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CRIMINAL LAW AND PROCEDURE

by

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THERE has been no pervasive alteration in the Texas criminal law during the period covered by this Article. Most of the changes that have occurred have resulted from attempts to apply some of the doctrines that have been announced by federal courts within the last few years. This is not to gainsay the activity of the Texas Legislature, which seems to be increasingly aware of its responsibility in the effort to modernize Texas criminal jurisprudence. Overall, the trend of the cases to be discussed indicates improvement in the administration of criminal justice in this state. The reader may follow the development of this trend in the cases decided since the writing of this Article.

I. SEARCH WARRANTS

It is axiomatic that before a magistrate can issue a valid search warrant he must be tendered an affidavit setting forth facts sufficient to establish probable cause to search.[1] In the 1948 case of *Johnson v. State*[2] the United States Supreme Court explained that the purpose of the affidavit is to insure that the finding of probable cause will be made by a magistrate, instead of by a police officer who is "engaged in the often competitive enterprise of ferreting out crime."[3] In other words, by requiring an affidavit before the warrant is issued, the police officer is compelled to persuade a magistrate, *in writing*, that probable cause for the search does exist. This requirement protects citizens from searches limited only by the discretion of the police; thus, the affidavit is the very essence of the fourth amendment.

The latest ruling on the sufficiency of such an affidavit is *Spinelli v. United States*,[4] decided by the United States Supreme Court in 1969. The affidavit used to obtain the warrant in *Spinelli* set out a number of incriminating facts and circumstances alleged to have been furnished to the police by a reliable informant. The Court overturned Spinelli's conviction because the affidavit failed to set out enough information to establish independently that the informant was either credible or that his information was reliable. The *Spinelli* decision is a logical extension of the doctrine set forth in the *Johnson* case. *Spinelli* teaches that if the information in the affidavit comes from a police informant, it must contain enough data to allow the magistrate to determine the informant's relia-

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[1] U.S. CONST. amend. IV; TEX. CODE CRIM. PROC. ANN. art. 18.01 (1966): "No search warrant shall issue for any purpose in this State unless a sworn complaint therefor shall first be filed with the issuing magistrate setting forth sufficient facts to satisfy the magistrate that probable cause does in fact exist for its issuance."

[2] 333 U.S. 10 (1948).

[3] *Id.* at 14.

[4] 393 U.S. 410 (1969).

bility. It is not sufficient for the police to allege that the informant is reliable; the magistrate must make that finding independently, based upon the facts in the affidavit.

The Texas Court of Criminal Appeals, in *Gaston v. State*,[5] appears to have correctly applied the *Spinelli* doctrine. The affidavit used to obtain the search warrant in *Gaston* read as follows:

> Affiants have received information from a credible and reliable informant. . . . The informant has been present on numerous occasions when the subject was using and under the influence of marijuana and has seen the subject dispense marijuana to other guests in her residence. In most instances the marijuana is smoked by using a water-type smoking pipe and this instrument is kept in the back or North bedroom up on a shelf, which is to the right as you enter the bedroom. Also, the marijuana is kept on this shelf a majority of the time. The informant further states that there have been several large marijuana parties thrown by Sharland Elizabeth Reeves within the past few weeks, at which time Sharland Elizabeth Reeves furnished marijuana. The informant states that she has seen marijuana in Sharland Elizabeth Reeves' possession within the past two days.[6]

The assertion that the "affiants have received information from a credible and reliable informant" was clearly not sufficient to meet the requirements of *Spinelli*.[7] Nevertheless, the balance of the affidavit was so detailed and explicit that the court held it sufficient to establish the credibility of the informant or the reliability of his information.

The catena of cases from *Draper v. United States*[8] to *Aguilar v. Texas*[9] to *Spinelli* demonstrates the necessity for improved police training. A proper and adequate search warrant affidavit can be prepared by police officers, but only when they have some appreciation of the concepts of *why* the affidavit is required. Furthermore, it is essential that police authorities understand the difference between an unsupported statement of a conclusion, and an allegation of *facts* necessary to support that conclusion.

II. Courtroom Identification of the Defendant

United States v. Wade[10] established the constitutional right of a defendant to have counsel present when he is placed in a line-up. *Martinez v. State*[11] explains the procedure to be followed in this state whenever the evidence discloses that the *Wade* doctrine has been violated. According to *Martinez*, if the line-up was conducted in violation of *Wade*, and if the defendant makes a timely objection, a witness will not be allowed to testify that he identified the defendant at the line-up. However, the

[5] 440 S.W.2d 297 (Tex. Crim. App. 1969).
[6] *Id.* at 298.
[7] *See* Recznik v. City of Lorain, 393 U.S. 166 (1968).
[8] 358 U.S. 307 (1959).
[9] 378 U.S. 108 (1964).
[10] 388 U.S. 218 (1967).
[11] 437 S.W.2d 842 (Tex. Crim. App. 1969).

defendant must object *before* the witness testifies in court to the identification; otherwise the objection is waived.

If a witness does attend a line-up conducted in violation of *Wade*, the prosecution might avoid any mention of that fact. What if the prosecution simply asks the witness in court to identify the defendant, without mentioning the earlier line-up? According to *Martinez*, if the defendent objects, the prosecution cannot ask the witness for an in-court identification until it first establishes "by clear and convincing proof" that the witness's testimony is not the fruit of the earlier line-up identification.[12] In other words, the prosecution must establish that the witness's ability to identify the defendant in court is not based on having seen the defendant in the line-up.[13] Obviously, part of the corpus delicti of any crime is proof of the identity of the defendant as the perpetrator. Therefore, the *Martinez* decision can be very useful to counsel in any case where the only witnesses who can identify the defendant have been tainted by being present at a line-up held in violation of *Wade*.

III. Jury Selection

The decision of the United States Supreme Court in *Witherspoon v. Illinois*[14] attracted a great deal of attention in Texas. *Witherspoon* held that due process is violated when a death sentence is imposed by a jury from which veniremen were excused solely because they expressed a general objection to, or conscientious scruples against, the death penalty. Actually, the *Witherspoon* doctrine has had a very limited impact upon Texas practice because: "It has long been the traditional practice in Texas, before and after the effective date of the 1965 Code, not to excuse a juror in capital cases who simply stated he had conscientious scruples against the death penalty *but to interrogate such juror further* to determine if this means that he or she could *never* vote for the death penalty."[15]

The United States Court of Appeals for the Fifth Circuit has announced an apparently different and unique interpretation of *Witherspoon*. In *Spencer v. Beto*[16] the Fifth Circuit alluded to the fact that although the Texas law allows the prosecution to challenge any venireman who has scruples *against* inflicting the death penalty, it does not expressly allow the defense to challenge a venireman who has scruples in *favor* of inflicting the death penalty.[17] The court reversed Spencer's conviction, and cited *Witherspoon* as authority. If the *Spencer* decision is followed, it may be impossible to lawfully select a jury to inflict the death penalty in Texas, at least until the statutes are amended. Hopefully, the Texas Court of Criminal Appeals will have an opportunity to respond to the *Spencer* decision in the near future.

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[12] *Id.* at 849.

[13] Giddings v. State, 438 S.W.2d 805 (Tex. Crim. App. 1969).

[14] 391 U.S. 510 (1968).

[15] Pittman v. State, 434 S.W.2d 352, 356 (Tex. Crim. App. 1968) (emphasis added). *But see Ex parte* Bryan, 434 S.W.2d 123 (Tex. Crim. App. 1968).

[16] 398 F.2d 500 (5th Cir. 1968).

[17] *See* Tex. Code Crim. Proc. Ann. art. 35.16(b), (c) (1966).

IV. ENHANCEMENT

In *Johnson v. State*[18] the Court of Criminal Appeals held: (1) if a conviction is obtained for a capital felony, a prior non-capital conviction cannot be used to enhance punishment; (2) if an indictment charges only a capital felony, but a conviction is obtained for a lesser included offense, then a prior non-capital conviction cannot be used to enhance punishment. In the recent case of *Baker v. State*[19] the court demonstrated the two-part operation of the *Johnson* rule.

The defendant in *Baker* was charged in a two-count indictment. The first count charged armed robbery (capital) and alleged a prior burglary conviction (non-capital) for enhancement. The second count charged robbery by assault (non-capital), but contained no allegations of any prior conviction for enhancement.

The first count in the *Baker* indictment was clearly erroneous for enhancement purposes because it violated the first part of the *Johnson* rule (*i.e.*, a prior non-capital conviction cannot be used to enhance punishment for a subsequent capital felony). However, the state dropped this count and secured a conviction under the second count of robbery by assault. Nevertheless, it was held that there could be no enhancement of punishment, because there was no allegation of a prior conviction contained in the *language of the second count.* Therefore, in cases where the primary offense is a capital felony, the indictment should be drawn in this pattern:[20]

First Allegation	—The elements of the primary capital offense.
Second Allegation	—The elements of any lesser included offenses.
Third Allegation	—The allegations of all prior convictions that are to be used to enhance punishment.

V. SENTENCING

The decision of the United States Supreme Court in *North Carolina v. Pearce*[21] precipitates a number of questions related to re-sentencing an offender who has appealed and had his conviction reversed. The *Pearce* decision requires that any time served by such an offender on the original sentence (*i.e.*, the one reversed on appeal) be fully credited against any sentence assessed at the new trial.

Suppose that a defendant sentenced to ten years' imprisonment spends two calendar years in the penitentiary, during which time he accumulates credit for two years and six months.[22] Assume that while in the penitentiary the defendant files a successful appeal. If this defendant is later re-convicted, should the sentencing judge credit him with two years or

[18] 436 S.W.2d 906 (Tex. Crim. App. 1968).

[19] 437 S.W.2d 825 (Tex. Crim. App. 1969).

[20] For a discussion of some other aspects of the enhancement doctrine, see Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 Sw. L.J. 567, 576 (1968).

[21] 395 U.S. 711 (1969).

[22] Prisoners may accumulate extra credit against their sentences in a variety of ways, *e.g.*, TEX. REV. CIV. STAT. ANN. art. 6166v (1962) (extra credit for good conduct); TEX. REV. CIV. STAT. ANN. art. 6166x (1962) (extra credit for overtime work).

two years and six months? Furthermore, is the defendant entitled to be credited with the time served between the granting of the appeal and the new trial? These questions were not answered by the Supreme Court in the *Pearce* case.

The *Pearce* case also stands for the proposition that:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made a part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.[23]

Is the *Pearce* decision limited to cases where the *judge* (as opposed to the jury) assesses the punishment at the new trial? This question has been answered by the Texas court of criminal appeals in the case of *Gibson v. State*,[24] holding that the *Pearce* decision will not be followed in this state if the new sentence is imposed by a jury. Therefore, lawyers representing clients who are being re-tried, following a successful motion for new trial on appeal, should seriously consider waiving the right to jury sentencing. This tactic will protect the client from receiving an increased sentence, unless there are adequate reasons shown in the record.

VI. Duty of Counsel Appointed on Appeal

The Texas Court of Criminal Appeals recently held that an attorney appointed to represent a defendant on appeal must file a brief in the trial court in compliance with the provisions of article 4.09 of the Code of Criminal Procedure.[25] This holding follows the mandate of the Supreme Court of the United States in *Anders v. California*.[26] Since filing a brief is now an indispensable obligation, the appointed lawyer is placed in an uncomfortable dilemma should he conclude that there are no reasonable grounds for an appeal. How can he file the indispensable brief if he finds no reasonable grounds for appeal?

The solution to the dilemma, according to both the Supreme Court of the United States and the Texas Court of Criminal Appeals, is for the appointed attorney to adopt the following procedure:[27]

1. File a brief in the trial court.
2. Advance any arguments that might conceivably support the appeal.

[23] 395 U.S. 711, 726 (1969).

[24] 6 Crim. L. Rep. 2379 (March 4, 1970). *Compare* United States v. Jackson, 390 U.S. 570 (1968), holding that the defendant's right to a jury trial is unconstitutionally restricted by a statute which allows a jury to impose a greater punishment than may be imposed by a judge for the same offense.

[25] Garza v. State, 433 S.W.2d 428 (Tex. Crim. App. 1968).

[26] Anders v. California, 386 U.S. 738 (1967). *But see* Sirls v. State, 432 S.W.2d 902 (Tex. Crim. App. 1968).

[27] *Compare* Garcia v. State, 436 S.W.2d 139 (Tex. Crim. App. 1969), *with* Gainous v. State, 436 S.W.2d 137 (Tex. Crim. App. 1969). *See also* People v. Brown, 245 N.E.2d 548 (Ill. App. Ct. 1969).

3. Advise the trial court, either in the brief or by motion to withdraw, that the appeal is frivolous.
4. Furnish the appellant with a copy of the brief, and allow him to raise any additional grounds of error that he may choose.

Perhaps the above procedure is the best solution to the dilemma; nevertheless, it is patently prejudicial to the appellant. The essence of an appeal is unbiased review of the trial proceedings by an appellate court. It simply does not comport with human experience to think that an appellate court can give unbiased review to a case where the record contains a statement by the appellant's own lawyer that the appeal is frivolous. On the other hand, lawyers cannot be expected to demean themselves or the profession by pressing forward with a wholly frivolous appeal. To date, the Supreme Court has not formally considered this dilemma.

VII. JUVENILE DELINQUENCY

In the case of *Dillard v. Texas*[28] a juvenile (age sixteen) who had committed two felonies, appealed an order by the juvenile court transferring his cases to the criminal district court for trial.[29] While this appeal was pending the juvenile became seventeen years of age. The Houston court of civil appeals followed a long line of decisions which held that the juvenile's age at the time of *trial* is the controlling factor so far as the respective powers of the district court and the juvenile court are concerned. When the youth became seventeen, the juvenile court lost all jurisdiction over him, and therefore the appeal was held to be moot.

This case raises an apparent inconsistency in the language of article 30 of the Penal Code.[30] Article 30 was amended in 1967 to provide that no person may be convicted of an offense *committed* before he was fifteen years of age, and that no male under seventeen or female under eighteen may be *convicted* of an offense unless the juvenile court waives jurisdiction. If a male commits a felony at age fifteen, can the prosecutor avoid the import of article 30 by simply waiting until that person is seventeen before attempting to convict him? In light of the decision in *Dillard*, it would seem that the answer to this question is yes. It is suggested that article 30 should be amended to require prosecutors to proceed without unreasonable delay to bring charges in the juvenile court against any person who commits an offense between the ages of fifteen and seventeen (male) or fifteen and eighteen (female). The amendment should further provide that once charges are filed in the juvenile court, that court retains jurisdiction until a final judgment or transfer order is entered.

Another significant Texas decision in the area of juvenile proceedings is *Santana v. State*.[31] The question in *Santana* was whether the standard of proof in delinquency cases should be "preponderance of the evidence"

[28] 439 S.W.2d 460 (Tex. Civ. App. 1969).
[29] *See generally* TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1964).
[30] TEX. PEN. CODE ANN. art. 30 (1967).
[31] 431 S.W.2d 558 (Tex. Civ. App.—Amarillo), *rev'd*, 444 S.W.2d 614 (Tex. 1969).

(the civil standard) or "beyond a reasonable doubt" (the criminal standard). In *Santana* the Texas supreme court opted to maintain the customary "preponderance of the evidence" test. The Supreme Court of the United States has granted certiorari in a case where the Court of Appeals of New York reached the same conclusion.[32] Therefore, we can anticipate that the matter will soon be finally settled.

The last Texas Legislature amended article 2338-1 of the Civil Statutes to provide for appointment and payment of counsel to represent juveniles accused of delinquency.[33] According to the amendment, if the juvenile is indigent, the court is required to appoint and pay counsel in the same manner as counsel is now appointed and paid in criminal cases. Moreover, the amendment provides that if the juvenile is *not* indigent, then: "[T]he Court shall order the parents, guardian, or other person responsible for the care and support of the child to employ counsel to defend the child."[34] It is interesting to speculate upon the meaning and potential impact of this amendment. It appears to impose a mandatory duty upon the court either to appoint an attorney, or order the parents to hire one. Query: If the court's duty is mandatory, then do the parents or the juvenile have power to waive representation by counsel?[35]

VIII. Driver's License

Recent adoption of article 802f of the Penal Code[36]—known as the implied consent law—has attracted the attention of prosecutors and defense attorneys throughout the state. This statute permits the Department of Public Safety to suspend the license of any driver who refuses to submit to a chemical breath test when arrested for driving while intoxicated. If the officer who makes the arrest reports the refusal to the Department of Public Safety, the matter is set for a hearing before a magistrate.

The nature of this hearing is defined as follows:

> If, upon such hearing, the court finds that probable cause existed that such person was driving or in actual physical control of a motor vehicle on the highway while under the influence of intoxicating liquor at the time of the arrest by the officer, the Director of the Texas Department of Public Safety shall suspend the person's license or permit to drive . . . .[37]

It seems that suspension of the license is automatic if the magistrate finds probable cause for the arrest, and that the defendant was intoxicated. Apparently, the license can be revoked without any judicial finding that the driver actually *refused* to submit to the breath test.[38] So construed,

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[32] W. v. Family Court, 247 N.E.2d 253 (N.Y.), *cert. granted*, 38 U.S.L.W. 3153 (U.S. Oct. 28, 1969).

[33] Tex. Laws 1969, ch. 171, at 505.

[34] *Id.*

[35] *Cf.* Gutierrez v. State, 433 S.W.2d 777 (Tex. Civ. App.—Fort Worth 1968).

[36] Tex. Laws 1969, ch. 434, at 1468.

[37] *Id.*

[38] The issue of whether or not the driver actually refused the test is a common one in other

the statute is probably a denial of due process of law in that it allows the taking of the valuable and substantial privilege of operating an automobile without first providing for a fair hearing.

Article 6687b, section 22 of the Civil Statutes is available to the Department of Public Safety to suspend the driving privileges of persons who are habitual traffic violators. This statute has been amended to allow magistrates to probate the period of suspension.[39] Presumedly, one factor that will be considered by the magistrate in deciding whether to probate a license suspension is the driver's need for the license in his occupation. Yet, if the magistrate refuses to probate the suspension, the legislature has provided the driver with another forum. Article 6687b has been further amended to provide that "any person whose license has been suspended for causes other than physical or mental disability or impairment" may file a petition in the *district court* seeking an occupational license which permits the driver to operate a motor vehicle in his occupation or trade.[40]

Perhaps the most that can be said for the amendments to article 6687b is that they greatly expand the role of the lawyer in the administration of the privilege to drive in this state. They seem to reflect a retreat from previous notions of absolute denial of driving privileges for excessive or gross traffic violations. This attenuation of strict enforcement is especially visible in the amendment that allows a petition for an occupational license to be filed in the district court. The petition may be ex parte, thus apparently denying the Department of Public Safety an opportunity even to be heard in the matter.[41] Furthermore, the petition may be granted solely upon occupational need; there is no requirement in the statute that the judge consider the best interests of the public. Hopefully, district judges will adopt a practice of considering a petitioner's driving record prior to granting an occupational license regardless of the lack of any statutory language requiring it.

IX. Compulsory Psychiatric Examinations

In *Blankenship v. State*[42] the defendant was examined by two court-appointed psychiatrists out of the presence of his lawyer. He contended that this was a violation of his right to counsel.[43] The Texas Court of Criminal Appeals held that a mental examination is not in the nature of a confession, hence the presence of counsel at the examination was not required.

The facts of the *Blankenship* case present two other constitutional issues not raised by the defendant and not discussed by the court. First,

jurisdictions that have implied consent laws. *See* cases collected in R. Erwin, Defense of Drunk Driving Cases § 28.04 (1966).

[39] Tex. Laws 1969, ch. 614, at 1824.

[40] *Id.* ch. 612, at 1821.

[41] *Id.*

[42] 432 S.W.2d 945 (Tex. Crim. App. 1968).

[43] "The court may, at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and as to his sanity, and to testify thereto at any trial or hearing in connection to the accusation against the accused." Tex. Code Crim. Proc. Ann. art. 46.02, § 2(f)(1) (1967).

does the fifth amendment protect a defendant in such circumstances because of the inherent likelihood that he may incriminate himself? Second, does the sixth amendment give the defendant a right to counsel because a psychiatric examination is a "critical stage" in the proceedings?[44] The answer to the question of whether the fifth amendment applies to court-ordered mental examinations may turn on how a mental examination is perceived. At least one court has held that a mental examination is analogous to the giving of a blood sample or handwriting exemplar, so that the fifth amendment did not apply.[45] On the other hand, where the mental examination includes a discussion of the criminal event, it has been held analogous to those testimonial or communicative acts that are protected by the fifth amendment.[46]

The Texas Legislature has attempted to solve the question of the applicability of the fifth amendment to mental examinations with this provision: "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."[47] This provision seems to imply that admissions of guilt made to an examining physician can be admitted at the trial if restricted to the issue of *sanity*. If so, then the defendant's only protection from an incriminating statement made to an examining physician is an instruction from the trial court telling the jury not to consider the defendant's statement as any evidence of guilt. Obviously, such an instruction would have no practical effect on the average juror.

The second constitutional issue raised by the *Blankenship* case (*i.e.*, whether a mental examination is a critical stage under the sixth amendment) is as perplexing as the first. Since *Gideon v. Wainwright*[48] in 1963, the Supreme Court has consistently held that a defendant has the right to the presence of counsel at all critical stages of criminal proceedings.[49] Whether or not a stage is "critical" is determined from the nature of the proceedings at that stage and from the facts of each particular case.[50] No case has been found where the issue of a mental examination as a critical stage has been raised. Hopefully, the Texas Court of Criminal Appeals will be given an opportunity to pass on this question in the forthcoming year.

X. Other Developments

Other recent developments in the Texas criminal law will be discussed here in summary form.

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[44] *See* Mempa v. Rhay, 389 U.S. 128 (1967); White v. Maryland, 373 U.S. 59 (1963).

[45] United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[46] State v. Obstein, 52 N.J. 516, 247 A.2d 5 (1968).

[47] Tex. Code Crim. Proc. Ann. art. 46.02, § 2(f)(4) (1967).

[48] 372 U.S. 335 (1963).

[49] For a discussion of what stages are "critical," see Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 496 (1969).

[50] United States v. Resnicke, 333 F.2d 608, 611 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964). *Compare* United States v. Wade, 388 U.S. 218 (1967), *with* Pointer v. Texas, 380 U.S. 400 (1965).

1. Changes in Texas community property laws have resulted in a new rule for the allegation of ownership of property in an indictment. The Texas Court of Criminal Appeals has held that, henceforth, the ownership of community property may be alleged in the husband *or* the wife.[51] This change is the result of the amendment of article 4621 of the Civil Statutes providing that comingled community property is subject to the joint control of the husband and wife.[52]

2. The Supreme Court of the United States has made it clear that *Miranda v. Arizona*[53] is not limited to custodial interrogations inside a police station. In *Orozco v. Texas*[54] the Supreme Court reversed a conviction where the defendant was apprehended, arrested and interrogated in his own bedroom without being given the *Miranda* warnings. The Court's opinion in *Orozco* emphasizes that it is the custodial (viz., under arrest) aspect of an interrogation that precipitates the necessity for the *Miranda* warnings and not the particular location where the interrogation takes place.

3. In *Chimel v. California*[55] the Supreme Court of the United States drastically limited the space that is subject to warrantless search incident to arrest. Prior to *Chimel*, the rule was that if the police made a valid arrest, they had the right to search, without a warrant, the surroundings (house, room, etc.) where the arrest was made.[56] In the *Chimel* opinion the Court limited the boundaries of such a search to the suspect's body, and the space within his reach where he might be expected to obtain a weapon or destructable evidence. The Court reasoned that the only justification for a warrantless search incident to arrest is to protect the officers from harm, and to prevent the suspect from destroying evidence. It is interesting to speculate what influence the *Chimel* opinion may have upon the Texas cases that allow a warrantless search of an automobile incident to a traffic arrest.[57]

4. The statutory requirement that a defendant be taken before a magistrate after arrest has never been strictly enforced in Texas.[58] The viewpoint of the Texas Court of Criminal Appeals is that the failure to take the defendant before a magistrate is not reversible error unless there is some causal connection between this failure and some harm to the defendant.[59] The purpose for taking a defendant before a magistrate after arrest is to: (1) allow the magistrate an opportunity to inform the

[51] Williams v. State, 438 S.W.2d 934 (Tex. Crim. App. 1969).
[52] TEX. REV. CIV. STAT. ANN. art. 4621 (1960).
[53] 384 U.S. 436 (1966).
[54] 394 U.S. 324 (1969).
[55] 395 U.S. 752 (1969).
[56] *E.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950).
[57] *Compare* Taylor v. State, 421 S.W.2d 403 (Tex. Crim. App. 1967), *with* Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967), *motion to dismiss appeal granted*, 404 F.2d 644 (5th Cir. 1968), *and* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).
[58] TEX. CODE CRIM. PROC. ANN. art. 15.17 (1967) provides in part: "[T]he person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested." For further discussion of the failure to strictly enforce this statutory provision, see Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 22 Sw. L.J. 211, 215-16 (1968).
[59] 432 S.W.2d 951 (Tex. Crim. App. 1968) (defendant failed to establish any causal connection between the failure to take him before a magistrate and the making of a confession).

defendant of the charges against him; (2) give the defendant the *Miranda* warnings; (3) allow the defendant reasonable time and opportunity to consult counsel; (4) admit the defendant to bail if allowed by law.[60] Therefore, in opposition to the court's viewpoint, it could reasonably be argued that a causal connection between a failure to take the defendant before a magistrate and harm to the defendant should be *presumed.* Nevertheless, the viewpoint of the Texas Court of Criminal Appeals has been buttressed by the United States Court of Appeals for the Fifth Circuit in *Gamez v. Beto,*[61] where the court stated:

> Although the State acted in direct contravention of Texas law in waiting an unreasonble length of time before bringing petitioner before a magistrate, there is no allegation that appellant's case was prejudiced by such misconduct. The failure to take one before a magistrate, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction.[62]

5. The opinion of the Texas Court of Criminal Appeals in *Schepps v. State*[63] casts some doubt upon the validity of what had been "the well settled Texas rule" that the confession of a principal is admissible in evidence at the trial of an accomplice. Unfortunately, however, the judges were not able to reach a consensus as to why, or under what circumstances, such confessions are not admissible. Judge Onion is apparently of the opinion that the use of a principal's confession under any circumstances at the trial of an accomplice is a violation of the accomplice's right of confrontation.[64] Judge Morrison concurred, but he emphasized the fact that in this particular case the state had ample evidence to establish the guilt of the accomplice without introducing the principal's confession.[65] Judge Belcher also concurred, but on the grounds that the trial court committed error in not excising a part of the confessions before they were admitted into evidence.[66] Judge Dice, joined by Judge Woodley, dissented on the theory that the "well settled Texas rule" was still valid in all respects.[67] Apparently, the most that can be said about the *Schepps* case is that there is some feeling by the court that if the confession of a principal implicates an accomplice, it should not be admitted into evidence at the trial of the accomplice.[68]

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[60] TEX. CODE CRIM. PROC. ANN. art. 15.17 (1966).

[61] 406 F.2d 1000 (5th Cir. 1969).

[62] *Id.* at 1001. *But cf.* Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) (imposing strict liability for false imprisonment, and mentioning failure to take before a magistrate as an example of the tort).

[63] 432 S.W.2d 926 (Tex. Crim. App. 1968).

[64] *Id.* at 938-43; *see* Bruton v. United States, 391 U.S. 123 (1968) (holding that the admission into evidence of the confession of one co-defendant violates the right to confrontation and cross-examination of other co-defendants).

[65] "[I]t is clear to me that the rationale of Bruton and other cases would bring about a reversal of this conviction by said Court. This is especially true because the State was armed with ample evidence outside of the confession of the principal to show the principal's guilt, as is shown in the original opinion." 432 S.W.2d at 944.

[66] *Id.*

[67] *Id.*

[68] *See* Loftis v. State, 433 S.W.2d 704 (Tex. Crim. App. 1968) (motion for severance denied where two principals were jointly tried, one pleaded guilty, and the other pleaded not guilty; dissent by Onion, J.).

XI. Conclusion

This has been a year of consolidation and careful consideration for Texas criminal jurisprudence. The courts and the legislature are beginning to respond to changes and advances in criminal law and procedure that have been imposed, mostly by federal courts, in the last few years. In the process, some of the heretofore undetected nuances of the new doctrines are coming to light. Hopefully, however, the overall thrust of the Texas law will continue in the direction of the full implementation of due process in the criminal justice system. Any punctilious reaction that derrogates from the due process norm can only result in renewed invitations to the federal courts to intermeddle in the criminal law of this state.