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PART III: PUBLIC LAW

CRIMINAL LAW AND PROCEDURE

by

Charles P. Bubany*

DURING the past year, the workload of the Texas Court of Criminal Appeals, which has been described as the heaviest of any state appellate court,¹ consisted primarily of cases in which the significant issues were procedural. The United States Supreme Court also rendered a number of decisions that will have an impact on Texas criminal procedure. Many of the questions considered by both courts were controversial, often dividing their respective members, but probably no decision from either court could fairly be labeled "landmark." However, some commentators have suggested that current decisions as a group manifest a retreat from the changes initiated by the Supreme Court in the "Criminal Law Revolution" of the 60's and early 70's and signal the beginning of a counter-revolution in criminal law administration.²

I. SCOPE OF APPELLATE REVIEW: WAIVER AND HARMLESS ERROR

The extent to which technical violations of the rules will constitute reversible error on appeal will be of as much practical importance to the lawyer as the rules themselves. Two concepts that are fundamental in defining the scope of appellate review are *waiver* and *harmless error*, which are conceptually distinct but related in terms of their practical impact. The concept of waiver in criminal cases is inconsistent, changing its meaning according to

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1. *Phillips v. State*, 511 S.W.2d 22, 25 (Tex. Crim. App. 1974), citing Todd, *Appellate Delay in the Criminal Courts of Texas*, 37 TEX. B.J. 454 (1974). The crushing workload of the appellate courts has made judges acutely aware of the need for judicial economy. Judges on the Texas Court of Criminal Appeals obviously feel the pressure, often expressing impatience, and even irritation, with activity felt to be needlessly time-consuming. See, e.g., *Posey v. State*, 515 S.W.2d 286, 288 (Tex. Crim. App. 1974) (Morrison, J., concurring in part, dissenting in part) ("majority's effort represents a needless exercise which defies the concept of judicial economy"); *Hawkins v. State*, 515 S.W.2d 275, 277 (Tex. Crim. App. 1974) (Douglas, J., dissenting) ("procedure adopted by the majority amounts to judicial wheel spinning" and is "useless"). Delay and inefficiency have been labelled as the major defects of the American criminal justice system. See Burger, *Paradoxes in the Administration of Criminal Justice*, 58 J. CRIM. L.C. & P.S. 428 (1967). However, the fear has been expressed that the push for administrative efficiency and speeding up the process may have serious adverse effects on the system. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Dash, *Preface to The United States Court of Appeals: 1971-1972 Term—Criminal Law and Procedure*, 61 GEO. L.J. 275, 280 (1972).

2. See, e.g., Gangi, *The Supreme Court, Confessions, and the Counter Revolution in Criminal Justice*, 58 JUDICATURE 68 (1974). However they are characterized, current appellate decisions evidence a shift away from concern with individual protections of the accused at the formal stages of the criminal process to an emphasis on the overall reliability and fairness of the proceedings to determine his guilt.

the context in which it is applied.³ For appellate review purposes it means that, except for fundamental errors, claims of error not properly raised in the trial court nor preserved on appeal are "waived" and need not be considered by the reviewing court.⁴ Harmless error, however, is a determination that an error, even if established after consideration by the court, is not substantial or prejudicial enough to warrant reversal.⁵ Some types of error are necessarily fundamental and may never be harmless, nor will they be held to have been waived by failure properly to object. These are errors which relate to the power of the state to prosecute the defendant, such as lack of jurisdiction, double jeopardy, or substantive defects in the indictment.⁶ However, even errors of constitutional dimension may be either waived⁷ or considered harmless⁸ if they are found not to have deprived the defendant of a fair trial.

A case illustrating the application of both concepts is *Gibson v. State*.⁹ The defendant objected on hearsay grounds to a police officer's testimony concerning a conversation that he had with the defendant's wife in the presence of the defendant at the time of his arrest. On appeal, the defendant argued that admission of the conversation into evidence violated the testimonial privilege of spouses granted in the Code of Criminal Procedure¹⁰ and his privilege against self-incrimination guaranteed by the fifth amendment. The court held that the claimed violation of the testimonial privilege was not fundamental error and had been waived by counsel's failure to object on that

3. See generally Tigar, *Waiver of Constitutional Rights: Disquiet on the Citadel*, 84 HARV. L. REV. 1 (1970). With reference to certain constitutional rights, waiver means an actual, knowing and intentional relinquishment, which may not be implied. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

4. TEX. CODE CRIM. PROC. ANN. art. 40.09(13) (1966) provides that the court of criminal appeals shall review "any unassigned error which in the opinion of the Court of Criminal Appeals should be reviewed in the interest of justice." As to claimed error in the trial judge's charge to the jury, the failure of the defendant to properly preserve his objections to the charges as required in *id.* arts. 36.14-18 will preclude reversal "unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." *Id.* art. 36.19.

5. See *Kotteakos v. United States*, 328 U.S. 750 (1946). With reference to non-constitutional errors, harmless error is the rough opposite of fundamental error, that is, an error that is *not* calculated to injure the rights of the appellant to the extent that he has not had a fair and impartial trial. See *Warren v. State*, 514 S.W.2d 458, 463 (Tex. Crim. App. 1974). For a constitutional error to be harmless, however, the court must be convinced beyond a reasonable doubt that the error could not have contributed to the verdict in any significant way. See, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972); *Bridger v. State*, 503 S.W.2d 801 (Tex. Crim. App. 1974).

6. *Blackledge v. Perry*, 417 U.S. 21 (1974) (guilty plea did not waive claim that "went to the very power of the State to bring the defendant into court to answer the charge brought against him"); *Standley v. State*, 517 S.W.2d 538 (Tex. Crim. App. 1975) (overruling *Ex parte Roberts*, 502 S.W.2d 802 (Tex. Crim. App. 1974), to the extent that it held a guilty plea waived a fatal defect in an indictment). In addition, violation of mandatory and absolute prohibitions of the Code of Criminal Procedure may not be waived. *Ballard v. State*, 519 S.W.2d 426 (Tex. Crim. App. 1975).

7. See, e.g., *Pizzalato v. State*, 513 S.W.2d 566 (Tex. Crim. App. 1974); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974).

8. See, e.g., *Ex parte Smith*, 513 S.W.2d 839 (Tex. Crim. App. 1974); *Bridger v. State*, 503 S.W.2d 801 (Tex. Crim. App. 1974).

9. 516 S.W.2d 406 (Tex. Crim. App. 1974).

10. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Supp. 1974).

specific ground at trial.¹¹ In fact, it was not error at all because the statutory privilege of spouses would not apply to out-of-court statements made by the wife to which she did not testify in court.¹² The fifth amendment claim that tacit acquiescence in the statement was used to incriminate by silence after arrest was also held waived, and additionally, even if it were error, it was harmless because the evidence did not significantly enhance the prosecutor's other evidence of guilt.¹³

The firm entrenchment of the rule that the grounds for an objection must be unambiguously identified at the trial level creates a problem for defense counsel in the rushed and often harried atmosphere of a criminal trial.¹⁴ Another aspect of the waiver doctrine that warrants caution by defense attorneys is the possibility of implied waiver by action during the trial which is inconsistent with a properly raised objection. The scope of implied waiver was at issue in *Alvarez v. State*¹⁵ in which the court determined that the defendant's attempted explanation of an admission to an extraneous offense of homicide did not amount to a waiver of his objection to the statement nor did it render harmless the error in admitting it into evidence.¹⁶ The defendant's testimony did not constitute a waiver of his objection because of "the long standing rule that an accused may offer evidence to rebut, destroy or explain improper evidence without waiving his objection,"¹⁷ particularly when he would not have testified but for the admission of the evidence. Admittedly, the standards are not easily applied, but the court held that were it not for such a rule, it would be possible "to whipsaw an accused into a position where he must acquiesce in the admission of the improper evidence or waive the error of its admission when he seeks to combat it."¹⁸

In his dissenting opinion Judge Douglas asked why the waiver rule applied in hundreds of cases was not so applied in *Alvarez*. Under this rule the court has routinely held that voluntary testimony presented by the defendant concerning objected-to evidence waived his objection.¹⁹ *Nicholas v. State*²⁰ apparently provides the answer to this question. There the rape defendant objected on constitutional grounds to the state's admission of photo negatives

11. 516 S.W.2d at 409.

12. *Id.*

13. *Id.* at 410. For a discussion of the constitutionality of using a defendant's silence as evidence, see cases cited in note 174 *infra*.

14. The Code requires the court to review a ground of error in the defendant's brief if it "can identify and understand such point of objection . . . notwithstanding any generality, vagueness or any other technical defect that may exist in the language employed to set forth such ground of error." TEX. CODE CRIM. PROC. ANN. art. 40.09, § 9 (Supp. 1974). The court has not interpreted this section liberally. See *Vela v. State*, 516 S.W.2d 176 (Tex. Crim. App. 1974); *Phillips v. State*, 511 S.W.2d 22 (Tex. Crim. App. 1974) (note especially the authorities cited *id.* at 26). See also *Ballard v. State*, 519 S.W.2d 426 (Tex. Crim. App. 1975) (objection specific enough on rehearing after a reading of the record as a whole).

15. 511 S.W.2d 493 (Tex. Crim. App. 1973).

16. *Id.* at 498-99 (opinion of Onion, P.J., on second motion for rehearing). The general rule is that admission of improper evidence will not require reversal if the same facts are proved by other evidence not objected to, including defendant's testimony. *Id.*

17. *Id.* at 500.

18. *Id.* at 499-500.

19. *Id.* at 500 (Douglas, J., dissenting).

20. 502 S.W.2d 169 (Tex. Crim. App. 1973).

taken from his apartment. Later, however, the defendant called a witness to establish by use of one of the negatives that no penetration had occurred. The opinion on the state's motion for rehearing by Judge Odom, holding that the defense testimony did not constitute a waiver of the objection, renders inaccurate the broad language of other opinions which implied that mere reference to the objected-to testimony by the defendant would automatically result in waiver. Further the court held that the waiver-harmless error rule is applicable when the un-objected to other evidence is of *substantially the same facts*, but is not applicable to mere introduction of some evidence on the same subject or mere use of the same evidence for rebuttal purposes.²¹ In other words, the court made a distinction between *adoption* of the objected-to evidence, which is inconsistent with an objection to its admission, and mere *use* as a predicate for an attack on its value, which is not. Thus, in *Warren v. State*,²² where the defendant complained of a search that yielded stolen tires from his storeroom, his testimony and that of another defense witness concerning the presence of the tires rendered harmless any error in the admission of the tires because the purpose of the testimony was merely to establish defendant's lack of knowledge that the tires were stolen, rather than to attack or controvert the admitted fact of possession.²³

Voluntary admissions by a defendant at the punishment hearing concerning evidence offered at trial will preclude questioning the admissibility of that evidence on appeal.²⁴ Apparently, the rationale of the rule is that even if the admission of the evidence at trial was reversible error, defendant's testimony could be used in lieu thereof on retrial. Thus, notwithstanding the pressure on a defendant who has been found guilty to attempt to mitigate his punishment by acknowledging guilt and explaining the circumstances of the offense, it is only at the stage where guilt or innocence is determined that he may attempt to controvert or explain the evidence without voluntarily waiving his objection to it.²⁵

The waiver and harmless error doctrines respond to the need for judicial economy by avoiding the useless process of reversing convictions because of merely technical errors. In addition, the waiver doctrine promotes the sound policy of enabling the court to make informed decisions on fully developed records. But both devices should be applied with care. Because determination of harmless error, waiver, and fundamental error necessarily involves subjective judgments, application of the concepts depends to a large degree

21. *Id.* at 174-75.

22. 514 S.W.2d 458 (Tex. Crim. App. 1974).

23. *Id.* at 464.

24. *Stein v. State*, 514 S.W.2d 927 (Tex. Crim. App. 1974); *Downey v. State*, 505 S.W.2d 907 (Tex. Crim. App. 1974).

25. This dilemma for defense counsel is created by the lack of a procedure for interlocutory appeal of contested issues relating to the admissibility of evidence. Because appeals take time and the likelihood of reversal is slim, counsel may not want to risk the possibility of incurring a heavy sentence because of the defendant's failure to admit the crime and to appear repentant at the punishment stage of the trial. Disclaimer by counsel of an intent to waive the objection will be insufficient in itself because "a mere recitation to this effect is not a talisman which invariably prevents an accused from waiving error" *Alvarez v. State*, 511 S.W.2d 493, 499 (Tex. Crim. App. 1974).

on the prevailing attitude of the judges. Judges are naturally and justifiably reluctant to reverse convictions on appeal, particularly when evidence of guilt is clear. However, the "presumption of guilt" on appeal and the desire for increased efficiency in the criminal process have combined, according to at least one eminent jurist, to create a "guilty anyway" syndrome in appellate courts.²⁶ Arguably, such an attitude has contributed to an unwarranted expansion of the waiver and harmless error doctrines. In any event, the increasing reliance on them reflects an apparent trend in appellate decisions toward emphasis on the reliability of convictions rather than on the manner in which they are obtained.²⁷

II. INVESTIGATION

Constitutional and statutory limitations on police investigatory techniques are implemented through the rule which mandates the exclusion of unlawfully obtained evidence at the trial of the accused.²⁸ Growing disenchantment with the exclusionary rule, particularly as applied to fourth amendment violations, has contributed to a tendency to resist expansion of its scope and to limit its effect.²⁹ In addition, a number of authorities, including the Chief Justice of the United States Supreme Court, have gone so far as to urge abandonment or substantial modification of the rule.³⁰ Whatever the ultimate fate of the exclusionary rule, the growing willingness of the courts to question the rationale of its strict application, particularly in cases in which the reliability and probative force of the allegedly inadmissible evidence is clear, has increased the uncertainty in an area of the law that was already "something less than a seamless web."³¹

26. Bazelon, *supra* note 1, at 26.

27. See Zagel, *Foreword to Supreme Court Review 1973*, J. CRIM. L.C. & P.S. 379, 392 (1974), in which the author states that *Chambers v. Mississippi*, 410 U.S. 284 (1973), discussed in Elliott, *Evidence, Annual Survey of Texas Law*, 28 Sw. L.J. 158-61 (1974), "may signal a new emphasis on the pursuit of truth as the fundamental concern of a constitutional system of criminal justice. If this is so, then we are about to embark on another criminal law revolution."

28. The exclusionary rule is still the primary remedy for police violations of the fourth amendment protection against unreasonable searches and seizures, *Mapp v. Ohio*, 367 U.S. 643 (1961); the fifth amendment privilege against self-incrimination, *Boyd v. United States*, 116 U.S. 616 (1886); cf. *Miranda v. Arizona*, 384 U.S. 436 (1966); the sixth amendment right to counsel, *United States v. Wade*, 388 U.S. 218 (1967); and the general due process clause of the fourteenth amendment, *Rochin v. California*, 342 U.S. 165 (1952). As a rule of evidence, it is codified in TEX. CODE CRIM. PROC. ANN. art. 38.23 (1966).

29. Dissatisfaction with the rule is perhaps best indicated by the increasing popularity of Justice Cardozo's wry observation that under the exclusionary rule "the criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). An express limitation of the rule occurred in *United States v. Calandra*, 414 U.S. 338 (1974), where the Supreme Court held that the exclusionary rule of *Mapp* does not apply to evidence presented to a grand jury. Decisions from the state and lower federal courts have followed the lead of the Supreme Court by finding exceptions to per se rules of exclusion, primarily by the harmless error device. See *United States v. Acosta*, 501 F.2d 1330, 1335 (5th Cir. 1974) (Gee, J., dissenting).

30. See Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 Sw. L.J. 573 (1971).

31. *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973). See also LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.

A. Arrest, Searches, and Seizures

As usual, the Texas Court of Criminal Appeals decided a large number of cases challenging the admissibility of evidence claimed to be the product of unlawful arrests or searches. Some of the questions considered were: (1) What conduct is subject to constitutional limitations of the fourth amendment? (2) Where the fourth amendment is applicable, what constitutes sufficient evidence to support either the issuance of a warrant, a warrantless arrest or search, or police intrusions not amounting to a full arrest or search? and (3) What is the scope and application of exceptions to the general warrant requirement for searches?

Fourth Amendment Activity. A *sine qua non* of a fourth amendment claim is police conduct that amounts to a "search" or "seizure" either of the person or property of the defendant to which the restrictions of the fourth amendment apply.³² In determining whether police conduct is subject to constitutional and statutory standards of reasonableness, the courts employ the "reasonable expectation of privacy" approach that had its inception in *Katz v. United States*.³³ Unless the defendant is found to have reasonably anticipated that the matters observed or things seized by the police would remain private, or has not assumed the risk they would be made public, he cannot claim a violation of a protected privacy interest.³⁴ This apparently was the thrust of the Texas court's holding in *George v. State*,³⁵ in which a view by the police of contraband (subsequently seized by warrant) through holes in defendant's backyard fence was "not unreasonable under the circumstances."³⁶ Although the court acknowledged that the police activity was a limited investigation calculated "to determine if there were any witnesses or contraband in plain view,"³⁷ the authorities it relied on to justify the view indicate that the court thought it was not technically a search.³⁸ Observation

32. Not all police activity is covered by the fourth amendment. See, e.g., *Willis v. State*, 518 S.W.2d 247 (Tex. Crim. App. 1975) (seizure of abandoned property).

33. 389 U.S. 347 (1967). The Supreme Court held that attaching an electronic "bug" to the outside of a public telephone booth violated the caller's privacy even though it did not constitute a physical intrusion into any enclosure. *Katz* rejected a solely physical definition of "constitutionally protected area" in favor of a dividing line between matter or places that the individual "knowingly exposes to the public, even in his home or office" and those that "he seeks to preserve as private, even in an area accessible to the public." *Id.* at 351-52. A later sophistication of the *Katz* expectation of privacy test is found in *United States v. White*, 401 U.S. 745 (1971), which represents the majority view of the Supreme Court. In holding that statements of a defendant to a cohort whom he mistakenly trusts with incriminating information are not constitutionally protected even when recorded by advance arrangement with the police, the plurality rejected the defendant's subjective expectation as controlling. *Id.* at 751-52. Instead, only expectations that society recognizes as reasonable are protected. See also *Cioffi v. United States*, 95 S. Ct. 195, 42 L. Ed. 2d 155 (1974) (Douglas, J., dissenting from denial of certiorari); *Thrush v. State*, 515 S.W.2d 122 (Tex. Crim. App. 1974).

34. *United States v. Matlock*, 415 U.S. 164 (1974); *Frazier v. Cupp*, 394 U.S. 731 (1969).

35. 509 S.W.2d 347 (Tex. Crim. App. 1974).

36. *Id.* at 348.

37. *Id.* (emphasis added).

38. *Id.* See, e.g., *Turner v. State*, 499 S.W.2d 182 (Tex. Crim. App. 1973); *Gil v. State*, 394 S.W.2d 810 (Tex. Crim. App. 1965); *Capuchino v. State*, 389 S.W.2d 296 (Tex. Crim. App. 1965).

without entry into premises may be a search,³⁹ but the courts routinely uphold views obtained by officers standing on public property who look through car windows⁴⁰ or open windows of dwellings⁴¹ under the "plain view" exception to the probable cause and warrant requirements of the fourth amendment. Because the plain view doctrine applies to "objects falling in the plain view of an officer who has a right to be in the position to have that view,"⁴² it has been argued that the observation of incriminating matter must be inadvertent and unplanned to be held a plain view.⁴³

The observation of contraband through the fence in *George* could hardly be called inadvertent. A more satisfactory conclusion is that the observation by the police of a matter that others might normally make cannot be said to be reasonably unanticipated and hence is not a search. A defendant may not claim an expectation of privacy when he has assumed the risk that the incriminating matter will be open to the public. The plain view doctrine and its inadvertence requirement would more appropriately apply to situations in which there is in fact an intrusion into an area to which the defendant has an expectation of privacy but the police have prior justification for being there through a warrant or otherwise.⁴⁴ The inadvertence requirement may then be seen as nothing more than a ban against the use of an initially justifiable intrusion as a subterfuge for observations of incriminating matter that otherwise could not have been obtained. Situations such as that in *George* involve the more basic question of whether there was any intrusion at all for fourth amendment purposes.⁴⁵

What appears to be an extravagant application of the plain view doctrine occurred in *Christian v. State*.⁴⁶ According to police testimony, an officer observed through a window what appeared to be marijuana in an apartment where officers had gone to contact occupants about a robbery of their residence. The officers left but later came back when they knew the occupants had returned. At the door, one of the officers announced that they were police, called the defendants by their names, and stated that they wanted to

39. See *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965); J. ISRAEL & W. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* 92 (1971).

40. *Casarez v. State*, 504 S.W.2d 847 (Tex. Crim. App. 1974).

41. *Turner v. State*, 499 S.W.2d 182 (Tex. Crim. App. 1973) (looking into window with no blinds or curtains is not a search).

42. *Harris v. United States*, 390 U.S. 234, 236 (1968).

43. The unanticipated discovery requirement was expressed by the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

44. See, e.g., *Nichols v. State*, 511 S.W.2d 269 (Tex. Crim. App. 1974) (probable cause to stop and arrest occupants of auto where officers had plain view of TV set in back seat); *Skunda v. State*, 508 S.W.2d 622 (Tex. Crim. App. 1974) (plain view of brown bag appearing to hold gun inside after stop of auto on probable cause).

45. In *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), the Supreme Court held that the maintaining of records by a bank at the Government's direction did not violate fourth amendment rights of the customers because there was no search or seizure. However, the customer's reasonable expectation of privacy has been held to include the expectation that his records would be used for internal banking purposes only, and hence the fourth amendment forbids law enforcement officials from obtaining them simply on request without legal process. *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). See also *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974) (defective grand jury subpoena not sufficient "legal process" for Government access).

46. 504 S.W.2d 865 (Tex. Crim. App. 1974).

talk to them. When the defendants (armed with a hammer and hatchet respectively) opened the door, both officers "from outside could see the narcotics still on the table in plain view."⁴⁷ After entering and examining the narcotics, the officers arrested the defendants and conducted a "further search" of the apartment that uncovered more narcotics. On appeal of the subsequent possession convictions of both occupants, the court rejected the defendants' contention that the warrantless search and seizure of narcotics was under the pretext that it had been left in open view.⁴⁸ Because one officer testified that the second trip to the apartment was to investigate the robbery, the court reasoned that the officers were not relying on the "plain view through the window on the first trip" but rather on the plain view of the same narcotics on the second.⁴⁹ The second observation justified an arrest for a felony and a search and seizure incident to that arrest.⁵⁰

The police officer's testimony that the reason for returning to the apartment was merely to investigate a robbery rather than to arrest for possession of narcotics seems almost incredible. But cases like *Christian* pose a problem for the court. Because conduct of the police appears reasonable under the circumstances and not motivated by bad faith, the court obviously is not inclined to censure it. However, the activity ultimately must be justified, if at all, by the specific criteria of reasonableness under the fourth amendment. Had the police relied on the first view of the marijuana, the court probably could not have justified the second intrusion without a warrant, but by eliminating the first trip from consideration, it could.⁵¹ *Christian* appears to be one of an increasing number of cases in which the court appears to be applying a general reasonableness standard to uphold a search, but must contrive a rationale for its decision under specific fourth amendment rules, which it did in this instance by seizing on the bootstrap testimony of the officers.⁵²

Probable Cause. The required quantum of evidence to justify arrests and searches is the constitutional and statutory minimum of probable cause. In

47. *Id.* at 866.

48. *Id.* at 867.

49. *Id.*

50. *Id.*

51. Reliance on the first view as establishing grounds to arrest or search would have required an explanation of the absence of a warrant. The "plain view" justification for search cannot be used as a subterfuge for deliberately delaying an arrest for the ulterior motive of viewing a particular place, or for maneuvering an arrestee into a position where incriminating evidence can be found. See notes 43-44 *supra* and accompanying text. Plain view implies that the evidence was "blundered upon" or stumbled onto by the police. See *United States v. Hand*, 497 F.2d 929 (5th Cir. 1974).

52. Police perjury, or at least distortion of the facts, is not infrequent. See *Sevilla, The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974); *Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 409 (1971). Police conduct may seem reasonable in some situations, at least from the standpoint of the police, but it may not meet per se rules derived from the general standard of reasonableness contained in the fourth amendment. Accordingly, in many cases it appears that the police, with the aid of the courts, strain to avoid rigid probable cause standards by fitting their actions into the black-letter exceptions to the warrant requirement. See, e.g., *Hampton v. State*, 511 S.W.2d 1 (Tex. Crim. App. 1974). When, as in *Hampton*, the trial court upholds the police activity, the appellate court is constrained to find some basis in the record, however meager, to justify its holding. The result may be a justification that has a strong after-the-fact appearance.

the case of arrests probable cause is reasonable grounds to believe that an offense has been committed and that the person to be arrested committed it.⁵³ For searches, probable cause requires that the items sought are connected with criminal activities, and that they will be found in the place to be searched.⁵⁴ The quantum of evidence is the same for both arrests and searches with or without warrant,⁵⁵ but warrantless arrests and searches require the court to sift through the facts of each case rather than focusing on the sufficiency of the affidavit in support of the warrant.⁵⁶

In Texas, an officer may arrest on probable cause without warrant for any offense committed in his presence.⁵⁷ However, a warrantless arrest for an offense committed outside the officer's presence is limited to felony offenses for which there is probable cause and a reasonable belief that the person to be arrested is about to escape.⁵⁸ The Texas rule is unique, however, in making an arrest warrant mandatory if it is practicable to get one. Although the Supreme Court has expressed a preference for arrest warrants, it has never held that an arrest without a warrant is unlawful because the warrant could have been obtained.

When probable cause for either an arrest or search is not based on the personal observation of a police officer, the information used to support the probable cause determination must establish unreasonable grounds to believe that the informant is a reliable or credible person, and that the information was obtained in a reliable manner.⁵⁹ Personal observation of the officer making an arrest or search or applying for a warrant suffices because his credibility may be tested,⁶⁰ as may be that of named citizens providing information.⁶¹ Most of the problems occur when police action is sought to be

53. *Beck v. Ohio*, 379 U.S. 89 (1964); TEX. CODE CRIM. PROC. ANN. arts. 14.01 (Supp. 1974), 14.02, .04 (1966).

54. *United States v. Ventresca*, 380 U.S. 102 (1965); TEX. CODE CRIM. PROC. ANN. art. 18.01 (Supp. 1974).

55. TEX. CODE CRIM. PROC. ANN. art. 18.03 (Supp. 1974) authorizes the issuance of combination warrants which authorize both a search and an arrest. *See Pecina v. State*, 516 S.W.2d 401 (Tex. Crim. App. 1974) (arrest justified by combination warrant notwithstanding officers' lack of knowledge that warrant authorized both search and arrest).

56. The United States Supreme Court has expressed a strong preference for warrants. *See United States v. Ventresca*, 380 U.S. 102 (1965); *Beck v. Ohio*, 379 U.S. 89 (1964); J. ISRAEL & W. LAFAYE, *supra* note 39, at 98-99. However, the use of form affidavits for arrest and search warrants is a common practice which the Texas court has criticized. *See, e.g., Sessions v. State*, 498 S.W.2d 933 (Tex. Crim. App. 1973). It is a well-known fact that the issuance of warrants, whether on the basis of printed forms or not, is often a perfunctory act by the magistrate that merely rubber-stamps the judgment of the police or the prosecutor, contrary to the spirit underlying the Supreme Court's preference for warrants.

57. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Supp. 1974).

58. *Id.* art. 14.04 (1966). Exigent circumstances which may dispense with the need for an arrest warrant are illustrated in *Hooper v. State*, 516 S.W.2d 941 (Tex. Crim. App. 1974).

59. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

60. The police officer's credibility may be tested in court when warrantless activity is challenged, and is thought to be assured by the oath requirement of a warrant affidavit.

61. *See Thompson & Starkman, The Citizen Informant Doctrine*, 64 J. CRIM. L.C. & P.S. 163 (1973). Unlike the anonymous police informant, "there is no reason for deeming the information self-serving or suspect and, therefore, a substantial basis for

justified on the basis of information from unnamed persons whose credibility cannot be directly tested or verified.

In *Truitt v. State*⁶² an anonymous telephone tip that defendant had left Dallas fifteen minutes earlier and was enroute to Greenville with about ten pounds of marijuana in his gold Firebird automobile was held insufficient to justify an arrest and subsequent seizure of marijuana. Over a dissent by two judges, the majority concluded that the corroboration of the details of the tip at the scene served only to establish the likelihood that the information had been gained in a reliable way. However, *before* the arrest and seizure took place, the police had no information to indicate that the informant was reliable and was being truthful. Thus, the court refused to hold that an anonymous tip may be "self-corroborating."

The standard method of establishing informer reliability is the allegation that the informer has given reliable information in the past.⁶³ Of course, alternative methods may be used, as held by the Supreme Court in *United States v. Harris*,⁶⁴ but confusion and dispute has arisen concerning just what information will justify crediting the tips of unnamed first-time informants. The Texas court has upheld affidavits which include statements to the effect that the informant had no criminal record, enjoyed a favorable reputation in the community or among his associates, and had continuous gainful employment.⁶⁵ Lack of criminal record by itself, however, is insufficient.⁶⁶ In *United States v. Acosta*⁶⁷ the Fifth Circuit read *Harris* as holding that the inability to establish the informant's reliability by an allegation of past correct information or otherwise could be offset in the case of a tip based on allegedly first-hand observation when three other factors existed together: the affiant's own knowledge of the suspect's background, the informant's declaration against penal interest, and the specificity of the information given. Consistently with the Fifth Circuit's view, the Texas court held in *Abercrombie v. State*⁶⁸ that an admission by the unnamed informant against his penal interest in a warrant affidavit for a marijuana search was insufficient in itself to support a finding that he was credible. Nor will the credibility of an informer or his information be established solely by the officer's knowledge of the bad reputation of the suspect or his previous involvement in activities related to the contemplated arrest or search. The officer's knowledge in *Rushing v.*

crediting the out-of-court statement exists by the mere fact that the information is furnished by a [named] citizen." *Id.* at 167.

62. 505 S.W.2d 594 (Tex. Crim. App. 1974).

63. *See, e.g.,* *Draper v. United States*, 358 U.S. 307 (1959); *Morgan v. State*, 516 S.W.2d 188 (Tex. Crim. App. 1974) (informant had given reliable information four times in the past); *Vera v. State*, 499 S.W.2d 168 (Tex. Crim. App. 1973). However, where the affidavit does not indicate that the reliable information came from the informer himself, it is insufficient. *Ashmore v. State*, 507 S.W.2d 221 (Tex. Crim. App. 1974).

64. 403 U.S. 573 (1971).

65. *See* *Caldarera v. State*, 504 S.W.2d 914 (Tex. Crim. App. 1974), and cases discussed therein.

66. *Id.*

67. 501 F.2d 1330 (5th Cir. 1974).

68. No. 48,334 (Tex. Crim. App., July 24, 1974).

*State*⁶⁹ that the defendant was on probation for a drug violation combined with an unverified tip that marijuana had been seen in the possession of the defendant and that he and a named companion were in a certain color and make pickup truck was held not enough to justify a warrantless arrest. The court acknowledged that the credibility of information from a completely unknown and untested informer was increased by knowledge of defendant's reputation, but held that "it would be relevant as *one element* helping to produce probable cause" if it "were bolstered by numerous other factors, such as were present in *Harris*."⁷⁰

Stop-and-Frisk. Seizure of weapons or evidence connected with criminal activity is often sought to be justified on less than probable cause or without a warrant under the "stop-and frisk" rationale of *Terry v. Ohio*⁷¹ and *Adams v. Williams*.⁷² This exception to the probable cause standard allows limited on-the-street detentions for investigation based on "reasonable suspicion that criminal activity is afoot" and permits limited protective searches of detained persons whom the officer reasonably suspects are armed and dangerous.⁷³ In *Wood v. State*⁷⁴ a "pat-down" of a passenger in an automobile, which had been stopped for a traffic violation, that yielded a roll of coins subsequently used at his murder trial was upheld. The officer testified that the defendant, who appeared to be under the influence of drugs or alcohol and who could produce no identification, was frisked after he was asked to get out of the car. Because the officer said he could not see the defendant's belt under his coat and because he felt that "it was a very dangerous time when a person is alighting from the vehicle in any traffic situation at that time of night,"⁷⁵ he was found to have had a reasonable belief that the passenger was armed and dangerous.⁷⁶ Cases like *Wood* illustrate the "hydraulic pressure" on the fourth amendment created by the stop-and-frisk exception to the probable cause requirement.⁷⁷ The facts relied on were the passenger's slurred speech, lack of identification, and the officer's inability to see his belt because of his coat, but the court appears to rely heavily on the officer's testimony that he felt such situations were always very dangerous.⁷⁸ Under the *Terry* stop-and-frisk rationale, the officer's subjective view that a danger exists sup-

69. 500 S.W.2d 667 (Tex. Crim. App. 1973).

70. *Id.* at 672 (emphasis by the court). An officer is entitled to act on information available to another requesting officer if the requesting officer has probable cause. *Whitely v. Warden*, 401 U.S. 560 (1971); *Turner v. State*, 499 S.W.2d 182 (Tex. Crim. App. 1973). When the state does not show that the information available to the requesting officer justified the police activity, the activity of the officer acting on request cannot be upheld. *Colston v. State*, 511 S.W.2d 10 (Tex. Crim. App. 1974).

71. 392 U.S. 1 (1968).

72. 407 U.S. 143 (1972).

73. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

74. 515 S.W.2d 300 (Tex. Crim. App. 1974).

75. *Id.* at 304.

76. *Id.* at 306.

77. See *Adams v. Williams*, 407 U.S. 143, 161 (1972) (Marshall, J., dissenting).

78. In concurring, Judge Douglas noted that the dangerous nature of the situation is common knowledge. He found *Wood* indistinguishable from *Wilson v. State*, 511 S.W.2d 531 (Tex. Crim. App. 1974), and concluded that "the fact that one officer says it is a dangerous situation in one case and the officer in another case does not say so should not be the difference between an affirmance and a reversal." 515 S.W.2d at 308.

posedly is not controlling, and it seems questionable that on the facts in *Wood* the average (or reasonable) police officer would have had any real fear of danger to himself or others. Perhaps the result in *Wood* is based on an unexpressed feeling that the officer's perception of danger would be commonly shared by officers on patrol alone. In *Wilson v. State*,⁷⁹ for example, the court refused to allow a movement by the automobile passenger toward the area between the two front seats without more to justify an officer's search of the front seat after the man was outside the vehicle with the officer's partner. In addition, the officer testified that he was not in fear of his life at the time he conducted the search of the car, and the defendant "was not sufficiently close to his vehicle that he could have conceivably lunged for a weapon."⁸⁰

The reasonable suspicion that a person is armed and dangerous may arise immediately after the forced confrontation, justifying an immediate seizure without a pat-down.⁸¹ However, in *Keah v. State*⁸² the officer's reaching into defendant's pocket to find and immediately remove a "large bulge" was improper absent any testimony that the officer thought it was a weapon, that the defendant was dangerous, or that the safety of the officers or others was in danger. It is obvious that in stop-and-frisk cases, as in other search and seizure situations, the testimony of the officer is critical.⁸³ Obviously there may be cases in which the officer's testimony as to his belief is patently unreasonable. However, the court's emphasis on the subjective belief of the officer indicates that the propriety of these searches may well depend in many cases on how well coached the officer is before he testifies.⁸⁴

Search Warrants. In addition to the short time limit for execution of search warrants—three days under the Code,⁸⁵ the information showing probable cause for issuance of the warrant must be fresh as the passage of time increases the likelihood of removal from the place to be searched. Hence, a statement of the time when the facts giving rise to probable cause took place ordinarily will be required.⁸⁶ However, a split decision in *Powell v. State*⁸⁷ found acceptable an affidavit that provided only one date—the date when the information was received by the affiant—and no indication of the date the informant actually gathered the information. The reasoning of the majority apparently is to be found in one statement: "It is not an unreasonable deduction for the magistrate to ascertain the closeness of time sufficient to conclude from this affidavit that probable cause did exist since the offense was alleged to have been committed on the same day as the affiant had

79. 511 S.W.2d 531 (Tex. Crim. App. 1974).

80. *Id.* at 533.

81. *Adams v. Williams*, 407 U.S. 143 (1972).

82. 508 S.W.2d 836 (Tex. Crim. App. 1974).

83. *See, e.g., Davidow, Criminal Law and Procedure, Annual Survey of Texas Law* 28 Sw. L.J. 268, 269 n.10 (1974). *See also* note 52 *supra*.

84. For example, in *Hampton v. State*, 511 S.W.2d 1 (Tex. Crim. App. 1974), the state nearly lost a search case because it was not until cross-examination by the defense attorney on the motion to suppress that the officer mentioned a traffic offense (driving in two lanes) that was used by the court to uphold the stop of the searched vehicle.

85. TEX. CODE CRIM. PROC. ANN. art. 18.06 (Supp. 1974).

86. J. ISRAEL & W. LAFAVE, *supra* note 39, at 109-11.

87. 505 S.W.2d 585 (Tex. Crim. App. 1974) (heroin possession).

spoken to his informer."⁸⁸ Judge Odom dissented on the ground that although events related by the informant could have occurred on the date he gave the information to the affiant, they could just as likely have occurred on any date before.⁸⁹ It appears that the only basis for the magistrate's conclusion is the affiant's own conclusion that the offense was committed on the same day he received the information. On the basis of the information provided, this could have been based merely on an assumption made by the affiant.

The constitutional⁹⁰ and Code requirement⁹¹ that a search warrant describe with particularity the person or place to be searched and the things to be seized is not strictly applied. For example, a warrant describing the premises to be searched as the residence occupied by a named person located at a particular street address and "all other structures, vehicles and places on the premises" is specific enough to justify the search of a U-haul trailer found in the front yard.⁹² Moreover, a technical error in the description of the house to be searched, such as an incorrect street number, is not fatal when the full description of the premises is reasonably adequate to inform the officers of the location and the place to be searched.⁹³ The name or description of the person in charge of the place to be searched is no longer required under the Code.⁹⁴ *Villegas v. State*⁹⁵ held that a description of the person in charge of the premises as "one Latin American male known only as Pete" was sufficient under the old requirement when the warrant and affidavit alleged that the full name of the occupant was unknown. Other cases have held that ethnic origin or surnames alone with no allegation that a given name was unknown were insufficient.⁹⁶ These cases no doubt are still valid precedent in cases of a warrant to search a person rather than a place under the new Code provision.⁹⁷

The traditional requirement that a search warrant describe the things to be seized must be qualified by the "plain view" and "mere evidence" exceptions to the warrant requirement. Items not named in a warrant, including "mere evidence" of a crime, discovered and seized during the execution of the warrant are normally admitted under the "plain view" exception.⁹⁸ In *Chambers v. State*⁹⁹ the court upheld the seizure of a shotgun, burned wallets,

88. *Id.* at 587.

89. *Id.* at 588 (Odom, J., dissenting).

90. *Marron v. United States*, 275 U.S. 192 (1927).

91. TEX. CODE CRIM. PROC. ANN. art. 18.04 (Supp. 1974).

92. *Pizzalato v. State*, 513 S.W.2d 566 (Tex. Crim. App. 1974).

93. *Suzman v. State*, 508 S.W.2d 375 (Tex. Crim. App. 1974). *See also* *Tyra v. State*, 496 S.W.2d 75 (Tex. Crim. App. 1973).

94. The former article 18.13 has been repealed and replaced by TEX. CODE CRIM. PROC. ANN. art. 18.04 (Supp. 1974).

95. 509 S.W.2d 314 (Tex. Crim. App. 1974).

96. *Brown v. State*, 136 Tex. Crim. 61, 124 S.W.2d 124 (1939); *Manly v. State*, 120 Tex. Crim. 212, 48 S.W.2d 256 (1932); *Aguirre v. State*, 31 Tex. Crim. 519, 7 S.W.2d 76 (1928).

97. TEX. CODE CRIM. PROC. ANN. art. 18.04 (Supp. 1974) provides that "[a] search warrant . . . shall be sufficient if it . . . name or describe, as near as may be, the person, place, or thing to be searched . . ."

98. *See* notes 37-47 *supra* and accompanying text. Authority to seize "mere evidence" is provided by *Warden v. Hayden*, 387 U.S. 294 (1967).

99. 508 S.W.2d 348 (Tex. Crim. App. 1974).

and a bloody blanket by officers investigating a double murder who had only a search warrant for an illegal weapon. The court relied on the Supreme Court's decision in *Warden v. Hayden*,¹⁰⁰ wherein the seizure of merely evidentiary items in addition to fruits or instrumentalities of a crime was approved. The only limitation is that the officers reasonably believe that at least some nexus exists between the items of evidence seized and the criminal activity being investigated.¹⁰¹ The basis for believing that the seized evidence is reasonably related to the offense for which the warrant was issued must be apparent from mere observation under the "plain view" exception to the requirement of a warrant.¹⁰² In other words, the officers may not seize anything which might be evidence and later justify the seizure when only by further examination are the items in fact revealed to be evidence of a crime.

Exceptions to the Warrant Requirement for Searches. A well-established part of fourth amendment law is that a warrantless search is per se unreasonable unless an emergency or exigent circumstances exist which make the obtaining of a warrant impracticable.¹⁰³ The exigent circumstances escape valve has spawned a rather large number of general classes of cases which constitute exceptions to the warrant requirement. As a practical matter, since most searches are conducted without warrants, the exceptions themselves have tended to become the rule.

Consent Searches. A well-established and frequently used exception to both the probable cause and warrant requirements is consent to a police intrusion by a person who has an interest in the premises searched or items seized. The ultimate validity of consent to searches either by the defendant himself or a third person is determined by the same test—whether the consent is voluntary.¹⁰⁴ Although many courts had previously assumed that the validity of consent to a search by the defendant against whom its fruits were used was based on the concept of waiver,¹⁰⁵ the Supreme Court in *Schneckloth v. Bustamonte*¹⁰⁶ defined the test as one of voluntariness rather than "knowing and intelligent" waiver of the right not to be searched. The effect of *Schneckloth* is to make the burden of proof on the state less onerous than

100. 387 U.S. 294 (1967).

101. 508 S.W.2d at 352. See also *Chase v. State*, 508 S.W.2d 605 (Tex. Crim. App.), cert. denied, 95 S. Ct. 71, 42 L. Ed. 2d 68 (1974), in which the Texas court held that the Texas search warrant statutes do not preclude warrants for search and seizure of merely evidentiary items.

102. *Nicholas v. State*, 502 S.W.2d 169 (Tex. Crim. App. 1973).

103. *Katz v. United States*, 389 U.S. 347 (1967); *White v. State*, No. 47,507 (Tex. Crim. App., July 2, 1974); *Stoddard v. State*, 475 S.W.2d 744 (Tex. Crim. App. 1972).

104. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), discussed in *Davidow*, supra note 83, at 268-69.

105. Although language is to be found in Texas cases that a consent to search is a "waiver" of the constitutional right to be free of a warrantless search, the prosecution must show by "clear and convincing evidence that the consent was freely and voluntarily given." *Potts v. State*, 500 S.W.2d 523, 525 (Tex. Crim. App. 1973). See also *Ribble v. State*, 503 S.W.2d 551, 553 (Tex. Crim. App. 1974).

106. 412 U.S. 218 (1973).

when it must demonstrate waiver of constitutional rights.¹⁰⁷ To establish a prima facie case of consent the state need not show knowledge of the right to refuse, which now is merely a factor to be taken into account.¹⁰⁸ Although a denial of guilt might appear to be patently inconsistent with a finding of consent to a search for incriminating matter, the court does not presume lack of consent from such a denial.¹⁰⁹ Nor is lack of consent presumed from custody or the fact that incriminating articles were easily located in the place searched.¹¹⁰ The defendant's objective acquiescence is sufficient. Where an officer does inform the defendant of his right to refuse the search, but the defendant nonetheless grants permission, his misguided notion that the fruits of the search will not be used as evidence will not vitiate the consent.¹¹¹

A consent form may be used by the police in anticipation of future challenges to the allegedly permissive search as in *Gentile v. United States*.¹¹² There the defendant, who had been arrested for burglary and had admitted that stolen articles were in his apartment, signed a consent form which authorized the police "to take from my premises any property, any letters, papers, material, or any other property or things which they desire as evidence for criminal prosecution in the case or cases now under investigation." In the ensuing search, the officers found, *inter alia*, a check that formed the basis of a federal conviction for mail theft. Justice Douglas, dissenting from the denial of certiorari to review the conviction,¹¹³ expressed his feeling that "procuring consent from persons in police custody should be viewed carefully and critically."¹¹⁴ His reasons for requiring close scrutiny of "consent" forms bears repeating:

By proceeding on the basis of a 'consent' form the police circumvent three important protections of the warrant procedure. First, they avoid submitting to a magistrate's independent assessment of probable cause. Second, they are spared the necessity of making a record, in the form of an affidavit sworn to prior to the search, that guards against the possibility that an *ex post* justification will be based upon what the search turns up. Finally, to the extent the police use, as they did here, a boilerplate consent form, they are relieved of the particularity requirement of the warrant.¹¹⁵

107. Decisions like *Schneckloth* indicate a fundamental shift in interpretation of the fourth amendment. If the validity of consent searches is not based on waiver, then presumably the defendant is not waiving a fundamental constitutional right to privacy by consenting to a search. He must be foregoing only a protection against unreasonable searches, rather than a right not to be searched without a warrant.

108. 412 U.S. at 227.

109. See *Potts v. State*, 500 S.W.2d 523 (Tex. Crim. App. 1973).

110. See also *Ribble v. State*, 503 S.W.2d 551 (Tex. Crim. App. 1974); *Silva v. State*, 499 S.W.2d 147 (Tex. Crim. App. 1973). But see *Truitt v. State*, 505 S.W.2d 594, 598 (Tex. Crim. App. 1974); *Fry v. State*, 493 S.W.2d 758 (Tex. Crim. App. 1973) (dissenting opinion).

111. *Potts v. State*, 500 S.W.2d 523 (Tex. Crim. App. 1973).

112. 493 F.2d 1404 (5th Cir. 1973), *cert. denied*, 419 U.S. 979 (1974).

113. *Gentile v. United States*, 419 U.S. 979 (1974) (Douglas, J., dissenting).

114. *Id.* at 982.

115. *Id.*

On the question of the effectiveness against the defendant of a consent to search by a third party, the Supreme Court concluded in *United States v. Matlock*¹¹⁶ that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."¹¹⁷ Accordingly, the Court upheld the validity of a woman's consent to the search of a room in which she had been living with the defendant. What "common authority" is has not been clearly defined, but it is not to be determined by reference to property or agency concepts. Third-party searches are justified by the expectation of privacy-assumption of risk test which determines whether, as to the defendant, a technical search actually occurred.¹¹⁸ The effectiveness of the third party consent as to the defendant "is concomitant to the reduction in privacy one expects when [use of] an area is shared with another."¹¹⁹ The defendant will be held to have assumed the risk of disclosure where there is a third person with at least "equal control over and equal use of the premises being searched"¹²⁰ and possibly less. It is a fact question whether the consenting party has the right to use and occupy a particular area to justify his consent to a search of that area.¹²¹

Searches Incident to Arrest. Emphasizing the language in *Gustafson v. Florida*¹²² that a custodial arrest for a traffic violation justified "a full search of petitioner's person incident to that lawful arrest,"¹²³ a majority of the court in *Wilson v. State*¹²⁴ refused to hold that the fact of a traffic arrest alone authorized a search of the immediate vicinity of the arrested person, namely, the area around the driver's seat. This view of the search-incident-to-traffic arrest exception is not shared by all jurisdictions, and arguably is inconsistent with the arm's reach limitation of the holding in *Chimel v. California*.¹²⁵ However, it could be justified as a means of preventing the use of traffic arrests as a subterfuge for a search of the offender's automobile.¹²⁶ The apparent shift of the Supreme Court toward emphasis of the fact of custody itself as the basis for the search incident to arrest exception, rather than on the need to protect the officer or to prevent destruction of evidence, was further indicated in *United States v. Edwards*.¹²⁷ There the Supreme Court upheld a seizure and examination of an arrestee's clothing ten hours after he was taken into custody because the fact that would have justified an earlier

116. 415 U.S. 164 (1974).

117. *Id.* at 171.

118. *Frazier v. Cupp*, 394 U.S. 731 (1969); see *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

119. *Lowery v. State*, 499 S.W.2d 160, 166 (Tex. Crim. App. 1973).

120. *Swift v. State*, 509 S.W.2d 586 (Tex. Crim. App. 1974); *Morrison v. State*, 508 S.W.2d 827 (Tex. Crim. App. 1974).

121. *Morrison v. State*, 508 S.W.2d 827, 828 (Tex. Crim. App. 1974).

122. 414 U.S. 260 (1973), discussed in Davidow, *supra* note 83, at 276-77.

123. 414 U.S. at 266.

124. 511 S.W.2d 531 (Tex. Crim. App. 1974).

125. 395 U.S. 752 (1969).

126. See *United States v. Robinson*, 414 U.S. 218, 238 (1973) (Marshall, J., dissenting).

127. 415 U.S. 800 (1974).

search, namely his in-custody status, still existed when the later search occurred.

Automobile Searches. Another foray by the Supreme Court into the auto search problem, this time in *Cardwell v. Lewis*,¹²⁸ failed to clarify the "moving vehicle" or "existent circumstances" exception to the general warrant requirement for searches. No clear-cut opinion on the merits emerged, but the deep philosophical split among the members of the Court was revealed once again. The four-justice plurality upheld the warrantless seizure of the arrested defendant's car from a public parking lot and an examination the next day for tire and exterior paint matchups. In the plurality opinion, Justice Blackmun suggested that the paint scrapings and tire examination did not in themselves amount to a search. However, because the auto itself had been impounded before the detailed examination and testing, he also needed to justify its warrantless seizure as well. He did so by concluding that exigent circumstances existed which justified, under the Court's earlier holding in *Chambers v. Maroney*,¹²⁹ dispensation from the warrant requirement. The circumstances were the likelihood that the car would be removed and its value as evidence destroyed. *Chambers v. Maroney* had held that where an immediate search of an automobile without a warrant would have been justified on the street because of the existence of probable cause and exigent circumstances, its immediate seizure and a delayed search at the stationhouse was permissible. The exigent circumstances were provided in *Chambers* by the car's mobility, but the Court bolstered its approval of the delayed search as did Justice Blackmun in *Cardwell* by noting that an immediate search in a dark parking lot in the middle of the night was impractical because of the potential danger to the officers and the inability to conduct a careful search.

The dissenting opinion in *Cardwell* emphasized that in the earlier decisions carving out the so-called automobile exception, exigent circumstances were provided as in *Chambers* by "a moving automobile on the open road."¹³⁰ Referring to the plurality's exigencies as mystical, Justice Stewart thought the police had ample time to obtain a warrant and that there was "no reasonable likelihood that the [immobilized] automobile would or could be moved . . ." ¹³¹ He suggested that the real basis of the plurality opinion was a dissatisfaction with the exigent circumstances limitation, as indicated by its strong emphasis on the unique nature of automobiles. Indeed, at least one other recent decision of the Court concerning automobile searches, *Cady v. Dombrowski*,¹³² came close to establishing a general standard of reasonableness for automobile searches in which the practicability of obtaining a warrant is irrelevant. Nevertheless, because the exigent circumstances exception still has superficial vitality, the state courts must continue to deal with it.

128. 417 U.S. 583 (1974).

129. 399 U.S. 42 (1970).

130. 417 U.S. at 597 (Stewart, J., dissenting).

131. *Id.* at 598.

132. 413 U.S. 266 (1973), noted in 35 U. PITT. L. REV. 712 (1974), authorizing search as a protective measure.

In *Henson v. State* three members of the Texas court concurred in a statement that a warrantless search of an automobile trunk is authorized if sufficient probable cause exists.¹³³ However, this statement is qualified by *White v. State*¹³⁴ as applying only to vehicles stopped on the highway which, because of their mobility, provide the exigencies that justify an immediate search. The state still must show exigent circumstances that make the obtaining of a warrant impracticable when the automobile is already stopped and is not on a highway. In *White* the defendant was arrested at the drive-in window of a bank for passing forged checks and was told to move his car out of the way of the entrance. While he was doing so, he was seen making a hand movement toward the glove compartment and then toward the seat as if attempting to stuff something between the seats. The defendant was then taken to the police station by one police officer while another drove his car there. The car was not searched until after an interrogation of from thirty to forty-five minutes, during which the defendant refused to consent to its search. The Texas Court of Criminal Appeals held that four wrinkled checks found stuffed between the fold-down console and the front seat were improperly admitted at trial. Commissioner Green's opinion, approved by all but Judge Douglas, found a total lack of any exigent circumstances which made the obtaining of a warrant impracticable, because of "no showing in the evidence of any reasonable likelihood that the automobile would be moved."¹³⁵ The court might well reverse itself in this case by finding sufficient exigencies under *Chambers v. Maroney*. The inherent mobility of the automobile existed at the scene before the officers took it to the station and would apparently have justified an immediate search even though the officers chose not to do so. The propriety of the delayed search in Commissioner Green's opinion appears to depend on whether a good reason to postpone the search existed. In *White*, unlike *Chambers*, just as careful a search with no greater hazards than a search at the station apparently could have been conducted at the scene.

Other Exigent Circumstances. Acting on two calls concerning a burglary, the police in *Nichols v. State*¹³⁶ were advised by a woman that a man had burglarized her home, attempted to rape her, and had stolen a pistol. The officers were also told by a man at the scene that he and his wife had seen a man climbing through a window of another house. When the officers demanded entrance to that house, and received no answer, an officer went through a window and found the defendant inside. During a subsequent full search of the house to determine if other persons were present, an officer found the gun earlier taken from the complaining witness. The court con-

^{133.} 502 S.W.2d 719, 721 (Tex. Crim. App. 1974), citing *Fry v. State*, 493 S.W.2d 758 (Tex. Crim. App. 1972) as authority. *Fry* did not distinguish, as it should have, "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." Davidow, *supra* note 83, at 275.

^{134.} No. 47,507 (Tex. Crim. App., July 2, 1974).

^{135.} *Id.* at 2.

^{136.} 501 S.W.2d 107 (Tex. Crim. App. 1973).

cluded that the search of the area beyond the immediate vicinity of the arrestee was not prohibited by *Chimel v. California*.¹³⁷ Noting its prior holding that *Chimel* prohibited only routine searches of the area beyond the arrestee's reach, the court concluded that *Chimel* did not prohibit broader searches of the premises by the police to protect themselves from possible harm by other persons who might be present. The leading Supreme Court case of *Warden v. Hayden*¹³⁸ is not direct authority for the holding in *Nichols* because the search of a house in that case was justified to find the defendant, and before his capture to search for weapons or other means of resistance or escape. In *Nichols* the search of the house took place after defendant's arrest, but presumably a full search for protection of the officers is justifiable even after an arrest if at least a reasonable possibility exists that accomplices or others are present who might assist him.

The courts obviously do not want search and seizure law to be an obstacle to performance by the officers of their duty of protection of the public. Accordingly, a warrantless search by an officer needing to take immediate action in the public safety, and not for the specific purpose of criminal investigation is permissible.¹³⁹ For example, an immediate warrantless search of a person may be justified by a medical emergency such as in *Perez v. State*.¹⁴⁰ There, an officer was summoned by a hotel manager who had been unable to revive an unconscious man lying in a toilet stall. The officer found a warm bottle cap, a balloon and eyedropper on the floor next to the man and saw fresh needle marks on his arm. The officer's search of the man's pockets that revealed heroin was held justifiable by either probable cause or the exigent circumstances doctrine. Although the defendant was not technically arrested until after the search, it probably was sufficiently contemporaneous to be justified as a search incident to a lawful arrest.¹⁴¹ Probable cause for the arrest was established by the observation of narcotics paraphernalia, the fresh needle mark, and defendant's unconscious state. However, the court stated that even without probable cause a search to find identification, medical history, or the names of relatives, friends, and physicians was proper under the emergency or exigent circumstances doctrine.¹⁴²

The exigent circumstances cases present potential factual problems similar to those encountered in many warrantless search cases as to the actual purpose of the officer at the time he conducted the search. The possibility always exists that the exigent circumstances may not have actually motivated the officer's decision to search, but they are used as an after-the-fact, and hence improper, justification for an otherwise impermissible search. However, even criminal investigatory activity by the police may not require search warrants, at least when it is characterized as pursuant to their general duty of

137. 395 U.S. 752 (1969).

138. 387 U.S. 294 (1967).

139. See TEX. CODE CRIM. PROC. ANN. art. 2.13 (1966).

140. 514 S.W.2d 748 (Tex. Crim. App. 1974).

141. Probable cause to search the person in possession of contraband cases would be the same quantum of proof necessary for arrest.

142. 514 S.W.2d at 749.

investigation at the scene of a crime.¹⁴³

B. Admissions and Confessions

Recent decisions of the United States Supreme Court concerning the admissibility of confessions reflect a tendency, similar to that in the fourth amendment cases, toward restriction of the scope of the exclusionary rule of the fifth amendment. Most recently, the Court strongly indicated in *Michigan v. Tucker*¹⁴⁴ that *Miranda v. Arizona*,¹⁴⁵ which established specific guidelines for protection of the privilege against self-incrimination, may be modified and perhaps overruled. In *Tucker* the Court held that a witness's testimony that was obtained through information given in a confession not preceded by complete *Miranda* warnings did not violate the defendant's privilege, at least in the absence of a showing of involuntariness or bad faith by the police. What is significant in *Tucker* is the majority's indication that the warnings prescribed in *Miranda* are nothing more than prophylactic rules in aid of the constitutional privilege rather than part of the privilege.¹⁴⁶ Regardless of *Miranda*'s ultimate fate, *Tucker* provides a basis for avoiding a literal black-letter application of the warning requirement.¹⁴⁷

The warning requirements of *Miranda* apply to station-house interrogations where the potentiality for compulsion is clear. However, they also apply outside the police station to situations in which the person interrogated is "deprived of his freedom of action in any significant way,"¹⁴⁸ even short of a formal arrest. In *Ancira v. State*¹⁴⁹ the defendant was not formally arrested but was questioned by the officers during a ride in a police car. The court held that the questioning was custodial-type interrogation because it occurred in a situation in which the "potential for compulsion existed" and after the "focus of the investigation had finally centered on the defendant."¹⁵⁰ The test of custody apparently is objective and depends on whether the investigation had focused on the defendant or whether the reasonable person would conclude that he was under arrest or otherwise not free to leave. In other words, although both are relevant, neither the questioning officers' intent nor

143. *Tocher v. State*, 501 S.W.2d 921 (Tex. Crim. App. 1973).

144. 417 U.S. 433 (1974).

145. 384 U.S. 436 (1966).

146. The Court stated that the *Miranda* rules established a set of "procedural safeguards" that "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974).

147. Arguably *Miranda* warnings should not be required in all cases, for example, to an attorney specializing in criminal cases who is arrested for a crime. In any event, it appears that a "reasonableness" approach is becoming standard in fifth amendment law. In *United States v. Castellana*, 500 F.2d 325 (5th Cir. 1974), a question to an arrested defendant whether he had weapons within reach was found not to be an interrogation under *Miranda* because it was not an attempt to elicit evidence of a crime but a bona fide and minimally offensive security measure consistent with the stop-and-frisk rationale of *Terry v. Ohio*, 392 U.S. 1 (1968).

148. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

149. 516 S.W.2d 924 (Tex. Crim. App. 1974).

150. *Id.* at 926.

the questioned person's belief will necessarily make the interrogation custodial.¹⁵¹

When a statement is elicited from the defendant in circumstances to which *Miranda* is applicable, the state has a "heavy burden" to demonstrate a knowing and intelligent waiver of the privilege against self-incrimination and the accompanying right to counsel.¹⁵² As a practical matter, when a court considers the question of waiver, it makes the same kind of case-by-case analysis of the facts as is made when the voluntariness of the statement itself is challenged or when consent to search is at issue.¹⁵³ Under this totality of circumstances test, the state usually is able to satisfy this heavy burden. In *Sweiberg v. State*¹⁵⁴ the defendant refused to make any statement without consulting an attorney, whereupon the officers stopped interrogating him. However, after the defendant was urged to talk by a girl friend and a military policeman, and was again given the *Miranda* warnings, he made a statement which the court held was admissible. Thus, a request for an attorney or reluctance to speak will not forever bar further interrogation, but at some point the continued issuance of warnings could constitute coercion which would make any purported waiver meaningless.¹⁵⁵

Assuming a valid waiver, an officer's subsequent conduct may, however, invalidate the confession under the due process clause. For example, in *St. Jules v. Beto*¹⁵⁶ a federal district court held that a county officer's promise to a burglary suspect that if he admitted a series of burglaries he would be tried for only one of them amounted to coercion and required suppression of the suspect's confession to a crime in a nearby city. However, mere admonitions to the suspect, statements of the interrogating officer's opinion, or assurances not amounting to a promise concerning ultimate disposition of the charges may not amount to improper inducement.¹⁵⁷ In determining both the existence of a waiver of *Miranda* rights and the voluntariness of the suspect's statement, the focal point of the inquiry is the suspect's subjective state of mind, but the intensity of the police activity and its probable effect on the average person may ultimately be the controlling factor.¹⁵⁸

151. See *Brown v. Beto*, 468 F.2d 1284 (5th Cir. 1972); cf. *Wussow v. State*, 507 S.W.2d 792 (Tex. Crim. App. 1974).

152. See, e.g., *Sweiberg v. State*, 511 S.W.2d 50, 53 (Tex. Crim. App. 1974).

153. See, e.g., *Moreno v. State*, 511 S.W.2d 273 (Tex. Crim. App. 1974); *Hughes v. State*, 506 S.W.2d 625 (Tex. Crim. App. 1974).

154. 511 S.W.2d 50 (Tex. Crim. App. 1974).

155. For other change-of-mind cases in which the admissibility of confessions were upheld, see *Brown v. State*, 508 S.W.2d 91 (Tex. Crim. App. 1974); *Mitchell v. State*, 503 S.W.2d 562 (Tex. Crim. App. 1974). The United States Supreme Court has granted certiorari in a renewed questioning case. See *Michigan v. Mosely*, 95 S. Ct. 801, 45 L. Ed. 2d 819 (1975) (No. 74-653).

156. 371 F. Supp. 470 (S.D. Tex. 1974).

157. See *United States v. Barfield*, 507 F.2d 53 (5th Cir. 1975); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). In *Barfield* the Fifth Circuit held that statements to the suspect that it would be in his best interest to tell the truth, and that otherwise he might be left "holding the bag" did not make the subsequent confession involuntary. 507 F.2d at 55-56.

158. In the confession cases, the courts cannot ignore the likelihood that the defendant's testimony concerning voluntariness-waiver will be self-serving. Hence, the defendant will have difficulty establishing that his subjective intent was different from that of an average person under the circumstances.

Under article 38.22 of the Texas Code of Criminal Procedure, out-of-court oral statements made by the accused are inadmissible unless they lead to evidence of guilt or are the "res gestae of the arrest or of the offense."¹⁵⁹ The rule apparently is based on an assumption that oral confessions not made in court are inherently unreliable except when the circumstances triggering either of the exceptions provide independent corroboration.¹⁶⁰ The *res gestae* exception, which applies to statements that are a "natural and spontaneous outgrowth" of the traumatic event of a criminal offense or arrest,¹⁶¹ has been the most troublesome. By definition *res gestae* could apply to statements made by persons either before or after being placed in custody. When applied to situations in which statements are made by defendant in custody but before interrogation, the *res gestae* exception closely resembles the volunteered statement exception of *Miranda*.¹⁶² An admission blurted out by a person confronted or restrained by the police without prompting should be admissible under *Miranda* because a prerequisite of its application, an interrogation, is absent. The absence of interrogation should support a finding that the statement also is admissible under the *res gestae* exception as being spontaneous and the product of the trauma of either the offense or the arrest.

Considerable confusion has occurred concerning the relationship of the *res gestae* exception to the constitutional limitations of *Miranda* in situations in which statements are made by an accused after in-custody questioning has begun. Contrary to most other courts, the Texas court will not necessarily exclude all unwarned statements made by an accused simply because they are made during an in-custody interrogation due to its interpretation of the *res gestae* exception. Statements of an accused in apparent response to questioning may be held in Texas to be the result of a spontaneous reaction to the stimulus of the arrest or the offense, rather than a desire or compulsion to respond to the questioning.¹⁶³ The Texas court has repeatedly emphasized that the *res gestae* exception is "superior to, independent of, and not limited by [other] rules" concerning the admissibility of out-of-court statements of an accused.¹⁶⁴ However, this past year a majority of the court in *Smith v. State*¹⁶⁵ concluded that the *res gestae* exception could not be applied in place of *Miranda* to make statements admissible that otherwise must be suppressed because of a constitutional violation. It should be noted, however, that the accused's admission in *Smith* was found to be not *res gestae* anyway because it was a "direct and responsive answer to in-custody interrogation" not preceded by adequate warnings.¹⁶⁶ Subsequent decisions of the

159. TEX. CODE CRIM. PROC. ANN. arts. 38.22(1)(a), (e)-(f) (Supp. 1974).

160. See *Butler v. State*, 493 S.W.2d 190, 197-98 (Tex. Crim. App. 1973).

161. See *Smith v. State*, 514 S.W.2d 749, 752 (Tex. Crim. App. 1974).

162. See Larkin, *Confessions in Texas Revisited*, 3 TEX. TECH L. REV. 55, 72-74 (1971).

163. See *Miles v. State*, 488 S.W.2d 790 (Tex. Crim. App. 1972), discussed in Davidow, *supra* note 83, at 278. See also *Smith v. State*, 507 S.W.2d 779, 781 (Tex. Crim. App. 1974) (Morrison, J., dissenting).

164. *Pilcher v. State*, 503 S.W.2d 547, 549 (Tex. Crim. App. 1974), and cases cited therein.

165. 507 S.W.2d 779 (Tex. Crim. App. 1974).

166. *Id.* at 781.

court indicate that the majority opinion in *Smith* should not be read as making the *res gestae* exception irrelevant in situations to which *Miranda* is applicable.¹⁶⁷ If *Miranda* is interpreted as requiring exclusion of only those statements that are the *product* of in-custody interrogation, the *res gestae* rule does not conflict with *Miranda*. Because the rule purports to allow only those statements that are the product not of the interrogation but of other factors, it could be justified in the context of in-custody interrogation as nothing more than a local test of *Miranda*'s applicability.¹⁶⁸

The court reaffirmed its position under the general rule of article 38.22¹⁶⁹ that a confession not admissible under the statute on the issue of guilt is inadmissible for any purpose, including impeachment of the testifying defendant.¹⁷⁰ However, an attempt by the defendant to use part of an inadmissible statement to raise favorable inferences in his behalf may allow the state to introduce the balance of the statement under the Texas version of the old "open door" doctrine.¹⁷¹ For example, if a witness for the defendant were to testify that the defendant told investigating officers he wanted to tell the truth, it would not be error for the state to question the witness concerning the defendant's version of the truth.¹⁷² The ban against the state's use of the statement will not be extended to allow the defendant to create a false or misleading impression by giving only a partial or one-sided account.¹⁷³ Using analogous reasoning, the Fifth Circuit has even held that a defendant's silence after arrest may be admissible to refute the impression created by his testimony at trial that he cooperated with the authorities.¹⁷⁴ As yet, the Texas court has not considered this question,¹⁷⁵ but arguably the court's reasoning that its statutory rule on confessions prevents impeachment by otherwise inadmissible confessions would be inapplicable to impeachment by silence.

The Texas courts also have had occasion to apply other statutory rules relating to out-of-court admissions of the defendant. In *Ballard v. State* the Texas Court of Criminal Appeals held that the Code's prohibition against admitting statements of an accused to a court-appointed psychiatrist on the issue

167. *Hill v. State*, 518 S.W.2d 810 (Tex. Crim. App. 1975); *Davis v. State*, 516 S.W.2d 157, 162 (Tex. Crim. App. 1974).

168. See *Larkin*, *supra* note 162. Of course, by looking beyond the objective fact of apparent response to questioning, the court becomes involved in a virtually impossible determination of what the actual motivation for the defendant's statement was.

169. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Supp. 1974).

170. See *McBride v. State*, 506 S.W.2d 887 (Tex. Crim. App. 1974); *Hugley v. State*, 505 S.W.2d 914 (Tex. Crim. App. 1974).

171. TEX. CODE CRIM. PROC. ANN. art. 38.24 (1966), applied in *Roman v. State*, 503 S.W.2d 252 (Tex. Crim. App. 1974). The common law version of the rule is discussed in *United States v. Paquet*, 484 F.2d 208 (5th Cir. 1973).

172. *Patterson v. State*, 509 S.W.2d 857 (Tex. Crim. App. 1974). The dissenting judges in *Patterson* disagreed that the defendant's remarks could fairly be interpreted as having broached the subject of his statement to the police so as to allow the prosecutor to delve into its contents. *Id.* at 863-65 (Roberts, J., dissenting).

173. *Roman v. State*, 503 S.W.2d 252, 253 (Tex. Crim. App. 1974).

174. *United States v. Fairchild*, 505 F.2d 1378 (5th Cir. 1975). See also *United States v. Quintana-Gomez*, 488 F.2d 1246 (5th Cir. 1974). The Supreme Court has granted certiorari in an impeachment by silence case, *United States v. Hale*, 498 F.2d 1038 (D.C. Cir.), *cert. granted*, 95 S. Ct. 616, 42 L. Ed. 2d 639 (1974) (No. 74-364).

175. See *Gibson v. State*, 516 S.W.2d 406 (Tex. Crim. App. 1974).

of guilt included their use to impeach the defendant's credibility.¹⁷⁶ Unlike the *Miranda* rule, the statutory prohibition absolutely proscribes use of the statements of the psychiatrist and hence cannot be waived. However, error in admitting such statements could be harmless, for example, when the same facts related in those statements are established by other admissible evidence.¹⁷⁷ In addition, several court of civil appeals decisions concluded that the new Family Code confers on juveniles an absolute right to an attorney during custodial interrogations, which cannot be waived without the presence of an attorney.¹⁷⁸

C. Lineups and Pretrial Identification

Defense counsel routinely contend that in-court identifications of the defendant should be excluded because a pre-trial lineup or show-up procedure was conducted in violation of either the defendant's right to counsel or his due process protection against impermissibly suggestive pre-trial identification procedures.¹⁷⁹ However, the state almost as routinely is able to meet its burden of establishing by clear and convincing evidence an independent source for the in-court identification which serves to purge it of any possible taint allegedly resulting from pre-trial impropriety.¹⁸⁰ It may do so by demonstrating such factors as the opportunity of the witness to observe the criminal act, immediacy of the initial pre-trial identification to the observation of the criminal act, conformity of a pre-lineup description to the actual appearance of the suspect, and the certainty of the identification.¹⁸¹ The existence of such factors will overcome the effect of admissions by the witness that the pre-trial observations of the defendant in photos or a lineup greatly aided the in-court identification.¹⁸² However, an admission by a witness that the in-court identification would not have been possible without an improper pre-trial identification, as in *Coleman v. State*,¹⁸³ will establish the necessary taint or causal connection and require exclusion of the in-court identification.

176. 519 S.W.2d 426 (Tex. Crim. App. 1975). See also *Smith v. State*, 502 S.W.2d 814 (Tex. Crim. App. 1973).

177. See, e.g., *Smith v. State*, 502 S.W.2d 814 (Tex. Crim. App. 1973).

178. See *In re S.E.B.*, 514 S.W.2d 948 (Tex. Civ. App.—El Paso 1974, no writ); *In re F.J.*, 511 S.W.2d 370 (Tex. Civ. App.—Amarillo 1974, no writ); *In re R.E.J.*, 511 S.W.2d 347 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

179. The fifth amendment applies only to testimonial disclosures and hence does not apply to observations or physical tests of the defendant. *Johnson v. United States*, 228 U.S. 457, 458 (1913); *Ward v. State*, 505 S.W.2d 832 (Tex. Crim. App. 1974). The fourth amendment also is inapplicable to compelled exhibition of physical characteristics not amounting to intrusions into the body. See, e.g., *Patterson v. State*, 509 S.W.2d 857 (Tex. Crim. App. 1974) (teethmark impression compellable), relying on *Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1972) (handwriting exemplars compellable), and its extended discussion of the types of physical evidence that are within constitutional protections. See also *Allen v. State*, 511 S.W.2d 53, 54 (Tex. Crim. App. 1974), holding that TEX. CODE CRIM. PROC. ANN. art. 38.23 (1966) is inapplicable to identifications because "[b]y its own terms it applies to illegally obtained evidence."

180. Application of this rule to improper identification claims had its genesis in *United States v. Wade*, 388 U.S. 218 (1967).

181. See *Neil v. Biggers*, 409 U.S. 188 (1972); *United States v. Wade*, 388 U.S. 218 (1967); *Nichols v. State*, 511 S.W.2d 269 (Tex. Crim. App. 1974); *Pizzalato v. State*, 513 S.W.2d 566 (Tex. Crim. App. 1974); *Waffer v. State*, 500 S.W.2d 659 (Tex. Crim. App. 1973); *Henriksen v. State*, 500 S.W.2d 491 (Tex. Crim. App. 1973).

182. See, e.g., *Bedford v. State*, 501 S.W.2d 625 (Tex. Crim. App. 1973).

183. 505 S.W.2d 878 (Tex. Crim. App. 1974).

Both the independent source and harmless error doctrines¹⁸⁴ enable courts in many cases to avoid the question of the propriety of the objected-to out-of-court procedure. However, in *Green v. State*¹⁸⁵ the court applied the Supreme Court's decision in *United States v. Ash*¹⁸⁶ to hold that in Texas no right to counsel attached to photographic displays. As to other pre-trial identifications, the court has apparently concluded that the right to counsel does not arise until after the indictment or information has been filed.¹⁸⁷ On a number of occasions the court reiterated its condemnation of one-man show-ups as being unnecessarily suggestive,¹⁸⁸ but only once did it hold that such a pre-trial identification so irreparably tainted an in-court identification as to violate due process.¹⁸⁹ A persuasive argument could be made that under present law it is doubtful that jurors are adequately shielded from unreliable identification testimony or adequately instructed concerning its potential deficiencies.¹⁹⁰

III. PRE-TRIAL PROCEDURE

The proceedings at the pretrial phase of the criminal process have more practical significance in the majority of cases than the trial itself.¹⁹¹ The most critical factor in the ultimate disposition of criminal charges is the discretion of the prosecutor at the pre-trial stages. During the survey year the Texas Court of Criminal Appeals rendered a number of decisions relating to the formal limits on that discretion.

Indictment and Information. In *American Plant Food Corp. v. State*¹⁹² the court provided a detailed discussion of the "subtle" but "well founded" dis-

184. See, e.g., *Hawkins v. State*, 509 S.W.2d 607 (Tex. Crim. App. 1974).

185. 510 S.W.2d 919 (Tex. Crim. App. 1974).

186. 413 U.S. 300 (1973).

187. The Texas court apparently views the indictment or information as synonymous with the formal charge that was held to initiate adversary criminal proceedings under *Kirby v. Illinois*, 406 U.S. 682 (1972); *Pizzalato v. State*, 513 S.W.2d 566 (Tex. Crim. App. 1974); *Nichols v. State*, 511 S.W.2d 269 (Tex. Crim. App. 1974); *Lane v. State*, 506 S.W.2d 212 (Tex. Crim. App. 1974); *Ward v. State*, 505 S.W.2d 832 (Tex. Crim. App. 1974). In *Pizzalato* the defendant was placed in a line-up after an arrest on a marijuana charge but before any robbery charges had been filed; apparently, as to the robbery charge, the right to counsel had not attached. The court also attaches a perhaps unwarranted significance to the execution of a formal waiver of right to counsel at line-ups. See, e.g., *Ward v. State*, 505 S.W.2d 832 (Tex. Crim. App. 1974).

188. See, e.g., *Nichols v. State*, 511 S.W.2d 269 (Tex. Crim. App. 1974); *Coleman v. State*, 505 S.W.2d 878 (Tex. Crim. App. 1974); *Davis v. State*, 505 S.W.2d 800 (Tex. Crim. App. 1974); *Winn v. State*, 503 S.W.2d 816 (Tex. Crim. App. 1974).

189. *Coleman v. State*, 505 S.W.2d 878 (Tex. Crim. App. 1974).

190. See generally *Grano, Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 719 (1974).

191. For example, post-arrest release of an accused normally is the first immediate concern of a lawyer and his client. The standards for fixing bail, the right to which is guaranteed in all but capital cases, TEX. CODE CRIM. PROC. ANN. art. 1.07 (1966), are contained in *id.* art. 17.15. The statute's prohibition of bail as "an instrument of oppression" reflects the notion that the sole justification for requiring bail is to assure the accused's presence at trial. See, e.g., *Ex parte Ramirez*, 156 Tex. Crim. 280, 241 S.W.2d 157 (1951). The fact that a defendant has skipped bail once before is a proper consideration in setting bail. *Ex parte Poindexter*, 511 S.W.2d 529 (Tex. Crim. App. 1974). However, an accused must be given an opportunity to present evidence relevant to the bail determination. *Ex parte Sellers*, 516 S.W.2d 665 (Tex. Crim. App. 1974).

192. 508 S.W.2d 598 (Tex. Crim. App. 1974).

inction in the Texas Code of Criminal Procedure between substantive as opposed to merely formal defects in indictments and informations.¹⁹³ The importance of the distinction on appeal is that only substantive defects are fundamental error and may be considered for the first time on appeal. The failure to allege the constituent elements of the offense charged is a substantive and fundamental defect that voids the conviction because the charging document is insufficient to support a conviction.¹⁹⁴ On the other hand, lack of specificity, although relative to substance, is considered a matter of form only that will be waived by failure to object at the trial level.¹⁹⁵

Joinder of Offenses and Former Jeopardy. In Texas a plea of former jeopardy as a bar to prosecution includes two distinct claims: *former conviction* of the "same offense," and *former acquittal* of the "accusation."¹⁹⁶ The scope of the former conviction bar is determined by the carving doctrine, which limits the state to a single conviction for only one offense where the offenses committed by the defendant are part of the "same transaction."¹⁹⁷ The limitation on the prosecution expressed in the carving doctrine is broader than the apparently constitutional minimum "same evidence" test of the "same offense" under the double jeopardy clause of the United States Constitution.¹⁹⁸ "Same evidence" is the test employed in Texas on the question of whether a subsequent prosecution will be barred by a prior *acquittal*.¹⁹⁹ Whether a prior *conviction* will bar a subsequent prosecution is determined by the often difficult application of the "separate and distinct" test of same transaction under the carving doctrine.²⁰⁰

Cases such as *Lamberson v. State*²⁰¹ do not prove difficult. The defendant had been convicted previously of robbery, but was convicted in a second prosecution for murder of the victim in the robbery. The court had little

193. See TEX. CODE CRIM. PROC. ANN. arts. 27.08-.09 (1966).

194. See note 6 *supra*. For examples of fatally defective charging documents, see *Besson v. State*, 515 S.W.2d 112 (Tex. Crim. App. 1974) (charge of willful fleeing and attempt to elude police fatally defective because information did not allege signal to stop or that vehicle was motor vehicle); *Crockett v. State*, 511 S.W.2d 519 (Tex. Crim. App. 1974) (charge of possession of dangerous drug void because drug Talwin not within statutory definition).

195. *American Plant Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974); *Lincoln v. State*, 508 S.W.2d 635 (Tex. Crim. App. 1974) (the name in an indictment may be amended). Duplicity is not a fundamental error and a duplicitous indictment may be amended. See, e.g., *Peterson v. State*, 508 S.W.2d 844 (Tex. Crim. App. 1974).

196. Former jeopardy is the only "special plea" in Texas. TEX. CODE CRIM. PROC. ANN. art. 27.05 (Supp. 1974). The Texas doctrine of former jeopardy is summarized in *Warren v. State*, 514 S.W.2d 458 (Tex. Crim. App. 1974).

197. The "carving doctrine" as a limitation on the power of the prosecutor to join offenses in one prosecution is illustrated by *Price v. State*, 475 S.W.2d 742 (Tex. Crim. App. 1972).

198. U.S. CONST. amend. V. Compare *Ashe v. Swenson*, 397 U.S. 436 (1970), in which the Supreme Court refused to adopt a broad definition of "same offense," but instead held the doctrine of collateral estoppel applicable as a part of the fifth amendment's double jeopardy prohibition. The doctrine estops the prosecution from relitigating issues necessarily decided for the defendant in his earlier prosecution. Cf. *Pope v. State*, 509 S.W.2d 593 (Tex. Crim. App. 1974).

199. See *Warren v. State*, 514 S.W.2d 458, 461 (Tex. Crim. App. 1974), wherein the language "same act" is used synonymously with "same evidence."

200. See *Waffer v. State*, 504 S.W.2d 408 (Tex. Crim. App. 1974).

201. 509 S.W.2d 328 (Tex. Crim. App. 1974).

difficulty concluding that the second prosecution was permissible because the offenses were separate and distinct. They were committed in different places and at different times, and they were not part of "one continuous assaultive action tying the two crimes together."²⁰² More difficult are cases such as *Lee v. State*,²⁰³ which is made even more difficult by the perhaps understandable reluctance of the majority to discuss how the facts support its finding that three separate sodomy convictions were permissible. The three separate indictments resulted from various sodomous acts presumably committed by the defendant on one victim at the same location but on different parts of the victim's body. The majority's conclusion that the three offenses were not proven by the same acts or evidence would only be sufficient to dispose of a contention that an acquittal of one offense would not necessarily preclude prosecution for another.²⁰⁴ Its conclusion that the offenses were separate and distinct seems questionable under its previous decisions in which identity of intent and victim, proximity in time and space, and continuity of the acts are controlling, notwithstanding technical differences in the acts.²⁰⁵

Right to a Speedy Trial. The specific constitutional guarantee of speedy trial under the sixth amendment²⁰⁶ attaches after the defendant is held to answer to a criminal charge either by way of indictment, information, or formal arrest.²⁰⁷ In determining whether a charge must be dismissed because of a denial of a speedy trial, the court must balance four factors: (1) length of the delay; (2) reasons for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant from the delay.²⁰⁸ The most difficult obstacle for a defendant claiming a denial of speedy trial, even in cases of lengthy delay, has been the requirement of a showing of prejudice. The Texas court has held that while actual prejudice need not be shown, the defendant has the burden of showing at least a real possibility of prejudice from the delay.²⁰⁹ In *McCarty v. Heard*²¹⁰ the federal district court granted

202. *Id.* at 330. The fact that testimony concerning the murder was admissible in the robbery trial under the res gestae rule was irrelevant because that rule is a rule of evidence and does not determine whether two crimes are one single transaction for double jeopardy purposes. *Id.* In *Jones v. State*, 514 S.W.2d 255 (Tex. Crim. App. 1974) the court was relieved of the necessity of deciding whether the offenses of burglary with intent to commit rape and the subsequent rape were separate and distinct because the statutes explicitly authorized prosecutions for both.

203. 505 S.W.2d 816 (Tex. Crim. App. 1974).

204. See note 199 *supra* and accompanying text.

205. See, e.g., *Ex parte Calderon*, 508 S.W.2d 360 (Tex. Crim. App. 1974) (indecent exposure, statutory rape, and fondling of same child on same date and at same time all part of one transaction); cf. *Crabb v. State*, 503 S.W.2d 260 (Tex. Crim. App. 1974) (fleeing from police separate from speeding because court able to characterize them as being at different times and on different stretches of same road).

206. U.S. CONST. amend. VI.

207. *United States v. Marion*, 404 U.S. 307 (1971). Pre-indictment or pre-arrest delay may, however, violate due process if it prejudices the defendant's right to a fair trial and is "an intentional device to gain tactical advantage over the accused." *Id.* at 324. The sole remedy for denial of speedy trial is dismissal of the charges with prejudice. *Strunk v. United States*, 412 U.S. 434 (1973).

208. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972); *Wilkerson v. State*, 510 S.W.2d 589, 591 (Tex. Crim. App. 1974); *George v. State*, 498 S.W.2d 202, 204 (Tex. Crim. App. 1973).

209. See *McCarty v. State*, 498 S.W.2d 212 (Tex. Crim. App. 1973); *Harris v. State*, 489 S.W.2d 303 (Tex. Crim. App. 1973). In *Archie v. State*, 511 S.W.2d 942 (Tex.

a petition for habeas corpus relief on an allegation of denial of speedy trial that had been rejected by the Texas court.²¹¹ The district court held, contrary to the Texas court, that the inability to show prejudice was not necessarily fatal to successful assertion of the claim.²¹² Relying on the analysis by Judge Brown of the Fifth Circuit of the *Barker* test²¹³ in *Hoskins v. Wainwright*,²¹⁴ the court concluded that "there must be some point of coalescence of the other three factors in a movant's favor, at which prejudice—either actual or presumed—becomes totally irrelevant."²¹⁵ In such case, "a court must intervene regardless of whether the defendant has been incarcerated, subjected to public scorn or obloquy, or impaired in his ability to defend himself."²¹⁶ The "inexplicable delay" of thirty-one months "in the face of vigorous demands for an immediate trial" was enough to uphold McCarty's claim.²¹⁷

Incompetency To Stand Trial. A defendant is incompetent to stand trial unless he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him."²¹⁸ A minimum requirement of due process is a separate inquiry into the incompetency or "present sanity" of a defendant whom the trial court reasonably doubts is competent to stand trial.²¹⁹ Article 46.02 of the Code²²⁰ requires that this inquiry be conducted by a separate jury apart from the trial on the issue of guilt of the crime charged.²²¹ In *Carpenter v. State*²²² the judge's decision to proceed to trial on the merits when the jury was unable to agree on a verdict in the competency hearing was held erroneous because of the lack of a final determination as required by the Code. Of course, in a given case, the trial judge could reverse his determination that a doubt as to present insanity existed, and if that decision were correct, the need of a separate jury would

Crim. App. 1974), a delay of over three years was not fatal when defendant was out on bail shortly after arrest and was unable to show any substantial interference with his ability to defend himself or to assist his counsel at trial. However, the defendant in *Ex parte McKenzie*, 491 S.W.2d 122 (Tex. Crim. App. 1973), was able to show prejudice due to long delay during which alibi witness died.

210. 381 F. Supp. 1290 (S.D. Tex. 1974).

211. *McCarty v. State*, 498 S.W.2d 212 (Tex. Crim. App. 1973).

212. 381 F. Supp. at 1293.

213. See text accompanying note 208 *supra*.

214. 485 F.2d 1186 (5th Cir. 1973). See also *Moore v. Arizona*, 414 U.S. 25 (1973) (per curiam).

215. 381 F. Supp. at 1293.

216. *Id.*

217. *Id.*

218. *Wages v. State*, 501 S.W.2d 105, 107 (Tex. Crim. App. 1973), quoting from *Dusky v. United States*, 362 U.S. 402 (1960).

219. See *Pate v. Robinson*, 383 U.S. 375 (1966). A competency hearing also is mandated by the federal law (18 U.S.C. § 4244 (1970)) when a report of a court-appointed psychiatrist "indicates a state of present insanity or such mental incompetency in the accused" that he is "unable to understand the proceedings against him or properly to assist in his own defense . . ." *United States v. Makris*, 483 F.2d 1082 (5th Cir. 1973).

220. TEX. CODE CRIM. PROC. ANN. art. 46.02 (Supp. 1974).

221. *Id.* § 1. The statutory requirement is absolute. See *Cavender v. State*, 515 S.W.2d 277 (Tex. Crim. App. 1974), and cases therein cited.

222. 507 S.W.2d 794 (Tex. Crim. App. 1974).

be obviated.²²³ However, in light of the strong evidence produced at the trial alone in *Carpenter*, the failure to submit the issue for a separate jury's determination would have been an abuse of discretion.

Whether the trial court's failure to order a separate hearing on the competency issue is an abuse of discretion can be a close question. In *Reeves v. State*²²⁴ the defendant made a motion for a pre-trial competency hearing based on the opinion in an attached unsworn statement of a privately-obtained psychiatrist, but withdrew the motion after learning the opinion of other experts. In holding that the trial court did not abuse its discretion in not impaneling a separate jury to determine the competency issue, the court stated that the mere suggestion in a motion coupled with a request for psychiatric examination was insufficient to raise a reasonable doubt as to competency.²²⁵ The court discounted the unsworn opinion of the psychiatrist because it was dated three months before the trial, because the motion had been withdrawn in the face of other opinion, and because no other evidence of insanity or incompetency was presented at the trial itself. Moreover, the defendant's behavior and testimony in a four-day trial at which he gave extensive, clear, and lucid testimony did not indicate incompetency.²²⁶

Discovery. Despite the opinion of two judges that the "majority has set a standard well-nigh impossible for many accused persons to meet,"²²⁷ the Texas court continues to give a restrictive interpretation to the discovery statute, article 39.14.²²⁸ As a result, whether a defendant has meaningful discovery in fact may depend primarily on how strictly the trial judges and prosecutors adhere to the statute. Under the statute, the defendant must establish (1) good cause, (2) materiality, and (3) possession by the state to require the prosecution to produce material for pre-trial inspection that is not specifically exempt from discovery before trial. The court repeatedly has upheld the trial court's refusal to grant discovery to a defendant because defendant's motion was too broad. For example, in *Thomas v. State* a motion for discovery of any papers, object, or real evidence in the possession of the prosecutor which may in any way be material was held too unspecific to require production of cigarette papers found in defendant's pocket when he was arrested.²²⁹ In his concurring opinion Judge Roberts noted that the

223. See *Quintanilla v. State*, 508 S.W.2d 647 (Tex. Crim. App. 1974).

224. 516 S.W.2d 410 (Tex. Crim. App. 1974).

225. See also *Marroquin v. State*, 511 S.W.2d 58 (Tex. Crim. App. 1974) (motion for psychiatric exam insufficient standing alone); *King v. State*, 511 S.W.2d 32 (Tex. Crim. App. 1974) (bare allegation of incompetency in motion for medical exam); *Thibodeaux v. State*, 505 S.W.2d 260 (Tex. Crim. App. 1974) (only evidence was statement made to the court after state had rested its case; no motion for hearing or requested charge on insanity).

226. 516 S.W.2d at 413. See also *Perryman v. State*, 507 S.W.2d 541 (Tex. Crim. App. 1974) (testimony coherent and no indication of incompetency); *Quintanilla v. State*, 508 S.W.2d 647 (Tex. Crim. App. 1974).

227. *Thomas v. State*, 511 S.W.2d 302, 304 (Tex. Crim. App. 1974) (Roberts, J., concurring).

228. TEX. CODE CRIM. PROC. ANN. art. 39.14 (1966); see *Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974).

229. 511 S.W.2d 302 (Tex. Crim. App. 1974). The court distinguished *Detmering v. State*, 481 S.W.2d 863 (Tex. Crim. App. 1972), in which error was found in the trial

"fishing expedition" objection to broad discovery motions effectively limits discovery to "only those items of which [the defendant] is aware" and hence gives "not discovery, but only a limited right of examination."²³⁰

Even if the motion makes a specific request for something that the state clearly has in its possession, the requirement of a showing of materiality poses a dilemma for defense counsel. Without knowledge of what the prosecution possesses, counsel may be unable to make even a colorable showing of materiality of any items other than those on which the state intends to rely at trial. Perhaps he may convince the trial judge to make an in camera inspection of the requested material,²³¹ but a trial judge may unilaterally decide that the material would not be useful or helpful to the defendant. On appeal the question of materiality effectively becomes simply whether the refusal to grant the request prejudiced the defendant or was harmless. Although witness statements are specifically exempted from pre-trial discovery as work product, under the court-fashioned *Gaskin* rule the defendant must be given requested reports or prior statements made by a testifying witness.²³² Moreover, other evidence not discoverable before trial must be disclosed if it is used by a witness "before the jury."²³³ In *Hoffman v. State*²³⁴ the court reemphasized the distinction between the *Gaskin* rule and the "use before the jury" rule. The defendant has an absolute right of access to reports or prior statements of a prosecution witness whether or not the witness has used the statement or report to refresh his memory.²³⁵ If the trial court for some reason, however, does not require their production for use by the defendant, it must append copies of the material to the record on appeal to enable the appellate court to determine if failure to produce was reversible error. In *Jackson v. State*²³⁶ the court held that failure to provide defendant's counsel with the written police report made by a testifying officer shortly after the arrest was prejudicial error. Although the report did not conflict with the officer's testimony, reversal was warranted because of certain critical evidence given by the officer in his testimony which was not in the report.²³⁷

The constitutional prohibition against the state's suppression of evidence favorable to the accused does not require pre-trial disclosure of exculpatory evidence not otherwise discoverable under article 39.14, according to *Payne v. State*.²³⁸ Payne's contention that the statutory requirement of adequate time to prepare required earlier disclosure was rejected.²³⁹ However, by

court's refusal to allow defendant to make a chemical analysis of drugs in response to his motion to discover " 'dangerous drugs . . . which the State of Texas intends to introduce into evidence in this case and which is now in the possession of the District Attorney.' " *Id.* at 864.

230. *Thomas v. State*, 511 S.W.2d 302, 304 (Tex. Crim. App. 1974).

231. *See Gutierrez v. State*, 502 S.W.2d 746 (Tex. Crim. App. 1973).

232. *Gaskin v. State*, 353 S.W.2d 467 (Tex. Crim. App. 1961).

233. *Id.* at 469 (Woodley, J., on motion for rehearing).

234. 514 S.W.2d 248 (Tex. Crim. App. 1974).

235. *Id.* at 253.

236. 506 S.W.2d 620 (Tex. Crim. App. 1974).

237. *Id.* at 622.

238. 516 S.W.2d 675 (Tex. Crim. App. 1974).

239. *Id.* at 677; *see* TEX. CODE CRIM. PROC. ANN. art. 26.04 (1966) (appointed defense counsel has ten days to prepare).

holding that the "opportunity to request a postponement or continuance . . . adequately satisfies due process requirements"²⁴⁰ the court implicitly recognized that some material and favorable evidence may be of little assistance unless available in advance of trial. The Texas court obviously does not intend to allow the prosecutor's constitutional duty to disclose to become a means by which the defense may short-cut its own preparation. In *White v. State*²⁴¹ the court reversed its earlier opinion that the state's purposeful conduct in procuring the absence of a material defense witness violated due process, holding on rehearing that the defendant had failed to show sufficient diligence to obtain the presence of the witness notwithstanding the state's activity.²⁴² As suggested by the dissenting opinion and the original majority opinion in *White*, however, instances of intentional or bad faith suppression by the prosecutor should reduce the defendant's burden of establishing diligence and specific prejudice.

IV. GUILTY PLEAS

The large number of cases involving attacks on guilty plea convictions reflect the fact that a majority of criminal cases are "settled" by bargained guilty pleas. The primary focus of the appellate cases has been on the adequacy of the warnings to the defendant and the record made at the guilty plea hearing under Code of Criminal Procedure article 26.13. Although the article 26.13 definition of the duty of the trial court in taking a guilty plea continued to cause dissension on the court,²⁴³ the "substantial compliance" interpretation of the statutory duty finally prevailed. Under that interpretation the defendant must be specifically advised of the nature of the offense and the consequences of his plea.²⁴⁴ However, the trial judge's inquiry into the voluntariness of the plea need not track the specific language of article 26.13 but need only be sufficient for the judge to conclude that the defendant is mentally competent and that his plea is not the result of coercion or improper influences.²⁴⁵ A mere recital in the judgment that the required inquiry took place, however, is not an adequate substitute for a personal inquiry by the judge into the voluntariness of the plea.²⁴⁶

The trial judge in Texas is not required to advise the defendant of any of the potential consequences of a judgment on a plea of guilty other than

240. *Payne v. State*, 516 S.W.2d 675, 677 (Tex. Crim. App. 1974).

241. 517 S.W.2d 543 (Tex. Crim. App. 1974).

242. *Id.* at 550.

243. *See, e.g., Bosworth v. State*, 510 S.W.2d 334 (Tex. Crim. App. 1974). TEX. CODE CRIM. PROC. ANN. art. 26.13 (Supp. 1974) provides: "If the defendant pleads guilty, or enters a plea of *nolo contendere*, he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is mentally competent, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt."

244. Reading the indictment is sufficient to advise the defendant of the nature of the charges. *Logan v. State*, 506 S.W.2d 593 (Tex. Crim. App. 1974).

245. *See, e.g., Bosworth v. State*, 510 S.W.2d 334 (Tex. Crim. App. 1974); *Curren v. State*, 509 S.W.2d 578 (Tex. Crim. App. 1974).

246. *Toombs v. State*, 514 S.W.2d 259 (Tex. Crim. App. 1974).

the potential punishment.²⁴⁷ In *Alvarez v. State*²⁴⁸ the court reversed a conviction of possession of heroin entered on a guilty plea because the defendant was incorrectly admonished under article 26.13 that the maximum penalty he could receive was twenty years when it was actually life imprisonment. The two dissenting judges, noting that the question had divided the court before, viewed the error as harmless because the obvious purpose of article 26.13 was to avoid misleading a defendant to plead guilty where he could receive a greater punishment than he thought possible. Here he did not receive a greater sentence than the maximum advised and, therefore, was not misled to his prejudice.²⁴⁹

Post-conviction attacks on guilty plea convictions often are based on claims that a bargain on which the plea was based was broken. Because the details of pre-plea bargaining need not be disclosed at Texas guilty plea hearings, the Texas Court of Criminal Appeals normally has a scanty record on which to resolve broken bargain claims. This problem led the Fifth Circuit in *Bryan v. United States*²⁵⁰ to mandate an early implementation of Federal Rule of Criminal Procedure 11 requiring that all plea arrangements and negotiations be disclosed at the hearing on the guilty plea. The Texas procedure, however, discourages an inquiry by the trial judge into the expectations of the person pleading guilty and in fact creates pressure on the defendant to pretend that no bargaining has taken place. On appeal the defendant will have a heavy burden to establish that any bargain was made by the prosecutor in the face of his statement to the contrary in the recorded colloquy below.²⁵¹ Even if the appellate court acknowledges that a bargain was struck, it will not invalidate the plea merely on the basis of alleged misunderstandings or subjective expectations of the bargaining defendant as to the effect of any prior agreement. For example, in *Valdez v. State*²⁵² the defendant claimed his plea was involuntary because he thought he was going to get probation pursuant to the recommendation of the prosecutor. Despite the prosecuting attorney's recommendation of probation on the charge of statutory rape, the defendant had been given a five-year sentence without probation. The court found the "warnings and admonitions to be in substantial compliance with Art. 26.13" and that the defendant had pleaded guilty because he was in fact guilty.²⁵³ The court stated that "[t]he fact that appellant may have plead guilty as a result of plea bargaining in the hope of escaping the possibility of a higher sentence did not invalidate the plea."²⁵⁴ A different question would have been presented had there been

247. See, e.g., *Simmons v. State*, 457 S.W.2d 281 (Tex. Crim. App. 1970) (failure to advise that sentences could run consecutively not error). See also *LeBlanc v. Henderson*, 478 F.2d 481 (5th Cir. 1973), cert. denied, 414 U.S. 1146 (1974) (need not advise of ineligibility for probation or parole).

248. 511 S.W.2d 521 (Tex. Crim. App. 1974).

249. *Id.* at 523.

250. 492 F.2d 775 (5th Cir. 1974).

251. See *Rodriguez v. State*, 509 S.W.2d 319 (Tex. Crim. App. 1974); *Miles v. State*, 501 S.W.2d 91 (Tex. Crim. App. 1973).

252. 507 S.W.2d 202 (Tex. Crim. App. 1974).

253. *Id.* at 203.

254. *Id.*

any evidence that the defendant was led to believe that the court was in any way bound by the prosecutor's recommendation.²⁵⁵ Although reference to prior bargaining need not be made, the judge should advise the defendant that the court is not bound by any agreements between the prosecution and the defense. Further, the court should advise the defendant that he will be permitted to withdraw his plea if the court's decision as to disposition does not conform to his understanding of the terms of the agreement.

V. EFFECTIVE ASSISTANCE OF COUNSEL

The constitutional guarantee of right to counsel assumes effective assistance of counsel, but whether the court will find inadequacy depends on whether counsel is retained or appointed. The court of criminal appeals has determined that inadequacy of retained counsel is not attributable to the state.²⁵⁶ Presumably, however, even retained counsel's performance could be so defective as to result in a "fundamentally unfair" trial or could be error if the trial court could have taken action to correct it.

Mirroring the current concern over the standard of performance of defense counsel in criminal cases, the court in *Ex parte Gallegos*²⁵⁷ clearly established the "reasonably effective assistance" standard as the test of constitutionally satisfactory representation by counsel. In so doing it conformed the state law to the standard that had been applied by the Fifth Circuit in reviewing state convictions.²⁵⁸ Under the new standard the court found that counsel's failure to provide the defendant with a rudimentary explanation of the elements of the crime charged before entry of a guilty plea constituted ineffective assistance of counsel. Later in *Ex parte Bratchett*²⁵⁹ another guilty plea was struck down because appointed counsel conducted no investigation of the case.

The standard for determination of indigency which requires state-paid counsel and other assistance is not definitely stated in the law and necessitates "a case-by-case analysis of each individual situation."²⁶⁰ Apparently, however, the defendant need not be totally destitute. Ownership of a seven-year-old "ordinary horse" in addition to a homestead and a car that was not running did not disqualify a defendant from having a free record on appeal that cost between \$250 and \$300.²⁶¹ But a claim of mere inability to "get to" assets will be insufficient to establish indigency.²⁶²

255. Due process requires that the prosecutor honor his bargains or make bargains that he can keep. *Santobello v. New York*, 404 U.S. 257 (1971).

256. *Curtis v. State*, 500 S.W.2d 478 (Tex. Crim. App. 1973).

257. 511 S.W.2d 510 (Tex. Crim. App. 1974).

258. *See, e.g.*, *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

259. 513 S.W.2d 851 (Tex. Crim. App. 1974).

260. *Stephens v. State*, 509 S.W.2d 363, 365 (Tex. Crim. App. 1974). The trial court is required to appoint counsel for "an accused charged with a felony or a misdemeanor punishable by imprisonment [who] is too poor to employ counsel." TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (1966). The trial court has a duty to conduct an inquiry at any time during the proceedings that a question arises concerning the financial status of the accused. *Foley v. State*, 514 S.W.2d 449 (Tex. Crim. App. 1974).

261. *Stephens v. State*, 509 S.W.2d 363 (Tex. Crim. App. 1974).

262. *Butler v. State*, 506 S.W.2d 902 (Tex. Crim. App. 1974).

VI. TRIAL

*Jury Trial.*²⁶³ The Supreme Court in *Taylor v. Louisiana*²⁶⁴ held that systematic exclusion of women from jury service was unconstitutional, but re-emphasized that any particular jury actually chosen need not "mirror the community and reflect the various distinctive groups in the population."²⁶⁵ In line with that notion, the Texas Court of Criminal Appeals has held that the mere showing that an identifiable group is not represented on a jury will not in itself establish discrimination.²⁶⁶ When a defendant objects to the exclusion of a qualified juror or the inclusion of an allegedly disqualified juror, he must show that he was injured or forced to proceed with an objectionable juror²⁶⁷ in order to establish error on appeal.

A concern that *voir dire* examination in jury selection may unduly prolong the criminal proceeding is reflected in several cases in which the trial court's decision to limit questioning was upheld. In *Smith v. State* the court held that the trial judge could properly prohibit duplicitous questioning and could impose reasonable limits on the amount of time for questioning.²⁶⁸ In *Barrett v. State*²⁶⁹ the trial court's limitation of *voir dire* examination for each side to thirty minutes was not considered an abuse of discretion, particularly when the complaining counsel had not demonstrated any specific need for additional questioning. Because of the push for streamlining and speeding up the criminal process, the wide latitude traditionally given counsel in *voir dire* may be limited severely.

Appearance of Defendant and Witnesses. The compelled appearance of a defendant in either a jail uniform or physical restraints compromises the presumption of innocence and is reversible error "unless the record reflects a good and sufficient reason for pursuing such an extraordinary course."²⁷⁰ According to *Thompson v. State*²⁷¹ the propriety of requiring defense witnesses to appear in uniforms or handcuffs is measured by the same standard as that which applies to the defendant, namely, abuse of discretion. In either case, if an objection is made the trial judge should give his reasons for allowing such an appearance and should instruct the jury not to consider the restraint in assessing the proof and determining guilt.²⁷² In *Thompson* the

263. The United States Supreme Court held that the sixth amendment guarantee of right to a trial by jury for non-petty offenses applied to contempt offenses whenever punishable by more than six months. *Taylor v. Hayes*, 418 U.S. 488 (1974); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).

264. 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

265. *Id.* at 702, 42 L. Ed. 2d at 703.

266. *Ford v. State*, 509 S.W.2d 317 (Tex. Crim. App. 1974); *Moya v. State*, 508 S.W.2d 369 (Tex. Crim. App. 1974); *cf. Partida v. State*, 506 S.W.2d 209 (Tex. Crim. App. 1974) (allegation of grand jury discrimination).

267. *Brown v. State*, 508 S.W.2d 91 (Tex. Crim. App. 1974).

268. 513 S.W.2d 823 (Tex. Crim. App. 1974). In *Burkett v. State*, 516 S.W.2d 147 (Tex. Crim. App. 1974), the failure of counsel to present the whole of the *voir dire* examination did not preserve his claimed error of unreasonable limitation of *voir dire* because the court could not determine whether the questions were duplicitous or not.

269. 516 S.W.2d 181 (Tex. Crim. App. 1974).

270. *Walthall v. State*, 505 S.W.2d 898, 899 (Tex. Crim. App. 1974).

271. 514 S.W.2d 275 (Tex. Crim. App. 1974).

272. *Id.* at 278.

court found no abuse of discretion where the trial court had allowed the defense witness to appear in handcuffs and jail clothes. Detailed reasons were given by the judge in support of his conclusion that it was necessary to preserve order in the courtroom.²⁷³ The merger of the question of jail uniforms with that of physical restraints appears questionable in light of the Fifth Circuit case of *Williams v. Estelle*.²⁷⁴ The court there held that trial of a defendant in his jail uniform is inherently unfair because, unlike physical restraints, trial in uniform is unnecessary and does not serve any legitimate state interest.²⁷⁵ According to the Fifth Circuit's rationale, appearance of the defendant or a defense witness in jail uniform is presumptively error and could not be justified by considerations relating to preservation of order. Furthermore, waiver will not be inferred from mere failure to object if the objections would have been futile because trial in prison garb was customary in that jurisdiction. However, if evidence exists that the defendant desired to wear the uniform for tactical reasons, he may be held to have waived any objections to unfairness.

Confrontation. The court considered several cases of claimed sixth amendment violations where the confession of another person was admitted as evidence against the defendant. The general rule is that a confession of guilt is admissible as an exception to the hearsay rule only against its maker. Of course, in a joint trial based on a conspiracy theory, the out-of-court statements of one defendant during the existence of the conspiracy may be admitted against a co-conspirator to prove the existence of a conspiracy.²⁷⁶ However, in the trial of a single defendant the admission of another's confession could be a violation of the sixth amendment right of confrontation.²⁷⁷

*Ex parte Smith*²⁷⁸ is a typical case. In the defendant's trial for murder with malice, the state introduced the confession of Coverson, who did not testify at the trial. Coverson's written confession implicated Smith as being among the group that went to the residence of the victim on the night he was killed by a member of the group. The court found the admission of Coverson's statement violative of the defendant's sixth amendment right of confrontation and cross-examination, but held that the error was harmless beyond a reasonable doubt, primarily because of defendant's own admissible confession.²⁷⁹

Circumstantial Evidence. The failure to give a requested jury charge on circumstantial evidence is error when no evidence is presented at trial that constitutes direct evidence of the ultimate fact to be proved. Hence, where the only proof of heroin possession is the defendant's presence in a residence at

273. *Id.* The reasons given by the judge all related to the potential dangerousness of the witnesses and to the necessity of maintaining order. *Quaere* how a jail uniform contributes to preservation of order?

274. 500 F.2d 206 (5th Cir. 1974).

275. *Id.* at 209.

276. *See Anderson v. United States*, 417 U.S. 211 (1974).

277. *Bruton v. United States*, 391 U.S. 123 (1968).

278. 513 S.W.2d 839 (Tex. Crim. App. 1974).

279. *Id.* at 846. *See also Carver v. State*, 510 S.W.2d 349 (Tex. Crim. App. 1974).

the time heroin was discovered and a recent puncture mark on his arm, a circumstantial evidence charge should have been given.²⁸⁰ Similarly, failure to give such a charge resulted in the reversal of a murder conviction in *Eiland v. State*.²⁸¹ Defendant's fingerprints on the window and windowsill of the victim's bedroom were not direct evidence of his guilt even though they could have been, for example, in a burglary prosecution where illegal entry is the primary fact to be proved.²⁸² In *Grandison v. State*²⁸³ the absence of any evidence that the defendant had been alone with the alleged murder victim made the failure to give a requested circumstantial evidence charge reversible error.

The requirement of giving a circumstantial evidence charge is qualified by the so-called "close juxtaposition" doctrine, the application of which has caused a split among the members of the Texas court. Closely akin to the concept of harmless error, the doctrine obviates the need of a circumstantial evidence charge in cases in which the evidence is "in such close relation to the main fact to be proved as to constitute [or have the same effect as] direct evidence."²⁸⁴ The distinction between direct and circumstantial evidence is tenuous and often the weight of circumstantial evidence is as persuasive as "direct" evidence. For example, in *Logan v. State*²⁸⁵ the defendant was convicted of possession of heroin on the basis of a series of closely related facts. Evidence was introduced that the defendant was seen with a burned spoon and syringe. He hid in a closet from which an apparently similar burned spoon and syringe containing heroin were recovered, made a statement referring to "stuff" being in a bedroom in which heroin was found, and jumped bond before the case was tried. Although the majority opinion states that the evidence was direct, it also concluded that "the facts stated are in such close juxtaposition to each other as to eliminate the necessity of giving a charge on circumstantial evidence."²⁸⁶ *Logan* could be read as supporting a proposition that whether the evidence is characterized as direct or closely related circumstantial evidence, if it excludes any reasonable hypothesis of innocence, a charge on circumstantial evidence is not required.²⁸⁷ The court's reluctance to make an artificial distinction between the quality of direct as opposed to circumstantial evidence is further reflected in *Taylor v. State*.²⁸⁸ Despite Judge Onion's dissent where he stated that the majority unnecessarily overturned well-settled law,²⁸⁹ the court held that lack of consent by the victim in burglary and theft cases may be shown by circumstantial

280. *Crawford v. State*, 502 S.W.2d 768 (Tex. Crim. App. 1973). See also *Selman v. State*, 505 S.W.2d 255 (Tex. Crim. App. 1974).

281. 509 S.W.2d 596 (Tex. Crim. App. 1974).

282. *Id.* at 598. To be distinguished are cases in which the accused admits that he killed the deceased, in which case a circumstantial evidence instruction is not required. *Sloan v. State*, 515 S.W.2d 913 (Tex. Crim. App. 1974).

283. 514 S.W.2d 763 (Tex. Crim. App. 1974).

284. *Roberts v. State*, 489 S.W.2d 893, 895 (Tex. Crim. App. 1972).

285. 510 S.W.2d 598 (Tex. Crim. App. 1974).

286. *Id.* at 600.

287. *Cf. Draper v. State*, 513 S.W.2d 563, 565 (Tex. Crim. App. 1974).

288. 508 S.W.2d 393 (Tex. Crim. App. 1974).

289. *Id.* at 398.

evidence regardless of the availability of direct evidence.²⁹⁰

Extraneous Offenses. The extraneous offense exception to the basic principle that a defendant is to be tried solely on the charge of which he is accused is a valuable weapon frequently used by prosecutors. Despite the court's efforts to clarify the scope of the exception, it remains, according to one judge, "a jumbled mess, totally lacking in consistency and predictability."²⁹¹ Although "[e]ach case must be determined on its own merits,"²⁹² extraneous offenses are generally admissible as part of the *res gestae* of the offense charged, or to show identity, intent, motive, scienter, or malice, or to refute a defensive theory of the case.²⁹³ However, the state may not use collateral offenses to establish an issue for which it has uncontradicted direct evidence because of the danger that the evidence admitted for a limited purpose will be used to convict the defendant for bad character generally.²⁹⁴

In *Lolmaugh v. State*²⁹⁵ the defendant discovered that his wife and her father had gone out in the country for a clandestine sexual encounter, and as a result he killed the father. The state attempted to rebut the defendant's claim of self-defense by introducing part of his statement that he had previously shot a man who had been his wife's lover. All members of the court agreed that admission of the statement was proper as tending "to show his state of mind toward a class, lovers of his wife" and "to rebut his theory of self-defense."²⁹⁶ However, the court has split on application of the extraneous offense exception in a number of cases.

In *Ransom v. State*²⁹⁷ defendant's identity as the perpetrator of a robbery which took place on January 29 was the main issue at trial. Perhaps to soften the impact of an anticipated introduction by the state of an extraneous robbery offense committed several days before the robbery in question, defense counsel offered evidence of the defendant's whereabouts on January 25. The state countered by producing rebuttal testimony that the defendant had committed a robbery on January 25 and the trial court instructed the jury to consider that evidence only on the issues of identity and intent. On appeal a majority of the court upheld the state's rebuttal evidence. Two members of the court affirmed on the ground that it was an extraneous offense admissible to prove identity;²⁹⁸ a third judge stated that by raising the question of alibi on January 25, the defendant had opened the door to the state's rebuttal of that alibi.²⁹⁹ The two dissenting judges concluded that the majority had destroyed the effect of its previous decisions that had established the requirement of common characteristics between the extraneous and pri-

290. *Id.* at 397.

291. *Ransom v. State*, 503 S.W.2d 810, 814 (Tex. Crim. App. 1974) (Roberts, J., dissenting).

292. *Lombardo v. State*, 503 S.W.2d 780, 783 (Tex. Crim. App. 1974).

293. *Albrecht v. State*, 486 S.W.2d 97, 100-01 (Tex. Crim. App. 1972).

294. *Id.* at 101.

295. 514 S.W.2d 758 (Tex. Crim. App. 1974).

296. *Id.* at 759.

297. 503 S.W.2d 810 (Tex. Crim. App. 1974).

298. *Id.* at 814.

299. *Id.* (Morrison, J., concurring).

mary offenses when the extraneous offense was used to show identity.³⁰⁰ Although the *modus operandi* of each offense was clearly different, the majority found the robberies sufficiently similar because both were committed at gunpoint in Dallas by a perpetrator who was aided by a confederate. The dissenters also objected to the broad language of the majority that any extraneous offenses "which 'tend' to defeat or discredit the accused's defensive theory" are admissible to rebut an alibi. Apparently, their fear was that the state would now be free to use any uncharged offense to impeach the defendant generally rather than to show merely the unbelievableability of his claim of alibi.

In *Kirkpatrick v. State*³⁰¹ the court divided on the question of whether failure to give the ordinarily required limiting charge to the jury on extraneous offenses was error. The defendant, a justice of the peace, was convicted of conversion on evidence that he had collected fines amounting to over \$1500 and that only part of that amount was transmitted to the county treasurer. By a 3-2 vote the court held that a requested charge limiting the jury's consideration of all the ancillary transactions to the questions of identity, intent, motive and scheme was not required. The majority stated that the transactions were not extraneous but all part of the chain of events showing the ultimate conversion.³⁰² The dissenters took the position that because there were at least two hundred technically separate offenses submitted to the jury it could return a conviction if it found him guilty of any one of them.³⁰³

Jury Argument. Defense counsel who deplore the judicial tendency to afford the prosecutor wide latitude in jury argument will find little solace in the decisions of the past year. In *Donnelly v. DeChristoforo*³⁰⁴ the United States Supreme Court reversed a decision of the First Circuit that a prosecutor's argument had denied due process to a defendant convicted of first degree murder in the state court.³⁰⁵ In reference to the defendant's motives for standing trial the prosecutor had stated, "I quite think that they [the defendant and his counsel] hope that you find him guilty of something a little less than first-degree murder." The lower court found this statement to be a deliberate attempt to convey the false impression that the defendant had unsuccessfully tried to plead guilty to a lesser charge. Although disclaiming any intent to justify prosecutorial misconduct, the Supreme Court stated that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury . . . will draw that meaning from the plethora of less damaging interpretations."³⁰⁶ This appears to be nothing less than a statement of a presumption that a jury has

300. *Id.* (Roberts, J., dissenting).

301. 515 S.W.2d 289 (Tex. Crim. App. 1974).

302. *Id.* at 292.

303. *Id.* at 294 (Roberts, J., dissenting).

304. 416 U.S. 637 (1974).

305. *DeChristoforo v. Donnelly*, 473 F.2d 1236 (1st Cir. 1973) (habeas corpus proceeding).

306. 416 U.S. at 647.

drawn the least harmful of inferences possible from a prosecutor's comments. As such, it is an affirmation of what might be called the "necessary implication" standard of the Texas Court of Criminal Appeals.³⁰⁷ Accordingly, in any case in which conflicting inferences may be drawn, the defendant bears the stringent burden of establishing on the basis of the whole proceedings and argument that the improper inference was drawn. Moreover, even if the reviewing court finds that such an inference was drawn, it still may hold that the error was harmless because any prejudice from the statement could not have had any determinative effect on the outcome of the trial.

The greatest obstacle to obtaining reversals based on improper argument by the prosecutor is the concept of waiver. The defendant will be held to have waived any objection to anything other than fundamentally unfair argument that goes outside the record under the "open door" or "invited argument" doctrine if it is found to have been made merely in response or retaliation to remarks of the defense that also go outside the record.³⁰⁸ Furthermore, to preserve error the defendant must specifically object to the prosecutor's comment, request an instruction that the jury disregard it, move for a mistrial, and obtain a ruling on each objection and request. In addition, he must except to a denial of his mistrial motion.³⁰⁹

VII. SENTENCING AND CORRECTIONS

In *Adrighetti v. State*³¹⁰ the court held that prior misdemeanor convictions, although obtained when the defendant was neither represented by counsel nor when he had waived his right to counsel may be used for impeachment or to enhance punishment if the prior conviction did not result in imprisonment.³¹¹ In perhaps one of the most significant decisions of the past year, the court held in *Scamardo v. State*³¹² that the state's burden of proof in probation revocation proceedings was a preponderance of the evidence.

Current cases relating to the state's treatment of persons committed to mental institutions, such as the Fifth Circuit case of *Donaldson v. O'Connor*,³¹³ could have a significant impact on future correctional treatment of criminal offenders. Although in *Donaldson* it was a civilly committed plaintiff who was held to have a constitutional right to treatment, the court's rationale could logically extend to support the same right in persons committed under the criminal process.³¹⁴ In fact, dissimilar treatment and release

307. See, e.g., *Winkle v. State*, 506 S.W.2d 891 (Tex. Crim. App. 1974).

308. See, e.g., *Gleffe v. State*, 509 S.W.2d 323 (Tex. Crim. App. 1974); *Jordan v. State*, 500 S.W.2d 638 (Tex. Crim. App. 1973).

309. See, e.g., *Sloan v. State*, 515 S.W.2d 913 (Tex. Crim. App. 1974). See generally *Crump, The Function and Limits of Prosecution Jury Argument*, 28 Sw. L.J. 505, 535-40 (1974).

310. 507 S.W.2d 770 (Tex. Crim. App. 1974).

311. *Id.* In dissent, Judge Onion said "color me amazed." *Id.* at 775.

312. 517 S.W.2d 293 (Tex. Crim. App. 1974). For an excellent discussion of the unique nature of probation revocation proceedings in Texas see Comment, *Scarpelli: A Mandate for Change of the Due Process of Law Requirements in Texas Probation Revocation Hearings*, 11 HOUSTON L. REV. 895 (1974).

313. 493 F.2d 507 (5th Cir.), cert. granted, 419 U.S. 894 (1974) (No. 74-8).

314. This fact was noted by Chief Justice Burger during the oral argument of the case before the United States Supreme Court. See 16 CRIM. L. REP. 4154, 4156 (1975)

procedures of criminally committed mental patients vis-à-vis those who had been civilly committed were held unconstitutional by a Texas federal district judge in *Reynolds v. Neill*.³¹⁵ A general constitutional principle that emerges from these cases is that the state has an obligation to provide that degree of correctional treatment which corresponds to the need for treatment which was claimed to justify the confinement in the first instance. A case supporting this proposition is *Morales v. Turman*,³¹⁶ in which a Texas federal judge ordered a comprehensive reorganization and revamping of two juvenile treatment facilities under the auspices of the Texas Youth Council.

VIII. SUBSTANTIVE LAW

Relatively few appeals involving convictions under the new Penal Code have as yet been decided, but the Code promises to be a fertile source of appellate litigation in future years. Recent decisions of the United States Supreme Court concerning the constitutionally-required specificity of penal statutes³¹⁷ have encouraged an increasing number of attacks on the definition of offenses in Texas. A majority of the Texas Court of Criminal Appeals voted to reconsider its decision on original submission concerning the Texas obscenity statute in *West v. State*.³¹⁸ Initially the court had decided that the terms "sexual matters" in the old statute, and "sex, nudity or excretion" in the new section 43.21³¹⁹ were sufficiently specific on their face to withstand a challenge of vagueness and overbreadth.³²⁰ However, the majority decided on rehearing that the wiser course was to uphold the obscenity statute by finding an authoritative construction of potentially obscene matter in prior Texas case law. In several other cases the court had little trouble finding that statutory language was clear and precise enough to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and to prevent arbitrary and erratic arrests and convictions.³²¹

An issue dividing the court in several different types of cases was the sufficiency of evidence presented to require charges by the trial court on a lesser included offense. In *Thompson v. State*,³²² involving a prosecution for assault with intent to murder a police officer, the court held that the failure to give defendant's specifically requested charge on the lesser included offense of aggravated assault was reversible error. The majority concluded

for portions of that oral argument. Lack of money by the state would be no excuse. See *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (requiring the Mississippi state prison system to virtually overhaul itself).

315. 381 F. Supp. 1374 (N.D. Tex. 1974).

316. 383 F. Supp. 53 (E.D. Tex. 1974).

317. See, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974); *Lewis v. New Orleans*, 415 U.S. 130 (1974).

318. 514 S.W.2d 433 (Tex. Crim. App. 1974), *aff'g on rehearing* 489 S.W.2d 597 (Tex. Crim. App. 1972).

319. TEX. PEN. CODE ANN. § 43.21 (1974).

320. For criticism of the court's approach on original submission, see Bubany, *The Texas Penal Code of 1974, Annual Survey of Texas Law*, 28 Sw. L.J. 292, 333-35 (1974).

321. See, e.g., *Ramirez v. State*, 518 S.W.2d 546 (Tex. Crim. App. 1975); *McMorris v. State*, 516 S.W.2d 927 (Tex. Crim. App. 1974).

322. No. 48,074 (Tex. Crim. App., Oct. 30, 1974).

that an aggravated assault charge was required in cases in which the evidence indicated no intent to kill. The dissenting judges, however, thought that the earlier cases did not support such a broad proposition because in those cases the defendant did not rely solely on an accident theory, but presented evidence of intent to use some force but not to kill. They stated that in the case under consideration the defendant's theory of defense and his evidence sought to prove only accident, that is, that in fact no assault occurred at all because of a lack of intent even to injure the victim. In *Esparza v. State*³²³ the majority found that in a murder prosecution a charge on negligent homicide was required in addition to the charge on accident that was given because the evidence was sufficient to justify a finding of the lesser included offense. Unlike its approach in *Thompson*, the court refused to adopt a general statement from previous cases as a rigid rule, namely, that a charge of negligent homicide is not required when a proper charge on accident is given. Thus, because there was evidence that the defendant swung his baby around in an attempt to make it dizzy so it would go to sleep, the jury could find that an intentional act produced an unintended result, a finding consistent with negligent homicide, but not with murder or accident.

The court has also held that in prosecutions for either murder or assault with intent to murder with malice, a charge on the lesser offenses of murder or assault without malice should be given when the evidence shows immediate acts of the victim which aroused passion in the defendant.³²⁴ The failure to instruct on the lesser offense will be required even if the defendant denies an intent to kill, which is an element of passion killings or assaults.³²⁵

Convictions for possession of proscribed drugs have been a source of numerous appeals attacking both the sufficiency of the evidence and the adequacy of jury charges. To prove a possession charge, the state must show: "(1) that the accused exercised actual care, control and management over the [contraband], and (2) that he knew that the object he possessed was contraband."³²⁶ Hence, in *Troyer v. State*³²⁷ the trial court's failure to charge the jury that to convict it must find knowing possession resulted in reversal. In a number of cases, the court reversed convictions for possession of prohibited drugs because of insufficient evidence of possession.³²⁸ Proof of mere presence at a place where narcotics are being used which are not within the exclusive possession of the accused is insufficient without proof of other facts that affirmatively link the accused to the contraband. Close proximity could be a factor indicating knowledge.³²⁹ However, the affirmative link was not established in a case where contraband was found

323. 520 S.W.2d 891 (Tex. Crim. App. 1975).

324. *Ray v. State*, 515 S.W.2d 664 (Tex. Crim. App. 1974); *Armentrout v. State*, 515 S.W.2d 297 (Tex. Crim. App. 1974); *Mays v. State*, 513 S.W.2d 846 (Tex. Crim. App. 1974).

325. *Ray v. State*, 515 S.W.2d 664 (Tex. Crim. App. 1974).

326. See, e.g., *Higgins v. State*, 515 S.W.2d 268, 270 (Tex. Crim. App. 1974); *Woolridge v. State*, 514 S.W.2d 257, 258 (Tex. Crim. App. 1974).

327. 516 S.W.2d 163 (Tex. Crim. App. 1974).

328. See, e.g., *Higgins v. State*, 515 S.W.2d 268 (Tex. Crim. App. 1974); *Woolridge v. State*, 514 S.W.2d 257 (Tex. Crim. App. 1974).

329. See generally *Higgins v. State*, 515 S.W.2d 268 (Tex. Crim. App. 1974).

in a borrowed automobile occupied by the defendant.³³⁰ Although the contraband was in close proximity to the defendant, it was not in plain view since it was discovered only upon a third inspection of the automobile. Furthermore, no odor was emitted which could have made the defendant aware of the contraband, and there was no indication that the defendant had access to the area in which it was found.

330. *Woolridge v. State*, 514 S.W.2d 257 (Tex. Crim. App. 1974).