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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

by

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SINCE the period covered by the last *Survey* there have been many exciting developments in the area of criminal law and procedure. At all levels of judicial activity a trend towards expansion of law enforcement powers has been emerging. Fortunately, this trend has not been accompanied by any significant erosion of basic constitutional guarantees. The devotee of civil liberties can no doubt find things to complain about in the decisions of the Burger Court, but he must concede that the Court has generally exhibited high fidelity to the preservation of fundamental freedoms. Whatever "strict construction" may imply, lawyers should find no difficulty in living with, and even applauding, recent examples of "strict construction" by the United States Supreme Court and the Texas Court of Criminal Appeals. Despite a crushing caseload, the Texas court, under the scholarly leadership of Judge Onion, has consistently maintained a high quality performance. No effort will be made in this Article to discuss all of the cases involving challenging issues. There are too many of them and space is too limited. But an effort will be made to consider some of the more outstanding decisions reflecting major trends that have developed.

I. DEATH PENALTY

In *Furman v. Georgia*[1] the United States Supreme Court held that Texas statutes authorizing capital punishment for rape,[2] and Georgia statutes authorizing capital punishment for rape[3] and for murder[4] could not be sustained consistently with the eighth amendment prohibition of cruel and unusual punishment.[5] The three capital punishment statutes which the Court considered were not significantly different from other federal and state non-mandatory capital punishment statutes in force throughout the nation.[6] The holding in *Furman*

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[1] 408 U.S. 238 (1972). The Court in *Furman* had before it three death penalty judgments, one imposed in a Georgia murder case, one imposed in a Georgia rape case, and one imposed in a Texas rape case. In a per curiam decision in which Justices Douglas, Brennan, Stewart, White, and Marshall concurred, the Court reversed each judgment "insofar as it leaves undisturbed the death sentence imposed," holding that the "imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40. The five separate concurring opinions collectively asserted that capital punishment, as currently applied, is incompatible with notions of equal protection implicit in the eighth amendment (*id.* at 257); does not comport with human dignity (*id.* at 270); is administered in a wanton and freakish manner (*id.* at 310); makes only marginal contributions to any discernible social or public purposes (*id.* at 312-13); and is morally unacceptable and excessive (*id.* at 358, 360). Three of the majority Justices, Douglas, Stewart, and White, expressed views consistent with the idea that the death penalty is not per se unconstitutional and conceivably might be imposed in a manner compatible with the requirements of the eighth amendment. Those views are summarized in Justice Powell's dissent. *Id.* at 415 n.1.

[2] TEX. PEN. CODE ANN. art. 1189 (1961).

[3] GA. CODE ANN. § 26-2001 (1972).

[4] *Id.* § 26-1101.

[5] This prohibition was held to be applicable to the states through the fourteenth amendment due process clause in Robinson v. California, 370 U.S. 660 (1962).

[6] All capital punishment statutes in this country, except a few which impose a mandatory death penalty [*see* 408 U.S. at 307 (Stewart, J., dissenting)], are non-mandatory in

is, therefore, inconsistent with the enforcement of death penalty judgments which have been obtained under those statutes.[7] On the day that the *Furman* decision was announced, the Court sua sponte invoked it as the basis for reversing 119 death penalty judgments then pending before the Court,[8] thereby conclusively demonstrating that the holding was fully retroactive.[9]

As applied by the court of criminal appeals to a Texas death penalty judgment, the *Furman* holding will compel a conclusion that the jury acted illegally in assessing the death penalty. That conclusion, in view of the decision in *Ocker v. State*,[10] will require a reversal of the conviction and a remand of the case for a new trial. But a different result will follow if, in the meantime, the Governor commutes the penalty to life imprisonment. In that situation, no change in the original judgment will be necessary and the court can affirm the judgment, basing its decision on *Whan v. State*.[11]

The validity of such an affirmance is open to question, as Judge Onion well argues in his dissent in *Whan*.[12] His position, that there can be no authority

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the sense that the death penalty they authorize may be assessed by jurors in the exercise of standardless discretion. A non-mandatory capital punishment statute came before the Supreme Court in McGautha v. California, 402 U.S. 183 (1971), and was held valid against an attack based on the fourteenth amendment due process clause. The conflict between *Furman* and *McGautha* is such as to warrant the view that *Furman* overruled *McGautha*. The Chief Justice so argues in his dissent in *Furman*. 408 U.S. at 400.

[7] As pointed out by Justice Powell in his dissent, the effect of *Furman* was to remove "the death sentence previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country." 408 U.S. at 417.

[8] *See* Moore v. Illinois, 408 U.S. 786, 800 (1972); Stewart v. Massachusetts, 408 U.S. 845 (1972); and death penalty cases cited in 408 U.S. at 932-41 (1972).

[9] *Cf.* Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970).

[10] 477 S.W.2d 288 (Tex. Crim. App. 1972). The court held that upon reversal of a conviction due to the exclusion on challenge for cause of prospective jurors who expressed conscientious scruples against imposition of the death penalty, the court could neither sentence the defendant to life imprisonment nor remand for assessment of punishment only. The Court's view was that the only course open to it was to remand the case for a new trial. The Court stated:

> If the punishment was erroneously imposed, then the case stands in the same position as if the jury had failed to reach a verdict. While this Court may remand for assessment of punishment where the punishment was originally set by the court, we may not do so where the original punishment was set by the jury. While the power to reduce or modify sentences may be desirable . . . we do not feel that we are able, or should effect such a procedure without legislative approval.

Id. at 291. *See also* Harris v. State, 485 S.W.2d 284, 285 (Tex. Crim. App. 1972); Turner v. State, 485 S.W.2d 282, 284 (Tex. Crim. App. 1972).

[11] 485 S.W.2d 275 (Tex. Crim. App. 1972). The Supreme Court had reversed an affirmance by the court of criminal appeals insofar as it imposed the death penalty. 438 S.W.2d 918, *rev'd*, 403 U.S. 946 (1971). The Governor subsequently commuted the punishment to life imprisonment, and the court of criminal appeals affirmed a second time, holding that the commutation operated to satisfy the mandate of the Supreme Court without otherwise affecting the original judgment. The court stated:

> [A] commutation does not affect the judgment, but merely mitigates the punishment which can be given. . . . That being the case, no change in the original judgment is necessary. The Supreme Court reversed our affirmance only in regard to the death penalty. The Governor's commutation has rendered the death penalty portion of the trial court's judgment and subsequent sentence a nullity. Therefore the proper course for this Court to follow is to again affirm the judgment of the trial court. By so doing the order of the Supreme Court is satisfied.

Id. at 277. *See also Ex parte* Crain, 485 S.W.2d 286, 288 (Tex. Crim. App. 1972); Harris v. State, 485 S.W.2d 284, 286 (Tex. Crim. App. 1972); Turner v. State, 485 S.W.2d 282, 284 (Tex. Crim. App. 1972).

[12] In his dissent Presiding Judge Onion stated:

to commute where there is no legal penalty, seems unassailable. After *Furman*, almost any case in which the death penalty has been assessed is, by reason of *Ocker*, left in the same position as it would have been had the jury failed to reach a verdict.[13] This fact would seem to be clearly inconsistent with the idea that if the sentence is commuted the conviction is valid.

An important sequel to *Furman* was the decision in *Ex parte Contella*,[14] which considered the impact of *Furman* on Texas bail laws. The court of criminal appeals held, in effect, that the provisions of the Texas Constitution which authorize denial of bail in capital cases when the proof is evident[15] will no longer be operative. Thus, offenses formerly classified as capital will be bailable in the same manner as other offenses.

II. CONFESSIONS

The question of what standard of persuasion applies in a *Jackson* hearing[16] was settled by the Supreme Court in *Lego v. Twomey*.[17] The defendant in *Lego* argued that *In re Winship*[18] required that the proof beyond a reasonable doubt standard be employed. Rejecting that argument, the Court held that in a *Jackson* hearing the trial judge is authorized to find the confession voluntary from a preponderance of the evidence. The Court pointed out that the states, if they wish, may adopt a higher standard. The matter is probably only academic, since it is inconceivable that a trial judge would fail to find the confession voluntary beyond a reasonable doubt if he found that it was voluntary from a preponderance of the evidence.

Usually the proof in a *Jackson* hearing on the issue of voluntariness of the confession will be conflicting. Thus, a finding that the confession is voluntary will generally be immune from successful attack in the higher courts.[19] Sometimes, however, the proof will conclusively negate voluntariness of the confession. This occurred in *Beecher v. Alabama*,[20] in which a finding by a state

> [S]ome penalty must be assessed for the authority of commutation to be exercised.
>
> While the Governor, acting upon the recommendation of the Board of Pardons and Paroles, may grant a pardon after a person has been found guilty, and prior to the assessment of punishment, he could not commute the punishment if none had been assessed. If this court has reversed a conviction and issued its mandate, it would not appear that the Governor, prior to a new trial, could grant a pardon or commute the punishment previously assessed.
>
> Then, may the Governor commute the punishment assessed subsequent to the time the penalty has been expressly set aside by the mandate of the United States Supreme Court and prior to any further action by this court? I think not. How can he commute that which is no longer in existence and which was determined to have been improperly assessed?

485 S.W.2d at 280.

[13] *See* note 10 *supra*.

[14] 485 S.W.2d 910 (Tex. Crim. App. 1972).

[15] TEX. CONST. art. I, § 11.

[16] Jackson v. Denno, 378 U.S. 368 (1963), requires that a preliminary evidentiary hearing be held to determine the voluntariness of a confession.

[17] 404 U.S. 477 (1972).

[18] 397 U.S. 358 (1970). In *Winship* the Court held that proof beyond a reasonable doubt "is among the essentials of due process and fair treatment required during the adjudicatory stage . . . ." *Id.* at 358.

[19] *See* Watts v. Indiana, 338 U.S. 49 (1949); Lisenba v. California, 314 U.S. 219 (1941); Babcock v. State, 473 S.W.2d 941 (Tex. Crim. App. 1971).

[20] 408 U.S. 234 (1972). Proof that the confession was coerced consisted of undisputed

court that the confession was voluntary was nullified by the Supreme Court because of the presence of proof conclusively showing that the confession was coerced.

At the end of a *Jackson* hearing, as a condition to admitting the confession, the trial judge must find the defendant knowingly and intelligently waived his right to have counsel with him during questioning. The amount of evidence necessary to support such a finding is minimal. All the prosecution must do is elicit testimony tending to show that defendant, after being suitably warned, said it was all right to go ahead with the interrogation without a lawyer present. *Nash v. State*[21] illustrates the application of this requirement. In *Nash* it was established without dispute that the defendant, after being warned, asked for a lawyer. Relying on *United States v. Priest*,[22] the defendant contended on appeal that his request negated the finding of waiver made by the trial court. Rejecting that contention, the court of criminal appeals concluded that a fact issue as to waiver was raised by other testimony which tended to show that after asking for a lawyer, the defendant relented and stated that he would talk without a lawyer present. The court was on solid ground in so concluding because the Supreme Court made it clear in *Miranda v. Arizona* that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver."[23] It would appear, however, that the court was on less than solid ground in stating that the prosecution has a heavy burden when attempting to demonstrate a waiver.

III. SEARCH AND SEIZURE

Stop-and-Frisk. The right of an officer to stop and frisk, approved by the Supreme Court in *Terry v. Ohio*,[24] was given an expanded scope by the Court in *Adams v. Williams*.[25] Rejecting an argument that reasonable cause for a stop-and-frisk can only be based upon an officer's personal observation, the Court held that an officer may also rely on information furnished by an undisclosed informant if the information bears appropriate indicia of reliability.

The evidence introduced against the defendant in *Adams* included heroin and other fruit of a search of his person and car made incident to a warrantless arrest. The arrest was made after the officer reached through an open window into the car where defendant was seated and removed from his waistband a loaded pistol. The officer initiated the stop-and-frisk procedure solely in reliance upon an informant's tip that defendant had narcotics in the car and a pistol in his waistband. Concluding that the procedure met fourth amendment requirements as established by *Terry*, the Court held that when the

testimony that at the time of his arrest defendant was surrounded by a very angry mob; that police were holding guns on him and even fired one shot by his head; and that one hour after his arrest he gave the confession to a doctor at a hospital following a morphine injection to relieve extreme pain caused by a gunshot wound.

[21] 477 S.W.2d 557 (Tex. Crim. App. 1972).

[22] 409 F.2d 491 (5th Cir. 1969).

[23] 384 U.S. 436, 475 (1966).

[24] 392 U.S. 1 (1968).

[25] 407 U.S. 143 (1972).

officer gained personal knowledge of the existence of the pistol, he had probable cause to make the arrest.

It was the view of the Court that the informant's tip bore indicia of reliability sufficient to authorize the stop-and-frisk. Those indicia, the Court explained, were: (1) the informant was known to the officer personally and had provided information in the past; (2) the tip was given by the informant personally and comprised information immediately verifiable at the scene; and (3) under the law of the forum, the informant might have been subject to immediate arrest for making a false complaint had the officer's investigation proved the tip incorrect.

Adams makes it easy for an officer to justify a stop-and-frisk, relaxing almost to the vanishing point the requirements for a frisk established in *Terry*. Under *Adams*, an arrest made when a *Terry* frisk reveals a weapon will be held to have been supported by probable cause and will authorize an incident search which otherwise could not have been made consistently with the fourth amendment. Thus *Adams* clearly strengthens law enforcement's investigative arm.

Consent Searches. In *United States v. Biswell*[26] a pawnshop operator with a federal license to sell sporting weapons was convicted of dealing in unlicensed firearms without payment of a required federal occupational tax. The Supreme Court decided that since the Gun Control Act of 1968[27] gave the federal officers authority to inspect the defendant's locked storeroom, they were entitled to search there independently of his consent. Therefore, the lawfulness of the search did not depend on whether his consent was voluntary. Rejecting the defendant's contention that such a decision was foreclosed by *Bumper v. North Carolina*,[28] the Court held that the consent to search involved in *Bumper* was involuntary because it was made in response to a demand for entry that was not pursuant to lawful authority.

Such a construction of *Bumper* would appear to conflict with the rule established by the Texas Court of Criminal Appeals in *Stanford v. State*.[29]

[26] 406 U.S. 311 (1972).

[27] 18 U.S.C. § 923(g) (Supp. 1972). This section authorizes official entry on the business premises of a dealer in firearms during business hours for the purpose of inspecting or examining any records or documents required to be kept and any firearms or ammunition kept or stored on the premises.

[28] 391 U.S. 543 (1968). In *Bumper* an important part of the prosecution's proof was a rifle which was found in the home where defendant lived with his grandmother. The rifle was found by officers during a search made pursuant to a consent to search given by the defendant's grandmother after the officers told her that they had a warrant. There was nothing in the record to show that there was ever a warrant, and, at the hearing on a motion to suppress the evidence, the prosecutor informed the trial court that he did not rely on a warrant to justify the search, but on the consent of defendant's grandmother. The issue before the Supreme Court was whether the search was justified on the basis of her consent. The Court decided that it was not justified: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49.

[29] 145 Tex. Crim. 306, 167 S.W.2d 517 (1943). In *Stanford* the court found it unnecessary to pass on the defendant's claim that the search warrant was invalid, holding that in any event the proof showed that the search was one which could be justified on the basis of the defendant's consent. The court drew a distinction between two types of response a defendant might make to an officer after being told by him that he has a search warrant.

Under that rule a defendant voluntarily consents to a search if he states that a warrant is unnecessary after officers with an invalid warrant or no warrant tell him that they have a warrant. Under *Bumper*, however, there can be no consent to a search if the defendant gives permission to search only after the official conducting the search has asserted that he possesses a warrant. In *Hoover v. Beto*,[30] however, the Fifth Circuit Court of Appeals, sitting en banc, construed *Bumper* to yield the same rule as *Stanford*. The court concluded that if the search warrant were invalid, the search could still be justified on the basis of the defendant's consent, because after the officers told him that they had the warrant, he stated that no warrant was necessary and invited them into his home.[31]

The Mere Evidence Rule. Before the decision of the Supreme Court in *Warden v. Hayden*,[32] the mere evidence rule was in force both in federal[33] and Texas[34] prosecutions. That rule prohibited officers from seizing "mere evidence," *i.e.*, anything "which is neither contraband nor tools nor fruits of crime but which consists of private documents or other chattels of the defendant wanted by the government solely for its evidentiary value."[35] In *Hayden* the Supreme Court abolished the rule, and permitted the use of garments seized by officers during a search of a residence conducted incident to an arrest as evidence against the defendant.

In *Haynes v. State*[36] the court, following *Hayden*, announced the demise of the mere evidence rule in Texas prosecutions. In *Haynes* the officers were making a search-warrant search for marijuana and found an envelope, ad-

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In the court's opinion the defendant consents to a search if his response consists of a statement to the effect that a warrant is not necessary, but does not consent if his response consists of a statement merely saying, "All right, go ahead." *Id.* at 309, 167 S.W.2d at 519.

[30] 467 F.2d 516 (5th Cir. 1972).

[31] Recent consent-search cases decided by the Texas Court of Criminal Appeals include: Sorenson v. State, 478 S.W.2d 532 (Tex. Crim. App. 1972), in which it was held that when a son lives at home his mother can validly consent to a search of his room; Clark v. State, 483 S.W.2d 465 (Tex. Crim. App. 1972), in which it was held that an otherwise valid consent to search is not made infirm merely because no *Miranda* warnings precede the giving of consent; Cole v. State, 484 S.W.2d 779 (Tex. Crim. App. 1972), in which it was held that a lady who answered the officers' knock did not consent to the search by inviting them in after they told her only that they were looking for defendant; Weatherly v. State, 477 S.W.2d 572 (Tex. Crim. App. 1972), in which it was held that an otherwise valid consent to search is not made invalid merely because it is given at a time when the person who gives it is under arrest; and Paprskar v. State, 484 S.W.2d 731 (Tex. Crim. App. 1972), in which it was held that a consent to search, which was given by the defendant's wife after officers physically abused her and told her that a justice of the peace was standing by to issue a search warrant if she did not consent, was not voluntary.

[32] 387 U.S. 294 (1967).

[33] *See* Abel v. United States, 362 U.S. 217 (1960); Harris v. United States, 331 U.S. 145, 154 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932); Gouled v. United States, 255 U.S. 298 (1921).

[34] *See* LaRue v. State, 149 Tex. Crim. 598, 197 S.W.2d 570 (1946); Cagle v. State, 147 Tex. Crim. 354, 180 S.W.2d 928 (1944). In *LaRue* officers conducted a search under a valid search warrant which authorized them to look for a pistol claimed to have been used by defendant in the commission of a homicide. During the search the officers discovered not only the pistol but also bloody garments which constituted incriminating evidence against the defendant. The court held that the mere evidence rule prevented any use of those garments as evidence.

[35] 8 J. WIGMORE, EVIDENCE § 2184a, at 45 (McNaughton rev. 1961).

[36] 475 S.W.2d 739 (Tex. Crim. App. 1971).

dressed to defendant, in a box containing marijuana. Testimony of an officer describing the envelope and its address was held admissible.

It is interesting to note that the officer's authority to seize the envelope, arising from its coming into his "plain view" during his search for the marijuana described in the search warrant,[37] would have been entirely nonexistent if the search had been conducted under a search warrant describing the envelope alone. This is true because the envelope was outside the scope of any of the classes of property for which Texas statutes authorize a search warrant.[38] The rule which invalidates any search under a search warrant for property not within one of those classes would thus be applied.[39]

Aguilar's Requirements. In order for a search warrant affidavit based upon information supplied by an informant to be valid under the fourth amendment, the affidavit must meet two requirements imposed by the Supreme Court in *Aguilar v. Texas.*[40] First, the affidavit must state some of the underlying circumstances from which the informant concluded that contraband was at the place to be searched; and, second, the affidavit must state the underlying circumstances from which the officer concluded that the informant was credible.

There have been a number of recent cases in which these requirements have been considered. In *United States v. Harris*[41] the Supreme Court held that a search affidavit may satisfy *Aguilar*'s credibility requirement by stating that

[37] The "plain view" rule authorizes officers making a search under a search warrant for contraband to seize other incriminating material they discover even though it was not described in the search warrant. *See* Alderman v. United States, 394 U.S. 165 (1969); Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); Broxsie v. United States, 372 F.2d 481, 482 (5th Cir. 1967) (which characterized finding of undescribed contraband as a "serendipitous discovery"); Taylor v. State, 421 S.W.2d 403, 408 (Tex. Crim. App. 1967); Daltwas v. State, 375 S.W.2d 732, 734 (Tex. Crim. App. 1964).

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice Stewart, speaking for himself and three other Justices, after referring to the rule requiring that a search incident to an arrest must be limited to the person of the arrestee and the area within which he might obtain a weapon or destroy evidence, concluded that if officers, while properly making such a search, see an unconcealed incriminating item beyond that area, they may seize it without a warrant. *Id.* at 465-66 n.24. But he also concluded that if the officers see an unconcealed incriminating item beyond that area which is not contraband, stolen property, or dangerous, and which they knew in advance they would find in plain view and intended to seize, a valid search warrant would be necessary to authorize seizure of that item. *Id.* at 466. *Query*: What should a Texas officer do if he has advance information of the location and existence of an incriminating item of personalty that does not fall within any of the classes of property for which a search warrant may be issued under Texas statutes? *See* notes 38, 39 *infra*, and accompanying text.

[38] Under Texas statutes a search warrant may validly authorize officers to search only for property included within the scope of one or more of the following classes of property: narcotic drugs, TEX. PEN. CODE ANN. arts. 725b, § 16, 726d (1961); illicit alcoholic beverages, *id.* art. 666-20; gambling paraphernalia, *id.* art. 633; slot machines, *id.* art. 642a, § 4; bombs, *id.* art. 1723, § 10; stolen property, TEX. CODE CRIM. PROC. ANN. art. 18.02 (1966); weapons or implements used in committing crime, *id.* art. 18.09; and arms or munitions kept for insurrection or rioting, *id.* art. 18.02.

[39] *See* Greenway v. State, 131 Tex. Crim. 620, 101 S.W.2d 569 (1937) (holding that the fact that, at the time of the search, there was no statutory authority for a search warrant to search for illicit alcohol precluded issuance of any valid search warrant to search for contraband of that type).

[40] 378 U.S. 108, 114 (1964).

[41] 403 U.S. 573 (1971). "Admissions of crime, like admissions against proprietary interests, carry their own indicia of reliability—sufficient at least to support a finding of probable cause to search." *Id.* at 583.

the informant admitted that he had committed an act constituting a crime at the place to be searched. In *Adair v. State* the Texas Court of Criminal Appeals held that *Aguilar*'s credibility requirement was met by an affidavit which stated only that the informant's reliability and credibility was established by his lack of a criminal record, his reputation in the neighborhood, and the fact that he was well thought of by his fellow associates.[42] The court of criminal appeals also held that the credibility requirement was met by an affidavit containing only an averment stating the name of the informant.[43] Moreover, in *Williams v. State*,[44] the court held that *Aguilar*'s personal knowledge requirement was met by an affidavit which stated only that the informant was a user of drugs who had gone to the place to be searched on several occasions to purchase narcotics.

These decisions reflect a trend toward applying the common-sense approach approved by the Supreme Court in *United States v. Ventresca* to the interpretation of search warrant affidavits.[45] Through the use of that approach the *Aguilar* requirements have been relaxed almost out of existence.

Mistaken Identity. Sometimes an arrestee, though reasonably believed by arresting officers to be a person they have probable cause to arrest, will in fact be someone else. In *Hill v. California*[46] the Supreme Court held that when a mistake of this kind occurs, the fruits of an otherwise proper search made incident to the arrest will be admissible to the same extent as if the arrestee had been the person the officers intended to arrest.

In a recent Dallas case,[47] officers with an arrest warrant for two suspects had probable cause to believe that they were in a certain garage apartment. The officers forcibly entered the apartment after announcing their presence and receiving no response to their knock. There was an exchange of gunfire between the officers and Tomas Rodriguez, who, with his family, lived in the apartment. Both Rodriguez and his wife were struck by shotgun blasts. Pro-

[42] 482 S.W.2d 247, 249 (Tex. Crim. App. 1972). For other cases in which affidavits with minimal specificity of facts germane to *Aguilar*'s credibility requirement were approved, see Wetherby v. State, 482 S.W.2d 852 (Tex. Crim. App. 1972) (affidavit stated informant was gainfully employed and well thought of in the community in which he lived and had no criminal record); and Yantis v. State, 476 S.W.2d 24 (Tex. Crim. App. 1972) (affidavit stated that the informant had an excellent reputation in the neighborhood in which he resided, had no criminal record, and had had continuous gainful employment).

[43] Frazier v. State, 480 S.W.2d 375 (Tex. Crim. App. 1972). The court reasoned that the fact that the informant allowed the officers to use his name in the search affidavit vouched for the information given and supported the view that his credibility was sufficient to meet *Aguilar*'s credibility requirement. *Id.* at 379-80.

[44] 476 S.W.2d 300 (Tex. Crim. App. 1972). The court stated:

> While we recognize, as appellant contends, that no statement is made that informant made any purchase or saw any drugs, at appellant's residence, we find it difficult to imagine that a user of drugs would go to a place to purchase same on several occasions unless drugs were actually present. . . . Unlike the affidavit condemned in Spinelli v. United States, 393 U.S. 410, . . . the affidavit recites how the informant came by his information. The affidavit contains allegations which go beyond the affiant's mere suspicion.

Id. at 303.

[45] 380 U.S. 102 (1965).

[46] 401 U.S. 797 (1971).

[47] Rodriguez v. Jones, Civil No. CA-3-4635-D (N.D. Tex., Mar. 24, 1972), *aff'd*, No. 72-2135 (5th Cir., Feb. 6, 1973).

ceeding under the Civil Rights Act of 1871[48] Rodriguez filed a damage suit against the officers in federal district court. The court denied relief, holding that the officers' entry was not illegal and did not deprive plaintiffs of any rights under color of law. The court specifically stated, however, that it was not ruling on the legality of the search which followed the legal entry.

Electronic Surveillance. The Supreme Court in *United States v. United States District Court*[49] held that warrantless wiretap surveillance of domestic subversives, conducted under the direction of the Attorney General of the United States, violated the fourth amendment. A threshold question for the Court was whether the surveillance in question could properly be judged on a general reasonableness standard of the kind approved in *United States v. Rabinowitz.*[50] The Court, following *Chimel v. California,*[51] refused to construe the fourth amendment as authorizing that standard, holding, in effect, that the test for determining reasonableness of an intrusion under the fourth amendment is whether it was accomplished pursuant to a valid warrant procedure or under circumstances sufficient to make applicable one of the established exceptions to the warrant requirement. Rejecting the Government's argument that special conditions require a further exception to the warrant requirement for domestic security surveillance, the Court held that the Attorney General may legally conduct electronic surveillance only if he follows the warrant procedure prescribed by section 2518 of the Omnibus Crime Control and Safe Streets Act of 1968.[52]

IV. SELF-INCRIMINATION

Right To Exercise Privilege Without Penalty. In *Brooks v. Tennessee*[53] the Supreme Court held invalid under the fifth amendment self-incrimination clause a Tennessee statutory procedure requiring an accused to forego his right to testify if he failed to testify at the commencement of the defense's case. In so holding the Court infused new vigor into the principle, established by the Warren Court in *Griffin v. California,*[54] that the fifth amendment privilege is violated by any procedure which penalizes the defendant for remaining silent at trial.

Unavailability of Privilege in Regulatory Situation. In *California v. Byers*[55]

[48] 42 U.S.C. § 1983 (1970).

[49] 407 U.S. 297 (1972).

[50] 339 U.S. 56, 66 (1950): "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."

[51] 395 U.S. 752 (1969). In *Chimel* the Court rejected the argument that it is "reasonable" to search a man's house when he is arrested in it: "[T]hat argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." *Id.* at 764-65.

[52] 18 U.S.C. § 2518 (1970).

[53] 406 U.S. 605 (1972).

[54] 380 U.S. 609 (1965). In *Griffin* it was held that comment by the prosecutor on the failure of the defendant in a criminal case to take the witness stand is unconstitutional because it amounts to a penalty for the exercise of a defendant's fifth amendment privilege.

[55] 402 U.S. 424 (1971).

the Supreme Court dealt with the question of whether the self-incrimination clause protects against disclosures required by regulatory statutes. The defendant in that case was prosecuted for noncompliance with a California hit-and-run statute[56] which made it a crime for a motorist in an accident causing property damage to fail to stop and give his name and address. The defendant had committed the traffic offense of wrongful passing and thereby became involved in the hit-and-run accident. Under the *Hoffman-Malloy* test,[57] he would have incriminated himself of the wrongful passing offense if he had complied with the statute requiring that he stop and give his name and address.[58] The prosecution for noncompliance with the hit-and-run statute was, therefore, punishment for his refusal to incriminate himself. Nevertheless, the Court in *Byers* decided, five-to-four, that the privilege was not available to him.[59] The effect of that decision was probably to establish that the privilege does not extend to incriminating disclosures reasonably necessary to effectuate a proper governmental purpose of noncriminal regulatory statutes directed at the public. Left unaffected by that decision was a series of earlier cases which held the privilege applicable to incriminating disclosures compelled by statutes directed toward selective groups inherently suspect of criminal activities.[60]

Use and Derivative Use Immunity. In *Kastigar v. United States*[61] the Supreme Court, overruling *Counselman v. Hitchcock*[62] and its progeny,[63] held

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[56] CAL. VEHICLE CODE § 20002(a) (West 1971).

[57] Malloy v. Hogan, 378 U.S. 1 (1964), made applicable to state prosecutions the rules established by Hoffman v. United States, 341 U.S. 479 (1951), for determining incrimination in federal prosecutions. Under those rules a witness's fifth amendment privilege "not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." A court asked to honor the privilege should do so unless from all the circumstances it is "perfectly clear" that the answers sought to be compelled from the witness "cannot possibly" have a tendency to incriminate him. 378 U.S. at 11-12.

[58] If the defendant had made the disclosures required of him by the statute, the inference would have arisen that he was the driver of the car that did the improper passing and caused the accident. That inference would have been a link in the chain of evidence by which he could have been convicted of that offense. It should also be noted that those disclosures, at least insofar as they communicated the defendant's knowledge of his name and address, would have been testimonial. *See* United States v. Wade, 388 U.S. 218, 222 (1967).

[59] The five Justices who joined in the decision wrote two opinions, one by the Chief Justice, who spoke for himself and Justices Stewart, White, and Blackmun, and one by Justice Harlan. Justice Harlan thought that the disclosures required by the statute were testimonial and incriminating under conventional tests (*see* note 57 *supra*), but concluded that the privilege was unavailable to the defendant because of an overriding governmental need for such information. The Chief Justice took a different approach. His view was that under conventional tests the disclosures required by the statute could not possibly have had a tendency to incriminate defendant and that, in any event, they were not testimonial. In reality, the possibility that the disclosures would have incriminated the defendant is evidenced by the fact that two days after the accident a criminal charge was filed against him for the crime of unlawful passing at the time of the accident. *See* note 58 *supra.*

[60] *See, e.g.*, United States v. Covington, 395 U.S. 57 (1969); Leary v. United States, 395 U.S. 6 (1969); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

[61] 406 U.S. 441 (1972).

[62] 142 U.S. 547 (1892). In *Counselman* the Court stated: "In view of the constitutional provision [against self-incrimination] a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* at 586.

[63] Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); Ullman v. United

that use and derivative use immunity[64] is a valid substitute for the privilege against self-incrimination on the theory that immunity of that kind, no less than full immunity from prosecution,[65] protects a witness as completely as allowing him to remain silent. That theory comports with reality only if there is a guarantee that no direct or derivative use will be made of a witness's compelled disclosures in any later prosecution of him for an offense revealed by those disclosures. The Court found that guarantee in the rule which makes inadmissible in such a prosecution any proof not affirmatively shown to have an independent source unconnected with those disclosures. The Court's view was that this rule supplies "very substantial protection, commensurate with that resulting from invoking the privilege itself."[66]

Kastigar, though removing the fifth amendment as an obstacle to employment of use and derivative use immunity as a substitute for the privilege, leaves unaffected Texas decisions[67] construing the Texas self-incrimination clause[68] to require a grant of immunity from prosecution before a witness may be compelled to incriminate himself. It also leaves unaffected various Texas statutes[69] which impose a similar requirement in the situations to which they relate. The continued vitality of the Texas cases was put in doubt by the decision of the court of criminal appeals in *Olson v. State*.[70] In that case the court rejected the claim that the Texas self-incrimination privilege should be construed as having a broader scope than that which the Supreme Court had

States, 350 U.S. 422 (1956); McCarthy v. Arndstein, 266 U.S. 34 (1924); Brown v. Walker, 161 U.S. 591 (1896).

[64] Immunity from "the use of compelled testimony and evidence derived therefrom" is conventionally characterized as "use and derivative use" immunity. 406 U.S. at 443.

[65] Immunity from "prosecution for offenses to which compelled testimony relates" is conventionally characterized as "transactional" immunity. *Id.*

[66] *Id.* at 461. Only if this rule is enforceable will a defendant receiving use and derivative use immunity as a substitute for his fifth amendment privilege get as much as he gives up. The possibility that this rule can be effectively enforced is remote. For example, consider the case of a witness who alone has knowledge of incriminating information showing his commission of a crime. If allowed to remain silent in the exercise of his fifth amendment privilege, he can be assured that there will be no impermissible prosecutory use of that information. But if he is compelled to divulge that information in exchange for use and derivative use immunity then he can no longer guarantee that there will be no impermissible use of the information. He will then be at the mercy of the prosecuting officials if for any reason they should decide to make impermissible use of the compelled testimony. He will almost always be unable to show that the use was impermissible because his only way of demonstrating impermissible use will be to elicit from those officials, in a tainted-evidence hearing, an admission that they relied on that information or leads from it rather than on independent sources. Of course, the likelihood of obtaining an admission of that kind will never be high. Whatever the theory of a tainted-evidence hearing may be, the inescapable reality is that it will usually end in a "no-taint" finding, supported by no more evidence than the assurances of prosecuting officials that the state's proof was solely the product of sources unconnected with the compelled disclosures.

[67] *See, e.g., Ex parte* Joseph, 172 Tex. Crim. 355, 356 S.W.2d 789 (1962); Ferrantello v. State, 158 Tex. Crim. 471, 256 S.W.2d 587 (1952); *Ex parte* Muncy, 72 Tex. Crim. 541, 163 S.W. 29 (1913).

[68] "In all criminal prosecutions the accused shall . . . not be compelled to give evidence against himself . . . ." TEX. CONST. art. I, § 10.

[69] TEX. PEN. CODE ANN. art. 694 (1961) (liquor law violations); *id.* art. 639 (gaming); *id.* art. 652 (horse race betting); *id.* art. 598 (insurance law violations); *id.* art. 1297 (sending anonymous letter); *id.* art. 775 (unlawful solicitation of patients); *id.* art. 1636 (antitrust violations); *id.* art. 1657 (railroad anti-pass law); *id.* art. 1621 (blacklisting); TEX. REV. CIV. STAT. ANN. art. 272 (1961) (examination by assignor for creditors); *id.* art. 5205 (discrimination against employees); *id.* art. 522b-9 (unemployment compensation); *id.* art. 5429a (legislative hearing); *id.* art. 7446 (antitrust cases).

[70] 484 S.W.2d 756 (Tex. Crim. App. 1972).

given the fifth amendment privilege and expressly overruled Texas cases consistent with that claim.[71] Following the example of the Supreme Court in *Gilbert v. California*,[72] the court in *Olson* held that requiring an accused to supply a handwriting exemplar does not compel him to give evidence against himself within the meaning of the Texas Constitution. That holding, and the opinion of Presiding Judge Onion supporting it, paves the way for an interpretation of the Texas self-incrimination privilege that will give it the same scope which *Kastigar* gave the fifth amendment privilege.

Ineffective Grant of Immunity. There is one type of situation in which a federal grand jury witness, despite an immunity grant, may refuse to testify without being guilty of contempt. This was illustrated in *Gelbard v. United States*.[73] A federal indictment returned against six defendants charged a plot to kidnap a government official and named Sister Joques Egan as a co-conspirator but not as a co-defendant. Though granted transactional immunity,[74] Sister Egan refused to answer questions put to her by the grand jury, claiming that she had a right to do so on the ground that they were based on information derived from illegal electronic surveillance directed at her. Agreeing that in view of section 2515 of the Omnibus Crime Control and Safe Streets Act of 1968[75] she was not required to answer the questions if her claim were proved, the Supreme Court remanded the case to the district court for a hearing to determine whether the questions were based on illegally obtained information.

V. SIXTH AMENDMENT RIGHTS

Right to Counsel. In *Kirby v. Illinois*[76] the Supreme Court concluded that a lineup conducted before initiation of a formal charge, preliminary hearing, indictment, information, arraignment, or other adversary judicial criminal proceeding was not a criminal prosecution within the meaning of the sixth amendment. The Court, therefore, held that the right to counsel[77] does not apply during such a lineup.

After *Kirby*, which narrowed the area in which the right to counsel will apply, the Court, in *Argersinger v. Hamlin*,[78] broadened the scope which that guarantee will have at trial. The issue in *Argersinger* was the validity of a

[71] The decisions overruled were: Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956) (blood sample); Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942) (speaking certain words for identification under compulsion); Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1941) (urine sample).

[72] 388 U.S. 263 (1967).

[73] 408 U.S. 41 (1972).

[74] Sister Egan was given a grant of transactional immunity under title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2514 (1970). That Act provides that a federal grand jury witness who is compelled to testify cannot be subjected to later prosecution on account of any matter to which his testimony related and that his testimony before the grand jury cannot be used as evidence in any criminal proceeding against him.

[75] *Id.* § 2515. This section provides that evidence obtained in violation of the Act may not be received in evidence in any trial, hearing, or other proceeding.

[76] 406 U.S. 682 (1972).

[77] "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. CONST. amend. VI.

[78] 407 U.S. 25 (1972).

Florida state court misdemeanor conviction imposing imprisonment on an indigent who was not represented by counsel and who did not waive counsel. Resolving that issue favorably to the defendant, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[79]

Other Supreme Court cases which further expanded the content of the sixth amendment counsel guarantee as it applies to a trial were *United States v. Tucker*[80] and *Loper v. Beto*.[81] In *Tucker* the Court held that the sixth amendment required invalidation of a sentence which may have been based, in part, on a prior conviction of defendant obtained in a state prosecution in which he was not represented by counsel, had not waived counsel, and was indigent. The Court in *Loper* held that use of such a conviction to impeach the defendant would also violate the sixth amendment. The Court reasoned that those holdings were required by *Burgett v. Texas*[82] and served the purpose of preventing erosion of the principle which *Gideon v. Wainwright*[83] established.

In *Morrissey v. Brewer*[84] the Supreme Court enumerated the minimum due process rights of a parolee in proceedings to revoke his parole.[85] The Court omitted the right of counsel from that enumeration and expressly left open the question whether a parolee has such a right. That omission is difficult to harmonize with the Court's previous decisions in *Mempa v. Rhay*[86] and *In re Gault*.[87] In any event, one thing seems certain: So long as parolees are without help of counsel in parole revocation proceedings, the due process rights the Court granted them in *Morrissey* will be more fictional than real.

Right of Confrontation. A Tennessee state court, in retrying a murder case after an appeal, admitted into evidence a transcript of testimony of a key prosecution witness from the first trial when it was shown that the witness was living in Sweden. The Supreme Court, in *Mancusi v. Stubbs*,[88] held that the admission of the transcript did not violate the defendant's right to be confronted with the witnesses against him, even though there was no showing of any effort by the prosecution to procure attendance of the witness at the trial. The Court rejected the defendant's claim that because of the lack of

[79] *Id.* at 37.
[80] 404 U.S. 443 (1972).
[81] 405 U.S. 473 (1972).
[82] 389 U.S. 109 (1967).
[83] 372 U.S. 335 (1963).
[84] 408 U.S. 471 (1972).
[85] The due process rights enumerated by the Court were: right to notice of claimed violations; right to disclosure of evidence against him; right to be heard in person and to present witnesses and documentary evidence; right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); right to a neutral and detached hearing body such as a traditional parole board; and, right to a written statement by the factfinders of the evidence relied on and reasons for revoking parole.
[86] 389 U.S. 128 (1967). In *Mempa* the Court extended the right of counsel to probation revocation proceedings, holding that the "necessity for the aid of counsel" in proceedings of that kind was "apparent." *Id.* at 135.
[87] 387 U.S. 1 (1967). In *Gault* the Court extended the right of counsel to juvenile delinquency proceedings.
[88] 408 U.S. 204 (1972).

such a showing *Barber v. Page*[89] required a different holding. The Court distinguished *Barber* on the ground that there the prosecution had available to it legal procedures which might have produced the absent witness if the prosecution had resorted to them.

In *Stubbs* the Court, after concluding that the absent witness was not available within the meaning of the *Barber* rule, addressed itself to the issue whether the transcript of the absent witness's testimony met the "sufficient indicia of reliability" standard first enunciated in *Dutton v. Evans.*[90] The Court emphasized that the confrontation clause would make the transcript inadmissible if it lacked such indicia. The Court decided that the transcript possessed sufficient indicia of reliability, since at the first trial there was adequate opportunity to cross-examine the witness, and defense counsel had availed himself of the opportunity.

Stubbs supplements *Barber* and *Dutton*, and operates with them to establish two basic requirements for admissibility of hearsay statements of a declarant who does not testify at trial. The prosecution must show (1) that the statements bear indicia of reliability, and (2) a valid excuse for not placing the statements before the jury through live testimony of the declarant himself. The first requirement will usually be satisfied when the prosecution shows that the statements come within an established exception to the hearsay rule, since such statements usually bear indicia of reliability which "have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."[91] The second requirement may be satisfied by showing that (1) the possibility of the unreliability of the statements being demonstrated by cross-examination of the declarant is wholly unreal;[92] (2) there are no legal procedures available to which the prosecution might resort in a good faith effort to obtain presence of the absent declarant;[93] or (3) that the prosecution used all available legal procedures in making a good faith effort to produce the witness and is unable to produce him despite that effort.[94]

Upon analysis it will be seen that the *Stubbs-Dutton-Barber* trilogy requires the prosecution to produce an available declarant in any situation in which his hearsay statements seriously incriminate the defendant and there is a real possibility of their reliability being shaken by cross-examination of the declarant. In most other situations admission of the statements without production of the available declarant will be proper or will, in any event, constitute no more than harmless error.

A fact situation to which this reasoning might be applied was involved in

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[89] 390 U.S. 719 (1968). The defendant in *Barber* was convicted of armed robbery. An important part of the evidence against him consisted of a transcript of testimony given by his co-defendant at a preliminary hearing. The Supreme Court held that the admission of the transcript violated defendant's sixth amendment right of confrontation. The Court's basis for that holding was that the prosecution made no effort to secure the co-defendant's presence at trial.

[90] 400 U.S. 74 (1970).

[91] *Id.* at 89.

[92] *Id.*

[93] Mancusi v. Stubbs, 408 U.S. 204 (1972).

[94] Barber v. Page, 390 U.S. 719 (1968).

Tezeno v. State.[95] The arresting officer was allowed to testify that a female with the defendant at the time of his arrest stated that a gun found in her purse was given to her by defendant just before the arrest. She was not called as a witness at the defendant's murder trial. The court of criminal appeals held that her statement was within the *res gestae* exception to the hearsay rule and on that basis rejected defendant's claim that its admission violated his federal constitutional right of confrontation. Such a basis, by itself, was not enough to justify rejection of the defendant's claim because, under the rules established by the *Stubbs-Dutton-Barber* trilogy, a further condition was that a valid excuse exist for the prosecution's failure to produce the absent declarant. Of course, this does not necessarily mean that the result in *Tezeno* was incorrect, since any violation of the confrontation clause that the trial court may have committed may have been harmless error anyway.

A confrontation problem will sometimes arise even though the declarant testifies at trial. *Nelson v. O'Neil*[96] involved a joint trial in which the trial court admitted the confession of one defendant which implicated the other defendant. The trial court instructed the jury to consider the confession only against the defendant who made it. At issue was the question whether the confessing defendant's denial on the witness stand that he made the confession prevented his being adequately cross-examined as to the contents of the confession. The Supreme Court refused to follow dicta in earlier cases which supported the view that the denial precluded the kind of cross-examination contemplated by the confrontation clause.[97] Instead, the Court held that the admission of the confession did not violate that clause, emphasizing that "where the declarant is not absent, but is present to testify and to submit to cross-examination . . . the admission of his out-of-court statements does not create a confrontation problem."[98]

Right to Speedy Trial. In *United States v. Marion*[99] the Supreme Court narrowed the area within which the sixth amendment speedy trial guarantee will apply; and in *Barker v. Wingo*[100] the Court described criteria which will govern in deciding whether that guarantee has been violated.

In *Marion* the Court refused to extend the reach of that guarantee to the period prior to arrest. The defendants contended that the prosecutor had known of the alleged crime for several years, but had delayed in seeking an indictment. The Court held that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that will engage the particular protections of the speedy trial provision of the Sixth Amendment."[101]

In *Barker* the Court held that the question of whether that guarantee has

[95] 484 S.W.2d 374 (Tex. Crim. App. 1972).
[96] 402 U.S. 622 (1971).
[97] *Id.* at 627. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 420 (1965).
[98] 402 U.S. at 626-27, quoting from California v. Green, 399 U.S. 149, 162 (1970).
[99] 404 U.S. 307 (1971).
[100] 407 U.S. 514 (1972). *See also* Courtney v. State, 472 S.W.2d 150 (Tex. Crim. App. 1971), in which the court of criminal appeals expressed its views about the proper criteria for determining whether there has been a violation of the speedy trial guarantee.
[101] 404 U.S. at 320.

been violated can be determined only on an ad hoc basis by weighing the conduct of the prosecution and the defendant. The Court concluded that the special factors which must be assessed in the course of the balancing process are the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. In *Barker*, though a five-year delay was involved, there were special circumstances which caused the Court to conclude that defendant sustained only minimal prejudice. The finding of minimal prejudice, coupled with the fact that the defendant made no claim that any of his witnesses had died or otherwise become unavailable due to the delay, justified, in the Court's opinion, a decision that the defendant's speedy trial guarantee was not violated.

The special factors used in *Barker* to decide whether the delay in trying a defendant infringed his right to a speedy trial are as vague, uncertain, and fluid as the special circumstances used in *Betts v. Brady*[102] to decide whether denying a defendant the aid of counsel violated his due process right to counsel. It therefore will not be surprising if the courts have as much difficulty applying *Barker* as they had applying *Betts*.

Right to Jury Trial. The Supreme Court, in *Duncan v. Louisiana*,[103] held that the due process clause of the fourteenth amendment required that the states observe the sixth amendment right to jury trial. Recent decisions have softened the impact of that right by limiting the area in which it will operate and by permitting the states to experiment with matters such as size of the jury and whether the verdict should be unanimous. Those decisions include: *McKeiver v. Pennsylvania*,[104] in which the Court refused to extend that guarantee to the adjudicative phase of juvenile delinquency proceedings; *Apodaco v. Oregon*,[105] in which the Court held that a less than unanimous jury verdict permitted by state law is not repugnant to that guarantee; and *Williams v. Florida*,[106] in which the Court held that no infringement of that guarantee

[102] 316 U.S. 455 (1942). In *Betts* the Court, though refusing to hold that the fourteenth amendment due process clause made the sixth amendment counsel guarantee enforceable against the states, recognized that in noncapital cases a defendant would, by virtue of the due process clause, have a right to appointed counsel if there existed special circumstances making it fundamentally unfair for him to be tried without help of counsel. The Court declined to establish any definite criteria for determining when that right would accrue, holding that the due process concept from which that right stemmed was "less rigid and more fluid" than the counsel requirement of the sixth amendment, and that an asserted denial of that right should be tested by an appraisal of the "totality of facts in a given case." *Id.* at 462. *Betts* was overruled by Gideon v. Wainwright, 372 U.S. 335 (1963).

[103] 391 U.S. 145 (1968).

[104] 403 U.S. 528 (1971). The Court's refusal in *McKeiver* to construe the due process concept as granting juveniles a jury trial right seems irreconcilable with the decisions in *In re* Gault, 387 U.S. 1 (1967), and *In re* Winship, 397 U.S. 358 (1970), in which the Court construed that concept as granting juveniles rights no more basic or important than the jury trial right, *i.e.*, right to counsel; right against self-incrimination; right of confrontation; right of notice of charges; and right to requirement of proof beyond a reasonable doubt. It appears that *McKeiver* is the herald for a trend that will move the Court away from the due process analysis which dominated those decisions. In *McKeiver* the Court recognized that the crucial issue was whether juvenile proceedings in their adjudicative phase should be equated with a criminal trial. 403 U.S. at 550. That issue was crucial because if those proceedings and a criminal trial properly should be equated, then *Duncan* would make the sixth amendment jury trial guarantee applicable in those proceedings. The holding in *McKeiver* was that the two systems cannot be equated. *But cf. In re* Gault, 387 U.S. at 36: "A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

[105] 406 U.S. 404 (1972).

[106] 399 U.S. 78 (1970).

occurs merely because the verdict is by a jury that, under applicable state law, is composed of less than twelve jurors.

In another recent case, *Peters v. Kiff*,[107] the Supreme Court utilized the right to jury trial guarantee as a basis for holding that a white defendant, claiming systematic exclusion of Negroes from the grand jury that indicted him and the petit jury that convicted him, had standing to make the claim in a federal habeas corpus proceeding. Also of interest is *Alexander v. Louisiana*,[108] in which the Court set aside a rape conviction of a Negro on the ground that the grand jury selection procedures used were not racially neutral. The all-white Louisiana grand jury that indicted the defendant was selected from a parish where twenty-one percent of the adults were black. The racial designations were obvious to the jury commissioners throughout the selection process. In the Court's opinion the opportunity for discrimination was present, and based on the record, it could not be said that the jury commissioners did not discriminate on the basis of race.

VI. Prosecutorial Misconduct

Two recent Supreme Court cases involving prosecutorial misconduct are *Giglio v. United States*[109] and *Santobello v. New York*.[110] In *Giglio* the misconduct consisted of the failure to disclose a promise made to a key prosecution witness that he would not be prosecuted if he testified before the grand jury and at trial. In *Santobello* the misconduct consisted of a prosecutor making a recommendation of sentence despite a previous promise of another prosecutor, made to defendant to induce plea bargaining, that no recommendation would be made.

In *Giglio* the Court, pointing out that the Government's case depended almost entirely on the testimony of the witness to whom the promise of immunity from prosecution was given and that the existence of the promise was relevant to his credibility, held that the jury was entitled to know of it. The failure of the prosecution to reveal the existence of the promise to the jury required reversal and a new trial. In so holding the Court applied and extended due process criteria previously established in *Napue v. Illinois*,[111] *Mooney v. Holohan*,[112] *Pyle v. Kansas*,[113] and *Brady v. Maryland*.[114] The Court

[107] 407 U.S. 493 (1972).
[108] 405 U.S. 625 (1972).
[109] 405 U.S. 150 (1972).
[110] 404 U.S. 257 (1972).
[111] 360 U.S. 264 (1959). *Napue* established that the fourteenth amendment is violated "when the State, although not soliciting false evidence, allows it to go uncorrected." *Id.* at 269.
[112] 294 U.S. 103 (1935). In *Mooney* the defendant contended that "the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." *Id.* at 10. The Court agreed that those contentions, if sustained, would require a decision that defendant was denied the due process of law guaranteed by the fourteenth amendment.
[113] 317 U.S. 213 (1942). In *Pyle* the Court held that a deprivation of rights guaranteed by the Constitution was charged by allegations that defendant's imprisonment resulted from "perjured testimony, knowingly used by the State authorities to obtain his conviction and from the deliberate suppression by those same authorities of evidence favorable to him." *Id.* at 216.
[114] 373 U.S. 83 (1963). In *Brady* the Court held "that the suppression by the prosecu-

treated as immaterial the circumstance that the prosecutor who tried the case was unaware of the promise of immunity earlier made to the witness by another prosecutor. The Court's view was that the prosecution staff was an entity that would be bound by a promise made by any of its members.

In *Santobello* the prosecutor who dealt with the defendant during plea bargaining and who made the promise that no recommendation of sentence would be made was not the same prosecutor who actually made the recommendation. The state claimed that the breach of the promise was inadvertent. The Court rejected that claim on the ground that the staff lawyers in a prosecutor's office have the burden of keeping each other informed. The Court reversed the conviction and remanded with instructions which allowed the trial court to determine whether it would permit withdrawal of the guilty plea or whether it would direct resentencing by a new judge without a recommendation of sentence.

VII. MULTIPLE PROSECUTIONS

The collateral estoppel principle which *Ashe v. Swenson*[115] incorporated into the fifth amendment double jeopardy guarantee was applied by the Supreme Court in *Turner v. Arkansas*[116] as the basis for setting aside an Arkansas state court robbery conviction. The robbery conviction was obtained after defendant was acquitted of the murder of the same person who was robbed. A fact which the acquitting jury could have found, and which, if found, barred the robbery prosecution under the principle of collateral estoppel, was that the defendant was not present at the scene when the murder and robbery occurred. The issue before the Supreme Court was whether the verdict of acquittal actually found that fact. The test established by *Ashe* required the Court in *Turner* to determine whether the jury could have acquitted without finding that fact.[117]

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tion of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

[115] 397 U.S. 436 (1970). Collateral estoppel is "the principle that bars relitigation between the same parties of issues actually determined at a previous trial." *Id.* at 442. In *Ashe* the Court held that collateral estoppel is embodied in the fifth amendment double jeopardy guarantee which Benton v. Maryland, 395 U.S. 785 (1969), made obligatory upon the states through the fourteenth amendment due process clause. The defendant in *Ashe* was acquitted of robbery of one of six poker players and then was convicted of robbery of another of those players. An issue common to both trials was whether he was present when the robbery occurred. The Court, after examination of the entire record of the first trial, held that the verdict of acquittal necessarily determined that issue in defendant's favor because it was the only rationally conceivable issue in dispute in that trial. On the basis of that holding the Court applied the principle of collateral estoppel and reversed the second conviction.

[116] 407 U.S. 366 (1972).

[117] In *Ashe* the Court held that the question whether a second prosecution compelled defendant to relitigate an issue decided in his favor by a previous judgment of acquittal requires examination of the entire record of the previous trial and then a determination whether "a rational jury could have grounded its verdict [of acquittal] upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444.

A similar test but in a different context was used by the Court in Schneble v. Florida, 405 U.S. 427 (1972). Under the charge in *Schneble* the jury could not have relied on the defendant's confession unless it found that it was voluntary beyond a reasonable doubt. After

Applying that test, The Court decided that the only logical conclusion supported by the record was that the jury could not have acquitted the defendant without finding that fact. On the basis of that decision the Court applied the collateral estoppel principle and reversed the robbery conviction.

In *Harris v. Washington*[118] the defendant was acquitted of the murder of one of two persons killed by a bomb delivered through the mail, and later convicted of the murder of the other victim. The state conceded that the verdict of acquittal in the first trial decided in defendant's favor the ultimate issue of whether he mailed the bomb. The state's contention was that the issue was not fully litigated in the first trial because of deficiencies of proof caused by erroneous trial court rulings, and, thus, the collateral estoppel principle did not apply. Rejecting that contention, the Supreme Court held that, in view of the state's concession, "the constitutional guarantee applied irrespective of whether the jury considered all relevant evidence and irrespective of the good faith of the State in bringing successive prosecutions."[119]

The *Ashe* collateral estoppel principle which worked well for defendants in *Turner* and in *Harris* will ordinarily yield no advantage to a defendant with a prior acquittal. Usually that principle will be inapplicable because the record made in the trial in which acquittal occurred will support a rational hypothesis that the jury could have acquitted without finding the fact or facts defendant seeks to foreclose from relitigation.[120]

Another recent Supreme Court case involving a multiple prosecution problem was *Colten v. Kentucky*.[121] Colten, after being fined $10 for disorderly conduct by a Kentucky inferior court, appealed to a court of general jurisdiction and after a de novo trial was convicted and fined $50. Rejecting his

examining the entire record, the Court concluded that on no rational hypothesis could the jury have decided defendant was guilty without reliance on the confession. Thus, the Court held that the jury had actually found that the confession was voluntary.

[118] 404 U.S. 55 (1972).

[119] *Id.* at 56-57.

[120] Two recent cases in which invocation of the collateral estoppel principle was unavailing are Carter v. State, 483 S.W.2d 483 (Tex. Crim. App. 1972), and *Ex parte* Johnson, 472 S.W.2d 156 (Tex. Crim. App. 1971). In *Johnson* the defendant, after being acquitted of burglary with intent to commit rape, was convicted of assault with intent to rape; and in *Carter* the defendant, after being acquitted of murder, was convicted of carrying a prohibited weapon in a place where alcoholic beverages were sold. In each case the Court failed to find any issue common to both trials that was foreclosed by the verdict of acquittal. The absence of any such issue kept the collateral estoppel principle from applying.

Where an acquittal occurs after a trial in which there was a failure to prove an essential element of the state's case, the record of that trial will support a finding that the jury could have acquitted because of the failure of proof. Such a finding will bar successful use of the principle of collateral estoppel in a later prosecution, even though the second prosecution may involve the identical transaction involved in the first trial. This is illustrated in Duncan v. Tennessee, 405 U.S. 127 (1972), in which the indictment charged armed robbery by use of a pistol. At trial the prosecution moved for a directed verdict of acquittal on the ground that the indictment erroneously charged that a pistol rather than a rifle was used in the robbery. The motion was granted and judgment of acquittal entered. Defendant was later reindicted and convicted after a trial under an indictment charging armed robbery by use of a rifle. The Supreme Court, by its action in holding that a writ of certiorari had been improvidently granted, left that conviction in effect. That result was consistent with the collateral estoppel principle. The defendant could not invoke collateral estoppel because the record in the first trial showed that the judgment of acquittal was based entirely on the failure to prove the essential averment of the first indictment. Therefore, the acquittal did not decide in defendant's favor the issue whether he committed the robbery with a rifle, as alleged in the second indictment.

[121] 407 U.S. 104 (1972).

claim that the imposition of the greater penalty contravened the requirements of due process enunciated in *North Carolina v. Pearce*[122] and violated his fifth amendment double jeopardy rights, the Supreme Court sustained the conviction, holding that the Kentucky trial de novo system did not present hazards warranting the restraints called for in *Pearce*. It was the Court's view that those restraints, if imposed on that system, "might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty."[123] A sufficient answer to defendant's double jeopardy contention was found by the Court in the fact that a "defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea."[124]

VIII. OTHER DEVELOPMENTS

Newsmen's Privilege. In *Branzburg v. Hayes*[125] the Supreme Court decided, five-to-four, that the first amendment does not give a reporter the right to conceal the identity of his sources, thereby providing a green light for jailing newsmen if they disobey a court order requiring disclosure of their sources to a grand jury. The inevitable effect of this decision will be to dry up news stories about official corruption based on information from informants whose exposure would cause them to be discharged or seriously injured. Such an effect is plainly not in the public interest and no doubt the problem will ultimately be solved by legislation supplying newsmen with a suitable privilege. In the meantime, newsmen will be faced with the possibility of contempt charges.

A leading Supreme Court case in the area of contempt is *Shillitani v. United States*.[126] The useful rule yielded by *Shillitani* is that incarceration for civil contempt may not continue after compliance by the contemnor becomes impossible or unnecessary. This might be the case, for example, if the grand jury term expires, if limitations run, if trial is completed, or if for any other reason the evidence sought from the newsman would be useless. An alternative to going to jail is for the contemnor to appear before the grand jury as ordered and make responses revealing a very poor memory or total amnesia. This, of course, is a dangerous tactic because it could lead to multiple perjury indictments.[127]

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[122] 395 U.S. 711 (1969).
[123] 407 U.S. at 119.
[124] *Id.*
[125] 408 U.S. 665 (1972).
[126] 384 U.S. 364 (1966).
[127] Behrle v. United States, 100 F.2d 714 (D.C. Cir. 1938), is an example of a perjury conviction in which the perjury consisted of defendant's falsely saying, "I don't remember." In that case defendant in July made a written statement describing a homicide. Thereafter, in November he made the same statement under oath to a grand jury. Three weeks later at the trial of the person charged with the commission of the homicide, he denied all recollection of having made any part of the statement, though he admitted his signature. He was later indicted and convicted of perjury and the conviction was affirmed. In the appellate court's opinion there was sufficient circumstantial evidence in the case to support the jury's

Burden of Persuasion in Probation Revocation Proceedings. In *Kelly v. State*[128] the Texas Court of Criminal Appeals held that the facts essential to revocation of probation are not required to be found beyond a reasonable doubt.[129] Rejecting defendant's claim that *In re Winship*[130] compelled a different result, the court distinguished *Winship* on the ground that in that case, but not in *Kelly*, the facts found were facts essential to conviction. Arguing that "the trial judge is more likely to grant probation in a case where he is assured that if the terms of probation are violated he might revoke the same, without undue delay and protracted litigation," the court concluded that "it is not only logically inconsistent but judicially unsound to suggest that the standard of proof necessary to revoke probation should be as stringent as the one necessary to support the initial conviction."[131] This conclusion is open to serious question.[132] Since the loss of liberty that results from revocation of probation is no less disastrous than the loss of liberty that results from the initial conviction, it is difficult to fault the view that the reasonable doubt standard applicable to conviction ought equally to be applicable to revocation of probation.

Gruesome Photos. A rule of long standing in this state, illustrated and discussed in *Burns v. State*,[133] was that gruesome photos are not admissible unless they tend to resolve a disputed fact issue. The court of criminal appeals, in *Martin v. State*,[134] discarded that rule and established a new test under which a photo, no matter how gruesome or how much it may arouse the passions of the jury, will be admissible if its subject matter could properly be the subject of testimony.[135] Applying that test, the court in *Martin* approved a trial court ruling which allowed the jury to see black and white photos showing a closeup of bullet holes and coagulated blood on deceased's face and clothing. The court indicated that an inflammatory photo might be inadmissible if it were offered solely to inflame the minds of the jury or if its inflammatory aspects were great and its probative value was very slight.

Incompetency of Persons Under Twenty-One To Be Jurors. Defendant in

finding that the defendant perjured himself. *See also* United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962).

[128] 483 S.W.2d 467 (Tex. Crim. App. 1972).

[129] The court did not expressly hold that the facts essential to revocation of probation must be found by a preponderance of the evidence. It did note, however, that this standard had been suggested by the American Bar Association. *Id.* at 470 n.1.

[130] 397 U.S. 358 (1970); *see* note 18 *supra.*

[131] 483 S.W.2d at 469-70.

[132] *See id.* at 473 (Onion, P.J., dissenting).

[133] 388 S.W.2d 690 (Tex. Crim. App. 1965).

[134] 475 S.W.2d 265 (Tex. Crim. App. 1972).

[135] The court's description of this new test was as follows:

> [I]f a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible. We recognize there will be cases where the probative value of the photographs is very slight and the inflammatory aspects great; in such cases it would be an abuse of discretion to admit the same.

Id. at 267-68.

Shelby v. State[136] was an eighteen-year-old convicted of burglary after a trial by a jury drawn from a panel from which persons under twenty-one were excluded. His position was that the requirement of Texas law, that jurors be at least twenty-one years old,[137] became inapplicable upon adoption of the twenty-sixth amendment to the United States Constitution.[138] Rejecting that position, the court of criminal appeals held that a qualified voter is not ipso facto a qualified juror.[139]

Use of Psychiatric Testimony for Impeachment. The defendant in *Hopkins v. State*[140] was convicted for possession of heroin. The defendant had sought to elicit opinion testimony of a psychiatrist which, if admitted, would have given the jury a basis for inferring that the psychological condition of the state's key witness might prompt him to distort facts. The court of criminal appeals held that such testimony was properly excluded, being of the opinion that Texas should align itself with those jurisdictions which do not permit psychiatric testimony for impeachment.[141] Judge Morrison thought that the matter should be left to the discretion of the trial court.

Competency of Mentally Diseased Rape Victim To Testify. The court of criminal appeals, in *Lee v. State*[142] and other cases,[143] equated legal insanity with the type of mental deficiency an alleged mentally diseased rape victim must have before there will be a violation of the Texas statute which makes it a crime to have carnal knowledge of a woman who is mentally diseased.[144] On that basis the court held that such a victim was without competency to testify to prove the corpus delicti in the rape trial. In *Sanchez v. State*[145] the court recently overruled those prior cases, holding that "the capacity to consent to rape . . . is not to be used as the standard for capacity to testify," and declaring that "[a] female legally incapable of such consent as is contemplated by the rape statute may be able to give a dependable account as a witness."[146]

Defense of Actor Available to Principal. In *Roberson v. State*[147] the court

[136] 479 S.W.2d 31 (Tex. Crim. App. 1972).

[137] TEX. REV. CIV. STAT. ANN. art. 2133 (1964).

[138] "The rights of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age . . . ." U.S. CONST. amend. XXVI.

[139] 479 S.W.2d at 34; *see* Glover v. Cobbs, 123 S.W.2d 794 (Tex. Civ. App.—Dallas 1938), *error ref.*

[140] 480 S.W.2d 212 (Tex. Crim. App. 1972).

[141] *See, e.g.*, Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

[142] 43 Tex. Crim. 285, 64 S.W. 1047 (1901).

[143] *See, e.g.*, White v. State, 109 Tex. Crim. 266, 4 S.W.2d 37 (1928); Davis v. State, 100 Tex. Crim. 617, 272 S.W. 480 (1925); Cokeley v. State, 87 Tex. Crim. 256, 220 S.W. 1099 (1920); Thompson v. State, 33 Tex. Crim. 472, 26 S.W. 987 (1894).

[144] "Rape is . . . the carnal knowledge of a woman . . . so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased . . . ." TEX. PEN. CODE ANN. art. 1183 (1961).

[145] 479 S.W.2d 933 (Tex. Crim. App. 1972).

[146] *Id.* at 939.

[147] 479 S.W.2d 931 (Tex. Crim. App. 1972).

of criminal appeals held that a defendant who is charged as a principal for an act committed by another is entitled to have submitted to the jury any defense which would have been available to the actor if he were on trial. This is also the rule in federal courts.[148]

Burden of State To Disprove Defense. In *Ramos v. State*[149] the court of criminal appeals reversed a conviction for possession of marijuana because defendant's defense that he did not know that the marijuana was at his residence was not submitted to the jury. In addition, the court made some interesting observations about a defense not raised by the evidence, the defense that the defendant did not know the substance found at his residence was marijuana. Relying on *Fawcett v. State*,[150] the court stated, in effect, that when such a defense is raised by the evidence the prosecution then must prove, as an essential element of its case, that defendant knew the substance in question was marijuana. Thus, the court implicitly approved the rule, earlier applied in *Dean v. State*,[151] that the state is required to disprove a defense beyond a reasonable doubt after it has been raised by evidence. A corollary of that rule is that any element which becomes an essential part of the state's case because of appearance of proof raising a defense, must be submitted to the jury by instructions sufficient to show that that element is one of the elements the jurors must believe beyond a reasonable doubt before they may convict.

Extraneous Crime. In *Williams v. State*[152] the court of criminal appeals, with Judges Onion and Roberts dissenting, approved the use of an extraneous crime as evidence. The state presented a prima facie case that on June 13 in San Antonio, defendant, in a car having license number GYW-916, exposed himself to two young ladies. Defendant countered with proof which tended to show that at the time of the alleged incident he was in a motel in Aransas Pass; that he did not return to San Antonio until June 24; and that a car which had license number GYW-916, and was registered in his wife's name, was not in San Antonio between June 15 and June 24. The state then responded with proof which tended to contradict the last fact. That proof consisted of the testimony of a young lady who said that on June 18 in San

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[148] *See* Shuttlesworth v. Birmingham, 373 U.S. 262, 265 (1963) ("there can be no conviction for aiding and abetting someone to do an innocent act").

[149] 478 S.W.2d 102 (Tex. Crim. App. 1972).

[150] 137 Tex. Crim. 14, 127 S.W.2d 905 (1939).

[151] 433 S.W.2d 173 (Tex. Crim. App. 1968). In *Dean*, which was a prosecution for selling securities without registration, the evidence raised the defense that the transaction in question was within a statutory exemption. Agreeing that the trial court erred in refusing to submit that defense to the jury, the court held:

> Since the exemption . . . is not contained within the body of the definition of the offense . . . the State was not required to negative the exemption as one of its elements of proof. . . . The burden rested with appellant to raise this exemption defense; then, if raised, the burden shifted to the State to disprove such defense beyond a reasonable doubt.

Id. at 178; *cf.* United States v. Sisson, 399 U.S. 267, 301 (1970) (holding, in a conscientious objector case, that "establishing the appropriate classification is actually an element of the Government's case . . . once a defendant raises a defense challenging it").

[152] 481 S.W.2d 815 (Tex. Crim. App. 1972).

Antonio she saw a car with license number GYW-916. She also testified that at the time she saw the car there was in it a naked man exposing himself. The court rejected the defendant's claim that the admission of the additional testimony, showing as it did the commission by an unknown man of an extraneous crime with highly inflammatory aspects, could not be justified under any established exception to the rule forbidding proof of extraneous crimes. The court then concluded that the additional testimony was proper rebuttal to the defensive proof which tended to show that defendant was not in San Antonio on June 18. It is difficult to rationalize this conclusion since it is obvious that the jury could not have rationally drawn from the additional testimony any inference that defendant was either in or out of San Antonio on June 18. It should also be noted that it is less than certain that the court was correct in holding that it was proper for the trial court to admit the testimony which did permit an inference of that kind, *i.e.*, that testimony tending to show that on June 18 there was a car in San Antonio bearing the same license number as the one on the car involved in the incident on June 13. Under conventional reasoning the fact that the defendant was not in San Antonio on June 18 was irrelevant to any issue in the case, would not have provided an alibi even if established, and was an issue on which the state could not have adduced proof as part of its main case. Therefore, the rule that impeachment by contradiction is not permitted as to collateral matters would apply.[153]

[153] The test for determining what is a collateral matter is whether the fact could have been shown in evidence for any purpose other than the contradiction. 3 J. WIGMORE, EVIDENCE § 1003, at 657 (3d ed. 1940). Texas cases consistent with this view include: Gatson v. State, 387 S.W.2d 65 (Tex. Crim. App. 1965); Keith v. State, 50 Tex. Crim. 63, 94 S.W. 1044 (1906); Miller v. State, 47 Tex. Crim. 329, 83 S.W. 393 (1904). *See also* Head v. Halliburton Oilwell Cementing Co., 370 F.2d 545, 546 (5th Cir. 1967) ("Impeachment by contradiction is not permitted on collateral matters.").