Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

by

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DUE PRIMARILY to decisions of the federal judiciary, recent years have seen dynamic changes in the field of criminal law. As an apparent bulwark against this so-called excessive federalism, judicial procrastination by many states, including Texas, is still evident. The passage of the Omnibus Crime Bill[1] may be directly credited to the congressional reaction to this encroachment of federalism. It is important to note, however, that the primary obstacle to law enforcement lies in the inability of the local police to apprehend criminals and clear crimes after their occurrence. For example, the clearance rate in Dallas, Texas, in 1967 was 30.07 per cent.[2] Of those charged with felony offenses, at least eighty per cent pleaded guilty and the number of convictions that are appealed and subsequently reversed is infinitesimal.[3] Statistics such as these are directly attributable to the lack of resources made available to law enforcement authorities. Until communities are willing to provide policemen with higher pay (including state civil service) and better training, and to invest in modern means of detection and communication, police effectiveness cannot be expected to increase. The Supreme Court of the United States, though oft-criticized for the coddling of criminals, is acutely aware of this major problem. In recent decisions the Court has acted very favorably toward law enforcement in the investigative area.[4]

I. Search and Seizure

Most of the important decisions during the past year dealing with search and seizure have been decided by the federal courts. The impact of these cases on state law is nevertheless significant, and where possible these decisions have been related to Texas law.

Stop and Frisk. Where the object of the search is not directed toward the acquisition of criminal evidence the recent federal decisions have eroded the necessity for probable cause. While the opinions may represent a wholesome and well-balanced innovation in the law of search and seizure, they must be carefully applied. In *Terry v. Ohio*,[5] a concealed weapon was

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[1] Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, § 100, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42, 47 U.S.C.).

[2] Annual Report of the Dallas Police Dept. for 1967, at 40.

[3] The Annual Report of Henry Wade, District Attorney, Dallas County, Texas, for 1967 reflects a total of 474 jury trials in all felony courts compared to a total of 3,746 pleas of guilty in all such courts for the same period.

[4] Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967); McCray v. Illinois, 386 U.S. 300 (1967); Schmerber v. California, 384 U.S. 757 (1966); United States v. Ventresca, 380 U.S. 102 (1965); Draper v. United States, 358 U.S. 307 (1959).

[5] 392 U.S. 1 (1968).

seized after a police officer concluded from observing the conduct of Terry and his companions that they were "casing" a job for a robbery and that an investigation was necessary. After continued observation over a lengthy period of time, the officer stopped the men and, fearing that they might have a gun, frisked the outside of their garments. The weapon that was removed from Terry was admitted into evidence over Terry's objections. The trial court recognized that there was no probable cause for an arrest but took the position that to protect himself it was reasonable for the officer to interrogate the suspect and pat his outer garments. The court attempted to distinguish between restraint of a person and seizure of a person. The Supreme Court, however, recognized that such a distinction was a mere play on words and accepted the fact that the person had been seized and that the fourth amendment had full application. The question thus presented was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[6] The reasonableness of the search is determined by a dual inquiry—whether the officer's action was justified at its inception and whether this action was reasonably related in scope to the circumstances which justified the initial interference. The Court set out the correct approach to take in answering these questions. (1) To justify such an interference the police officer must be able to articulate facts which, coupled with rational inferences from such facts, reasonably warranted such an intrusion. In making this assessment, it is imperative that the facts be tested by an objective standard: Did the facts available to the officer at the moment of search or seizure warrant a man of reasonable caution in the belief that such action was appropriate? (2) When the officer is justified in believing that the suspicious person he is about to investigate is armed and presently dangerous to the officer or to others, it would be unreasonable to deny the officer the power to determine whether or not the person is in fact carrying a weapon and to neutralize the potential threat. (3) The search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Its extent must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.

In *Peters v. New York*[7] and *Sibron v. New York*[8] the Supreme Court further noted that the search must remain something less than a full search. Unanswered, however, is the question of whether things such as narcotics or burglary tools would be admissible into evidence if discovered during a search for weapons.

Under article 14.03 of the Texas Code of Criminal Procedure, any police officer may arrest, without warrant, persons found in suspicious places and under conditions which reasonably show that such persons have committed or threatened to commit a felony or breach of the peace. The

[6] *Id.* at 15.
[7] 392 U.S. 40 (1968).
[8] 392 U.S. 40 (1968).

Supreme Court considered a similar statute in *Sibron*. There the Court held that such a statute did not diminish the requirements of the fourth amendment. It would appear, therefore, that the Texas statute gives no particular power to an officer in addition to that he already possesses under *Terry*. Nevertheless, in *Henderson v. State*[9] the Texas court of criminal appeals relied upon the statute rather than the Supreme Court's interpretation of the fourth amendment to justify an officer's arrest of a person for being drunk in a public place.

Electronic Surveillance. Assume that two people are speaking in confidential tones in a public park, under circumstances that would normally cause them to believe that the communication is a private one. Unknown to them at the time, however, there is an intruder to their conversation in the upper story of a hotel recording their conversation through the use of a telescopic microphone. Tested under prior decisions, their conversation would not be protected because they were not in a constitutionally protected area. The Supreme Court's decision in *Katz v. United States*[10] represents a major victory for their right of privacy. F.B.I. agents found that Katz often used a certain public telephone at a particular location and at certain times to transmit wagering information. The agents installed a bug on the booth which was used only when Katz was in the booth. The Court held that when a person seeks to preserve a conversation as private, "even in an area accessible to the public,"[11] the conversation will be constitutionally protected under the fourth amendment. The Court clearly indicated that it would have approved this type of eavesdropping if prior judicial approval had been obtained, emphasizing the narrow circumstances under which the surveillance was conducted and the fact that no conversation of innocent persons was overheard. Since no warrant was obtained, however, Katz's conviction was reversed.

In *Lee v. Florida*[12] police officers had a party line installed in order to overhear and record conversations of the defendant. The defendant previously had ordered telephone service and was informed that no private lines were available. The police, using special equipment, had continuous access to all of the defendant's calls and eliminated the tell-tale "click" that might otherwise appraise the conversing parties that someone was on the line. The Supreme Court, speaking through Justice Stewart, held that the Federal Communications Act[13] proscribed the divulging of an intercepted communication and that the statute applied to the states as well as private individuals. The Court rejected any distinction between this case and the fact situation in *Rathbun v. United States*,[14] where the conversation was overheard with the consent of one of the conversing parties.

[9] 422 S.W.2d 175, 179 (Tex. Crim. App. 1967).
[10] 389 U.S. 347 (1967).
[11] *Id.* at 351.
[12] 392 U.S. 378 (1968).
[13] 47 U.S.C. § 605 (1964).
[14] 355 U.S. 107 (1957).

Schwartz v. Texas,[15] holding that state courts were not required to reject evidence gathered in violation of the Act, was held overruled by *Mapp v. Ohio*,[16] which applied the exclusionary rule to all illegal searches and seizures. Strong dissents were written by Justices Black, White, and Harlan on the ground that the majority was acting as a supervisory power over state courts.

It is difficult to understand why the Court did not rely on *Katz*. The fact that a party line user's privacy is vulnerable does not necessarily lead to the conclusion that conversing parties might not seek to preserve their conversations as private. Such an approach seems more appropriate than the reliance upon a federal statute which is subject to amendment or change.

It seems well established[17] that the use of an eavesdropping device wired to an informer for the purpose of recording the informer's conversation with a suspect is constitutionally permissible. The eavesdropping must be carefully circumscribed, however, and limited to specific conversations which the eavesdropper knew would take place. *Berger v. New York*[18] voiced disapproval of the indiscriminate seizure of conversations of innocent people, when such conversations are overheard in a continuous operation over a lengthy period of time. Pursuant to a court order obtained under a New York statute, a tape recorder was planted in an office suspected of being used by persons involved in a conspiracy relating to the issuance of liquor licenses. Part of the conversations recorded were played back at the trial of Berger. His conviction was reversed by the Supreme Court on the ground that the statute authorizing the "plant" was unconstitutional. The statute did not require a particular description of the conversations sought to be recorded; it allowed the eavesdropping to be continuous over an indeterminate period of time, and it did not provide for notice as in ordinary warrants.

Title III of the Omnibus Crime Bill[19] authorizes wiretapping and eavesdropping orders for thirty-day periods. A title III bug or tap normally will be a continuous operation which will inescapably pick up all conversations in the area. Thus, not only is the privacy of the telephone user invaded with respect to those calls relating to the offense, but all other calls are overheard. In addition, all persons who respond to the telephone user's calls have their conversations overheard. It appears that such wiretapping or eavesdropping represents a sweeping intrusion into the private and con-

[15] 344 U.S. 199 (1952), holding that state trial courts were not required to reject evidence violative of § 605.

[16] 367 U.S. 643 (1961).

[17] Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963). A federal district court for the District of Columbia, however, recently decided that an informer's consent to the government's monitoring of the informer's conversation with a suspect is no substitute for the prior consent of a judge to the interception of such conversation. The court viewed *Osborn* as resting upon the prior judicial determination of reasonableness and not upon the conversation being recorded with the consent of one party, the informant. Were this extremely broad view generally followed it would appear to eliminate informants testifying aided by any transcript of any government monitoring. United States v. Jones, Crim. No. 40-66 (D.D.C., Sept. 30, 1968).

[18] 388 U.S. 41 (1967).

[19] Omnibus Crime Control & Safe Streets Act, 18 U.S.C.A. §§ 2510-20 (Supp. 1968).

stitutionally protected conversations of innocent as well as guilty persons, thereby assuming the character of a general search. Title III further suffers from the fundamental deficiency that a warrant for electronic surveillance cannot possibly describe particularly the conversations to be overheard.[20] While it is true that title III requires a finding of probable cause, this requirement has little actual effect. The lengthy period of surveillance authorized by the Act belies the apparent adherence to any requirement of particularity. Such an indiscriminate search, even under the authority of a valid warrant, has been soundly condemned by the Supreme Court. It is inconceivable, for example, that a search warrant could constitutionally authorize an officer to enter a private home and search for a period of thirty days or that it could authorize that anything written by a person in the thirty-day period could be seized with the hope that incriminating evidence could be obtained. It is clear that title III ranges far beyond the tightly drawn requirements of *Katz* and *Berger*.

Consent To Search. In *Bumper v. North Carolina*,[21] officers asked to search the house in which Bumper lived with his grandmother, stating that they had a search warrant. The reliance for the lawfulness of the search, however, was placed upon the grandmother's consent[22] rather than the warrant (it was never shown that a warrant actually existed). The Supreme Court held that the consent was involuntary as a matter of law since it was given only after the officers had stated that they had a search warrant. While courts have heretofore recognized that a claim of official authority is a factor to be considered strongly against a finding of voluntariness, *Bumper* appears to go further, making such a claim of authority a controlling factor.

In some areas there is emerging a *Miranda*-type warning as a prerequisite to a valid consent to search. In *United States v. Moderacki*[23] the defendant had been fully warned of his *Miranda* rights before a search of his person was made. He was not, however, warned that he need not submit to a search or that anything found on his person might be used against him in evidence. He was then requested to empty his pockets, which he did. A federal district court held that without such a warning the defendant did not waive his fourth amendment rights.[24]

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[20] The Supreme Court emphasized in *Berger* and *Katz* that the requirements of the fourth amendment are applicable to wiretapping and eavesdropping and that these requirements are the same as those applied to conventional search warrants. It is rather well established that conventional warrants must describe with particularity an object to be seized and that a judge authorizing the issuance of such a warrant must have cause to believe that the described object will be found on the premises searched.

[21] 391 U.S. 543 (1968).

[22] For an excellent discussion of the consent by a person other than the defendant, see CRIMINAL LAW AND THE CONSTITUTION 146-54 (J. Reed, V. Nordin, A. Sugarman, J. Rice, eds. 1968).

[23] 280 F. Supp. 633 (D. Del. 1968).

[24] In the 1966 case of United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966), it was suggested that a pre-search warning might not be necessary if it could otherwise be shown that the defendant had full knowledge of his rights. This, of course, does not comport with the Miranda v. Arizona, 384 U.S. 436 (1966), doctrine of refusing to inquire into the defendant's awareness of his constitutional rights. The Seventh Circuit, citing *Blalock*, held, in United States v. NiKrasch, 367 F.2d 740 (7th Cir. 1966), that, at least where the defendant was in custody at the time of consent, a specific warning of his fourth amendment rights was necessary. With a split in the cir-

Probable Cause. Prior to the Supreme Court decision in *Aguilar v. Texas*[25] the execution of the affidavit in Texas in support of the search warrant amounted to nothing more than a mere conclusion as to probable cause. The device was so widespread that the affidavit appeared in printed form in many areas of the state, relating merely that the facts contained in the affidavit came from an unknown but reliable, credible, and truthful citizen of "X" county. There were no allegations of fact from which the magistrate could conceivably determine reliability. It now appears clear that each affidavit must set out in detail the facts giving rise to probable cause. That this is not an insurmountable problem may be noted by a review of the affidavit appearing in the footnotes to the 1960 case of *Jones v. United States.*[26] The affidavit based solely upon an informant without subsequent corroboration must consist of two major parts: (1) the personal knowledge of the informant, and (2) the previous reliable information furnished by the informant. In *Jones* the Supreme Court held that these requirements were not met by stating a mere conclusion. However, a review of affidavits supporting search warrants in Texas today reveals rather consistent use of terminology such as "the above informant has furnished information in the past on numerous occasions which proved to be correct." It thus appears that there is developing another pre-*Aguilar* "form" affidavit to avoid revealing to the magistrate "information" from which he can judge reliability. Whether or not this technique will be ultimately sustained by the federal courts is subject to question. In applying the *Aguilar* test, the Second Circuit in the 1966 case of *United States v. Warden*[27] struck down the warrant because the affidavit did not contain a statement that the informant spoke from personal knowledge. *Warden* was recently quoted with approval by the Seventh Circuit in *United States v. Davis.*[28] Both decisions recognized the validity of affidavits based on hearsay but viewed *Aguilar* as requiring that the magistrate be advised of the underlying circumstances from which the informant made his conclusions.

In *Schutz v. United States*[29] the affidavit recited that the affiants had received information from a reliable source that Schutz had just returned from San Antonio, Texas, with a large quantity of heroin, that the informant had, in the past, provided the officers with reliable information, that a large number of known addicts had been observed going and coming from Schutz's house, and that Schutz was trafficking in narcotics. The Tenth Circuit held that the affidavit met the test of *Aguilar*, relying on the previous decisions of *United States v. Ventresca*[30] and *McCray v. Illinois.*[31] Reliance upon *McCray*, however, seems misplaced, since there the

cuits, the practitioner would be amiss if he did not raise the *Miranda* rationale in each motion to suppress an objection to search (one can always be alert for the "consent dragon" to raise its head at any time).

[25] 378 U.S. 108 (1964).
[26] 362 U.S. 257 (1960).
[27] 381 F.2d 209 (2d Cir. 1967).
[28] 402 F.2d 171 (7th Cir. 1968).
[29] 395 F.2d 255 (10th Cir. 1968).
[30] 380 U.S. 109 (1965).
[31] 386 U.S. 300 (1967).

affidavit stated that the police had known the informant for about two years, that the informant had given them information about twenty or twenty-five times, and that the information had resulted in a conviction. It would appear that the court in *Schutz* gave additional consideration to facts peculiarly within the affiant's personal knowledge and accepted the statement concerning Schutz's return from San Antonio as the needed corroboration.

It has become somewhat customary in many parts of the country to describe the principal by name in the search warrant and affidavit and then to add "and person or persons unknown" despite the fact that no information is known concerning any other persons. The problem becomes evident in light of the customary practice of tacking a warrant for arrest to the search warrant. In executing the warrant, officers frequently arrest and search all persons on the premises (as well as persons coming into the dwelling while the search is in progress) without any particular regard to the sequence, purpose, or order of events. In one case[32] a New York court held that an officer could not search a person not named specifically in the warrant. But a Georgia statute[33] which authorized the search of any person in the dwelling if the officer believed it reasonably necessary to protect himself from attack or to prevent disposal or concealment of evidence described in the warrant, was held to be constitutional by the Georgia Supreme Court.[34] The contention that the statute was unconstitutional because it authorized a search without probable cause and without describing the person to be searched was rejected.

Texas has statutory authorization for inclusion of an arrest warrant in the search warrant.[35] Nevertheless, as the previous cases indicate, the arrest and search of a person upon the premises must be conducted within the constitutional commands of probable cause or the limited application of the stop and frisk doctrine.

Standing To Complain. It appears that the scope of standing to complain of an illegal search and seizure is moving even further from the old property interest concept. In *Berger v. New York*[36] the petitioner was never present in one of the offices where eavesdropping was being conducted. While the majority of the Supreme Court passed upon the constitutionality of the eavesdropping statute, Justice White, in his dissenting opinion, took

[32] People v. Smith, 21 N.Y.2d 698, 234 N.E.2d 460, 287 N.Y.S.2d 425 (1967).

[33] GA. CODE ANN. § 27-309 (Supp. 1968).

[34] Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968). *See also* United States v. Haywood, 284 F. Supp. 245 (E.D. La. 1968), where it was held that a warrant authorizing a search of a residence did not authorize a search of a person. The officer patted down the defendant and discovered capsules—known not to be weapons (see "Stop and Frisk" rationale). This did not authorize the removal of the capsules from the person of the defendant on the belief that such capsules were heroin (later established to be heroin). *Compare* Doby v. State, 363 S.W.2d 286 (Tex. Crim. App. 1963). According to a New Hampshire decision, merely because a person is found in a room at a time when the room is being searched under a valid search warrant does not justify such a search of the person on the basis of mere presence in the room. In this instance the warrant had been issued to search a women's dormitory room and the one searched was not the girl to whom the room had been assigned. State v. Bradbury, 243 A.2d 302 (N.H. 1968).

[35] TEX. CODE CRIM. PROC. ANN. art. 18.11 (1966).

[36] 388 U.S. 41 (1967).

the position that Berger had no standing to contest the search in that office. But Justice Harlan, although also dissenting, stated that:

> However oblique this invasion of petitioner's personal privacy might at first seem, it would entirely suffice, in my view, to afford petitioner standing to challenge the validity of [the search]. . . . The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded.[37]

Thus it seems that a participatory interest is being woven into the pattern of standing.

The participatory interest issue was raised in the case of *Mancusi v. DeForte*.[38] There the prosecutor caused to be issued a subpoena duces tecum to the Teamsters local for the production of certain records. After the union refused to comply, a search was conducted and certain material was seized from the union office. Since the subpoena did not confer the right to seize property, it could not qualify as a valid search warrant and a search without a warrant was, of course, unreasonable. But aside from the reasonableness of the search was the question of whether the defendant—a union official who spent "a considerable amount of time" in the office—had standing to object to the seizure. In an opinion written by Justice Harlan the Court held that the union official did have sufficient standing to challenge the search, since there was "a reasonable expectation of freedom from governmental intrusion."[39] The official "could reasonably have expected that only [union officers] and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups."[40]

Search Incident to an Arrest. It is basic that an exploratory search is illegal under the Federal Constitution. A search incident to an arrest is an exception to this command and is permitted only under the limitations developed by the Supreme Court with respect to the purpose and product of the search. The Court has noted three reasons for allowing an officer to search an arrested person or the immediate area: (1) to protect the officer; (2) to prevent the escape of the accused; and (3) to prevent the destruction of evidence.[41] With respect to ordinary traffic offenses, the danger involved to the officer is minimal, escape is virtually impossible, and there is no evidence to be destroyed. In *Lane v. State*,[42] however, the Texas court of criminal appeals seemed to ignore these facts. The officer, upon making a lawful arrest for speeding, conducted a search of the automobile. A pistol which was found was later used to convict the driver of unlawfully carrying a weapon. Since the officer ordered the defendant to get out of the vehicle, and then, ignoring person of the defendant, began a search of the

[37] *Id.* at 103.
[38] 392 U.S. 364 (1968).
[39] *Id.* at 368.
[40] *Id.* at 369.
[41] United States v. Rabinowitz, 339 U.S. 56 (1950); *see* cases collected in Annot., 10 A.L.R.3d 314 (1966).
[42] 424 S.W.2d 925 (Tex. Crim. App. 1967), *cert. denied*, 392 U.S. 929 (1968).

automobile, it appears his purpose was to make an exploratory search. Nevertheless, the Texas court upheld the conviction, explicitly stating that all peace officers have the right to search incidental to a lawful arrest. Judge Morrison dissented on the ground that even in a search incident to an arrest the search must be confined to the purposes previously stated by the United States Supreme Court.[43]

Although *Lane* seems clearly incorrect, an officer may search an automobile after an arrest for a traffic offense when probable cause for a more extensive search develops upon arrest. For example, a lawful search for alcohol may be conducted when the driver's actions reflect that he was driving while intoxicated. The officer, under those circumstances, has conducted the search to prevent the destruction of fruits or instrumentalities of the *new offense* and not the original traffic violation.

The search of an automobile after an arrest for an offense more serious than a traffic violation presents additional problems. The United States Supreme Court long ago held that an automobile, because of its ambulatory nature, may be searched without a warrant.[44] It follows that if the automobile is no longer mobile the reason for the warrantless search vanishes. Thus the 1964 case of *Preston v. United States*[45] held that when an automobile is impounded by the police and searched thereafter, a warrant is required. It seems possible, however, that just as a gun used in the commission of a crime can be examined ballistically without a warrant, so an impounded automobile which was used in the commission of a crime can be examined without a warrant. This "instrument of the crime" theory appeared in *Harris v. United States*.[46] An automobile suspected of being used in a robbery was being inventoried pursuant to a departmental regulation which required the police, for caretaking purposes, to search each such vehicle thoroughly to remove all valuables, and to place an informational tag pertaining thereto on the car. It was raining, and when the officer opened a door to roll up the window, a registration card belonging to the victim was discovered. The card was later used in the trial which resulted in the defendant's conviction. On appeal, the defendant argued that the card was the fruit of an illegal search. The government argued that the

[43] *Lane* was followed by the Texas court in Adair v. State, 427 S.W.2d 67 (Tex. Crim. App. 1968), although Judges Morrison and Onion dissented. *Id.* at 68. In Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967), however, a federal district court sitting in Dallas held that such an exploratory search of an automobile was prohibited by the fourth amendment. As pointed out in the dissenting opinion in *Lane*, 424 S.W.2d at 928, the *Lane* decision is in conflict with practically all jurisdictions. *See* 10 A.L.R.3d 314 (1966). *See also* Charles v. United States, 278 F.2d 386 (9th Cir.), *cert. denied*, 364 U.S. 831 (1960), where the search of the arrested party's person was sustained but a random search pursuant to an arrest for a minor traffic violation was condemned. Whether or not a search of the automobile incidental to the traffic arrest is reasonable would appear necessarily to depend upon all the circumstances. The burden would seem to fall on the prosecution to show these circumstances. The Oklahoma Court of Criminal Appeals in Robinson v. State, 444 P.2d 845 (Okla. Crim. App. 1968), allowed a search of the automobile of the defendant who was arrested for speeding, but the court emphasized the facts surrounding the arrest, namely, the arresting officer's knowledge that the defendant had carried concealed weapons on prior occasions and, under such circumstances, the policeman "had a right and a duty to search the defendant and for immediate presence of any offensive weapons." *Id.* at 847. *See* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).

[44] Carroll v. United States, 267 U.S. 132 (1925).

[45] 376 U.S. 364 (1964).

[46] 370 F.2d 477 (D.C. Cir. 1966).

automobile, as an instrument of the crime, could be subjected to a lawful warrantless search. On the first hearing, before a three-judge panel, the court of appeals reversed the conviction, holding that use in the commission of a crime does not exempt the search of an item from the strictures of the fourth amendment. On a rehearing en banc, this determination was vacated, and the conviction was upheld on the ground that when the officer viewed the card he was not actually making a search, but was merely protecting the automobile. The Supreme Court affirmed the latter disposition per curiam,[47] upholding the basis of the decision without any discussion of the validity of the departmental regulation. However, the decision in *Harris* does not seem to afford officers a rationale for circumventing the *Preston* doctrine since the Court took particular pains to distinguish between the acts of the officer protecting the car and those constituting the search for valuables.

Motion To Suppress. In *Simmons v. United States*[48] the Supreme Court held that a defendant may testify at a motion to suppress hearing without fear that such testimony may be admitted against him at trial. The Court noted that a defendant need not relinquish his right to remain silent in order to assert a fourth amendment right.[49]

II. CONFRONTATION

The right to face one's adversaries was strengthened in recent cases.[50] In *Bruton v. United States*[51] the Court overruled *Delli Paoli v. United States*,[52] which held that in a joint trial the admission of an incriminating extra-judicial statement of one co-defendant implicating the other as well as himself was constitutionally permissible. In *Delli Paoli* the Court had assumed that the encroachment upon the right to confrontation could be eliminated by an instruction to the jury. *Bruton*, following the rationale of *Jackson v. Denno*,[53] took the more realistic position that the jury could not be expected to ignore prejudicial matter that they had just heard, and held that the defendant's right to cross-examination as secured by the confrontation clause of the sixth amendment was violated despite an instruction to the jury. The effect of *Bruton* on inadmissible hearsay is not settled. *Bruton* is fully retroactive and applies to the states through the fourteenth amendment.[54]

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[47] 390 U.S. 234 (1968) (per curiam).

[48] 390 U.S. 377 (1968).

[49] On the same basic rationale the United States Court of Appeals for the District of Columbia recently held that a parolee's statements at a revocation hearing cannot be later used at a trial on the issue of guilt, in reliance upon Garrity v. New Jersey, 385 U.S. 493 (1967), and *Simmons*. Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968).

[50] Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Garafolo v. United States, 392 U.S. 293 (1968); Bruton v. United States, 391 U.S. 123 (1968); Roberts v. Russell, 392 U.S. 293 (1968).

[51] 391 U.S. 123 (1968).

[52] 352 U.S. 232 (1957).

[53] 378 U.S. 368 (1964).

[54] Roberts v. Russell, 392 U.S. 293 (1968).

The principles of *Pointer v. Texas*[55] were fortified in *Barber v. Page*,[56] where recorded preliminary hearing testimony of a state's witness was admitted on the ground that he was unavailable because of his absence from the state. The Supreme Court assumed that Barber's attorney had the opportunity to cross-examine the absent witness in the preliminary hearing. Nevertheless, the Court held that a witness is not "unavailable" as an exception to the confrontation right unless the enforcement authorities have made a good faith effort to obtain his presence at the trial.

III. Competency

In *Townsend v. State*[57] the Texas court of criminal appeals, following the dictates of *Pate v. Robinson*,[58] defined procedural guidelines for the determination of competency to stand trial. Prior to the 1965 revision of the Code of Criminal Procedure a preliminary hearing to determine competency to stand trial was available upon request accompanied by allegations of incompetency. Article 46.02 of the amended Code severely limits this procedure by requiring the consent of the prosecutor and the trial judge.[59] The question in *Townsend* arose when the prosecutor would not give his consent to a hearing. The court held that where a timely demand for a preliminary hearing supported by sufficient evidence is denied for want of consent, the trial judge is under a duty, after the selection of the jury for the trial on the merits, to afford the accused a hearing on his competency. Under such a procedure the same jury could possibly pass on competency, guilt or innocence, and even punishment. It takes little imagination to see the possibility of prejudice in a procedure which allows evidence inadmissible in the trial on guilt to be heard by the jury in the hearing on competency.

IV. Self-Incrimination: Confessions

The judicial procrastination referred to earlier in this Article is illustrated by *Charles v. State*.[60] The majority held, despite the fact that there was no evidence that defendant affirmatively waived his *Miranda* rights, that the Texas statutes in force at the time of the confession afforded sufficient procedural safeguards to satisfy *Miranda*'s "other fully effective means" substitute for the specific warnings. Further, the majority expressed "utmost faith that the rights of appellant as well as the rights of society will be protected by the [United States] Supreme Court."[61] The dissent of Judge Onion emphasized that even providing "other fully effective means" did not exempt the prosecution from establishing a voluntary waiver. In regard to the adequacy of the statutory warnings, Judge Onion concluded that "[w]hat the majority still fails to grasp, the Texas

[55] 380 U.S. 400 (1965).
[56] 390 U.S. 719 (1968).
[57] 427 S.W.2d 55 (Tex. Crim. App. 1968).
[58] 383 U.S. 375 (1966).
[59] Tex. Code Crim. Proc. Ann. art. 46.02 (1966).
[60] 424 S.W.2d 909 (Tex. Crim. App. 1968).
[61] *Id.* at 921.

Legislature was quick to realize" in subsequently requiring the *Miranda* waiver.[62] Moreover, he felt that giving an "opportunity" to the Supreme Court of the United States to review the conviction ignored the expensive burden placed upon the defendant and the impossibility of the Court's reviewing all questions.

It appears to be established in Texas that absence of an express statement as to waiver of *Miranda* rights is not determinative of the question of waiver. In *Gonzales v. State*[63] the court of criminal appeals held that a completely voluntary, written, signed confession, even though it did not contain an express statement of waiver, was admissible. In *McCandless v. State*[64] the same court held that waiver of the right to *retained* counsel, shown by the written confession and the inferences to be drawn from the totality of the circumstances, reflected waiver of the right to *appointed* counsel. Thus there was no need for an express statement of such waiver. Although the written statement's preamble, which referred to waiver, was considered of great significance, it does not appear that the *McCandless* opinion is grounded solely upon the appearance of a waiver in the written confession. Such reasoning would ignore the fact that *Miranda* is directed toward custodial interrogation as well as the ultimate signed confession.

In *Hill v. State*[65] the court held that *Miranda* does not require that further interrogation must cease once an accused has stated that he is attempting to retain counsel, where there is no evidence of improper police behavior, and in his confession the accused voluntarily waives his right to counsel.

V. Discovery

The basis for disclosure of a grand jury transcript is the United States Supreme Court decision of *Dennis v. United States*.[66] *Dennis* apparently does not command disclosure of a witness's grand jury testimony prior to the time that he testifies at trial, since the grand jury transcript could be used only for the purpose of impeachment or to test the witness's credibility.[67] But the requirement that the testimony be produced at trial cannot be circumvented, according to *Melton v. United States*,[68] by the simple expedient of not transcribing the reporter's notes of the grand jury proceedings. In *Melton* the defendant made a timely motion for production of the grand jury testimony. The Tenth Circuit held that the particularized need was shown when the request was made for the reason that its production "will give us an opportunity to establish an inconsistency."[69]

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[62] *Id.* at 922.
[63] 429 S.W.2d 882 (Tex. Crim. App. 1968).
[64] 425 S.W.2d 636 (Tex. Crim. App. 1968).
[65] 429 S.W.2d 481 (Tex. Crim. App. 1968).
[66] 384 U.S. 855 (1966).
[67] *See* Hanger v. United States, 398 F.2d 91 (8th Cir. 1968). In Texas it is clear that the defendant has no absolute right to the production of such transcribed testimony prior to trial. McDuff v. State, 431 S.W.2d 547 (Tex. Crim. App. 1968); Bryant v. State, 423 S.W.2d 320 (Tex. Crim. App. 1968).
[68] 398 F.2d 321 (10th Cir. 1968).
[69] *Id.* at 322.

The fact that the notes had not been transcribed was held no basis for refusal to produce.

VI. PUNISHMENT

Increase of Penalty on Retrial. Three federal circuit courts[70] have indicated that on the retrial of a reversed conviction the defendant does not have a right to receive no greater sentence than he received at the first trial. The Fourth Circuit, on the other hand, reached a contrary conclusion in *Patton v. North Carolina.*[71] The *Patton* court held that the increase of sentence following a successful appeal and conviction after retrial was a violation of a defendant's rights under the equal protection, due process, and double jeopardy clauses of the Federal Constitution. Certiorari was granted by the Supreme Court on October 28, 1968, in *North Carolina v. Pearce*[72] to decide the question of whether or not the constitution prevents a state court from sentencing a defendant to a longer term of imprisonment at the second trial, so the inconsistency generated by the circuit courts may soon be laid to rest.[73]

Recidivism. Under the *Gideon* doctrine any conviction is void where the defendant was not represented by counsel and did not waive his right to counsel.[74] Consequently, no such conviction may be used for enhancement purposes. In *Ex parte Kellison*[75] an enhanced life sentence imposed in 1939 was reversed by the court of criminal appeals because the petitioner was not represented by counsel at the primary conviction or at the time of the prior conviction used for enhancement. In *Cox v. State*[76] the court held that informing the jury of defendant's five prior convictions alleged for enhancement prior to jury deliberation on guilt or innocence was not reversible error where no timely objection was made. An admission by the defendant on cross-examination that he had been convicted previously of the offense was held in *Jones v. State*[77] not to relieve the state of the burden of establishing the prior conviction. *Clark v. State*[78] held that the hearing provided under article 40.09[79] to allow the record to "speak the truth" cannot be used to attack a prior conviction used for enhancement purposes, since the provision has no bearing upon the case after it has been closed, judgment rendered, and sentence pronounced.

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[70] United States v. White, 382 F.2d 445 (7th Cir. 1967), *cert. denied*, 359 U.S. 1059 (1968); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir.), *cert. denied*, 389 U.S. 889 (1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

[71] 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

[72] 268 N.C. 708, 151 S.E.2d 571 (1966), *cert. granted*, 89 S. Ct. 258 (1968).

[73] *See* Honigsberg, *Limitations Upon Increasing a Defendant's Sentence Following a Successful Appeal and Reconviction*, 4 CRIM. L. BULL. 329 (1968).

[74] Gideon v. Wainwright, 372 U.S. 335 (1963).

[75] 422 S.W.2d 729 (Tex. Crim. App. 1968). *See also Ex parte* Stevenson, 422 S.W.2d 739 (Tex. Crim. App. 1968).

[76] 422 S.W.2d 929 (Tex. Crim. App. 1968).

[77] 422 S.W.2d 183 (Tex. Crim. App. 1967). A stipulation personally entered into by the defendant is sufficient to relieve the state of the necessity of further proof of a prior conviction. Steward v. State, 422 S.W.2d 733 (Tex. Crim. App. 1968).

[78] 424 S.W.2d 445 (Tex. Crim. App. 1968).

[79] TEX. CODE CRIM. PROC. ANN. art. 40.09 (1966).

VII. Right to Counsel

Trial. In *Ex parte Meadows*[80] the Texas court of criminal appeals held that where appointed counsel is not allowed the statutory[81] ten days for preparation and no written waiver of the right is given, the attorney must nevertheless make a request for additional time for preparation before relief can be granted. The court noted that even though the statute is violated the defendant must show that the violation deprived him of a fair trial. It is important to note, however, that the court's holding applies only to a collateral attack on an otherwise valid conviction. The same court held in *Stewart v. State*[82] that a showing on direct appeal of a failure to allow the mandatory ten days for preparation is grounds for reversal.

Ex parte Engle[83] held that the fact that an attorney has not paid his bar dues at the time of appointment is no longer grounds for reversal of the conviction where there is no showing that counsel was ineffective. In *Ex parte Breen*[84] the Texas court ignored decisions of the Supreme Court of the United States[85] in denying relief to a petitioner whose appeal was based upon the failure of the indigent's counsel to request that a statement of facts be prepared. Judge Onion in his dissent appeared to adopt the correct position that petitioner was denied his constitutional right to counsel on appeal and that he should be entitled to an out-of-time appeal.

Parole—Probation. One petitioning for parole has no right to counsel, regardless of his financial position, since nothing is being taken from him.[86] However, a probation revocation does take away one's liberty and the United States Supreme Court in *Mempa v. Rhay*[87] has held that the right to counsel in a probation hearing is constitutionally protected. The Texas court of criminal appeals refused, in *Crawford v. State*,[88] to give retroactivity to *Mempa*. However, prior to consideration of motion for rehearing, the United States Supreme Court decided that retroactivity was inherent in the principles of *Mempa*,[89] as in any other right to counsel case. Thus on the motion for rehearing *Crawford* was reversed and remanded.[90]

VIII. Identification

In *Stovall v. Denno*[91] the United States Supreme Court held that in a case involving fair identification procedures, the burden is on the defendant to show that the method used resulted in such unfairness that his right

[80] 418 S.W.2d 666 (Tex. Crim. App. 1967).
[81] Tex. Code Crim. Proc. Ann. art. 26.04(b) (1966).
[82] 422 S.W.2d 733 (Tex. Crim. App. 1968).
[83] 418 S.W.2d 671 (Tex. Crim. App. 1967).
[84] 420 S.W.2d 932 (Tex. Crim. App. 1967).
[85] Entsminger v. Iowa, 386 U.S. 748 (1967); Swenson v. Bosler, 386 U.S. 228 (1968); Douglas v. California, 372 U.S. 353 (1963).
[86] Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968).
[87] 389 U.S. 128 (1967).
[88] No. 41466 (Tex. Crim. App., Oct. 9, 1968), *motion for rehearing granted* Nov. 27, 1968.
[89] Stiltner v. Rhay, 89 S. Ct. 32 (1968); McConnell v. Rhay, 89 S. Ct. 32 (1968).
[90] Crawford v. State, No. 41466 (Tex. Crim. App., Oct. 9, 1968), *motion for rehearing granted* Nov. 27, 1968.
[91] 388 U.S. 293 (1967).

to due process of law was infringed. Applying this standard in *Graham v. State*,[92] the Texas court of criminal appeals held that

> since the witnesses had an adequate opportunity to view the defendant during the crime, and the defendant failed to show any suggestive influence by the police during lineup procedures during which the witnesses identified the defendant, the subsequent courtroom identification was not improper.

In *Moore v. State*[93] the trial court rejected the request that the defendant be allowed to stand among other persons of the same general age, race, and sex when being identified by a witness.[94] The court of criminal appeals affirmed, holding that a defendant may be lawfully compelled to sit at the defense counsel's table when being identified.[95] The court further noted that the state's counsel is not prohibited from pointing to the defendant and describing his appearance in the presence of witnesses.

IX. Jury Selection

In *Witherspoon v. Illinois*[96] the Illinois statute under attack provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[97] The United States Supreme Court held that, although the exclusion of jurors who are opposed to capital punishment does not affect the determination of guilt, the death penalty may not be imposed by a jury that was chosen by excluding persons who voiced general objections to the death penalty. The Court made it unmistakably clear that the decision would have no application to the exclusion for cause of prospective jurors who state that they would automatically vote against the imposition of capital punishment without regard to evidence developed at the trial or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. *Bumper v. North Carolina*[98] makes it clear that *Witherspoon* does not affect the validity of any sentence other than one of death. Although *Witherspoon* is fully retroactive, its effect upon Texas practice is likely to be slight.[99]

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[92] 422 S.W.2d 922 (Tex. Crim. App. 1968).
[93] 424 S.W.2d 443 (Tex. Crim. App. 1968).
[94] *Id.* at 444.
[95] *See generally* P. Wall, Eye-Witness Identification in Criminal Cases (1965).
[96] 391 U.S. 510 (1968).
[97] Ill. Rev. Stat. ch. 38, § 743 (1959), *repealed.*
[98] 391 U.S. 543 (1968).
[99] Pittman v. State, 434 S.W.2d 352 (Tex. Crim. App. 1968).