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Sentencing and Post-Trial

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this instance the guilt of the appellant had already been determined, he was not entitled to a circumstantial evidence charge as to his punishment.\footnote{556 S.W.2d at 250.}

In \textit{Ellis v. State}\footnote{551 S.W.2d 407 (Tex. Crim. App. 1977).} the court of criminal appeals again considered a failure to charge on circumstantial evidence. The principal issue was whether a statement given by the defendant was circumstantial in nature. The defendant had admitted that he witnessed another person commit the slaying with which he was charged; he did not, however, admit that he killed the deceased nor did he admit to aiding or encouraging anyone else. The court, relying on \textit{Ransonette v. State},\footnote{550 S.W.2d 36 (Tex. Crim. App. 1976).} stated that the trial court’s instruction on criminal responsibility for the conduct of another\footnote{See \textsc{Tex. Pen. Code Ann.} § 7.02(a)(2) (Vernon 1974).} did not eliminate the necessity for a charge on circumstantial evidence where the evidence is in fact circumstantial. Because the defendant’s statement did not “unequivocally admit the commission of the act charged,”\footnote{551 S.W.2d at 407.} it was not direct evidence. Since no other direct evidence was produced linking the defendant to the murder, the court ruled that a circumstantial evidence charge should have been given.

\section*{V. SENTENCING AND POST-TRIAL}

\textit{by}

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\textit{Sentencing Alternatives Generally; Pleas of Guilty; Probation and Parole; New Trial, Appeal, and Post Conviction Habeas Corpus}

\subsection*{A. Sentencing Alternatives Generally}

\textbf{Legislation}. During this survey period the Texas Legislature changed some old ideas about corrections, initiated a complete overhaul of the state’s mechanism for criminal appeals, and, at the same time, continued earlier trends to improve the tools available to a sentencing judge. What follows are highlights of the new legislation concerning the manner in which a defendant may be sentenced.

Expansion of the modes of sentencing continued. In 1975 the legislature had given trial judges the right to fix a period of probation without regard to the term of punishment assessed\footnote{TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1978).} and to reduce the term of imprisonment
upon revocation. In addition, a special kind of "deferred" or "unadjudicated" probation was created to avoid the stigma of conviction. Still another variation on this theme was added in the recent legislation. A new section gives a judge the opportunity to terminate a prison sentence after it has begun, allowing the prisoner to serve the balance of the sentence on probation. To qualify, the prisoner must have been eligible for probation in the first instance, and the termination must occur before one hundred twenty days of the sentence elapses. This provision extends the concept of "shock probation" begun in 1975 when the legislature added a thirty day "period of detention in a penal institution" as an optional condition of felony probation, similar provisions exist under the Misdemeanor Probation Law.

Another example of creative legislation is a new refinement in a judge's authority to permit a convicted defendant to serve jail time during off-work hours or on week-ends. The statute now provides that the court may not make such an order without a prior request by the defendant; but if the defendant does request such special treatment, the court may require a special quid pro quo. The judge can require the defendant to arrange with his employer that money be deducted from his paycheck for child support, for restitution, for fines, or reimbursement of the general fund of the county for the jail expenses in keeping the prisoner. Although the employer cannot be compelled to participate in this arrangement, the prisoner can be compelled to request the employer to participate if the prisoner wants to serve his sentence during off-hours or week-ends.

Perhaps of greatest long-term significance are two changes in the structure of the probation and parole system. The first such change requires a probation office to be established in each judicial district in the state, and to implement that mandate a Texas Adult Probation Commission has been created. No longer will parts of the state be without a probation system, and those probation systems that already existed will be controlled and funded from Austin.

The second fundamental change is found in what is now called the Adult Probation, Parole, and Mandatory Supervision Law. In expressing its intent, the legislature stated, "[I]t is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for those prisoners not

639. Id. § 8(a).
640. Id. § 3(d)(a).
641. Id. § 3(e).
642. Id. § 6(b).
643. Id. art. 42.13, § 3(a).
644. Id. art. 42.03, § 5.
645. Id. §§ 5(b)-(d).
646. Id. art. 42.12, § 10(a) (effective Sept. 1, 1978).
647. Id. art. 42.121 (effective Sept. 1, 1978). Section 1.01 of that article provides:

The purposes of this article are to make probation services available throughout the state, to improve the effectiveness of probation services, to provide alternatives to incarceration by providing financial aid to judicial districts for the establishment and improvement of probation services and community-based correctional programs and facilities other than jail or prison, and to establish uniform probation administration standards.
released on parole. . . . 648 In the past, not all inmates were paroled. Ironically, those who did not make parole may have been the ex-convicts who most urgently needed the services of local parole offices, who often serve in a "big brother" capacity for the released inmate. Such unparoled convicts will now be released to mandatory supervision "as if released on parole" when they discharge their sentences, for a period equal to the "good time" they have received toward reduction of sentence. Mandatory supervision is calculated so that the total time in prison and on supervision will not exceed the total calendar time of the maximum sentence. 649

The trend of recent years has been to enlarge the discretion of those in sentencing authority. Nevertheless, that latitude was severely cramped in 1977 in cases of very serious crimes or where firearms or deadly weapons are used. New section 3f and amended section 15(a) and (b) of article 42.12, will surely have as great an impact on the state's correctional system as the new statewide probation system and mandatory release and parole supervision programs. While the supervision programs will tend to increase the incidence of probation and hasten prison release, 3f and 15(a) and (b) may well have the opposite effect.

Section 3f applies to six offenses: capital murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, aggravated robbery, and any felony during which the defendant used a "deadly weapon." In such cases the defendant may receive probation only if the jury recommends it. 650 Thus, the judge and the prosecutor by themselves are powerless to grant probation.

The implications of section 15 are even more staggering. A defendant who commits one of the enumerated offenses and fails to receive probation from the jury will bear the additional burden of calendar time. 651 While other prisoners hurry through their sentences at the rate of ten, twenty, or thirty extra days credit per month, 652 the section 3f offender will serve day for day. 653 Should a jury recommend probation in such a case, the judge has the right to apply shock probation by sending the defendant to prison for four months. 654 The new provision instructs the trial judge to make an "affirmative finding," which he shall enter in the judgment of the court, when a deadly weapon was used in an offense. 655

Three other fruits of the biennial harvest deserve comment here. Section 12.51 of the Penal Code was amended to increase the possible punishment

648. Id. art 42.12, § 1.
649. Id. §§ 15(c), (d).
650. Id. § 3f(a) (denying application of § 3c to actions involving the enumerated offenses).
651. Id. § 15(b).
653. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(b) (Vernon Supp. 1978).
654. Id. § 3f(b).
655. Id. § 3f(a)(2).
by fine of a corporate defendant; most notably, in the case of a Class C misdemeanor the maximum fine was raised from $200 to $2,000. The rudimentary expungement statute was also added to the Code of Criminal Procedure. The statute applies only to cases which were never filed or were filed but dismissed. To take advantage of the provision, a person must not have been convicted of a felony in the preceding five years, and he then must undertake an ex parte procedure in district court. Anyone who breaches the records after they have been sealed is punishable as a Class B misdemeanor.

An era ended when the legislature voted to replace “Old Sparky,” Texas' electric chair, with fastidious, twenty-first century death by injection. The enactment followed close on the heels of a temporarily successful suit by a television newsman to force the Texas Department of Corrections to permit filming of executions in the electric chair. The new mode of execution, unique when the Texas Legislature considered it, has already survived attack at the state level.

Cases. On the subject of the sentences available under Texas law, a recent enhancement case and a case on off-hour sentencing deserve comment. In the latter case, State ex rel. Wilson v. Harris, the district attorney sued for a writ of mandamus, complaining that the trial judge had no jurisdiction to enter an order that the sentence be served during off-work hours after original sentencing, appeal, and affirmance. A divided court of criminal appeals held that the judge had exceeded his authority.

In Scott v. State the court considered whether an indictment enumerating prior convictions for enhancement purposes must also allege the finality of those convictions. Overruling the earlier cases to the extent they conflicted, the court of criminal appeals held that the indictment need only aver that the defendant had been duly and legally convicted of the prior offense. Finding that the records of those convictions had not been properly authenticated under Texas law, and hence were inadmissible, the court remanded the case for re-assessment of punishment at a new hearing.

B. Guilty Pleas

Ironically, uncontested criminal cases have been a wellspring of appellate litigation. This fact reflects the law’s traditional skepticism about waiver of
procedures meant to test the justification for a criminal conviction and a new consciousness about plea bargaining.

Statutory Developments. The evolution of Texas statutory law concerning guilty pleas began in 1975 when the legislature expanded the theretofore terse article 26.13 of the Code of Criminal Procedure. The legislature first dealt with admonishments to the accused about the consequences of a plea of guilty. This amendment responded to discord on the court of criminal appeals over whether a conviction on a guilty plea should be reversed merely because the judge inadvertently failed to state the range of punishment and inquire into improper influences described by statute or whether injury from the omission had to be shown. The legislature dropped explicit reference to "fear," "persuasion," or "delusive hope of pardon" and substituted a warning about the range of punishment in lieu of the former, ambiguous "consequences." Moreover, the amended statute codified the "substantial compliance" standard and the requirement that the defendant on appeal affirmatively show that he was "not aware," "misled," or "harmed" by the trial judge's oversights. These amendments reflected almost contemporaneous decisions of the court of criminal appeals and foredoomed most appeals to the graveyard of harmless error.

The 1975 legislature also took plea bargaining out of the closet and put it on the pages of the Texas statutes by requiring the trial court to warn the defendant of the consequences of a guilty plea or a plea of nolo contendere. This requirement is codified in articles 26.13 and 26.15 of the Code of Criminal Procedure.

668. Under Texas law capital defendants are not permitted to waive the scrutiny of a grand jury, a petit jury, or the appellate court although such waivers by minor felons are routinely accepted. TEX. CODE CRIM. PROC. ANN. arts. 1.13, 1.14 (Vernon 1977), art. 37.071(f) (Vernon Supp. 1978).

669. See, for example, Santobello v. New York, 404 U.S. 257 (1971), which not only acknowledged the legitimacy of plea bargaining, but also declared the Court's readiness to guarantee such bargains as a matter of defendant's due process rights. Subsequent additions to rule 11 of the Federal Rules of Criminal Procedure established an elaborate procedure for identifying, approving, or disapproving plea agreements before a defendant may plead guilty in federal court. FED. R. CRIM. P. 11(e).

670. 1973 Tex. Gen. Laws, ch. 399, § 2(A), at 969, provided:
If the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is mentally competent, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt.


672. 1975 Tex. Gen. Laws, ch. 341, § 3, at 909 provided:
(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
   (1) the range of punishment attached to the offense; and
   (2) the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.
(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.
(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

accused that "any recommendation of the prosecuting attorney as to punishment is not binding on the court" when admonishing him of the possible punishment. This amendment reflected the changing attitude toward discussion of plea bargaining in open court rather than a change in the law.675

In 1977 the legislature added the following language to article 26.13:

Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere, and no statement or other evidence received during such hearing on the defendant's plea of guilty or nolo contendere may be admitted against the defendant on the issue of guilt or punishment in any subsequent criminal proceeding.676

This amendment also had been midwifed by the court of criminal appeals. In this instance, however, the legislature was rejecting, not codifying, the rules of law which the court found itself bound to apply. The dilemma arose in situations where a trial judge declined to follow a prosecutor's recommendation as to punishment, even when he knew it was the result of a plea bargain and that the plea of guilty had been made with the expectation of the hapless defendant and his attorney that it would be honored by the judge in assessing punishment. In such cases the court held that no remedy was available, even if the defendant promptly asked to withdraw his plea of guilty. For example, in Gibson v. State677 the majority reiterated that "prosecutor and defense counsel are without authority to bind the court to a fixed punishment or to probation by plea negotiation."678 The amendment, of course, does not confer on the prosecution and defense that prerogative; the judge still decides whether the recommended punishment will be followed. Nevertheless, by permitting the defendant to withdraw and start anew, the amendment does insure against a courthouse double-cross and, perhaps more importantly, prevents the appearance of collusion between judge and district attorney.679 In this respect, the Texas and federal procedures are now consistent.

In the legislature's desire to stem the flow of appeals from pleas of guilty, it also amended article 44.02, concerning the right of appeal. This change was apparently intended to foreclose most appeals from guilty pleas except where the trial judge violates the new mandates of article 26.13 concerning punishment consistent with a plea bargain. The new language makes only

678. Id., at 75. Judge Odom's majority opinion relied on the ABA, Standards for Criminal Justice (Approved Draft 1971) to delineate the prosecution and defense functions in determining whether the guilty plea had been properly negotiated. 532 S.W.2d at 75. In his dissent, however, Judge Roberts cited the ABA, Standards Relating to Pleas of Guilty (Approved Draft 1968) as support for his argument that the accused should be permitted to withdraw his guilty plea should the trial judge reject the plea bargain. 532 S.W.2d at 77.
679. 532 S.W.2d at 76-77 (Roberts, J., dissenting).
two further exceptions: (1) it allows appeals "on those matters which have been raised by written motion filed prior to trial"; and (2) it allows appeals where the trial court grants "permission." 680

Since the recent amendments to article 26.13 have apparently solved earlier problems, the amendment of article 44.02 may have overshot the mark. Troublesome ambiguities now exist where formerly there were none. For example, article 26.13 as amended gives the trial judge a veto over plea bargaining agreements. He can "reject such agreement in open court and before any finding on the plea," in which event the defendant "shall be permitted to withdraw his plea of guilty." 681 Article 26.13 does not say what would happen if the defendant refuses to withdraw the plea, but the clear implication is that he would have no choice but to accept whatever punishment the trial judge then assessed. If the amended article 44.02 is applied, however, that implication becomes less clear. Article 44.02 now says, in effect, that the defendant may appeal when the trial court's punishment exceeds the "punishment recommended by the prosecutor and agreed to by the defendant and his attorney." 682 Thus, the legislature may have achieved what it did not intend: making plea bargains between the prosecutor and defendant binding on the trial judge. 683

Further, another of the article 44.02 exceptions appears to open an opportunity for appeal heretofore closed. The new statute denies the right of appeal from guilty pleas "except on those matters which have been raised by written motion filed prior to trial." 684 The court of criminal appeals has consistently held, however, that a plea of guilty waives error usually raised by pre-trial motions in writing, such as motions to suppress evidence on the grounds of unlawful searches and seizures. 685 Consequently, this new provision may be a legislative overruling of the waiver doctrine. If so, it eliminates an old dilemma for defense lawyers: whether to risk the short term results of a trial in order to gain the long term benefit of a favorable appeal.

Moreover, the effect of the amended article on legitimate appellate questions accompanying guilty plea convictions is also unclear. The 1975 amendment to article 26.13 permitted appeals where the trial judge inappropriately

680. The 1978 proviso, TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon Supp. 1978) states:
[B]efore the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This article in no way affects appeals pursuant to Article 44.17 of this chapter [concerning trials de novo from justice in corporation court to the county court].

681. Id. art. 26.13.
682. Id. art. 44.02.
683. Arguably, the language in art. 44.02 deals with those matters the defendant can assert on appeal, and not with the jurisdiction of the court; otherwise, the discussion of pre-trial matters, for which a conferral of jurisdiction is meaningless, would be irrelevant. Indeed, jurisdiction has not been the question; rather, the question has been whether the objection to jurisdiction was waived. See, e.g., Chaney v. State, 477 S.W.2d 580 (Tex. Crim. App. 1972).
684. TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon Supp. 1978).
admonished the defendant concerning the range of punishment or failed to make sufficient inquiry into the voluntariness of the plea. It increased the burden for reversal on appeal, however, by making "substantial compliance" sufficient and by requiring the defendant on appeal to show harm.\textsuperscript{686} In the event that there was \textit{not} substantial compliance and the defendant can show an indisputably unjust result, does the law now foreclose a remedy on direct appeal? Under amended article 44.02, that is the apparent result.\textsuperscript{687}

That both the prosecuting and defense attorney would misunderstand the law, agree in plea bargaining to punishment greater than allowed by law, and so mislead the judge is unlikely. Yet it is not an impossibility, since judges frequently do little more than perfunctorily read papers, charges, and punishment ranges prepared by the attorneys. Even if amended article 44.02 precluded direct appeal in such a case, defendant would probably succeed in a collateral attack on a conviction on the grounds that he did not have a lawyer "rendering reasonably effective assistance."\textsuperscript{688} In the event of a successful article 11.07 post conviction writ of habeas corpus,\textsuperscript{689} the question would arise as to what, in fact, had been achieved by limiting direct appeal.

Suppose, however, that after the felony defendant waived counsel and plea bargained \textit{pro se} with the district attorney, he was assessed punishment over and above the judge's admonishments. Or, suppose a defendant without an attorney entered his plea of guilty without a plea bargain, as a so-called open plea, and was similarly assessed punishment. Would such defendants be unable to seek relief either by direct appeal or by habeas corpus? Under the literal terms of amended article 44.02, the only remedy in that situation would be "permission" from the court to appeal.\textsuperscript{690} That exception, however, means little since trial judges already have jurisdiction to set aside their own mistakes and miscarriages of justice.\textsuperscript{691}

\textit{Case Law Development.} The following cases during the survey period should be viewed with the foregoing discussion in mind. In \textit{Sanchez v.}
an aggravated assault conviction on a plea of guilty before the court was reversed by the court of criminal appeals for want of sufficient evidence of "serious bodily injury."

Notwithstanding the fact that the defendant had stipulated in writing that he had caused serious bodily injury to the victim, the court held that the trial judge should have withdrawn the plea of guilty on its own motion. The court stated "it is highly questionable that the evidence is sufficient to show serious bodily injury" and held that "the evidence reasonably and fairly raised an issue of fact as to the innocence of Appellants."

In Barrett v. State, a similar result was reached in an aggravated kidnapping case. The defendant pled guilty and the evidence was stipulated. The conviction was reversed because insufficient evidence existed to show that the defendant was connected with the attack or the abduction in question. In remanding, the court cited article 1.15 of the Code of Criminal Procedure, which requires the State to introduce evidence into the record showing the guilt of the defendant regardless of the plea. The court pointed out that a guilty plea is a mere admission of guilt which is insufficient alone to support a conviction on a plea of guilty before the court.

At this point, the reader should note that the restrictions on appeal in the 1977 amendment to article 44.02 apply only to pleas of guilty before the judge, not to cases where a jury is empaneled to assess punishment on a plea of guilty. Accordingly, the following three cases decided during this survey period should be viewed from two perspectives. First, they are important in their own right, as cases reversed on pleas of guilty before a jury. Second, the question of whether these cases would have been appealable had they been tried before the court under amended article 44.02 should be kept in mind.

In Gates v. State, Woodberry v. State, and Malone v. State the convictions were reversed because the evidence reasonably and fairly raised issues of fact concerning the defendants' guilt. In each case the court of criminal appeals, citing Burks v. State, held that the cases should not have proceeded to final judgment on pleas of guilty. After reviewing the totality of the circumstances in each case, the court held that the defendants had not voluntarily pled guilty to the offenses charged in the indictments.

Malone illustrates the basic scenario of these cases. Defendant was charged with aggravated robbery. He took the stand and testified that he thought...
his accomplice was joking when he said he had robbed the Stop 'N 'Go convenience store; he did not see a robbery, participate in a robbery, or understand what had happened until the police told him. Regardless of what the jury might believe concerning such testimony, the court of criminal appeals held that the plea of guilty should have been set aside in favor of a plea of not guilty at that point in the trial. Although these reversals were based on legitimate concerns about the propriety of convicting and punishing persons for crimes, if amended article 44.02 had been applicable, the appeals would have been foreclosed.

Significantly, in the Malone case the defense counsel made no effort to withdraw the plea of guilty nor did he object to the court's charge to the jury instructing a finding of guilty, even after the exculpatory testimony was presented. Arguably, collateral attack will be inevitable if direct appeal is precluded in such cases. Indeed, the existence of a state statute arbitrarily interdicting direct appeal is a passport to federal court, even under recent holdings strengthening the "exhaustion" doctrine. On the other hand, since the statute does not preclude direct appeals based on mistakes of trial counsel many such cases will continue to reach the appellate level. Trahan v. Estelle presents a thorough analysis of defense counsel's duty in advising his client of the consequences of a guilty plea. Reversing the district court's grant of habeas corpus to the sixteen year old defendant on the ground that the due process requirement of effective assistance of counsel had been satisfied, the court remanded for a determination of the nature of the advice and the voluntariness of the plea. In a special concurring opinion, Judge Goldberg reviewed the standard of "significant misleading statements" by which the effectiveness of the advice might be determined. Judge Goldberg observed that counsel's possible failure to dispel the defendant's apprehension that he could be subject to the death penalty or to supply information about the actual penal consequences of alternative pleas would be particularly relevant in determining the validity of the plea bargain. Moreover, the absence of defense counsel during the bargaining session with the district attorney presented the unusual question of the adequacy of counsel's subsequent performance.

Both state and federal courts continue to refine the rights and remedies of plea bargaining. In Barnett v. Hopper two Georgia defendants reached agreements that, in exchange for their guilty pleas to the crime of armed robbery, the prosecutor would recommend that the court impose ten year probated sentences conditioned on the payment of $2,000 fines by each. Accordingly, each entered pleas of guilty. Although his co-defendant paid the fine and received probation, Barnett was sentenced to ten years imprisonment when the money he had anticipated could not be raised. He petitioned for habeas corpus relief in federal court on the grounds that the ten

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703. 548 S.W.2d at 909.
705. 544 F.2d 1305 (5th Cir. 1977).
706. Id. at 1317 (Goldberg, J., concurring specially).
707. 548 F.2d 550 (5th Cir. 1977).
year sentence violated Supreme Court precedents concerning jailing defendants unable to pay a fine. The Fifth Circuit agreed, even though Barnett conceded that he had agreed to pay the fine immediately. The court rejected the State's argument that such an agreement by the defendant waived his right to assert that he should have been allowed to pay the $2,000 in reasonable installments. The court also rejected an argument that the doctrine of volenti non fit injuria was applicable. In so holding the court displayed its willingness to grant a defendant relief from his own bargain.

Santobello v. New York established that plea bargains can be enforced by a defendant as if contract law were being applied. In Barnett the Fifth Circuit, while basing its decision on constitutional principles, in effect equitably reformed such a contract. The contractual analogy is also apparent in McFadden v. State, a case in which the court of criminal appeals granted specific performance of a plea bargain by reforming the judgment.

The defendant in McFadden had simultaneously pled guilty to a felony indictment and "true" to felony probation revocation. Under the terms of his plea bargain, he was to receive two concurrent sentences of seven years. Between the plea and sentencing, however, he filed pro se notices of appeal. Both the prosecution and the judge regarded this act as a violation of the plea bargain; when the defendant was sentenced, the two seven year sentences were run consecutively rather than concurrently, despite the defendant's request for permission to withdraw one of the pleas. In post-trial hearings both sides gave testimony that an agreement not to appeal was never part of the plea bargaining agreement. On direct appeal, the court of criminal appeals held that the defendant was "penalized for exercising his statutory right of appeal by the prosecutor's failure to live up to the State's part of the plea bargaining agreement." The judgments were therefore reformed to run concurrently.

C. Probation and Parole

Important changes in the statutes governing probation and parole have been analyzed in an earlier part of this article. Other less portentous amendments in the area of probation and parole during this survey period, however, affect daily decision making in the courtrooms of the state. For example, statutory probation fees have been raised from $10 to $15. In a proceeding to revoke probation for failure to pay that fee, the prosecutor

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710. 404 U.S. at 262.
712. Id. at 162.
713. For the discussion of a uniform probation system under a central state agency see notes 646-47 supra and accompanying text; for mandatory supervision of inmates released from prison regardless of parole see notes 648-49 supra and accompanying text; for expansion of "shock probation" see notes 654-55 supra and accompanying text; and for elimination of good time credit of offenders whose crimes fall into certain categories see notes 651-53 supra and accompanying text.
714. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6a(a) (Vernon Supp. 1978).
was previously required to prove that the probationer could have paid the
fee but willfully failed to do so.\footnote{715} The legislature switched the burden of
proof to the defendant, in both felony and misdemeanor probation revoca-
tion proceedings, and made inability to pay an affirmative defense which the
probationer must prove by a preponderance of the evidence.\footnote{716}

Changing the burden of proof is no small matter. It will undoubtedly make
easier the state’s enforcement of probation conditions requiring monetary
payment. The likelihood that such conditions will be imposed was increased
in felony cases by the addition of explicit new conditions which a judge may
use.\footnote{717} Under both felony and misdemeanor law, it has long been possible
for the judge to require, in addition to probation fees, that the probationer
make “restitution or reparations,” and that he “[support his depend-
ts.”\footnote{718} Under the amendment, however, a felony probationer can also be
required to “[r]eimburse the county in which the prosecution was instituted
for compensation paid to appointed counsel for defending him in the
case.”\footnote{719} Further, he can now be required not only to submit to “custodial
supervision in a community-based facility” as a condition to probation but
also to pay the county room and board.\footnote{720} This last requirement is stated in
terms of payment of a “percentage of his income.”

The same language, “[p]ay a percentage of his income,” is repeated in a
new provision concerning support of the probationer’s dependents while
under custodial supervision;\footnote{721} it also appears in a new provision concerning
compensation “for any property damage or medical expenses sustained by
the victim as a direct result of the commission of the offense.”\footnote{722} One
cannot but wonder whether the addition of this new language was intended
to funnel the probationer’s paycheck into the hands of the probation of-

\footnote{715} Id. See id. art. 42.03, §§ 5(a), (b) (conditions which can be imposed on defendant allowed to
serve sentence during off-work hours). See also Balsaldua v. State, 558 S.W.2d 2 (Tex. Crim.
App. 1977) (recoupment plan, including reimbursement to county for fees paid to probationer’s
court appointed lawyer, held constitutional). See generally Williams v. Illinois, 399 U.S. 235
(1970), concerning the sanctions which may be applied to a criminal defendant for failure to pay
assessed fines.
\footnote{724} 549 S.W.2d 718 (Tex. Crim. App. 1977).
\footnote{725} Id. at 722.
there was no question about what the jury intended, but what it intended, i.e., a year in the county jail together with a probated fine, was impossible. In both cases tangled jury forms were at fault. In Taylor the jury was required to select between alternative forms of punishment while in Batten the jury was presented with a two-step process for achieving probation. Nevertheless, in neither case did the court clearly state which procedure, if either, is proper.

Appeals from probation revocations in Maden v. State and Curtis v. State contribute to the law of evidence and objections as well to the law concerning probation revocation. As the court recognized, revocation proceedings differ both in nature and in evidentiary requirements from ordinary trials. Maden was reversed because the evidence was insufficient to establish that the probationer had committed the offense of robbery in violation of his probation. The evidence offered was a police officer's hearsay testimony about a lineup at which witnesses to the alleged crime had identified the probationer. Neither of the witnesses testified at the hearing, and the court held that the police officer's hearsay testimony was inadmissible and presumed disregarded, even though trial counsel failed to object.

In Curtis the court considered the sufficiency of evidence that the substance possessed by the probationer was heroin. The prosecution first offered a detective's testimony that he had conducted a Marquis reagent field test. Nevertheless, the court of criminal appeals stated that a positive reaction to such a test does not prove the substance is heroin but merely that it was "an opiate derivative." The state then offered testimony that a federal government chemist had told the detective that the substance was heroin. The court held the testimony to be hearsay and of no probative value. Finally, the state relied on the officer's experience in making visual identification of heroin. The court rejected this evidence as well "since morphine, codeine, paragoric, other opiates, other control substances, and noncontrolled substances also appear in white or brown powdered form." Therefore, the court reasoned that while an officer may be competent "to testify that a certain green leafy plant substance is marihuana," the evidence did not show that even an expert could visually identify heroin.

Time requirements for probation revocation hearings were addressed in Newcomb v. State. The court noted that in 1975 the legislature had added a time limit which permitted a probationer in jail without bail to move the

727. Both cases were decided on the same day in opinions by Presiding Judge Onion. Neither opinion, however, mentions the other, although both contain copious references to the statute and precedent. Judges Odom and Douglas dissented in both cases.
730. Id. at 59, 542 S.W.2d at 192.
731. 542 S.W.2d at 191-92.
732. 548 S.W.2d at 59.
733. Id. at 59.
court for a hearing on the motion to revoke.\textsuperscript{735} In \textit{Ex parte Trillo}\textsuperscript{736} this hearing was held to be mandatory, requiring dismissal if there were neither hearing nor bail within twenty days. Since the appellant in \textit{Newcomb} failed to invoke the statute, the court held that he could not complain about the seven month delay between filing of the motion and his revocation hearing. The court expressly refused to set a time limit within which a motion to revoke probation must be heard, and refused to address the issue of speedy trial which had not been developed in the trial court.

Several other noteworthy cases in the area of probation revocation were decided during this survey period. In \textit{Aguilar v. State},\textsuperscript{737} recognizing the rule that a probationer may be estopped from objecting to delegated authority which he has accepted over a period of time,\textsuperscript{738} the court nevertheless refused to apply that rule where the probation officer directed only that the probationer report “about once a week.” Although the record in \textit{Parker v. State}\textsuperscript{739} suggested that the probationer had engineered the failure of his hired counsel to be present at the revocation hearing, the court reversed, holding that the probationer had not clearly waived his right to counsel. On the other hand, the court in \textit{Davila v. State}\textsuperscript{740} affirmed a revocation in which a variation existed between the allegation and proof of the county where the revocation offense occurred; since the State need prove only that an offense against the law of Texas occurred, the particular county in which it occurred was irrelevant.

In \textit{Franco v. State}\textsuperscript{741} the court held that a probationer’s insistence on pleading “untrue” to a motion for revocation overcame an earlier written stipulation of evidence in which he admitted violating his probation. Without the stipulation, the evidence was insufficient to revoke and the court therefore reversed. In \textit{Roberson v. State}\textsuperscript{742} the defendant had pled “true” to an allegation that he committed burglary, but, on taking the stand, he denied any intent to commit theft after entering the habitation. Although the court held that the trial court should have withdrawn the “true” plea, it nevertheless reformed the judgment of revocation to show commission of the lesser included offense of criminal trespass.

Noteworthy developments also occurred in the subject areas of parole, right to parole, revocation of parole, and the calculation of good conduct time credits toward eligibility for parole. The Fifth Circuit in \textit{Cruz v. Skelton}\textsuperscript{743} rejected an ingenious assertion that assignment to the Ellis Unit of the Texas Department of Corrections constituted a denial of due process. The argument was based on the fact that more sociological and psychological services were available to prisoners in other units. The prisoner, whose parole applications had been repeatedly rejected, asserted that since such

\textsuperscript{735} \textsc{Tex. Code Crim. Proc. Ann.} art. 42.12, § 8(a) (Vernon Supp. 1978).
\textsuperscript{736} 540 S.W.2d 728 (Tex. Crim. App. 1976).
\textsuperscript{737} 542 S.W.2d 871 (Tex. Crim. App. 1976).
\textsuperscript{739} 545 S.W.2d 151 (Tex. Crim. App. 1977).
\textsuperscript{740} 547 S.W.2d 606 (Tex. Crim. App. 1977).
\textsuperscript{741} 552 S.W.2d 142 (Tex. Crim. App. 1977).
\textsuperscript{742} 549 S.W.2d 749 (Tex. Crim. App. 1977).
\textsuperscript{743} 543 F.2d 86 (5th Cir. 1976).
rehabilitative services enhance the likelihood of parole, assignment to the Ellis Unit was prejudicial. The opinion contains a good review of parole due process law but turned on the fact that the defendant members of the Board of Pardons and Paroles are powerless to control such circumstances.

Two decisions of the court of criminal appeals have substantially affected the law as to good time credit. In *Ex parte Williams* the court held that a federal prisoner serving time on his Texas sentences concurrently was entitled to good time credit on his Texas sentence for the time he served in the federal prison. In *Gardner v. State* the court of criminal appeals reviewed recent changes in both statutory and case law concerning the obligation of the state to give good conduct time to a county jail prisoner awaiting transfer to the Texas Department of Corrections. The court held that only the department of corrections has the jurisdiction to award good time. Consequently the court concluded that even if the time served in jail plus good time credit would result in immediate release, the law nevertheless requires transferring the prisoner from jail to penitentiary. In a related decision, *Caraway v. State*, the court held that the prisoner’s due process rights were violated by denying credit on the sentence for pretrial jail time when he received the maximum penalty and was unable to make bond before trial because he was indigent.

Although certain changes in the Texas statute governing parole procedures were discussed earlier in this Survey, two other statutory changes in parole law deserve comment. The first is the enlargement of the time between arrest and parole revocation hearing from sixty days to ninety days, and the requirement that the hearing be public. The second is an amendment to section 21 of article 42.12 concerning issuance of a warrant for the arrest of a parolee or other prisoner released under the act. The amendment enumerates the grounds for issuance of a warrant for the return of a prisoner and ends on the following formidable note:

> when there is reason to believe that he has committed an offense against the laws of this State or of the United States, violated a condition of his parole, mandatory supervision, or conditional pardon, or when the circumstances indicate that he poses a danger to society that warrants his immediate return to incarceration.

Except for the qualification in the quoted language concerning a danger “to society”, the kind of danger in question is not defined in the act; nor is it clear what authorities are to do after the warrant is issued and the parolee is in custody. Thus, one must ask whether not posing a “danger to society” is now a new parole condition.

**D. New Trial, Appeal, and Post-Conviction Habeas Corpus**

During this survey period, the 65th Legislature and the voters approved...
constitutional amendments which will aid the Texas Court of Criminal Appeals in its efforts to manage the court’s caseload. The first such amendment altered both the personnel of the court and the procedure for hearing cases. The number of elected judges on the court was increased from five to nine; perhaps more important in terms of caseload reduction was the amendment authorizing the court to sit in three judge panels to hear cases, with two judges constituting a quorum. Moreover, if necessary, the court may still appoint commissioners to help with the workload. A second constitutional amendment enlarges the jurisdiction of the court of criminal appeals to include “mandamus procedendo, prohibition, certiorari, and such other writs as may be necessary to protect its jurisdiction or enforce its judgments” rather than limiting it, as before, to writs of habeas corpus.

Fifteen new “Rules of the Court of Criminal Appeals,” published under article 44.33 of the Code of Criminal Procedure, implement the constitutional amendments. Rule 1 provides the procedure for determining which judges will sit in which panels, and for rotating the judges and the panels on a quarterly basis. The rule also provides a procedure for random assignment of cases to panels. Following the decision of a panel of three judges, a litigant may present a motion within fifteen days for rehearing “en banc”; if four judges call for consideration of the case, the full court has the authority by majority vote to modify or overrule the panel’s decision. Such a rehearing may be held on the court’s own motion as well.

One new rule limits appellate briefs to fifty pages. Another rule responds to a radical change in appellate procedure, resulting from an amendment to article 40.09. That code provision controls extension of time for filing “statements of fact,” transcriptions of court reporter trial notes, and appellate briefs. In an effort to hasten the appellate process in criminal cases, the legislature placed authority for all such extensions in the court of criminal appeals itself or a judge thereof, rather than in the trial court. The court’s new rule which implements this provision sets out the requisites for a motion to extend time. In the case of extensions for filing transcriptions of the court reporter’s notes, the affidavit of the court reporter, including his estimate of the completion date, must be attached. Counsel should note especially that the new rule provides that all such motions for extension, whether for statement of facts or briefs, “shall be filed at least one week before the present deadline for the filing of the item in question.”

During this survey period one decision rivalled Haley’s Comet for infrequency, and was almost as spectacular. Despite the fact that appeals by the state in criminal cases are proscribed both by the state constitution and statute, a Panhandle prosecutor took issue with the Texas court’s determin-

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750. TEX. CONST. art. V, § 4.
751. Id. § 5.
752. TEX. CT. CRIM. APP. R., reprinted in TEX. CODE CRIM. PROC. ANN. art. 44.33 (Vernon Supp. 1978).
753. Id. R. 1.
754. Id. R. 14.
756. TEX. CT. CRIM. APP. R. 15.
757. TEX. CONST. art. V, § 26; TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon 1966).
nation of a search and seizure question based on federal constitution standards. He applied for certiorari to the United States Supreme Court, which granted the writ and reversed the Texas case. On remand, the court of criminal appeals dutifully honored the Supreme Court's suzerainty over fourth amendment matters. Nevertheless, in a "well you did it and got away with it but you should not have" opinion, the court made it clear that in the future almost any request for relief will be recognized if the state again violates the prohibitions against its appeal.

Less unusual were those cases decided during the survey period that dealt with sentence, judgment, and notice of appeal. In Conaway v. State the court of criminal appeals held a sentence invalid where no valid judgment was ever announced, the punishment was first announced during the sentencing, and the appellate record failed to demonstrate that the defendant had waived the ten day period for filing a motion for new trial. The court required the trial judge to re-assess the punishment and sentence again on remand. A similar result was reached in Richie v. State where, in a revocation of conditional discharge under the Controlled Substances Act, the record failed to show any judgment finding the defendant guilty. The court held, however, that if a judgment was entered after the appeal, sentence could be imposed.

On the other hand, the court in Pittman v. State dismissed an appeal from a probation revocation because the defendant failed to make notice of appeal within ten days of the judgment; since he had instead made notice within ten days of the sentencing, the court held itself to be without appellate jurisdiction. The court also refused to entertain the appeal in Tyra v. State where a new punishment hearing had taken place after a previous reversal and remand. Because a new judgment was not entered at the conclusion of the punishment hearing, the court held that the record contained no completed judgment upon which sentence could be pronounced and remanded for entry of a new judgment.

Although the trial judge in Ex parte Shields pronounced sentence without allowing ten days in which to file a motion for new trial, the proceeding was held voidable only, and, in the instant case, not subject to collateral attack. In the original opinion by Judge Odom and the opinion on rehearing by Presiding Judge Onion, the court reviewed the law of collateral attack; it concluded that while void judgments may be attacked at any time, errors which render a proceeding voidable can be collaterally attacked only if a showing of harm is made.

In Cody v. State the defendant appealed a D.W.I. conviction, for which he had been assessed a probated jail sentence and a fine, after he had paid

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the fine and court costs. Since the probated jail sentence had not been satisfied at the time of appeal, the court held that his payment of the fine did not render the appeal of the sentence moot. Thus, *Cody* is distinguishable from *Foulke v. State*\(^{766}\) which held an appeal moot because the sole punishment in that case was a fine which, when voluntarily paid, left nothing to complain of on appeal.

In a lengthy and thorough opinion reviewing the law regarding grants of new trials on the basis of newly discovered evidence, a divided court in *Carlisle v. State*\(^{767}\) reversed and remanded the conviction. Commissioner Brown, writing for the majority, emphasized the trial court's considerable discretion in granting a new trial on such a basis and required strict compliance with four criteria.\(^{768}\) He then held that the criteria had been met in this case, despite the cumulative nature of the evidence. Because the defendant's story was admittedly incredible, he indicated that the newly discovered corroborating testimony might well have affected the jury's deliberations, and the new trial was ordered.

Whether a defendant is bound by his agreement to waive appeal when the agreement is made after judgment of conviction but before the pronouncement of sentence was the issue decided in *Ex parte Thomas*.\(^{769}\) Printed waiver forms, heretofore commonplace in many counties for recording waivers of appeal on guilty pleas, were in effect relegated to scratch paper by the court's holding that pre-sentence waivers are not binding.

Procedures to be followed in providing representation for indigent defendants on appeal continue to make law. Following the earlier holding in *Conrad v. State*,\(^{770}\) the court in *Barber v. State*\(^{771}\) stated the rule that indigency on appeal must be decided at the time of appeal rather than the time of trial, regardless of monies already spent for bail and trial counsel. In considering the obligations of appointed counsel in *Gonzales v. State*\(^{772}\) the court held that where appointed counsel finds that his task on appeal is "wholly frivolous,"\(^{773}\) his obligation to notify his client was satisfied by a showing of diligence in trying to locate the client.

Texas' punishment election procedure and the bifurcated trial, which recently celebrated their tenth birthday, remain prominent in the advance sheets. In *Evans v. State*\(^{774}\) a defendant sought to change his initial election of jury punishment to punishment by the judge after the jury convicted him. His request was granted, but after the judge sentenced him the defendant said he wanted to appeal. The judge was incredulous and responded, "[Y]ou

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\(766\). 529 S.W.2d 772 (Tex. Crim. App. 1975).
\(768\). The four criteria are: (1) that the movant was unaware of the evidence before trial; (2) that his failure to discover the evidence was not due to lack of diligence; (3) that the evidence would materially affect the outcome of a new trial; and (4) that the evidence was competent and not merely cumulative, corroborative, collateral, or impeaching. *Id.* at 704.
\(772\). 548 S.W.2d 60 (Tex. Crim. App. 1977).
\(773\). *Id.* at 61.
want to appeal—you feel you have not had a fair trial—looks like we will set it aside and continue with our jury. The jury was then brought back for a punishment trial. On appeal the court reversed the conviction, holding that the trial court lacked authority to order a punishment hearing before the jury after the defendant had elected and received punishment assessed by the court. Thus, the punishment proceedings before the jury were void and of no effect and the original judgment and sentence based on the court's assessment of punishment was reinstated.

Evans illustrates the court's trend away from reversals and toward reformation of judgments or, at the most, remands for reassessment of punishment. Nevertheless where the error is in a jury trial on punishment, there is no choice but to reverse and start over again; where, however, the judge sets punishment and commits error, a remand for reassessment of punishment is possible. In keeping with the trend, the court in Bullard v. State held that once the defendant had waived the jury at punishment, he was bound by that waiver even on remand. In a thorough majority opinion by Presiding Judge Onion and a long dissenting opinion by Judge Phillips, the applicable rules, including state and federal constitutional questions involving the right to trial by jury, were discussed. The procedure was held not to deprive the defendant of his constitutional rights.

The case of Williams v. State is a benchmark in a line of cases considering whether evidence developed at post-trial hearings is properly in the record on appeal. Boykin v. State had held that evidence introduced at an untimely hearing on a motion for new trial could not be considered by the court on appeal. Williams reaffirmed that rule. In doing so, it expressly overruled another decision of the same term, Sims v. State, which in turn had overruled Boykin by implication. Under the short-lived rule of Sims, evidence presented at a hearing on an untimely motion for a new trial was treated as an informal bill of exceptions.

Another significant survey case on the subject of the record on appeal was Dexter v. State. At trial the prosecutors brought before the jury a file cabinet labeled "Organized Crime", in violation of a previous order. The defense counsel neither objected before the jury nor requested that the jury be instructed to disregard; instead he moved for mistrial outside the presence of the jury, which motion was denied. Reversing, the appellate court stated that a motion for an instruction to disregard the sign on the file cabinet was unnecessary because it would not have cured the injury.

The procedure for post-conviction habeas corpus was changed by an amendment to article 11.07 of the Code of Criminal Procedure. Previously

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775. Id. at 142.
776. 548 S.W.2d 13 (Tex. Crim. App. 1977). The court noted, however, that the right to jury at the punishment phase of a capital murder prosecution cannot be waived.
780. These cases do not cite precedent apparently in point. See, e.g., Johnson v. State, 467 S.W.2d 247 (Tex. Crim. App. 1971) (trial judge in 'interest of justice' could continue hearing on motion for new trial beyond deadline for overruling by operation of law).
issued by the district court where the conviction occurred, a writ of habeas corpus now issues by operation of law. The State has fifteen days to answer the writ. Within thirty-five days the trial court must decide if there are contraverted fact issues. If there are none, the petition proceeds to the court of criminal appeals. If there is an issue, the trial court then proceeds to deal with it through alternatives such as appointing an attorney or magistrate to conduct a hearing. After the hearing the court reporter must submit a transcript of the proceeding within fifteen days. After making findings of fact, the trial court transmits the record to the court of criminal appeals.\footnote{782. \textit{Tex. Code Crim. Proc. Ann.} art. 11.07, § 2 (Vernon Supp. 1978).} 

Several cases considering post-conviction habeas corpus were decided during this survey period. \textit{Ex partes Guzman}\footnote{783. 551 S.W.2d 387 (Tex. Crim. App. 1977).} held that a post-conviction writ was not moot merely because the petitioner was no longer in custody. The court noted that prior convictions may have "serious collateral consequences to a criminal defendant, thus the mootness doctrine cannot prohibit a collateral attack."\footnote{784. \textit{Id.} at 388.} In \textit{Ex parte McCarty}\footnote{785. 546 S.W.2d 327 (Tex. Crim. App. 1977).} Presiding Judge Onion in a concurring opinion admonished trial judges not to wait for the action of the appellate court in cases where they find a petitioner was improperly denied a direct appeal. He recommended that the judges proceed to send the record of the original trial along with their findings of fact and conclusions on the writ, so that the appellate court can deal with the case in a single submission and opinion.

Two cases decided on the same day dealt with post-conviction habeas corpus involving misdemeanor convictions in county court. In \textit{Ex parte Sheppard}\footnote{786. 548 S.W.2d 414 (Tex. Crim. App. 1977).} the defendant had been repeatedly incarcerated in direct violation of a district court's valid order; when the district court refused further relief, an application for an original writ was granted. The court stressed that the power to enter an original writ was rarely exercised, and then only in the court's discretion. On the other hand, \textit{Ex parte Crosley}\footnote{787. 548 S.W.2d 409 (Tex. Crim. App. 1977).} held that an attempted appeal from denial of a writ in county court was not properly before the court.

One habeas corpus case decided during this survey period interpreted the law of double jeopardy, particularly the doctrine of collateral estoppel. In \textit{Ex parte Green}\footnote{788. 548 S.W.2d 914 (Tex. Crim. App. 1977).} the court held that the State was not estopped from prosecuting a defendant for murder of one victim with malice after he was convicted of murdering another without malice. The facts show the killing of two boys in a single transaction. The court found that murder with malice was not properly raised by the evidence at the first trial; a juror testified that the verdict was based on the defendant's youth and other factors unrelated to the question of malice. The Court reasoned that the fact issue of malice had not been determined and the prosecution was entitled to litigate it again at a second trial involving murder of the second victim. Judge Roberts,
dissenting, argued inter alia that the juror's testimony at a post-trial hearing was incompetent. 789

Any survey of recent post-conviction litigation must include the United States Supreme Court's holding in Wainwright v. Sykes. 790 In another step toward constricting federal review of state convictions, the Court, in a seven to two decision, denied habeas corpus review of a confession in state court where the defendant failed to challenge the confession when it was offered at trial. In Sykes there was neither a showing of prejudice nor an excuse for failure to object contemporaneously.

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789. Id. at 918.
790. 97 S.Ct. 2497, 54 L.Ed. 2d 163 (1977).