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CRIMINAL LAW AND PROCEDURE

by

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CASES decided during the survey period reflect a continuation of the process of judicially refining the far-reaching and revolutionary decisions handed down by what is popularly known as the Warren Court. In many areas of the criminal law the decisions discussed herein are probably only the first of a series of cases yet to be decided before the full impact of the Warren Court opinions is felt in Texas practice. Even so, the trend is inescapable—much of what has been unique to Texas criminal jurisprudence is giving way to an approach that more closely resembles the practices of the federal system.

I. SEARCH AND SEIZURE

Since the case of *Aguilar v. Texas*,[1] decided in 1964, much of the development in the law of search and seizure has centered around the contents of the search warrant affidavit.[2] One aspect of this affidavit that has largely been overlooked by the courts and commentators is the age of the information it contains.[3] The recent case of *Moore v. State*[4] provided the court of criminal appeals with an opportunity to discuss the significance of this aspect. The affidavit in *Moore* stated that the officer making it had received information about the case from a reliable informant on November 1, and that thereafter the informant had made a "buy" from the defendant on November 19. The affidavit further stated that the chemical analysis of the substance purchased by the informant was received on November 29. For some reason, the affidavit was not signed by the officer until December 30, a month after all of the foregoing facts were known. The court of criminal appeals upheld the validity of the warrant issued upon this affidavit, but implicitly admitted that the information in an affidavit must be of reasonably recent vintage if it is to

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[1] 378 U.S. 108 (1964).

[2] TEX. CODE CRIM. PROC. ANN. arts. 19.01-.02, 18.06-.09 (1965); *see* Jones, *Translating Recent Supreme Court Decisions Into Courtroom Reality*, 19 BAYLOR L. REV. 371, 389-403 (1967); Jones, *Search Warrant Searches*, TRIAL LAWYERS FORUM, Nov.-Dec. 1969, at 3.

[3] The Texas rule is that "[a]n affidavit for issuance of a search warrant to be sufficient must show that the act or event upon which probable cause is based occurred within a reasonable time prior to the making of the affidavit." Hall v. State, 171 Tex. Crim. 227, 347 S.W.2d 262, 263 (1961). In *Hall* the affidavit did not show the date on which the act relied upon occurred. *See* Smith v. State, 114 Tex. Crim. 315, 23 S.W.2d 387 (1929) (a period within 30 days of the date of the affidavit was held to support probable cause); Rozner v. State, 109 Tex. Crim. 127, 3 S.W.2d 441 (1928) (10 days or 2 weeks held to be reasonable to support probable cause); *cf.* Beasley v. State, 120 Tex. Crim. 81, 48 S.W.2d 261 (1932) (where no date and place was indicated with respect to act relied upon, the affidavit would not support probable cause because both the date and place might have been too remote). The Texas rule would appear to be in accord with the general rule in most jurisdictions. *See* Annot., 100 A.L.R.2d 525, 534 (1965).

[4] 456 S.W.2d 114 (Tex. Crim. App. 1970). *Moore* also holds that an allegation in the affidavits to the effect that the informant purchased marijuana from the defendant may constitute a part of the probable cause necessary to authorize a search of the defendant's residence.

be given any credence by the magistrate to whom it is presented. Seemingly, this problem could be avoided if officers would include in the affidavit some brief explanation of any delay in making their request for a search warrant.

Mattei v. State[5] presents a different aspect of the problem of timing in search warrant affidavits. The affidavit in *Mattei* was made on December 5, and a warrant was issued and returned unserved. On December 8, an identical warrant was issued based upon the affidavit filed on December 5. The majority of the court upheld the validity of that procedure. However, Judge Onion filed a dissent based, in part, on *Sgro v. United States*.[6] Discussing the lack of an affidavit filed contemporaneously with the second search warrant, Judge Onion stated: "Under these circumstances the issuance of the second search warrant which was utilized was essentially a new proceeding requiring adequate support, which was not available or shown by this record."[7] It is submitted that the view of the dissent is too mechanistic. There is nothing in the Fourth Amendment of the United States Constitution or the Texas statutes specifically requiring a new affidavit every time a new warrant is issued. To the contrary, the language used in the Constitution and the statutes is merely that the warrant be supported by an oath.[8]

As any practicing lawyer or policeman knows, most searches are made *without* a warrant.[9] A common type of warrantless search is one conducted with the consent of the owner or person in possession. Nevertheless, courts are divided over the issue of whether consent alone is sufficient;[10] or if the person asked to consent must first be advised of his right not to consent.[11] The Fifth Circuit in *Perkins v. Henderson*[12] has adopted *informed* consent as the test. Although *Perkins* does not require a complete incantation of all the rights concerning a search, it does clearly hold that a person has the right to be told that no warrantless search can be conducted without his consent.

Another classification of warrantless search is that conducted under the "plain view" doctrine: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[13]

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[5] 455 S.W.2d 761 (1970).

[6] 287 U.S. 206 (1932).

[7] 455 S.W.2d at 768.

[8] U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." TEX. CODE CRIM. PROC. ANN. art. 1.06 (1966) states: "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation."

[9] I. MENDELSON, DEFENDING CRIMINAL CASES 133 (1967).

[10] United States v. Curiale, 414 F.2d 744 (2d Cir. 1969).

[11] *See generally* Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); Wallenstein, *Consent Searches*, 4 CRIM. L. BULL. 509 (1968).

[12] 418 F.2d 441 (5th Cir. 1969).

[13] Harris v. United States, 390 U.S. 234, 236 (1968).

The "plain view" doctrine has been applied by the Fifth Circuit in several cases where the evidence was out in the open and the officers had a right to be at the location where it could be seen by them.[14] However, the latest Fifth Circuit decision dealing with the doctrine appears to limit its future applicability. In *United States v. Davis*[15] the prosecution introduced a .38 caliber pistol into evidence over Davis' objection. The prosecution admitted that the officers had no warrant when they seized the pistol, but insisted that they were relying upon the "plain view" doctrine. At the time of his arrest, Davis had pointed the pistol at the officers. After the officers opened fire with their own weapons, Davis threw his pistol into his front yard and surrendered. About three-and-a-half hours later the officers returned to Davis' home and took the pistol from the front yard. In holding that the pistol was illegally seized and should have been excluded from evidence, the court stated:

> Many of the cases involving the 'plain view' doctrine concern evidence recovered from automobiles located in public places. The rule lends itself to application in these situations because the observing officer is not required to trespass on private property in order to have a clear view . . . .
>
> . . . The government will not be heard to say that the 'plain view' rule applies where the observing officer has physically invaded a constitutionally protected area in order to secure the view.[16]

It is submitted that the *Davis* decision is anomalous in its implication that "plain view" searches are limited to instances where the officers are not trespassing.[17] Many courts have sustained "plain view" searches made within the constitutionally protected area of the home and curtilage.[18]

A search incident to a lawful arrest is another major category of warrantless searches.[19] The Supreme Court of the United States may have settled some of the controversy surrounding the search of an automobile incident to a lawful arrest[20] with its opinion in *Chambers v. Maroney*.[21] *Chambers* involved a filling station robbery. Police investigating the robbery were told that the robbers drove away in a light blue station wagon, and that one of the men was wearing a green sweater and another a trench coat. This description was broadcast over the police radio, and within an hour the police located such a car about two miles from the scene. One of the occupants was wearing a green sweater and there was a trench coat inside. The men were arrested and the car was driven to

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[14] *Cf.* Marshall v. United States, 422 F.2d 185 (5th Cir. 1970); Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968).

[15] 423 F.2d 974 (5th Cir. 1970).

[16] *Id.* at 977-78.

[17] *See* Hester v. United States, 265 U.S. 57 (1924).

[18] *See* State v. Brown, 461 P.2d 836 (Ore. Ct. App. 1969); Thompson v. State, 447 S.W.2d 175 (Tex. Crim. App. 1969).

[19] "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." Chimel v. California, 395 U.S. 752, 762-63 (1969).

[20] *Compare* Lane v. State, 424 S.W.2d 925 (Tex. Crim. App. 1967), *cert. denied*, 392 U.S. 929 (1968), *with* Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967). *See generally* Preston v. United States, 376 U.S. 364 (1964); Annot., 19 A.L.R.3d 727 (1968); Annot., 10 A.L.R.3d 314 (1966); Note, *What Is an Unreasonable Search*, 24 MICH. L. REV. 277 (1926).

[21] 399 U.S. 42 (1970).

the police station, where it was searched without a warrant. The search uncovered additional evidence. In upholding the validity of the warrantless station-house search, the Court stated:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained. . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[22]

In his dissent, Mr. Justice Harlan argued that the holding in *Chambers* condones the removal of a car to the police station for a warrantless search at the convenience of the police. Indeed, that conclusion seems inescapable since the majority of the Court admitted that in many, if not most, cases, probable cause for arrest may also furnish probable cause for the station-house search of the automobile.[23]

Searches incident to lawful arrests also encompass a search of the dwelling or surroundings where the person is arrested. The scope of such a search has been limited by the Supreme Court in *Chimel v. California* to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[24] By way of obiter dictum, the Texas court of criminal appeals has indicated that it may give a more liberal construction to the phrase "within his immediate control." In *Thornton v. State*[25] three robbery suspects and six other persons were known to be in a one-bedroom apartment. Not having time to procure a warrant, the police entered the apartment and made a valid arrest of the three suspects. At the same time, the police searched the bathroom, a closet, a dresser drawer, and under a mattress, finding incriminating evidence in each location. The court of criminal appeals sustained the validity of this warrantless search, apparently on the theory that, considering the size of the apartment and the number of occupants, the search was necessary to protect the officers. The *Thornton* case could serve as the springboard for an attempt to carve out an exception to the *Chimel* limitation in those instances in which the officers are searching for offensive weapons as opposed to contraband or fruits of the crime.

II. LINE-UPS

Although lawyers consider themselves to be ingenious people by training, if not by inclination, it may be that they are equalled, if not excelled, by law enforcement officers. The recurring problem of the suggestive line-

[22] *Id.* at 51-52. The Court made it clear that this holding is not to be applied to search of a house, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Id.* at 52.

[23] *Id.* at 47 n.6.

[24] 395 U.S. 752, 763 (1969).

[25] 451 S.W.2d 898 (Tex. Crim. App. 1970).

up procedure is a prime example of the ability of law enforcement officers to beat lawyers at their own game. When the Supreme Court decided *United States v. Wade*,[26] reference was made to the rather common abuse of line-up procedures by officers who would manage to conduct the line-up so that there could be no doubt who the prime suspect was. Apparently, the Supreme Court thought they could correct these abusive practices by requiring that a suspect have a lawyer appointed and present at his line-up to guard against any untoward suggestion of which participant was regarded by the police as the prime suspect. However, after *Wade* was decided, the police began to devise ways to avoid its impact. The most viable device in the law enforcement officer's bag of anti-*Wade* tricks is the use of photographic identification.[27]

Just how successful photographic identification can be is demonstrated in *Sertuche v. State*,[28] where the only witness to a robbery was shown a group of five pictures by the police. She failed to identify any of them. A few days later the police returned, this time with four pictures. The first three pictures were of the group she was shown earlier. Just before the woman came to the fourth picture, the officer said: "Now take your time before you say anything."[29] The woman was then shown the fourth picture, whereupon she readily stated that she was sure he was the robber. The court of criminal appeals held that this practice was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[30]

It would appear that no relief from the judicial approval of out-of-court photographic identification as an exception to the *Wade* doctrine is in sight. The Fifth Circuit recently had an opportunity to rule on the question for the first time.[31] Following earlier holdings in a number of other circuits, the court decided that the photographic identification practice did not, per se, violate the decision of the Supreme Court in *Wade*.[32] One recent Texas case, *Wright v. State*,[33] does hold that if the defendant makes a request prior to the testimony of any identification witness, the trial court should conduct a hearing out of the jury's presence to determine if the photographic display was unduly suggestive.[34]

III. SENTENCING

In *North Carolina v. Pearce* the Supreme Court of the United States held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . . In order to insure the absence of such a motivation,

[26] 388 U.S. 218, 228-29 (1967).
[27] United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970).
[28] 453 S.W.2d 841 (Tex. Crim. App. 1970).
[29] *Id.* at 842.
[30] *Id.*
[31] United States v. Ballard, 423 F.2d 127, 130 (1970).
[32] *But see* United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970); United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).
[33] 457 S.W.2d 55 (Tex. Crim. App. 1970).
[34] *See also* United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).

we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."[35] In *Casias v. State* the court of criminal appeals appropriately pointed up the difficulty of applying the *Pearce* decision in Texas: "Unfortunately, the United States Supreme Court did not discuss Pearce's application to Texas and other jurisdictions where the *jury* is permitted, in many instances, to assess punishment."[36] The *Casias* case holds that *Pearce* does not apply in instances where an increased sentence at a new trial is assessed by a jury. At first glance, the distinction made in *Casias* between judge and jury sentencing seems unwarranted. After all, a jury may be as vindictive as a judge, and every trial lawyer knows it is practically impossible to re-try a criminal case without the jury's becoming aware, at some point, that the defendant has previously been tried and convicted for the same offense. However, the jury is not likely to know the *length* of the first sentence, thus effectively denying it the opportunity to increase the punishment vindictively. Of course, in cases where the jury somehow becomes aware of the length of the first sentence, then perhaps the *Pearce* rationale should apply.

The Supreme Court also stated in *Pearce* that if a defendant is reconvicted at a new trial, the new sentence must be credited with the time already served under the original sentence.

> We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.[37]

This language raises two questions. (1) Is a defendant entitled to be credited with the time he spends in jail awaiting trial? (2) Is a defendant entitled to be credited with the time he spends in jail after trial while his conviction is being appealed? On its face, article 42.03 of the Texas Code of Criminal Procedure answers both questions negatively. Article 42.03 leaves the matter of credit for jail time pending trial or appeal to the discretion of the trial judge.[38] In *Bennett v. State*[39] the Texas court of criminal appeals concluded that the discretion of the trial judge to credit, or refuse to credit, time spent in jail prior to trial was not affected by the *Pearce* decision.[40] The rationale for this decision was that time

[35] 395 U.S. 711, 725-26 (1969).

[36] 452 S.W.2d 483, 490 (Tex. Crim. App. 1970) (emphasis added).

[37] 395 U.S. at 718-19. This part of the *Pearce* holding was followed in Smotherman v. State, 455 S.W.2d 285 (Tex. Crim. App. 1970).

[38] TEX. CODE CRIM. PROC. ANN. art. 42.03 (Supp. 1970) reads in part as follows: "[P]rovided that in all criminal cases the judge of the court in which the defendant was convicted may within his discretion, give the defendant credit on his sentence for the time, or any part thereof, which said defendant has spent in jail in said cause, from the time of his arrest and confinement until his sentence by the trial court . . . ."

[39] 450 S.W.2d 652 (Tex. Crim. App. 1970).

[40] *See* Gremillion v. Henderson, 425 F.2d 1293 (5th Cir. 1970).

spent in jail pending trial is not punishment, but only a procedural device to insure the defendant's appearance at trial.[41] The Fifth Circuit court of appeals provided the answer to the second question raised by *Pearce*. In *Robinson v. Beto*[42] that court held that a defendant must be credited with the time spent in jail pending appeal, and that anything to the contrary in article 42.03 was unconstitutional.

Another aspect of sentencing now attracting considerable judicial attention is the practice of holding indigents in jail beyond the maximum term set for an offense because of their inability to pay the fine and costs.[43] This practice has been laid to rest by the United States Supreme Court in *Williams v. Illinois*.[44] Williams was convicted of petty theft and received the maximum sentence of one year in jail and a $500 fine plus costs. At the end of the one-year sentence, Willams, who was indigent, was retained in jail in lieu of payment of the fine and costs. Williams contended that he was being forced to stay in jail beyond the statutory maximum of one year solely because of his penurious condition. After his writ was denied by the Illinois supreme court,[45] he appealed to the Supreme Court of the United States. The Supreme Court dealt with this issue in the following cryptic terms: "We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay, and accordingly, we [reverse]."[46]

Given the *Williams* decision, what is the legality of placing an indigent defendant in jail in lieu of payment of the fine and costs when no other punishment is provided, or when the statute only allows for the characteristic "$30 or 30 days?"[47] The Texas court of criminal appeals in *Ex parte Tate*[48] recently held that a defendant was not entitled to release from jail because he was too poor to pay $425 in traffic-offense fines. The Supreme Court of the United States has granted Tate's writ of certiorari,[49] so a definitive answer to this problem may be forthcoming.*

[41] *See generally* Isben v. Warden, Nevada State Prison, 471 P.2d 229 (Nev. 1970).

[42] 426 F.2d 797 (5th Cir. 1970); *accord*, *Ex parte* Griffith, 457 S.W.2d 60 (Tex. Crim. App. 1970).

[43] With respect to the serving out of fines, TEX. CODE CRIM. PROC. ANN. art. 43.01 (1966) provides: "When the judgment and sentence against a defendant is for fine and costs he shall be discharged from the same . . . 3. When he has remained in custody for the time required by law to satisfy the amount thereof." *Id.* art. 43.09 provides:

> When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse . . . or . . . he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him . . . .

See generally Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968), *discussed in* Note, *Constitutional Law*, 55 VA. L. REV. 784 (1969).

[44] 399 U.S. 235 (1970).

[45] People v. Williams, 4 Ill. 2d 511, 244 N.E.2d 197 (1969).

[46] 399 U.S. at 240-41.

[47] The Court expressly avoided this question in the *Williams* decision. 399 U.S. at 243.

[48] 445 S.W.2d 210 (Tex. Crim. App. 1969), *cert. granted*, 399 U.S. 925 (1970) (No. 1873, Misc.).

[49] 399 U.S. 925 (1970).

* Editor's Note: As this Article was going to press the Supreme Court handed down its opinion in *Tate*, holding that the conversion of a fine into a jail sentence solely on the basis of the in-

Apparently, Texas is the only state to employ the bifurcated trial system for all felonies and misdemeanors punishable by imprisonment.[50] Article 37.07 of the Texas Code of Criminal Procedure provides that after a finding of guilty, "evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character."[51] The Texas state bar committee that drafted article 37.07 recommended using the words: "such other competent evidence as in the discretion of the trial judge may be considered helpful in assessing suitable punishment."[52] However, that language was deleted by a legislative conference committee.[53] As a result, many Texas lawyers are of the opinion that evidence at the sentencing stage of a bifurcated trial must be limited solely to proof of prior convictions and testimony as to the character of the defendant.[54] Nevertheless, in *Allaben v. State*[55] the Texas court of criminal appeals gave an early indication that it would be charitable towards the efforts of defense counsel who sought to introduce evidence of something other than convictions and character at the sentencing stage. Allaben complained of the trial court's refusal to allow him to testify at the sentencing stage regarding psychiatric care and treatment he was receiving. The prosecution had objected to that testimony because it did not deal with Allaben's prior convictions or character. The court of criminal appeals ruled that the trial court committed error by not allowing the testimony, but further ruled that the error was harmless. In discussing the scope of evidence permissible under article 37.07, the court stated that it was by no means limited to the defendant's prior criminal record, his general reputation, and his character, but rather encompassed "[e]vidence legally admissible to mitigate punishment or . . . relevant to the application for probation . . . ."[56]

It now appears evident that the court of criminal appeals is retreating from the position it took in *Allaben*. In two recent cases, *Schulz v. State*[57] and *Asay v. State*,[58] the defendants, relying upon *Allaben*, offered expert testimony at the sentencing stage to the effect that they would not be rehabilitated or otherwise benefitted by a long prison term. In both cases the court of criminal appeals held that the trial court properly excluded the testimony. In fact, in *Schulz* the court went so far as to state that "[i]f such testimony is allowed, the State would be justified in seeking to

digency of the defendant was a violation of the equal protection clause of the fourteenth amendment. The Court said: "Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." Tate v. Short, 39 U.S.L.W. 4301, 4302 (U.S. March 9, 1971).

[50] Brumfield v. State, 445 S.W.2d 732, 739 (Tex. Crim. App. 1969).

[51] TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Supp. 1970).

[52] Onion, *Special Commentary*, 3 TEX. CODE CRIM. PROC. ANN. 629 (1966).

[53] Comment, *The Texas Code of Criminal Procedure*, 44 TEXAS L. REV. 983, 1008-10 (1966).

[54] *E.g.*, Vance, *The 1967 Amendments to the Texas Code of Criminal Procedure; A Prosecutor's Reflections*, 10 S. TEX. L.J. 214, 217-18 (1968).

[55] 418 S.W.2d 517 (Tex. Crim. App. 1967).

[56] *Id.* at 519.

[57] 446 S.W.2d 872 (Tex. Crim. App. 1969).

[58] 456 S.W.2d 903 (Tex. Crim. App. 1970).

put on an expert, perhaps a sociologist or penologist to prove that it would be better for the defendant to serve time in a penal institution. Then further testimony would no doubt be offered by both sides on the relative values of probation compared to confinement."[59] Thus, at the very time when commentators[60] and organizations such as the American Bar Association[61] are trying to awaken lawyers to their responsibilities to develop and present more pertinent evidence at sentencing hearings, the Texas court of criminal appeals is complaining that such tactics will only result in each side calling expert witnesses. Query: What better way to fully equip the judge or jury with *all* the relevant information essential to make a wise and intelligent sentencing decision? In a state such as Texas, where pre-sentence investigations are only rarely utilized, one might reasonably presume that the courts would *encourage* efforts to bring forth evidence that might bear upon the nature and extent of the sentence that should be imposed.

IV. Probation Revocation

Probation revocation hearings are not trials in a constitutional sense. For example, the defendant is not entitled to a jury, and revocation may be based on uncorroborated testimony of an accomplice.[62] On the other hand, when a state elects to provide a system of probation, due process cannot be denied at revocation hearings.[63] Therefore, when the state seeks to revoke a probation, the probationer must be provided basic rights such as appointed counsel, if indigent,[64] and notice of particulars in a form sufficiently specific to enable him to prepare a defense.[65] As a procedural framework for revocation proceedings, a Texas court in *Campbell v. State*[66] suggested that the hearing be conducted in the following manner:

1. Unless waived, counsel should be allowed ten days in which to prepare for the hearing.

2. Prior to the hearing, the judge should call the probationer and his counsel before the bench and inquire of the probationer if he has been served with a copy of the state's motion to revoke, and if he has read and understands it.

3. The judge should inquire of counsel if he has explained the proceedings to the probationer. The judge should then read the motion to revoke and ask the probationer to enter a plea of "true" or "not true."

4. The hearing should begin with the taking of testimony and the introduction of evidence.

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[59] 446 S.W.2d at 874.

[60] *E.g.*, Portman, *The Expanded Role of Defense Counsel in the Sentencing Process*, 27 LEGAL AID BRIEFCASE 161 (1969).

[61] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES 238-52 (1968).

[62] Hulsey v. State, 447 S.W.2d 165 (Tex. Crim. App. 1969).

[63] Campbell v. State, 456 S.W.2d 918 (Tex. Crim. App. 1970).

[64] *Ex parte* Wood, 456 S.W.2d 395 (Tex. Crim. App. 1970); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3b (1966). *But see* Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970).

[65] Campbell v. State, 456 S.W.2d 918 (Tex. Crim. App. 1970).

[66] *Id.*

Article 42.12, section 6 of the Texas Code of Criminal Procedure gives the trial judge discretion to require a probationer to pay a fine and make restitution payments as a condition of his probation.[67] However, the court of criminal appeals held that probation cannot be revoked for failing to make restitution payments unless the state proves that the probationer intentionally and willfully failed to make them.[68] Subsequently, article 42.12 was amended to give the trial judge discretion to require a probationer to pay a monthly fee toward the cost of administering the probation department.[69] The court of criminal appeals has now held in at least two cases that probation cannot be revoked for failing to pay the monthly fee or costs, unless the state establishes the probationer's ability to pay and that his failure to do so was intentional.[70]

As discussed earlier,[71] the court of criminal appeals in *Ex parte Tate* held that an indigent may be imprisoned for failure to pay a fine. Therefore, the law in this state appears to be that a penurious person may be imprisoned for his inability to pay a fine, but he cannot be imprisoned for his inability to pay probation fees or restitution payments. The incongruity of this result speaks for itself.

V. MULTIPLE PROSECUTIONS

From the standpoint of the legal doctrines involved, the practice of carving more than one offense from a single criminal transaction has always been troublesome.[72] In 1969, the United States Supreme Court in *Benton v. Maryland*[73] held that the double jeopardy clause of the fifth amendment was applicable to the states. *Benton's* progeny are now making their mark upon the law of Texas. In fact, the law and procedure relating to multiple prosecutions has probably changed more in the last year than any other aspect of Texas criminal jurisprudence.

Texas has always enforced the common-law doctrine of implied acquittal, holding that conviction of a lesser-included offense bars subsequent prosecution for the greater offense, even though the defendant obtains a new trial.[74] However, the court of criminal appeals has consistently re-

[67] TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966). The power to impose conditions upon probation cannot be delegated by the trial judge to the probation officer. Cox v. State, 445 S.W.2d 200 (Tex. Crim. App. 1970).

[68] McKnight v. State, 409 S.W.2d 858 (Tex. Crim. App. 1966).

[69] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6a (Supp. 1970) reads in part as follows:

> (a) A court granting probation may fix a fee not exceeding $10 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation.
>
> (b) The court shall distribute the fees received under Subsection (a) of this section to the county or counties in which the court has jurisdiction for use in administering the probation laws.

[70] Hall v. State, 452 S.W.2d 490 (Tex. Crim. App. 1970); Hardison v. State, 450 S.W.2d 628 (Tex. Crim. App. 1970).

[71] *See* text accompanying notes 48, 49 *supra*.

[72] *See generally* Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 SW. L.J. 567 (1968).

[73] 395 U.S. 784 (1969).

[74] *E.g.*, Welcome v. State, 438 S.W.2d 99, 104 (Tex. Crim. App. 1969). The doctrine of implied acquittal has been given statutory dimension in TEX. CODE CRIM. PROC. ANN. art. 37.14 (1966):

> If a defendant, prosecuted for an offense which includes within it lesser offenses,

fused to apply the doctrine of implied acquittal to murder cases, with the result that a defendant could be tried for murder with malice, convicted for murder without malice, and, after a reversal, re-tried for murder with malice.[75] The Court of Appeals for the Fifth Circuit has now ruled in *Galloway v. Beto*[76] that the Texas murder statutes are not exceptions to the doctrine of implied acquittal.[77] Therefore, if a defendant is tried for murder with malice, but the jury finds him guilty of the lesser crime of murder without malice, that verdict stands as an acquittal of the greater crime of murder with malice, and the defendant cannot be re-tried for murder with malice even though the conviction is overturned on appeal.

Another aspect of the problem of multiple prosecutions is the dual-sovereignty doctrine applied by many states.[78] This doctrine provides that a conviction in a municipal court is not a bar to a conviction in a state court for the same offense. Its rationale is that municipal and state courts are separate and distinct sovereignties. Texas has a broad form of the dual-sovereignty doctrine, extending to justice-of-the-peace courts, as well as to municipal courts.[79] For instance, in *Mangan v. State*[80] a conviction for indecent exposure in a municipal court did not bar a subsequent prosecution in county court for aggravated assault arising out of the same incident, and in *Allen v. State*[81] a conviction for simple assault in a justice-of-the-peace court did not bar an indictment for robbery by assault arising out of the same incident. The dual-sovereignty doctrine has now been declared unconstitutional by the Supreme Court of the United States in *Waller v. Florida*.[82] Characterizing dual-sovereignty as "an anachronism,"[83] the court held that conviction in a municipal court is a bar to any subsequent conviction for the same offense in state court. Seemingly, therefore, the Texas version of the dual-sovereignty doctrine, as incorporated in article 28.13 of the Texas Code of Criminal Procedure,[84] is now open to serious question on constitutional grounds. However, it is not clear if *Waller* will be limited to situations where the two prosecu-

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be convicted of an offense lower than that for which he is indicted, and a new trial be granted him, or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered an acquittal of the higher offense; but he may, upon a second trial, be convicted of the same offense of which he was before convicted, or any other inferior thereto.

[75] *E.g.*, Beckham v. State, 141 Tex. Crim. 438, 148 S.W.2d 1104 (1941); Chappell v. State, 124 Tex. Crim. 187, 61 S.W.2d 842 (1933).

[76] 421 F.2d 284 (5th Cir. 1970).

[77] The *Galloway* decision has been bolstered by a similar holding from the United States Supreme Court in the recent case of Price v. Georgia, 398 U.S. 323 (1970).

[78] For a listing of states applying the dual sovereignty doctrine, see Waller v. Florida, 397 U.S. 387, 391 n.3 (1970).

[79] TEX. CODE CRIM. PROC. ANN. art. 28.13 (1966):

A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said court had not jurisdiction, unless such judgment was had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense.

[80] 171 Tex. Crim. 20, 344 S.W.2d 448 (1961).

[81] 389 S.W.2d 307 (Tex. Crim. App. 1965).

[82] 397 U.S. 387 (1970).

[83] *Id.* at 395.

[84] TEX. CODE CRIM. PROC. ANN. art. 28.13 (1966).

tions are for the identical offense (*e.g.*, affray and aggravated assault), or if *Waller* will be applied to prosecutions for different crimes arising from a single transaction (*e.g.*, speeding and negligent homicide).[85]

Ashe v. Swenson[86] is another recent Supreme Court case that will undoubtedly receive considerable attention in the Texas courts. Ashe was convicted of participating in the robbery of a poker game. He was charged in six different indictments—one for each poker player robbed. Ashe was brought to trial upon one of the six indictments, and the jury found him not guilty, apparently because the evidence identifying him as one of the robbers was insufficient. The Supreme Court held that further prosecution on the remaining five indictments was barred by the finding of not guilty on the first indictment. The rationale for this holding is the doctrine of collateral estoppel, which the Supreme Court defines as meaning "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."[87] In other words, the jury in the first trial declined to find that Ashe was one of the robbers, and therefore that issue could not be relitigated between Ashe and the state in any of the other five indictments.[88] Heretofore, the Texas court of criminal appeals has refused to apply the doctrine of collateral estoppel in criminal cases,[89] and, to that extent, the decision in *Ashe* apparently represents a change in the Texas law.

Almost the converse of the doctrine of collateral estoppel is the doctrine of "carving," which is "a rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once."[90] Under the carving doctrine, there is some question whether Ashe had legally been indicted six times. While the Supreme Court expressly withheld any judgment on the constitutional validity of the carving doctrine in *Ashe*,[91] the Texas court of criminal appeals construed the carving doctrine in light of the *Ashe* decision in *Duckett v. State*.[92] There, the defendant had robbed and shot

[85] The defendant in *Waller* was convicted of breach of the peace in the municipal court and grand larceny in the circuit court. Nevertheless, the Supreme Court made this statement: "Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime." 397 U.S. at 390.

[86] 397 U.S. 436 (1970).

[87] *Id.* at 443.

[88] It is submitted that the doctrine of collateral estoppel is not as appropriate for criminal cases as it might be for civil cases for two reasons. First, the jury in a criminal case may not actually determine an ultimate fact, but rather only the *absence* of an ultimate fact. As in *Ashe*, the jury failed to find that Ashe was one of the robbers. However, that does not necessarily mean they determined that to be a fact; it only means that the prosecution failed to convince the jury beyond a reasonable doubt that he was one of the robbers. Secondly, verdicts in criminal cases are usually general, *viz.*, "guilty" or "not guilty." Therefore, it is often impossible to determine what the jury actually found as the facts in the case.

[89] Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 257 (1918). *See also* Steele, *supra* note 77, at 569-71.

[90] Simco v. State, 9 Tex. Crim. 338 (1880).

[91] 397 U.S. at 446. *See also* concurring opinion by Justices Brennan, Douglas and Marshall. *Id.* at 448.

[92] 454 S.W.2d 753 (Tex. Crim. App. 1970); 454 S.W.2d 755 (Tex. Crim. App. 1970).

a service station attendant. He was convicted of robbery by assault with a firearm and then convicted of asault with intent to murder. Relying on *Ashe v. Swenson* and *Benton v. Maryland*, the court of criminal appeals reversed the second conviction because of the carving doctrine. The court stated that "[t]he indictment for assault to murder . . . and the indictment for robbery by assault were based upon the same assault and transaction and the same proof was used to support both convictions. . . . [W]hen one has been convicted, the State cannot, upon the same evidence, again convict him of the same act."[93]

In applying the carving doctrine, one must be constantly alert to the fact that its basis is the similarity of *evidence* in the two prosecutions. Therefore, the doctrine is not available to bar all multiple prosecutions that might arise out of the same transaction. This point is well illustrated by the recent court of criminal appeals decision in *Drake v. State*.[94] Drake was convicted of murder without malice due to a fatal automobile collision he caused while intoxicated. Prior to his trial for murder, Drake was convicted of driving while his operator's license was suspended, a crime he committed at the same time he caused the fatal automobile collision. At his murder trial, Drake pleaded this prior conviction as a bar to the murder charge. The court overruled this plea on the grounds that the evidence was not identical, in that the elements of proof for the two offenses were entirely different in character.[95]

VI. Post-Conviction Relief

An indigent appellant has a constitutional right to a free transcript and statement of facts.[96] It seems logical to assume that after the statement of facts is furnished, the appellant and his attorney will read it carefully, searching for errors that might be grounds for appeal. Suppose an indigent prisoner who has exhausted or waived all appeals desires to challenge the legality of his trial and conviction under the post-conviction procedure set out in article 11.07 of the Texas Code of Criminal Procedure. Does he have a right to be furnished a free transcript and statement of facts from his trial to peruse prior to applying under article 11.07? Obviously, a statement of facts could be as useful to a petitioner for post-conviction relief as it is to an appellant. Nevertheless, no court has held that a petitioner for post-conviction relief must be furnished a free transcript of the evidence adduced at his trial.[97] In *Wade v. Wilson*[98] an indi-

[93] *Id.* at 757-58.

[94] 450 S.W.2d 625 (Tex. Crim. App. 1970).

[95] *Cf.* Johnson v. State, 432 S.W.2d 98 (Tex. Crim. App. 1968), holding that an acquittal of burglary of a private residence at night with intent to commit rape does not bar a subsequent prosecution for assault with intent to rape growing out of the same transaction. *Query*: Has this case been impliedly overruled by *Ashe v. Swenson*?

[96] *See* Griffin v. Illinois, 351 U.S. 12 (1956). Preparation of the record for appeal and a procedure by which the indigent defendant may obtain a copy of the reporter's transcript free of charge are provided in TEX. CODE CRIM. PROC. ANN. art. 40.09 (1966). *See also Ex parte* Thorbus, 455 S.W.2d 756 (Tex. Crim. App. 1970).

[97] *Compare* Long v. District Ct., 385 U.S. 192 (1966), *with* Bentley v. United States, 431 F.2d 250 (6th Cir. 1970).

[98] 396 U.S. 282 (1970).

gent petitioner sought a complete trial transcript for use in pinpointing any trial court errors in order that he might fully allege them in a petition for post-conviction relief. After granting certiorari,[99] the Supreme Court of the United States acknowledged the constitutional issue, but expressly avoided deciding it because it was not necessary to a disposition of the case.[100] Undoubtedly, indigent prisoners will continue to press for the right to a free copy of the trial transcript. Furthermore, it is difficult to avoid the obvious fact that a habeas corpus petition might be more complete and accurate if a transcript of the trial were available for reference. On the other hand, if prisoners are given the right to a free copy of their trial transcript, the burden on court reporters could become unmanageable. It would seem that the Supreme Court will eventually be forced to work out some kind of reasonable compromise to this dilemma.

Within the last year the courts have rendered several important decisions delineating the limits of post-conviction relief available to prisoners who were originally sentenced as the result of a guilty plea. The United States Court of Appeals for the Fifth Circuit set the stage in *Schnautz v. Beto.*[101] In that case, the court set forth the following statement of principles:

> [W]hen a defendant has counsel, as he did here, that counsel is the manager of the law suit. If the best professional advice that a lawyer can give is to enter a guilty plea and the accused relies on his lawyer's expertise, the accused cannot later successfully urge the plea was involuntary on the basis of counsel coercion. This is a good time, too, to reiterate the principle that a plea is not rendered involuntary solely because it was induced as a result of a plea bargaining situation.[102]

Schnautz prompts the question: At what point should counsel be *available* to give "the best professional advice"? In *Rhodes v. State*[103] the appellant contended that his prior convictions were illegal because counsel had not been appointed to represent him until after he had negotiated with the prosecutor and agreed upon a plea of guilty. The court in *Rhodes* held that the appellant had not been denied effective assistance of counsel, because counsel had reviewed the advisability of the plea bargain after he was appointed.[104] *Schnautz* also raises the question of how one determines when "the best professional advice that a lawyer can give is to enter a guilty plea." In large part that question was answered by the Fifth Circuit in *Windom v. Cook*,[105] decided after *Schnautz*. Windom's court-appointed counsel conferred with him only once—for fifteen to thirty minutes immediately prior to the guilty plea. The lawyer did not inquire into the facts or the elements of the charges against Windom.

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[99] 393 U.S. 1079 (1969).
[100] 396 U.S. at 286.
[101] 416 F.2d 214 (5th Cir. 1969).
[102] *Id.* at 215-16 (citations omitted).
[103] 450 S.W.2d 329 (Tex. Crim. App. 1970).
[104] *See generally* Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 498 (1969).
[105] 423 F.2d 721 (5th Cir. 1970).

Holding that the lawyer was ineffective, per se, the court stated that "[e]ffective counsel includes familiarity of counsel with the case and an opportunity to investigate it if necessary in order to advise the accused of his options."[106] Subsequent to the decision in *Windom*, the Texas court of criminal appeals had occasion to examine the effectiveness of counsel in a guilty plea situation. In *Ex parte Perry* the defendant pleaded guilty after conferring for three to five minutes with an appointed lawyer who "because of his poor eyesight . . . did not have the opportunity to brief and keep abreast with the current law and . . . had not been appointed in cases where a contest was likely."[107] The Texas court sustained this conviction, stating that the record failed to show that the plea of guilty was unintelligently or involuntarily made. It is submitted that the court in *Perry* avoided the opportunity to explore in detail how a plea can possibly be voluntarily and intelligently made when counsel is not in a position to adequately consult with the accused about his options.

In *McMann v. Richardson*[108] the Supreme Court of the United States seemingly laid to rest all speculation about the validity of a guilty plea induced by an allegedly invalid confession. In a well-reasoned opinion, the Court pointed out that when a person pleads guilty he is also tacitly foregoing his opportunity to test the validity of the confession at a trial, and therefore he should not be afforded a second opportunity to test its validity through post-conviction relief. Furthermore, the Court held that such a plea is intelligently made, even when the defendant relies on counsel's erroneous advice that the confession is admissible as long as "that advice was within the range of competence demanded of attorneys in criminal cases."[109] However, the Court did not close the door to a prisoner who was forced to evaluate his chances based upon the advice of an incompetent attorney:

> [W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing the defendants in criminal cases in their courts.[110]

VII. Juvenile Delinquency

Rule 173 of the Texas Rules of Civil Procedure, provides in part: "When a minor may be a defendant to a suit . . . the court shall appoint a guardian ad litem for such person."[111] Juvenile delinquency proceedings are often characterized as civil in nature.[112] Therefore, must the court appoint a guardian ad litem when a juvenile is the defendant in a de-

[106] *Id.* at 721.
[107] 455 S.W.2d 214, 215 (Tex. Crim. App. 1970).
[108] 397 U.S. 759 (1970).
[109] *Id.* at 771.
[110] *Id.*
[111] Tex. R. Civ. P. 173.
[112] Brenan v. Court of Civ. App., 444 S.W.2d 290 (Tex. 1968).

linquency case? In *Starks v. State*[113] the juvenile appeared in court for a hearing to revoke his probation. He was accompanied by an attorney, but his parents were not present. No guardian ad litem was appointed, and the probation was revoked. On appeal, the Eastland court of civil appeals reversed the case, holding that, under rule 173, appointment of a guardian ad litem was mandatory.[114] If, in fact, a guardian ad litem must be appointed in delinquency cases, the issue then becomes whether or not the juvenile's lawyer (if he has one) may serve as the guardian. There is authority in Texas sustaining the practice of having the same lawyer serve the dual role of guardian ad litem and defense counsel.[115] However, such a practice can place the lawyer in an untenable position. As expressed by one court considering the problem:

> An attorney can effectively argue the alternate courses open to a client only to one assumed to be capable of making a discriminating choice. The minor is presumed incapable and under disability, hence the need of a guardian ad litem to weigh alternatives for him. Yet a lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandry of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests.[116]

To date, the Texas courts have not fully dealt with the ramifications inherent in appointing the same lawyer to serve as guardian and defense counsel in a delinquency case. However, that issue has been considered at length by courts in other jurisdictions, and they have upheld the practice, at least in cases where there was no apparent conflict between the two roles.[117]

Since the United States Supreme Court decision in *In re Gault*,[118] the emphasis on the civil nature of delinquency proceedings has dwindled in favor of treating delinquency proceedings as criminal in nature. One major step in that direction was the opinion of the United States Supreme Court in *In re Winship*,[119] holding that the standard of proof in a delinquency case should be beyond a reasonable doubt (the standard in criminal cases) instead of preponderance of the evidence (the standard in civil cases). In effect, *Winship* overruled a recent holding of the Texas supreme court in *State v. Santana*.[120] Nevertheless, the overall problem of characterizing the substance and procedure of delinquency matters is far from settled. For example, what are the criteria for disposition of a delinquent child?[121] In *Hill v. State*[122] the juvenile court judge committed an eleven-year-old delinquent, charged wth burglary, to the Gatesville State School

[113] 449 S.W.2d 559 (Tex. Civ. App.—Eastland 1969), *error ref.*

[114] *But see* Yzaguirre v. State, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968).

[115] *See, e.g.*, Cole v. Waite, 151 Tex. 175, 246 S.W.2d 849 (1952).

[116] *In re* Dobson, 125 Vt. 165, 212 A.2d 620, 622 (1965).

[117] *See In re* Westover, 125 Vt. 354, 215 A.2d 498 (1965); Gibson v. State, 177 N.W.2d 912 (Wis. 1970).

[118] 387 U.S. 1 (1967).

[119] 397 U.S. 358 (1970).

[120] 444 S.W.2d 614 (Tex. 1969).

[121] *Compare In re* Lewis, 11 N.J. 217, 94 A.2d 328 (1953), *with* State v. Myers, 74 N.D. 199, 22 N.W.2d 199 (1946). *See also* Workman v. Kentucky, 429 S.W.2d 374 (Ky. Ct. App. 1968).

[122] 454 S.W.2d 429 (Tex. Civ. App.—San Antonio 1970).

for Boys. The court of civil appeals reversed, holding that the trial court erred in committing the child without first hearing evidence as to how his and the state's best interest would be served by such a commitment.

The tension between the civil and criminal approaches to delinquency is probably most apparent in the area of search and seizure. Courts all over the United States have been struggling with the problem of how much, if any, of the fourth amendment protections should be applicable to juveniles.[123] *Mercer v. State*[124] is a significant recent Texas decision dealing with search and seizure as related to a juvenile in the public schools. Upon being advised that his father would be called if he failed to comply with the school principal's request to empty his pockets, Mercer handed over two marijuana cigarettes. The principal called the police, and Mercer was subsequently declared delinquent, based upon the possession of the marijuana. Although there can be little doubt that such a search would have been illegal in the case of an adult, it was upheld in *Mercer* on the theory that in making the search, the school principal acted in the place of the boy's father, who has the right to search his son without regard to the fourth amendment. The apparent fallacy in this reasoning was noted by the dissent, which questioned "How many parents of teenage children would knowingly transfer to school authorities their right and privilege of determining whether evidence incriminating their child should be suppressed or used to deprive him of his freedom for years?"[125]

Post-conviction relief is another aspect of juvenile delinquency proceedings where the tension between the civil law approach and the criminal law approach has become quite visible. The struggle of Herbert Douglas McAlpine to secure his release from Gatesville School for Boys, as reflected in several recent appellate opinions,[126] is indicative of that fact. In 1967, McAlpine was declared delinquent and placed on probation. In 1969, the probation was revoked and he was committed to the custody of the Texas Youth Council. He contended that this commitment was illegal because he was not represented by counsel in 1967 when he was initially declared delinquent. Relying on section 14 of the Delinquent Children Act,[127] McAlpine sought his release by filing a "Motion to

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[123] *See generally* Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152 (1970), and the *Uniform Juvenile Court Act, Third Tentative Draft*, in ABA NATIONAL INSTITUTE PRACTICE MATERIALS, THE CHANGING WORLD OF JUVENILE LAW (May 1968), cited therein. As stated in Willey, *supra*, at 185, the Uniform Act § 27 provides that illegally-seized evidence cannot be used against a child in a juvenile proceeding.

[124] 450 S.W.2d 715 (Tex. Civ. App.—Austin 1970).

[125] *Id.* at 721.

[126] McAlpine v. State, 457 S.W.2d 424 (Tex. Civ. App.—Houston 1970); McAlpine v. State, 457 S.W.2d 426 (Tex. Civ. App.—Houston 1970); McAlpine v. State, 457 S.W.2d 428 (Tex. Civ. App.—Houston 1970).

[127] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 14 (1964), *as amended*, (Supp. 1970), provides:

> A petition may be filed with the committing court requesting the re-opening of the case of a child who has been committed by the court to the custody of an institution, agency or person; if the court is of the opinion that the best interest of the child will be served, it may at its discretion proceed to hear and determine the question at issue. Except as provided in Section 5 of this Act as amended by Section 2 hereof, the court may thereupon order that such child be restored to the custody of its parents or guardian or be retained in the custody of the institution, agency or person; and may direct such institution, agency or person to make other arrange-

Vacate Commitment" in the juvenile court.[128] Citing section 5(c) of the Delinquent Children Act,[129] the court of civil appeals held that a juvenile court loses jurisdiction once its judgment of commitment becomes final. The court of civil appeals suggested that the proper procedure for challenging a final, but allegedly void, juvenile court commitment order was to file an application for writ of habeas corpus in a court of general jurisdiction. Taking this advice, McAlpine next filed a writ of habeas corpus in a district court. There he established that at the time of his delinquency hearing in 1967 the trial court asked both him and his parents if they would waive counsel, and they indicated that they would do so. However, there was no evidence that McAlpine or his parents were ever unequivocally advised that they had an absolute right to counsel, and to the appointment of counsel if they were indigent. Nevertheless, the district court denied the writ. On appeal, the court of civil appeals held that the original adjudication of delinquency in 1967 was, in fact, void, and that consequently the probation order was void and could not be subsequently revoked.[130] Basing its opinion upon *In re Gault*, the court made this definitive statement about the right to counsel in juvenile delinquency proceedings:

> Even a defendant who pleads guilty in a criminal case is entitled to the benefit of counsel whether he requests one or not. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.
>
> Since the right to counsel guaranteed to the minor by the Constitution of the United States was not clearly explained by the court before he questioned him concerning waiver, the record does not show that the minor or his parents intelligently and understandingly waived counsel.[131]

VIII. Other Developments

Jury Voir Dire. Under the principles established by the United States Supreme Court in *Witherspoon v. Illinois*,[132] a prospective juror in a capital case should be excused for cause if his conscientious scruples would *invariably* compel him to vote against the death penalty. Suppose a juror has a bias against the death penalty, and the state challenges him for cause without first determining whether his scruples would invariably compel him to vote against capital punishment. If the defense counsel

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ments for the chlid's care and welfare as the circumstances of the case may require; or the court may make a further order or commitment.

[128] McAlpine v. State, 457 S.W.2d 426, 427 (Tex. Civ. App.—Houston 1970).

[129] Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 5(c) (1964), *as amended*, (Supp. 1970), states:

> When the juvenile court obtains jurisdiction of a delinquent child, its jurisdiction continues until the child is discharged by the court or until he becomes twenty-one years of age unless committed to the control of the agency charged with the care, training, control of, or parole of delinquent children. The court's continued jurisdiction does not prejudice or bar subsequent or additional proceedings against the child under the provisions of this Act.

[130] McAlpine v. State, 457 S.W.2d 428, 430 (Tex. Civ. App.—Houston 1970).

[131] *Id.* (citations omitted). *See also* Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 7-B (1964), *as amended*, (Supp. 1970).

[132] 391 U.S. 510 (1968).

declines to question this juror further, and the judge excuses him without objection, has the *Witherspoon* doctrine been violated? Some courts have answered in the affirmative, holding that a death sentence must be reversed if only one prospective juror was improperly excluded.[133] Furthermore, there is authority for the proposition that the defendant does not waive the *Witherspoon* error by failing to object.[134] Nevertheless, the Texas court of criminal appeals recently took a contrary position in *Harris v. State*.[135] The Texas court realized that for strategic reasons, a defense counsel might acquiesce in excusing some prospective jurors without a complete *Witherspoon*-type inquiry into their feelings about the death penalty. In reaching that conclusion, the Texas court referred to several cases from other jurisdictions holding that a defendant cannot complain about excusing prospective jurors in violation of *Witherspoon* where there was no objection to their removal and no attempt by the defense to qualify them for service.[136]

One additional recent aspect of the *voir dire* practice should be mentioned. When the Texas Code of Criminal Procedure was revised in 1965, an effort was made in article 35.16 to distinguish between the causes for which either the state or the defendant could challenge a prospective juror. Thus, the statute provides that only the state may challenge for conscientious scruples against the death penalty,[137] while only the defendant may challenge because the juror "has a bias or prejudice against any of the law applicable to the case . . . or of the punishment therefor."[138] It was commonly assumed that this statute created a *quid pro quo* between the state's right to challenge for prejudice against the maximum penalty and the defendant's right to challenge for prejudice against the minimum penalty. However, in *Huffman v. State*,[139] a death penalty case, the court of criminal appeals upheld the state's challenge of a prosective juror who would not give the *minimum* punishment for murder with malice. The court relied upon section (b)3 of article 35.16, which permits the state to challenge any prospective juror who "has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment."[140] Therefore, apparently, in a death penalty case, it is the law of this state that the defendant cannot challenge a prospective juror because he is unwilling to vote for the death penalty, but the state can challenge a prospective juror because he is unwilling to vote for the minimum penalty.

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[133] *See, e.g.*, People v. Terry, 70 Cal. 2d 410, 454 P.2d 36, 77 Cal. Rptr. 460 (1969).

[134] *See* Bean v. State, 465 P.2d 133 (Nev. 1970).

[135] 457 S.W.2d 903 (Tex. Crim. App. 1970).

[136] State v. Duling, 21 Ohio St. 2d 13, 254 N.E.2d 670 (1970); State v. Wigglesworth, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969).

[137] TEX. CODE CRIM. PROC. ANN. art. 35.16(b)1 (1966) reads: "(b) A challenge for cause may be made by the State for any of the following reasons: 1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty . . . ."

[138] *Id.* art. 35.16(c)2.

[139] 450 S.W.2d 858 (Tex. Crim. App. 1970).

[140] TEX. CODE CRIM. PROC. ANN. art. 35.16(b)3 (1966).

Severance. Article 36.09 of the Texas Code of Criminal Procedure makes severance mandatory when two or more defendants are jointly or separately proceeded against for the same offense, if it is made known to the court that there is an admissible prior conviction against one of those defendants.[141] In the companion cases of *Johnson v. State*[142] and *Robinson v. State*[143] the defendants were jointly tried for the same offense. Both defendants had prior convictions, and, accordingly, they both moved for severance. The court of criminal appeals held that severance is not mandatory under those circumstances. The court construed the language of article 36.09 to mean that severance is mandatory only when one of the defendants has no prior criminal record. On the other hand, if both defendants have prior records, then severance is a matter for the discretion of the court.

Impeachment. Often, a witness who testifies at a trial will refresh his memory from notes of some kind prior to taking the stand. The rule in Texas has been that the adverse attorney is not entitled to examine those notes for purposes of cross-examination unless the witness uses them in the presence of the jury.[144] The court of criminal appeals added a further qualification in *Leal v. State*, holding that "the trial court is not required to make available a report used to refresh the memory of a witness where the report is made by a person other than the witness."[145] It is submitted that the identity of the maker of the report should not be decisive in deciding whether or not it should be made available to the adverse attorney for his use in cross-examination. After all, if the witness has refreshed his memory from a report, that report may be an inseparable part of that witness's testimony, and, as such, should be as available for cross-examination as the witness himself.[146]

In *Burgett v. Texas*[147] the Supreme Court of the United States held that a prior conviction against an indigent who had no counsel and who did not waive counsel could not be used to support guilt or enhance punishment in a trial for a subsequent offense. In *Simmons v. State*[148] the Texas court of criminal appeals was presented with the question of whether such an illegally-obtained prior conviction could be introduced in a subsequent trial for the purpose of impeaching the defendant after he had taken the stand. The majority of the court held that it could be.[149]

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[141] *Id.* art. 36.09.

[142] 449 S.W.2d 237 (Tex. Crim. App. 1969).

[143] 449 S.W.2d 239 (Tex. Crim. App. 1969).

[144] Gaskin v. State, 172 Tex. Crim. 7, 353 S.W.2d 467 (1961); *cf.* Pruitt v. State, 172 Tex. Crim. 187, 355 S.W.2d 528 (1962).

[145] 442 S.W.2d 736, 737 (Tex. Crim. App. 1969).

[146] "For a memorandum to be used to refresh recollection it is not essential that it should have been made by the witness himself, since it is not the memorandum but the recollection of the witness which is the evidence. Memoranda made by other persons are constantly used." 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 550 (2d ed. 1956).

[147] 389 U.S. 109 (1967).

[148] 456 S.W.2d 66 (Tex. Crim. App. 1970).

[149] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963). *But see* Tucker v. United States, 431 F.2d 1292 (9th Cir. 1970).

Judge Onion, in a lengthy dissent, surveyed the rather inconclusive cases in point from other jurisdictions, and concluded that "[t]he issue of creditability is material to the determination of guilt or innocence. The presumptively void prior conviction when offered for impeachment was, in effect, used to aid the establishment of guilt."[150] To some extent, the meaning of the *Simmons* opinion is clouded by the court's discussion of the harmless error rule. Therefore, until the court has an opportunity to write on the subject again, lawyers would be wise to continue to object to the impeachment of their client by the introduction of prior convictions obtained in violation of the doctrine of right to counsel.

Civil Commitment for Drug Addiction. In essence, article 5547-31 of the Texas Mental Health Code prohibits an application to commit civilly a person for mental illness if that person is charged with a crime.[151] In 1969, the legislature added to the Mental Health Code article 5561c-1, providing for civil commitment of drug addicts.[152] However, the legislature neglected to include a clause in article 5561c-1 exempting persons who are charged with crime. The question then arises as to whether or not a drug addict, charged with possession or sale, may be committed for addiction under the civil statutes in lieu of criminal prosecution. Part of the answer has been provided in the case of *Berney v. State*,[153] decided by the Dallas court of civil appeals. Berney had already been convicted in several cases of possession and sale of narcotics and dangerous drugs when an application was made under article 5561c-1 to commit her civilly as a narcotic addict. The trial court dismissed the petition for lack of jurisdiction. The court of civil appeals affirmed the trial court, reasoning that jurisdiction over Berney had been acquired by the criminal courts first, giving them the power to carry out their judgments and sentences without interference from any other court that might subsequently acquire jurisdiction. The court reasoned that the holding was essential to the orderly administration of the laws, noting that "if the rule were otherwise the Sheriff of Dallas County might easily have been placed in the untenable position of attempting to execute at the same time the order of the criminal court to place the prisoner in the state prison and the order of the probate court to place the same person in the state hospital."[154] The court's reasoning appears to be sound. But the opinion ob-

[150] 456 S.W.2d at 80.

[151] TEX. REV. CIV. STAT. ANN. art. 5547-31 (1958) provides:

> A sworn Application for Temporary Hospitalization of a proposed patient may be filed with the county court of the county in which the proposed patient resides or is found. The Application may be made by any adult person, or by the county judge, and shall state upon information and belief that the proposed patient is not charged with a criminal offense, that he is mentally ill, and that for his own welfare and protection or the protection of others he requires observation and/or treatment in a mental hospital.

[152] TEX. REV. CIV. STAT. ANN. art. 5561c-1, § 1 (Supp. 1970), provides: "Any person found to be addicted to narcotics in accordance with the provisions of this Act shall be committed to a mental hospital for such period of time as may be necessary to arrest the person's addiction to narcotics."

[153] 457 S.W.2d 182 (Tex. Civ. App.—Dallas 1970), *error granted.*

[154] *Id.* at 184.

viously raises more questions than it answers. For instance, what if the situation had been reversed, and a petition for civil commitment had been filed before formal criminal charges were brought? Would the jurisdiction of the probate court, having been acquired first, preclude further proceedings by the criminal courts? If so, does a civil commitment toll the statute of limitations for the crimes involved? Predictably, the legislature will amend article 5561c-1 at the next session so as to make these questions moot.

IX. Conclusion

Over all, the cases analyzed in the foregoing pages are not particularly noteworthy for any new doctrines or legal principles they may contain. For the most part, they may be characterized simply as "hole-pluggers" —cases that do no more than fill some of the gaps left by the more notable decisions of the past decade. Indeed, it may be that the constitutional revolution in criminal law and procedure is reaching its completion. If the Texas legislature enacts all or substantial parts of a new penal code, the Texas court of criminal appeals will undoubtedly spend a substantial portion of its time during the next several years interpreting it. Therefore, although the criminal law's revolution in the constitutional sense may be near an end, its upheaval in a substantive sense may be just over the horizon.