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CRIMINAL LAW AND PROCEDURE

by

Walter W. Steele, Jr.*

THE recent court decisions seem less innovative and stimulating than has been true for past issues of this *Annual Survey*. However, one would be amiss to presume that criminal jurisprudence has entered a quiescent phase. More realistically, courts are shifting their attention from trial and pretrial stages to some of the post-trial stages of the criminal process. Furthermore, there appears to be a significant increase in the number of juvenile delinquency cases being appealed. Taken together, therefore, the cases discussed below represent some important and significant advances in Texas criminal jurisprudence.

I. LEGISLATIVE AMENDMENTS

Although the legislature has not yet passed a complete revision of the Penal Code, it has recently made substantial alterations in the criminal law. Some of these amendments and alterations have been discussed by the courts; others are too new for any reported judicial interpretation.

In 1969 the Sixty-first Texas Legislature added section 22(e) to article 6687(b).¹ This section permits a court to probate the suspension of a driver's license, if that suspension is based upon an administrative hearing held under section 22(a). In *Standifer v. Texas Dep't of Public Safety*² the petitioner's license was suspended because he had been finally convicted of driving while intoxicated, an offense which carries an *automatic* suspension under section 24 of article 6687(b). Relying on section 22(e), the petitioner sought probation of this suspension. The court held that section 22(e) is applicable only if the suspension is based upon an administrative hearing brought under section 22(a), and that probation may not be sought if the suspension is automatic for one of the reasons set forth in section 24.³

The Sixty-first Legislature also passed article 5561(c)-1, section 1, which provides in part: "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."⁴ Can a person with pending criminal charges be civilly committed to a mental hospital under this legislation? That question was answered in the negative by the Texas Court of Civil Appeals at Dallas in *Berney v. State*,⁵ and the Texas Supreme Court recently affirmed that holding.⁶ However, in reaching its de-

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¹ Ch. 614, § 1, [1969] Tex. Laws 1824, codified in TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(e) (Supp. 1971).

² 463 S.W.2d 38 (Tex. Civ. App.—Houston [14th Dist.] 1971).

³ Query: Would the petitioner have had the right to seek an "occupational license" under TEX. REV. CIV. STAT. ANN. art. 6687b, § 23A (Supp. 1971)? See Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 24 SW. L.J. 229, 236 (1970).

⁴ Ch. 543, § 1, [1969] Tex. Laws 1682, codified in TEX. REV. CIV. STAT. ANN. art. 5561c-1, § 1 (Supp. 1971).

⁵ 457 S.W.2d 182 (Tex. Civ. App.—Dallas 1970). For an analysis of the case, see Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 25 SW. L.J. 213, 233 (1971).

⁶ *Berney v. State*, 462 S.W.2d 949 (Tex. 1971).

cision, the court appeared to favor civil commitment if a person charged with a criminal offense would not otherwise receive treatment for addiction. In the language of the court:

At the time of the granting of the writ [of error] we were concerned that a person needing treatment as an addict and out on bail might go untreated for the many months which could elapse between the time of conviction and the termination of the appellate steps and his or her discharge or actual entry into the Department of Corrections where treatment might be received.⁷

Seemingly, therefore, a person with pending criminal charges might be entitled to seek a civil commitment, if he could establish that no other treatment was available while the criminal case was awaiting trial.

One further piece of recent legislation has been interpreted by the courts. In 1967 article 42.12 of the Texas Code of Criminal Procedure was amended to increase the time a prisoner must serve to be eligible for parole from one-fourth to one-third of his maximum sentence.⁸ In *Ex parte Alegria*⁹ a prisoner contended that his eligibility for parole should be computed according to the law as it existed in 1961, when he was sentenced, rather than according to the 1967 amendment. The court of criminal appeals sustained the prisoner's contention, saying: "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."¹⁰

Although they have not yet been interpreted by the courts, some of the more recent amendments merit consideration. For example, article 1.141 has been added to the Texas Code of Criminal Procedure.¹¹ It allows a person represented by counsel to waive indictment in all noncapital felonies. However, article 1, section 10 of the Texas Constitution provides in part: "[N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in a penitentiary . . ."¹² Furthermore, at least one Texas case has held that return of an indictment is part of the "fundamental law of Texas" and a "pre-requisite to conferring jurisdiction upon the court in the first instance."¹³ Obviously, the language of the new article 1.141 conflicts with the quoted language of the Texas Constitution. And yet, the matter is not so easily disposed of because the Texas Court of Criminal Appeals could hold that an accused can elect to make a voluntary waiver of his right to indictment by a grand jury.¹⁴

Another instance of new legislation conflicting with old may be found in the

⁷ *Id.*

⁸ Ch. 659, § 29, [1967] Tex. Laws 1745, amending TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a) (Supp. 1971).

⁹ 464 S.W.2d 868 (Tex. Crim. App. 1971).

¹⁰ *Id.* at 872.

¹¹ Ch. 260, § 1, [1971] Tex. Laws 1148, codified in TEX. CODE CRIM. PROC. ANN. art. 1.141 (Supp. 1971).

¹² TEX. CONST. art. I, § 10.

¹³ *Hollingsworth v. State*, 87 Tex. Crim. 399, 402, 221 S.W. 978, 980 (1920).

¹⁴ The fifth amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." Construing that clause in *Hurtado v. California*, 110 U.S. 516 (1884), the United States Supreme Court held that due process of law does not require an indictment in all cases.

extensive 1971 amendments to article 6701d.¹⁵ Section 50A was added, creating the offense of "Homicide by Vehicle," defined as follows: "Whoever shall unlawfully and unintentionally (with a conscious disregard for the rights of others) cause the death of another person while engaged in the violation of any State law or municipal ordinance applying to the operation or use of a vehicle or streetcar or to the regulation of traffic shall be guilty of homicide when such violation is the proximate cause of death."¹⁶ Heretofore, such an offense would probably have been characterized as negligent homicide, and prosecuted under articles 1238-1243 of the Texas Penal Code.¹⁷ Those statutes have not been repealed, and they provide a punishment range different from that established for a violation of the new section 50A. Henceforth, prosecutors investigating a homicide caused by negligent operation of a motor vehicle must decide whether to proceed under the new "Homicide by Vehicles" statute or the old negligent homicide statutes. Unfortunately, none of these statutes is altogether clear and precise, making it almost impossible to speculate upon the probable outcome of future judicial interpretations of the distinctions between homicide by vehicle and negligent homicide.

Article 802f of the Texas Penal Code has been amended to create a presumption that one is under the influence of intoxicating liquor whenever there is 0.10% by weight of alcohol in his blood.¹⁸ The amendment also specifies, more clearly than in the past, the nature of proof which must be offered in order to suspend a driver's license for refusal to take a breath test.¹⁹

A new provision, article 17.031, has been added to the Texas Code of Criminal Procedure.²⁰ This statute allows a magistrate to set a bond and release a defendant upon his personal bond. Other courts subsequently acquiring jurisdiction over the case may not revoke the magistrate's bond "except for good cause shown."²¹

Article 46.02 of the Texas Code of Criminal Procedure has been amended to provide that persons found insane at the time of an alleged crime, or persons found incompetent to stand trial, must be committed to the hospital designated by the Texas Department of Mental Health.²² The only exception is when the alleged crime involved an act of physical violence against the person in which event the court may commit the defendant to Rusk State Hospital. This amendment continues the power of a trial court to commit the defendant for pretrial mental examination, but prohibits such commitment to a state mental hospital without the consent of the head of that hospital.

II. SEARCH AND SEIZURE

Overall, the recent search and seizure cases are quite instructive, helping to

¹⁵ Ch. 83, [1971] Tex. Laws 722.

¹⁶ *Id.* § 19, at 730.

¹⁷ TEX. PEN. CODE ANN. arts. 1238-43 (1961).

¹⁸ Ch. 709, § 1, [1971] Tex. Laws 2340.

¹⁹ See generally Steele, *Critique of the New Implied Consent Law*, 4 TRIAL LAW. F., Jan.-Feb. 1970, at 9.

²⁰ Ch. 787, § 1, [1971] Tex. Laws 2445.

²¹ *Id.*

²² Ch. 995, § 1, [1971] Tex. Laws 3026.

solve some of the problems left unsettled by earlier cases. *Heredia v. State*²³ contains an excellent analysis of three requirements for all search warrant affidavits. First, the court considered whether or not the affidavit (fully quoted in the opinion) met the two-pronged test of *Aguilar v. Texas*.²⁴ Both prongs were satisfied in that the affidavit alleged that: (1) the informer furnished reliable information on prior occasion (hence, the magistrate could conclude that he was a generally reliable informer); and (2) the information provided by the informer was based upon personal observation (hence, the magistrate could conclude that the information was reliable in this particular instance). Next, the appellate court examined the issue of the age of the information contained in the affidavit.²⁵ The affidavit contained no averment of when the informant had gathered his information. The court correctly held that without such an averment a magistrate cannot determine that probable cause to search exists, because the facts set out in the affidavit may be too stale to justify a search on the day the warrant is issued. The last requirement of an affidavit to be considered by the court was the need for a date on the affiant's jurat. In *Heredia* the date had been omitted, and the court held the affidavit insufficient for that further reason.

In many instances a search warrant affidavit contains nothing but hearsay. Although there is general agreement that hearsay is not a sufficient justification to search, there has been some disagreement about what kinds of additional information will render the affidavit sufficient.²⁶ A partial answer has been given by the United States Supreme Court in *United States v. Harris*.²⁷ All information supplied by the informant in *Harris* was hearsay. However, the affidavit also contained a statement by the officer that the suspect in question was known by reputation as a law violator. Concerning the informant's reliability, the court said:

While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report for an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant, which, when coupled with the affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant.²⁸

As to the hearsay nature of the information in the affidavit, the Court said: "It will not do to say that warrants will not issue on uncorroborated hearsay. This only avoids the issue of whether there is reason for crediting the out-of-court statement."²⁹

It would seem, therefore, that the Supreme Court is ready to apply a broader interpretation to its previous decisions in *Aguilar v. Texas*³⁰ and *Spinelli v. Uni-*

²³ 468 S.W.2d 833 (Tex. Crim. App. 1971).

²⁴ 378 U.S. 108 (1964).

²⁵ See *Moore v. State*, 456 S.W.2d 114 (Tex. Crim. App. 1970) (31-day delay allowable).

²⁶ See *Spinelli v. United States*, 393 U.S. 410 (1969); *Kemp v. State*, 464 S.W.2d 141, 145 (Tex. Crim. App. 1971) (Onion, J., dissenting).

²⁷ 403 U.S. 573 (1971).

²⁸ *Id.* at 579.

²⁹ *Id.* at 584.

³⁰ 378 U.S. 108 (1964).

ted States.³¹ Apparently, affidavits will be construed from their four corners as a totality, with the sole issue being whether or not the quantum of information, taken as a whole, supports a finding of probable cause.

The law applicable to searches without a warrant has likewise been refined by some of the recent decisions. To a large extent, these cases center around the reasonableness of a search, since the fourth amendment only protects against unreasonable searches. For example, in *Legall v. State*³² an officer stopped to render road assistance and, in the process, shined his flashlight into the automobile and discovered contraband. The admissibility of the evidence was sustained, apparently on the basis that there was nothing unreasonable about the conduct of the officer. A further illustration may be found in *Johnson v. State*.³³ In *Johnson* officers (acting without a warrant) looked through a gap in the window curtains of an apartment and saw stolen property. The court admitted the fruits of this search, reasoning: "Under this set of facts, we cannot say that appellants could reasonably assume that they were free from uninvited inspection through the window and we must hold that no search protected by the Fourth Amendment occurred."³⁴

Perhaps the most difficult application of the doctrine of reasonableness arises when an automobile is searched without a warrant. Initially there are complex questions concerning the right to make even a cursory search of an automobile. In addition, there are separate and distinct questions concerning the extent to which an automobile may be searched under given circumstances. Cases involving the search of an automobile incident to arrest for a traffic violation are typical of the problem.³⁵ In *Wallace v. State*³⁶ the defendant attracted attention because he was speeding. The officers had some difficulty getting the defendant to stop. When they finally succeeded, it was discovered that he was drinking and did not have a driver's license. The officers searched the defendant's car and found a pistol. Holding that these circumstances went beyond a simple, straightforward traffic arrest, the court said: "We conclude the officers had reasonable grounds, under the facts described and the totality of the circumstances, to search for weapons or like material which would constitute a danger to their lives or which might be used to facilitate escape."³⁷

Assuming it is reasonable under the circumstances to make a search of an automobile, the question of how extensive that search may be remains. In *United States v. Adams*³⁸ a driver's car was impounded after he was arrested for driving while intoxicated. Without a warrant the officers searched the car and

³¹ 393 U.S. 410 (1969).

³² 463 S.W.2d 731 (Tex. Crim. App. 1971).

³³ 469 S.W.2d 581 (Tex. Crim. App. 1971).

³⁴ *Id.* at 584. Other cases with similar facts have been decided on the basis of whether or not the officers were trespassing when they peeked. Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 25 Sw. L.J. 213, 214-15 (1971). However, in the instant case the court of criminal appeals refused to be distracted by such considerations. The court stated: "[T]he Fourth Amendment protects people, not places. Therefore, the fact that the officers did not trespass upon appellant's property does not determine this issue." 469 S.W.2d at 584.

³⁵ Compare *Walker v. State*, 397 S.W.2d 432 (Tex. Crim. App. 1966), with *Grundstrom v. Beto*, 273 F. Supp. 912 (N.D. Tex. 1967).

³⁶ 467 S.W.2d 608 (Tex. Crim. App. 1971).

³⁷ *Id.* at 610.

³⁸ 424 F.2d 175 (5th Cir. 1970).

removed the rear seat and entered the trunk, where they found incriminating evidence of another crime. The court concluded that the search was unreasonable and, therefore, illegal: "[For] a warrantless search of an automobile under police control to be lawful it must be closely related to the reason for the arrest and the reason the car is in custody" The search was not necessary to protect the officers, no emergency existed, nor was there danger that evidence might be lost, or that the vehicle might be removed."³⁹ The holding in *Adams* should be contrasted with the holding in *United States v. Johnson*,⁴⁰ likewise decided by the United States Court of Appeals for the Fifth Circuit. In *Johnson* the court held that a search warrant was unnecessary for the inspection of a vehicle solely for the determination of its identification number because such inspections are reasonable and do not violate the right of the people to be secure in their persons, houses, papers, or effects.⁴¹

III. RIGHT TO COUNSEL

In 1967 the United States Supreme Court decided that prior convictions obtained in violation of the defendant's right to counsel could not be used to support guilt or enhance punishment.⁴² Later, in 1970, the Court held that entering a guilty plea waives the right to contest the admissibility of evidence offered by the state.⁴³ Therefore, the question arises: What if a defendant pleads guilty and receives a punishment enhanced by evidence of prior convictions obtained in violation of the right to counsel? In *Zales v. Henderson*⁴⁴ the Fifth Circuit held that a guilty plea is a self-conviction so strong, that by entering it, the defendant waives any defect in prior convictions, thus making them available for use in enhancing punishment.⁴⁵

*Wade v. United States*⁴⁶ was another 1967 holding of the Supreme Court that seemingly extended the doctrine of right to counsel. *Wade* declared the right to exist whenever a defendant is placed in a line-up, but the court did not clearly delineate the role of counsel during the line-up procedure. In the recent case of *Doss v. United States*⁴⁷ the defendant's attorney was invited to attend the line-up, but he was not allowed to listen to any remarks between the witnesses and the police officers. The court commented that counsel was not meant to play any affirmative part in the line-up procedure, but only to discourage the police from conducting an inherently unfair line-up. Therefore, the defendant's right to counsel was not impaired by refusing to allow his counsel to listen to conversations between the witnesses and the police.⁴⁸

³⁹ *Id.* at 176; cf. *Chambers v. Maloney*, 399 U.S. 42 (1970).

⁴⁰ 431 F.2d 441 (5th Cir. 1970) (en banc).

⁴¹ "To the extent that *Glisson v. United States*, 406 F.2d 423 (5th Cir. 1969) would find such a search or inspection constitutionally infirm, that decision is expressly overruled" *Id.*

⁴² *Burgett v. Texas*, 389 U.S. 109 (1967).

⁴³ *McMann v. Richardson*, 397 U.S. 759 (1970).

⁴⁴ 433 F.2d 20 (5th Cir. 1970).

⁴⁵ The court sets out a detailed list of various kinds of rights that a defendant waives when he enters a guilty plea. *Id.* at 23.

⁴⁶ 388 U.S. 218 (1967).

⁴⁷ 431 F.2d 601 (9th Cir. 1970).

⁴⁸ *Contra*, *People v. Williams*, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971) (en banc).

Harris v. New York,⁴⁹ decided by the Supreme Court in 1971, represents another kind of softening of the right to counsel doctrine. In *Harris* the Court held that a confession taken in violation of *Miranda v. Arizona*⁵⁰ could, nevertheless, be admitted in evidence for the limited purpose of impeaching some prior testimony of the defendant.⁵¹ That holding gives rise to some interesting collateral questions. Suppose a defendant takes the stand in his own defense, and on direct examination testifies that he has never before been convicted. Might the state impeach that testimony by introducing records of prior convictions even though they had been obtained in violation of the defendant's right to counsel? The analogy to *Harris* is rather obvious, and, accordingly, in *United States ex rel. Walker v. Follette*⁵² the Second Circuit held that such evidence would be admissible. On the other hand, suppose that the defendant takes the stand and says nothing about prior convictions. In such an instance could the state introduce prior convictions to impeach the general credibility of the defendant even though those convictions had been obtained in violation of the defendant's right to counsel? In *Loper v. Beto*⁵³ the Fifth Circuit declined to pass on that question, holding it to be an evidentiary issue not of constitutional proportions. However, *Simmons v. State*,⁵⁴ an earlier opinion by the Texas Court of Criminal Appeals, seems to hold that such prior convictions could, indeed, be introduced to impeach the general credibility of the defendant.

IV. MULTIPLE PROSECUTION

Not infrequently a criminal escapade violates more than one penal statute. Whether the state may prosecute for all or only one of the violations is an issue that has plagued courts for years.⁵⁵ The problem was partially solved by the 1970 holding of the Supreme Court in *Waller v. Florida*⁵⁶ in which municipal and state court prosecutions for the same criminal act were held unconstitutional as double jeopardy.

The Texas Court of Criminal Appeals was presented with one of the classic examples of multiple prosecution in *McMillan v. State*.⁵⁷ The defendant was convicted of driving on the wrong side of the street (violation of municipal ordinance) and driving while intoxicated (violation of state statute). He appealed, contending that his two convictions were for a single act, thus placing him in double jeopardy and violating the holding in *Waller*. In a concise and well-reasoned opinion the court sustained both convictions, pointing out that the doctrine of double jeopardy is not violated when the multiple prosecutions are for separate and distinct offenses. In other words, although offenses are committed simultaneously, each of them may be charged, so long as they are dis-

⁴⁹ 401 U.S. 222 (1971).

⁵⁰ 384 U.S. 436 (1966).

⁵¹ *Accord*, *Morales v. State*, 466 S.W.2d 293, 300 (Tex. Crim. App. 1971) (rehearing held soon after *Harris* came down, in which the court followed the *Harris* rule).

⁵² 443 F.2d 167 (2d Cir. 1971).

⁵³ 440 F.2d 934 (5th Cir. 1971).

⁵⁴ 456 S.W.2d 66 (Tex. Crim. App. 1970).

⁵⁵ See Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 Sw. L.J. 567 (1968).

⁵⁶ 397 U.S. 387 (1970).

⁵⁷ 468 S.W.2d 444 (Tex. Crim. App. 1971).

tinct in character. *Waller* applies only when the multiple prosecutions are for the identical act.

The case of *Turner v. State*⁵⁸ presented a unique approach to the problem of multiple prosecution. The defendant was indicted for the murder of *A* and *B*. After all evidence was in, the court charged the jury that they could convict if they found that the defendant had murdered *A* or *B*. The jury returned a general verdict of guilty. Judge Morrison held that since *A* and *B* had been killed with one weapon in one fusillade, there was but one criminal transaction. Therefore, according to Judge Morrison, the defendant could not conceivably be injured by the fact that he was tried for killing two men by a jury authorized to convict if it found him guilty of killing only one man. Judge Woodley expressed the opinion that the killing of *A* and *B* was not one and the same transaction in law.⁵⁹ However, he concurred in the result, finding no harmful error. Judge Belcher concurred. Judge Onion dissented. He agreed with Judge Woodley that two separate transactions were presented, but he felt that harm could result when a jury is allowed to choose between offenses without being forced to specify the offense the conviction was based on.⁶⁰

V. DISCOVERY

The 1965 revision of the Texas Code of Criminal Procedure widened the right of a defendant to take depositions in criminal cases.⁶¹ But an inhibiting factor is the broad discretion vested in the trial judge to grant or deny a motion for depositions, coupled with the extreme difficulty of establishing abuse of that discretion on appeal. For example, in *Beshears v. State*⁶² the defendant sought the depositions of eight named witnesses because he was otherwise unable to determine the nature of their testimony. The trial court granted the motion as to one witness, but denied it as to the others. On appeal, it was held that the appellant must show some injury from the trial court's ruling to establish abuse of discretion. In this case appellant did not establish that he was surprised by the testimony of any of the witnesses; hence, in the opinion of the court, no injury was shown. In most instances the defendant seeks a deposition because a witness refuses to make himself otherwise available. If the motion to take the deposition is denied, the witness will remain unavailable, regardless of whether his testimony is ultimately surprising. Perhaps, therefore, surprise—or lack of surprise—should not be a decisive factor. Better reasoning might be that the defendant has been harmed if his opportunity to cross-examine the witness or develop other facts from his testimony was substantially impaired by reason of his lack of advance access to that witness.

Another aspect of discovery practice is the obtaining of written statements

⁵⁸ 462 S.W.2d 9 (Tex. Crim. App. 1969), *partially overruling* *Pate v. State*, 91 Tex. Crim. 471, 239 S.W. 967 (1922), *and* *Barton v. State*, 88 Tex. Crim. 368, 227 S.W. 317 (1921).

⁵⁹ 462 S.W.2d at 18 (Woodley, J., concurring).

⁶⁰ *Id.* at 20 (Onion, J., dissenting).

⁶¹ *See* TEX. CODE CRIM. PROC. ANN. art. 39.02 (1965). "The taking of depositions of witnesses by the defendant has been greatly liberalized within the sound discretion of the court." Onion, *Special Commentary*, 4 TEX. CODE CRIM. PROC. ANN. 597 (1965).

⁶² 461 S.W.2d 122 (Tex. Crim. App. 1970).

made prior to trial by witnesses.⁶³ In *Campos v. State*⁶⁴ the court of criminal appeals made some very useful comments about the application of that right in Texas. During the cross-examination of several state's witnesses the defendant requested that the court make an *in camera* inspection of any prior written statements made by these witnesses. He further requested that the court provide him with any portion of such statements relevant to cross-examination. The trial court refused both requests. In its decision the court of criminal appeals pointed out that a motion for *in camera* inspection was not necessary. To the contrary, a defendant has an automatic right to prior written statements made by state's witnesses under either of two circumstances. First, if the statement is displayed or referred to in the presence of the jury, then it must be tendered to the defendant (the "use before the jury rule"). Secondly, any statement written by the witness personally must be tendered to the defendant during cross-examination, *regardless* of whether it was used before the jury, and regardless of whether it was used by the witness to refresh his memory (the "*Gaskin* rule").⁶⁵

VI. GUILTY PLEAS

Some confusion has arisen over stipulating testimony in felony cases tried without a jury. In *Elder v. State*⁶⁶ the court pointed out that article 1.15 of the Texas Code of Criminal Procedure (as it was then written) did not permit oral stipulation in such situations. The court stated: "The statute is mandatory and does not permit the trial court to accept any stipulated evidence except in writing and in conformity with its provisions. Oral stipulations in any form are not permissible."⁶⁷

Apparently, it had become common practice in certain parts of this state to stipulate evidence in such cases by dictating it into the record. That practice may have been especially common when the defendant not only waived trial by jury, but also entered a plea of guilty before the court. In *Beatty v. State*⁶⁸ the defendant waived trial by jury and entered a plea of guilty to felony theft. The prosecutor orally stipulated evidence of the offense into the record. The defendant's conviction was reversed on appeal because orally stipulated evidence could not legally be a part of the record.

Subsequently, article 1.15 was amended by the Sixty-second Legislature. It now provides for oral stipulations in felony cases when a jury is waived, and when the defendant consents to their use.⁶⁹ However, since oral stipulations seem to have been common prior to the amendment, many earlier convictions may be of doubtful validity.⁷⁰ Clearly the issue does not exist if the plea of guilty

⁶³ TEX. CODE CRIM. PROC. ANN. art. 39.14 (1965).

⁶⁴ 468 S.W.2d 81 (Tex. Crim. App. 1971).

⁶⁵ *Query*: If a prior written statement is not used before the jury, and was not written by the witness himself, but *was* used by him to refresh his memory prior to testifying, then must the statement be tendered to the defense during cross-examination under the common-law rules of evidence relating to refreshing memory? See C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE §§ 553, 554 (2d ed. 1956).

⁶⁶ 462 S.W.2d 6 (Tex. Crim. App. 1970); *accord*, *Rangel v. State*, 464 S.W.2d 858 (Tex. Crim. App. 1971).

⁶⁷ 462 S.W.2d at 7.

⁶⁸ 466 S.W.2d 284 (Tex. Crim. App. 1971).

⁶⁹ Ch. 996, § 1, [1971] Tex. Laws 3028.

⁷⁰ *Query*: If a conviction is obtained by the illegal use of oral stipulations, can the point

was reinforced by the defendant's taking the stand and admitting his guilt under oath. In *Beaty* the court explicitly stated that although a guilty plea, per se, is not enough to sustain a conviction, "a judicial confession standing alone is sufficient to support appellant's guilty plea . . . despite any defects in stipulated evidence or the insufficiency of the other evidence offered."⁷¹

Another seemingly pervasive practice in this state is plea bargaining with jailed defendants prior to the appointment of counsel. In *Rhodes v. State* the defendant alleged a denial of his right to effective aid of counsel because he "made a deal with the prosecuting attorney" before counsel was appointed.⁷² The Texas Court of Criminal Appeals held that lack of effective assistance of counsel was not shown because counsel was subsequently appointed and conferred with the defendant prior to the entry of the guilty plea. The Fifth Circuit recently reached the same conclusion in *Gotcher v. Beto*.⁷³ However, the doctrine of right to counsel is being extended to numerous stages in the criminal justice process, and the language of the Fifth Circuit in *Gotcher* may be prophetic: "While this court does not approve of the practice of a member of the District Attorney's office visiting the petitioner without the petitioner's counsel being present (unless he waives having counsel present), it does not appear that this fact made petitioner's guilty plea involuntary."⁷⁴

VII. JURY SELECTION

The Texas law and practice for selecting petit and grand juries has been questioned and interpreted in recent cases. In *Ortego v. State*⁷⁵ the prosecutor and trial judge examined and disqualified a number of prospective jurors in a capital case after determining that they would not assess the death penalty under any circumstances. The trial judge sustained the state's challenge for cause without allowing defense counsel any opportunity to question those prospective jurors. Defense counsel sought permission to ask additional questions in an attempt to qualify some of the excused jurors as to penalty. Among the several questions he was denied the right to ask was: "Could you subordinate your personal view on the death penalty to what you perceived your duty to abide by your oath as a juror and to obey the law of this state?"⁷⁶ Judge Morrison, who wrote the opinion in the case, stated that he was "convinced that it would have been proper to permit the appellant to propound [the question quoted above, among others] but my brethren do not agree."⁷⁷ Nevertheless, he held that no reversible error was shown. Judge Woodley concurred in the result without written opinion. Judge Onion wrote a concurring opinion in which he

be raised for the first time in a petition for postconviction relief under TEX. CODE CRIM. PROC. ANN. art. 11.07 (1965), or is it an issue that can be raised only on appeal? For one answer, see *Ruiz v. Beto*, 445 F.2d 811 (5th Cir. 1971).

⁷¹ 466 S.W.2d at 286.

⁷² 450 S.W.2d 329, 331 (Tex. Crim. App. 1970).

⁷³ 444 F.2d 696 (5th Cir. 1971).

⁷⁴ *Id.* at 698 (emphasis added). See 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).

⁷⁵ 462 S.W.2d 296 (Tex. Crim. App. 1970).

⁷⁶ *Id.* at 305.

⁷⁷ *Id.*

stated: "[I] would caution trial judges against using this decision as authority for the proposition that once a juror has answered questions in such a way as to meet the Witherspoon test and subjects himself to the State's challenge for cause, the right of the defendant who is on trial for his life may be completely denied any right to question the prospective juror at all."⁷⁸

Despite Judge Onion's candid admonition to the trial judges of Texas, the question remains: In a capital case does defense counsel have an absolute right to ask a seemingly unqualified prospective juror if he could subordinate his personal feelings against the death penalty and consider the full range of punishment? Furthermore, assuming defense counsel is allowed to ask that question, and assuming the juror replies in some affirmative fashion, should a challenge for cause from the state be sustained or denied? These questions may have been answered by the Fifth Circuit, at least by way of dicta, in *Marion v. Beto*.⁷⁹ In that case the court contrasted the language of the United States Supreme Court in *Witherspoon v. Illinois*⁸⁰ with the language of the Texas Court of Criminal Appeals in *Pittman v. State*.⁸¹

The Supreme Court further implied that doubts concerning the ability of a venireman to subordinate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion, stating in footnote 9, on page 515-516 of the opinion, 88 S. Ct. on page 1774: 'Unless a venireman states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position.'

We note that this statement is in sharp contrast to the words of the Texas Court of Criminal Appeals in the post-*Witherspoon* case of *Pittman v. State*, 434 S.W.2d 352, 357 (1968): 'It has long been the holding of this Court that if it is doubtful whether the juror had conscientious scruples in regard to the infliction of capital punishment, the Court's action in sustaining the State's challenge for cause on that ground will be sustained on appeal.'⁸²

In addition to the above dicta the Fifth Circuit in *Marion* specifically held that a death penalty conviction must be reversed if only one prospective juror of the many interviewed was improperly excused. There is a split of authority on this point, and *Marion* was the first opportunity for the Fifth Circuit to decide it.⁸³

The method of selecting Texas grand juries has also been under recent scrutiny by the courts. As one might suspect, the questions raised in these cases have dealt with "the right to a grand jury chosen without discrimination"⁸⁴ — "[a] constitutional right of no meager or paltry dimension."⁸⁵ The recent Fifth Circuit decision in *Muniz v. Beto*⁸⁶ is a classic example of the applicable law. Since 1935 the requirements for a finding of racial discrimination in the selection of jurors have been a significant disparity between (1) the percentage of

⁷⁸ *Id.* at 309 (Onion, J., concurring); cf. *Morford v. United States*, 339 U.S. 258 (1950).

⁷⁹ 434 F.2d 29 (5th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

⁸⁰ 391 U.S. 510 (1968).

⁸¹ 434 S.W.2d 352 (Tex. Crim. App. 1968).

⁸² 434 F.2d at 31.

⁸³ *Id.* at 32. *But see* *Grider v. State*, 468 S.W.2d 393 (Tex. Crim. App. 1971).

⁸⁴ *Muniz v. Beto*, 434 F.2d 697, 698 (5th Cir. 1970).

⁸⁵ *Id.*

⁸⁶ *Id.* at 697.

persons of petitioner's race to the total persons available as potential jurors, and (2) the percentage of persons of petitioner's race selected as jurors to the total persons selected as jurors.⁸⁷ Petitioner, Muniz, demonstrated that from 1936 through 1945 in El Paso County (he was originally indicted there in 1942) people with Spanish surnames comprised from five to twenty percent of the population, although only three percent of the grand jurors selected during that period had Spanish surnames. The court reversed Muniz's original conviction, stating that the facts "do more than speak for themselves—they cry out discrimination with unmistakable clarity."⁸⁸ The court also reiterated a point it had made earlier in the case of *Brooks v. Beto*:⁸⁹

Nor do we attach significance to the finding that the various grand jury commissioners who selected grand jurors in El Paso County did not [consciously] exclude people from grand jury service on the basis of creed or color The results of the jury selection process are what count, and the results in this case clearly show discrimination against Mexican-Americans in the selection of grand jury members.⁹⁰

It may be settled law that grand jury commissioners must not discriminate on ethnic or social grounds, and that they must make a valid effort to secure grand jurors from a cross-section of the community. But what if they do so, and the trial judge then manipulates the list submitted by them so as to partially undo their best efforts? *Ex parte Becker*⁹¹ is the first Texas case to deal directly with that problem. One of the commissioners in *Becker*, a lawyer, testified that they "made a sincere effort to obtain as members of the Grand Jury panel a representative cross-section of Dallas County along social, economic, cultural and racial lines"⁹² After receiving the commissioner's list, the trial judge rearranged the sequence in which the names appeared, thereafter selecting the first twelve names according to the sequence in which he had arranged them.⁹³ The court of criminal appeals held that the trial judge's act did not violate any statute. However, the court carefully noted that it was not passing upon the validity of any indictment returned by such a grand jury, and that if an inditcee could show discrimination resulting from "the inclusion or exclusion of certain persons of his race, color, creed, sex, age or place of residence in the county,"⁹⁴ he would have a good basis for challenging his indictment.

VIII. PROBATION REVOCATION

In the past the process for revoking probation has been somewhat routine—if not altogether perfunctory. Apparently, however, probation revocation is be-

⁸⁷ *Norris v. Alabama*, 294 U.S. 587 (1935). See also Note, *The Texas Grand Jury Selection System—Discretion To Discriminate?*, 21 Sw. L.J. 545 (1967).

⁸⁸ 432 F.2d at 702.

⁸⁹ 366 F.2d 1 (5th Cir. 1966).

⁹⁰ 432 F.2d at 703.

⁹¹ 459 S.W.2d 442 (Tex. Crim. App. 1970).

⁹² *Id.* at 442-43.

⁹³ The court of criminal appeals noted that by custom and tradition it had become a part of the Texas grand jury system for the trial judge to select the first twelve names submitted by the grand jury commissioners, assuming the persons named were qualified to serve. *Ex parte Becker*, 459 S.W.2d 442 (Tex. Crim. App. 1970).

⁹⁴ *Id.* at 445 n.3.

ginning to attract the attention of lawyers and courts.⁹⁵ One instance of this phenomenon is reflected in the case of *DeLeon v. State*.⁹⁶ DeLeon's probation contract contained the normal condition that he "report to the Probation Officer as directed."⁹⁷ The court of criminal appeals pointed out that the probation contract did not specify how often DeLeon was to report, and the trial court never told DeLeon when to report. Since the trial court cannot delegate that authority to the probation officer, DeLeon's probation could not be revoked for failing to report *as directed*.

Although the court of criminal appeals applies the rule of strict construction to probation contracts, it has consistently held that revocation hearings are not trials in the constitutional sense. Therefore, there is no right to jury at a revocation hearing, and probation may be revoked by virtue of an offense for which the probationer has not yet been convicted.⁹⁸ Surprisingly enough, the Supreme Court of Texas may be at odds with the Texas Court of Criminal Appeals over the constitutional nature of revocation hearings. In *Farris v. Tipps*⁹⁹ the petitioner (an out-of-state convict) sought mandamus in the Texas Supreme Court to compel a speedy trial on a probation revocation petition filed against him in Texas. The supreme court granted mandamus, stating: "As is at once evident, the Constitution of the United States, like the Texas Constitution, guarantees the accused 'in all criminal prosecutions' (1) a trial by an impartial jury, (2) a public trial, and (3) a speedy trial."¹⁰⁰ In his dissent Judge Reavley pointed out the obvious conflict between the import of the holding in *Farris* and the long-standing position of the Texas Court of Criminal Appeals. In the language of Judge Reavley: "The Texas Court of Criminal Appeals has consistently held that the constitutional requirements for the trial to determine guilt or innocence do not necessarily apply to a proceeding to revoke probation The majority does not explain how the constitutional right of speedy trial by impartial jury requires a speedy hearing but not a jury in a revocation proceeding."¹⁰¹

IX. JUVENILE DELINQUENCY

There was a time when it would have been quite inappropriate to include a discussion of juvenile delinquency law in a critique of criminal law and procedure. Now, however, the law of juvenile delinquency is at least as much a part of criminal jurisprudence as it is of civil jurisprudence. In fact, at present the central issue in juvenile delinquency is whether criminal or civil procedure should govern.

The ongoing dilemma over appointment of a guardian ad litem in delinquen-

⁹⁵ See *Barnes v. State*, 467 S.W.2d 437 (Tex. Crim. App. 1971); *Pickens v. State*, 466 S.W.2d 563 (Tex. Crim. App. 1971). In *Barnes* Judge Onion commented: "I feel compelled to dissent as vigorously as I know how to the continuing efforts of the majority to lower the standards applicable to revocation of probation hearings when the trend should be in the opposite direction in this day and age of continuing improvement in criminal procedure and fairness in all criminal proceedings." 467 S.W.2d at 441 (dissenting opinion).

⁹⁶ 466 S.W.2d 573 (Tex. Crim. App. 1971).

⁹⁷ *Id.* at 574.

⁹⁸ *Hood v. State*, 458 S.W.2d 662 (Tex. Crim. App. 1970).

⁹⁹ 463 S.W.2d 176 (Tex. 1971).

¹⁰⁰ *Id.* at 179.

¹⁰¹ *Id.* at 181.

cy cases is an excellent example of the frustration that occurs when one tries to meld rules of criminal and civil procedure into the trial of a single lawsuit. In 1967 the United States Supreme Court declared that a juvenile in delinquency proceedings had the same right to court-appointed counsel as an adult in a criminal case.¹⁰² In addition to that constitutional right rule 173 of the Texas Rules of Civil Procedure provides: "When a minor may be a defendant to a law suit . . . the court shall appoint a guardian ad litem for such person."¹⁰³ Several questions are immediately apparent. Since the juvenile must have an attorney (retained or appointed), must he also have a guardian ad litem? If so, can the attorney also serve as guardian ad litem?¹⁰⁴ Furthermore, if the juvenile's parents are present during the proceedings, must a guardian ad litem be appointed; and if so, can the parents be appointed?

Among several Texas cases dealing with these issues *Felder v. State*¹⁰⁶ is the most recent. On all occasions *Felder* was represented by an attorney and at least one of his parents was present. He never requested the appointment of a guardian ad litem. Nevertheless, he appealed his adjudication of delinquency on the grounds that a guardian ad litem was not appointed for him. The appellate court expressed its dilemma in this language: "Cases of this type are fraught with much difficulty and uncertainty. We are not only required to apply rules relating to civil procedure in proceedings instituted under the Juvenile Act, but in proceedings to determine delinquency which may lead to commitment to a state institution, we must regard the proceedings as criminal in nature so far as due process is concerned."¹⁰⁶ The court held that appointment of a guardian ad litem was mandatory, and reversed the case.¹⁰⁷ The court also made passing reference to the question of whether parents or counsel may serve as guardians ad litem: "[T]he powers and functions of a guardian ad litem are different from those of an attorney or possibly even of the parents of the child."¹⁰⁸

Another example of the inherent conflict that can exist between civil and criminal procedure in the trial of delinquency cases is found in *Carrillo v. State*.¹⁰⁹ During trial the state was granted permission to materially amend its petition. Although the defendant could not establish any surprise or prejudice as a result of the amendment, he objected. Rule 66 of the Texas Rules of Civil Procedure allows amendment under those circumstances.¹¹⁰ However, article 28.10 of the Texas Code of Criminal Procedure states that an indictment cannot be amended under any circumstances after trial has commenced.¹¹¹ Which rule should govern? In a carefully written opinion the court reasoned that civil

¹⁰² *In re Gault*, 387 U.S. 1 (1967).

¹⁰³ TEX. R. CIV. P. 173.

¹⁰⁴ These two questions are fully discussed in Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 25 SW. L.J. 213, 227-28 (1971).

¹⁰⁵ 463 S.W.2d 272 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.* *Contra*, *Yzaquique v. State*, 427 S.W.2d 687, 694 (Tex. Civ. App.—Corpus Christi 1968); *In re Gonzales*, 328 S.W.2d 475 (Tex. Civ. App.—El Paso 1959), *error ref. n.r.e.*

¹⁰⁶ 463 S.W.2d at 273.

¹⁰⁷ "The appointment is required whether request is made for such appointment or not, and unless it is clear that disabilities of minority do not exist, it is the duty of juvenile judges to make such appointments." *Id.* at 274.

¹⁰⁸ *Id.*

¹⁰⁹ 470 S.W.2d 227 (Tex. Civ. App.—San Antonio 1971), *error granted*.

¹¹⁰ TEX. R. CIV. P. 66.

¹¹¹ TEX. CODE CRIM. PROC. ANN. art. 28.10 (1965).

procedure should constitute the basic framework for trial of delinquency cases because that is the clear mandate of the Texas Legislature. Recognizing the role of criminal procedure in delinquency cases, the court reasoned that criminal procedure is necessary only insofar as it insures due process. Apparently, the court felt that due process had not been violated in *Carrillo* because the juvenile was not prejudiced by the action of the trial judge in allowing the amendment.

The holding in *Carrillo* might be contrasted with the holding in *P.S.M. v. State*¹¹² because, taken together, they present a perfectly sound approach to the due process balance which must be maintained in delinquency cases. In *P.S.M.* the petition alleged that the juvenile was delinquent because she habitually "ran away from home without the consent of her *parents*"¹¹³ Despite that pleading the state failed to show that the child's ventures away from home were without the consent of *both* parents. Therefore, the case was reversed because of insufficiency of the evidence.

Questions of the legality of search and seizure in delinquency cases are especially perplexing when they arise from a search conducted by school authorities. One approach is to reason that school officials are not officers of the state, and, therefore, are not bound by the fourth and fifth amendments to the Constitution of the United States.¹¹⁴ Another approach is to reason that school officials act *in loco parentis*, entitling them to make searches of the children and their possessions without conforming to the Constitution. That is the approach adopted in two recent Texas cases.¹¹⁵ This reasoning seems to assume that parents have virtual freedom to override the personal constitutional rights of their children. And yet, one Texas court has already announced: "A guardian ad litem of a minor party to a lawsuit, or his attorney, cannot make admissions binding on the minor nor waive any of the minor's substantial rights."¹¹⁶ By analogy it could be argued that a parent has no more right than a guardian ad litem to waive a child's personal constitutional rights to the extent that such waiver would incriminate the child. Indeed, at least one court in another jurisdiction has so held.¹¹⁷

X. CONCLUSION

Obviously, no one can accurately predict what aspects of the criminal law will be most prominent in the courts of this state during the next year. However, the recent cases have answered a great many of the issues regarding criminal law and procedure raised by the Warren Court. Therefore, one might expect some new problems to surface as lawyers search for innovative grounds to appeal. Substantive law and procedure relating to delinquency, sentencing, and prisoner's rights are examples of areas which one might expect to be developed in forthcoming appellate opinions.

¹¹² 469 S.W.2d 13 (Tex. Civ. App.—San Antonio 1971).

¹¹³ *Id.* (emphasis added).

¹¹⁴ The issue raised, but avoided by the court in *Reasoner v. State*, 463 S.W.2d 55 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.*

¹¹⁵ *Romiger v. State*, 460 S.W.2d 181 (Tex. Civ. App.—Beaumont 1970); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App.—Austin), *dismissed for mootness*, 13 Tex. Sup. Ct. J. 36 (1970). For a discussion of *Mercer*, see Steele, *supra* note 104, at 229.

¹¹⁶ 463 S.W.2d at 59.

¹¹⁷ *People v. Flowers*, 23 Mich. App. 583, 179 N.W.2d 56 (1970).

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