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Robert P. Davidow

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CRIMINAL LAW AND PROCEDURE

by

*Robert P. Davidow**

THIS survey of Texas Criminal Law and Procedure consists of a rather detailed discussion of nine areas in which there have been numerous decisions during the past year. The topics are presented in a somewhat arbitrary order, although an attempt has been made to deal first with those items which are clearly procedural, and secondly with those items that have both procedural and substantive aspects. The word "court," unless qualified explicitly or by context, has been used throughout to refer to the Texas Court of Criminal Appeals.

I. SEARCHES AND SEIZURES

A. *Consent Searches*

Although it is now clear from the United States Supreme Court's recent decision in *Schneckloth v. Bustamonte*[1] that a person whose consent to search is sought need not be advised of his right to refuse consent, the determination of whether consent has been voluntarily given is still a difficult one to make in some cases. In *Papraskar v. State*[2] appellant's wife was advised that she need not consent to a search. Thus, that which was not required in *Bustamonte* was nevertheless present in this case. However, the court found an absence of consent because of other circumstances present:

> In the instant case, the undisputed evidence shows that appellant's wife was not only under arrest, but had been physically abused and surrounded by a veritable posse of armed officers prior to the request for her consent to search. Her request to see her husband or to have the matter of consent referred to him was denied. Assuming she was informed she could refuse to consent, she was also told that if she did not consent, the officers would get a search warrant and that a Justice of Peace was standing by on the Jacksboro Highway to do just that if necessary.[3]

By contrast, the United States Court of Appeals for the Fifth Circuit relied on the assumption that notification of the right to withhold consent was not necessary to a valid consent in upholding a consent search in *United*

* A.B., Dartmouth College; J.D., University of Michigan; LL.M., Harvard University. Professor of Law, Texas Tech University. The research for this Article was supported in part by Texas Organized Research Funds.

1. 412 U.S. 218 (1973).
2. 484 S.W.2d 731 (Tex. Crim. App. 1972).
3. *Id.* at 738.

States v. McCann.[4] Here appellant, while driving his car, was stopped by a detective. In response to a question whether he would mind whether the detective looked in his car, appellant replied, "No, sir, I don't."[5] The search in *McCann* was complicated by the fact that the evidence sought to be suppressed was not found merely in the car proper, but rather in a briefcase in the front seat of the car. The question raised by the appellant was whether the consent to search the car included consent to search the briefcase. The court, however, without much elaboration, concluded that the consent did extend to a search of the briefcase.

B. *Stop and Frisk*

In *Jones v. State*[6] two Dallas policemen in an unlighted squad car approached five men standing in a circle behind a restaurant. When they turned their lights on the group they observed one of the men drop a matchbox and another a billfold. The officers found marijuana in both the matchbox and the billfold, and upon searching the men further, also found marijuana in the shirt pocket of the defendant. On appeal from a conviction for possession of marijuana, the court held that the original detention of all five men was proper under *Terry v. Ohio*[7] and that the finding of marijuana in the matchbox and billfold was probable cause for appellant's arrest. There are several problems with this analysis. First, in *Terry* the Court authorized a seizure for the purpose of a protective search for weapons. The Court emphasized that such a seizure was authorized when the policeman had reasonable cause to believe that the person whom he was investigating was about to engage in a crime of violence.[8] Clearly no crime of violence was suspected in *Jones*. Furthermore, the more recent case of *Adams v. Williams*,[9] in which the United States Supreme Court applied the principle of *Terry* to the seizure of a weapon from a person seated in an automobile, does not aid the Texas court here. In *Adams*, although a narcotics offense was suspected, the policeman who removed the weapon had also been told specifically by the informer that the person whom he was investigating was armed. In addition, there was in *Jones* substantial doubt that the police even had a reasonable suspicion of a crime when two of the five individuals dropped a matchbox and a billfold respectively. Apart from the question of police fabrication raised by this now familiar "dropsy" testimony,[10] a billfold is surely not the kind of object that gives rise to a reasonable suspicion of anything. It is apparently true that a matchbox is often used in connection with marijuana possession, but it is equally true that persons who smoke

4. 465 F.2d 147 (5th Cir. 1972).
5. *Id.* at 152.
6. 493 S.W.2d 933 (Tex. Crim. App. 1973).
7. 392 U.S. 1 (1968).
8. *Id.* at 28.
9. 407 U.S. 143 (1972).
10. For a consideration of the possibility of police fabrication in "dropsy" cases, *i.e.*, cases in which officers have testified that defendants have dropped narcotics to the ground after they have been confronted by police officers, *see, e.g.*, Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

lawful tobacco also carry matchboxes. Moreover there was nothing unusual about a group of men meeting at 11:45 p.m. behind a cafe.

Even if it is assumed, *arguendo*, that the principle of *Terry* applies to drug cases in the absence of evidence of the possession of weapons, and further that the police officer had a reasonable basis to stop the individuals when he saw a matchbox drop to the ground (and therefore that the detention was appropriate), it does not follow that the arrest of appellant was lawful once marijuana was discovered in the matchbox and the billfold. There was no testimony that marijuana was in plain sight; on the contrary the testimony was that the marijuana was inside the matchbox and the billfold. Thus, there was no indication that appellant knew that the marijuana was in the matchbox and the billfold. Moreover, there was no evidence as to the content of any conversation among the five individuals. For all the arresting officers knew, the five suspects might have been "discussing the world series."[11] And, as *Sibron v. New York* makes abundantly clear, mere association with drug users does not constitute probable cause for arrest.[12]

C. *Search of Everyone Present During Execution of Search Warrant*

In *Hegdal v. State*[13] appellant unsuccessfully claimed that an affidavit for a search warrant was insufficient. The search warrant was executed at a house occupied by one Bobby Wright in Lubbock where the appellant was merely one of those present. The police officers searched everyone present. The question arises whether the execution of a search warrant justified the search of, and presumably seizure of contraband from, all those who happened to be there even though they were not shown to be in control of the premises. The issue is very similar to that raised in *Terry v. Ohio*[14] and *Sibron v. New York*.[15] If mere association or conversation with known addicts does not furnish a basis for either probable cause for arrest or reasonable suspicion that would permit a "stop and frisk," then it is difficult to see how the practice of searching everyone who happens to be present at the time a search warrant is executed can be justified.[16] The situation would have been different if the persons present had been using narcotics or if the officers had smelled marijuana in the air. Such, however, was not the case in *Hegdal*.

D. *License Check*

In *Black v. State*[17] and *Leonard v. State*[18] the court of criminal appeals upheld seizures of drugs in plain view following the stopping of the two

11. *See* Sibron v. New York, 392 U.S. 40, 62 (1968).
12. *Id.* at 62-63.
13. 488 S.W.2d 782 (Tex. Crim. App. 1972).
14. 392 U.S. 1 (1968).
15. 392 U.S. 40 (1968).
16. For a general discussion of this problem, see 58 CORNELL L. REV. 614 (1973).
17. 491 S.W.2d 428 (Tex. Crim. App. 1973).
18. 496 S.W.2d 576 (Tex. Crim. App. 1973).

motor vehicles for a "license check" as ostensibly authorized by Texas law.[19] The facts in the *Black* case illustrate the extent to which the court is willing to go in order to permit the police to stop and to seize whatever is in plain view following the stop. The officer on patrol testified that he stopped the car for a driver's license and registration check because the car had out-of-state license plates and because he observed that the occupants of the car appeared to be nervous and were looking at each other and attempting to look back at him. This was not a case in which the police situated themselves on the side of the road and stopped every car or a random selection of cars for the purpose of checking drivers' licenses.[20] Rather, the officer singled out Black's car because of his allegedly peculiar demeanor, and the officer's reliance on the statute authorizing license checks seems to have been merely a pretext. The affirmance of the conviction in *Black* seems inconsistent with the requirement of reasonable suspicion as elaborated in *Terry v. Ohio*[21] and *Sibron v. New York*[22] for cases in which a stop may be authorized in the absence of probable cause. *Terry* makes clear that unarticulated suspicion will not do.[23]

It is difficult to see how *Black* and *Leonard* can be reconciled with *Terry* and *Sibron*, unless stopping an automobile is materially different from stopping and frisking a pedestrian. Certainly no opinion of the United States Supreme Court lends support to that conclusion.[24] The Court has struggled with the automobile situation in cases where there was probable cause for arrest or search, and the Court has dealt in such cases with the question whether there was a need for a warrant.[25] There seems to be no reason to permit the stopping of a vehicle without probable cause in situa-

19. "Any peace officer may stop and detain any motor vehicle operator for the purpose of determining whether such person has a driver's license as required by this Section." TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (Supp. 1973).

20. It is not completely clear that a routine stop for a license check or other administrative purposes is constitutional. In Commonwealth v. Swanger, 300 A.2d 66, 68 (Pa. 1973), the Supreme Court of Pennsylvania held unconstitutional a Pennsylvania statute which purported to give a peace officer the power to stop a vehicle " 'for the purpose of inspecting the said vehicle, as to its equipment and operation, or manufacturer's serial number or engine number, and securing such other information as may be necessary.' " *But cf.* United States v. Biswell, 406 U.S. 311 (1972).

21. 392 U.S. 1 (1968).

22. 392 U.S. 40 (1968).

23. "And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in the light of his experience." 392 U.S. 1, 27 (1968).

24. In the recent case of United States v. Robinson, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the United States Supreme Court upheld a full search incident to a full custody arrest for a traffic offense. As Mr. Justice Marshall's dissenting opinion indicates, probable cause for stopping the appellant on April 23, 1968, for failure to have an operating license resulted from a routine spot check stop of the appellant's car on April 19, 1968. That may have been a reference to a license check; however the issue is not fully discussed by any of the Justices, since "[i]t was assumed by the majority of the Court of Appeals, and is conceded by the respondent here, that Jenks [the police officer] had probable cause to arrest respondent, and that he effected a full custody arrest." *Id.* at 470, 38 L. Ed. 2d at 432.

25. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). Even in United States v. Robinson, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), there was probable cause to arrest the driver of the vehicle for a traffic offense. Thus, there was never any doubt about the authority under the fourth amendment to effectuate an arrest.

tions which would not justify a forceable stop of a pedestrian. To reach the contrary conclusion is to view the fourth amendment as having little or no application to automobiles.

E. *Plain View*

In *Spencer v. State*[26] a police officer stopped an automobile driven by appellant because of loud mufflers. Under the most recent Supreme Court decisions in the area of automobile arrest, *United States v. Robinson*[27] and *Gustafson v. Florida*,[28] presumably an officer would be authorized to conduct a search incident to that arrest, at least if there had been a full custody arrest resulting in a trip to the police station.[29] In the instant case, however, the court did not rely on the theory of search incident to arrest in upholding the seizure of suspected drugs. Instead, the court relied on the fact that the seizure of a brown bottle which fell to the ground as appellant got out of the car and a matchbox which apparently fell from the right rear door of the automobile resulted from these items having been in plain view. The court did not discuss the related question whether there must be probable cause to believe that the thing in plain view was contraband. In the case of the matchbox, there might have been some remote suspicion that the matchbox contained contraband, but it is difficult to see how there could have been probable cause to believe that the matchbox contained marijuana when a matchbox is so commonly carried by smokers. Since the car was stopped for a traffic offense, there was no good reason to believe that the matchbox contained marijuana; there may have been a possibility, but this is far from a probability. With respect to the brown bottle, the officer determined that it contained "one red capsule and two clear capsules in which there was a whitish brown substance which appeared to the officer to be heroin."[30] Presumably red capsules and clear capsules are not unusual items, since they often are used for medicinal purposes. It is not indicated that the officer used any chemical test to determine the substance; he apparently relied only on the color. There was no testimony that the officer had had prior experience with substances of this sort so that he could be considered an expert; neither was there testimony that the color of heroin is distinctive enough to permit the officer to distinguish it from other drugs.

F. *Officer's Awareness of "High Crime Area" versus Officer's Personal Knowledge Regarding the Defendant*

In *Talbert v. State*[31] the court reversed a conviction of possession of mari-

26. 489 S.W.2d 594 (Tex. Crim. App. 1973).
27. United States v. Robinson, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).
28. Gustafson v. Florida, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973).
29. "The majority opinion of the Court of Appeals also discussed its understanding of the law where the police officer makes what the court characterized as 'a routine traffic stop,' i.e., where the officer would simply issue a notice of violation and allow the offender to proceed. Since in this case the officer did make a full custody arrest of the violator, we do not reach the question discussed by the Court of Appeals." 94 S. Ct. at 477 n.6, 38 L. Ed. 2d at 441 n.6.
30. 489 S.W.2d 594, 595 (Tex. Crim. App. 1973).
31. 489 S.W.2d 309 (Tex. Crim. App. 1973).

juana because of the erroneous admission into evidence of marijuana seized when an automobile was stopped in a "high crime area." The court refused to accept the description of "high crime area" which included the entire university area of Austin in order to justify the stop.[32] This decision in *Talbert* seems inconsistent with the decisions in *Black* and *Leonard*.[33] It is hard to see why, on the one hand, driving in a nebulously defined high crime area is not probable cause for stopping, while on the other hand driving with a nervous demeanor is. In the latter cases the officers were held to have acted lawfully because they relied on the license check statute, whereas in the former case there was apparently no such reliance. Both types of stops would seem to be equally in violation of the fourth and fourteenth amendments to the United States Constitution.

The *Talbert* case is to be contrasted with *Lerma v. State*,[34] in which the court upheld a conviction of possession of heroin, despite the introduction into evidence of heroin seized when the appellant was seen by an officer through binoculars in front of a lounge, taking a small paper packet from his pants pocket and beginning to pass it to another individual in apparent exchange for a sum of money. At this point the transaction was interrupted when an officer, relying in part on his personal knowledge that appellant was a user of heroin and that the lounge was a place frequented by drug addicts, drew his pistol and ran towards the appellant and the other individual. The only exceptional circumstance in this case was that appellant looked cautiously over his shoulder before he removed the packet from his pocket. Reasonable minds might differ about whether the furtive action of appellant was sufficient to provide probable cause, but it is clear that the court took into account the officer's personal knowledge that appellant was a user of heroin and that the lounge was frequented by narcotics addicts. Whether such personal knowledge of a policeman can form the basis of probable cause for arrest is questionable. In *United States v. Harris*[35] three Justices agreed that such knowledge could be relied upon by an officer or magistrate in evaluating the reliability of an informer's tip. But six Justices refused to agree, and it is doubtful that a majority of the Court would now accept the proposition that the policeman himself could rely on such personal knowledge in deciding whether there was probable cause to act.[36]

G. *Informant Reliability: Applications of Draper v. United States*

In *Draper v. United States*[37] corroboration of detailed information given by an informer whose reliability had been previously established was found to provide probable cause for arrest. The informant in that case had supplied many details, especially regarding Draper's personal appearance.[38]

32. *Id.* at 310-11.
33. *See* notes 17-18 *supra*, and accompanying text.
34. 491 S.W.2d 152 (Tex. Crim. App. 1973).
35. 403 U.S. 573 (1971).
36. Of the six Justices—Stewart, White, Harlan, Douglas, Brennan, and Marshall—only Justice Harlan is no longer on the Court.
37. 358 U.S. 307 (1959).
38. The informant told officers that Draper would arrive by train in Denver on

When these details were corroborated by the officers' observations, the Court held that the officers had probable cause for arrest.

The Texas Court of Criminal Appeals has not required corroboration of the same amount of detailed information for probable cause. In *Harris v. State*[39] officers received information that Harris would be arriving at a certain lounge, driving a certain car with specified license plates, carrying illegal drugs. When Harris in fact arrived as predicted, the officers arrested him inside the lounge, searched him without finding any contraband, and then searched his car, in which contraband was found. The greater the detail that is supplied by the informant, the greater is the likelihood that he has personal knowledge of the facts which he has related to the police officer, especially when the details are corroborated before the arrest. In the *Harris* case the paucity of detail relating only to Harris' car and arrival time does not compare with the detail in *Draper*, in which the informant described the appellant precisely as to height, age, weight, race, outer garment, trousers, shoes, style of walking, and the type of bag carried by appellant.

There is yet another distinction between *Harris* and *Draper*. While the details given in *Draper* were corroborated at each step in the observation and arrest, when Harris was searched personally nothing was found. As there had been a failure of corroboration at that point, there was no justification for the continued restraint of Harris and the search of his car. The court, however, found that there was still probable cause to search the car and considered the question whether it was reasonable for the police to search the car immediately instead of procuring a search warrant. The difficutly is, of course, that since the information supplied by the informant was not confirmed by the presence of contraband on Harris, there simply was no probable cause to search the car. If the drugs described by the informant had been found on Harris, arguably his arrest could have been justified under the *Draper* rationale, but there would have been no probable cause to believe that there were any drugs in the vehicle. There then would have been the problem that no search of the car could have been conducted incident to a lawful arrest, and that there would have been no probable cause for the search of the vehicle.[40] On the other hand, if there was no probable cause to arrest the appellant because of a failure to find drugs on him, then the probable cause to search the vehicle also vanished, because probable cause in each instance depended on the same information supplied by the informant.

In *Fry v. State*[41] the court first reversed a conviction of burglary based on evidence seized from the trunk of an automobile, but subsequently affirmed the conviction on the state's second motion for rehearing. Judge

the morning of the 8th or 9th of September, carrying a tan zipper bag and walking very fast. He further described Draper as a Negro of light brown complexion, twenty-seven years old, five feet eight inches tall, weighing 160 pounds, and wearing a light colored raincoat, brown slacks, and black shoes. 358 U.S. at 309 and n.2.

39. 486 S.W.2d 88 (Tex. Crim. App. 1972).
40. Chambers v. Maroney, 399 U.S. 42 (1970).
41. 493 S.W.2d 758 (Tex. Crim. App. 1973).

Onion, speaking for two of the three judges of the final majority, purported to rely on *Draper* in concluding that information given by a first-time informer (whose credibility had not been previously established) was sufficiently corroborated by what the officers found at the time of the arrest of appellant to provide probable cause for search of the trunk of appellant's car.

Several problems appear in Judge Onion's opinion. First, there is his assumption that the information given by the first-time informer would have established probable cause for arrest but for the fact that the informant's credibility had not been previously established. The difficulty is that it is unclear exactly what information the police had at the time they arrested Fry. Specifically, the several opinions raise a question whether the informant told the police how he (the informant) obtained his information.[42]

Another difficulty relates to Judge Onion's assumption that the arrest of Fry was proper. When the police saw Fry's car parked in an alley behind the drugstore which the informant had said was Fry's next target, they arrested Fry and searched the car. There they found a bracket for a radio and some rings which the informant had mentioned. The informant's information was thus verified to that extent, but the verification occurred *after* the arrest. Since, according to Judge Onion, the informant's credibility had not been established, the only authority for the arrest was article 14.03,[43] which provides for arrest of persons found in suspicious places under circumstances which reasonably show that a crime is imminent. But there is no authority under the fourth and fourteenth amendments to arrest suspicious persons.[44]

The *Fry* decision cannot draw support from *Draper*. In the latter case the reliability of the informant had been previously established, and corroboration of the informant's details only served to demonstrate his first-hand knowledge.[45] In *Fry*, however, the informant's reliability was itself in question. The corroboration in *Fry* may have demonstrated informant's first-hand knowledge, but it did nothing to support his credibility and thus provide probable cause for arrest and search.

Finally, even if there had been probable cause to believe that the car contained contraband, there was still no authority for the search. Judge Onion failed to distinguish in his opinion between probable cause to stop a moving vehicle and the exigencies which warrant immediate search of a vehicle already stopped somewhere other than on a highway. The police could easily have obtained a search warrant either before or after the arrest of Fry if their informant was as reliable as they contended. Without a warrant the court should have found no authorization for the search.[46]

42. In Aguilar v. Texas, 378 U.S. 108 (1964), the Court imposed the requirement, *inter alia*, that the informant obtain his information in a reliable way.

43. TEX. CODE CRIM. PROC. ANN. art. 14.03 (Supp. 1973).

44. *See* notes 11-12 *supra*, and accompanying text. *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

45. *See* notes 37-38 *supra*, and accompanying text.

46. *Compare* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (a car may be searched without a warrant if there is probable cause to believe it contains contraband

H. *Other Automobile Searches*

Although the recent United States Supreme Court cases of *United States v. Robinson*[47] and *Gustafson v. Florida*[48] have answered in the affirmative the question whether the policeman who effects a full custodial arrest based on a traffic offense can conduct a full search of the arrested person as an incident to the arrest, questions remain with respect to the scope of that search. In particular, there remains the question whether, or how much of, the car itself can be searched under the *Chimel*[49] principle, particularly if the arrested person gets out of the car before the policeman physically seizes him.

In *Walthall v. State*[50] the appellant was stopped for speeding. One of the arresting officers saw a sawed-off shotgun between the bucket seats of the car. Although the sawed-off shotgun was not short enough to make its possession illegal, the court concluded that the officers had a right to look for other weapons for their own protection. It is not entirely clear from the court's opinion when the appellant got out of the car or whether this shotgun was observed before the appellant got out. The court may have believed that the sight of the sawed-off shotgun gave the officers probable cause to arrest, but the court did not state this explicitly. During the course of the search of appellant, a prescription bottle suspected of containing marijuana was found on the appellant. Presumably under the principle announced in *Robinson* and *Gustafson*, this could be seized. Of more doubtful validity was the seizure of a bag of marijuana found under the seat. Again it is not clear when this bag was seized. If it occurred after the appellant got out of the car, then the question becomes whether it was within the reach of appellant.[51] Another possibility, of course, is that once the marijuana was found on appellant, this gave the officers probable cause to believe that there was other contraband in the vehicle. Again, this was not discussed by the court. Indeed, it appears that many of the issues that now seem crucial in the light of *Robinson* and *Gustafson* were simply not discussed in *Walthall*.

Similar uncertainties are found in *Pace v. Beto*,[52] a decision by the United States Court of Appeals for the Fifth Circuit, affirming a district court decision that an unlawful search had been conducted by Texas police. Pace had been arrested for running a red light and having a loud muffler. After his car had been stopped, he got out and walked back to the police car. His suspicions aroused by Pace's apparent nervousness, the officer searched Pace's person and then moved toward his car to search it. When Pace tried

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and there is a danger that it may be moved if not searched immediately), *with* Chambers v. Maroney, 399 U.S. 42 (1970) (a car may be searched without warrant if there is probable cause to believe it contains contraband).

47. 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

48. 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973).

49. Chimel v. California, 395 U.S. 752 (1969) (incident to a lawful arrest search may be made of the area in the immediate control of the defendant).

50. 488 S.W.2d 453 (Tex. Crim. App. 1972).

51. *See* note 49 *supra*, and accompanying text.

52. 469 F.2d 1389 (5th Cir. 1972).

to follow, the officer placed him in the squad car. Inside Pace's car the officer found a matchbox in the glove compartment. When he started to open it, Pace approached from behind and attempted to take the box away. When the officer had again subdued Pace, he opened the matchbox and found marijuana. Later, he found more marijuana in the trunk of the car. The court concluded that, even if it was assumed that the search of the interior was justified as a search for weapons, the search for other items was not justified. Thus, the court concluded that there was no justification for opening the matchbox.

In the light of *Robinson* and *Gustafson* the proper result in *Pace* is far from clear. First, it is not certain that the arresting officer intended to effect a full custody arrest, the only type of arrest discussed in *Robinson* and *Gustafson*. If the officer merely intended to issue a citation for speeding and for driving a car with a loud muffler, it is possible that no search of the car was justified at all. Even if it is assumed that the officer did intend to effect a full custody arrest, there still remains the question of the scope of the vehicle search. The incident in *Pace* occurred prior to the decision in *Chimel*, but the question remains whether under these facts a search would now be justified in view of the *Chimel* decision. Apart from *Chimel*, there is a question whether containers found in a car can be opened. Regardless of the rationale for search incident to arrest of the person, as elaborated in *Robinson* and *Gustafson*, there surely is no probable cause to believe that a person arrested for a traffic offense possesses narcotics in a closed container in his vehicle.[53] On the other hand, the Supreme Court's apparent refusal in *Robinson* and *Gustafson* to pay much attention to the justifications for searches and seizures, as outlined in *Chimel*, suggests that in this situation also the Court might simply announce a flat rule authorizing such searches. There is nothing in *Robinson* or *Gustafson* that would require a holding that a full custodial arrest of an individual for a traffic offense justifies a full search of the car as well. It is possible, however, that the problem in *Pace* will be treated as a problem of an inventory of the car, although this would not require that each closed container be opened.[54] In fact, there really is no need to search the automobile at all, although, if the automobile were driven to the police station or some other place, the driver would obviously see anything which was in plain view.

II. CONFESSIONS AND OTHER EXCEPTIONS TO THE HEARSAY RULE

In at least two cases[55] the Texas Court of Criminal Appeals reaffirmed the proposition that under article 38.22 of the Code of Criminal Procedure[56]

53. *Cf.* State v. Elkins, 245 Ore. 279, 422 P.2d 250 (1966).

54. The requirement that the contents of a car be inventoried does not necessarily justify opening containers, since the arrested person could be given the option of signing a release, relieving the police of any liability for loss of items contained within the containers found in the automobile. United States v. Robinson, 94 S. Ct. 467, 487 n.7, 38 L. Ed. 2d 427, 454 n.7 (1973) (Marshall, J., dissenting).

55. Easley v. State, 493 S.W.2d 199 (Tex. Crim. App. 1973); Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973).

56. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Supp. 1973).

certain oral confessions are inadmissible as evidence in Texas even though they comply with the requirements of *Miranda v. Arizona*.[57] In particular, the court ruled that, despite the United States Supreme Court's holding in *Harris v. New York*[58] that a confession taken in violation of the *Miranda* decision could still be used for impeachment purposes, an oral confession not taken in compliance with article 38.22 could not be so used.

In view of the foregoing, it is somewhat surprising to find that the *Miranda* decision itself has apparently not been fully recognized by the Texas Court of Criminal Appeals. In *Miles v. State*[59] the defendant was convicted of murder with malice. Part of the evidence against the defendant was a statement made by him to police officers shortly after the murder. After questioning several witnesses at the scene of the crime, two police officers had gone to defendant's house and, by entering the front and rear doors simultaneously, prevented defendant from leaving. The appeals court concluded that at that point defendant was under arrest. One officer then asked defendant whether he had been at the scene of the crime, to which he responded affirmatively. To the officer's next question as to what happened, defendant replied, "I cut the boys."[60] The appeals court upheld the trial court's admission of the statement into evidence as part of the res gestae of the offense, concluding: "This court has held innumerable times that statements which are part of the res gestae are admissible notwithstanding the fact that they may not be admissible as confessions or admissions, for the rule of res gestae is independent of, superior to, and cannot be limited by the rules relating to confessions or admissions after arrest."[61]

This may be a proper statement of the law of Texas, but it does not answer the question whether the principle in *Miranda* has been violated. It may be true, as a commentator has suggested, that a spontaneous exclamation, as an exception to the hearsay rule, may occur even in apparent response to a question.[62] Nevertheless, the facts of this case show that the answers given were responsive answers to specific questions. It was not a case in which one innocuous question was asked and an unresponsive incriminating answer followed. The first question had to do with the whereabouts of the appellant at a certain time. The reply was brief and totally responsive. In answer to the second question regarding what had happened the appellant responded that he had "cut the boys." If this is not interrogation, it is difficult to imagine what is. The court concluded that appellant was under arrest at this time. If words have any meaning, this was the kind of custodial interrogation to which *Miranda* applies.[63] In the light of the supremacy clause,[64] the fact that the Texas rule may permit admission of such testimony does not make the evidence constitutionally admissible. *Miles*

57. 384 U.S. 436 (1966).
58. 401 U.S. 222 (1971).
59. 488 S.W.2d 790 (Tex. Crim. App. 1973).
60. *Id.* at 791.
61. *Id.* at 792.
62. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 706 (2d ed. 1972).
63. *See* Orozco v. Texas, 394 U.S. 324 (1969).
64. U.S. CONST. art. VI.

should be contrasted with *Hood v. State*,[65] in which the appellant, "while seated in a police car after the shooting, yelled out, 'Yes, I shot the M.F.—I shot him.' "[66] The court was on much firmer ground in ruling in *Hood* that the evidence was properly admissible, since the statement was clearly spontaneous and not in response to any question.

Another example of insensitivity to defendant's fifth amendment rights is found in *Thomas v. State*.[67] In this murder case a police officer was permitted to testify regarding what an eye witness had said to the officer in the presence of the defendant, who was then not under arrest. The court held that this evidence was properly admissible as an exception to the hearsay rule because a statement was made calling for a response, and the defendant's silence was the equivalent of an admission. The difficulty here is that, although there was no duty on the part of the officer to warn the defendant that he had a right to remain silent since he was not in custody, the defendant had no duty to respond since he was obviously a suspect because of the accusatory nature of the statement to which he did not respond.[68] As the Supreme Court cases dealing with the fifth amendment have made clear, a person in the presence of a police officer has no duty to respond or to incriminate himself.[69] Under the circumstances, the rule as applied by the Texas Court of Criminal Appeals has the effect of penalizing the exercise of a constitutional right.

In *Corbett v. State*[70] the court applied the res gestae exception to the hearsay rule under the following circumstances. Appellant allegedly struck the deceased with a lead pipe while the deceased was on the telephone talking to someone at a bank about checks which appellant, an employee of the deceased, had written. Just prior to the phone conversation appellant and deceased had argued about these checks. At trial the deceased's wife was permitted to testify regarding a conversation between the deceased and her concerning these checks just before the deceased departed on his fatal trip to appellant's residence. The court concluded that the wife's testimony was properly admissible as an explanation of her husband's meeting with the appellant. The problem remains, however, that there was no apparent spontaneity. At least the court did not refer to any facts which established any particular spontaneity which would distinguish this conversation from the ordinary conversations which clearly are not admissible under the hearsay rule. Unless there were facts present which the court did not allude to, the ruling in this case logically could mean that any conversation about

65. 490 S.W.2d 549 (Tex. Crim. App. 1973).
66. *Id.* at 550.
67. 488 S.W.2d 777 (Tex. Crim. App. 1973).
68. "He [the police officer] testified that Minnie Patton stated to him that the appellant walked up to Coleman and started arguing with him for no apparent reason, pulled a knife from under his shirt and stabbed him, and that two boys then took the knife and ran off with it. Before the stabbing, the appellant told Coleman that he was not 'king of the block' and that he (the appellant) was going to kill him." *Id.* at 778.
69. Terry v. Ohio, 392 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436, 467 (1966).
70. 493 S.W.2d 940 (Tex. Crim. App. 1973).

a subsequent event which becomes important in litigation is admissible as part of the res gestae and explanatory of the subsequent transaction to which the conversation has referred.

III. GUILTY PLEA PROCEDURES

In a number of cases[71] the court of criminal appeals has made it clear that a guilty plea cannot stand unless the court before which the plea is entered inquires whether the defendant pleading guilty "is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt."[72] The court has also held, however, that the exact language of article 26.13 of the Code of Criminal Procedure need not be followed.[73] Indeed, as one of the judges has argued,[74] a simple inquiry into the question whether the person is pleading guilty because he has been threatened or because he has been promised anything which might be helpful, may be more understandable to the average defendant than the esoteric language of article 26.13.[75]

In *Williams v. State*[76] the court of criminal appeals upheld the lower court's refusal to permit the appellant to withdraw her plea of guilty to the offense of possession of marijuana prior to sentencing. There was a conflict in testimony as to precisely what had been promised appellant prior to the entry of the plea. Appellant's testimony was that "two officers promised her in the presence of Assistant District Attorney Guyton that she would get probation; that she was told by the officers the only reason her case was coming to court was so as to not arouse suspicion and that they were satisfied with her cooperation."[77] There was also testimony that appellant's counsel had informed her "that the court was reluctant to grant probation and that the court only promised to order a pre-sentence investigation."[78] There was even testimony that appellant was informed prior to the entry of the plea that the decision whether to grant probation was solely that of the judge. But the appeals court found decisive appellant's negative response to the trial court's article 26.13 admonishment and further inquiries as to promises of probation, despite appellant's later testimony that she responded negatively merely because she thought that to do so was a required formality.

This attachment of importance to the formal denial of promises or threats is to be contrasted with the treatment of such formal denials in *Hilliard v.*

71. *See, e.g.*, Prudhomme v. State, 495 S.W.2d 941 (Tex. Crim. App. 1973); Heathcock v. State, 494 S.W.2d 570 (Tex. Crim. App. 1973); Jefferson v. State, 486 S.W.2d 782 (Tex. Crim. App. 1972).

72. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Supp. 1973).

73. Clayton v. State, 493 S.W.2d 176 (Tex. Crim. App. 1973); Mitchell v. State, 493 S.W.2d 174 (Tex. Crim. App. 1973); Espinosa v. State, 493 S.W.2d 172 (Tex. Crim. App. 1973); Jackson v. State, 488 S.W.2d 451 (Tex. Crim. App. 1972).

74. Mitchell v. State, 493 S.W.2d 174, 176 (Tex. Crim. App. 1973) (Douglas, J.).

75. The court has also rejected the contention that article 26.13 requires that the defendant pleading guilty be advised of the possibility of the use of his conviction for enhancement purposes. Green v. State, 491 S.W.2d 882 (Tex. Crim. App. 1973).

76. 487 S.W.2d 363 (Tex. Crim. App. 1972).

77. *Id.* at 364.

78. *Id.* at 365.

Beto.[79] In *Hilliard* a federal district court had dismissed an application for habeas corpus without requiring an evidentiary hearing, relying on petitioner's formal denial that he had been influenced by threats or promises. In vacating the judgment of the district court and remanding for an evidentiary hearing, the Court of Appeals for the Fifth Circuit held that the defendant's denial of promises or inducements during the guilty plea hearing did not completely foreclose further inquiry.[80] As it is common knowledge that formal denials often accompany plea bargaining,[81] the court in *Hilliard* seems to have taken a much more realistic approach than the court in *Williams.*

IV. Failure on the Part of Defense Counsel To Preserve Error on Appeal—Ineffective Assistance of Counsel

The court of criminal appeals has continued to refuse to review certain matters on appeal when the matters below were not properly preserved for appeal. Two common examples are the failure of counsel to submit written objections to jury instructions[82] and the failure of counsel to accompany a motion for continuance with the defendant's own affidavit.[83]

The requirement that objections to jury instructions be in writing serves no useful purpose.[84] It may be that at a time when verbatim transcripts were rare if not unknown, such written objections aided the court on appeal. Now, however, when court stenographers prepare verbatim transcripts, the

79. 465 F.2d 829 (5th Cir. 1972).

80. *See also* Santobello v. New York, 404 U.S. 257 (1971), in which the United States Supreme Court vacated a lower court decision upholding a conviction based on the guilty plea, because it appeared that the state had failed to adhere to a bargain agreed upon with the petitioner. The case arose in part because the agreement was not disclosed to the judge at the time the plea of guilty was entered. Had this been done, the attorney who represented the state at the time of the entry of the plea of guilty would not have been unaware of the bargain entered into by another attorney of the state.

81. The proposed rule 11 of the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 416-18 (1971), would require disclosure of any such agreement in open court and hence would obviate many of the difficulties resulting from the present sham procedure. *Cf.* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE 169 (2d tent. draft 1973). For quite a number of years both the United States Army and Navy have dealt specifically with the problem of plea bargaining by requiring that an agreement be in writing, considered by the trial court in open court, and appended to the record of trial on appeal. For a description of the procedure in the Army, see DEPARTMENT OF THE ARMY, MILITARY JUDGES' GUIDE 3-3 (D.A. Pam. 27-9, May 1969); DEPARTMENT OF THE ARMY, MILITARY CRIMINAL LAW—TRIAL PROCEDURE 14-7 to -8 (Draft D.A. Pam. 27-173 Revised, January 1973).

82. *See, e.g.*, McClennon v. State, 492 S.W.2d 524 (Tex. Crim. App. 1973); Murry v. State, 491 S.W.2d 118 (Tex. Crim. App. 1973); Wood v. State, 486 S.W.2d 771 (Tex. Crim. App. 1972). In a related case, Joiner v. State, 494 S.W.2d 598 (Tex. Civ. App.—Waco 1973), a court of civil appeals rejected the appellant's complaint that the trial court failed to charge on the presumption of innocence. The court relied on the fact that the appellant's counsel had not requested such a charge of the court. In the light of *In re* Winship, 397 U.S. 358 (1970), in which the Court held that the standard of proof beyond a reasonable doubt is an essential of due process, it would seem that the sort of error complained of is so fundamental that no objection should be necessary in order to raise it. In view of the fundamental nature of the presumption of innocence, the court should be bound, sua sponte, to give such an instruction.

83. Sellers v. State, 492 S.W.2d 265 (Tex. Crim. App. 1973).

84. *See* Parrot v. Tallahassee, 381 U.S. 129 (1965); Douglas v. Alabama, 380 U.S. 415 (1965). *But cf.* Monger v. Florida, 405 U.S. 958 (1972).

failure to submit a written objection to a charge does not make review by an appellate court impossible. It is also difficult to see how the failure to submit written objections would materially affect the trial court's ability to understand the nature of the objections. If there were some confusion, the court could certainly clarify the situation through interrogation of counsel.

It is even more difficult to understand the need to have the defendant himself swear to the motion for continuance. Under the American Bar Association's *Standards Relating to the Prosecution Function and the Defense Function* the question of continuances is a matter of trial strategy within the complete discretion of defense counsel.[85] The defendant is not sufficiently familiar with the law and with matters of trial strategy to know whether a continuance is proper. Therefore, it seems totally unnecessary to have the defendant personally swear to a motion for continuance.

Perhaps the only purpose served by the above-described procedural requirements is to lighten the workload of the overburdened court of criminal appeals. This may be understandable from a practical standpoint, but it is hardly consistent with the pursuit of justice. It is also arguable that such efforts to avoid a consideration of questions of this sort may merely result in further reliance upon collateral relief, first in the Texas courts, and then in the federal courts unless the applicant has "deliberately bypassed the orderly procedure of the state courts."[86] It would be hard to argue that there has been a deliberate bypass or evasion of the orderly adjudication of defenses when defense counsel has objected to an instruction or has moved for a continuance, albeit not in compliance with the formal requisites of the Texas Code of Criminal Procedure.[87]

The court of criminal appeals has also found that any possible error in the admission of evidence illegally seized is rendered harmless when the defendant takes the stand and testifies with reference to the evidence seized.[88] This particular approach seems inconsistent with the result reached in *Harrison v. United States*,[89] in which the United States Supreme Court ruled inadmissible former testimony of the defendant, because that former testimony was merely a response to the admission into evidence at the first trial of a confession unlawfully obtained. In other words, the United States Supreme Court was not willing in *Harrison* to penalize a defendant for action taken in response to illegal activity on the part of the state.

There is thus insufficient justification for the enforcement of the procedural rules referred to above. However, as the Texas Court of Criminal

85. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 162-63 (approved draft 1971).

86. Fay v. Noia, 372 U.S. 391, 438 (1963).

87. Even on direct review by the United States Supreme Court, a failure to comply with a state procedural rule will not necessarily prevent review by the United States Supreme Court unless that rule can be said to constitute "independent and adequate state grounds." Henry v. Mississippi, 379 U.S. 443, 446 (1965). Such a procedural rule will not be considered an adequate state ground unless the procedural rule serves a legitimate state interest. An argument can certainly be made on the basis of what has been said that no legitimate state interest is served by the rules referred to above. *But cf.* Monger v. Florida, 405 U.S. 958 (1972).

88. McComb v. State, 488 S.W.2d 105 (Tex. Crim. App. 1972).

89. 392 U.S. 219 (1968).

Appeals has frequently enforced these rules the question arises whether a defendant has obtained effective assistance of counsel if his defense counsel has consistently failed to take the kinds of steps which, the court has made plain, are necessary to preserve error on appeal. In *Taylor v. State*[90] a conviction of murder without malice was upheld by the court. On appeal objections were raised concerning the admissibility of an oral confession, the absence of expert testimony regarding the cause of death, the failure of the trial court to require recordation and transcription of all proceedings, and erroneous jury instructions. With the exception of the objection regarding lack of expert testimony, all the objections were summarily rejected by the court because counsel at trial had failed to take the steps necessary to preserve the issues for appeal. Moreover, with respect to the issue regarding failure to record and transcribe the *voir dire* and jury argument, appellant's counsel on appeal relied on a federal statute inapplicable to state proceedings. The court nowhere discussed the question of effective assistance of counsel.

The *Taylor* case may be compared with *Gomez v. Beto*,[91] in which the Court of Appeals for the Fifth Circuit found, as a matter of law, a denial of effective assistance of counsel because of the failure of counsel at trial to investigate the question of alibi, which was raised by the defendant. The defendant had not only maintained an alibi, but also given his defense counsel the names of witnesses who could support it.

V. EXTRANEOUS OFFENSES

In *Ford v. State*[92] the court reversed a felony-murder conviction based on a homicide which occurred in the course of a robbery because of the erroneous admission of evidence concerning another robbery. The court had occasion to review the principles involved in the admission of extraneous offenses, particularly when used to prove identity. The court stated the rule that "[e]vidence of another crime is admissible to prove identity, when identity is an issue, only if there is some distinguishing characteristic common to both the extraneous offense and the offense for which the accused is on trial. . . . In the case of identity, similarity is required as a basis for the inference to be drawn from the evidence of the former crime."[93] The court found that although there were some similarities,[94] the dissimilarities were very great. The court pointed to the fact that one was a robbery of a chemical company, whereas the other was a robbery of a supermarket; the robbery of the chemical company was by one individual, whereas the robbery of the supermarket was by four individuals; the chemical company robbery was committed when the perpetrator pretended to seek employment, whereas there was no evidence regarding the method used in the supermar-

90. 489 S.W.2d 890 (Tex. Crim. App. 1973).
91. 462 F.2d 596 (5th Cir. 1972).
92. 484 S.W.2d 727 (Tex. Crim. App. 1972).
93. *Id.* at 729.
94. The color of the shirt or sweater allegedly worn by appellant was the same in both cases, and both times weapons were discharged.

ket robbery. On these facts the court found an insufficient similarity to justify the admission of the extraneous offense to prove identity.

In other cases the court also reversed convictions because of erroneous admission of extraneous offenses.[95] In *Rodriguez v. State*,[96] for example, the court reversed a murder conviction because the state introduced evidence of another killing on the theory that the two were similar because of an absence of motive in each case. The court found that such a similarity amounted to nothing more than an assertion that, because the defendant was a bad person and killed in one instance, he would also kill in another instance.

Granato v. State[97] is a good illustration of the proper admission of an extraneous offense to show fraudulent intent. In this case, involving a charge of theft by false pretext, the state attempted to show that the appellant fraudulently misrepresented the amount of collateral available to secure a loan. When questioned about the collateral by a bank official, appellant insisted that his wife had merely made a mistake in addition on the original list of collateral. At trial evidence was introduced to the effect that about ten months after the principal transaction the appellant borrowed money from another bank by misrepresenting the collateral, which misrepresentation he again blamed on his wife, using the same excuse. The similarity of the two transactions in *Granato*, showing an apparent *modus operandi*, clearly bears upon the question whether appellant was truthful in his assertion that a mere mistake had been made, and the trial court so held.[98]

In several other cases, however, the court has arguably misapplied the principle of extraneous offenses. In *Lee v. State*[99] the appellant was charged with the offense of selling heroin. After an undercover agent had testified that he purchased heroin from the appellant on a particular day, the appellant denied the commission of the offense entirely and claimed that he had been at his brother's house at the time of the alleged transaction. The appellant contended on appeal that the trial court erred in permitting the agent to testify regarding another alleged sale of heroin to an informer by appellant. The court affirmed the conviction, holding that the appellant's denial of sale raised an issue regarding the identity of the seller and that the testimony regarding the second sale was relevant to disprove appellant's assertion that he had never sold heroin to the agent or anyone else. The difficulty with the court's reliance on the principle that an extraneous offense may be introduced to show identity is that there was no showing, apart from appellant's alleged participation in both transactions, that the two transactions were in any way similar. An extraneous offense is admissible

95. *See, e.g.*, Newman v. State, 485 S.W.2d 576 (Tex. Crim. App. 1972); Rogers v. State, 484 S.W.2d 708 (Tex. Crim. App. 1972).
96. 486 S.W.2d 355 (Tex. Crim. App. 1972).
97. 493 S.W.2d 822 (Tex. Crim. App. 1973).
98. Another example of the proper admission of extraneous offenses is Moulton v. State, 486 S.W.2d 334 (Tex. Crim. App. 1971).
99. 496 S.W.2d 616 (Tex. Crim. App. 1973).

only when it is shown that the same person has committed both the principal offense and the extraneous offense.[100] There must be enough similarities between the two offenses to show that the same person committed both. No such similarities were described in *Lee*.

Superficially, proof of the extraneous offense refuted appellant's claim that he had never sold heroin to the informer or anyone else. However, in most extraneous offense situations the extraneous offense is in some way supportive of the principal offense in part because third parties are witnesses to the extraneous offense. So, for example, where the question is one of identity, the fact that the other persons also identified the appellant in extremely similar situations suggests that the witnesses with respect to the principal offense were correct in their identification.[101] In *Lee*, however, the witness to each offense was the same informer, and in both cases it was the informer's word against the appellant's. If the informer was wrong as to the principal offense, he might also have been wrong as to the extraneous offense. Hence, in *Lee* the evidence of the extraneous offense did not further the search for truth, which is the only justification for the admission of such otherwise prejudicial evidence.[102]

VI. PROBATION AND PAROLE REVOCATION

A. *Procedural Aspects*

Since the United States Supreme Court decision in *Gagnon v. Scarpelli*,[103] which imposed upon the states the same limitations with respect to probation revocation as it had previously applied to parole revocation in *Morrissey v. Brewer*,[104] the question arises whether Texas probation revocation procedures satisfy the new constitutional standards. On its face, article 42.12, section 8, of the Code of Criminal Procedure[105] fails to satisfy the requirement imposed in *Gagnon* that there be a preliminary hearing as well as a final hearing on the question of revocation. Whether the Texas procedure satisfies the constitutional requirements because the alleged violator of probation is apparently kept in jail pending a hearing before the court and not sent to the penitentiary, and because the hearing proper is before a judge rather than some lesser neutral personage, remains to be seen.[106]

100. *See* note 93 *supra*, and accompanying text.

101. This point is illustrated by Ford v. State, 484 S.W.2d 727 (Tex. Crim. App. 1972), note 92 *supra*, and accompanying text. In *Ford*, although the court found that evidence of another offense was improperly admitted, the extraneous offense sought to be admitted was witnessed by persons other than those who witnessed the principal offense.

102. Other cases in which there has been a questionable application of the extraneous offense principle are Avilla v. State, 493 S.W.2d 233 (Tex. Crim. App. 1973); Gillon v. State, 492 S.W.2d 948 (Tex. Crim. App. 1973); and Sanchez v. State, 492 S.W. 2d 530 (Tex. Crim. App. 1973).

103. 411 U.S. 778 (1973).

104. 408 U.S. 471 (1972).

105. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8 (Supp. 1973).

106. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court indicated that it was requiring a preliminary hearing because of the time lag between arrest of the parolee and revocation of his parole and because a parolee is often removed from the location of the alleged parole violation to a penitentiary before revocation. To the extent that

One other requirement of *Gagnon* which is arguably not now being met under Texas case law is that the hearing body provide, at the end of the hearing, "a written statement by the fact finders as to the evidence relied on and the reasons for revoking [probation or] parole."[107] In *Stafford v. State*[108] three grounds for revocation of probation were alleged. The probationer urged on appeal that the evidence was insufficient to justify revocation on one of the three stated grounds. The court refused to inquire into the sufficiency of the evidence for revocation because the appellant had neglected to request written findings of fact. The court's reliance on the appellant's failure to request findings as a ground for not considering his allegation of insufficiency thus conflicts with the requirements of *Gagnon*.

Although not directly relating to probation or parole revocation, the ruling in *Cazares v. State*[109] does at least deal with the relationship between the parole officer and the probationer or parolee. In this case the appellant, charged with possession of heroin, argued that an exception to the hearsay rule ought to be recognized with respect to exculpatory statements made by him to his parole officer. The court rejected this contention on the grounds that "[t]he effect of such a rule would be to encourage fabrication and deter the necessary candid relationship between the parolee and his parole officer."[110] While it is true that courts have assumed that there exists a candid relationship between the probationer or parolee and his parole officer and that everything ought to be done to encourage the maintenance of this relationship,[111] the Texas Court of Criminal Appeals has had no hesitancy in holding statements made to parole officers by parolees or probationers admissible *against* the parolee or probationer in hearings to revoke the parole or probation.[112] In fact, the parole officer is often the one who initiates revocation proceedings. This is hardly conducive to a close relationship, especially when statements made by the probationer to his officer can be used against him but not in his favor. The privilege ought to apply both ways, and all such statements should be inadmissible.

B. *Substantive Aspects*

In numerous cases the court has upheld revocation of probation for seemingly trivial activities almost totally unrelated to the principal offense. For

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the Court was relying on the removal of the defendant from the spot of the alleged violation, the Texas procedure would seem to satisfy this aspect of the rule.

Although the identity of the persons deciding the question of revocation was not mentioned by the Court in *Morrissey* in connection with the question of the preliminary hearing, it is not inconceivable that a court would say that since the Texas procedure gives the parolee something to which he is not constitutionally entitled—*i.e.*, a hearing before a court as opposed to an administrative official—the failure to provide a preliminary hearing is somehow less significant. Functionally, such an argument would make no sense if there were a substantial time lag between the arrest and the parole revocation hearing.

107. 411 U.S. 778, 786 (1973).
108. 487 S.W.2d 337 (Tex. Crim. App. 1972).
109. 488 S.W.2d 455 (Tex. Crim. App. 1972).
110. *Id.* at 457.
111. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).
112. Cunningham v. State, 488 S.W.2d 117 (Tex. Crim. App. 1972).

example, the court has revoked probation for public intoxication or for failure to meet with the parole officer, even though these activities are unrelated to charges such as burglary or murder.[113] While the court conducting the probation revocation hearing is clearly authorized by statute to revoke probation for such reasons,[114] the question remains whether the legislature ought to change this by requiring that revocation be permitted only when the probationer has committed a serious criminal act or has engaged in the same conduct that resulted in the principal conviction. The theoretical purpose of probation is not to make certain the eventual confinement of the probationer but rather to give the individual a second chance by permitting him to remain relatively free in society.[115] The probationer, who has already demonstrated his fallibility, should not be required to adhere to standards stricter than those applied to other people. Most people are not required to "avoid injurious or vicious habits" or to "work faithfully at suitable employment as far as possible."[116] While probation ought to involve the imposition and enforcement of certain standards of behavior,[117] it does not follow that a person should be required to serve out his full sentence merely because he failed to visit his probation officer or made the mistake of becoming drunk in public. It seems that the imposition of such onerous and vague conditions, with the concomitant exercise of unfettered discretion by the trial judge, is simply a device by which persons who are thought to be "bad," but against whom there is insufficient evidence of a substantial offense, can be sent to the penitentiary without proof of the commission of such an offense. The exercise of such unfettered discretion is the antithesis of the rule of law.[118] Moreover, the example of apparently arbitrary revocation of probation is not likely to contribute to the eventual rehabilitation of the probationer.

VII. REASONABLE DOUBT

In several cases the court's instruction on reasonable doubt has created a certain amount of semantic confusion.[119] Article 38.03 of the Code of Criminal Procedure[120] requires the state to demonstrate beyond a reasonable

113. *See* Smith v. State, 494 S.W.2d 873 (Tex. Crim. App. 1973) (revocation for driving while intoxicated, the principal offense being burglary); Martinez v. State, 493 S.W.2d 954 (Tex. Crim. App. 1973) (revocation for driving while intoxicated, the principal offense being murder without malice); Szczeck v. State, 490 S.W.2d 576 (Tex. Crim. App. 1973) (revocation for failure to meet with probation officer, the principal offense being burglary).

114. TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 6, 8 (Supp. 1973).

115. *See* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PROBATION 1, 15-16 (approved draft 1970).

116. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (1966).

117. The legislature might provide as a sanction for the violation of a less serious condition of probation that the probationer be imprisoned for a period of several days.

118. "The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality." L. FULLER, THE MORALITY OF LAW 46 (rev. ed. 1969). *Cf.* Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183, 250 (1971) (Brennan, J., dissenting).

119. *See, e.g.*, Randolph v. State, 493 S.W.2d 869 (Tex. Crim. App. 1973); Gordon v. State, 492 S.W.2d 262 (Tex. Crim. App. 1973).

120. TEX. CODE CRIM. PROC. ANN. art. 38.03 (1966).

doubt that a crime has been committed. Failure to carry this burden results in the acquittal of the defendant. But when the jury is instructed to acquit if it finds that the defendant did not commit the offense or if it has a reasonable doubt thereof,[121] it is unclear whether the burden is on the state to prove guilt or on the defendant to prove innocence. The phrase "reasonable doubt of innocence" would make sense only if the burden were on the defendant to prove his innocence and if his failure to do so would result in his conviction. As this is clearly not the statutory or constitutional rule in Texas,[122] this instruction should be abandoned in favor of the usual instruction that the jury must acquit if the state fails to prove its case beyond a reasonable doubt.

VIII. PRESUMPTIONS AND PERMISSIBLE INFERENCES

In *Gardner v. State* the court, in assessing the sufficiency of evidence to support a burglary conviction, stated that "[u]nexplained possession of property recently stolen from burglarized buildings is sufficient to support conviction for burglary."[123] This statement regarding unexplained possession was arguably dictum, since there was other evidence that connected the defendant with the burglary. It is noteworthy, however, that the court appeared willing to apply this permissible inference to a situation in which the unexplained possession occurred two or three days after the burglary. This raises the question of the constitutionality of this permissible inference in light of the recent Supreme Court decision in *Barnes v. United States*.[124] The Court there upheld an instruction that "ordinarily [the jury] would be justified in inferring from unexplained possession of recently stolen mail that the defendant possessed the mail with knowledge that it was stolen."[125] In so doing, the Court required that there be a rational connection between the fact proved and the ultimate fact presumed. According to the Court any inference of guilt from unexplained possession is irrational, and hence unconstitutional, unless "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[126] As it is common knowledge that people who burglarize very often sell what they have obtained, the passage of two or three days suggests the possibility of sale of the stolen goods to the defendant. How, therefore, can it be said to be more likely than not that a person in unexplained possession of goods two or three days after they

121. An example of a jury instruction containing this ambiguity is found in Randolph v. State, 493 S.W.2d 869, 873 (Tex. Crim. App. 1973):

> You are further instructed that if you believe that Sylvester Randolph was not acting together with the said Earl Mabry in robbing, or attempting to rob LeRoy Thompson, if he did, or if Sylvester Randolph had not previously entered into an agreement with the said Earl Mabry to rob, or attempt to rob the said LeRoy Thompson, if they did, or if you have a reasonable doubt thereof, you will acquit the Defendant, Sylvester Randolph.

122. *In re* Winship, 397 U.S. 358 (1970); TEX. CODE CRIM. PROC. ANN. art. 38.03 (1966).

123. 486 S.W.2d 805, 806 (Tex. Crim. App. 1972).

124. 412 U.S. 837 (1973).

125. *Id.* at 838.

126. Leary v. United States, 395 U.S. 6, 36 (1969).

were taken in a burglary was guilty of the burglary? Even if the person in possession had knowledge of the manner in which the goods were obtained and could thus be convicted of theft under the new Texas Penal Code,[127] such an offense is quite different from the more serious offense of burglary.[128]

An even more questionable use of a presumption is illustrated by *Stills v. State*.[129] Stills was convicted of murder without malice on evidence showing that he shot the deceased with a .22 calibre pistol. Because he testified that he did not intend to kill the deceased, Stills claimed on appeal that the lower court erred in not giving a charge to the jury on the lesser included offense of aggravated assault. The court said:

> The appellant admits firing the pistol at the deceased. A pistol is a deadly weapon per se. When a deadly weapon is fired at close range and death results, the law presumes an intent to kill. The intent to kill being presumed, the issue of aggravated assault was not raised. . . . The appellant's testimony under these circumstances, that he did not intend to kill the deceased nor anyone else, does not require that the charge of aggravated assault be given.[130]

The reasoning of the court suggests that no verdict other than murder with or without malice would have been possible, although the testimony regarding intent seemed to raise the issue of negligent homicide. Thus, the language quoted from *Stills* suggests that a jury is not merely permitted to infer from the use of a deadly weapon that there was an intent to kill, but rather required to find an intent to kill when a deadly weapon was fatally used. This amounts to an irrebuttable presumption; in effect, it precludes the jury from believing the defendant when he says that he did not intend to kill. Surely there may be circumstances in which a defendant may use a deadly weapon and not intend to kill. For example, if the defendant were an expert in the use of handguns and intended merely to frighten the victim by hitting a spot a few inches away from the victim, but tripped over a chair as he fired, there would be some merit to his contention that he did not intend to kill.[131] Nonetheless, this ruling by the court would prevent the jury from finding an intent not to kill; in effect, it would be an instruction to disregard the testimony of the defendant, thus creating an irrebuttable presumption of doubtful constitutional validity.[132]

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127. TEX. PEN. CODE ANN. §§ 31.02-.03 (Supp. 1973).
128. *Id.* § 30.02.
129. 492 S.W.2d 478 (Tex. Crim. App. 1973).
130. *Id.* at 479.
131. Under the new Penal Code this offense certainly could not be more than involuntary manslaughter and possibly only criminally negligent homicide. For a crime to be murder under § 19.02, there would have to be an intention to kill, an intention to cause serious bodily injury, or felony murder. The offense would be involuntary manslaughter under § 19.03 if it were committed "recklessly," but only criminally negligent homicide if death resulted through criminal negligence. TEX. PEN. CODE ANN. §§ 19.02, 19.04, 19.06 (Supp. 1973). In view of the expertise of the defendant, this might be a close question of fact for the jury. If the defendant were not an expert but nevertheless intended not to hit the victim but merely to frighten him, this non-expert might be guilty only of involuntary manslaughter by reason of his reckless act, causing the death of the victim.
132. *See* Vlandis v. Kline, 412 U.S. 441, 446 (1973).

IX. OBSCENITY

Volumes could, and probably will, be written about the new United States Supreme Court obscenity rulings in *Miller v. California*[133] and related cases.[134] The first effort by a Texas appellate court to apply the rulings in *Miller* occurred in *Richard v. State*.[135] The court of civil appeals reviewed a lower court injunction entered under section 13 of article 527 of the Penal Code,[136] which injunction prohibited (a) the showing or distribution of nine specific films, (b) the showing or distribution of any other obscene material in violation of article 527, and (c) any sale or exhibition of films depicting males and females engaging in actual sexual intercourse, oral sodomy, anal sodomy, and cunnilingus. The appellate court reviewed the films and found them to be obscene under any definition of the term. Eschewing a detailed description, the court said merely that "from the first to the last scene, each film is a filthy, cynical, disgusting portrayal of explicit sexual activity."[137] The court did, however, strike down the section of the injunction forbidding other violations of article 527 as a " 'prior restraint' with a vengeance and without any precise guidelines to govern the defendants' future conduct."[138] On the other hand, the court did uphold the section forbidding the exhibition of films showing specified acts on the ground that the activity prohibited was very explicit. The court, however, limited the section "to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value."[139]

Following *Miller* the states may prohibit distribution and exhibition of films which arguably could not have been prohibited under *Memoirs*[140] or

133. 413 U.S. 15 (1973).

134. *See, e.g.*, United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Super 8-mm. Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Five days after these decisions were handed down the Supreme Court decided three other cases dealing with procedural issues in the obscenity area: Alexander v. Virginia, 413 U.S. 836 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973).

135. 497 S.W.2d 770 (Tex. Civ. App.—Beaumont 1973).

136. Act of June 14, 1971, ch. 887, § 3, [1971] Tex. Acts 2725 (repealed 1973). Despite the repeal of this section there remains ostensible authority to enjoin distribution of obscene films. TEX. REV. CIV. STAT. ANN. art. 4667 (Supp. 1973).

137. 497 S.W.2d at 778.

138. *Id.*

139. *Id.* at 782.

140. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966). Under the plurality opinion in *Memoirs* the test for obscene material was:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418. The test announced in *Miller* is:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . , (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

they may adhere to the old standard. Although Texas has not yet adapted its penal code to the new *Miller* standards, it appears after *Richard* that *Miller* has been adopted judicially.

An additional question in *Richard* is why the state sought an injunction when the behavior to be enjoined was already proscribed under the criminal law. The answer may lie in the difference between the procedure employed in a criminal trial and that employed in a show-cause hearing to determine whether a person is to be held in contempt for violating an injunction. A jury trial is required in the former but not in the latter.[141] This procedure sanctioned in *Richard* thus denies a defendant a jury trial on what is for all other purposes an obscenity charge. This denial of jury trial aggravates the plight of the obscenity defendant, as described by Justice Douglas in his dissent in *Miller*. The holding of that case allows a criminal conviction for violation of an obscenity statute, despite the vagueness of the obscenity doctrine, with the defendant having been given no advance notice that the film which he has exhibited is violative of the statute.[142] Under *Richard* the defendant will not only fail to receive advance notice, but also will not have the benefit of a jury determination of obscenity.[143]

Whether a contempt proceeding brought for violation of an injunction such as the one in *Richard* would pass constitutional muster under the first amendment decisions of the United States Supreme Court is unclear.[144] The *Richard* injunction closely resembles the unconstitutional permanent injunction prohibiting the publication of the periodical, "The Saturday Press," in *Near v. Minnesota*.[145]

X. CONCLUSION

No one who has read this Article can fail to notice the generally negative assessment of the work of the Texas Court of Criminal Appeals contained herein. In my view, part of the problem is institutional: The court is overworked. The current effort to draft a new state constitution provides an opportunity to restructure the judiciary. In particular, there is an urgent need to merge the Court of Criminal Appeals with the Supreme Court of Texas and to allow the several courts of civil appeals to become intermediate courts within the integrated judicial system. Additionally, merit selection of judges would improve the quality of Texas courts by making it more likely that persons with varying backgrounds and philosophies would sit on the appellate courts.

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413 U.S. at 24. Whether the standard set forth in *Miller* is any clearer than the standard set forth in *Memoirs* is questionable. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting).

141. TEX. CONST. art. 1, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (1966); *In re* Allison, 48 Tex. Crim. 634, 639, 90 S.W. 492, 495 (1905).

142. 413 U.S. at 37 (Douglas, J., dissenting).

143. That the guaranty of a jury trial in obscenity cases is no mere formality is illustrated by the recent jury acquittal of a defendant who was charged with a violation of the obscenity statute because of his showing of "The Last Tango in Paris." State v. Boyd, No. 56982 (County Court-at-Law, Lubbock County, Texas, Nov. 12, 1973).

144. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

145. 283 U.S. 697 (1931).