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Walter W. Steele Jr.

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CRIMINAL LAW AND PROCEDURE

by

Walter W. Steele, Jr.*

A PATTERN seems to be emerging from the accelerating evolution of state and constitutional jurisprudence. Based upon stare decisis, state courts disallow defense contentions, whereupon the defendant appeals to some federal jurisdiction and is sustained. The newly formed postulate of law is then embraced by the legislature in the form of a statute. Often as not, however, the statute is quickly obscured by another innovative postulate.

I. SEARCH AND SEIZURE

Recent cases at the national, state, and federal district level have had considerable impact upon the law of search and seizure. Most significant is the opinion of the United States Supreme Court in *Warden v. Hayden*,¹ which invalidated the concept of "mere evidence."² Prior to this decision, an officer making a legal search could not seize an item which was mere evidence; only instrumentalities of the crime, fruits of the crime, weapons, or contraband property were the proper subject of seizure.³

Problems of the form and content of "probable cause information" sufficient to justify the issuance of a search warrant continue to arise. In 1965 and 1966 a number of cases from Texas, decided by the court of criminal appeals and the Supreme Court of the United States,⁴ stressed the requirement of a written affidavit sufficient on its face to adequately describe facts amounting to probable cause, unaided by personal conclusions. Recently, however, the emphasis is shifting from a construction of the written affidavit within its four corners only, allowing consideration of other information which the magistrate might have gained orally. For instance, in the Fifth Circuit case of *Lopez v. United States*,⁵ an affidavit for a warrant to search a house merely stated the conclusion that the officer believed that narcotics were in the house because, "I have been informed of the existence of the foregoing set out facts by reliable, creditable, reputable, and trustworthy citizens of El Paso County, Texas, and further investigation."⁶ The court admitted that the affidavit alone probably did not establish probable cause so as to justify the warrant. Nevertheless, the court upheld the warrant because of a finding that the officer

* LL.B., Southern Methodist University. Lecturer, Southern Methodist University. Attorney at Law, Dallas, Texas.

¹ 387 U.S. 294 (1967), noted in 21 Sw. L.J. 867 (1967).

² *Id.* at 300. "The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits or contraband has been criticized by courts and commentators. . . . We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment."

³ *Abel v. United States*, 362 U.S. 217, 234 (1960).

⁴ See Baernstein, *Criminal Law and Procedure, Annual Survey of Texas Law*, 21 Sw. L.J. 237, 242 (1967).

⁵ 370 F.2d 8 (5th Cir. 1966).

⁶ *Id.* at 10.

provided the magistrate with facts by oral statements at the time the affidavit was signed.

This philosophy can only lead to protracted pre-trial suppression hearings involving magistrates being asked to recall details of what was told them by an officer at some past date. The potential inaccuracy involved in the proof of oral statements, contrasted with the ease of preparing a plenary affidavit, seemed to dictate that the court avoid any expansion of the doctrine of oral supplementation.⁷

*Miranda v. Arizona*⁸ has raised some significant collateral issues on the subject of capacity of the defendant to consent to a warrantless search while under arrest.⁹ At least one federal case has already held that such consent is invalid unless the defendant has been specifically advised of his right to refuse the search and then has made an intelligent waiver.¹⁰ On the other hand, the Texas Court of Criminal Appeals, in a case decided since *Miranda*, has stated unequivocally that consent to search is not analogous to confession; therefore the *Miranda*-type warnings are not necessary until the Supreme Court specifically says so.¹¹ One might logically speculate that, as on other occasions, the Supreme Court of the United States will accept the challenge of the Texas Court of Criminal Appeals. It is difficult to imagine why a defendant in custody must be carefully advised of his rights concerning interrogation, but not so advised of his right to require a search warrant.

Judge Taylor of the Federal District Court for the Northern District of Texas recently wrote an opinion in a habeas corpus case which has received considerable notice.¹² The petitioner had been convicted of armed robbery in state court. He was stopped by a Dallas police officer while driving with a loud muffler. When he failed to produce a driver's license, he was arrested and placed in the squad car, whereupon the officer tore out the kickboard under the dashboard of the defendant's car and discovered money from a robbery. While admitting that the arrest was valid, the federal district court held this to be an illegal and unauthorized search and applied the exclusionary rule to the fruits. To consider this case a departure from existing Texas law is to misconstrue it. Although there may be some Texas cases with broad language, it is believed that Texas has always followed the rule that arrest for a traffic offense alone is not sufficient probable cause to justify a warrantless search of an automobile.¹³

⁷ So far Texas has refused to allow oral testimony at least when offered to contradict statements made in the affidavit. *Piper v. State*, 34 S.W.2d 283 (Tex. Crim. App. 1930); *Cordona v. State*, 31 S.W.2d 452 (Tex. Crim. App. 1930).

⁸ 384 U.S. 436 (1966).

⁹ See Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

¹⁰ *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966).

¹¹ *Weeks v. State*, 417 S.W.2d 716, 719 (Tex. Crim. App. 1966). "Until the Supreme Court of the United States holds that the rules announced in those cases [*Miranda* and others] apply in voluntary consent cases, we will adhere to our former holdings that the fact that appellant was under arrest at the time he consented to the search would not render inadmissible the fruits of the search."

¹² *Grundstrom v. Beto*, 273 F. Supp. 912 (N.D. Tex. 1967).

¹³ *Walker v. State*, 397 S.W.2d 432 (Tex. Crim. App.), cert. denied, 385 U.S. 864 (1966).

II. RIGHT TO COUNSEL

Certainly the expanding recognition of the right to counsel is of signal importance to all practitioners.¹⁴ Economic considerations of supply and cost, practical demands created by the effective counsel doctrine, as well as serious ethical postulates, are all cause for apprehension.

The most significant recent developments in this area are, as usual, from the Supreme Court of the United States. *In re Gault*¹⁵ is now famous for extending to the juvenile in delinquency proceedings not only the right to counsel, but also the right to adequate notice, the privilege of silence, and the right to confrontation. In expressing the need for counsel in juvenile court, the Supreme Court said: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him."¹⁶ This language offers little comfort to the practitioner who finds himself representing a child in juvenile court for the first time. How shall the average lawyer reconcile the efforts of the juvenile court system to recognize and bring early treatment to sociopathic conduct with his duty as an advocate? Is there a place for the institution of defense counsel in an essentially non-adversary proceeding? *In re Gault* does not provide the answers.

*United States v. Wade*¹⁷ extended the right to presence of counsel to line-up identification procedures. In this respect the case represents little more than predictable interpretation of the *Escobedo*¹⁸ doctrine. However, the case is significant in light of its potential implications for what is apparently the common practice in Texas of routinely not appointing counsel for indigents until *after* indictment. If protection of counsel is critically necessary during initial identification procedures, is it not a fortiori so during the time of grand jury proceedings? Although the defendant in *Watkins v. State*¹⁹ presented just such a question, the Texas Court of Criminal Appeals seemed to ignore the problem, simply stating that the record revealed no error.

Complying with the mandate of the Supreme Court in *Greer v. Beto*,²⁰ the Texas court now holds that if the defendant was not represented by counsel at his previous conviction, said conviction may not be used for

¹⁴ For development of the right to counsel, see *Powell v. Alabama*, 287 U.S. 45 (1932); *Betts v. Brady*, 316 U.S. 455 (1942); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967). See also Comment, *Custodial Interrogation as a Tool of Law Enforcement—Miranda v. Arizona and the Texas Code of Criminal Procedure*, 21 Sw. L.J. 253 (1967).

¹⁵ 387 U.S. 1 (1967).

¹⁶ *Id.* at 36.

¹⁷ 388 U.S. 218 (1967). *Wade* was held not retroactive in *Stoval v. Denno*, 388 U.S. 293 (1967).

¹⁸ *Escobedo v. Illinois*, 378 U.S. 478 (1964). See also *Miranda v. Arizona*, 384 U.S. 436 (1966); Comment, note 14 *supra*.

¹⁹ 411 S.W.2d 364 (Tex. Crim. App. 1967). See also *Hearn v. State*, 411 S.W.2d 543 (Tex. Crim. App. 1967).

²⁰ 384 U.S. 269 (1966).

purposes of enhancement.²¹ Nevertheless, the court in *Ex parte Williams*²² held article 42.12, providing for the appointment of counsel at the time probation is sought,²³ not to be retroactive, and therefore a previously revoked probated sentence was used for enhancement even though no counsel was present during the revocation procedure.²⁴ In other cases during the year, the Texas Court of Criminal Appeals has declared that counsel must be appointed in extradition proceedings²⁵ and has set the standard of counsel as one "reasonably likely to render and rendering reasonably effective assistance."²⁶ The court has also declared that the burden is upon the defendant to establish indigency before the court is under a duty to appoint counsel for him.²⁷ To date, no cases have set an indigency standard.

III. JUVENILES

The effect of *In re Gault* on the juvenile court system has been previously discussed.²⁸ The present delinquency statute was amended very recently to provide a method for possible transfer of a juvenile to district court for trial as an adult, and appointment of counsel to attend such transfer hearings.²⁹ Although clearly required by *Gault*, there is currently no statutory authority for the appointment or payment of counsel in delinquency proceedings. Some inconsequential relief is afforded by the holding in *Lee v. McKay*,³⁰ that parents of children declared delinquent without counsel may appeal without the necessity of posting an appeal bond or affidavit thereof.

Still with us is the hoary question of when, if ever, is the juvenile offender subject to prosecution as an adult. The legislature has now made clear its intention that:

1. No person shall be convicted of any offense, except perjury, committed before age fifteen;³¹
2. If the defendant was a male between fifteen and seventeen, or a female between fifteen and eighteen at the time of commission of a felony, the juvenile court may, after hearing, transfer the case to the district court for handling as an adult;³²
3. If, *after hearing*, the juvenile court retains jurisdiction, the defendant is not subject to subsequent prosecution at any age for any offense alleged in

²¹ *Ex parte Greer*, 408 S.W.2d 711 (Tex. Crim. App. 1966).

²² 414 S.W.2d 472 (Tex. Crim. App. 1967).

²³ TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966).

²⁴ *Williams* also leaves open the question of whether counsel must be present at time of sentencing as distinguished from conviction. Cf. *Ex parte Ferrell*, 406 S.W.2d 440 (Tex. Crim. App. 1966).

²⁵ *In re Turner*, 410 S.W.2d 639 (Tex. Crim. App. 1967).

²⁶ *Caraway v. State*, 417 S.W.2d 159, 162 (Tex. Crim. App. 1967).

²⁷ *Clark v. State*, 417 S.W.2d 402 (Tex. Crim. App. 1967).

²⁸ See text accompanying note 14 *supra*.

²⁹ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1967); accord, *Kent v. United States*, 383 U.S. 541 (1966).

³⁰ 414 S.W.2d 956 (Tex. Civ. App. 1967).

³¹ TEX. PEN. CODE ANN. art. 30, § 1 (1967).

³² TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1967).

the delinquency petition, or any other offense known to the judge as evidenced by the record.³³

In *Ex parte Miranda*³⁴ the question was presented of what happens when the juvenile court did not hold a transfer hearing, and instead adjudicated delinquency based upon facts simultaneous with but not connected to the subsequent criminal charge. The Texas Court of Criminal Appeals reasoned that it was not mandatory under the statutes for the juvenile court to hold a hearing concerning possible transfer to the district court. Therefore, they reasoned, there is nothing under this set of facts to prevent prosecution of the defendants at age seventeen for a criminal charge which is separate from and unrelated to the delinquency proceeding.

Now, however, article 30 of the Penal Code has also been amended³⁵ to provide that a delinquent may not be subsequently punished as an adult for the offense alleged in the delinquency petition or *any other* offense evidenced in the record of the juvenile proceeding. Therefore, the question in *Ex parte Miranda* is moot, provided the attorney representing the juvenile introduces into the record in the delinquency hearing evidence of all crimes which may have been committed. Because of the effects of *Gault*, many attorneys may find themselves in juvenile court for the first time. Failure to carefully consider the questions of strategy presented by *Ex parte Miranda* and the amendment of article 30 of the Penal Code could easily result in a subsequent allegation of inadequate representation. As an advocate, should the attorney introduce evidence of crimes as yet undetected so as to insure against possible prosecution at age seventeen? Is the introduction of evidence of collateral crimes against the interest of a juvenile client on the main issue, *i.e.*, is he "delinquent?"³⁶

IV. CONFESSION

Article 38.22 of the Code of Criminal Procedure has been amended³⁷ to provide that a written confession is admissible if the defendant was previously warned by the magistrate *or* the person to whom the confession was given. This is substantially the procedure existing prior to the initial code amendment in 1965.³⁸ Now that the necessary warning by a disinterested magistrate has been removed, one might feel safe in predicting an increase in the number of confessions.

It would seem that Texas will never enforce its age-old provision requiring an arresting officer to take the defendant before a magistrate.³⁹ Therefore, consideration of whether the taking should be "immediately"⁴⁰ or "without unnecessary delay"⁴¹ is futile. Experience has shown that

³³ *Id.* § 6(i) (emphasis added).

³⁴ 415 S.W.2d 413 (Tex. Crim. App. 1967).

³⁵ TEX. PEN. CODE ANN. art. 30, § 3 (1967).

³⁶ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1967).

³⁷ TEX. CODE CRIM. PROC. ANN. art. 38.22, § 1(b) (1967).

³⁸ *Id.* art. 727 (1925).

³⁹ See Morrison, *Commentary on Article 15.17*, 1 TEX. CODE CRIM. PROC. ANN. 419 (1966).

⁴⁰ TEX. CODE CRIM. PROC. ANN. art. 15.17 (1965).

⁴¹ *Id.* art. 15.17 (1967).

court-imposed sanctions are often necessary to make statutory commands operational.⁴² One of the many cases exemplifying the attitude of the Texas Court of Criminal Appeals regarding presentation of the defendant to a magistrate is *Lacefield v. State*.⁴³ *Lacefield* was illegally arrested and held for five hours before being taken before a magistrate. He subsequently signed a voluntary confession. At trial he contended the confession was inadmissible as the product of an illegal arrest.⁴⁴ The court repeated its stance that the exclusionary sanctions applicable to illegal search are not applicable to illegal arrests.⁴⁵

For some reason the court is straying from its earlier position that no evidence of the truth or falsity of a confession should be admissible at the hearing on whether the confession was voluntary.⁴⁶ In *Bryan v. State*,⁴⁷ and the earlier case of *Acosta v. State*,⁴⁸ the court allowed the prosecutor at the *Jackson v. Denno*⁴⁹-type hearing to question the defendant as to whether the facts contained in the confession were true. In both cases the Texas Court of Criminal Appeals passed over the problem by saying that a trial judge will always consider only admissible testimony. The obvious prejudicial effect of such testimony at a time when the trial judge is attempting to rule upon the question of voluntariness suggests that the court of criminal appeals should emphatically require the prosecution to cease this practice.⁵⁰

V. GRAND JURY

In *Brooks v. Beto*⁵¹ the Fifth Circuit overruled its previous stand in *Collins v. Walker*.⁵² According to *Brooks*, intentional inclusion of racial minorities on grand jury panels is constitutional because it may be the only practical way to arrive at a racially balanced mix. In concurring opinions, Judge Gewin⁵³ and Judge Bell⁵⁴ pointed out that the language of the majority places an undue burden upon the jury commissioners to acquaint themselves with the ethnic makeup of the community. The majority opinion makes the demand:

[T]hat jury selectors make themselves acquainted with, not just the class, but the members of it in order to determine the identity and availability of individuals who have qualifications for potential jurors and whose presence is required in the 'universe' to assure fair community representation. . . . But

⁴² *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴³ 412 S.W.2d 906 (Tex. Crim. App. 1967).

⁴⁴ *Wong Sun v. United States*, 371 U.S. 471 (1963); *Collins v. Beto*, 348 F.2d 823 (5th Cir. 1965).

⁴⁵ See also *Pearson v. State*, 414 S.W.2d 675 (Tex. Crim. App. 1967).

⁴⁶ *Lopez v. State*, 384 S.W.2d 345 (Tex. Crim. App. 1964); TEX. CODE CRIM. PROC. ANN. art. 38.22(2) (1967).

⁴⁷ 406 S.W.2d 210 (Tex. Crim. App. 1966).

⁴⁸ 403 S.W.2d 434 (Tex. Crim. App. 1966).

⁴⁹ 378 U.S. 368 (1964) (hearing to determine whether confession is voluntary).

⁵⁰ See *Rogers v. Richmond*, 365 U.S. 534 (1961).

⁵¹ 366 F.2d 1 (5th Cir. 1966).

⁵² 329 F.2d 100 (5th Cir.), cert. denied, 379 U.S. 901 (1964).

⁵³ 366 F.2d 1, 30 (5th Cir. 1966).

⁵⁴ *Id.* at 31.

they must also 'know' the internal structure of such area groupings sufficiently to be able to determine identity and availability of those qualified to serve.⁵⁵

In fact, such language does create significant potential for future challenge of grand jury arrays.⁵⁶

It should be noted that a few days before *Brooks*, the Fifth Circuit decided *Rabinowitz v. United States*,⁵⁷ relating to the method of jury selection in federal courts. The court concluded the method used was unconstitutional because it resulted in only five per cent of the Negroes being eligible jurors, when in fact Negroes represented approximately thirty-four per cent of the community. When the government pointed out that five Negroes actually sat on the grand jury in question, the court responded: "We think this evidences a basic misconception. The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury or grand jury."⁵⁸ If the commissioners are under affirmative duty to investigate the community's racial components and "the focus of the law is on the list," then why is purposeful racial inclusion on the panel the only practical solution as stated in *Brooks*? At best, the reasoning in the two opinions will require further clarification.

VI. INSANITY

Amendment of article 46.02 of the Code of Criminal Procedure by the Sixtieth Legislature codified the test of insanity at the time of trial (present competency) to be, "if he is presently incompetent to make a rational defense."⁵⁹ Certainly, we might expect soon to see cases seeking definition of who is competent to make a rational defense. Query: Is a lawyer an expert witness on the question of whether a given individual is "incompetent to make a rational defense?" If it is presently troublesome for the medical profession to offer meaningful testimony under the familiar right-from-wrong test, what can we anticipate from the legal profession concerning a person's competency to participate in a trial?

Also new is article 46.02, section 2(f), providing for court appointment of experts to examine the defendant's sanity and to testify thereto at any trial of the accused. This procedure already exists in many states. The conundrum of potential violation of fifth amendment rights is dealt with in 46.02, section 2(f)(4).⁶⁰ The addition of the court-appointed psychiatrist presents a serious dilemma for the practitioner. Realistically,

⁵⁵ *Id.* at 23.

⁵⁶ Texas has a very restrictive procedure for challenge of the array, TEX. CODE CRIM. PROC. ANN. art. 19.27 (1965): "Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard . . ." See also *Valdez v. State*, 408 S.W.2d 109 (Tex. Crim. App. 1966).

⁵⁷ 366 F.2d 34 (5th Cir. 1966).

⁵⁸ *Id.* at 59.

⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 46.02 (1967); and see *Dusky v. United States*, 362 U.S. 402 (1960); *Guagando v. State*, 41 Tex. 626, 630 (1874).

⁶⁰ "No statement made by the defendant during examination into his competency shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding no matter under what circumstances such examination takes place." TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(f)(4) (1967).

the prosecution will have access to the substance of the conversations between the doctor and the defendant. This is easily acquired by the prosecution without approaching the statutory prohibition that no statement by the accused be "admitted into evidence."⁶¹ So, does the defense attorney encourage the defendant to cooperate fully with the medical examiner, and freely discuss the facts of the case in expectation of a finding of insanity; or does he place his emphasis upon the burden of the state to prove the case, and advise his client to remain silent in the presence of the court-appointed physician?⁶²

Section 2(g)(1) has been added to article 46.02 to provide a procedure for the trial of the issue of present insanity as it might arise in a case being tried without a jury. However, as is so often the case, the legislature apparently failed to recognize the effect of the correlation between its new section and the remainder of article 46.02 as it already existed.⁶³ As the statute now reads, if a defendant is being tried by a jury, he may not have the issue of present sanity considered unless he himself raises it; however, if the trial is before the court without a jury, the judge himself may raise the issue "from any cause."

One last comment should be made upon the status of the law in Texas with reference to the insanity defense. The 1965 amendment to the Code of Criminal Procedure removed the right to bifurcated trial on the issue of sanity. Since the date of the new Code, sanity can be tried in advance of trial on the merits only with consent of the state's attorney and approval of the judge.⁶⁴ Forcing the defendant to present his sanity issues to the same jury and at the same time as the state is presenting inflammatory details of the corpus delicti is an obvious disadvantage. So much so that the defendant may be denied due process.⁶⁵

VII. WITNESSES

The legislative oversight creating the conflict between article 36.09, Code of Criminal Procedure and article 82, Penal Code⁶⁶ concerning wheth-

⁶¹ *Id.*

⁶² See Note, *Pretrial Mental Examinations in Maine: Are They Mechanisms for Compelling Self-Incrimination?*, 18 MAINE L. REV. 96 (1966).

⁶³ Compare TEX. CODE CRIM. PROC. ANN. art. 46.12, § 2(a) (1967): "At the trial on the merits, the trial court shall hear evidence on the issue of present insanity only if prior to the offer thereof there be filed on behalf of the defendant a written motion asking the court to hear evidence on such issue and requesting the court to declare a mistrial because of such insanity . . . ;" with *id.* art. 46.02, § 2(g)(1) (1967): "If the trial is before the court without a jury and if, after commencement of a trial on the merits and before the return of a verdict, there arises in the mind of the court from any cause, a reasonable doubt as to the present sanity of the defendant, the court shall suspend the proceedings and without unnecessary delay impanel the jury to determine the issue of the present sanity of the defendant."

⁶⁴ TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1 (1967): "No issue of insanity shall be tried in advance of trial on the merits, except upon written application on behalf of the accused with the consent of the state's attorney and the approval of the trial judge."

⁶⁵ See *Pate v. Robinson*, 383 U.S. 375 (1966); Onion, *Commentary on Article 46.02*, 5 TEX. CODE CRIM. PROC. ANN. 561 (1965).

⁶⁶ Tex. Pen. Code Ann. art. 82 (1952): "Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, cannot be introduced as witnesses for one another, . . ."; TEX. CODE CRIM. PROC. ANN. art. 36.09 (1965): "Two or more defendants who are jointly or separately indicted or complained against for the same offense or an offense growing out of the same transaction . . . in any event either defendant may testify for the other or on behalf of the state"

er principals, accomplices, and accessories are competent witnesses for or against each other has been solved by the repeal of article 82.⁶⁷ The issue is by no means at an end, however. In *Washington v. State*⁶⁸ the court of criminal appeals confirmed the conviction of a principal who had been denied the benefit of the testimony of his co-principal because the state's attorney, relying upon article 82, objected to the admission of such testimony. The Supreme Court of the United States has now reversed the court of criminal appeals, stating that the effect of article 82 was to deny the defendant his sixth amendment right to compulsory process.⁶⁹

The question immediately arises as to whether or not this decision will be retroactive. Apparently as a result of the Supreme Court ruling in the *Washington* case, the court of criminal appeals was presented with a writ of habeas corpus in *Ex parte Zerschausky*.⁷⁰ The petitioner had been convicted of murder and assessed punishment of fifty years confinement as a result of a trial in which, he alleged, he was denied the testimony of an accessory. With dissenting opinions by Judges Morrison and Onion, the majority of the court distinguished the ruling of the Supreme Court in the *Washington* case on the basis that the accessory witness was never actually called during the *Zerschausky* trial and hence there was no objection in the record made by the state's attorney nor was there any order by the court denying the admission of the testimony of such witness. Note should be made, however, of the fact that the court of criminal appeals did not take this opportunity to declare that it would refuse to apply *Washington* retroactively.

VIII. SENTENCE

The Texas Legislature has never been consistent in expressing maximum punishment for non-capital offenses.⁷¹ Some statutes express the maximum as "life" and some as "any term of years." Article 62 of the Penal Code provides that if a defendant is convicted of a felony the second time, the punishment shall be "the highest which is affixed to the commission of such offenses in ordinary cases."⁷² What is "the highest" under those statutes which declare that the maximum punishment for the offense is "any term of years?"⁷³ Heretofore the Texas court had answered that for a first offense the jury had unlimited discretion, *i.e.*, 199 years,⁷⁴ but for

⁶⁷ Tex. Pen. Code Ann. art. 82 (1952) was repealed by Tex. Laws 1967, ch. 659, at 1852.

⁶⁸ 400 S.W.2d 756 (Tex. Crim. App. 1966).

⁶⁹ *Washington v. Texas*, 388 U.S. 14 (1967). In connection with this decision, it is interesting to note that in *Bonner v. Beto*, 373 F.2d 301 (5th Cir. 1967), the Fifth Circuit had previously ruled that article 711 of the old Texas Code of Criminal Procedure violated fourteenth amendment due process but specifically refused to decide the issue of whether or not the sixth amendment was violated or to assume that the sixth amendment was applicable to the states through the fourteenth amendment.

⁷⁰ 417 S.W.2d 279 (Tex. Crim. App. 1967).

⁷¹ For example, TEX. PEN. CODE ANN. art. 1408 (1953) authorizes "life" as maximum for robbery; but when a weapon is used "any term of years" is the maximum.

⁷² For the *third* conviction the felon shall receive life. TEX. PEN. CODE ANN. art. 63 (1952).

⁷³ E.g., TEX. PEN. CODE ANN. art. 1408 (1953) (robbery); *id.* art. 1162 (rape); *id.* arts. 1190, 1398 (burglary); *id.* art. 1391 (burglary of home).

⁷⁴ *Blassingale v. State*, 408 S.W.2d 115 (Tex. Crim. App. 1966).

enhancement for a second offense under article 62, the "highest" punishment was limited to ninety-nine years.⁷⁵ So, it was possible for an offender to receive a greater punishment for a first offense than for a second crime of like character.⁷⁶

In *Ex parte Davis*⁷⁷ the court finally concluded that the only logical answer to the dilemma was to hold that the enhancement provisions of article 62 simply cannot be applied to any crime which does not prescribe life or a fixed term of years as a maximum punishment. It is not clear if this decision will apply retroactively to cases where enhanced sentences of ninety-nine years have previously been given under the court's old reasoning. It should be noted that on the same day as *Ex parte Davis* the court decided *Ex parte Balas*,⁷⁸ granting a writ of habeas corpus voiding a 1955 sentence of life for burglary of a private residence at night, because the statute does not provide life as a maximum, but only "any term not less than 5 years."⁷⁹

The multiplicity of writ and appeal remedies now available to defendants points up the question of credit for time served under a conviction which has been reversed, and the defendant then re-convicted of the same offense.⁸⁰ In *Ex parte Ferrell*⁸¹ the defendant was originally assessed an enhanced sentence of life for theft in 1953. This sentence was set aside by habeas corpus in 1964 and the defendant was re-sentenced to life in 1965. On appeal this re-sentence was reformed to ten years by reason of the failure of proof for enhancement.⁸² In the meantime, the defendant has actually served in excess of twelve calendar years in the penitentiary and had a total earned time of almost nineteen years. The court of criminal appeals held, however, that the defendant must commence to serve his ten-year sentence as of January 1965. Although there is considerable split of authority,⁸³ many states follow Texas in refusing to allow credit upon re-conviction of a sentence previously voided through the efforts of the defendant. At least one case has held that the denial of this credit for time served is not of constitutional dimensions.⁸⁴

The Texas Court of Criminal Appeals continues to hold⁸⁵ that suspension

⁷⁵ *Sellars v. State*, 401 S.W.2d 835 (Tex. Crim. App. 1966); *Madeley v. State*, 388 S.W.2d 187 (Tex. Crim. App. 1965); *Joseph v. State*, 367 S.W.2d 330 (Tex. Crim. App. 1963).

⁷⁶ *Ex parte Davis*, 412 S.W.2d 46, 52 (Tex. Crim. App. 1967). "The effect of *Brown*, *supra*, and the cases following it was to provide for no maximum for the first offense, but a maximum for a second conviction making it possible for a first offender to receive a greater punishment than the second offender despite the clear purpose of Art. 62, V.A.P.C."

⁷⁷ See note 72 *supra*.

⁷⁸ 412 S.W.2d 53 (Tex. Crim. App. 1967).

⁷⁹ TEX. PEN. CODE ANN. art. 1391 (1953).

⁸⁰ Problems of increase of original sentence on retrial are also being brought forward. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967); *United States ex rel. Starnes v. Russell*, 378 F.2d 808 (3d Cir. 1967); *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967).

⁸¹ 406 S.W.2d 440 (Tex. Crim. App. 1966).

⁸² *Ferrell v. State*, 397 S.W.2d 86 (Tex. Crim. App. 1965).

⁸³ See *Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951); *Annot.*, 35 A.L.R.2d 1283 (1954).

⁸⁴ *United States ex rel. Watson v. Pennsylvania*, 260 F. Supp. 474 (E.D. Pa. 1966). See also *United States ex rel. Jones v. Nash*, 264 F.2d 610 (8th Cir. 1959).

⁸⁵ *Leslie v. State*, 408 S.W.2d 116 (Tex. Crim. App. 1966); *cf. Harward v. State*, 398 S.W.2d 127 (Tex. Crim. App. 1966).

of a driver's license is not a part of the penalty for driving while intoxicated, and may not be argued to the jury nor included in the court's charge. Although the legislature did amend article 6687b, section 1(r)⁸⁶ to provide that suspension was subject to executive clemency, it did not amend the penalty provisions of article 802. And so the conclusion of the court of criminal appeals seems to be sound.⁸⁷

IX. OTHER CONSIDERATIONS

Bail. Seemingly, the court of criminal appeals is reversing its previous position that incarceration of the defendant out of the state will not exonerate his sureties when his case is called for trial in this state.⁸⁸ In *Grantham v. State*⁸⁹ the court held that the fact that the defendant had been incarcerated in Nebraska State Penitentiary would discharge his Texas sureties from further liability on the bond; and in *James v. State*⁹⁰ it held that the sureties were entitled to a jury issue on whether extradition to Mississippi constituted an "uncontrollable circumstance"⁹¹ sufficient to avoid forfeiture of a bond in Texas for a case called to trial here.

Examining Trial. Language in the revised Code of Criminal Procedure had caused some defense attorneys to predict that there would now exist a right to an examining trial in misdemeanor cases, and in all felony cases where requested prior to indictment. In *Clark v. State*⁹² the court held that there was no right to an examining trial in misdemeanor cases.⁹³ In *Trussel v. State*⁹⁴ the court found no error where the defendant's requested examining trial was denied, followed by indictment three days later.⁹⁵ Thus, in spite of new language, the law remains unchanged from what it was prior to the passage of the new Code.

Voir Dire. In spite of the clear language of article 40.09, section 4⁹⁶ the trial court in *Morris v. State*⁹⁷ refused to order the court reporter to take the *voir dire* examination. Since the defendant made no claim, or even suggested prejudicial error, the court of criminal appeals did not reverse; but, it did make clear that they would be forced to do so in any case in

⁸⁶ Tex. Laws 1965, ch. 717, § 1, at 1663.

⁸⁷ Davison v. State, 313 S.W.2d 883 (Tex. Crim. App. 1958).

⁸⁸ Williams v. State, 92 S.W.2d 1036 (Tex. Crim. App. 1936).

⁸⁹ 408 S.W.2d 235 (Tex. Crim. App. 1966).

⁹⁰ 413 S.W.2d 111 (Tex. Crim. App. 1967).

⁹¹ TEX. CODE CRIM. PROC. ANN. art. 22.13, § 3 (1965).

⁹² 417 S.W.2d 402 (Tex. Crim. App. 1967).

⁹³ TEX. CODE CRIM. PROC. ANN. art. 15.17 (1966) provides that in "each case" the magistrate shall inform the accused "of his right to have an examining trial." No distinction is made between misdemeanors and felonies.

⁹⁴ 414 S.W.2d 466 (Tex. Crim. App. 1967).

⁹⁵ TEX. CODE CRIM. PROC. ANN. art. 16.01 (1966): "The accused in any felony case shall have the right to an examining trial before indictment . . ." Apparently the court of criminal appeals considers the phrase "before indictment" as limiting rather than instructional. See Onion, *Commentary on Article 16.01*, 1 TEX. CODE CRIM. PROC. ANN. 430 (1966).

⁹⁶ TEX. CODE CRIM. PROC. ANN. art. 40.09, § 4 (1965): "At the request of either party the court reporter shall take shorthand notes of all trial proceedings including voir dire examination . . ."

⁹⁷ 411 S.W.2d 730 (Tex. Crim. App. 1967).

the future where the defendant suggested that he could not demonstrate error because of a lack of reporter's notes. Furthermore, by judicial interpretation the court added motions for change of venue to the list of proceedings requiring shorthand notes.

Form of Complaint. In *Cisco v. State*⁹⁸ the defendant contended the complaint charging him with driving while intoxicated was invalid because it did not contain affirmative allegations of specific facts, such as those now required for search warrant affidavits.⁹⁹ The defendant reasoned that since a complaint is defined as "the affidavit made before the magistrate,"¹⁰⁰ a charging complaint was bound to have the same formalities as a complaint for warrant of search or arrest.¹⁰¹ The court of criminal appeals refused this contention, thus creating two standards: if the complaint is used to secure a warrant, it must state probable cause; if the complaint is used to support an information,¹⁰² conclusions alone may be stated.

Discovery. The limitations upon the duty of the prosecution to allow defense inspection of witness statements and police reports remains uncertain. Article 39.14 expressly exempts these items from discovery and the Texas court is following this clear mandate,¹⁰³ except in instances where the witness has used the writing to refresh his memory at the trial.¹⁰⁴ Nevertheless, the applicability of the language of the Supreme Court in *Brady v. Maryland*¹⁰⁵ has yet to be resolved: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution."¹⁰⁶

X. CONCLUSION

The Supreme Court of the United States has brought an end to what was the quiescent posture of criminal law and procedure. Unfortunately, as the volume of prognostic criminal cases reaches its zenith, even the vigilant practitioner may be left behind. Extension of the right to counsel, concomitant with interpretation of the meaning of adequate counsel, might serve to intimidate the lawyer as much as reassure the client. Recognition by the bar of professional responsibility for continuing education is imperative.

⁹⁸ 411 S.W.2d 547 (Tex. Crim. App. 1967).

⁹⁹ *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958).

¹⁰⁰ TEX. CODE CRIM. PROC. ANN. art. 15.04 (1965).

¹⁰¹ *Barnes v. Texas*, 380 U.S. 253 (1965).

¹⁰² TEX. CODE CRIM. PROC. ANN. art. 2.05 (1965).

¹⁰³ *Smith v. State*, 409 S.W.2d 408 (Tex. Crim. App. 1966).

¹⁰⁴ *Martinez v. State*, 407 S.W.2d 504 (Tex. Crim. App. 1966).

¹⁰⁵ 373 U.S. 83 (1963). See *Giles v. Maryland*, 386 U.S. 66 (1967), and *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), where production of written instruments was required even though no request was made by the defendant.

¹⁰⁶ 373 U.S. at 87.