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# EVIDENCE—Impeachment of Witnesses—Evidence of Indictment Is Admissible to Show Motive, Bias or Interest of a Witness Not a Party to the Prosecution

*Evans v. State,*
519 S.W.2d 868 (Tex. Crim. App. 1975).

Co-defendants Evans and Meyers were tried on separate indictments for the murder of a convenience food store operator. The State's principal witness, Knock, at the time of the trial was under felony indictment for sodomy. The defendants offered the sodomy indictment as evidence to show the bias, prejudice, interest, and motive of the testifying witness. This evidence was not offered to impeach the character of the witness, but to establish an inference of undue pressure due to the pending indictment.[1] The State objected, arguing that only final convictions are admissible for impeachment of a witness under Article 38.29 of the Code of Criminal Procedure.[2] This objection was sustained. Held—*Reversed and remanded.* Evidence of pending charges against a witness is admissible under certain circumstances for the limited purpose of showing bias, prejudice, interest, and motive of a witness.[3]

The adversary system of adjudication is one of the major cornerstones of the Anglo-American system of justice. One of its striking characteristics is

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1. Brief for Appellant, Evans v. State, 519 S.W.2d 868 (Tex. Crim. App. 1975). The Appellant attempted to show that Knock's case had been carefully set and reset by the State in order that it would continue to hang over Knock's head until he had testified against Appellant and Meyer. *Id.* at 12-14.

2. TEX. CODE CRIM. PROC. ANN. art. 38.29 (1966) states:

> The fact that a defendant in a criminal case, or a witness in a criminal case, is or has been, charged by an indictment, information or complaint, with the commission of an offense against the criminal laws of this State, of the United States, or any other State shall not be admissible in evidence on the trial of any criminal case for the purpose of impeaching any person as a witness unless on trial under such indictment, information or complaint a final conviction has resulted, or a suspended sentence has been given and has not been set aside, or such a person has been placed on probation and the period of probation has not expired. In trials of defendants under Article 36.09, it may be shown that the witness is presently charged with the same offense as the defendant at whose trial he appears as a witness.

3. Evans v. State, 519 S.W.2d 868, 872-73 (Tex. Crim. App. 1975). The scope of the *Evans* decision is limited to witnesses who are not a party to the prosecution. Article 38.29 presently allows introduction of charges for bias impeachment only in the case of trials of defendants under article 36.09. It provides that if a witness is an accomplice to a crime, and he was testifying at the trial of his co-defendant, either in support of the State or his co-defendant, it can be shown that the witness is charged with the same offense as the other defendant. McWilliams v. State, 496 S.W.2d 630, 633 (Tex. Crim. App. 1973); *accord,* Burkhalter v. State, 493 S.W.2d 214, 217-18 n.2 (Tex. Crim. App. 1973).



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the right of counsel to impeach the credibility of an opponent's witness.[4] This right is guaranteed by the sixth amendment right of confrontation, and is accomplished in a criminal proceeding by cross-examination of adverse witnesses. The purpose of impeachment is to suggest to the jury that the witness' testimony is unworthy of belief.[5]

Generally, a witness' credibility may be attacked by several methods.[6] It may be shown that on previous occasions he has made statements inconsistent with his present testimony.[7] Another method is to show the witness' incapacity to properly observe, remember, or recount the matters about which he testified.[8] Counsel may offer proof by other witnesses that material facts are other than as testified to by the witness under attack,[9] or that the moral character of the witness makes his testimony doubtful.[10] Finally, impeachment may be accomplished by showing bias, interest, or motive on the part of the witness to falsify his testimony.[11] The purpose of these different attacks is not to strike the witness' testimony from the record, but to enable the jury to weigh his credibility from the evidence presented.[12]

Criminal records may be introduced into evidence when either character or bias impeachment is used.[13] Character impeachment permits counsel to discredit the witness by showing the possibility of false testimony because of the witness' bad character as a convicted felon.[14] Bias impeachment, how-

4. Comment, *Credibility Impeachment by Prior Conviction*, 36 MO. L. REV. 472 (1971).

5. Impeachment is a common courtroom practice which has been substituted for the incompetency standards used to exclude witnesses at common law. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 61, at 139 (2d ed. 1972).

6. *Id.* § 33, at 66.

7. *E.g.*, Sierra v. State, 476 S.W.2d 285, 287 (Tex. Crim. App. 1971); Davis v. State, 125 Tex. Crim. 131, 66 S.W.2d 339, 341-42 (1933). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 687-98, at 531-49 (2d ed. 1956).

8. *E.g.*, Bryant v. State, 471 S.W.2d 66, 67 (Tex. Crim. App. 1971) (poor witness memory); Taliaferro v. State, 143 Tex. Crim. 243, 245, 158 S.W.2d 493, 494 (1942) (intoxicated at time of crime). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 663-69, at 510-13 (2d ed. 1956).

9. Ratliff v. State, 165 Tex. Crim. 573, 575, 309 S.W.2d 242, 243 (1958); *accord*, Thrash v. State, 500 S.W.2d 834, 835-36 (Tex. Crim. App. 1973). *Contra*, Gatson v. State, 387 S.W.2d 65, 68 (Tex. Crim. App. 1965) (witness not permitted to be impeached because matter collateral to issue). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 682-86, at 525-30 (2d ed. 1956).

10. *E.g.*, Nichols v. State, 494 S.W.2d 830, 834 (Tex. Crim. App. 1973) (final conviction); Ulmer v. State, 106 Tex. Crim. 349, 351, 292 S.W. 245, 246 (1927) (proof that truth and veracity are bad is admissible). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 644-62, at 487-509 (2d ed. 1956).

11. *E.g.*, Jackson v. State, 482 S.W.2d 864, 867-68 (Tex. Crim. App. 1972) (racial bias); Barr v. State, 128 Tex. Crim. 652, 654, 83 S.W.2d 998, 999 (1935) (motive). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 670-81, at 514-25 (2d ed. 1956).

12. 5 MEMPHIS ST. U.L. REV. 137, 138 (1974).

13. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, §§ 40, 43, at 80, 84 (2d ed. 1972).

14. *See* Cousins v. State, 185 A.2d 488, 489 n.1 (Md. Ct. App. 1962). *See generally* 1 C. MCCORMICK & R. RAY, TEXAS EVIDENCE § 644, at 487 (2d ed. 1956).

ever, is used to show that the testimony of the witness should be doubted, not because of the witness' general character, but because of his bias, interest or motive in the outcome.[15] In jurisdictions which allow character impeachment only by evidence of a final conviction, it has been held that the mere fact a witness has been charged with a crime is subject to inquiry where his testimony might be influenced by interest, bias, or a motive to testify falsely.[16] The primary reason behind allowing such liberal cross-examination is to expose the jury to the fact that the witness can be influenced by the expectation or hope that by aiding in the conviction of the defendant, he will be granted immunity or leniency when he himself comes before the court.[17]

As early as 1874 Texas courts considered it improper to impeach the character of a witness by asking if he had ever been incarcerated.[18] In *Lights v. State*,[19] however, Texas adopted the liberal view permitting impeachment of a witness' character with evidence of arrests or indictments.[20] This decision aligned Texas with the minority jurisdictions[21] which held it permissible upon cross-examination to show that the witness had been arrested, indicted, or confined in prison even though a conviction had not occurred.[22] Subsequently, this rule was refined so that a mere arrest, without legal charges, was insufficient for impeachment purposes.[23]

15. *See* People v. Garcia, 232 N.E.2d 810, 814 (Ill. Ct. App. 1967); Tachini v. State, 59 Tex. Crim. 55, 59, 126 S.W. 1139, 1141 (1910). *See generally* 1 C. McCORMICK & R. RAY, TEXAS EVIDENCE § 670, at 514 (2d ed. 1956).

16. United States v. Baker, 494 F.2d 1262, 1266-67 (6th Cir. 1974); United States v. Hykel, 461 F.2d 721, 728 (3d Cir. 1972); United States v. Bonanno, 430 F.2d 1060, 1062 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); Hughes v. United States, 427 F.2d 66, 68 (9th Cir. 1970); Stephens v. State, 40 So. 2d 90, 92 (Ala. 1949); People v. Gibbs, 63 Cal. Rptr. 471, 476 (Ct. App. 1968); People v. King, 498 P.2d 1142, 1144-45 (Colo. 1972); People v. Barr, 280 N.E.2d 708, 710 (Ill. 1972); State v. Tate, 469 P.2d 999, 1003 (Wash. Ct. App. 1970).

17. State v. Alston, 195 S.W.2d 314, 315 (N.C. Ct. App. 1973). *See also* Annot., 62 A.L.R.2d 610, 624 (1958). In some instances a defendant may even introduce evidence of pending charges to show the bias, interest or motive of a witness even though the prosecution has not given the witness the slightest basis for such belief or hope. Spaeth v. United States, 232 F.2d 776, 778-79 (6th Cir. 1956); State v. Reynolds, 449 P.2d 614, 615 (Ariz. 1969); People v. Pantages, 297 P. 890, 897 (Cal. 1931); Morrell v. State, 297 So. 2d 579, 580 (Fla. Dist. Ct. App. 1974) (absolute right); State v. Brooks, 513 S.W.2d 168, 174 (Mo. Ct. App. 1974); State v. Tate, 469 P.2d 999, 1003 (Wash. Ct. App. 1970).

18. State v. Ivey, 41 Tex. 35, 38 (1874).

19. 21 Tex. Ct. App. 308, 17 S.W. 428 (1886).

20. *Id.* at 313, 17 S.W. at 429. Although the court spoke only of inquiries of incarceration, *Lights* represented the expansion of cross-examination to almost any matter that would impair the credibility of a witness.

21. *See* State v. King, 378 P.2d 147, 154 (Kan. 1963); State v. Keen, 41 So. 2d 223, 225-26 (La. 1949); Ryan v. State, 36 S.W. 930, 931 (Tenn. 1896); Moore v. State, 152 Tex. Crim. 312, 315, 213 S.W.2d 844, 845 (1948); People v. Hite, 33 P. 254 (Utah 1893). *See also* Annot., 20 A.L.R.2d 1421 (1951). All jurisdictions now require final convictions for character impeachment purposes.

22. Carroll v. State, 32 Tex. Crim. 431, 435-36, 24 S.W. 100, 102 (1893). *See generally* Chandler, *Attacking Credibility of Witnesses by Proof of Charge or Conviction of Crime*, 10 TEXAS L. REV. 257 (1932).

23. Gray v. State, 124 Tex. Crim. 682, 685, 65 S.W.2d 319, 320 (1933); Criner

The minority viewpoint toward character impeachment prevailed in Texas for 65 years after the *Lights* decision.[24] In 1951, the Texas Legislature recognized the absence of a statute which precluded the use of an indictment, information, or complaint to impeach a witness.[25] Therefore, the legislators enacted Article 732(a) of the Code of Criminal Procedure.[26] With the passage of this article and its early judicial interpretation, Texas adopted the majority view permitting only final convictions to impeach character.[27] After the adoption of article 732(a) and its amendment as article 38.29[28] in 1965, the Texas Court of Criminal Appeals consistently followed this rule of evidence,[29] subject however, to the requirements that the conviction be for a felony offense or misdemeanor involving moral turpitude, neither of which can be too remote.[30]

Although the courts previously have allowed great latitude in showing any fact which would tend to establish ill feeling,[31] bias,[32] motive,[33] or interest[34] on the part of a testifying witness, Texas, unlike the majority of jurisdic-

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v. State, 89 Tex. Crim. 226, 228, 229 S.W. 860, 861 (1921); Lasater v. State, 88 Tex. Crim. 452, 456, 227 S.W. 949, 951 (1920) (mere arrests not shown to be legal charges by a complaint, information or indictment cannot be used for impeachment purposes).

24. *See, e.g.*, Terry v. State, 142 Tex. Crim. 454, 456, 154 S.W.2d 473, 474-76 (1941); Eaves v. State, 115 Tex. Crim. 460, 29 S.W.2d 339, 341 (1929) (permissible to use indictments for impeachment purposes so long as they did not arise out of the same criminal transaction charged); *cf.* Moore v. State, 152 Tex. Crim. 312, 315, 213 S.W.2d 844, 845 (1948) (defendant testified in his own behalf).

25. Tex. Laws 1951, ch. 458, § 3, at 814.

26. TEX. CODE CRIM. P. art. 732(a) (1951). The language of article 732(a) is the same as that of article 38.29 with the exception that article 38.29 added the provision concerning trial of defendants under article 36.09.

27. Urban v. State, 158 Tex. Crim. 106, 111, 253 S.W.2d 38, 40 (1952). Article 732(a) was enacted after the case was originally decided, but on rehearing the judges cited it as persuasive authority for their holding.

28. TEX. CODE CRIM. PROC. ANN. art. 38.29 (1966).

29. *E.g.*, Luna v. State, 387 S.W.2d 896, 898 (Tex. Crim. App. 1965) (cases filed, but no convictions); Gibbs v. State, 385 S.W.2d 258, 259 (Tex. Crim. App. 1964) (misdemeanor offense—D.W.I.); Wardrope v. State, 170 Tex. Crim. 305, 306, 340 S.W.2d 498, 499 (1960); Fleming v. State, 161 Tex. Crim. 519, 520, 279 S.W.2d 340, 341 (1955) (indictment against prosecution witness); Dukes v. State, 161 Tex. Crim. 423, 425, 277 S.W.2d 710, 711 (1955) (misdemeanor).

30. Nichols v. State, 494 S.W.2d 830, 834 (Tex. Crim. App. 1973). *See also* P. MCCLUNG, LAWYERS' HANDBOOK FOR TEXAS CRIMINAL PRACTICE 235-36 (rev. ed. 1973) (a good selection of cases as to remoteness of the conviction).

31. *E.g.*, Wood v. State, 486 S.W.2d 359, 361 (Tex. Crim. App. 1972); Pope v. State, 65 Tex. Crim. 51, 54, 143 S.W. 611, 613 (1912).

32. *E.g.*, Jackson v. State, 482 S.W.2d 864, 867-68 (Tex. Crim. App. 1972) (racial); Blake v. State, 365 S.W.2d 795, 796 (Tex. Crim. App. 1963); Wilson v. State, 71 Tex. Crim. 330, 333, 158 S.W. 1114, 1116 (1913) (family relationship).

33. *E.g.*, Seal v. State, 496 S.W.2d 621, 623 (Tex. Crim. App. 1973) (police search for drugs); Barr v. State, 128 Tex. Crim. 652, 654, 83 S.W.2d 998, 999 (1935) (fear); Kissinger v. State, 126 Tex. Crim. 182, 184, 70 S.W.2d 740, 742 (1934) (release from prison).

34. *E.g.*, Morris v. State, 85 Tex. Crim. 275, 276, 211 S.W. 784 (1919) (pecuniary gain); Tachini v. State 59 Tex. Crim. 55, 59, 126 S.W. 1139, 1141 (1910) (bounty).

tions,[35] did not extend this rule to bias impeachment involving the introduction of pending charges. Texas strictly adhered to the limitations on impeachment as set out in article 732(a) and article 38.29[36] although a few early decisions recognized the right to use pending charges in bias impeachment.[37] The absence of any relevant decisions between 1917 and the adoption of article 732(a) in 1951 can be attributed to the minority rule Texas was following which allowed character impeachment by evidence of pending charges. After 1951, when adoption of bias impeachment through introduction of pending charges would have been appropriate, the courts instead chose to strictly interpret articles 732(a) and 38.29 to mean that pending charges were inadmissible and could not be used in any manner of impeachment against a witness not a party to the prosecution.[38] Thus, the courts failed to adopt the majority view on bias impeachment and recognize the separate lines of attack of a witness' credibility and the relationship of criminal records to each.

It was not until 1975 in *Evans v. State*[39] that the Texas Court of Criminal Appeals recognized bias impeachment through the use of pending charges. *Davis v. Alaska*,[40] decided a year earlier, was primarily responsible for that decision. In *Davis*, the United States Supreme Court considered whether the Confrontation Clause[41] required that a defendant be allowed to impeach the credibility of a prosecution witness by cross-examination directed at bias derived from the witness' vulnerable status as a probationer, when such impeachment would conflict with a state statute precluding such inquiry.[42] De-

35. Cases cited note 16 *supra*.

36. Gaines v. State, 481 S.W.2d 835, 837 (Tex. Crim. App. 1972); *accord*, Locke v. State, 453 S.W.2d 484, 485 (Tex. Crim. App. 1970) (although witness allowed to be asked if he had any interest in the case, jury had no idea that charges were pending against him); Hall v. State, 402 S.W.2d 752, 755 (Tex. Crim. App. 1966) (witness under indictment for theft and in jail at time of trial; defense attempted to show motive and interest of witness in testifying for prosecution to reduce charges against him); Scarborough v. State, 171 Tex. Crim. 83, 87, 344 S.W.2d 886, 889 (1961) (trial court refused to allow defense to introduce evidence of federal indictments against witness although defense made it clear it only wanted to show bias); *cf.* Smith v. State, 516 S.W.2d 415, 420 (Tex. Crim. App. 1974) (although mere fact of arrest or indictment of witness not normally admissible for impeachment purposes to show bias, interest, motive or animus, where evidence arises out of same transaction for which defendant is on trial, it may be admissible for impeachment of the witness).

37. Jones v. State, 81 Tex. Crim. 230, 232, 194 S.W. 1109, 1110 (1917) (witnesses charged with different offenses than defendant and it appeared not from the same transaction); O'Neal v. State, 66 Tex. Crim. 460, 464-65, 146 S.W. 938, 940-41 (1912) (witness under similar charge of bootlegging, but not from same transaction).

38. Cases cited note 36 *supra*.

39. 519 S.W.2d 868 (Tex. Crim. App. 1975).

40. 415 U.S. 308 (1974).

41. U.S. CONST. amend. VI.

42. The prosecution witness was a 17 year-old juvenile who was on probation for burglary. Alaska had a statute, ALAS. STAT. ANN. § 47.10.080(g) (1971), and a juvenile procedure rule, ALAS. R. CHILD. P. 23 (1963) that protected the confidentiality of a juvenile's past criminal record.

fense counsel attempted to introduce evidence of the probation to show bias on the part of the witness who possibly was motivated by fear of probation revocation.[43] The trial court refused to allow cross-examination for bias, citing the Alaska statute, and the Supreme Court of Alaska affirmed.[44] The United States Supreme Court reversed, holding that the State's policy interest in the statute must yield to the vital constitutional right of cross-examination of an adverse witness for bias.[45] The Court further stated that the denial of the right to effective cross-examination was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it . . . ."[46] *Davis* effectively rendered article 38.29 unconstitutional in light of past interpretations which placed restrictions upon the right to cross-examine for bias.[47]

In reaching its decision in *Evans*, the Court of Criminal Appeals noted the similarity of facts in *Evans* and *Davis*. These cases involved crucial prosecution witnesses that gave critical testimony and although the witnesses were not parties to the respective crimes, they possibly could have been linked to them.[48] Both were vulnerable to prosecution pressure[49] and Texas and Alaska each had statutes which limited cross-examination for bias impeachment. Under the circumstances, Texas could not ignore the *Davis* mandate to expand cross-examination of adverse witnesses in the area of bias impeachment.

The effect of *Evans* was to find article 38.29 constitutionally sound through judicial construction of the statute, so that Texas now follows the majority of jurisdictions allowing bias impeachment by evidence of pending charges. This judicial expansion of the text of the statute to include bias impeachment is sufficient, in and of itself, to hold that the statute is constitutionally sufficient in light of the *Davis* decision.[50]

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43. Davis v. Alaska, 415 U.S. 308, 311 (1974). Green, the prosecution witness, could have been under pressure to shift suspicion away from himself since the stolen property was found near his property coupled with the fact he was on probation for burglary at that time.

44. *Id.* at 311.

45. *Id.* at 320.

46. *Id.* at 318, *quoting* Brookhart v. Janis, 384 U.S. 1, 3 (1966). The Court, for emphasis, went into a detailed explanation in distinguishing character and bias impeachment and the use of criminal records in each. *Id.* at 316.

47. Cases cited note 36 *supra.*

48. Knock, the witness in *Evans*, was of the same build as one of the defendants that had not been positively identified. Further, Knock had many of the same articles of clothing and could wear them interchangeably with the defendant who had not been positively identified. In a sense then, Knock could have been a suspect. In *Davis*, the stolen safe was found near Green's property.

49. Green, the witness in *Davis*, was on probation for an unrelated burglary and Knock was under indictment for sodomy.

50. *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 354-62 (1964). Legislative reform of the impeachment statute is necessary, however, to reflect the judicial construction of *Evans*. A new statute or amendment must distinguish between using final con-

It should be noted that the *Evans* decision does not extend the right of the accused to cross-examine and impeach all adverse witnesses for bias. Presumably it is limited to situations where the witness is material and delivers vital testimony against the accused. In *Evans*, the test of a principal witness delivering vital information was clearly met although not explicitly stated in the opinion. By comparing the case of *Mutscher v. State*[51] with *Evans*, the manner in which the Texas Court of Criminal Appeals construes *Davis* becomes evident. Clearly, bias impeachment through the use of pending charges will not extend to *all* adverse witnesses.[52]

The *Evans* decision does not represent a return to the pre-1951 Texas decisions which permitted pending charges for impeachment of general character. Mr. Justice Stewart, in his concurring opinion in *Davis v. Alaska*,[53] noted the limited scope of the Court's holding. *Evans v. State*[54] remained within that holding by not extending pending charges to *character* impeachment but staying in the realm of bias impeachment.

The effect of *Evans* on the rights of an accused where a State's material witness has pending charges against him is clear. The accused can now more effectively cross-examine the witnesses against him to the point where he may at least present the possibility of bias or motive to the jury. *Evans* is not as advantageous for prosecutors because their witnesses within this category are no longer "sheltered." The credibility of a witness for the State surely will be damaged by the opportunity of the jury to weigh any previous criminal

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victions for character impeachment and using indictments, informations, or complaints for bias impeachment. During any statutory reformation, the legislature should consider the scope of bias impeachment and whether it should be extended to *all* adverse witnesses or limited solely to material witnesses.

51. 514 S.W.2d 905 (Tex. Crim. App. 1974). In *Mutscher* the accused, citing *Davis*, attempted to show bias on the part of one of the prosecution witnesses by introducing into evidence federal indictments pending against the witness. The court refused to allow introduction of the indictments into evidence stating that the witness was not a key witness nor did he contribute any vital information not already before the court. *Id.* at 921.

52. Such a limitation is valid as against the Confrontation Clause. Although cross-examination should have the largest possible scope, the trial judge should have discretion in determining the scope of cross-examination for bias. The impeachment for bias of *any* adverse witness with pending charges, without regard to the relevancy or importance of his testimony to the crime of the accused, not only seems without purpose, but falls into the category of witness harassment and humiliation of which the United States Supreme Court spoke in *Alford v. United States*, 282 U.S. 687 (1931). This discretion extends to "a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humilate him." *Id.* at 694. Denial of impeachment for bias, by the trial court, of a nonessential witness would not constitute reversible error since the accused's case would not be prejudicially harmed by the refusal to admit into evidence the pending charges against the witness. This is otherwise known as the "harmless error" rule. *Compare* Harrington v. California, 395 U.S. 250 (1969) *and* Gilbert v. California, 388 U.S. 263, 268 (1967) *with* Burgett v. Texas, 389 U.S. 109, 115 (1967) *and* Fahy v. Connecticut, 375 U.S. 85, 91-94 (1963).

53. 415 U.S. 308, 321 (1974).

54. 519 S.W.2d 868 (Tex. Crim. App. 1975).