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Probation May Be Granted Prior to Conviction under Article 42.12, Section 3d of the Texas Code of Criminal Procedure without Violating Article IV, Section 11A of the Texas Constitution.

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likelihood that inappropriate charges will be brought against defendants who seem unwilling to waive their constitutional rights.[81] If the prosecutor is required to bring the charges against the defendant before engaging in plea bargaining, the defendant will know the consequences of refusing to plead guilty. The accused will not be faced with the uncertainty of whether or not the prosecutor will be able to obtain a new indictment. If the evidence for the increased indictment is known to the prosecutor when the original indictment is obtained, the prosecutor should not be allowed to pressure the defendant with the threat of reindictment. Although a prosecutor has discretionary power to decide whether to charge a person under a habitual criminal statute, he should be required to make a determination whether or not the more serious charge is necessary to serve the public's best interest. He should not be able to use his charging power vindictively. The discretion to decide the severity of a charge against a defendant is abused when used as a tool to coerce or as a weapon to punish.

Since the rule in *Pearce* and *Blackledge* was designed to protect defendants from vindictiveness, it is difficult to reconcile the *Bordenkircher* decision with the rationale of the rule. The Court seems intent on upholding the plea bargaining process, but does an injustice in allowing prosecutors to act vindictively. Subsequent cases must decide how far the prosecutor may go in threatening the defendant with dire consequences if a plea agreement proposal is refused.

Mary Byrd Hover

CRIMINAL PROCEDURE—Probation—"Probation" May Be Granted Prior to Conviction Under Article 42.12, Section 3d of the Texas Code of Criminal Procedure Without Violating Article IV, Section 11A of the Texas Constitution

McNew v. State,
No. 56,669 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

W. J. McNew, Jr., pleaded guilty to a charge of theft of one head of cattle. After receiving the plea, the trial court deferred further proceedings and placed the defendant on probation for a period of five years, pursuant

81. *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 2.09 (1978) (plea bargaining may compromise integrity of the criminal justice system); *id.* § 2.09(2) (plea bargaining frustrates intelligent sentencing); Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621, 623 (1976) (prosecutor engaging in plea bargaining avoids decisions he is morally and legally obligated to make).

to article 42.12, section 3d of the Texas Code of Criminal Procedure.[1] Subsequently, alleging that McNew had violated a condition of his probation by committing a robbery, the state moved to revoke the defendant's probation. At the second hearing, the court revoked the defendant's probation, adjudged him guilty of the cattle theft charge, and assessed punishment at ten years imprisonment. On appeal the defendant contended, *inter alia*, that because article 42.12, section 3d permitted the court to grant pre-conviction probation it was violative of article IV, section 11A of the Texas Constitution.[2] Held—*Affirmed.* Since probation granted under article 42.12, section 3d of the Texas Code of Criminal Procedure is not equivalent to probation under article IV, section 11A of the Texas Constitution, it may be granted prior to conviction without violating the Texas Constitution.[3]

In its broadest meaning clemency encompasses the power to grant pardons, reprieves, parole, probation, and commutation, and to take other actions which absolve guilt, mitigate punishment, or prevent prosecution for offenses committed against the state.[4] The power to grant clemency is inherent in the sovereign, the people,[5] but once the sovereign has vested the power to grant clemency in one branch of government, no other branch may infringe upon that power.[6] Probation is distinguished from other forms

1. Article 42.12 is entitled the Adult Probation, Parole, and Mandatory Supervision Law. Section 3d(a) provides: "[T]he court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation . . . ." TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d(a) (Vernon Supp. 1966-1977).

2. TEX. CONST. art. IV, § 11A. "The Courts . . . shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation . . . under such conditions as the Legislature may prescribe." *Id.*

3. McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

4. *See, e.g., Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780 (1933); *Ex parte* Rice, 72 Tex. Crim. 587, 596, 162 S.W. 891, 900 (1914); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing). Sometimes use of the term is restricted to executive clemency such as parole, pardon, and commutation. *See, e.g., Ex parte* Anderson, 149 Tex. Crim. 139, 142, 192 S.W.2d 280, 282 (1946); MD. ANN. CODE art. 41, §§ 107(a)-(f); H. HOFFMAN, PRISONER'S RIGHTS: TREATMENT OF PRISONERS AND POST-CONVICTION REMEDIES § 13 (1976). *See also* Lasater v. State, 456 S.W.2d 104, 106 (Tex. Crim. App. 1970) (probation is form of clemency).

5. This is contrasted with English common law, under which the king, as sovereign, was the sole holder of the power to grant clemency. Snodgrass v. State, 67 Tex. Crim. 615, 633-34, 150 S.W.2d 162, 170 (1912). A portion of this power, in the form of pardoning power, has been placed in the executive branch on the federal and state levels. *See Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing); U.S. CONST. art. II, cl. 1; TEX. CONST. art. IV, § 11.

6. *Ex parte* Rice, 72 Tex. Crim. 587, 596, 162 S.W. 891, 900 (1914); Baker v. State, 70 Tex. Crim. 618, 624, 158 S.W. 998, 1002 (1913); *see Ex parte* Giles, 502 S.W.2d 774, 780 (Tex.

of clemency in that it has a definite maximum duration,[7] is always conditioned on the defendant's good behavior,[8] may be conferred prior to incarceration,[9] and places the defendant under court supervision during the probationary period.[10] Recognizing the need for a means of granting probation,[11] all states have enacted statutes which provide that it may be granted;[12] some statutes allow it prior to adjudication of guilt.[13]

Although a direct act of the people, such as the adoption of a constitutional provision, is sufficient to place the power to grant clemency in any branch of government,[14] it is not the only means of accomplishing this

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Crim. App. 1973); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing); Snodgrass v. State, 67 Tex. Crim. 615, 633-34, 150 S.W. 162, 170 (1912).

7. *See* H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 251 (1974). *See also* Chudleigh v. State, 540 S.W.2d 314, 318-19 (Tex. Crim. App. 1976); Baker v. State, 70 Tex. Crim. 618, 620, 158 S.W. 998, 999 (1913); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.1 (1970).

8. H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 245 (1974); *see* Glenn v. State, 168 Tex. Crim. 312, 314, 327 S.W.2d 763, 764-65 (1959); Wilson v. State, 156 Tex. Crim. 228, 230, 240 S.W.2d 774, 775-76 (1951).

9. H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 245 (1974). *See also* United States *ex rel.* Spellman v. Murphy, 217 F.2d 247, 249-51 (7th Cir. 1954) (mixed sentence of probation and imprisonment).

10. *See* Shore v. Howard, 414 F. Supp. 379, 390 (N.D. Tex. 1976); H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 245-46 (1974); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.1 (1970).

11. The underlying purposes for granting probation include: to save the state the expense of incarceration; to provide professionally supervised rehabilitative treatment in an atmosphere conducive to rehabilitation; to lessen the effect of conviction on the probationer's family; to allow or require restitution to the offender's victim; and in an appropriate case, to save the offender the stigma of conviction. *See Ex parte* Medley, 253 P.2d 794, 797 (Idaho 1953); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 26 (1968); Houp, *A New Direction for Corrections in Texas*, 34 TEX. B.J. 63, 66 (1971); Potts, Book Review, 26 TEXAS L. REV. 607, 630 (1948); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.2 (1970).

12. *See* State v. Wright, 202 N.W.2d 72, 82-84 (Iowa 1972) (concurring opinion) (47 statutes cited); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 26 (1968). The majority of states have held that a court's authority to grant probation is not inherent in the judiciary, but rather is dependent upon a vesting of that power by the people. State v. Wright, 202 N.W.2d 72, 76 (Iowa 1972); *see Ex parte* Giles, 502 S.W.2d 774, 780 (Tex. Crim. App. 1973); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing). *But cf.* State v. Wright, 202 N.W.2d 72, 81-82 (Iowa 1972) (concurring opinion) (court's inherent authority to defer sentencing as a grant of clemency).

13. *See, e.g.*, FLA. STAT. ANN. § 948.01(3) (West Supp. 1978); IDAHO CODE § 19-2601 (Supp. 1977); MD. ANN. CODE art. 27, § 641 (Supp. 1977); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1977). *See generally* Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 26 n.101 (1968).

14. *See Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780 (1933) (legislature may vest clemency power in any branch as long as it does not infringe upon power already vested); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing) (sovereign people may act through legislature to vest clemency power in any

objective.[15] Having the capacity to act on behalf of the sovereign, the legislature may enact statutes which vest the power to grant clemency in the judiciary, provided that the power so vested does not encroach upon a power already given by the people to another branch of government.[16]

In Texas prior to 1935, the power to grant post-conviction clemency was lodged in the office of the Governor under article IV, section 11 of the Texas Constitution.[17] The courts consistently held that statutes purporting to allow post-conviction probation infringed on the Governor's power to exercise clemency.[18] Conversely, the power to grant pre-conviction clemency was retained by the sovereign.[19] Therefore, the legislature, acting on behalf of the people, was free to place the power to grant pre-conviction clemency in any branch of the government.[20]

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branch); *cf.* People v. Tanner, 138 Cal. Rptr. 167, 170-71 (Ct. App. 1977) (probation has no constitutional basis); State v. Blackman, 562 P.2d 397, 398 (Ariz. Ct. App. 1977) (court's probation power purely statutory). *Compare* FLA. STAT. ANN. § 948.01(3) (West Supp. 1978) *and* FLA. CONST. art. 4, § 8 (statutory and constitutional basis for pre-conviction probation) *with* IDAHO CODE § 19-2601 (Supp. 1977) (statutory basis only for court-granted probation).

15. *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing); *see Ex parte* Giles, 502 S.W.2d 774, 780 (Tex. Crim. App. 1973); *Ex parte* Rice, 72 Tex. Crim. 587, 595-96, 162 S.W. 891, 900 (1914).

16. *See, e.g., Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780-81 (1933); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing); Baker v. State, 70 Tex. Crim. 618, 624-26, 158 S.W. 998, 1000-1002 (1913); *cf.* State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973) (held judicial commutation of sentence unconstitutional, but expressly recognized authority of legislature to prevent punishment before conviction). *See generally Ex parte* Medley, 253 P.2d 794, 797 (Idaho 1953).

17. Snodgrass v. State, 67 Tex. Crim. 615, 637, 150 S.W. 162, 172 (1912); *see* TEX. CONST. art. IV, § 11.

18. *See Ex parte* Gore, 109 Tex. Crim. 244, 245, 4 S.W.2d 38, 39 (1928); Snodgrass v. State, 67 Tex. Crim. 615, 628, 150 S.W. 162, 167 (1912).

19. *See* State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 101 n.2 (Tex. Crim. App. 1973); *Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780-81 (1933); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44-45 (1914) (on motion for rehearing); *Ex parte* Rice, 72 Tex. Crim. 587, 596, 162 S.W. 891, 900 (1914); *cf.* Baker v. State, 70 Tex. Crim. 618, 624, 158 S.W. 998, 1001-1002 (1913) (pre-conviction suspended sentence upheld).

20. *Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780-81 (1933); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing).

> The pardoning power is inherent in . . . the people of this state, [and] they could . . . confer it upon any of the departments of the government they saw proper. In the Constitution this power is given to the Governor *after conviction* only, and the power to pardon *before* conviction still rests with the sovereign people, and they, acting through their representatives, the Legislature, could bestow it upon the Governor, the courts, or any other agency of government . . . .

Id. at 562, 163 S.W. at 44 (on motion for rehearing) (emphasis supplied by the court). Some examples of non-gubernatorial pre-conviction clemency include: statutes of limitation, grants of immunity from prosecution in exchange for otherwise incriminating testimony, and the statutory authority to suspend imposition of sentence or pronouncement of guilt. Lee v. State, 516 S.W.2d 151, 152 (Tex. Crim. App. 1974); *Ex parte* Pittman, 157 Tex. Crim. 301, 305, 248 S.W.2d 159, 161 (1952); *Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780 (1933); Baker v. State, 70 Tex. Crim. 618, 624-26, 158 S.W. 998, 1002 (1913).

In 1935, by adopting article IV, section 11A of the Texas Costitution, the people divested the Governor of some of his power to grant post-conviction clemency, and gave the courts "the power, after conviction, . . . to place the defendant upon probation" in accordance with legislative guidelines.[21] Pre-conviction clemency, however, was addressed by neither the pre-existing article IV, section 11 of the Texas Constitution, nor section 11A.[22] After the adoption of section 11A, statutes which would have enabled the courts to grant post-conviction pardons or commutations were declared unconstitutional,[23] but legislation enabling the courts to grant post-conviction probation was upheld against constitutional challenge.[24] In 1965 the Adult Probation and Parole Law was incorporated into the Texas Code of Criminal Procedure.[25] Prior to 1975 judicial exercise of pre-conviction probation was overturned on the ground that such clemency exceeded the court's statutory authority,[26] but not on the basis of any constitutional prohibition. The addition of section 3d to article 42.12 of the Texas Code of Criminal Procedure in 1975 provided statutory authority for the courts to grant pre-conviction probation.[27] The procedure delineated in section 3d enables an offender to avoid the stigma of a conviction[28] and to receive the benefits of professional rehabilitative services under court supervision.[29]

In *McNew v. State*[30] the court held that article IV, section 11A of the

21. State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 100, 104 (Tex. Crim. App. 1973); TEX. CONST. art. IV, § 11A. Authority to grant post-conviction clemency was thus divided between probation-granting authority in the judiciary and pardon-, parole-, and commutation-granting authority in the executive. *See Ex parte* Giles, 502 S.W.2d 774, 785 (Tex. Crim. App. 1973); State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 101 (Tex. Crim. App. 1973). *See generally* Gilderbloom v. State, 160 Tex. Crim. 471, 476-78, 272 S.W.2d 106, 110 (1954).

22. *See* TEX. CONST. art. IV, §§ 11, 11A.

23. *See, e.g., Ex parte* Giles, 502 S.W.2d 774, 785 (Tex. Crim. App. 1973) (mandatory post-conviction clemency invalid as attempted legislative commutation); State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973) (mandatory re-sentencing of convicted felons invalid as attempt at legislative and judicial commutation); Gilderbloom v. State, 160 Tex. Crim. 471, 478, 272 S.W.2d 106, 110 (1954) (permissive commutation of misdemeanor sentences invalid as infringement on gubernatorial clemency power).

24. *See* Lee v. State, 516 S.W.2d 151, 152 (Tex. Crim. App. 1974); *Ex parte* Giles, 502 S.W.2d 774, 784 (Tex. Crim. App. 1973); *Ex parte* Hayden, 152 Tex. Crim. 517, 520-21, 215 S.W.2d 620, 622-23 (1948). *See also Ex parte* Hensley, 162 Tex. Crim. 348, 354, 285 S.W.2d 720, 722-23 (1956).

25. TEX. CODE CRIM. PRO. ANN. art. 42.12 (Vernon 1966 & Supp. 1966-1977). Section 3d, however, was not added until 1975. 1975 Tex. Gen. Laws, ch. 231, § 1, at 572.

26. *See* Nealy v. State, 500 S.W.2d 122, 125 (Tex. Crim. App. 1973); *cf.* Teel v. State, 432 S.W.2d 911, 912 (Tex. Crim. App. 1968) (suspended execution of sentence not authorized by statute, regardless of constitution).

27. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1967).

28. *See id.* § 3d(a). *See generally* Houp, *A New Direction for Corrections in Texas,* 34 TEX. B.J. 63, 66 (1971).

29. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1966-1977).

30. No. 56,669 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

Texas Constitution actually prohibited the courts from granting probation prior to conviction.[31] On this premise the court observed that in order to uphold the constitutionality of article 42.12, section 3d, of the Texas Code of Criminal Procedure, it had to make one of two findings: either the proceedings outlined in section 3d resulted in a conviction followed by probation, or that "probation" under section 3d differed from probation under article IV, section 11A of the Texas Constitution.[32] Reasoning that a "conviction" always requires an adjudication of guilt,[33] the court held that a defendant who receives probation under article 42.12, section 3d of the Code of Criminal Procedure has not been convicted.[34]

The court of criminal appeals then determined that the meaning of the term "probation" as used in section 3d was different from the meaning of probation as defined elsewhere in article 42.12 of the Code of Criminal Procedure.[35] To arrive at this conclusion the court first looked to article 42.12, section 2 which sets out definitions for article 42.12 purposes that are applicable "unless the context otherwise requires." Section 2b refers to probation as "the release of a convicted defendant . . . ."[36] Noting that probation under section 3d could only be granted before conviction, the *McNew* court determined that the context of "probation" as used in section 3d required that the section 2b definition not apply.[37] Apparently equating the probation defined by section 2b with the probation allowed by article IV, section 11A, the court concluded that section 3d probation was not included within the constitutional meaning of probation.[38]

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31. *Id.* at 5.

32. *Id.* at 5; *see* TEX. CONST. art. IV, § 11A; TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1977).

33. McNew v. State, No. 56,669, slip op. at 6, 7 (Tex. Crim. App. Feb. 15, 1978), *reh. granted; see* Woods v. State, 532 S.W.2d 608, 611 (Tex. Crim. App. 1976); Faurie v. State, 528 S.W.2d 263, 265 (Tex. Crim. App. 1975); Morgan v. State, 515 S.W.2d 278, 280 (Tex. Crim. App. 1974); Barber v. State, 486 S.W.2d 352, 354 (Tex. Crim. App. 1972).

34. McNew v. State, No. 56,669, slip op. at 7 (Tex. Crim. App. Feb. 15, 1978), *reh. granted*; *see* TEX. CODE CRIM. PRO. ANN. art. 42.12, §§ 3d(a), 3d(c) (Vernon Supp. 1966-1967).

35. McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted*; *see* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 2b (Vernon 1966).

36. McNew v. State, No. 56,669, slip op. at 7, 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted*; TEX. CODE CRIM. PRO. ANN. art. 42.12, § 2b (Vernon 1966).

37. McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted*; *see* TEX. CODE CRIM. PRO. ANN. art. 42.12, §§ 2b, 3d (Vernon 1966 & Supp. 1966-1977).

38. McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted*; *see* TEX. CONST. art. IV, § 11A; TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1977). The court reasoned that probation under the section 2b definition is within the constitutional meaning, and section 3d probation is not within the meaning of probation under section 2b. Therefore, the meaning of probation in section 3d is not within the meaning of probation under the constitution. It is noteworthy that the court did not define the term "probation" either in its constitutional or statutory usage. *See* McNew v. State, No. 56,669, slip op. at 7-8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

It is difficult to determine the basis of the court's premise that article IV, section 11A of the Texas Constitution prohibits the legislature from vesting pre-conviction clemency power in the judiciary. Logically, the conclusion cannot be based on the wording of the article alone since its language merely provides that post-conviction clemency may be granted, and does not address pre-conviction probation.[39] Nor can that premise be based on Texas case precedent, since the principle is settled that the legislature may vest the power to grant clemency in any branch of the government, provided that such power does not infringe on the powers reserved to another branch.[40]

That article IV, section 11A of the Texas Constitution is permissive rather than proscriptive is recognized by the *McNew* court, at least implicitly, by the statement that "section 11A . . . evolved as a response to *Snodgrass v. State.*"[41] The *Snodgrass* court held that section 11 precluded a statute which would have permitted the judicial exercise of post-conviction clemency; the statute was unconstitutional because such clemency infringed upon the Governor's pardoning power.[42] The premise in *McNew*, however, that section 11A prohibits pre-conviction probation, cannot be based to any extent on the infringement rationale of *Snodgrass,*[43] since the power to grant pre-conviction clemency has not been constitu-

39. The article states that if a defendant has been convicted, he may be eligible for probation. TEX. CONST. art. IV, § 11A. The court's conclusion is exactly inverse to the wording of the article—if a defendant has not been convicted he may not receive probation. *See* McNew v. State, No. 56,669, slip op. at 5 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.* To assume that a proposition leads logically to its own inverse is a classic *non sequitur*; therefore, the holding cannot be based on the wording of the article alone. *See generally Ex parte* Giles, 502 S.W.2d 774, 778 (Tex. Crim. App. 1973) (portion of statute granting post-conviction commutation struck down, but portion granting pre-conviction commutation upheld); State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 101 (Tex. Crim. App. 1973) (art. IV, § 11A is a limited grant of clemency to courts). *See also* State v. Klein, 154 Tex. Crim. 31, 35, 224 S.W.2d 250, 252 (1949); *Ex parte* Hayden, 152 Tex. Crim. 517, 521, 215 S.W.2d 620, 622 (1948). "The provisions of the Constitution are to be strictly construed, and should be allowed no liberality of meaning where such provisions to be passed upon . . . are plain and unambiguous." *Id.* at 521, 215 S.W.2d at 622.

40. *See, e.g.,* Lee v. State, 516 S.W.2d 151, 152-53 (Tex. Crim. App. 1974) (upholding misdemeanor probation without adjudication of guilt under TEX. CODE CRIM. PRO. ANN. art. 42.13, § 4 (Vernon 1966)); *Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780 (1933) (immunity would be unconstitutional if legislature did not have power to prevent punishment before conviction); *Ex parte* Muncy, 72 Tex. Crim. 541, 562-63, 163 S.W. 29, 44 (1914) (on motion for rehearing) (legislature may vest pre-conviction clemency power in any branch of government).

41. 67 Tex. Crim. 615, 150 S.W. 162 (1912); *see* McNew v. State, No. 56,669, slip op. at 4 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

42. Snodgrass v. State, 67 Tex. Crim. 615, 627, 150 S.W. 162, 166 (1912).

43. *See* McNew v. State, No. 56,669, slip op. at 5-8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted. See also Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing).

tionally vested in the executive branch of the government.[44] Indeed, had the *McNew* court applied the *Snodgrass* rationale to article 42.12, section 3d of the Code of Criminal Procedure, its conclusion would have been that since article 11 of the constitution speaks only of post-conviction clemency, statutes which vest the courts with the power to grant pre-conviction probation are not unconstitutional.[45]

After deciding that article IV, section 11A of the constitution prohibits pre-conviction probation, and that article 42.12, section 3d of the Code of Criminal Procedure permits pre-conviction probation, the *McNew* court concluded that the probations authorized in each are different.[46] This conclusion is of questionable validity because the court has limited the definition of the term "probation" as used in article IV, section 11A of the constitution to a meaning contained in a subsequently enacted statue, article 42.12, section 2b.[47] This is contrary to the rule stated in *Snodgrass*[48] that "the meaning of the words at the time they were placed in the Constitution [can] not be altered nor amended by any legislation at a subsequent time . . . ."[49] Furthermore, the *McNew* court does not state what is the difference between pre-conviction probation and post-conviction probation.[50] Clearly there must be more of a distinction between pre-conviction probation and post-conviction probation than merely the times when each are granted.[51] Implicit in the court's holding is that probation

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44. TEX. CONST. art. IV, § 11, vests the executive branch with the power to grant parole, pardon, and commutation after conviction. A statute which places the power to grant pre-conviction clemency in another branch cannot encroach on the clemency power held by the Governor. *See Ex parte* Miers, 124 Tex. Crim. 592, 597, 64 S.W.2d 778, 780 (1933).

45. *See* Snodgrass v. State, 67 Tex. Crim. 615, 628, 150 S.W. 162, 167 (1912) (post-conviction probation infringes on Governor's post-conviction pardoning power); *cf. Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780 (1933) (no limitation on legislature's power to prevent punishment prior to conviction). In *Ex parte Miers* the court upheld the constitutionality of an immunity statute precisely because its application was restricted to granting pre-conviction clemency. *Id.* at 596-97, 64 S.W.2d at 780-81. *See also* State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 101 n.2 (Tex. Crim. App. 1973).

46. McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

47. *Id.* at 7, 8. *Compare* TEX. CONST. art. IV, § 11A *with* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 2b (Vernon Supp. 1966-1977).

48. 67 Tex. Crim. 615, 150 S.W. 162 (1912).

49. *Id.* at 638, 150 S.W. at 172.

50. *See* McNew v. State, No. 56,669, slip op. at 5-8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

51. If pre-conviction probation represented the same type of clemency as post-conviction probation, but granted at a different time, then section 3d would be unconstitutional under the *McNew* court's interpretation of article IV, section 11A of the constitution. *See* State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973); TEX. CONST. art. IV, § 11A; TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1977). "By whatever name the grant of clemency may be called, the substance of the act and not the name by which it is designated controls its effects." State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973); *accord, Ex parte* Giles, 502 S.W.2d 774, 783-84 (Tex. Crim. App. 1973).

granted before conviction and probation granted after conviction are two different types of clemency.[52]

The court's finding that there are two different "probations" leaves unsettled the exact nature of the clemency granted before a conviction under section 3d of article 42.12.[53] "Probation" is a term used throughout article 42.12 of the Code of Criminal Procedure.[54] Since the definition of probation is controlled by section 2b of that article, and that definition does not include "probation" as used in section 3d, it is dubious whether other sections of article 42.12 apply to pre-conviction "probation" under section 3d. For instance, where probation has been granted under section 3d, questons may arise whether the probationer is entitled to the assistance of professionally trained probation officers,[55] whether the court may impose statutory conditons of probation without regard to the nature of the offense,[56] whether the probationary period may be terminated early,[57] and whether the probationer may be required to pay a fee to be used in administering probation laws.[58]

By holding article 42.12, section 3d of the Texas Code of Criminal Procedure constitutional,[59] the court continues the laudable practice of pre-conviction probation.[60] The nature of clemency that pre-conviction probation is to assume, however, is uncertain because of the court's reasoning in *McNew*.[61] It is both unnecessary and potentially confusing to have two different definitions of probation. If the court had held that pre-conviction probation under section 3d could not possibly infringe upon the powers of clemency vested by the constitution in other branches of government,[62] and

52. *See* McNew v. State, No. 56,669, slip op. at 7, 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted. See also* cases cited note 51, *supra.*

53. *See* McNew v. State, No. 56,669, slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

54. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, §§ 1-11a (Vernon Supp. 1966-1977).

55. *See id.* § 10(c).

56. *See id.* §§ 6a-6m.

57. *See id.* § 7.

58. *See id.* § 6a(b).

59. McNew v. State, No. 56,669,-slip op. at 8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

60. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 1 (Vernon 1966). *See generally Ex parte* Medley, 253 P.2d 794, 797 (Idaho 1953); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay,* 47 TEXAS L. REV. 1, 26, n.101 (1968); Houp, *A New Direction for Corrections in Texas,* 34 TEX. B.J. 63, 65 (1971); Potts, Book Review, 26 TEXAS L. REV. 607, 630 (1948); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.1 (1970).

61. As previously noted, this uncertainty results in part from having two separate definitions of "probation." *See generally* McNew v. State, No. 56,669, slip op. at 5-8 (Tex. Crim. App. Feb. 15, 1978), *reh. granted.*

62. *See Ex parte* Miers, 124 Tex. Crim. 592, 596, 64 S.W.2d 778, 780-81 (1933); *Ex parte* Muncy, 72 Tex. Crim. 541, 562, 163 S.W. 29, 44 (1914) (on motion for rehearing). *Compare* TEX. CONST. art. IV, § 11 *and id.* § 11A *with* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d (Vernon Supp. 1966-1977).