.S. 956 (1966), which reached the same result under similar facts. See *Battles v. State*, 389 So. 2d 957, 960 (Ala. Crim. App. 1980), *cert. denied*, 452 U.S. 920 (1981). See generally Annot., 90 A.L.R.3d 1085 (1979) (necessity that demanding state show probable cause to arrest fugitive).

396. 642 S.W.2d at 811. The issue is presumably raised by specific averment in the application for writ of habeas corpus.

397. *Id.* at 812. Regrettably, both the Supreme Court in *Doran* and the court of criminal appeals in *Sanchez* failed to discuss the critical question of the fourth amendment's application and significance in the extradition context. A compelling argument could be advanced that the fourth amendment alone imposes a duty upon the courts of an asylum state to make an independent probable cause determination, at least where evidence is insufficient to prove adequately a previous and adequate determination in the demanding state. Nevertheless, some resolution and accommodation of the competing constitutional provisions of the extradition clause, U.S. CONST. art. IV, § 2, and the fourth amendment would have been appropriate. see *Doran*, 439 U.S. at 290-98 (Blackmun, J., concurring); *Sanchez*, 642 S.W.2d at 812 (Roberts, J., concurring); see also *Kirkland v. Preston*, 385 F.2d 670, 676 (D.C. Cir. 1967) (for extradition, affidavit must present facts evidencing probable cause).

398. 651 S.W.2d 430 (Tex. App.—Dallas 1983, pet. ref'd).

399. *Id.* at 431.

400. Texas courts have long held that introduction of a governor's warrant, regular on its face, is sufficient to make out a prima facie case for extradition. See *Ex parte Nelson*, 594 S.W.2d 67, 68 (Tex. Crim. App. 1979); *Ex parte Reagan*, 549 S.W.2d 204, 205 (Tex. Crim. App. 1977); *Ex parte Sykes*, 400 S.W.2d 568, 568 (Tex. Crim. App. 1966).

401. Although the state may introduce the supporting papers to support a prima facie case for extradition, *Ex parte Stehling*, 481 S.W.2d 431, 433 (Tex. Crim. App. 1972), the

resorting to a probable cause analysis as authorized in *Sanchez*, the *Blankenship* court simply held that the express statutory requirements of the Extradition Act were not complied with.⁴⁰² Section 3 of the Extradition Act provides that the asylum state's governor can honor the request for extradition on an affidavit and warrant issued in the demanding state only when the affidavit is made before a magistrate.⁴⁰³ The court therefore found the instant warrant, issued upon a complaint executed before a district attorney, insufficient to permit an order of extradition.⁴⁰⁴

In *Ex parte Henson*,⁴⁰⁵ a case involving the issue of identity, the court of criminal appeals relaxed the quantum of proof necessary under the state's burden of showing that the person held in custody is the same person named in the warrant. A presumption of identity generally arises when the name of the accused is the same as that set out in the warrant, and the burden of proof on the identity issue is on the accused.⁴⁰⁶ Once the accused places identity in issue,⁴⁰⁷ however, the burden shifts to the state.⁴⁰⁸ The prosecution normally attempts to satisfy this burden by introducing a photograph or set of fingerprints that have been authenticated by the demanding state. Such photographs are sufficient for this purpose when affidavits accompanying them clearly identify the person in the photograph as the same person who allegedly committed the offense for which extradition is requested, and the trial court finds that the person depicted therein is the same as the accused.⁴⁰⁹ Such evidence has been considered insufficient to

supporting papers can also be used to defeat the prima facie case if they contradict the allegations contained in the governor's warrant. *Ex parte Cain*, 592 S.W.2d 359, 362 (Tex. Crim. App. 1980); *Ex parte Wilson*, 437 S.W.2d 569, 570 (Tex. Crim. App. 1968).

402. 651 S.W.2d at 431.

403. TEX. CODE CRIM. PROC. ANN. art. 51.13, § 3 (Vernon 1979) provides that the demanding state's requisition must be accompanied by:

a copy of an indictment found or by information supported by affidavit in the State having jurisdiction of the crime, or by a copy of an affidavit before a magistrate there, together with a copy of any warrant which issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof

See also *Ex parte Rosenthal*, 515 S.W.2d 114, 119 n.2 (Tex. Crim. App. 1974) (interpreting § 3 of the Extradition Act).

404. 651 S.W.2d at 431.

405. 639 S.W.2d 700, 701 (Tex. Crim. App. 1982).

406. See *Ex parte Smith*, 515 S.W.2d 925, 926 (Tex. Crim. App. 1974).

407. Identity may be placed in issue by an affidavit of the accused stating he is not the same person named in the governor's warrant, see *Ex parte Spencer*, 567 S.W.2d 520, 522 (Tex. Crim. App. 1978), or by testimony by the accused to that effect, see *Ex parte Larson*, 494 S.W.2d 179, 180-81 (Tex. Crim. App. 1973).

408. *Ex parte Martinez*, 530 S.W.2d 578, 579 (Tex. Crim. App. 1975); *Ex parte Parker*, 515 S.W.2d 926, 927 (Tex. Crim. App. 1974).

409. See, e.g., *Ex parte Viduari*, 525 S.W.2d 163, 163 (Tex. Crim. App. 1975) (affidavit accompanying photograph stated that the person depicted therein was John Viduari who was in St. Louis County, Missouri, on December 26, 1973, and who was the defendant in cause no. 351688 in the circuit court of St. Louis County, the case for which extradition was requested); *Ex parte Landers*, 366 S.W.2d 567, 567 (Tex. Crim. App. 1963) (affidavit identified attached photograph as that of one of persons who committed robbery for which extradition was sought and with same name as one of the accused's aliases); *Ex parte O'Connor*, 169 Tex. Crim. 579, 580, 336 S.W.2d 152, 153 (1960) (affidavit executed by a store detective identified picture of accused as "Oliver O'Connor who was arrested by me in August of

prove identity, however, if the record fails to reflect such specific verification or a finding that the photograph actually depicts the person then in custody.⁴¹⁰ In *Henson* the affidavit supporting probable cause merely stated that the individual named therein and shown in an attached photograph was the same as the person against whom criminal charges had been filed in the demanding state. The affidavit contained no allegation that the person depicted in the photograph was charged with the crime for which extradition was requested, and the trial court record contained no findings identifying the accused as the man in the picture. Implicitly holding that in this context an unequivocal and specific identification is no longer required, the court of criminal appeals found the evidence on the issue of identity sufficient.⁴¹¹ The court also expressly overruled prior case authority and held that the trial court, as fact finder, need not make a specific finding matching the accused and the person in the photograph.⁴¹² While such a finding might clarify the record, the court concluded that the trial court's decision on identity was implicit in its ruling denying habeas relief.⁴¹³

In *Curry v. Ater*⁴¹⁴ the court of criminal appeals was called upon to decide the applicability of the provisions for legislative continuance to extradition proceedings. After obtaining several delays in his extradition writ hearing, the accused in *Curry* hired a state senator as co-counsel. On the date set for hearing, the senator filed a motion for continuance under the provisions of article 2168.⁴¹⁵ The judge presiding at the habeas corpus

1955" for offense charged in the extradition request); *see also Ex parte Mackerman*, 376 S.W.2d 350, 351 (Tex. Crim. App. 1964) (court held mistaken middle-name immaterial); *Ex parte Green*, 170 Tex. Crim. 311, 311-12, 340 S.W.2d 821, 821-22 (1960) (sworn affidavit charging "Fred L. Green" with forgery).

410. *See Ex parte Spencer*, 567 S.W.2d 520, 522 (Tex. Crim. App. 1978); *Ex parte Smith*, 515 S.W.2d 925, 926 (Tex. Crim. App. 1974).

411. 639 S.W.2d at 701.

412. *Id.* The court stated that "[i]nsofar as [they are] in conflict with this holding, *Ex parte Spencer* . . . and *Ex parte Smith* . . . are overruled." *Id.* (citations omitted).

413. *Id.*

414. 648 S.W.2d 10 (Tex. Crim. App. 1983).

415. TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1984) provides:

In all suits, either civil or criminal, or in matters of probate, pending in any court of this State, and in all matters ancillary to such suits which require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders, at any time within thirty (30) days of a date when the Legislature is to be in Session, or at any time the Legislature is in Session, or when the Legislature sits as a Constitutional Convention, it shall be mandatory that the court continue such cause if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a Member of either branch of the Legislature, and will be or is in actual attendance on a Session of the same. If the member of the Legislature is an attorney for a party to such cause, his affidavit shall contain a declaration that it is his intention to participate actively in the preparation and/or presentation of the case. Where a party to any cause or an attorney for any party to such cause is a Member of the Legislature, his affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty (30) days after the adjournment of the Legislature and such affidavit shall be proof of the necessity for such continuance, and such continuance shall be deemed one of right and shall not be charged

proceeding denied the motion.⁴¹⁶ The court of criminal appeals noted that the granting of a legislative motion for continuance that conforms with the statutory requirements is mandatory and applies in all criminal or civil "suits."⁴¹⁷ Although an exception to this rule is recognized where a "substantial existing right would be defeated or abridged by extended continuances,"⁴¹⁸ the court of criminal appeals observed that the demanding state failed to show how any rights might be defeated by the delay.⁴¹⁹ The court, therefore, held that because a habeas corpus proceeding is a "suit" within the meaning of the statute and because the motion complied with the requirements prescribed therein, the trial court should have granted the motion for legislative continuance.⁴²⁰

XIII. APPELLATE PROCEDURE

Since September 1, 1981, the various courts of appeals have had jurisdiction over criminal as well as civil appeals.⁴²¹ Previously, as the courts of civil appeals, the intermediate appellate courts were limited to consideration only of appeals from civil cases.⁴²² In 1980, however, article V, section 6 of the Texas Constitution was amended to delete this jurisdictional limitation and the legislature created a new statutory scheme for appeals.⁴²³ This new appellate scheme provided for appeals in criminal cases from the trial courts to the courts of appeals, followed by discretionary review by the court of criminal appeals.⁴²⁴

against the party receiving such continuance upon any subsequent application for continuance. It is hereby declared to be the intention of the Legislature that the provisions of this Section shall be deemed mandatory and not discretionary.

Notwithstanding the foregoing, the right to such continuance, where such continuance is based upon an attorney in such cause being a member of the Legislature, shall be discretionary with the Court in the following situations and under the following circumstances, and none other, to wit:

(1) Where such attorney was employed within 10 days of the date such suit is set for trial.

416. 648 S.W.2d at 11-12.

417. *Id.* at 12 (citing *Mora v. Ferguson*, 145 Tex. 498, 505, 199 S.W.2d 759, 763 (1947); *Glover v. State*, 532 S.W.2d 346, 348 (Tex. Crim. App. 1976); *Cuellar v. State*, 521 S.W.2d 277, 279 (Tex. Crim. App. 1975)); see TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1984).

418. *Waites v. Sondock*, 561 S.W.2d 772, 775 (Tex. 1977).

419. 648 S.W.2d at 12.

420. *Id.*; see *Ex parte Browder*, 373 S.W.2d 256, 257 (Tex. Crim. App. 1963).

421. TEX. CONST. art. V, § 6 states: "Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." See TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.03 (Vernon Supp. 1984).

422. TEX. CONST. art. V, § 6 (1891, amended 1980) stated: "Said Court of *Civil* Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to *all civil cases* of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." *Id.* (emphasis added).

423. Act of Sept. 1, 1981, ch. 291, §§ 102-103, 1981 Tex. Gen. Laws 761, 802.

424. See *id.* For analysis of the new appellate scheme, see Dally & Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 St.

One unforeseen problem with this new scheme has surfaced during this survey period. In amending article V, section 6 to allow the courts of appeals to decide criminal matters, the drafters left untouched that section's proviso that states: "Provided, that the decision of said courts shall by *conclusive on all questions of fact* brought before them on appeal or error."⁴²⁵ In *In re King's Estate*⁴²⁶ the Texas Supreme Court set out the meaning of this provision in the context of civil cases. The supreme court in that case decided that this provision allowed the courts of civil appeals to resolve fact questions and set aside verdicts that were against the great weight and preponderance of the evidence.⁴²⁷ Such a factual determination was not subject to review by the supreme court, which was limited to consideration of claims that there was no evidence to support a verdict since that was a question of law not fact.⁴²⁸

This procedure differed from that used in the review of the sufficiency of the evidence in criminal cases. In *White v. State*⁴²⁹ the court of criminal appeals held that it lacked jurisdiction to consider complaints that a conviction was against the weight and preponderance of the evidence.⁴³⁰ The court found that the proviso of article V, section 6 applied only to the courts of civil appeals and gave no authority to the court of criminal appeals to review evidence in that manner.⁴³¹ The only standard of review in criminal cases is whether, after viewing the evidence in the light most favorable to the verdict, any rational factfinder could have found all of the elements of the crime beyond a reasonable doubt.⁴³² With the combination of criminal and civil appeals in the intermediate courts, however, a conflict in these procedures became likely.

This conflict occurred in *Combs v. State*⁴³³ in which the Houston court of appeals reversed Combs's conviction and remanded the case for a new trial.⁴³⁴ The court of appeals held that the trial court should have granted a mistrial because the state failed to prove that the cause of death was drowning as alleged in the indictment for murder.⁴³⁵ The court did not discuss article V, section 6 of the Texas Constitution or the weight and preponderance of the evidence.

MARY'S L.J. 211 (1981); McColl & McColloch, *Criminal Post-Trial and Appellate Procedure: Practice Under the New Texas Rules*, 44 TEX. B.J. 1208 (1981).

425. TEX. CONST. art. V, § 6 (emphasis added).

426. 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951).

427. *Id.* at 664, 244 S.W.2d at 662.

428. *Id.*

429. 591 S.W.2d 851 (Tex. Crim. App. 1979).

430. *Id.* at 856.

431. *Id.*

432. *Garrett v. State*, 619 S.W.2d 172, 175 (Tex. Crim. App. 1981); *Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974).

433. 631 S.W.2d 534 (Tex. App.—Houston [1st Dist.]), *rev'd*, 643 S.W.2d 709 (Tex. Crim. App. 1982), *aff'd*, 652 S.W.2d 804 (Tex. 1983).

434. 631 S.W.2d at 538.

435. *Id.* The court also held that the appellant had not knowingly, intelligently, and voluntarily waived his right against self-incrimination and his right to counsel prior to confessing. *Id.* at 535-57.

The state obtained discretionary review of the court of appeals' decision by the court of criminal appeals.⁴³⁶ The court of criminal appeals, apparently on its own, raised the application of article V, section 6 and framed the issue as follows:

At the outset, we must decide whether our Court has jurisdiction to review sufficiency questions once they have been passed on by the Courts of Appeals. . . . If sufficiency of the evidence is a "question of fact," then the decisions of the Court of Appeals on sufficiency questions would appear to be binding on our Court.⁴³⁷

The court then discussed the practice developed in civil cases interpreting questions of fact in article V, section 6 to mean questions of weight and preponderance of the evidence.⁴³⁸ Relying on *Martin v. State*⁴³⁹ and *White v. State*,⁴⁴⁰ the court of criminal appeals reiterated that it lacked jurisdiction to pass upon such questions of fact.⁴⁴¹ In a footnote, the court "perceived" no other standard for use by the courts of appeals than sufficiency of the evidence to support a conviction.⁴⁴² Because sufficiency of the evidence review by the court of criminal appeals entails accepting the evidence most favorable to the verdict, without reconciling conflicts or judging witness credibility, it is a question of law.⁴⁴³ As such it is not a question of fact on which the decision of the court of appeals is final under article V, section 6. The court concluded that the evidence in *Combs's* case, viewed in the light most favorable to the verdict, sufficiently proved that the cause of death was drowning; the court, therefore, reversed the court of appeals' judgment.⁴⁴⁴

Although ostensibly settled in *Combs*, the application of article V, section 6 again came into issue in *Minor v. State*.⁴⁴⁵ In *Minor* the court of appeals held that there was sufficient evidence to sustain the appellant's aggravated assault conviction.⁴⁴⁶ In a lengthy concurrence, Chief Justice Cadena sought to demonstrate that the court of criminal appeals' decision in *Combs* was wrong although not implicated in the case before the court.⁴⁴⁷ Justice Cadena argued that article V, section 6 gave the courts of appeals the authority to review criminal verdicts by the weight and preponderance standard and that their decision should not be reviewable by the court of criminal appeals.⁴⁴⁸

Minor filed a petition for discretionary review with the court of criminal

436. *Combs v. State*, 643 S.W.2d 709 (Tex. Crim. App. 1982), *aff'd*, 652 S.W.2d 804 (Tex. 1983).

437. 643 S.W.2d at 714.

438. *Id.* at 715.

439. 605 S.W.2d 259 (Tex. Crim. App. 1980).

440. 591 S.W.2d 851 (Tex. Crim. App. 1979).

441. 643 S.W.2d at 716.

442. *Id.* at 716 n.1.

443. *Id.* at 717.

444. *Id.* at 717-18.

445. 653 S.W.2d 349 (Tex. App.—San Antonio 1983, pet. ref'd).

446. *Id.* at 351.

447. *Id.*

448. *Id.* at 354.

appeals. The court denied the petition, but in a per curiam opinion discussed the matters raised in Chief Justice Cadena's concurrence below.⁴⁴⁹ The court noted that while article V, section 6 provides that the judgment of the courts of appeals are final on all questions of fact, that section also limits their appellate jurisdiction by retaining the language "under such restrictions and regulations as may be prescribed by law."⁴⁵⁰ The legislature, as part of the 1981 statutory appellate scheme, modified article 1820 of the Texas Revised Civil Statutes to state: "The judgments of the Courts of Appeals in *civil cases* shall be conclusive in all cases on the facts of the case."⁴⁵¹ Among other changes,⁴⁵² the 1981 legislature also gave the court of criminal appeals the power to review decisions of the courts of appeals without limitation.⁴⁵³ From this statutory scheme, the court determined that the legislature had undertaken to prevent the application of article V, section 6 to criminal actions.⁴⁵⁴ However, since these issues were not raised in *Minor*, the court left unresolved the final question of whether the courts of appeals may review criminal convictions by a standard other than in the light most favorable to the verdict.

Abdnor v. Ovard,⁴⁵⁵ an action for a writ of mandamus, gave the court of criminal appeals an opportunity to consider the standard for determining an appellant's indigency for purposes of obtaining a free statement of facts from his trial. The trial court, after a hearing, denied Abdnor a free transcription of the court reporter's notes.⁴⁵⁶ Abdnor then sought a writ of mandamus from the Dallas court of appeals to compel the trial court to order that he be provided with a statement of facts.⁴⁵⁷

After finding that it had jurisdiction to issue a writ of mandamus,⁴⁵⁸ the court of appeals held that Abdnor had failed to prove his indigency.⁴⁵⁹ The court applied the "firm standard" of indigency outlined in *Ex parte Hennig*,⁴⁶⁰ a Dallas court of civil appeals case involving a civil contempt order for failure to pay child support. The *Hennig* test requires that to demonstrate indigency, a person must prove that he: (1) lacks sufficient

449. *Minor v. State*, 657 S.W.2d 811 (Tex. Crim. App. 1983) (per curiam).

450. TEX. CONST. art. V, § 6.

451. TEX. REV. CIV. STAT. ANN. art. 1820 (Vernon Supp. 1984) (emphasis added).

452. See, e.g., *id.* art. 1821 (judgment conclusive on law); TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.03 (Vernon Supp. 1984) (what courts have criminal jurisdiction; courts of appeals).

453. TEX. CODE CRIM. PROC. ANN. art. 44.45(a), (b) (Vernon Supp. 1984) provides that the court of criminal appeals may review a decision of the court of appeals on its own motion or upon a petition for discretionary review.

454. 657 S.W.2d at 812.

455. 653 S.W.2d 793 (Tex. Crim. App. 1983).

456. The transcription would have cost the appellant \$24,500.

457. 635 S.W.2d 864 (Tex. App.—Dallas, *aff'd on other grounds*, 653 S.W.2d 793 (Tex. Crim. App. 1983)).

458. 635 S.W.2d at 867. The court of appeals based its finding of mandamus jurisdiction on TEX. REV. CIV. STAT. ANN. art. 1823 (Vernon 1964), which states that "[s]aid courts [of appeals] and the judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts."

459. 635 S.W.2d at 869.

460. 559 S.W.2d 401 (Tex. Civ. App.—Dallas 1977, no writ).

property that could be sold or mortgaged for the necessary amount; (2) has unsuccessfully attempted to borrow money from lending institutions; and (3) knows of no other source, including relatives, from which he could obtain the sum needed.⁴⁶¹ Although the testimony of Abdnor's father, who was legal guardian of Abdnor's estate, and of the father's accountant showed that Abdnor had no known assets to pay for a statement of facts, the court found no evidence to prove that Abdnor had attempted to borrow the money, or that he did not know of any other source from which he could obtain the funds.⁴⁶² The court of appeals held that in the absence of such proof the trial court was justified in denying Abdnor indigency status.⁴⁶³ The court also implied that Abdnor was required to testify in support of his affidavit of indigency.⁴⁶⁴

On Abdnor's petition for discretionary review, the court of criminal appeals held that the court of appeals erred in imposing the *Hennig* rule in criminal appeals, but affirmed the denial of mandamus relief.⁴⁶⁵ The court determined that the issue of indigency involves consideration of the financial status of the appellant, not his relatives.⁴⁶⁶ The court also wondered how many financial institutions would lend money to an appellant to pay for a transcript and specifically disapproved the court of appeals' implication that Abdnor was required to testify at the indigency hearing.⁴⁶⁷ Though the court of appeals erred in applying the *Hennig* standard, however, mandamus was not the appropriate procedure to obtain relief. The court found that the issue should instead be raised in the direct appeal of appellant's conviction.⁴⁶⁸

Two cases decided by the court of criminal appeals illustrate the confusion in the courts of appeals regarding jurisdiction over appeals from denial of bail. In *Beck v. State*⁴⁶⁹ the court of appeals refused to hear an appeal from the denial of bail in a capital murder case. The court of criminal appeals held that the court of appeals had jurisdiction over the matter.⁴⁷⁰ The appellant's bail had been denied pursuant to article I, section 11 of the Texas Constitution, which gives the right to bail in all cases except capital cases that likely will result in the defendant's receiving the death penalty.⁴⁷¹ Because appellant was under seventeen years of age at the time of the offense, he could not receive the death penalty⁴⁷² and thus was entitled to bail. The court of criminal appeals determined that the

461. *Id.* at 402-03.

462. 635 S.W.2d at 868-69.

463. *Id.* at 869.

464. *Id.* The court stated: "We hold that . . . Abdnor was 'required' to so testify in the sense that he had the burden to make the showings required by *Hennig*." *Id.*

465. 653 S.W.2d at 793-94.

466. *Id.* at 794.

467. *Id.*

468. *Id.*

469. 648 S.W.2d 7 (Tex. Crim. App. 1983).

470. *Id.* at 10.

471. TEX. CONST. art. I, § 11 provides: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident." *Id.*

472. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1984) states: "No person may, in

court of appeals erroneously relied upon article I, section 11a, which allows the denial of bail to persons who are habitual offenders, have committed a felony while on bail, or are charged with a felony involving a deadly weapon following conviction for a prior felony.⁴⁷³ Denials of bail under this constitutional provision are within the exclusive appellate jurisdiction of the court of criminal appeals.⁴⁷⁴ The appellant's capital murder case was not, however, within the purview of article I, section 11a and the court of appeals should have exercised its appellate jurisdiction.⁴⁷⁵

The court of appeals also misinterpreted article I, section 11a in *Ex parte Borgen*.⁴⁷⁶ In *Borgen* the court of appeals, relying on the jurisdiction limitation in article I, section 11a,⁴⁷⁷ refused to consider an appeal from denial of habeas corpus relief for bail pending appeal. The court of criminal appeals reversed, holding that bail pending appeal is governed by article 44.04 of the Texas Code of Criminal Procedure,⁴⁷⁸ not by article I, sections 11 and 11a of the Constitution, which pertain to preconviction bail.⁴⁷⁹ The courts of appeals are given explicit statutory authority over appeals involving denial of bail pending appeal⁴⁸⁰ and over appeals from denial of habeas corpus relief.⁴⁸¹

*Tonjes v. State*⁴⁸² also involved an appeal of a bail matter. Although otherwise a relatively unimportant case, *Tonjes* points out a need for legislative action. In *Tonjes* the appellants successfully obtained a reduction in

any case, be punished by death for an offense committed while he was younger than 17 years."

473. TEX. CONST. art. I, § 11a provides:

Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefore, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, or (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above or of the offenses committed while on bail in (2) above, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above or the accusation and indictment used under (2) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused *for a review of any judgment or order made hereunder*, and said appeal shall be given preference by the Court of Criminal Appeals.

(Emphasis added.)

474. *Clapp v. State*, 639 S.W.2d 949, 952 (Tex. Crim. App. 1982).

475. 648 S.W.2d at 10.

476. 646 S.W.2d 450 (Tex. Crim. App. 1983).

477. TEX. CONST. art. I, § 11a.

478. TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon Supp. 1984).

479. 646 S.W.2d at 451.

480. TEX. CODE CRIM. PROC. ANN. art. 44.04(g) (Vernon Supp. 1984).

481. *Id.* art. 44.34.

482. 649 S.W.2d 646 (Tex. App.—Tyler 1982, no pet.).

the amount of their pretrial bail from the courts of appeals. They then moved for immediate issuance of the mandate in accordance with the court's opinion. The court of appeals denied the motion pursuant to article 42.04a of the Texas Code of Criminal Procedure,⁴⁸³ which prohibits the court from issuing the mandate until forty-five days from the date of its ruling.⁴⁸⁴ Until then the appellants remained restrained under excessive bail.

The court of appeals' decision means that pretrial detainees may be effectively deprived of bail, even when the bail is excessive, due to the lengthy delay in issuance of the mandate. The legislature has provided that habeas corpus appeals are to be acted upon at "the earliest practicable time."⁴⁸⁵ It is incongruous to require immediate hearing on the appeal, but leave the appellant to languish in jail even though he has obtained a bail reduction, because of the time constraints of the normal appellate timetable. A shorter time period for issuance of the mandate should be provided in habeas corpus appeals, particularly when the incarcerated appellant is successful.

One issue arising out of the relatively new discretionary review process is the precedential value of a summary denial of a petition for discretionary review by the court of criminal appeals. The court of criminal appeals decided this issue in *Sheffield v. State*.⁴⁸⁶ In *Sheffield* the court of criminal appeals refused appellant's petition for discretionary review from the affirmation of his conviction by the Austin court of appeals.⁴⁸⁷ Eschewing the practice of the Texas Supreme Court in attaching precedential value to the refusal of review, the court of criminal appeals determined that the summary refusal of discretionary review does not lend any additional precedential value to the court of appeals opinion, whether or not the court of criminal appeals disavows the reasoning of the court of appeals decision.⁴⁸⁸

483. TEX. CODE CRIM. PROC. ANN. art. 42.04a (Vernon Supp. 1984).

484. 649 S.W.2d at 647.

485. TEX. CODE CRIM. PROC. ANN. art. 44.36 (Vernon Supp. 1984) provides: "Cases of habeas corpus, taken to the Court of Appeals by appeal . . . shall be heard at the earliest practicable time." (Emphasis added.).

486. 650 S.W.2d 813 (Tex. Crim. App. 1983).

487. *Id.* at 814.

488. *Id.*

