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Constitutional Law - Pointer v. Texas - Guarantee of an Accused's Right to Confront the Witnesses against Him in a State Proceeding According to Federal Standards

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A final warning should be offered against drawing absolute conclusions. For example, *Brown* seemingly allows employers in an association to treat all union employees as strikers once one company has been subjected to an economic strike. Nevertheless, it does not necessarily follow that employers can *permanently* replace the employees who did not in fact strike.[72] The Board and the courts will still attempt to balance the opposing interests equitably in each individual case. Moreover, the Board will probably continue to be recognized as the body with expertise to balance judiciously such interests.

The "beefed-up" lockout, then, is not the ultimate weapon. It is, however, a great improvement over weapons previously allowed. Its greatest use probably will occur at the "cold war" bargaining table. Unions should not fear a tremendous increase in lockouts themselves. They should be ready, though, to approach negotiations with new respect for employers' ability to deal through strength.

James H. Wallenstein

Constitutional Law — Pointer v. Texas — Guarantee of an Accused's Right to Confront the Witnesses Against Him in a State Proceeding According to Federal Standards

I. The Trend Toward "Incorporation"

The language of the fourteenth amendment to the United States Constitution makes no mention of the Bill of Rights. Mr. Justice Black has vigorously contended that section 1 of the amendment[1] was intended to incorporate the Bill of Rights.[2] While some historical evidence tends to support the argument that Congress intended in-

[72] NLRB v. Mackay Radio & Telephone Co., 304 U.S. 333 (1938).

[1] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[2] In Adamson v. California, Mr. Justice Black, in his dissent, stated: "I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights." Justice Douglas joined Black in his dissent, 332 U.S. 46, 89 (1947). Felix Frankfurter, a staunch adversary of Black's theory, defined the term incorporation as follows: "The sense of the word 'incorporate' implies simultaneity. One writes a document incorporating another by reference at the time of the writing." Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into The Due Process Clause of The Fourteenth Amendment*, 78 Harv. L. Rev. 746, 748 (1965).

corporation,[3] it is equally clear that the states and the general public did not.[4]

The early case history clearly shows that the judiciary did not interpret the amendment as incorporating the Bill of Rights. In *Twitchell v. Commonwealth*,[5] decided in 1868, the Supreme Court, though making no mention of the new amendment, held that the fifth and sixth amendments restricted only federal power. As authority, the Court cited Mr. Chief Justice Marshall's statements in *Barron v. City of Baltimore*:[6] "These amendments contain no expression indicating an intention to apply them to State governments. This Court cannot so apply them."[7] In subsequent years, when faced with the question of the relation of the fourteenth amendment to the Bill of Rights, the Court refused to renounce this authority.[8]

In *Twining v. New Jersey*[9] the Court held that the "privileges and immunities" clause did not "forbid the States to abridge the personal rights enumerated in the first eight Amendments. . . ."[10] but went on to say that if some of the personal rights so enumerated are safeguarded against state action, it would be because they are of such a nature as to be "included in the concept of due process of law. . . ."[11] Mr. Justice Cardozo, speaking for the Court in *Palko v. Connecticut*,[12] said that the immunities which, since *Twining*, had been found to be enforceable against the states[13] were so found because they were "implicit in the concept of ordered liberty," and that this process of "absorption" is based upon the belief that "neither liberty nor justice would exist if they were sacrificed."[14]

In 1947 the "incorporation" issue was squarely faced by the Court. *Adamson v. California*,[15] a five-four decision, rejected Mr. Justice

[3] See appendix to Black's dissenting opinion in Adamson v. California, 332 U. S. 46, 92 (1947). *Contra*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); See also note 4, *infra*.

[4] Note, *Constitutional Law—Was it Intended That the Fourteenth Amendment Incorporate the Bill of Rights?*, 42 N. C. L. REV. 925 (1964).

[5] 74 U.S. (7 Wall.) 321 (1868).

[6] 10 U.S. (7 Peters) 464 (1833).

[7] *Id.* at 468.

[8] West v. Louisiana, 194 U.S. 258 (1904); Brown v. New Jersey, 175 U.S. 172 (1899); Spies v. Illinois, 123 U.S. 131 (1887).

[9] 211 U.S. 78 (1908).

[10] *Id.* at 99.

[11] *Ibid.*

[12] 302 U.S. 319 (1937).

[13] De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of speech and peaceable assembly); Grosjean v. American Press Co., 297 U.S. 233 (1936) (freedom of press); Hamilton v. Regents, 193 U.S. 245 (1934) (free exercise of religion); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel). Chicago B. Q. Ry. Co. v. Chicago, 166 U.S. 226 (1897) (just compensation clause of the fifth amendment), had been decided prior to *Twining*.

[14] 302 U.S. 319, 325 (1937).

[15] 332 U.S. 46 (1947). Despite Mr. Justice Black's lengthy appendix, Mr. Justice Reed, speaking for the Court said that nothing had been called to the attention of the majority

Black's "incorporation" theory and affirmed the "natural law" theory of *Palko*. The Court rejected the petitioner's contention that the self-incrimination clause of the fifth amendment applied to the states through the due process clause of the fourteenth amendment. The *Twining* Court had previously rejected a contention that the "privileges and immunities" clause made the self-incrimination clause applicable to the states.[16] Seventeen years later *Adamson* was overruled by *Malloy v. Hogan*[17] in which the Court held that the fourteenth amendment guaranteed the petitioner the protection of the fifth amendment's privilege against self-incrimination in a state proceeding.

In the time between *Adamson* and *Malloy* the Court held that the fourteenth amendment guarantees against infringement by the states the liberties of the fourth amendment,[18] the eighth amendment's prohibition of cruel and unusual punishment,[19] and the sixth amendment's guarantee of assistance of counsel for an accused in a criminal prosecution.[20] This line of cases culminating in *Malloy* evidenced a trend away from the "natural law" theory of *Palko* and toward the doctrine of "selective incorporation." *Malloy* rejected the theory of "wholesale incorporation" of the Bill of Rights, and accepted an approach which is a kind of " 'incorporation' in snatches."[21] As a result the Court no longer was concerned solely with whether the state court's proceedings met the demands of fundamental fairness which due process embodies, but also with whether the proceedings complied with federal standards, *i.e.*, the extent to which the federal courts had guaranteed a specific provision of the Bill of Rights.[22] In *Malloy*, Mr. Justice Brennan stated:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[23]

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that would indicate that either the framers of the fourteenth amendment or the states intended that the due process clause draw within its scope any of the earlier amendments. Mr. Justice Frankfurter, in his concurring opinion, stated that an amendment, since it is proposed for public adoption, should be read in a sense most obvious to the common understanding at the time of its adoption. This reasoning, from an historical standpoint, completely negates Black's "intent to incorporate" theory.

[16] 211 U.S. 78 (1908).

[17] 378 U.S. 1 (1964).

[18] Mapp v. Ohio, 367 U.S. 643 (1961).

[19] Robinson v. California, 370 U.S. 660 (1962).

[20] Gideon v. Wainwright, 372 U.S. 335 (1963), noted 18 Sw. L. J. 284 (1964).

[21] Malloy v. Hogan, 378 U.S. 1, 14, 27 (1964) (Harlan, J., dissenting).

[22] *Ibid.*

[23] 378 U.S. 1, 11 (1964).

With the "natural law" theory of *Palko* rejected in favor of "selective incorporation," the federal standards became as important as the prevailing state practice in a state proceeding.

II. An Accused's Right to Confront the Witnesses Against Him

A. *Federal Standards*

The sixth amendment to the United States Constitution states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." As early as 1899, the right of confrontation was recognized as one of the "fundamental guarantees of life and liberty."[24] Included in the right of confrontation is the right to look upon the witnesses, to cross-examine them, and to impeach their testimony in every method authorized by the rules of criminal procedure.[25] The presumption of the innocence of the accused relates to every fact which must be established to prove his guilt beyond a reasonable doubt. A failure to afford these rights would in effect deny the presumption by failing to give the accused an opportunity to question the veracity of the facts established by an unconfronted witness.[26] Even though the right is fundamental, it is not absolute, and the Court continues to recognize as exceptions to the general rule the admissibility of dying declarations,[27] recorded testimony taken at a former trial where the witness died before the second trial,[28] and testimony of a witness whose absence was due to the procurement of the defendant.[29]

In *West v. Louisiana*,[30] after recognizing the right as fundamental, the Court held that the sixth amendment did not apply to proceedings in state courts, and therefore, where a state denied the accused the right to confront the witnesses against him, the only question before the Court was whether there was a denial of due process. After recognizing the exceptions to be allowed, the *West* Court went on to say any further exceptions should be decided by the state courts subject to the due process requirements of the fourteenth amendment.[31]

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[24] Kirby v. United States, 174 U.S. 47 (1899). See also, Turner v. Louisiana, 379 U.S. 466 (1965); *In Re* Oliver, 333 U.S. 257 (1948).
[25] Kirby v. United States, 174 U.S. 47 (1899).
[26] *Ibid.*
[27] Mattox v. United States, 146 U.S. 140 (1892).
[28] Mattox v. United States, 156 U.S. 237 (1895).
[29] Reynolds v. United States, 98 U.S. 145 (1878).
[30] 194 U.S. 258 (1904).
[31] *Id.* at 266.

B. *Texas Standards*

Article 1, section 10 of the Texas Constitution states: "In all criminal prosecutions the accused shall . . . be confronted by the witnesses against him . . . except that when the witnesses reside out of the State . . . , the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide. . . ." The Legislature has provided that the deposition of a witness taken in an examining trial in the presence of the defendant and where the defendant himself had the privilege of cross-examining the witness, may be read at the trial of the accused[32] upon oath of any credible person that the witness resides out of the state.[33]

The Texas Court of Criminal Appeals has interpreted these statutory provisions as applying equally to cases in which the evidence is offered by the accused, as to those in which it is offered by the state, and further, that there is no need to exercise diligence to require the presence of a witness in order to reproduce his prior testimony.[34] Where the evidence shows that the defendant was not given the right to cross-examine the witness at the examining trial, the witness' testimony cannot be introduced.[35] But where the opportunity to cross-examine was afforded,[36] the testimony is admissible regardless of whether the defendant was represented by counsel at the time.[37] Texas, therefore, has recognized not only the exceptions conceded by the United States Supreme Court,[38] but also the exception of reproducing testimony where the witness resides out of the state and the defendant, with or without benefit of counsel, has had a previous opportunity to cross-examine him.[39]

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[32] TEX. CODE CRIM. PROC. ANN. art. 750 (1941).

[33] TEX. CODE CRIM. PROC. ANN. art. 749 (1941).

[34] Webb. v. State, 160 Tex. Crim. 144, 268 S.W.2d 136 (1954).

[35] Gill v. State, 148 Tex. Crim. 508, 188 S.W.2d 584 (1945).

[36] Cumpston v. State, 155 Tex. Crim. 385, 235 S.W.2d 446 (1950).

[37] Young v. State, 82 Tex. Crim. 257, 199 S.W. 479 (1917).

[38] Garcia v. State, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948); McMurry v. State, 145 Tex. Crim. 439, 168 S.W.2d 858 (1943); and see cases cited in notes 27-29 *supra*.

[39] The right of an accused to confront the witnesses against him has long been held to be a fundamental right. See note 24 *supra*. In recent years the Court has not hesitated to hold that certain fundamental rights guaranteed by the Bill of Rights cannot be denied in state proceedings because these rights are guaranteed, through the due process clause of the fourteenth amendment, against infringement by the states. See notes 18-21 *supra*. Malloy v. Hogan, 378 U.S. 1 (1964), established the test of determining whether a fundamental right had been denied in a state proceeding, as being whether or not the fundamental right was afforded in the same manner in which federal courts afford the right, *i.e.*, according to "federal standards." This exception allowed by the Texas courts had not been recognized by the federal courts, therefore, it was not in accordance with the federal standards of granting the accused the right to confront the witnesses against him. In light of the Court's decisions that guarantee an indigent defendant charged with a felony the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), and that the defendant is

III. POINTER v. TEXAS[40]

Pointer and Dillard were arrested in Texas and taken before a state judge for an examining trial on a charge of robbery.[41] An assistant district attorney was present and acted as prosecutor, but Pointer and Dillard were without counsel. Phillips, the victim of the robbery, identified Pointer as the man who robbed him at gunpoint, and while Dillard attempted to cross-examine Phillips, Pointer did not. After Pointer was indicted and before his trial, Phillips moved to California. At the trial, Phillips' testimony was allowed as evidence over the continual objections of Pointer's counsel because, in the trial court's view, the *defendant* had had adequate opportunity to cross-examine Phillips. Pointer contended that he was denied due process because (1) counsel had not been appointed prior to indictment, and (2) he was denied the right to confront the witnesses against him. The Texas Court of Criminal Appeals held that because the examining trial is only for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail;[42] because there was no statutory provision requiring appointment of counsel prior to indictment; and because no pleas of guilty or not guilty are taken, the fact that Pointer was not represented by counsel at the examining trial was not a denial of due process. As Pointer had an opportunity to cross-examine the witnesses at the examining trial, his right of confrontation was not denied.[43]

The United States Supreme Court reversed and remanded, holding that the confrontation guarantee of the sixth amendment is to be enforced against the states under the fourteenth amendment according to the "same standards" that protect this personal right against federal encroachment. Mr. Justice Black, speaking for the Court, reviewed the past decisions[44] which recognized the right of confrontation as fundamental and concluded that sufficient precedent had been established to hold that a denial of the right would be a

entitled to counsel at every stage of the proceedings, Powell v. Alabama, 287 U.S. 45 (1932) (which has been interpreted in the federal courts as a guarantee of counsel at a preliminary hearing), Edwards v. United States, 139 F.2d 365 (D.C. Cir. 1943), citing Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942), the exception allowed by the Texas courts, whereby the defendant, with or without counsel, is afforded the right of confrontation at an examining trial, would not comply with federal standards of granting an indigent defendant the right to counsel as guaranteed by the sixth amendment and applicable to the states through the fourteenth amendment.

[40] 380 U.S. 400 (1965).

[41] TEX. PEN. CODE ANN. art. 1408 (1953).

[42] TEX. CODE CRIM. PROC. ANN. Art. 261 (1954).

[43] Pointer v. State, 375 S.W.2d 293 (1963).

[44] Turner v. Louisiana, 379 U.S. 466 (1965); Greene v. McElroy, 360 U.S. 474 (1959); *In Re* Oliver, 333 U.S. 257 (1948); Alford v. United States, 282 U.S. 687 (1931); Kirby v. United States, 174 U.S. 47 (1899).

denial of due process of law. Because the exception allowed by the Texas Court of Criminal Appeals had not been recognized by the Supreme Court's prior decisions[45] and was not in accordance with the federal standards, the Court held that the sixth amendment's guarantee was unquestionably denied Pointer. The Court went on to say that those exceptions which previously had been allowed were not contradicted by *Pointer*. More significantly, the Court said that if petitioner had been represented by counsel at the examining trial, the case would have been a quite different one. In fact, a prior Supreme Court decision supports this statement. In *West v. Louisiana*,[46] the Court held that where the witness had been cross-examined by the defendant's *counsel* in a hearing before a committing magistrate, and the witness' attendance could not be procured at the trial, the introduction of his testimony was not a denial of due process.

While the Court reserved the question of whether failure to appoint counsel to represent petitioner at the examining trial denied him his constitutional rights as guaranteed by *Gideon v. Wainright*,[47] the Court stated:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner *through counsel* an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to a denial of the privilege of confrontation guaranteed by the Sixth Amendment.[48]

Since *petitioner* actually had an opportunity to cross-examine the witness, it seems clear that *Gideon's* guarantee of right-to-counsel was the controlling force of the decision, *i.e.*, the Court's quarrel is with the fact that there was no opportunity to cross-examine *through counsel.*

While all of the Justices agreed that petitioner was denied the right of confrontation assured by the due process clause of the fourteenth amendment, Justices Harlan and Stewart did not join in the Court's holding that the right of confrontation, as guaranteed by the sixth amendment, was obligatory on the states according to federal standards. Mr. Justice Goldberg, on the other hand, expressly stated in his concurring opinion that he subscribed to the process whereby fundamental guarantees of the Bill of Rights are "absorbed" by the fourteenth amendment and thereby applied to the states. The result

[45] See text accompanying notes 27-29 *supra.*
[46] 194 U.S. 258 (1904).
[47] 372 U.S. 335 (1963), noted 18 Sw. L. J. 284 (1964).
[48] 380 U.S. 400, 407 (1965). (Emphasis added.)

of these opinions is a rehearing of the "incorporation v. natural law" controversy.

Mr. Justice Goldberg contended that the language of *Twining v. New Jersey*[49] makes it clear that those rights which the fourteenth amendment is held to protect, will be protected in all cases where they have been denied, not just the cases where, after considering all the facts and circumstances, it seems fair to a majority of the Court to afford the protection. Goldberg further contended that even though a state should be able to serve as a "laboratory" and try novel social and economic experiments,[50] this does not include the power to experiment with fundamental liberties safeguarded by the Bill of Rights. He refers to the "natural law" theory, which would allow the Court, after considering the factual circumstances of each case, to determine whether a practice was sufficiently repugnant to the notion of due process as to be forbidden as "extremely subjective and excessively discretionary."[51] Such a practice would lessen predictability and increase discord between state and federal legal processes. Rather than increasing federal power, Goldberg contended, the "absorption process" acts to limit state power in accordance with federal standards and thus, safeguard the individual's fundamental rights and liberties in state and federal proceedings equally.

Mr. Justice Harlan contended that the decision is another step toward adoption of the long since discredited[52] "incorporation" doctrine, and that "incorporation," whether selective or total, is historically and constitutionally unsound.[53] Justice Harlan maintained that the sound basis for reversing the judgment is that the right of confrontation is " 'implicit in the concept of ordered liberty,' . . . reflected in the Due Process Clause of the fourteenth amendment independently of the sixth."[54] Harlan reasoned that this standard recognizes that the Constitution is tolerative, rather than prohibitive, of differences in the manner by which state and federal governments execute their legitimate concerns, and further stated:

> "Selective" incorporation or "absorption" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of

[49] Notes 9-11 *supra*. It would take a very liberal construction of *Twining* to reach such a conclusion.

[50] New State Ice Co. v. Liebman, 285 U.S. 262, 280, 341 (1932) (Brandeis, J., dissenting).

[51] 380 U.S. 400, 413 (1965).

[52] Adamson v. California, 332 U.S. 46 (1947).

[53] See Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

[54] 380 U.S. 400, 408 (1965).

> the Bill of Rights should be deemed "fundamental," it at the same time ignores the possibility that not all phases of any given guarantee described in the Bill of Rights are necessarily fundamental.[55]

Since all the justices agreed that petitioner was denied due process as guaranteed by the fourteenth amendment, and that *Pointer* could have been reversed on that basis solely, Mr. Justice Stewart referred to the Court's holding that the sixth amendment's guarantee was obligatory on the states as a "questionable *tour de force*."[56] It is clear that the Court does not wish to follow Mr. Justice Black's "total incorporation" theory, nor does it wish to adhere to the "natural law" theory of *Palko*. However, *Pointer* is justified by the fact that the Court's choice of the middle course, *i.e.*, "selective incorporation" or, "absorption," means that a majority of the present Court consider the specifics of the Bill of Rights as more dependable than nine shifting consciences.[57]

IV. Conclusion

As no pleas of guilty or not guilty are accepted in a Texas "examining trial," the Court reserved the question of whether that stage was so "cricital" to the defendant as to call for appointment of counsel.[58] Because a defendant may make a statement at the examining trial which can later be used against him,[59] and because his liberty until the trial on the merits is in question,[60] it would seem that the examining trial *is* such a critical stage as to require counsel. *Powell v. Alabama*[61] states that a defendant is entitled to counsel at every step of the proceedings, and this decision has been cited as authority for the requirement of representation by counsel in a federal preliminary hearing.[62] While the Supreme Court has not dealt with the question of appointing counsel at such a state hearing, except where pleas of guilty or not guilty were taken,[63] the language of *Pointer*, plus the fact that a defendant is entitled to see his retained counsel upon request after becoming a "suspect,"[64] should be sufficient precedent to require appointment of counsel at this time.

Since *Pointer* strongly implies that the testimony of an absent

[55] *Id.* at 409.
[56] 380 U.S. 400, 410 (1965).
[57] Rochin v. California, 342 U.S. 165, 175, 179 (1952) (concurring opinions).
[58] 380 U.S. 400, 403 (1965).
[59] Tex. Code Crim. Proc. Ann. art. 247 (1954).
[60] Tex. Code Crim. Proc. Ann. art. 261 (1954).
[61] 287 U.S. 45 (1932).
[62] Edwards v. United States, 139 F.2d 365 (D.C. Cir. 1943), citing Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).
[63] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).
[64] Escobedo v. Illinois, 378 U.S. 478 (1964).

witness could be used if the defendant had an opportunity to cross-examine *through counsel,* appointment of counsel at the Texas examining trial would be the only practical way to preserve the use of such testimony. The new Texas Code of Criminal Procedure, effective January 1, 1966, seems to remedy the procedure which resulted in the reversal of Pointer's conviction. Although the provisions dealing directly with confrontation of witnesses and the reading of depositions of an absent witness have not been changed[65] substantially, the new code expressly provides that in any case under the code, the person arrested shall be: taken immediately before a magistrate;[66] informed *inter alia,* of his right to retain counsel; allowed to request appointment of counsel if he is not able to obtain one; and given reasonable time and opportunity to consult counsel. The language of the code makes it mandatory that the person arrested be informed of his right to an examining trial, and upon such examining trial the accused shall have a "sufficient time" to obtain counsel.[67] Because the person arrested is to be afforded a reasonable time to consult with his counsel, and no distinction is made between one who obtains counsel on his own and one who requests that counsel be appointed, it appears that an indigent defendant will have the opportunity of being represented by counsel through every stage of the proceedings against him.[68]

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[65] TEX. CODE CRIM. PROC. art. 1.25 (1965), effective January 1, 1966: "The defendant, upon a trial, shall be confronted with the witnesses, except in certain cases provided for in this Code where depositions have been taken." TEX. CODE CRIM. PROC. art. 39.01 (1965), effective January 1, 1966, enumerates as exceptions the cases where the defendant was present and was afforded the privilege of cross-examining the witness when the testimony was taken at an examining trial, jury of inquest, or a prior trial of the defendant for the same offense, and 1) the witness resides out of the state, 2) the witness has died since the testimony was taken, 3) the witness was prevented from attending by procurement of the other party or one seeking to deprive the defendant of the benefit of such testimony, or 4) the witness is unable to attend because of age or bodily infirmity. Upon proof of one of the situations above, TEX. CODE CRIM. PROC. art. 39.12 (1965), effective January 1, 1966, allows the testimony to be read at the trial.

[66] TEX. CODE CRIM. PROC. art. 14.06 (1965), effective January 1, 1966: "In each case enumerated in this Code, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Art. 15.17 of this Code."

[67] TEX. CODE CRIM. PROC. art. 15.17 (1965), effective January 1, 1966:

> In each case enumerated in this Code, the person making the arrest shall immediately take the person arrested before some magistrate of the county where the accused was arrested. The magistrate shall inform the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

[68] A shadow of doubt is cast by article 16.01 of the new code which provides: "In a proper case, the magistrate may appoint counsel to represent the accused in such examining

Because the Court was silent on the question, it remains to be seen whether *Pointer* will have both prospective *and* retrospective application. Even though in the recent decision of *Linkletter v. Walker*[69] the Court rejected a contention that an absolute rule of retroaction prevails in the area of constitutional adjudication, it appears that *Pointer* will follow the rationale of other cases which have been applied retroactively.[70] The *Linkletter* Court stated that the issue of retrospective application of each case will be decided by "looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation."[71] The Court refused to apply retroactively *Mapp v. Ohio*,[72] the case in question, because the ultimate purpose of *Mapp* was solely to deter and restrain police officers from making illegal searches and seizures. The fairness of the trial was in no sense under attack. Using the test of *Linkletter*, it seems apparent that *Pointer*, where the fairness of the trial was directly in question, will merit retrospective application. The right of confrontation has long been held to be fundamental, and the purpose of the rule is aimed at the "very integrity of the fact finding process."[73] The evidence obtained from a witness whom the accused had no opportunity to cross-examine through counsel would be of questionable reliability and could substantially affect the fairness of the trial.[74] Retrospective application of *Pointer* would further its operation by assuring a trial with full judicial protection.

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trial only. . . ." TEX. CODE CRIM. PROC. art. 16.01 (1965), effective January 1, 1966. The language of this provision is confusing when considered in connection with other provisions of the code which deal with right to counsel. While it was most likely intended to be a practical aid to both the courts and attorneys, it may be construed as a qualification of these other provisions, and if so, the admission at a trial of any deposition of a witness who resides out of the state, and which was taken while the accused was without counsel, will be a denial of due process of law under the decision of *Pointer*.

[69] 381 U.S. 618 (1965).

[70] Jackson v. Denno, 378 U.S. 368 (1964), noted 18 Sw. L. J. 729 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963), noted 18 Sw. L. J. 284 (1964); Griffin v. Illinois, 351 U.S. 12 (1956).

[71] 381 U.S. 618, 629 (1965).

[72] 367 U.S. 643 (1961).

[73] 381 U.S. 618, 639 (1965).

[74] The right to be free from unreasonable searches and seizures and the right of the accused to be confronted by the witnesses against him are both fundamental rights, and a denial of either is a denial of due process. However, evidence obtained as a result of an illegal search and seizure is generally reliable evidence, and the facts established by its introduction, while damaging, are more often than not, truthful. On the other hand, the testimony of a witness whom the defendant has had no opportunity to cross-examine through counsel is of questionable veracity. Because the trial is supposed to be a proceeding between equal adversaries and is aimed at finding the truth, a defendant who is not afforded the right to confront the witnesses against him is at a definite disadvantage, and any evidence admitted which is derived from an unconfronted witness' testimony may result in unjustifiable harm to the defendant.