VOICE
for the DEFENSE

JAMES RIELY GORDON:
TEXAS COURTHOUSE ARCHITECT

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1982 TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
Editor's Corner

In this issue of the VOICE we begin what is considered one of the most critical functions of TCDLA—the monitoring and development of legislation substantially affecting criminal law issues in the substantive and procedural field.

The TCDLA Legislative Committee, co-chaired this year by Ed Mallett of Houston, and “Rusty” Duncan of Denton, makes the first of what we can expect to be extensive reports on areas being covered by all interest groups, proposals and resolutions being jammed into the legislative hopper, along with suggestions and policy statements from the TCDLA standpoint.

This first report focuses on three bills being proposed by the Penal Code and Criminal Procedure Committee of the State Bar in the area of pre-trial discovery.

The lengthiest proposal relates to discovery and the repeal of present Article 39.02, Code of Criminal Procedure, and the creation of a new Article 39.14. This proposal sets out information subject to disclosure by the State and the Defendant—a continuing duty of reciprocal discovery on both prosecutor and defense counsel. It includes a requirement of notice of reliance on alibi defense along with—a new wrinkle—specific sanctions for failure to comply with the duty of disclosure, including regulations on the discovery process.

Another proposal from the same State Bar committee calls for amending Article 28.01, Code of Criminal Procedure, to add provision for a state bill of particulars, to allow for a more specific description of the necessary elements of the offense charged to allow a defendant to prepare his defense, prevent surprise and permit the plea of double jeopardy in a subsequent case.

The last State Bar proposal presented in this first legislative committee report is one calling for the repeal of present Article 39.02, Code of Criminal Procedure, and the substitution of a new law on the taking of witness depositions by both sides, limiting the State’s right to depose to situations where the defense has been granted the right.

These first three proposals being studied by the TCDLA Legislative Committee contain enough substance to whet the appetite of all members for a full discussion of the areas covered. We want to hear from you—comments, counterproposals, criticisms and suggestions on whether TCDLA should take a stand for or against.

There’s more to come in the battle over the insanity defense, DWI legislation, and other important matters.

We invite all comments and discussions for disclosure in the VOICE. Your letters and communications will be published in each Legislative Committee Report in the VOICE, and forwarded to the Committee co-chairmen.

Out of all this study, comment, thunder and lightning, will come a credible and comprehensive legislative package from TCDLA that will have a significant impact on the criminal law debate we know will explode in the 1983 legislative session.

TCDLA Secretary-Treasurer Louis Dugas, Jr., of Orange, has been elected to a three-year term as a Director of the National Association of Criminal Defense Lawyers at NACDL’s annual meeting at Steamboat Springs, Colorado.
As I write this, the VOICE for the Defense for September has arrived. There is an excellent article on final argument by my long time friend, Waggoner Carr of Austin, formerly of Lubbock. If you haven't submitted a "manuscript" for a VOICE article, you stand to end up on the "barbed end" of one of Editor Weinberg's classic comments. Stan needs new and fresh material at all times and the members of the Board are reminded of their responsibility to submit a minimum of one article per year. In the meantime, my compliments go out to Waggoner Carr for an excellent and informative article.

Since we last met, Rosalind and Laurie have produced a most handsome Membership Directory. Favorable comment has come from everyone who has seen it. The new size also makes it handy for carrying in your briefcase. One of the letters that I received described it as the "most handsome" organization publication that the writer of the letter had seen in 15 years.

The national news brings daily threats of proposed legislation from President Reagan, and various members of the Congress, challenging the exclusionary rule, the insanity defense and other fundamental guarantees of human rights. On the State level, aspiring legislators are beginning to come forth with equally "chilling" recommendations for legislation that will affect people in Texas more directly. All of this accentuates the extreme necessity that we remain diligent to challenge these assaults upon our constitutional heritage. The first meeting of our Legislative Committee, under the leadership of Ed Mallett and Rusty Duncan, will be in Austin on September 24th, the day immediately preceding our first Board Meeting.

Our first membership campaign is also scheduled for Friday, the 24th. A recent check by Rosalind shows that our office records reflect that many of our charter members are not members at this time. I intend to confer with Jan Hopphill and Mike Gibson to see if we cannot find some way of bringing these long time supporters of our organization back into the fold.

A letter from James R. Mallory, an attorney in Fort Worth, reminds me to remind you that the new rules on lawyer advertising, established July 21, 1982, by the Texas Supreme Court, became effective on September 1, 1982. He advises that an attorney who advertises after that date will face the possibility of a grievance being filed against him if he has not made his ad conform to these new rules. The September issue of the Texas Bar Journal arrived today, and the new rules are contained therein in a tear-out section. In addition to other requirements, the new rules require that all ads, after 9-1-82, have to say whether or not the person is Board Certified.

The same issue of the Texas Bar Journal brings news that our Director, Arch C. McColl III, of Dallas, who is also the Chairman of our Amicus Curiae Committee and Associate Editor of "Significant Decisions," in the VOICE, has been elected a new director of the Texas Young Lawyers Association. Congratulations, Arch, upon another significant honor in your professional career.

Your President has observed with interest and with concern the colloquy, by letter and editorial, resulting from the appearance in the VOICE of a cartoon which provoked response from some of our members. I am sincerely concerned about anything that causes indignation to any of our members, and I sincerely hope that the explanations offered by Editor Weinberg, coupled with the efforts that I know were put forth by Kerry FitzGerald to remedy the situation, have resulted in a restoration of peace and harmony within our association. As an association that is dedicated to the furtherance of the rights of the individual and the enhancement of the privileges of liberty at every level, we certainly must strive for preservation of such ideals within the association and its membership. All of you, I am sure, can appreciate the remarkable dedication demonstrated by people like Kerry FitzGerald, Arch McColl and Stanley Weinberg in putting out a publication like our VOICE for the Defense, in addition to running a busy law office. If a slight "goof" should occur from time to time, I hope you will be tolerant. The excellence of their performance on a regular level should atone for such.

Since the next time the VOICE for the Defense will reach your hands will be after the November elections, I think it important to remind all of you that there are some important judicial offices to be filled in the November 2nd election. Let's everyone get out and vote and demonstrate our interest in these positions.
SENTENCING ALTERNATIVES
YOU CAN'T AFFORD NOT TO...

ALTERNATIVE SENTENCING REPORTS AND PLANS

Many attorneys feel that a sentencing presentation should be made at the last possible moment through oral communication with the Court. Often times some attorneys will present an elaborate picture of their client through their own sentencing report efforts. Both of these are necessary with one exception. It is our experience that an objective sentencing report can change the entire psychological atmosphere of the Court concerning a particular client.

The attorney is involved with the case from the very beginning and is before the Judge on several occasions concerning defense motions, etc. Many times arguments become a part of the courtroom scene, as well as extensive involvement in jury trials and presentations. As a result, by the time sentencing comes along, the Court has no new ideas concerning an individual and is inundated with the redundancy of defense and prosecution statements of bias.

When the client reaches the sentencing stages, it is most critical. Even if a client is expected to serve time, the amount of time that an attorney may wish to have imposed can be significantly mitigated by an extensive background sentencing report. The important weight of the sentencing report is that it is coming from an outside source investigating the client with expected expertise in evaluation and diagnosis of rehabilitation needs.

A first thought would be that a sentencing report submitted by a defense attorney would automatically be biased. This is a misconception inasmuch as semantics make the difference between a defense-oriented sentencing report and one from the government. Negative things in an individual's background can be turned around to appear positive, based just on the impact they might have on an individual psychologically, sociologically, or environmentally. Furthermore, the government often focuses strictly on the crime and not the personal background and history of an individual and its cause-and-effect relationship to the crime.

National Legal Services' statistics have proven that a sentencing report can be significantly mitigating, even if it does not produce probation — although that is often the end result. Major cases which are facing a severe amount of time are often mitigated at the last moment by the Court as a result of the submission of a defense sentencing report from an objective source.

Do not underestimate the use of these reports in changing the psychological attitudes of the Judge prior to or during the sentencing proceedings. Comments received from various Courts throughout the country have proven that the report has, indeed, made an impact on the Judge and has been respected as honorable submissions by defense attorneys.

ALTERNATIVES

Alternatives to incarceration are of greater value when the program fits the individual. Preparing a detailed and professional background report regarding your client is of the utmost importance when identifying for the Court the need for alternatives to incarceration or an alternative to lengthy incarceration. Coordinating the person with the program must be projected in a professional report of the highest quality. It must be individualized and researched with statistical information updated for each person on a regular basis. Individual treatment in the courtroom can only be achieved through this method, drawing attention to the individual's personal and psychological development as it relates to pleading for an alternative to incarceration.

PREVENTION

The sentencing report has also been used in the prevention of future problems, both for the defense attorney as well as the paroling bodies on the state and federal levels. Sentencing reports can enhance the Court's awareness of how the Parole Commissions throughout the country and review cases in light of the Court's intent versus their position and guidelines. The sentencing report can also advise attorneys of alternatives which can be used at the time of sentencing and request same from the judges. It certain issues are brought up at the time of sentencing and are placed on the record, that record can be used at a future time for the prevention of parole problems.

The small details which are covered at sentencing, although tedious, can indeed assist in future concerns of the client — both in parole and probation matters.

The important issue here is to make the record clear prior to incarceration. As an attorney, being equipped at sentencing to prevent these future problems is an asset to you as well as to your client and will reflect most positively on your preparedness.

Please feel free to contact our main office in Atlanta for more information and assistance.

Providing Special Assistance to Law Firms on SENTENCING ALTERNATIVES and Institutional ADMINISTRATIVE PROCEDURES

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October 1982/VOICE for the Defense
INDICTMENTS AND INFORMATIONS

Judge Marvin Collins
Criminal District Court Number One
Tarrant County, Texas

PART ONE
STATE LAW

A. THE NECESSITY OF AN INDICTMENT AND INFORMATION.

1. An indictment is the written statement of a grand jury that accuses a person of an offense against the law. Art. 21.01, TEX.CODE CRIM.PROC.ANN. (hereinafter cited as C.C.P.) An indictment is required in all felony prosecutions unless it is expressly waived by the defendant. (Only non-capital indictments may be waived.) TEX.CODE CRIM.PROC.ANN. art. 1, sec. 10; art. V, sec. 10; art. 1, 141, C.C.P.

2. An information is a written statement filed and presented on behalf of the state by the district or county attorney charging the defendant with an offense which may, by law, be so prosecuted. Art. 21.20, C.C.P. It is normally the pleading which initiates a misdemeanor prosecution in county court. Art. 2.05, C.C.P.

B. FORM AND SUFFICIENCY

1. Formal Requisites of the Indictment.
   a. Commencement.
      The indictment must commence with the words "in the name and by authority of the State of Texas," or it is fatally defective. Art. V, sec. 12, TEX.CODE CRIM.PROC.ANN.; art. 21.02(1), C.C.P.; Brown v. State, 81 S.W.2d 718 (Tex.Crim.App. 1904).

   b. Conclusion.
      The indictment is void if it does not conclude "Against the peace and dignity of the State." Art. V, sec. 12, TEX.CODE CRIM.PROC.ANN.; art. 21.02, C.C.P.; Sheelk v. State, 530 S.W.2d 108 (Tex.Crim.App. 1975).

   c. Venue.
      (1) Art. 21.02(5), C.C.P., provides that the indictment must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented. Failure to so allege is a fatal defect. Robins v. State, 9 Tex.Crim. 666 (1880). See also, Green v. State, 578 S.W.2d 411 (Tex.Crim.App. 1979).

      (2) Only the county need be alleged as the place where the offense was committed if the offense could be committed anywhere within the county, the place where the offense was committed is not an element of the offense, and the court in which the offense is tried has county-wide jurisdiction. Hedge v. State, 527 S.W.2d 289 (Tex.Crim.App. 1975); Ex parte Hunter, 604 S.W.2d 188 (Tex.Crim.App. 1980); Ex parte Hyatt, 610 S.W.2d 787 (Tex.Crim.App. 1981). ("Murder, burglary, and theft are examples of offenses which may be committed anywhere within the county.") Navrrez v. State, 503 S.W.2d 767, 769 (Tex.Crim.App. 1974).

      (3) The use of the words "then and there" as words of reference to the previously mentioned county within the indictment are sufficient to afford the defendant notice of the offense and a sufficient allegation of facts to bar future prosecutions for the same offense. Ex parte Hunter, 604 S.W.2d 188 (Tex.Crim.App. 1980).

      (4) When the offense may be prosecuted in either of two or more counties, the indictment may allege the offense to have been committed in the county where the same is prosecuted, or in any county or place where the offense was actually committed. Art. 21.06, C.C.P.; Rushing v. State, 546 S.W.2d 610 (Tex.Crim.App. 1977). See, Ch. 13, Venue, C.C.P., in general for multiple county prosecution choices.

   d. Name of Accused.
      (1) The indictment must allege the name of the accused or state that his name is unknown and give a reasonably accurate description of him. Art. 21.02(4), C.C.P. See also, McClain v. State, 432 S.W.2d 73 (Tex.Crim.App. 1968).

      (2) In alleging the defendant's name, it is sufficient to state one or more of the initials of the Christian name and the surname. Art. 21.07, C.C.P.


      (4) A middle name or initial may be disregarded. A material variance between the allegation and proof of the middle name or initial is neither material nor fatal. Martinez v. State, 541 S.W.2d 605 (Tex.Crim.App. 1976); Ex parte Mitchell, 608 S.W.2d 915 (Tex.Crim.App. 1980).

      (5) If the defendant's name is misspelled in the indictment, Arts. 26.07 and 26.08, C.C.P., authorize the trial court, upon proper request, to correct the spelling error. Younagh v. State, 457 S.W.2d 67 (Tex.Crim.App. 1970);

(6) The purpose of naming the accused is for his identification; it is a matter of form which can be altered at the defendant's election. Therefore, if the defendant chooses to allow this defect of form to remain in the indictment, then he waives any objection unless such defect prejudices his substantial rights. Jones v. State, 504 S.W.2d 442 (Tex.Crim.App. 1974).

(7) If defendant timely suggests his true name, the trial court must correct the indictment, but in order to be timely, defendant's suggestion of his correct name must be made at time of arraignment or he waives error. Bowden v. State, S.W.2d 363 (Tex.Crim.App. 1982). Cox v. State, 540 S.W.2d 619 (Tex.Crim.App. 1976); Silguero v. State, 608 S.W.2d 619 (Tex.Crim.App. 1980). If the victim's name is presented incorrectly, the indictment or information is defective as to form. Art. 28.10, C.C.P. A person known by two or more names may be identified by any one of such names. Art. 21.07, C.C.P.

(8) When the name of the person is unknown to the grand jury, that fact shall be stated, and if it be the accused, a reasonably accurate description of him shall be given in the indictment. Art. 21.07, C.C.P.; Ex parte Ward, 560 S.W.2d 660 (Tex.Crim.App. 1978).

(9) If the defendant is charged by a different name in a prior indictment used for enhancement, the enhancement portion of the present indictment is not insufficient if the state proves that the defendant is the same person in the prior indictment. Carr v. State, 548 S.W.2d 55 (Tex.Crim.App. 1977).

(10) The rule of idem sonans ("of the same sound") is as follows: If the attentive ear finds difficulty in distinguishing varying names when pronounced the defendant should request a jury instruction to resolve the issue. Objections concerning the rule of idem sonans must first be raised at trial or they are waived. Martin supra, overruling all cases to the contrary; Cox, supra.

(12) If a fact issue requiring application of the rule of idem sonans is raised before the jury, the defendant should request a jury instruction to resolve the issue. Objections concerning the rule of idem sonans must first be raised at trial or they are waived. Martin, supra, overruling all cases to the contrary; Cox, supra.

C. The Victim's Name.

(1) Failure to name the complaining witness renders an indictment or information fundamentally defective. Ex parte Lewis, 544 S.W.2d 430 (Tex.Crim.App. 1976); Silguero v. State, 608 S.W.2d 619 (Tex.Crim.App. 1980). If the victim's name is presented incorrectly, the indictment or information is defective as to form. Art. 28.10, C.C.P. A person known by two or more names may be identified by any one of such names. Art. 21.07, C.C.P.

(2) If the victim's name is unknown to the grand jury, the indictment or information will be sufficient if that fact is alleged along with a reasonably accurate description of the person. Art. 21.07, C.C.P. The state at trial will have to prove that the grand jury exercised due diligence in attempting to ascertain the person's name. Jordan v. State, 520 S.W.2d 388 (Tex.Crim.App. 1975).

(3) However, the Court of Criminal Appeals has held that an indictment charging credit card abuse which failed to allege from whom such property was obtained, was defective as a matter of form only. Stribling v. State, 542 S.W.2d 418 (Tex.Crim.App. 1976). Also, the court in Childs v. State, 547 S.W.2d 613 (Tex.Crim.App. 1977) held that the indictment alleging aggravated rape which failed to allege to whom the threat of imminent infliction of death was directed was defective only as to form. However, the Court of Criminal Appeals has held it was error to overrule a motion to quash the indictment in a capital murder case where the indictment failed to allege the victim of the attempted rape. Silguero v. State, 608 S.W.2d 619 (Tex.Crim.App. 1980).

f. Presentment.

(1) The indictment must show that it was presented in the district court of the county where the grand jury is in session. Art. 21.02(2), C.C.P. See also, Casey v. State, 414 S.W.2d 657 (Tex.Crim.App. 1967).


(3) It is not necessary to charge that the grand jurors were sworn or that the indictment was presented upon their oaths or affirmations. Lamar v. State, 149 S.W.2d 89 (Tex.Crim.App. 1941).

(4) The allegation in an indictment that the offense was committed "anterior to the presentment of this indictment ..." is sufficient to fulfill the requirement of Art. 21.02(6), C.C.P., requiring that the indictment affirmatively disclose that it was presented subsequent to the date of the offense. Same v. State, 609 S.W.2d 762 (Tex.Crim.App. 1980).

h. Signature of Grand Jury Foreman.

(1) The indictment should be signed officially by the grand jury foreman. Art. 21.02(9), C.C.P.


i. Date of the Offense.

The indictment was found fundamentally defective when it alleged “on or about the 10th day of November, A.D. 19—8”.

(2) If the alleged date of the offense is after the date of the presentment of the indictment, the indictment fails. Art. 21.01(6), C.C.P. Also, the date alleged must be within the limitation period. Art. 21.02(6), C.C.P. If the date is not within that period, the facts sufficient to toll the running of limitations must be alleged. Ex parte Dickerson, 549 S.W.2d 202 (Tex.Crim.App. 1977).

(3) It is permissible for the date element to be alleged by an averment stating that the offense was committed “on or about” a specific date. Benson v. State, 79 S.W.2d 122 (Tex.Crim.App. 1935); Ex parte Hyett, supra.

C. SUFFICIENCY OF THE INDICTMENT OR INFORMATION.

1. Requisites of Sufficiency.

a. To be sufficient to support a guilty verdict, the pleading must charge the defendant with the commission of an offense. If it fails to state an offense, it fails to give the court jurisdiction over the case and is fundamentally defective. Art. 27.08(1), C.C.P.; American Plant Food Corporation v. State, 508 S.W.2d 598 (Tex.Crim.App. 1974).

b. To charge an offense, the pleading must state every essential element of the offense. If it does not allege every element of the offense, it is void. Arts. 21.03, 21.11, C.C.P.; Ex parte County, 577 S.W.2d 260 (Tex.Crim.App. 1979).

c. The pleading on its face must charge the offense in plain and intelligible words so as to enable a person of common understanding to know what is meant. It must allege the offense with such certainty as to enable the accused to know what offense he will be required to defend himself against and to enable him to plead the judgment that may be given on it in bar of any further prosecution for the same offense. Arts. 21.02(7), 21.04, 21.11, C.C.P.; McManus v. State, 591 S.W.2d 505 (Tex.Crim.App. 1980); Moore v. State, 532 S.W.2d 333 (Tex.Crim. App. 1976); Terry v. State, 471 S.W.2d 848 (Tex.Crim.App. 1971).

d. Although failure to state an offense renders the pleading fundamentally defective, failure to state an offense clearly enough to give the defendant notice is only a defect as to form. American Plant Food Corporation, supra.

e. Everything should be stated in an indictment which is necessary to be proved; however, defensive issues need not be pleaded. TEX. PENAL CODE ANN., sec. 2.03(b) [hereinafter cited as PEN. C.]; Antwine v. State, 518 S.W.2d 830 (Tex.Crim.App. 1975).

f. If the facts alleged in an indictment clearly show that the charged offense is unlawful, it is not necessary to expressly allege the fact that the conduct is unlawful. Ex parte Reed, 610 S.W.2d 495 (Tex.Crim.App. 1981).

2. Defects of Form.

a. Defects of form which may be raised by a motion to quash are as follows:

(1) That it does not appear to have been presented in the proper court;

(2) The lack of any requisite description by Arts. 21.02, 21.21, C.C.P.;

(3) That it was not returned by a lawfully chosen or empaneled grand jury. Art. 27.09, C.C.P.

b. An indictment is not insufficient because of any defect of form which does not prejudice the substantial rights of the defendant. Art. 21.19, C.C.P.

c. Grammatical errors do not constitute grounds for quashing of an indictment unless the errors render the indictment uncertain so that one is unable to determine the charge intended. Butler v. State, 551 S.W.2d 412 (Tex.Crim.App. 1977). [Use of the word “of” instead of the word “by.”]

d. An otherwise good pleading is not rendered invalid because of a misspelled word if the sense is not affected and the meaning cannot be mistaken. Ablon v. State, 537 S.W.2d 267 (Tex.Crim.App. 1976). [Diazepam misspelled “diazepam.”]

e. A variation in a cause number between that proved at trial and that alleged in the indictment as a prior conviction, which was the result of a transpositional error was not fatal since it did not mislead the defendant and prejudice the preparation of the defense. Cole v. State, 611 S.W.2d 79 (Tex.Crim.App. 1981).
f. A variation between the purport clause of an indictment (“unlawfully acquired a controlled substance, amphetamine”) and the tenor clause of an indictment (“forged prescription for Biphentamine”) is generally not fatally defective if it is found that the defendant is given sufficient notice of the complained offense to offend the defendant an opportunity to establish a defense to the charge. Ex parte Holbrook, 609 S.W. 2d 541 (Tex.Crim.App. 1980).

3. Following Statutory Language.


c. If the statutory language is completely descriptive of the offense so as to inform the accused of the charge against him, tracking the statutory language would be sufficient. However, if the statutory language is not completely descriptive so that greater particularity is required, then merely tracking the statute would be insufficient. Haecker v. State, 571 S.W.2d 920 (Tex.Crim.App. 1978). There an allegation that the accused “tortured” an animal was subject to a motion to quash, since “torture” can include a diverse number of acts. Note that “torture” is undefined in the Penal Code.

d. In Amaya v. State, 551 S.W.2d 385 (Tex.Crim.App. 1977), allegation of a general statutory term was held to be insufficient to give the defendant fair notice of the charge against her. The state alleged that the defendant, by means of a “willfully false statement,” obtained welfare assistance to which she was not entitled. This allegation failed to notify the defendant which of many statements the state would rely upon for conviction.

e. It is impermissible to track statutory language so that an essential allegation (other than the date allegation) is pleaded disjunctively. See, Jasper v. State, 403 S.W.2d 790 (Tex.Crim.App. 1966).

f. It is generally sufficient to allege an offense in statutory terms without alleging additional facts; however, if it is the manner and means by which an act is done that makes an otherwise innocent act a criminal offense, it is necessary to allege the facts showing the manner and means which make the act a criminal offense. Posey v. State, 545 S.W.2d 162.

h. The facts constituting a statutory offense should be set forth so that a required legal conclusion may be arrived at from the facts stated. The act constituting the offense should not be alleged by merely stating a legal conclusion, Pozzol, supra. [Allegation of the conclusion that the accused did obtain possession of a controlled substance by misrepresentation, fraud, deception and subterfuge but omission of allegations of additional facts which would lead to that legal conclusion.]

i. It is permissible to plead as a legal conclusion an element other than the main act charged. For example, theft may be stated as a conclusion in an indictment charging the offense of burglary, and it is not necessary to plead the separate elements of theft. Davila v. State, 547 S.W.2d 606 (Tex.Crim.App. 1977). However, where theft is the only accusation pleaded, the separate elements must be described. Reynolds v. State, 547 S.W.2d 590 (Tex.Crim.App. 1977).

j. Whenever recklessness or criminal negligence is an element of the offense, the act relied upon to constitute recklessness or criminal negligence must be alleged with reasonable certainty. It is not sufficient to allege merely that the accused, in committing the offense acted recklessly or with criminal negligence. Art. 21.15, C.C.P.; Arredondo v. State, 582 S.W.2d 457 (Tex.Crim.App. 1979).

k. When a statute defining any offense uses special or particular terms, the pleading may use the general term which, in common language, embraces the special term. Art. 21.12, C.C.P.; see, Gray v. State, 178 S.W. 337 (Tex.Crim.App. 1915).

l. Words used in a statute to define an offense need not be strictly construed in the indictment, but substituted words must convey the same meaning or include the sense of the statutory word. Art. 21.17, C.C.P.; Rovinsky v. State, 605 S.W.2d 578 (Tex.Crim.App. 1980); Chance v. State, 563 S.W.2d 812 (Tex.Crim.App. 1978); Sample v. State, 626 S.W.2d 515 (Tex.Crim.App. 1982). This rule does not apply to an element consisting of a particular culpable mental state described in the definition of the offense. Such element is required by art. 21.05, C.C.P., to be stated in terms. See, Victory v. State, 547 S.W.2d 1 (Tex.Crim.App. 1977).


n. In any event, allegation of a term with multiple statutory meanings has been held not to constitute a fundamental defect. The accused is put on notice that the state may rely on any of such meanings to prove its case. Pelzmann v. State, 576 S.W.2d 402 (Tex.Crim.App. 1979); Farmer v. State, 549 S.W.2d 721 (Tex.Crim.App. 1976). See also, Reynolds v. State, 547 S.W.2d 590 (Tex.Crim.App. 1977).

o. Normally, if a word is defined in the statute and the word is used in an indictment alleging the statutory language, the word need not be further alleged or defined in the indictment. It is defined within the statute as “taking from the state.” However, if the definition contains an essential element of the offense, such as the culpable mental state, such element must be specifically averred and allegation of only the defined word is insufficient. Victory v. State, 547 S.W.2d 1 (Tex.Crim.App. 1976).


a. An exception to an offense in the Penal Code is labeled by the phrase: “It is an exception to the application . . . ” PEN. C. sec. 2.02(a).

b. The prosecuting attorney must negate the existence of that exception in the accusation charging the commission of an offense. PEN. C. sec. 2.02(b).

c. It is only necessary to negate an exception which does not fall within the statutory definition if it is essential to the definition of the offense. “If the thing forbidden by the particular statute under consideration could not be made out without proof of the so-called exception or omission, then said exception would be a necessary element of the offense, and its existence should be negated in the indictment and find support in proof.” Baker v. State, 106 S.W.2d 308 (Tex.Crim.App. 1937). See also, Ex parte Davis, 542 S.W.2d 192 (Tex.Crim.App. 1976).

d. It is not necessary for the state to negate in any pleading any exception set forth in the Controlled Substances Act, art. 4476-15, sec. 5.10(a), TEX.REV.CIV.STAT.ANN. [hereinafter cited as T.R.C.S.] (1975), or in the Alcoholic Beverage Code, sec. 101.05.

5. Mental States.

a. Failure to allege in an indictment a mental state which is required by law will render the indictment void. Art. 21.05, C.C.P.; Ex parte Winton, 549 S.W.2d 751 (Tex.Crim.App. 1977); Huggins v. State, 544 S.W.2d 147 (Tex.Crim.App. 1976).

b. Problems arise in determining which mental state must be alleged, when a particular required mental state has been sufficiently alleged, and what wording will be deemed sufficient to make the required allegations. Because PEN. C. sec. 6.02 supplies accompanying mental states for most offenses in which the statute defining the offense does not require a mental state, very few problems arise in deciding whether a mental state is required. Generally, a mental state need not be alleged only in those penal statutes which clearly dispense with a mental element. PEN. C. sec. 6.02(e). Since enactment of the Penal Code effective January 1, 1974, the Court of Criminal Appeals has found only three offenses in which no mental element is required: DWI, Owen v. State, 525 S.W.2d 164 (Tex.Crim.App. 1975); Ex parte Ross, 522 S.W.2d 214 (Tex.Crim.App. 1975); Involuntary Manslaughter, Ross, supra;

c. To determine what mental element is required, the statute must be read carefully. Then, definitions of each word used in the statute must be carefully read to determine what, if any, mental element is required by the definitions. Finally, it must be determined if PEN. C. sec. 6.02(c) supplies a mental element which must be used.

d. In Cardenas v. State, 628 S.W.2d 153 (Tex.Ct.App. Houston 14th, 1982), a mental element is required by the definition of a criminally negligent collision under this ordinance. Cardenas held that the owner of property.

e. Generally, there are two categories of mental elements: general culpable mental states as defined by PEN. C. sec. 6.03 (intentional, knowing, recklessly, or criminally negligent) and particular intents as required by Art. 21.05, C.C.P. (e.g., taking of property with intent to deprive the owner of property.)

f. Offenses (and there are many) which do not contain any of the general culpable mental states (intentional, knowing, recklessly, criminally negligent) are of two types: those which do contain a further mental element such as particular intent, and those which do not contain any other mental element. Generally, in those which contain neither any general culpable mental states, nor any other mental element, an allegation that defendant acted intentionally, knowingly, or recklessly is required, and will suffice. Tex v. State, 551 S.W.2d 375 (Tex.Crim. App. 1977); Day v. State, 532 S.W.2d 302 (Tex.Crim.App. 1975); Ex parte Garza, 544 S.W.2d 432 (Tex.Crim.App. 1976); Braxton v. State, 528 S.W.2d 844 (Tex.Crim.App. 1975). In those which do not contain any general culpable mental states, but do require a particular intent, allegation of the particular intent is required, and is all that is necessary. Teniente v. State, 533 S.W.2d 805 (Tex.Crim.App. 1976); Hazel v. State, 534 S.W.2d 698 (Tex.Crim.App. 1976). The Court of Criminal Appeals has held that allegation of the required specific intent obviates the necessity of alleging the more general culpable mental states. Martinez v. State, 565 S.W.2d 70 (Tex.Crim.App. 1978).

g. If the statute creating the offense requires both a general culpable mental state and a particular intent, both must be alleged. Victory v. State, 547 S.W.2d 1 (Tex.Crim.App. 1977). Failure to allege properly the particular intent element is a fundamental defect. Slavin v. State, 548 S.W.2d 30 (Tex.Crim.App. 1977). Allegation that an act was attempted is sufficient to allege that the defendant had the intent to do the act. Dowdina v. State, 564 S.W.2d 378 (Tex.Crim.App. 1978).

h. When it is otherwise proper not to allege the elements of a crime intended or attempted as part of the definition of the main offense, it is not necessary to allege any particular intent element of the intended or attempted crime. Davilla v. State, 547 S.W.2d 606 (Tex.Crim.App. 1977).

i. Indictment which includes a culpable mental state not required by statute for the offense is not fundamentally defective if the required mental states are alleged. Here, aggravated assault indictment alleged that assault was done intentionally, knowingly, and recklessly. Intentionally and knowingly were properly alleged, and without "recklessly," the indictment conferred jurisdiction on the court. Soto v. State, 564 S.W.2d 1663 (Tex.Crim.App., 1978).

j. Criminal negligence as opposed to simple negligence is the lowest degree of conduct imposing criminal responsibility. Here, city ordinance creating offense of negligent collision substituted simple negligence for criminal negligence as a culpable mental state. PEN. C. sec. 1.03(b) prohibits a municipality from defining an offense to exclude application of PEN C. sec. 6.02. Therefore, information alleging negligent collision under this ordinance failed to allege a culpable mental state and was fundamentally defective. Honeycutt v. State, 627 S.W.2d 417 (Tex.Crim.App. 1981).

6. Description of Property.

a. When it becomes necessary to describe property in an indictment or information as required by Art. 21.03, C.C.P., Art. 21.09, C.C.P. provides that:

(1) Personal property alleged in an indictment shall be identified, if known, by the name, kind, number and ownership of the property. If this information is unknown, that fact shall be stated and a general classification describing and identifying the property as near as may be be included in the indictment.

(2) If the property is real estate, its general locality in the county and the name of the owner, occupant or claimant shall be a sufficient description.

b. A defect in the description of property under art. 21.09, C.C.P., must be raised by a motion to quash and may not be raised for the first time on appeal unless the description is so defective as to be so description at all and to constitute a jurisdictional defect. Rhodes v. State, 560 S.W.2d 665 (Tex.Crim.App. 1978). [The description in a theft indictment of "wall paneling" of a value of over fifty dollars does not suffer from such a defect.] Such a defect is seen in Willis v. State, 544 S.W.2d 150 (Tex.Crim.App. 1976), where the court held that a theft indictment was fundamentally defective because it described the property allegedly stolen only as "merchandise." However, description of the property as "merchandise" coupled with the allegation that the exact name, number, and kind was unknown is sufficient to comply with the requirements of art. 21.06, C.C.P., and to withstand a motion to quash. Hood v. State, 607 S.W.2d 567 (Tex.Crim.App. 1980); Centry v. State, 608 S.W.2d 643 (Tex.Crim.App. 1980). See also, Green v. State, 578 S.W.2d 411 (Tex.Crim.App. 1979). [Real property was adequately described.]

c. Some lack of specificity in describing stolen property is probably desirable to avoid the problem of giving too specific a description of the property because such allegations must be proven


e. As to real property, if the particular offense may be committed anywhere within the county, identifying the premises on which the offense occurred by naming the owner and alleging that such premises are located within the county is adequate. Hodge v. State, 527 S.W.2d 289 (Tex.Crim.App. 1975). [Burglary of a habitation.] However, if the offense may be committed only at specified locations in the county, the indictment must allege that each place is located in the county and is within the class of places specified in the definition of the particular offense although an allegation as to the specific location is not required. Neumore v. State, 503 S.W.2d 767 (Tex.Crim.App. 1974). [Carrying a pistol on licensed premises.]


7. Ownership of Property.

a. Where an allegation of ownership of property is required, art. 21.08, C.C.P., provides that:

(1) Where property is owned in common or jointly by two or more persons the ownership may be alleged in either or all of them.

(2) Where one person owns the property, and another person has the possession of the same, the ownership may be alleged in either. See examples, Salas v. State, 548 S.W.2d 52 (Tex.Crim.App. 1977). [Manager of a motel may be named in a burglary indictment as the owner.] And Black v. State, 505 S.W.2d 821 (Tex.Crim.App. 1974) [Tenant of victimized premises may be alleged as owner.]

(3) Where the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator, or heirs of such deceased person or in any one of such heirs.

(4) Where the ownership of the property is unknown to the grand jury, it shall be sufficient to allege that fact. However, the state must show at trial that due diligence was used by the grand jury to ascertain the name of the person. Payne v. State, 487 S.W.2d 71 (Tex.Crim.App. 1972).

b. When property belongs to a corporation, ownership should be alleged in the name of the natural person who fits within the definition of a specific owner. Eaton v. State, 533 S.W.2d 33 (Tex.Crim.App. 1976). For example, a security guard may be alleged as the owner of property in a shoplifting case since he has a "greater right to possession" than the accused. Johnson v. State, 606 S.W.2d 894 (Tex.Crim.App. 1980). [Commons v. State, 575 S.W.2d 518 (Tex.Crim.App. 1978), which held contrary, is overruled.]


d. In an indictment for theft, the allegations of ownership need not expressly state which of the various statutory alternatives will be used. Thomas v. State, 621 S.W.2d 158 (Tex.Crim.App. 1981).

8. Disjunctive Versus Conjunctive Pleading

a. Traditionally, the averment of nonsynonymous things disjunctively was impermissible. See example, Lewellen v. State, 114 S.W. 117 (Tex. Crim. App. 1908). [On or about his person is improper.]

b. A step has been taken by the Court of Criminal Appeals to abolish this rule. The Court of Criminal Appeals has held the use of the word "or" between the word "intentionally" and "knowingly" in an aggravated assault indictment was permissible. Hunter v. State, 576 S.W.2d 395 (Tex.Crim.App. 1979), accord, Elly v. State, 582 S.W.2d 420 (Tex.Crim.App. 1979). The Court in Hunter noted that this hyper-technical rule has no place in the pleading of criminal cases today. However, the Court leaves open the possibility that there may be some instances in which a particular disjunctive pleading would be so vague, uncertain and indefinite as to give no notice of the offense charged.

c. When offenses may be committed in more than one way, it is permissible for an indictment to allege alternative methods of committing the offense. Martinez v. State, 498 S.W.2d 938 (Tex.Crim.App. 1973). When such offenses are alleged conjunctively, proof of any of the ways charged in the indictment will support a conviction. Sidney v. State, 560 S.W.2d 679 (Tex.Crim.App. 1978). Care must be taken to submit only those means in the charge which are supported by the evidence.

d. Generally, where the definition of a term used in describing the offense contains optional meanings disjunctively defined, the pleader need not specifically allege which of the definition(s) is being relied upon, even in the face of a motion to quash. Thomas v. State, 621 S.W.2d 158 (Tex.Crim.App. 1981). But, where the definition allows several distinct and different ways of alleging acts or omissions of defendant's criminal conduct, that State must, upon timely motion to quash, allege which of the specific acts or omissions will be relied upon. (Note: State may allege all of such acts or omissions of the defendant conjunctively, and conviction will stand if proof substantiates any of such means.) Gorman v. State, 624 S.W.2d 845 (Tex.Crim.App. 1981); Ferguson v. State, 622 S.W.2d 846 (Tex.Crim.App. 1981). See and compare: Phelps v. State, 560 S.W.2d 518 (Tex.Crim.App. #67,930, Sept. 30, 1981). However, this is defect of form and therefore, when defendant has pleaded guilty, failure to quash is not error. Greene v. State, 613 S.W.2d 488 (Tex.Crim.App. 1981). In case of doubt, the safer practice would be to allege conjunctively all of the optional definitions to meet possible variations in proof.

9. General Statute Versus Special Statute

Generally, if a general statute conflicts with a special statute, the special statute controls. Ex parte Holbrook, 607 S.W.2d 925 (Tex.Crim.App. 1980); Jones v. State, 552 S.W.2d 836 (Tex.Crim.App. October 1982/VOICE for the Defense 11
An indictment must directly and positively allege all of the constituent elements sought to be charged. Nothing must be left to inference, Chance v. State, 563 S.W.2d 812 (Tex.Crim.App. 1978).

   a. PEN. C. sec. 15.01 sets forth the elements of criminal attempt. The Court of Criminal Appeals has held that the attempt element was sufficiently alleged by use of the word “attempt” rather than by pleading such element in terms. Donahua v. State, 564 S.W.2d 378 (Tex.Crim.App. 1978); Colman v. State, 542 S.W.2d 144 (Tex.Crim.App. 1976); Green v. State, 533 S.W.2d 769 (Tex.Crim.App. 1976), wherein Court held that failure to allege the act constituting the attempt did not render the indictment fundamentally defective.
   b. The indictment must allege facts which lead to a legal conclusion that the accused did “more than mere preparation” in committing the offense. Language such as “amounting to more than merely preparatory work that tends, but fails to effect the commission of the offense intended” has been found not to be fundamentally defective. Cody v. State, 605 S.W.2d 271 (Tex.Crim.App. 1980) (Attempted murder.)
   c. Omission of the phrase “amounting to more than mere preparation that tends, but fails to effect, the commission of the offense intended” does not render the indictment fundamentally defective. Colman v. State, 542 S.W.2d 144 (Tex.Crim.App. 1976). However, as noted above, failure to allege one or more overt acts which would constitute more than mere preparation to commit the intended offense does render the indictment fundamentally defective. Morrison v. State, 625 S.W.2d 729 (Tex.Crim.App. 1982).
   d. The elements of attempt are (1) a person, (2) with specific intent to commit an offense, (3) does an act amounting to more than mere preparation that, (4) tends, but fails, to effect the commission of the offense intended. Whitley v. State, 609 S.W.2d 808 (Tex.Crim.App. 1980).

12. Unconstitutional Statute.
   An indictment is void if it is based on an unconstitutional statute. See, Smith v. State, 540 S.W.2d 693 (Tex.Crim.App. 1976).

   The indictment in Smith v. State, 573 S.W.2d 546 (Tex.Crim.App. 1978), alleged that property stolen was valued at over $200.00, but the indictment failed to allege a value of less than $10,000.00. The Court held that although the failure to plead the upper limit of the property value would prohibit conviction for theft over $10,000.00, even if the state proved value greater than $10,000.00, the indictment was sufficient to charge theft less than $10,000.00 but over $200.00.

   Art. 21.8, C.C.P., provides that presumptions of law and matters of which judicial notice is taken need not be alleged in an indictment. See also, Carrillo v. State, 566 S.W.2d 902 (Tex.Crim.App. 1978).

15. Information and Complaint.
   b. A complaint is an affidavit of a credible person made before the magistrate or district or county attorney charging the commission of an offense. Art. 15.04, C.C.P.
   c. A person authorized to present informations and conduct prosecutions cannot be the affiant to the complaint. Wells v. State, 516 S.W.2d 663 (Tex.Crim.App. 1975).
   d. The affidavit shall be filed with the information. Art. 21.22, C.C.P.
   e. The rules concerning allegations in an indictment and the certainty required also apply to an information. Art. 21.23, C.C.P.
   f. However, the information must show that it was presented by the proper officer in the proper court. Art. 21.21 (3), C.C.P.

D. AMENDMENTS OF INDICTMENTS AND INFORMATIONs.
   1. Form Versus Substance.
      b. Generally, the distinction between form and substance is defined by the Code of Criminal Procedure.
   (1) Substance: Art. 27.08, C.C.P. That it does not appear therefrom that an offense against the law was committed by the defendant; that it appears from the face thereof that a prosecution for the offense is barred by a lapse of time, or that the offense was committed after the finding of the indictment; that it contains matter which is a legal defense or bar to the prosecution; and that it shows upon its face that the court trying the case has no jurisdiction thereof.
   (2) Form: Art. 27.09, C.C.P. That it does not appear to have been presented in the proper court as required by law; and, it contains no evidence of which any party has been notified by licensed by arts. 21.02 and 21.21; that it was not returned by a lawfully chosen or empaneled grand jury.
   (3) Art. 21.02, C.C.P. An indictment shall be deemed sufficient if it has the following requisites: It shall commence “In the name and by authority of the State of Texas”; it must appear that the same was presented in the district court of the county or to the grand jury that is in session; it must appear to be the Act of a grand jury of the proper county; it must contain the NAME of the accused, or state that his name is unknown and give a reasonably accurate description of him; it must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented; the time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation; the offense must be set forth in plain and intelligible words; the indictment must conclude, “Against the peace and dignity of the State”; it shall be signed officially by the foreman of the grand jury.
   c. Additionally, the statutory allowance to amend an indictment as to matters of form is limited by the constitutional requirements of a grand jury finding, Brasfield v. State, 600 S.W.2d 288 (Tex.Crim.App. 1980). Provisions under art. 21.02, C.C.P., cannot be corrected by amendment, i.e., an amendment of an allegation returned by the grand jury as to the commission of the offense is not
amendable. Brasfield, supra.

d. An exception is allowed as to striking of surplusage which is construed as tantamount to abandonment of what is not needed to be proven. Garcia v. State, 537 S.W.2d 930 (Tex.Crim.App. 1976). [When alternative means are stated in an indictment, one alternative may be abandoned.] Recently, the Court of Criminal Appeals in Brasfield, supra, has listed cases as they fall under the respective topics of substance or form:


2. Procedure

a. An indictment or information may be amended at any time before the announcement of ready for trial on the merits by both parties. Art. 28.10, C.C.P.; Burrell v. State, 526 S.W.2d 799 (Tex.Crim.App. 1975); Jackson v. State, 419 S.W.2d 370 (Tex.Crim.App. 1967). [It is reversible error to permit an amendment after the indictment has been read to the jury at the outset of trial.]

b. All amendments must be made with leave of the court and under its direction. Art. 28.11, C.C.P.

c. "If the exception to an indictment or information is only on account of form, it shall be amended, if defective, and the cause proceed upon such amended charge." Art. 28.09, C.C.P.

d. The proper remedy to object to an amendment is by a motion to quash the indictment or information and failure to make such an objection waives any non-fundamental defect. Roberts v. State, 489 S.W.2d 113 (Tex.Crim.App. 1972).

e. The proper relief upon a motion to quash an indictment or information that gives insufficient notice is not to amend it; rather, it is to dismiss the indictment or information. Brasfield, supra.

E. WAIVER OF INDICTMENT.


2. To be effective, a waiver of indictment must be knowingly, voluntarily, and intelligently made. Art. 1.141, C.C.P.; Lackey v. State, 574 S.W.2d 97 (Tex.Crim.App. 1978). ["[A]ppellant did not waive the right to be tried by indictment by failing to voice an objection to trial upon a felony information."]

3. The accused must be represented by counsel and the waiver of indictment must be made in open court or in writing. Art. 1.141, C.C.P.


F. ATTACKING THE SUFFICIENCY OF AN INDICTMENT OR INFORMATION.

1. Fundamental Defects.

a. An indictment which is fundamentally defective is void from the outset, and the court thus lacks jurisdiction over the defendant. Therefore, such an information or indictment can be attacked at any time, i.e., through a motion to quash, for the first time on appeal, in a proceeding to revoke probation or through a post-conviction writ of habeas corpus. Ex parte Charles, 582 S.W.2d 844 (Tex.Crim.App. 1979); Ex parte Cannon, 546 S.W.2d 266 (Tex.Crim.App. 1976); American Plant Food Corporation v. State, 508 S.W.2d 598 (Tex.Crim.App. 1974); Ex parte Wong, 612 S.W.2d 548 (Tex.Crim.App. 1981).

b. Generally, a fundamental defect in an indictment or information exists where the description of the offense alleged to have been committed by the defendant is so deficient as to utterly fail to charge that an offense against the laws has been committed by the defendant. American Plant Food Corporation, supra; Rohlfing v. State, 612 S.W.2d 598 (Tex.Crim.App. 1981). More specifically, the indictment or information must accuse the defendant of an act constituting an offense. Art. 21.01, C.C.P.; Ex parte Lopez, 549 S.W.2d 401 Tex.Crim.App. 1977). Also, the indictment or information must state all the elements of the offense. Art. 21.03, C.C.P.; Ex parte Winton, 549 S.W.2d 751 (Tex.Crim.App. 1977).

c. An indictment or information generally is considered sufficient to allege an offense when the language of the statute is tracked. See, Pat v. State, 575 S.W.2d 522 (Tex.Crim.App. 1979); Row v. State, 547 S.W.2d 612 (Tex.Crim.App. 1977); and Posey v. State, 545 S.W.2d 162 (Tex.Crim.App. 1977). However, there are cases that require
greater particularity either from the obvious intention of the Legislature or from legal principles. See, e.g., Bocanegra v. State, 552 S.W.2d 130 (Tex.Crim.App. 1977). Information which tracks the language of the statute was fundamentally defective for failing to allege a culpable mental state as required by PEN. C. sec. 6.02.

2. Defects as to Form
a. Non-fundamental defects in the indictment or information must be raised by a pre-trial motion to quash, if not, waiver of such defect will result. Rhodes v. State, 560 S.W.2d 665 (Tex.Crim.App. 1978); American Plant Food Corporation, supra.

b. The sufficiency requirement that the indictment or information by plain and intelligible words particularize the act charged sufficiently to protect the defendant’s right against double jeopardy and give him notice of precisely what he is charged with falls under this category of non-fundamental defects. Terry v. State, 471 S.W.2d 848 (Tex.Crim.App. 1971); Drumm v. State, 560 S.W.2d 944 (Tex.Crim.App. 1977); King v. State, 594 S.W.2d 425 (Tex.Crim.App. 1980); Silguero v. State, 608 S.W.2d 619 (Tex.Crim.App. 1980).

c. A motion to quash is one of the matters required to be determined at a pretrial hearing if one is set. Art. 27.10, C.C.P.; Fadks reversal will not result unless defendant


f. The motion to quash should state the manner in which the notice is deficient and show the precise nature of the defect which is being objected to. Drumm v. State, 560 S.W.2d 944 (Tex.Crim.App. 1977).

g. To determine the sufficiency of the indictment or information as to whether the accused in a particular case is furnished with information upon which he may prepare his defense, this information must come from the face of the indictment or information. Benoit v. State, 561 S.W.2d 810 (Tex.Crim.App. 1977), accord, Brasfield v. State, 600 S.W.2d 288 (Tex.Crim.App. 1980). The proper relief for a motion to quash an indictment, for such a defect, is to dismiss the indictment not to amend it. Brasfield, supra.

G. JOINDER OF SEPARATELY CHARGED OFFENSES IN ONE TRIAL


2. If defendant consents, consolidation of separate indictments in a single trial is a matter of discretion with the trial court. Johnson, supra.

3. Sentences for separately indicted offenses so joined must be concurrent. PEN. C. sec. 3.04; Watson, supra; Overton v. State, 552 S.W.2d 849 (Tex.Crim.App. 1977). If the defendant exercises his right to sever, the sentences imposed may be cumulated. PEN. C. sec. 3.04.

5. The court will not consider separately charged offenses so joined in a single criminal action pursuant to PEN. C. sec. 3.02 unless the state has given the required thirty days written notice, and in case of failure to give such notice, sentences may be cumulated. Caughorn, supra.

H. JOINDER OF SEPARATELY CHARGED PROPERTY CRIMES IN ONE TRIAL

1. A defendant may be prosecuted in a single criminal action for all offenses arising out of the same “criminal episode” (repeated commission of any one offense in Title 7 of the Penal Code). PEN. C. sec. 3.01, 3.02. Wayne v. State, 533 S.W.2d 802 (Tex.Crim.App. 1976). The state must file written notice of its intent to join offenses for trial under PEN. C. sec. 3.02 thirty days before trial if the proposed single criminal action is based upon more than one charging instrument. PEN. C. sec. 3.02(b). Impliedly, such written notice is not required where the offenses are charged in a single indictment or information.

2. Joinder under PEN. C. sec. 3.02 applies only to repeated commission of any one property crime under Title 7 of the Penal Code. PEN. C. sec. 3.01, 3.02.


4. Defendant has an absolute right to severance of offenses so joined. PEN. C. sec. 3.04; Wayne, supra; Overton v. State, 552 S.W.2d 849 (Tex.Crim.App. 1977). If the defendant exercises his right to sever, the sentences imposed may be cumulated. PEN. C. sec. 3.04.

5. The court will not consider separately charged offenses so joined in a single criminal action pursuant to PEN. C. sec. 3.02 unless the state has given the required thirty days written notice, and in case of failure to give such notice, sentences may be cumulated. Caughorn, supra.

I. JOINDER OF OFFENSES IN SEPARATE COUNTS OF A SINGLE CHARGING INSTRUMENT

1. Common law rule—It has long been held in Texas that a defendant could not be indicted in several counts of a single indictment for different offenses committed at different times arising from different transactions, nor convicted and punished separately for any distinct offenses so misjoined. Crawford v. State, 19 S.W. 766 (Tex.Cr.App. 1892). However, charging instruments may contain as

It was consistently held that only one offense, did not prevent charging in one indictment more than one offense based upon the same incident or transaction. Hicks v. State, 508 S.W.2d 400 (Tex.Crim.App. 1974) [Rape and robbery]; Ex parte Easley, supra; Van v. State, 408 S.W.2d 228 (Tex. Crim.App. 1966) [Forgery and passing].

It should be carefully noted that this rule permits joinder in separate counts of a single indictment not only of separate offenses against the same victim arising from one criminal transaction, but also permits joinder in separate counts of one indictment of separate offenses against different victims if such offenses arise from a single criminal transaction. Slay v. State, 33 S.W.2d 159, Tex.Crim.App. 1930). [Note that unlike felony cases, the common law rule in misdemeanors historically permitted joinder in one indictment, information or complaint if as many different offenses arising from different transactions on different dates as the pleader thought advisable. Hall v. State, 24 S.W. 407 (Tex.Crim.App. 1893); Witherspoon v. State., 44 S.W. 164 (Tex.Crim.App. 1898). This common law rule was repealed by statute in 1959. See: Former Article 408a Code of Criminal Procedure, now, Article 21.24 C.C.P.; Munoz v. State, 333 S.W.2d 148 (Tex. Crim.App. 1960)].

2. The rewriting of Art. 21.24, C.C.P., effective January 1, 1974, apparently does not change this rule. See, Crocker v. State, 573 S.W.2d 190 (Tex.Crim.App. 1978), wherein the Court of Criminal Appeals held that the trial court did not err in refusing to require the state to elect between the castration (Art 1168, 1925 Texas Penal Code) and disfiguration (Art. 1167, 1925 Texas Penal Code) counts contained in a single indictment, because both arose out of the same transaction, and because the jury was authorized to return a guilty verdict on one count only. See also, Kohi v. State, 604 S.W.2d 156 (Tex.Crim.App. 1980).

3. Heretofore, a defendant who has been prosecuted on two or more counts of a single indictment, where such counts arise from a single criminal transaction, but where each count charges a separate offense, may be convicted on any one of the counts. Crawford v. State, supra; Ex parte Easley, supra; Harris v. State, 499 S.W.2d 139 (Tex.Crim.App. 1973). [Possession of narcotic paraphernalia and possession of marijuana.] However, the Court of Criminal Appeals having recently abolished the long-standing doctrine of carving in Ex Parte McWilliams, S.W.2d — (Tex.Crim.App. No. 64,508, May 12, 1982), the question now arises as to what effect this will have on joinder of offenses in one indictment. Clearly, since the doctrine of carving presupposes a single criminal transaction out of which arise several different offenses, McWilliams, supra will have no effect upon joinder of distinct offenses committed at different times and in different transactions. That is still impermissible, Crawford, supra, unless the defendant consents. Johnson v. State, 509 S.W.2d 322 (Tex.Crim.App. 1973).

Since a defendant may consent (by positive waiver, or by failure to object) to joinder of separately indicted offenses, there is no reason in logic why the same rule should not apply to distinct transactions joined in one indictment. Likewise, so long as double jeopardy rights are carefully observed, there is no reason why different offenses arising from one transaction should not be prosecutable in one indictment (separate counts) and a verdict and sentence as to each rendered, if the defendant consents (or fails to object).

In the event defendant objects, he, of course, cannot be prosecuted for distinct transactions in one indictment. Crawford, supra. However, with abolition of the doctrine of carving, may a defendant be prosecuted for different offenses arising from one transaction and a verdict and sentence imposed on each, over objection?

There appears to be no valid reason why such cannot be done. Under the previous common law rule, the Defendant may be charged in one indictment and tried for all such offenses at one trial, but may be convicted for only one. If separate convictions and sentences may be imposed on successive trials for all different offenses arising out of the same transaction (as now permitted by McWilliams, supra), it is difficult to proffer any defensible reason why, although a defendant may be tried for all such offenses in one trial, he may be convicted of only one.

Thus, separate verdicts and judgments on multiple counts of an indictment — where each count charges a separate crime, but all arising from one transaction—appear to be a logical extension of the abolition of the doctrine of carving. Care must be taken to distinguish three related problems.

a. Multiple convictions and punishments cannot be permitted upon multiple counts of the same indictment which charge different modes of committing the same offense, or charge lesser included offenses, under familiar double jeopardy principles.

b. Care must be taken to apply traditional double jeopardy tests to different crimes charged in different counts, and multiple convictions and punishments permitted only where each offense requires proof of a separate statutory element that the other does not.

c. Care must be taken not to confuse this with joinder of offenses arising from a single "criminal episode" as permitted by TEX. PENAL CODE ANN. sec. 3.02 That provision permits joinder of distinct offenses arising out of the same criminal transaction (as now permitted by McWilliams, supra).

J. JOINDER OF PROPERTY CRIMES IN SEPARATE COUNTS OF A SINGLE CHARGING INSTRUMENT.

I. PEN. C. sec. 3.02(a) allows joinder in a single criminal trial of all offenses arising out of the same "criminal episode", i.e., repeated commission of any one of the property crimes enumerated in Title 7 of the Penal Code. Two or more such offenses may be pled in separate
counts of a single indictment or information. Caughorn, supra.


3. Defendant has an absolute right to severance of offenses so joined. PEN. C. sec. 3.04; Waythe v. State, 533 S.W.2d 802 (Tex. Crim.App. 1976) [Forgery]; Overton v. State, 552 S.W.2d 849 (Tex. Crim.App. 1977). If the defendant exercises his right to sever, the sentences imposed may be cumulated. PEN. C. sec. 3.04.

4. Joinder of property crimes in a single criminal action should be carefully distinguished from aggregation of amounts obtained by theft or fraud to determine the grade of the offense pursuant to PEN. C. secs. 31.09, 32.03. When amounts are so aggregated, defendant does not have the right to sever. Wagges v. State, 573 S.W.2d 804 (Tex. Crim.App. 1978).

K. JOINDER OF OFFENSES IN ONE COUNT OF A SINGLE INDICTMENT: DULCITTY.

1. Art. 21.24(b), C.C.P., effective January 1, 1974, provides as follows: 
   "(b) A count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense."

2. This article codified for the first time the long-standing rule against duplicity: an indictment is bad for duplicity if it joins two or more distinct offenses in the same count, or if it joins in the same count two or more phases of the same offense where the punishment is different. Burrell v. State, 526 S.W.2d 799 (Tex.Crim.App. 1975); Steambarge v. State, 440 S.W.2d 68 (Tex.Crim.App. 1969).

3. For the rule to apply, two or more offenses must be completely alleged; otherwise, the incomplete allegations may be rejected as surplusage. Odle v. State, 139 S.W.2d 595 (Tex.Crim.App. 1940).

4. There are a number of "exceptions" to the rule, which include the following:
   a. Several ways or means in which a single offense may be committed may be conjunctively alleged in one count of an indictment without violating the rule. Sidney v. State, 560 S.W.2d 679 (Tex.Crim.App. 1978).
   b. Where the definition of one offense includes another that proof of the one necessarily includes or makes out the other, both may be charged in the same count. [Burglary and theft] Faulks v. State, 528 S.W.2d 607 (Tex.Crim.App. 1975); Nichols v. State, 569 S.W.2d 929 (Tex.Crim.App. 1980) [Kidnapping and aggravated kidnapping].
   d. The charging of a single conspiracy in one count does not offend the rule simply because it is alleged that the subject of the conspiracy was multiple crimes. Matscher v. State, 514 S.W.2d 905 (Tex.Crim.App. 1974).
   f. Where several ways an offense may be committed are set forth in a statute and are embraced in the same definition, are punishable in the same manner, and are not repugnant to each other, there are not distinct offenses. Jurak, supra; Steambarge, supra.


6. If a count is bad for duplicity, the court may either set aside the indictment or require the state to elect. Melley, supra.

L. ELECTION AMONG MULTIPLE COUNTS.

1. With one exception, a defendant may not be convicted upon separate counts of a single charging instrument, where such counts arise from different transactions. Garcia v. State, 574 S.W.2d 133 (Tex.Crim.App. 1978). The exception is where two or more property crimes are properly joined pursuant to PEN. C. sec. 3.02. [Note that defendant is given a mandatory right to severance in such instance.]

2. There are two instances in which application of the above rule will normally arise:
   a. Where the indictment misjoins distinct offenses arising from different criminal transactions in different counts;
   b. Where the indictment properly joins distinct offenses arising from a single criminal transaction in different counts.

3. In both instances, the defendant may be convicted of only one offense alleged in the indictment.

4. However, only in the first instance involving misjoinder is an election among counts required. Smith v. State, 234 S.W.2d 893 (Tex.Crim.App. 1951); Loftis v. State, 13 S.W.2d 853 (Tex.Crim.App. 1929); Flowers v. State, 202 S.W.2d 462 (Tex.Crim.App. 1947). An election made before trial by the state to proceed on only one count will cure the error of misjoinder, even if a timely motion to quash has been previously improperly overruled. Campbell v. State, 294 S.W.2d 125 (Tex.Crim.App. 1956). The error of misjoinder is waived if defendant raises the question for the first time in a motion in arrest of judgment. Collins v. State, 43 S.W. 90 (Tex.Crim.App. 1897).

5. In the second instance — where distinct offenses arising from a single transaction are properly joined in separate counts of the same indictment — no election is required. Flowers, supra. While the defendant may be convicted of only one of such offenses (Garcia, supra), all offenses may be submitted to the jury alternatively. Crocker v. State, 573 S.W.2d 190 (Tex.Crim.App. 1978). In the case where Title 7 offenses are consolidated for trial or where the charging instrument contains more than one count, all offenses or counts may be submitted to the jury. Art. 37.07, sec. 1(c), C.C.P.
M. ELECTION AMONG ACTS IN A SINGLE COUNT.

1. Where an indictment or information contains only one count, the state is required to elect only where the evidence shows there are two or more distinct transactions, each of which is an offense for which the defendant may be convicted. *Rivas v. State*, 496 S.W.2d 600 (Tex.Crim.App. 1973), accord, *Crocker v. State*, 573 S.W.2d 190 (Tex.Crim.App. 1978). For example, where defendant is charged in a one-count indictment with statutory rape and is convicted after proof shows that he had intercourse with the prosecutrix several times within the year prior to the date of the return of the indictment, the trial court erred if it fails to require the state to elect between the acts because each act of intercourse was a distinct completed offense. *Bates v. State*, 305 S.W.2d 366 (Tex.Crim.App. 1957).


3. Where the State has conjunctively alleged multiple means of commission of the offense to meet possible variations in proof as the trial transpires, the State is not required to elect among such multiple means, and all of such means (which are supported by proof) may be submitted to the jury alternatively. *Zanghetti v. State*, 618 S.W.2d 383 (Tex.Crim.App. 1981).

4. Where the indictment is not bad for duplicity on its face, but the proof at trial shows two or more distinct transactions, the State is then required, upon timely motion, to elect as to which transaction it will rely on for conviction. *McVicker v. State*, 129 S.W.2d 650 (Tex.Crim.App. 1939). A proper jury instruction to disregard the extraneous offense will apparently cure any error in admitting evidence of more than one offense. *McVicker, supra*.

"James Riely Gordon: Texas Courthouse Architect" is the subject of a Centennial exhibition at The University of Texas at Austin/School of Architecture scheduled January 21–March 18, 1983, at the Architecture Library, Battle Hall. This will be the first exhibition of Gordon's work and acknowledgment of the architect who designed fifteen of the state's courthouses and other public buildings between 1889-1902. Twelve Gordon courthouses which are predominantly Romanesque in style still exist in: Fayette County, La Grange; Bexar County, San Antonio; Erath County, Stephenville; Victoria County, Victoria; Gonzales County, Gonzales; Hopkins County, Sulphur Springs; Ellis County, Waxahachie; Wise County, Decatur; Comal County, New Braunfels; Lee County, Giddings; Harrison County, Marshall; McLennan County, Waco.

James Riely Gordon holds particular interest for lawyers since he utilized the judicial system with fervency and was involved in lawsuits regarding copyright and fee disputes within the very courthouses that he designed. He is considered a major contributor to late 19th century Texas architecture and an innovator in his approach to climatic considerations and ventilation.

A beautiful color poster of Gordon's Ellis County Courthouse in Waxahachie (1895) is available now for a $38.00 tax-deductible contribution (including postage and handling) payable to "UT-Austin School of Architecture Excellence Fund." Measuring 25" X 34" the limited edition poster has been produced on quality stock and is a reproduction of Gordon's original watercolor rendering of the courthouse housed within the Architectural Drawings Collection. Contact: The School of Architecture, The University of Texas, Austin, Texas 78712; Tel. (512) 471-1922.
LEGISLATIVE COMMITTEE REPORT

M. P. "Rusty" Duncan III

In its usual display of amoebic perception, the 1981 Texas Legislature, in spite of opposition by TCDLA and others, inundated the public with an array of superfluous criminal legislation (I guess the word "criminal" could also be used as a descriptive adjective relative to most of their legislation). Hopefully, this can be avoided with the next legislature.

In 1981 most significant criminal law issues were drug related. In 1983 the legislature will devote much of its time to other issues, such as reforming the laws related to alcohol offenses, considering possible changes in the insanity defense, and other less publicized matters.

In 1983, TCDLA must have a comprehensive and acceptable legislative package to maintain the credibility achieved during the 1981 session. This association cannot merely oppose another's proposed legislation; it is obligated to submit affirmative, public-oriented alternatives. For example, the present D.W.I. laws are totally ineffective in preventing alcohol use and driving. However, rather than merely oppose the legislation that is to be offered by others we should endeavor to prepare a valid alternative.

The Penal Code and Criminal Procedure Committee of the State Bar is proposing several matters that need our support, or alternatively, our opposition. Proposals for a reciprocal discovery procedure and a bill of discovery statute are but two examples. A copy of these and other proposed bills are included in this issue of the VOICE. Please examine them closely because one's practice of criminal law can be significantly changed if these proposals become law.

The Legislative Committee of this association is earnestly seeking your comments and suggestions. Thus, please let us know as soon as possible what you like or dislike about these legislative proposals and/or what you want our legislative package to include. Without your active participation in this effort only a few people will make these decisions and that is absurd.

A BILL TO BE ENTITLED AN ACT relating to a motion for a bill of particulars, adding subsection 11 to Section 1 of Article 28.01, Code of Criminal Procedure, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 28.01, Code of Criminal Procedure, is amended by adding subsection 11 to Section 1 to read as follows:

(11) Bill of Particulars — The court may direct the filing of a bill of particulars. The purpose of the bill of particulars is to provide a more specific description of the necessary elements of the offense charged so as to enable a defendant to prepare his defense, prevent surprise, and to plead double jeopardy in a subsequent proceeding. The state is not required to show how it intends to prove these descriptive allegations. A motion for a bill of particulars may be made at any time prior to the defendant's announcement of readiness. A bill of particulars may be amended at any time subject to such conditions as justice requires. A motion for a bill of particulars is directed to the sound discretion of the trial court.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended and the rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

A BILL TO BE ENTITLED AN ACT relating to discovery in criminal cases; repealing the present Article 39.14, Code of Criminal Procedure and substituting therefor a totally new article, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 39.14, Code of Criminal Procedure is hereby repealed, and the following is substituted therefor:

Disclosure of Evidence by the State

(1) Information Subject to Disclosure
(A) Statement of Defendant. Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state; a transcript of and/or the tape or film of any electronically recorded statement, including a motion picture, video tape, or other visual recording, made by the defendant within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known by the state; the recording device used to take an electronically recorded statement of the defendant; the substance of any oral statement which contains assertions of facts or circumstances which are found to be true and which the state intends to offer in evidence at the trial, made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a law enforcement officer; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, or partnership, or association, the court may grant the defendant, upon its request of the defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical examinations or mental examination of the defendant and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state, and which are material to preparation of his defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

(B) Defendant's Prior Record. Upon request of the defendant the state shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state.

(C) Documents and Tangible Objects. Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to preparation of his defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical examinations or mental examination of the defendant and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state, and which are material to preparation of the defense or are intended for use by the state as evidence in chief at the trial.

(E) Names and Addresses of Witnesses. Upon request of the defendant the state shall furnish to the defendant at least ten days prior to trial the names and addresses of witnesses to be called by the state and a copy of the prior criminal record of convictions admissible for impeachment, if any, that is within the possession, custody, or control of the state, the existence of which is known, to the attorney for the state.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a) (1), this article does not authorize the discovery or inspection of reports, this subdivision does not authorize the discovery or inspection of records, memoranda, or other internal documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by the state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this article, he shall promptly notify the other party or his attorney.
or the court of the existence of the additional evidence or material.

(d) Notice of Alibi.

(1) Notice by Defendant.

Upon written demand of the attorney for the state stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the state, a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Disclosure of Information and Witnesses.

Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the state shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's alibi witnesses.

(3) Continuing Duty to Disclose.

If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(4) Failure to Comply.

Upon the failure of either party to comply with the requirements of this article, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This article shall not limit the right of the defendant to testify in his own behalf.

(e) Regulation of Discovery.

(1) Protective and Modifying Orders.

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing in whole or in part in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of appeal.

(2) Failure to Comply with a Request.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and the rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Your Legislative Committee at Work

Reading clockwise from left: Rusty Duncan giving legislative report; committee members (l-r) Ed Mallett, Waggoner Carr and Bill Wischkaemper; Dain Whitworth (TCDLA lobbyist) and Duncan; and Whitworth discussing DWI crackdown.
SEARCY RAY SMITH, No. 053-82, State's Petition For Discretionary Review (PDR): Granted - Remanded to C/A, En banc opinion, Judge Dailey, 9/15/82.

RULE OF EVIDENCE--ORAL TESTIMONY SUFFICIENT: Trial Court granted D a new trial without specifying a reason. D was retried and on appeal after his second conviction, contended he was being placed in jeopardy because there was insufficient evidence presented to convict him in the first trial and the C/A agreed. CCA found that the real issue not addressed by the C/A was whether ownership of city's parking meters may be proved by oral testimony and whether there was oral testimony to prove ownership. D was charged with burglary of a coin operated machine. CCA held that when the correct rule of evidence is applied that the ownership of the parking meters may be shown by oral testimony, there was ample evidence to show that the city of Houston owned the parking meters and that the evidence in the first trial was sufficient to support the jury's verdict. The case was remanded to C/A for further consideration of other grounds of error.

NICHOLAS G. ESPINOZA, JR., No. 100-82, State's PDR: Case remanded to C/A, Judge Tom G. Davis, En banc opinion, 9/15/82.

DOUBLE JEOPARDY--EVIDENCE OF SEPARATE OFFENSES ADMITTED UNDER ONE INDICTMENT--EFFECT OF NO ELECTION BY D: D pled not guilty before the Court to burglary of a building. Evidence showed that burglaries took place at same building on the night of April 8 and again on April 10, which dates were anterior to presentation of indictment. Indictment alleged burglary occurred "on or about the ninth day of April, 1977". D was arrested April 14 in the act of cashing a forged check taken from the burglarized building on April 10. After the first burglary, the door broken through was repaired and it was again damaged at the second burglary. C/A held that the usual "on or about" rule could not be used by the State to reach the check wrongfully passed by D, and that D was not indicted for the second burglary and therefore there was no showing of recent unexplained possession of property taken in the first burglary.
CCA first noted that D did not move that the State be required to elect upon which offense it intended to rely for conviction and found that the conviction may have been had under the indictment upon sufficient proof to support a conviction for burglary occurring on either April 8 or April 10. The case was remanded to C/A to determine if there was sufficient evidence to support a conviction growing out of either of the two burglaries upon which evidence was introduced in the trial court.

The court also observed that as to the question of jeopardy which may arise when evidence of separate offenses is admitted under an indictment upon which a conviction of either offense can be had:

"Where two or more similar but separate acts constituting separate offenses are placed in evidence under an indictment or information under which a conviction of either offense can be had, and neither the State nor the Court elects one particular act on which conviction is sought, a plea of former conviction or of former acquittal will be good on a subsequent prosecution based on any of the acts or offenses proved, it being uncertain for which one the conviction was had." Hill v. State, 544 S.W.2d 411.

DAVID S. THOMAS, No. 108-82, Aggravated robbery, D's PDR, Affirmed, Judge Clinton, En banc, 9/15/82.

DA'S IMPROPER JURY ARGUMENT WAS NOT A DIRECT FLAGRANT REFERENCE TO D'S FAILURE TO TESTIFY: Judge Clinton succinctly presented the question as: Whether during final argument on punishment the State may properly comment on the failure of an accused who did not testify to adduce from his witnesses who did testify of contrition on his part about committing the offense of which he has just been found guilty? DA argued to the jury that it did not hear one single solitary bit of contrition on the part of this Defendant from his witnesses nor his attorney, that his wife and sister testified but did not tell the jury the Defendant was sorry about this and wants to do right, that the DA guaranteed the jury that if the Defendant was sorry for what he had done, the jury would have heard about it from his witnesses. D objected: "The prosecutor is pointing at my client. He has attempted to comment on the Defendant's failure to testify, which he has a right not to do and I object on that basis." The objection was overruled. The C/A held that the argument was a reference to the failure of character witnesses to give evidence of D's contrition and thus the argument was not improper.

CCA stated that in criminal cases self-serving declarations by an accused are ordinarily inadmissible in his behalf. Third parties testifying such declarations were made by accused do not provide evidence of probative value. DeRusse v. State, 579 S.W.2d 224. Thus CCA held that testimony of third persons that an accused has expressed contrition is not "legally admissible" evidence in mitigation when offered by an accused. Consequently, CCA did not approve of holding that the argument in question was "not improper." It was improper because prosecutor faulted D for that which he could not accomplish through testimony of his wife and sister in that they were not competent and material
witnesses on the subject of the state of his mind with respect to con-
trition. CCA further noted that when an accused does take the stand at
a punishment hearing, the court has held he may be cross examined as to
his feeling of remorse. Wills, 501 S.W.2d 925. CCA ultimately held,
however, that while the argument here was improper, it was not a direct
and flagrant reference to what the jury had not heard D say; that the
DA’s language literally indicted others than D individually and person-
ally. Thus the argument is improper but from the standpoint of a lay
jury, it does not constitute a necessary implication that D had failed to
testify in his own behalf.

Judge Teague in his dissenting opinion, would adopt the dissenting opin-
on of Justice Whitham of the Dallas Court of Appeals (Thomas v. State,
629 S.W.2d 112,116 [Tex. App.-Dallas, 1981]) including the following:

"Once the jury's attention is called to the absence of sorrow,
remorse, regret, or any other act of contrition (on the part of
the defendant), it defies logic and common sense to believe that
the remark refers to any person other than the defendant."

Judge Teague believes that the majority is now putting the stamp of
approval on this type of argument and anticipates seeing similar argu-
ments in the future. An additional objection, however, on the grounds
that the prosecutor’s argument is improper because the Defendant’s self-
serving declarations to other parties including his wife and sister are
not admissible and therefore the lack of such testimony is not a proper
basis for showing the Defendant’s lack of contrition, should properly
preserve the matter for review on appeal.

In Footnote 6 Judge Clinton sets forth what I believe to be helpful
comments regarding evidence in mitigation available to the Defendant,
as follows:

"Yet, the trend of decisions by the Court has been to approve or
itself develop and impose restrictions on evidence in mitigation
available to an accused."

See Ingram*, 426 S.W.2d 877, mother's testimony that alcoholic son had
just left hospital against medical advice shortly before committing
theft of automobile; White, 444 S.W.2d 921, accused’s own version of
facts of offense on trial does not tend to show his character (but see
Marrero, 500 S.W.2d 818 for different rule when offense is murder with
malice, and compare holding in Dixon, 506 S.W.2d 585 that an accused
who remains silent on the merits is not permitted to testify at penalty
stage to facts that exonerate or raise affirmative defenses); Tezono,
484 S.W.2d 374, evidence of sociological, economic, political, and
overall conditions of neighborhood of one convicted of murder with
malice now allowed; Williams, 481 S.W.2d 119, psychological testimony
of mental condition of accused and possible benefit from treatment;
Simmons, 504 S.W.2d 465, reputation on and before date of offense only
arguably bears on mitigation of punishment; DeRusse, 579 S.W.2d 224,
evidence indicating conduct of accused part of county-wide epidemic
has little relevance to punishment; Stiehl, 585 S.W.2d 716, conditions

*Full citation abbreviated to save space.
CLICK!—ACQUITTAL: Indictment alleged that D attempted to cause the death of X by shooting at her with a gun. The proof showed a gun was pointed at X, the trigger was pulled, and the gun only clicked. The gun was not fired. The definition of shoot means some projectile being discharged. The elements of a criminal attempt are: (1) a person (2) with specific intent to commit an offense (murder) (3) does an act amounting to more than mere preparation (4) intends but fails to effect the commission of the offense intended. Whitlow, 609 S.W.2d 808. The phrase "by shooting at her with a gun" is the allegation of the act amounting to more than mere preparation; the "shooting" is the allegation of an element and must be proven. The State had the burden of proving that the gun was actually shot and it failed to do so. To the extent they conflict, Dovalina, 564 S.W.2d 378 and Colman, 542 S.W.2d 144 are overruled. Under Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), there must be an acquittal entered. Cox, 608 S.W.2d 219; Herrera, 623 S.W.2d 940.

CLARENCE LACKEY, No. 61094, Opinion on Appellant's Motion for Rehearing: Reversed, Judge Dalley, En banc opinion, 9/15/82.

DEATH PENALTY CASE--ONE MEMBER OF VENIRE WAS IMPROPERLY EXCLUDED UNDER WITHERSPOON TEST: A juror who initially stated that he could vote for the death penalty in extreme cases and could answer the special issues in the affirmative, eventually testified that he could not state under oath that the mandatory penalty of death or life would not affect his deliberation on any issue of fact and he was excused by the Court over objection. The death penalty may not be imposed even if only one member of the venire was improperly excluded under Witherspoon test. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). The Court further noted that this prospective juror had not testified that his beliefs about capital punishment were so strong that he would disregard the evidence and answer the questions required by Art. 37.071 so that the death penalty could not be assessed. The Court thus distinguished Williams, 622 S.W.2d 116 and Porter, 623 S.W.2d 374, wherein the prospective jurors had testified that their beliefs against capital punishment were so strong that they would in any case vote "no" in answer to at least one of the questions required by Art. 37.071 so that a defendant could not receive the death penalty.

This contention was not briefed as a ground of error on appeal, but was urged in oral argument before the Court on original submission. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) was decided since this case was argued on original submission.
On original appeal, the CCA found no reversible error but did remand the cause because of error in the competency hearing held prior to trial. That opinion was delivered April 7, 1982. It sounds like counsel on appeal in this case persevered and did an excellent job for the Appellant; it also sounds like the CCA, at least in capital cases, will consider substantial constitutional contentions in a Motion for Rehearing.

CHARLES J. CHALIN, No. 61277, Delivery of Phentermine, Reversed/Dismissed
Judge Roberts, Panel opinion, 9/15/82.

DELIVERY OF PHENTERMINE--NO RETROACTIVE APPLICATION: D argued successfully that State's application of Section 4.02(b)(6) to his conduct denied him liberty without due process of law, in violation of Fourteenth Amendment to U.S. Const., because it was a retroactive application of an unforeseeable construction of the statute by this Court in Ex parte Ashcraft, 565 S.W.2d 926. Ashcraft was the first authoritative holding the possession of phentermine could be punished as possession of "an isomer of methamphetamine." D's delivery of phentermine took place several months before this Court's delivery of Ashcraft. The State relied entirely on Ashcraft's construction of the statute, but has not replied to the argument against the retroactive application of it. The principles of law in this particular area were set out in Bouie v. City of Columbia, 378 U.S. 347 (1964).

SHERRELL AUSTELL, No. 61588, Kidnapping for extortion, Reversed,
Judge Roberts, En banc opinion, 9/15/82.

INCOMPLETE APPELLATE RECORD REQUIRES REVERSAL: D appealed his conviction and requested the voir dire examination. Some delay was caused by the court reporter's schedule. Then D escaped from jail and the State moved to dismiss the appeal and eventually the trial court dismissed the appeal, finding that the appeal was "moot". The court reporter then destroyed some of his notes, including the voir dire jury selection. When the case finally reached the CCA, D was back in custody and was again requesting his complete record, which obviously was not possible to furnish.

CCA first noted that trial court had no authority to dismiss the appeal, that only the appellate courts have such authority when a defendant escapes from custody after he gives notice of appeal. When an appellant, through no fault of his or his counsel's, is deprived of a part of the statement of facts which he diligently requested, the appellate court cannot affirm the conviction. Gamble, 590 S.W.2d 507.

BEASLEY AND BEASLEY, No. 61770, 61771, Aggravated robbery, Reversed,
Judge Clinton, Panel opinion, 9/15/82.

STATE FAILED TO PROVE DEFENDANTS' STATEMENTS WERE NOT THE PRODUCT OF AN ILLEGAL ARREST AND DETENTION: On October 25, 1978, at 6:30 a.m. officers received a radio call of suspicious people being in a residential area of Mesquite. One officer pulled up head on to a pickup truck parked legally on the right side of the road. Ds were standing at the rear of
the truck, the doors of which were closed, the hood of which was ajar. The area was dark with trees on each side. Officers asked identification and the purpose of Ds being there. Ds produced drivers licenses and an officer radioed in the information. Ds explained that they were electricians on their way to work, but the clutch in the pickup burned out and the motor was causing trouble and they were waiting for someone already in route to help them. Ds then re-entered the pickup. Meanwhile the officers ran checks on both Ds. The National Crime Information Center Information relayed that both Ds were "known offenders" but did not elaborate. Somehow an officer obtained the vehicle identification number from the inside section of the cab, but the officer denied he opened the door to the pickup to get it and stated the door was already open. Then an officer testified that they were all sitting talking and Ds asked for some cigarettes out of the vehicle and at that time the officers had information from the computer that Ds were known offenders so the officer walked back to the side of the pickup on the passenger's side, opened the door, and in plain view saw a gun case laying on the floorboard. The officer could not see through it and did not know whether it contained a weapon until he picked it up, opened it, and removed a .22 automatic. At this time both Ds were placed under arrest for unlawfully carrying a weapon. It was some time after this point that the check on the VIN of the truck came back reporting the vehicle as stolen.

Question #1: Whether Ds were "seized" by the officers within the meaning of the Fourth Amendment and Art. 1, Sec. 9 of the Texas Constitution? CCA declined to find a "seizure" upon the officers' initial arrival; however, at a later point Ds were in fact "detained" by the officers to the extent that they had to "ask" for cigarettes from the truck and an officer felt an appropriate response was that he should go to the passenger's side, open the door, and enter the vehicle for them. The facts leading up to Ds' arrest did not justify a seizure of any kind, and since there was no justification for Ds' detention, the officers' action in opening the door and entering the truck was unreasonable. Neither will this record support a conclusion that the computer check on the VIN which subsequently revealed the truck to be stolen justify Ds' arrests nevertheless. The record is devoid of evidence indicating circumstances under which the VIN was in the first instance obtained from inside the cab. Thus, the State failed to meet its burden of proof and what remains is the glaring inference that the VIN, like the automatic weapon, was obtained as a result of Ds' illegal detention. Wong Sun v. U.S., 371 U.S. 471. Thus, the State failed to prove Ds' arrests without a warrant were reasonable.

Question #2: Whether the connection between Ds' unauthorized arrests and their inculpatory statements obtained during the period of their illegal detention was sufficiently attenuated to permit the use of those statements at trial? At the hearing on Ds' Motion to Suppress the Confessions as to the aggravated robbery, evidence showed that about two and a half to three days after Ds' arrests, an officer confronted both Ds who were still in custody with information that a shotgun had been discovered under the hood of the pickup and a sack of credit and identification cards inside the cab, which belonged to victims of an aggravated robbery. Both Ds then signed written statements which the trial court found to be voluntary, and CCA deferred to said finding. However, the CCA held that the
State in this case failed to prove that the voluntary statements were not the product of an illegal arrest and detention. The record was essentially silent as to intervening events of significance between arrest and the signing of the confessions; and the initial illegal detention of Ds were flagrant. The court emphasized that this was a case where the State did not meet its burden of proof. As to the factors to be considered in determining whether the confessions were not the product of Ds illegal arrests and detentions. Green, 615 S.W.2d 700; Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Taylor v. Alabama, ___ U.S. ___, 31 Cr.L. 3118 (delivered June 23, 1982).

ARMANDO G. MARTINEZ, No. 62056, Burglary, Reversed, Judge Dalley, Panel opinion, 9/15/82.

REFUSAL OF COURT TO PERMIT D TO OFFER EVIDENCE TO JURY ON PLEA OF FORMER JEOPARDY WAS ERROR: Prior to trial D filed a sworn plea of former jeopardy alleging he had been previously tried for the same offense on the same indictment, and after a jury failed to reach a verdict it was discharged over his objection, and that the jury was discharged before it had been kept together for such time as to render it all together improbable that it could agree on a verdict. During the trial D made a Bill of Exception, at which time two jurors of the first jury testified that if the jury had not been discharged it could have reached agreement and rendered a verdict. CCA held that whether the court discharged the former jury prematurely for inability to agree and reach a verdict is a question of fact which, if properly presented and not waived, must be submitted to the jury on a plea of former jeopardy. Rodriguez, 466 S.W.2d 788.

JESUS RODRIGUEZ, No. 62060, Aggravated robbery, Affirmed, Judge Clinton, Panel opinion, 9/15/82.

KNIFE IS A DEADLY WEAPON: CCA reiterated that expert testimony is not necessary to prove a knife is a deadly weapon and that prior opinions to the contrary were overruled (i.e. Denham, 584 S.W.2d 129). CCA will assay the facts of each case to determine "that manner of the weapon's use and intended use was such as to allow the jury to infer that the weapon was deadly". In this case the use of the weapon was shown to be such as to be capable of causing serious bodily injury or death (i.e. size of weapon, threats uttered, injuries inflicted, and poking movements toward victims).

DAVID FERGUSON AND ROY FERGUSON, No. 62254, Delivery of cocaine, Affirmed, Judge Tom Davis, Panel opinion, 9/15/82.

PERMITTING SHERIFF TO ASSEMBLE ADDITIONAL VENIREMEN WITHOUT RECOUSE TO THE JURY WHEEL NOT FUNDAMENTAL ERROR: When it was clear trial court did not have enough veniremen assembled, the sheriff was directed to and did procure additional prospective jurors. One such veniremen actually served on the jury. This juror had 19 years of prior experience as a police officer including having worked for the prosecuting attorney's
office but at time of trial he was employed as a car salesman. CCA held that as Ds did not object, there was no fundamental error and that the error was in fact waived and that no such additional jurors were shown to be absolutely disqualified from sitting on the panel. A timely objection would have caused a reversal. Steadman, 206 S.W.2d 597.

FAILURE TO APPLY LAW OF PARTIES TO FACTS OF CASE NOT FUNDAMENTAL ERROR: Ds' complaint that the law of parties was not applied to the facts of the case did not constitute fundamental error. No objection was made in the trial court. Romo, 568 S.W.2d 298.

D NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL: The test to be applied in determining whether counsel provided constitutionally satisfactory services is the "reasonably effective assistance" standard. Ex parte Gallegos, 511 S.W.2d 510. Such a determination will be based upon the totality of counsel's representation. Sanchez, 589 S.W.2d 422. Based upon trial counsel's failure to object to the failure to use the jury wheel and the failure to object to the court's charge, D then attacked his trial counsel. CCA reviewed the record and concluded that Ds' counsel played an active role in Ds' defense. Counsel filed numerous pre-trial motions, extensively cross examined each witness, and presented seven defense witnesses as well as 14 defense witnesses at the punishment phase; counsel argued during both phases and exhibited a thorough knowledge of the facts surrounding the case. Counsel's efforts were more than sufficient to constitute reasonably effective assistance at trial. Passmore, 617 S.W.2d 682.

NO INEFFECTIVE ASSISTANCE OF COUNSEL IS SHOWN BY CONFLICT OF INTEREST CLAIM: Ds' also claimed ineffective assistance because their retained counsel represented both them and another individual to the transaction. CCA stated mere assertions of conflict of interest do not support ineffective assistance of counsel. Green, 534 S.W.2d 909. An actual and significant conflict of interest exists where one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing. Gonzales, 605 S.W.2d 278. Here there was no objection to the dual representation at trial. When no objection is raised at trial, the defendant must show an actual conflict which adversely affected his lawyer's performance; the mere showing of a possible conflict of interest is not sufficient. Pollan, 612 S.W.2d 594; Cuyler v. Sullivan, 444 U.S. 823, 100 S.Ct. 1708, 62 L.Ed.2d 30 (1980). Further, the co-defendant in question here admitted to committing the offense, but did not shift the blame to the other defendants and thus the claim was not supported by the record.

LARRY JORDAN, No. 62263, Misdemeanor theft, Reversed, Judge Roberts, Panel opinion, 9/15/82.

SPEEDY TRIAL ACT VIOLATED AS STATE DID NOT ANNOUNCE READY: This theft case commenced July 23, 1978, when D was arrested. The State did not announce that it was ready for trial until the day of trial, 194 days later (there was a 90-day limitation). A timely announcement of ready is a prima facie showing that the State is ready for trial as the statute requires, but such an announcement is not essential. The State
may also make out a prima facie showing by declaring at the hearing on the Motion to Dismiss that it was ready for trial within the statutory time limit. Barfield, 586 S.W.2d 538. The State made no such declaration in this case, and stated only that the Court should consider the jacket. On appeal the State sought to exclude from the computation of time some 110 days. CCA noted the burden of proving such exclusions was on the State. The State rested its claim for 95 days of exclusion on a notation on a docket "10-6-78 Bond Forfeiture", which was followed by the notation "1-9-79 Bond Forfeiture set aside". CCA found that the docket notation did not demonstrate that D's location was unknown much less the other matters reflected under Sec. 4(4) of the Speedy Trial Act, and the CCA distinguished Hamilton, 621 S.W.2d 407 (wherein D used assumed name to prove State's entitlement to an exclusion under Sec. 4(4)(A) or 4(10) of Art. 32A.02 C.C.P.). Thus the trial court erred in denying the Motion to Set Aside the Indictment.

IN VIEW OF REVERSAL, APPELLATE REVIEW OF SUFFICIENCY OF EVIDENCE UNNECESSARY: D challenged the sufficiency of the evidence and the CCA noted that normally it was required to consider such claims, even when CCA found reversible error, because an appellate reversal for insufficient evidence would call for an acquittal, while a reversal for trial error merely calls for a new trial. Rains, 604 S.W.2d 118. The claim need not be considered in this case, however, for the setting aside of the indictment will require the trial court to discharge the Appellant, which will bar further prosecution for this offense or for any other offense arising out of the same transaction. Art. 28.061 C.C.P.

WILLIAM WILHOIT, No. 62,292, Aggravated Rape, Affirmed, Judge Clinton, Panel opinion, 9/15/82.

SPECIAL EVIDENTIARY RULE IN RAPE CASES--REFERENCE BY DA TO D'S WIFE IS ERROR: In rape cases, prosecutor may not prove the accused is a married man unless it tends to solve some issue as to whether the accused committed the offense of rape or aggravated rape. Here, DA's references to D's wife during voir dire examination ("I believe his wife is seated back there") and during examination of a former employer of D ("Did you ever meet his wife") were improper, but court's instructions to jury cured the error. Johnson, 298 S.W.2d 132; Hanner, 572 S.W.2d 702.

STANDARD OF REVIEW WHEN CONSIDERING SUFFICIENCY OF THE EVIDENCE: In deference to the case of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), CCA now inquires "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Griffin, 614 S.W.2d 156. CCA held evidence of penetration to be sufficient.

LYONS RULE VIRTUALLY CRIPPLED: In Lyons, 388 S.W.2d 950 the court held that while a witness who had identified her assailant at the trial may testify that she also identified him while he was in custody of the police, others may not bolster her unimpeached testimony by corroborating the fact that she did identify him. Here, the complainant's husband testified that the complainant looked at a number of photographs and made an identification; the investigating officer testified that D's
picture was in a photo lineup and that the Complainant picked the picture of her assailant from that lineup. CCA noted that the Lyons rule has been so weakened by explanations and distinctions that it is futile for an accused to invoke it if he has merely "attempted to impeach an eye witness". Smith, 595 S.W.2d 120. The Defendant here would no doubt concede that he conducted a vigorous cross examination of the complainant in that undertaking and thus there cannot be Lyons type error. Johnson, 583 S.W.2d 399; Turner, 496 S.W.2d 797.

ALFARO & KINSE, No. 62,708, 62,709, Aggravated robbery, Reversed, Judge Roberts, En banc opinion, 9/15/82.

ORAL STATEMENTS IN RESPONSE TO CUSTODIAL INTERROGATION NOT ADMISSIBLE--LIMITED FUTURE APPLICATION: State's evidence showed extortion and robbery; defense countered that complainant was sexually involved with one of the defendants and after being caught in an embarrassing situation, claimed robbery. In rebuttal State showed that within three days after the arrest of both defendants, and as a result of custodial interrogation, both defendants made oral statements to the police which contradicted in material part their trial testimony. CCA reviewed application of Article 38.22, Sections 3 and 5 and first noted that Section 3 was amended August 29, 1977, and was effective through August 31, 1981. Section 3 effective for this case provided that an oral statement of an accused made as a result of custodial interrogation is admissible against the accused in a criminal proceeding for the purpose of impeachment only and when six conditions were met (i.e. electronic recordings, certain warnings, etc.). Section 5, still effective, provides that nothing in Article 38.22 precludes the admission of a voluntary statement whether or not the result of custodial interrogation that has a bearing upon the credibility of the accused as a witness. CCA concluded that Section 3 controlled over Section 5, that an oral statement made by the accused as a result of custodial interrogation during the effective dates of the statute (August 29, 1977, through August 31, 1981) is admissible only for impeachment purposes and only when the statement is shown to comply with the six specific requirements contained in Section 3. Section 5 applies to statements other than oral custodial statements made by the accused.

The obvious difficulty is that Section 3 has now been amended and now provides that no oral statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless four conditions are met. There is no longer any mention of "impeachment". CCA by footnote indicated that it expressed no opinion concerning the interplay between Sections 3 and 5 as currently enacted.

JOHN DOROUGH, No. 62,922, Capital murder, Life, Affirmed, Judge Dalley, Panel opinion, 9/15/82.

EVIDENCE SHOWED MURDER OF DECEASED WAS COMMITTED IN COURSE OF AGGRAVATED RAPE OF FEMALE VICTIM: D argued that since the aggravated rape victim and the murder victim were not the same person and since the non-assaultive
behaviour intervened between the rape and the murder, the relationship between the two offenses was severed, creating separate acts rather than a continuous course of conduct. Facts showed D first confronted the couple in their car, asked for car keys, and shot the deceased as he attempted to comply. D reloaded his gun, forced the deceased into the trunk, drove the car into the desert, and while still holding the gun in his hand, raped the female victim. D forced the victim to submit to further acts of sexual and deviate sexual intercourse, while still holding the pistol. D allowed her to dress and let the deceased out of the trunk and told them both to walk off and they did so. For some reason the deceased soon turned around and returned to where D was standing near the car at which time D shot him in the chest, fatally wounding him.

CCA noted that although approximately 45 minutes had elapsed between the last sexual assault and the murder, significant elements of the assaultive conduct remained present: both victims were in D's custody throughout the course of the episode, and D threatened them with a gun the entire time. D never left the scene. The assaultive conduct was as continuous as was the conduct in Moore, 542 S.W.2d 664. That there were two offenses committed upon two people here does not alter the Moore holding. Thus, CCA held evidence was sufficient for jury to have found beyond a reasonable doubt that the murder was committed in the course of aggravated rape.

CYNTHIA HARRELL, No. 63,149-63,159, Obtaining a controlled substance by fraud, Eight cases reversed, Two cases affirmed, Judge Roberts, Panel opinion, 9/15/82.

FUNDAMENTALLY DEFECTIVE INDICTMENTS: In eight cases CCA held that as dilaudid and desoxyn were not specifically named in any of the schedules or penalty groups of the Controlled Substances Act, the respective indictments were fundamentally defective. Ex parte Everette, No. 64568 (7/14/82).

JURY ARGUMENT--NO REFERENCE TO PAROLE LAW: DA argued that in 1975 D received four years for another drug case and was paroled in 1976 "So you know its going to take a substantial longer period of time..." D objected on the basis that the arguments encouraged the jury to consider the parole status, and was overruled. CCA held that DA should not have referred to the fact that D had been paroled after serving one year of the earlier four year sentence (a fact which was in evidence) but that the remark did not appear to have been intended to persuade the jury to consider the State's parole laws in assessing punishment. Rather, the DA's remark appears to have been a plea but the jury assessed a substantially longer period of confinement than was previously assessed because D had not been rehabilitated by her earlier period of confinement, and thus no reversible error.

HARRY BONNER, No. 63,205, Burglary of a vehicle, Reversed, Judge Clinton, Panel opinion, 9/15/82.

D'S EXCEPTION TO INDICTMENT WELL TAKEN--SPECIFIC VEHICLE SHOULD HAVE
BEEN IDENTIFIED: Indictment in part alleged that D did break and enter a vehicle owned by X without the effective consent of X. D excepted to the indictment as it failed to state specifically which vehicle the State would seek to prove was burglarized. D emphasized that the State's evidence showed three vehicles were involved in this case. CCA initially noted that it is improper to look to the record of the case in order to determine whether the indictment allegation constitutes adequate notice since it is from that accusation that notice must be had. Brasfield, 600 S.W.2d 288.

Article 21.09 C.C.P. clearly states that if known, personal property alleged in an indictment shall be identified by name, kind, number, and ownership and thus D's timely exception on this basis should have been granted.

The next question was one of harm, for an insufficiency in the allegations of an indictment which is a defect of form will not require a reversal unless it prejudices the substantial rights of the defendant. Article 21.19 C.C.P.; Craven, 613 S.W.2d 488. CCA, looking to the evidence, stated that three different vehicles belonging to X were implicated in both the allegations contained originally in the State's pleading and the proof adduced at trial. D's opportunity to defend the prosecution was necessarily diminished by the failure to inform him precisely of the accusation against him. The error therefore requires reversal of the judgment and dismissal of the indictment. King, 594 S.W.2d 425.

CHARLES CARPENTER, No. 63,207, Rape, Affirmed, Judge Clinton, Panel opinion, 9/15/82.

SECTION 21.02(b)(1) AND (2) P.C. (RAPE) DOES NOT VIOLATE EQUAL PROTECTION CLAUSE: D argued statute was unconstitutional on its face as a denial of equal protection in that it condemns conduct by a male but would not condemn such conduct if committed by a female. The statute is obviously not "gender neutral". The applicable test requires the classification to bear a substantial relationship to important governmental objectives. Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed. 2d 437 (1981). The statute meets this test. CCA reaffirmed holding in Finley, 527 S.W.2d 553 wherein similar contention was made based upon the 1972 Texas Equal Rights Amendment. See Tex. Const. Art. I, Section 3a. In Carpenter, however, D's argument was based upon the Fourteenth Amendment to the Constitution of the United States.

JOE C. WILLIAMS, JR., No. 63,460, Theft, Reversed, Judge Tom Davis, Panel opinion, 9/15/82.

THEFT INDICTMENT SHOULD HAVE BEEN DRAWN UNDER SPECIAL STATUTE ENTITLED HINDERING SECURED CREDITORS: D signed a promissory note obliging a company to repay a bank $20,000 by a certain date. The note stated that it was secured by security interest on certain described property. D executed an assignment of accounts receivable on behalf of the company, in which it was stated that the assignment was to secure the note. Subsequently, D received payment on several outstanding accounts, deposited the funds in a corporate account, but immediately withdrew them.
rather than depositing them in a segregated account or transferring them directly to the bank as per the assignment agreement.

CCA found incorrect the State's contention that the assignment of accounts receivable did not create a security interest in the accounts receivable since ownership of the accounts was transferred to the bank. Both the note and the assignment clearly state that the accounts receivable are security for the note. If a defendant's conduct is proscribed under a general statute and a specific statute, complete within itself, the defendant should be charged under the latter statute. Section 31.03(d) (4)(A) is a general theft statute whereas Section 32.33 is a special statute. This special statute is more specific than the general theft statute in three particulars: (1) the victims (secured creditors); (2) the property (property on which there is a security interest of a lien); and (3) the means of theft (destroying, removing, concealing, encumbering, transferring, harming, or reducing the value of the property).

Since there were conflicts between the theft statute and the hindering secured creditors statute both as to elements of proof and penalty provisions and since the penalty provided for was a misdemeanor under the latter statute, D should have been charged with hindering secured creditors.

TOLENTINO & TOLENTINO, No. 63,575, Possession of marijuana, Reversed, Judge Teague, Panel opinion, 9/15/82.

INVALID AFFIDAVIT—SEARCH WARRANT FATALY DEFECTIVE: Affidavit stated that on January 3, 1979, the officer affiant found a telephone company bag (shopping bag) abandoned on the ground at a certain intersection. Inside was packaging for about five packages of marijuana bricks and in the packaging was a small amount of marijuana seeds and stems. Officer also found a Continental Airline luggage claim check with the name "A. Tolentino" written on it. The location was isolated except for an apartment complex several blocks east. The officer went there, talked to a resident, and found out that Tolentino lives in Apartment 118 and was 21 to 25 years of age. Due to the time the officer found the bag and that it had not been there earlier in the night, the officer believed that the bag was recently abandoned and that the suspect had marijuana from the empty packaging in his apartment, 734 Masa Hills, Apartment 118, for possible distribution and sale. The resident of the apartment to whom the officer spoke was known to the officer to be reliable, but requested anonymity.

A search warrant to be valid must be based upon probable cause, i.e., must set forth sufficient circumstances to enable a magistrate to judge independently the validity of the affiant's belief that contraband is at the place to be searched. Probable cause will be found to exist if the affidavit shows facts and circumstances within the affiant's knowledge and of which the affiant has reasonable trustworthy information sufficient to warrant a person of reasonable caution to believe that the criteria set forth in Art. 18.01(c) C.C.P. has been met, that is, that the affidavit has set forth facts which establish that (1) a specific offense has been committed; (2) the property to be searched or items to

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be seized constitute evidence of the offense or evidence that a particular person committed the offense; (3) the property or items are located at or on the person, place, or thing to be searched. Berger v. N.Y., 388 U.S. 41; Draper v. U.S., 358 U.S. 307. Mere affirmation of belief or suspicion is not enough to sustain the issuance of a search warrant. Nathanson v. U.S., 290 U.S. 41.

CCA held affidavit failed on all grounds. There is nothing in the affidavit to establish the inference and support the belief that marijuana was in the residence of the defendants. The affidavit reflected absolutely nothing more than the possibility that because an airline claim ticket with the name "A. Tolentino" thereon was found in a grocery type bag which contained particles of illegal contraband, the type wrapping paper found was that which is ordinarily used to wrap marijuana, one of the defendants had the name Arturo Tolentino, and it was established that he lived nearby, that this connected one of the defendants with the bag found in a median of the roadway. These facts constitute nothing more than mere suspicion and the Motion to Suppress should therefore have been granted. Aguilar v. Texas, 378 U.S. 408 (1964).

NEIL TRAVIS, No. 63,636, Possession of marijuana, Reversed/Acquittal entered, Judge McCormick, Panel opinion, 9/15/82.

EVIDENCE INSUFFICIENT TO SHOW POSSESSION OF MARIJUANA: D was a passenger in a vehicle owned and driven by Cynthia Robertson. At the Sierra Blanca checkpoint, an agent asked the driver to open the trunk of the car so it could be examined. D obtained the keys and opened the trunk. In plain view in an open paper sack was a brick of marijuana. No fingerprints were found on the sack in which the marijuana was found. Women's clothing was found in the sack with the marijuana. Except for the testimony by the agent that D was nervous as he opened the trunk, the court found that there was no testimony which affirmatively links D with the contraband and thus found the evidence insufficient to support the conviction. Deshong, 625 S.W.2d 327; Rhyne, 620 S.W.2d 599; Sinor, 612 S.W.2d 591; Dubry, 582 S.W.2d 841.

CURTIS HARRIS, No. 66,879, Capital murder, Death, Reversed, Judge Clinton, En banc opinion, 9/15/82.

TRIAL COURT REVERSIBLY ERRED IN RESTRING EFFECTIVE CROSS EXAM OF STATE'S STAR WITNESS: State witness Rencher testified that she was D's 16 year old girlfriend and was with him on the day in question when she, D, and others encountered car troubles. Eventually the deceased drove up and attempted to help, but unsuccessfully so. According to Rencher, D and his companions assaulted the deceased, and D struck the deceased with a jack several times. Prior to Rencher's testimony, her attorney was called as a witness and testified that the State agreed she would not receive more than ten years at most if she testified in this case and that a petition to certify Rencher as an adult in connection with this case had been filed. On cross examination, D attempted to question Rencher as to whether she had been accused of the offense of murder arising out of these same facts but was unable to do so because of the...
objections of Rencher's attorney. D stated his intent was to establish the bias and prejudice of the witness by showing the fact certification proceedings had started with the filing of a petition which charged her with a capital murder for which D was on trial. Eventually the State advised the court that such questioning about juvenile proceedings was not admissible and the court agreed. The court denied D's request to develop the fact that the juvenile prosecutor had agreed to abate the juvenile proceedings against Rencher at the request of the prosecuting attorney. At a recess D called the prosecuting attorney who said he had communicated with the juvenile prosecutor and asked that the hearing on the petition pending against Rencher be delayed until the trials against D and his two companions could be conducted and that Rencher remain in custody until that time; that the prosecuting attorney's main concern was the safety of the witness.

D was denied an opportunity to cross examine Rencher. CCA first noted that the right to cross examination for the purpose of affecting a witness's credibility was dual: a witness may be asked any question, the answer to which may have a tendency to affect his credibility. And if he denies anything that would show a motive for, or animus to, testify against a party it may be shown by other witnesses and by independent facts. While Rencher's attorney testified as to an agreement, this was not by any means adequate to place the witness Rencher in her proper setting and put the weight of her testimony and her credibility to the test without which the jury could not fairly appraise her. The jury was entitled to know what Rencher's understanding of the agreement was, that she had been in custody pursuant to the prosecuting attorney's intervention with the juvenile prosecutor and that the juvenile matter had been delayed until after the trial. That she had not yet been adjudicated a delinquent child or ordered transferred to the district court under the pending case was itself a relevant circumstance, probative not only of her credibility as a witness but also of the only substantive issue in the case; whether she was an accomplice witness whose testimony would require corroboration. CCA firmly rejected suggestion that testimony of the material state's witness' attorney could be substituted for the accused's right to confront and cross examine the only witness against him. CCA also rejected notion that D failed to perfect a Bill of Exception as the record was fully developed as to the facts the defense sought to establish and the reasons such facts were probative of Rencher's credibility. Burkhalter, 493 S.W.2d 214; Pointer v. Texas, 380 U.S. 403 (1965); Davis v. Alaska, 415 U.S. 308 (1974); Jackson, 482 S.W.2d 864. Nor can the State's interest in the secrecy of juvenile criminal records overshadow the defendant's right of confrontation. Alford v. United States, 282 U.S. 687 (1931).

The court further stated:

"Accordingly, eliciting an admission that the witness has been accused of or incarcerated for a crime may be pertinent to show that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of (government who are) conducting the present prosecution. Even if the witness were charged with some other offense. . . , (a defendant would be) entitled to show
by cross examination that his testimony was affected by fear or favor growing out of his detention.'"

DONNA MCGLYNN, No. 67,435, Possession of controlled substance, Opinion on State's Motion for Rehearing: Affirmed, Judge Clinton, En banc opinion, 9/15/82.

SEARCH AND SEIZURE--PLEA OF GUILTY TO MISDEMEANOR--ILLEGAL EVIDENCE NOT SHOWN TO BE ADMITTED INTO EVIDENCE: On original submission a panel found warrantless search of purse D had been carrying, incident to her arrest for aggravated assault on the officer who later conducted the search, did not offend the Fourth Amendment but it held constitutionally impermissible his opening a normal prescription bottle and seizing the variety of pills contained in the bottle.

On D's Motion to Suppress Evidence of a quantity of a substance alleged to be methylphenidate seized during a search of her purse, arresting officer, the only witness, testified as to what occurred in a parking lot of a restaurant where the arrest and search took place. The officer conceded then that he could not tell whether the pills he seized were controlled substances. D pled guilty, taking exception to her rights under the Fourth Amendment regarding the search. CCA stated there was no evidence in the record that the methylphenidate D pleaded guilty to possessing is that which the arresting officer seized from the prescription bottle in her purse on the night in question. The question presented is what must the record show about the "evidence" the trial court found was admissible but which was not actually admitted, in order for CCA to exercise his jurisdiction to decide a ground of error, re a search and seizure. Not withstanding a plea of guilty, when the conditions of Art. 44.02 C.C.P. are satisfied, D who has just been convicted of a misdemeanor offense on his plea of guilty alone still may appeal on those matters which have been raised by written motion prior to trial. Art. 44.02 C.C.P. Obviously, however, the appellate record will not contain a transcription of the notes of the court reporter reflecting evidence adduced at trial--only a record of testimony and perhaps exhibits previously elicited at the hearing on a pretrial motion to suppress as in the case at bar. In this case, unlike the clear showing in Isam, 582 S.W.2d 441 that the controlled substance seized was marijuana, the testimony of the arresting and searching officer does not inform CCA that the pills he seized from the prescription bottle in her purse of D were or contained a controlled substance; he candidly conceded he merely suspected one or more pills of different colors were contraband from his observation that there was more than one type of substance in the bottle; but he had no idea what kind of controlled substances he was looking at and seized. The testimonial record in this case does not show that anything the officer seized was methylphenidate, much more than it was the same methylphenidate to which she pleaded guilty of possessing. Thus, unless and until CCA is confident about what fruits of a search have somehow been used, the court need not decide whether the search was constitutionally permissible.
EX PARTE KENNETH HENSON, No. 68,620, Extradition, Affirmed, Judge Tom Davis, En banc opinion, 9/15/82.

EXTRADITION—EVIDENCE SUFFICIENT TO ESTABLISH IDENTITY OF D: D argued that as his Application for Writ of Habeas Corpus recited that he was not the person named in the extradition papers or in the governor's warrant, that there was insufficient evidence to prove identity. However, CCA held evidence was sufficient in view of a photograph in the supporting papers and an affidavit which recited that person of same name as D was one and the same individual as the individual who was shown in the photograph attached. Insofar as in conflict with this holding, Ex parte Spencer, 567 S.W.2d 520 and Ex parte Smith, 515 S.W.2d 925 were overruled.

EX PARTE SAMMIE ENGLISH, No. 68,953, 11.07 Writ, Relief granted, Judge Dalley, En banc, 9/15/82.

PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN PSYCHIATRIC TESTIMONY WAS ADMITTED AT PUNISHMENT STAGE ON DEATH PENALTY CASE: Conviction originally affirmed in English, 592 S.W.2d 949. After a hearing trial court made specific findings of facts supported by the record that D before a pretrial psychiatric examination was not informed he did not have to participate and that he could remain silent, that his statements in the psychiatric testimony based on the exam could be used at the punishment stage of his trial; also, D's counsel were not notified in advance that the psychiatric examination was being made to prepare the psychiatrist to testify on the issue of D's dangerousness. The Supreme Court's holding in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 69 L.Ed.2d 359 (1981) requires reversal. The psychiatrist's testimony and opinion in this case was based on his examination of D. The hypothetical questions propounded to the witness also incorporated the witness' own examination and findings concerning D. Vanderbilt, 629 S.W.2d 709.

EX PARTE JOSEPH RAMSEY, III, No. 68,983, Relief denied, Judge Odom, En banc opinion, 9/15/82.

CONTEMPT ORDER UPHELED: D was orally ordered by the trial court that he not refer to his lack of representation by legal counsel. The order of contempt stated that D was instructed "to in no way refer or allude during the trial of the case to the fact that he had not deemed it necessary to seek representation by legal counsel". D violated these instructions by referring to the fact he was not represented by counsel and had not had opportunity to be so represented and despite further admonition of the Court, D made an additional comment in violation of the court's instructions. CCA held that there was no substantial variation between the instructions given by the court and D's conduct which violated those instructions. The original order need not be reduced to writing; only the order of commitment need be reduced to writing. See Art. 1911a, V.A.C.S.; Supercinski, 561 S.W.2d 482.
USA V. WRIGHT, No. 80-9030, Fifth Circuit, 9/7/82, Per curiam opinion, Affirmed.

DEFENDANT'S ORAL STATEMENTS ADMISSIBLE--MIRANDA WARNINGS NOT APPLICABLE: Two IRS agents traveled to a lumber yard that D frequented to interview him. They identified themselves and asked D to answer some questions. D went with the agents to a small office at the lumber yard. Before any questioning, one agent read D a "rights card" which stated that one of his functions was to investigate the possibility of criminal violations of internal revenue laws and related offenses and that in connection with his investigation of D's tax liability or other matters, the agent would like to ask some questions. He first, however, had to advise D that under the Fifth Amendment to the Constitution of the United States he could not compel D to answer any questions or to submit any information if such answers or information might tend to incriminate D in any way. He also advised D that anything which D said and documents that D submitted may be used against him in any criminal proceeding which may be undertaken and he advised that D may if he wished seek the assistance of an attorney before responding. D stated he didn't understand his rights so the second agent reread the card, paraphrasing and explaining as he went along. D then stated that he understood and agreed to talk with the agents. The interview lasted about one hour during which D made several incriminating statements and thereafter left freely, not under arrest.

Court stated that it need not decide whether the rights card was sufficient to satisfy the Miranda requirements because it concluded that the district court was correct in holding that D was not subjected to a custodial interrogation, and Miranda warnings were therefore not necessary. That an IRS criminal investigation has focused on a defendant does not in and of itself mandate Miranda warnings. Beckwith v. United States, 425 U.S. 341 (1976). Further, IRS agents conducted their interview in surroundings familiar to D and there was no evidence that the agents restrained or coerced him in any way. D accompanied the agents freely to the office, was questioned for only an hour and then left. Miranda was inapplicable. U.S. v. Fontenot, 628 F.2d 921 (Fifth Cir. 1980).

MCSHANE V. ESTELLE, No. 81-1388, Fifth Circuit, 7/19/82, Habeas Corpus remanded in part.

HABEAS CORPUS--REMAND FOR EVIDENTIARY HEARING AFTER RULE 9(b) DISMISSAL OF PETITION: D filed numerous excessive writs after his conviction in both the state and the federal courts urging and re-urging a number of contentions. Court initially held that several specific issues previously presented and denied were not denied since the prior determination was on the merits and the ends of justice would not be served by reaching the merits of the subsequent application. A Rule 9(b) dismissal will be granted only if it can be shown that petitioner either deliberately withheld a claim from a previous petition or was inexcusably negligent. Papazian v. Estelle, 612 F.2d 1003, (Fifth Cir. 1980). The court also stated that the Writ of Habeas Corpus is not abused if a petitioner alleges error not presented in his first petition if his unawareness of facts which might support a habeas petition is excusable or if his failure
to understand the legal significance of the known facts is justifiable. Vaughan v. Estelle, 671 F.2d. 152 (Fifth Cir. 1982). In this case McShane offered several reasons to explain his failure previously to assert all of the grounds for relief now alleged, including his difficulty in obtaining copies of state court proceedings to aid in his presenting his federal petition and his lack of counsel in preparing the petitions, etc. Court held the reasons sufficient to require an evidentiary hearing to determine whether D deliberately withheld several of his claims from a previous petition or was inexcusably neglectful in failing to assert these grounds of error before.

USA v. KALISH, Nos. 80-1716, 7-23-82, Judge Reavley, Appeal, Affirmed as to substantive counts, Reversed as to conspiracy counts.

DOUBLE JEOPARDY. GOVERNMENT DID NOT MEET BURDEN OF SHOWING SEPARATE CONSPIRACY: The defendant was charged and convicted on one count of conspiracy to import marijuana and one count of conspiring to possess with intent to distribute 40,000 pounds of marijuana arising out of a shrimp boat on December 10, 1979. The defendant was also charged and convicted in a separate trial of two counts charging violations of the same two conspiracy statutes charged in the December 10, 1979, seizure. The second trial resulted from the seizure of 100,000 pounds of marijuana as it was being unloaded at a marina on December 19, 1979. The defendant claimed double jeopardy barred his second trial. The court looked to five factors to determine whether there was a single conspiracy: (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events took place. When a defendant establishes a prima facie, non-frivolous double jeopardy claim on a pretrial motion, the burden is on the government to prove by a preponderance of the evidence that the indictments charge different conspiracies. The government never met its burden and therefore the conspiracy counts stemming from the December 19th incident were barred by the double jeopardy clause.

DELONY V. ESTELLE, No. 81-1289, 6/14/82, Judge Garza, Habeas Corpus, Motion for Appointment of Counsel granted and appeal reinstated.

DEFENDANT'S FAILURE TO FILE WRITTEN OBJECTION TO MAGISTRATE'S REPORT NOT FATAL: Petitioner, a prisoner in TDC, moved for appointment of counsel in order that he might effectively pursue an appeal of the district court's denial of his application for habeas corpus relief. Petitioner, however, failed to file an objection to the magistrate's report and recommendations. While failure to file written objections to the magistrate's report continues to operate as a bar to the factual findings in the report, the bar shall not occur unless the magistrate informs the party that his objections must be filed within 10 days. Motion granted, appeal reinstated.
USA V. LEON, No. 81-1319, Fifth Circuit, 7/2/82, Affirmed in part and reversed in part.

COURT'S ORDER FOR D TO TESTIFY OUT OF ORDER NOT ERROR: During the trial D wanted a break to locate a witness and thereafter D advised court that a witness was flying in out of state but had not arrived and that the only witness was the defendant. As the other witness had not arrived, the court told counsel to put on the defendant, to keep the trial from stalling in midafternoon. The record showed that the defendant had decided to testify and thus the court's actions did not influence that decision. Thus, the trial judge did not infringe upon the defendant's constitutional rights by telling defense counsel to put him on the stand in that order. Brooks v. Tennessee, 406 U.S. 605 (1972) was distinguished in that in Brooks a Tennessee statute required a defendant to testify first or not at all and the Supreme Court held the statute violated due process by restricting an accused's defense and by depriving him of the guiding hand of counsel.

ELEMENTS OF ENTRAPMENT: Court held that a jury instruction on entrapment was justifiably denied. A defendant must show (1) lack of predisposition to commit the crime and (2) some governmental involvement and inducement more than just providing the opportunity or facilities to commit the crime. US v. Andrey, 666 F.2d. 915 (Fifth Cir. 1982). Defendant failed in his burden in this case.

FAILURE TO CHARGE JURY AS TO COUNT CONTAINED IN INDICTMENT: At trial the court failed to charge the jury as to one of the counts in the indictment. "A judge must instruct the jury on all aspects of a case in order for them to reach a fair and proper verdict. When the judge omits a count, as here, we simply cannot know the basis for the jury's decision." The Court of Appeals reversed and remanded for a new trial on that particular count.

USA V. SCRIVNER, No. 81-1561, Fifth Circuit, 7/22/82, Vacated and remanded

STANDING--ABANDONMENT NOT SHOWN--LINGERING QUESTION AS TO INVENTORY SEARCH AFTER IMPOUNDMENT SO CASE VACATED AND REMANDED: Between 3:30 and 4:00 a.m. in a small town on the Texas/New Mexico border, police were alerted by a silent burglar alarm that was disposed to cry wolf. An officer who was dispatched to investigate encountered two vehicles on the way. About a half a block from the sight of the alarm he saw D, driving a passenger car, pull out of a driveway near a recently burglarized business. On being stopped, D identified himself and explained that he and his female passenger had been smooching. A second vehicle in the same vicinity, a truck, was also stopped and then allowed to depart, the truck driver explaining that he had been checking his tire pressures. After determining that alarm had been a false one, officer returned to the area where he had stopped the vehicles, a warehouse in poor repair. Entering the premises, he discovered a rental service truck with its cargo doors slightly ajar parked behind the building. Through the door the officer could see unidentifiable boxes. Checking the building and finding nothing wrong, he returned to the truck, opened its rear door,
and identified the boxes as containing cigarettes. Further investigation showed the windows to the truck cab were open and its keys in the ignition. Taking the keys and closing the door, he prepared to depart. As he did so, he spied through the open door of the warehouse another rental truck, this one inside it. After returning to headquarters and calling for help, the officer returned with others to the scene. A search of the cabs and glove compartments revealed the truck lease agreements and that the second truck was also parked with its keys in the ignition. Suspecting no criminal activity at that time, the police impounded the trucks for their owners' protection. Later they learned that the cigarettes were from a hijacked shipment and later that day when D and another claimed the trucks, they were arrested.

D testified without dispute that he was the lessee of both trucks and warehouse at the time of the search. The police also admitted that they had been advised that the warehouse was leased by persons who would be loading produce at night because it was cooler then. The district court ruled that D lacked standing to contest the search because he had abandoned the trucks.

Abandonment is primarily a question of intent which may be inferred from words, acts, and other objective facts—the question being whether the actor has voluntarily discarded or relinquished the interest in the property in question. While during the early morning hours one's leaving two loaded trucks leased by him unlocked and with the ignition keys is careless and imprudent, it does not support conclusion that he had cast the vehicles aside, relinquishing his interest in them any more than a householder does from time to time when he leaves his car in his driveway or garage, trunk unlocked and keys in the ignition. The order below cannot be affirmed on this ground. However, another was advanced in the district court, i.e., inventory search after the impoundment, on which the district court did not pass. Therefore, the case was vacated and remanded.

USA V. BEAM, No. 81-1360, 9/7/82, Judge Garwood, Appeal, Reversed.

VAGUE STATUTE FATAL TO CONVICTION—ASSEMBLY: Defendant was convicted of violating 16 U.S.C. 551, which made it a crime to conduct and participate "in an assembly and special event" in a National Forest System without a permit. The evidence showed that defendant, Grand Dragon of the Texas Ku Klux Klan, and 24 others camped out and conducted military maneuvers and training in an undeveloped area of the LBJ National Grasslands. The defendant testified that he was unaware of any requirement that a permit was needed, that he went to the local Ranger's office and gave his name, told the secretary that he and some friends were going to camp out (he did not state that military type exercises would be conducted) and wanted to "know what the rules and regulations were governing the use" of the park. Nothing was said about a permit being needed. The court held that criminal statutes are to be strictly construed in favor of the defendant and that ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency. Because of ambiguity as to whether this statute applies to private parties, the statute must be resolved in favor of leniency. The conviction was reversed.
USA V. NAMER, No. 80-3611, 7/22/82, Judge Clark, Appeal, Reversed and Remanded.

NO PROBABLE CAUSE TO SUPPORT WARRANT--RECKLESS DISREGARD FOR TRUTH:
The defendant at his trial moved to suppress evidence secured as a result of a "broad" search warrant issued by a Louisiana magistrate. The affidavit that was the basis for the warrant alleged among other things that the defendant had violated the Louisiana Blue Sky Law because the loan instruments were securities within the meaning of the law, that they had not been registered with the Securities Commission and that the defendant was not a registered broker-dealer. On cross examination the Deputy Commissioner of Securities for the State of Louisiana stated that there was no classification process for securities in Louisiana and that the allegation contained in the affidavit was merely his opinion. The court recognized the fact that affidavits are normally drafted by non-lawyers and therefore should be read in a commonsense and realistic manner. However, this particular affidavit was drawn up by two attorneys after a lengthy investigation and by using the words "classified as securities" the state connotes the authoritative result of ordered procedures and methodologies, and this was the only item in the affidavit tending to establish that the defendant acted criminally, it was therefore material. Because of the lengthy investigation, draftsmen trained in the law with experience in white-collar criminal prosecution, lack of exigency, novel legal theory, appreciation of the importance of the Assistant Commissioners opinion, and understanding of the informed process by which he reached and rendered his opinion, the court found that prosecutors proceeded in reckless disregard for the truth. Striking this portion of the affidavit therefore left insufficient information on which to base a warrant. Reversed and remanded. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d. 667 (1978)

USA V. CURRY, No. 81-3130, 7/29/82, Judge Goldberg, Appeal, Reversed and Remanded.

MAIL FRAUD--FAILURE TO GIVE GOOD FAITH CHARGE IS FATAL TO CONVICTION:
Defendant was chairman of a political action committee. According to the government, defendant received $23,777.80 on behalf of the political action committee and that he converted $14,975.00 to his own personal use, by depositing checks from candidates into his own checking account, or cashing the checks. According to the government only a small fraction of these funds were used to pay for campaign expenses. Pursuant to Louisiana law, defendant was required to report campaign finances to a supervisory committee. The defendant mailed his report and according to the government the affidavits were false and fraudulent. The government contends that the false affidavits were intended to conceal the amount of money received by him thereby preventing discovery of his scheme to defraud the political action committee. The court noted that the record showed that if D believed in good faith that the affidavits which were mailed were correct and were in compliance with Louisiana's Election Act, a jury could not reasonably conclude that the affidavits were intended to defraud the supervisory committee of true and correct campaign finance information. Because good faith is a defense to the charge of mail fraud, the defendant was entitled to a good faith jury instruction if there was any evidence at all to support the charge, regardless of how weak, inconsistent or dubious the evidence of good faith may have been.
INTERFERENCE BY COURT APPOINTED STANDBY COUNSEL CAUSES REVERSAL WITH APPLICATION OF HARMLESS ERROR RULE: D was charged with the armed robbery of a grocery store. Before trial D requested and was granted the right to represent himself, but the court appointed two attorneys as standby counsel. During the trial one of the attorneys began to take on a more active role and D protested this unsolicited participation, claiming that it prohibited him from conducting his own defense. The court responded that D was going to receive counsel's aid whether he wanted it or not. Thereafter, counsel continuously participated in the proceedings, both in and out of the presence of the jury. The court stated that in addition to making objections too numerous to cite, counsel on several occasions cursed, argued with D, and moved for mistrials against D's wishes. Eventually D was sentenced to life as a recidivist.

The narrow issue presented is whether a defendant's Sixth Amendment right to self representation may be violated by the unsolicited participation of over-zealous court appointed standby counsel, an issue not presented in Faretta v. California, 422 U.S. 806 (1975). The court noted that while the presence of standby counsel may be forced on a defendant, his aid may not. His function is to aid the accused if and when the accused requests help. Anything more would prevent the pro se defendant from conducting his defense. Therefore, the rule that Fifth Circuit established in this case is that court appointed standby counsel is to be seen, but not heard. By this the court stated it meant that said counsel is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit.

The court further noted that in this case the defendant's right to proceed pro se, while initially granted, had been interfered with and under these limited circumstances there was a need for a harmless error rule. Were there none, a reversal would be mandated every time over-zealous counsel, acting in the best interest of his client, volunteered his aid without prior permission. A review of the record showed that the government in this case failed in its task of demonstrating that counsel's participation was harmless and therefore a reversal was necessary.
Recently, in the Harris County Criminal Bar Newsletter, Allen Isbell included the following memorandum with respect to preserving error during voir dire examination. Each month one of our cases discusses some aspect of voir dire examination. This memorandum neatly summarizes several situations as follows.

SITUATION #1: The Court excuses a panel member who is not disqualified. To preserve the error: (1) object specifically on the record, see Bulwark v. State, 542 S.W.2d 677 (1976); Chambers v. State, 568 S.W.2d 313 (1978); (2) show on appeal and in the record that the State exhausted its peremptory challenges, Payton v. State, 572 S.W.2d 677; Martinez v. State, 621 S.W.2d 797 (1982); Smith v. State, No. 117-82, decided 7/21/82.

SITUATION #2: The Court refused to grant a challenge for cause. To preserve the error: (1) make sure the record shows the good challenge for cause, and the judge's ruling; (2) make certain that the record shows that the defense exhausted all peremptory challenges; (3) request additional peremptory strikes; (4) dictate into the record the names of the jurors who were objectionable to the defense and who would have been struck, except for having to use the peremptory strike on the person who should have been removed for cause. See Powers v. State, 497 S.W.2d 594 (1973); Doggett v. State, 530 S.W.2d 552 (TCA 1975); Evert v. State, 561 S.W.2d 489 (TCA 1978).

SITUATION #3: The trial court excuses a juror who is not absolutely disqualified, without either the State or the defense challenging for cause. To preserve the error: (1) object to his being excused without a challenge for cause. Moore v. State, 542 S.W.2d 664 (1976); Valore v. State, 545 S.W.2d (1977); Pearce v. State, 513 S.W.2d 539 (1974); Chambers v. State, 568 S.W.2d 313 (1978).

SITUATION #4: The trial court seats a person whom you have struck. To preserve the error: if mistake is discovered after jury sworn, but before verdict: (1) move to withdraw the plea; (2) move to discharge the jury; (3) move to empanel another jury; (4) establish that the juror has an opinion as to the case, or animus, or prejudice. Munson v. State, 31 S.W.2d 387 (1895). If mistake is discovered after verdict returned: (1) you must show on Motion for New Trial that the mistakenly impaneled juror was prejudicial. Anderson v. State, 154 S.W.2d 482; Acosta v. State, 522 S.W.2d 528.
In the June 1982, issue of the VOICE, a letter commending TCDLA was printed in the Letters to the Editor department from the pen of Lynn Malone, the first assistant criminal district attorney of McLennan County in Waco.

The kind words for TCDLA were caused by our strike force's defense of an attorney employed by the State of Texas at TDC who had been held in contempt for declining to accept an appointment to represent an indigent defendant because of an obvious conflict of interest.

In December of 1981, two inmates escaped from the Texas Department of Correction's Coffield Unit in Anderson County, crossing the Trinity River into Freestone County where they allegedly broke into some homes and took a truck. They were caught and returned to prison.

One, Richard Stone, was indicted by a Freestone County grand jury for burglary of a habitation and unauthorized use of a vehicle. This cause seeks to invoke the original subject matter jurisdiction of the Court provided by Tex. Const. Article V, §5, and is denominated an original application for both writ of habeas corpus and writ of prohibition by the Petitioner.

The strike force, past-president Charles M. McDonald should be proud of the results to keep him in custody at the Coffield Unit and have TDC security personnel escort him to and from Freestone County for court appearances.

On July 21, 1982, the Texas Court of Criminal Appeals, on banc, in a lengthy opinion by Judge Clinton, granted relief to Staff Counsel White against Judge Reiter, and in the process set a landmark in the area of conflict of interests for judges throughout Texas to null over.

The Strike Force and past-president Kaye Reiter, Judge 87th Judicial District Court of Freestone County, were apprehended a short time later at a roadblock set up by TDC employees, and returned to the Coffield Unit. Richard Stone was thereafter indicted by a Freestone County grand jury for the offenses of burglary of a habitation and unauthorized use of a vehicle.

The record indicates that after these indictments were returned, TDC authorities were reluctant to release Stone to Freestone County, preferring instead to keep him in custody at the Coffield Unit and have TDC security personnel escort him to and from Freestone County for court appearances.

It was apparently on February 1, 1982, that the Honorable P. K. Reiter, Judge of the 87th Judicial District Court of Freestone County (Respondent), contacted W. J. Estelle, Director of the Texas Department of Corrections, by telephone, and informed him of the necessity to appoint counsel for Stone and his coindigent who were indigents incarcerated in TDC. Respondent advised Estelle that in view of the custodial circumstances of the accused, he was considering appointing Staff Counsel for Inmates (staff counsel).

The Strike Force and past-president to Freestone County, preferring instead to keep him in custody at the Coffield Unit and have TDC security personnel escort him to and from Freestone County for court appearances.

In February 1982, the saga of William Louis White, Esq., Director of Staff Counsel at TDC, and the Hon. Putnam Kaye Reiter, Judge of the 87th Judicial District Court of Freestone County, began.

Judge Reiter reached several counties over and appointed TDC Inmate Staff Counsel White in Walker County to represent Richard Stone in both of his felony cases in Freestone County.

The confrontation, in the long run, involved hearings on contempt, the Texas Attorney General's Office and finally in mid-April, TCDLA and its strike force, represented by then TCDLA President Charles M. McDonald. Before things settled down, Mr. White found himself in custody and then released. Finally, he

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Judge McCaim. Petitioner stated into the
for all time spent representing Stone
able for such activity.

record, "It's my firm belief that any

conviction [of Richard Stone], if I am

would have to be reviewed up." Also, it

or Texas Department of Corrections.

Petitioner was ordered jailed but then
relesed on his personal bond pending a second hearing. Judge McCain's order
and commitment were reduced to writ-
ing on the same day. On March 16,
Judge McCain entered another order,
setting a contempt hearing before another
appointed district judge, for April 1, 1982.

On April 1, the Honorable David
Walker of the 159th Judicial District,
pursuant to appointment, convened a
second hearing. At this hearing Petitioner
elaborated upon his view of the conflict
of interest he anticipated in the event
he were to represent Stone. Due to the
nature of the offenses charged, Peti-
tioner was of the opinion that it would
be incumbent on the State to prove "the
whole criminal transaction, . . . circum-
stances of [Stone's] escape [from TDC]
would have to be proved up." Also, it
was Petitioner's understanding "that
[Stone's] arrest involved employees of
Texas Department of Corrections. . . . That there was a roadblock set up by the
Texas Department of Corrections and . . .
[Stone was] arrested at that time as a
result of the roadblock." Petitioner
opined that the validity of that roadblock
would be litigated in Stone's defense
because it was his understanding that
TDC "has no authority under state law"
to stop a vehicle on a public road. There-
fore, Petitioner would be placed in the
position of either having to attempt to
show that fellow TDC employees were
acting illegally and possibly not testify-
ing truthfully, or failing to provide
Stone with the vigorous representation
to which he was entitled.

Petitioner testified that he was not
necessarily concerned that he might lose
his State job, but explained that, due
to the nature of the staff counsel's objec-
tives, the relationship between the inmate
attorneys and other TDC employees was
at times a tensionous one to which the staff
was always attentive since the success
of many pursuits on behalf of inmates
was dependent on the cooperation of
these fellow employees, the "keepers"
of his clients. It was Petitioner's "fear
that [his] zealous defense of [his] client
might conflict with the longer range
purposes that [he had] as director of
staff counsel."

Petitioner stated that he did not think
a lawyer placed in his position could feel
assured in his own mind that he could
represent Stone without an attitude of
divided loyalty; therefore, it was his
professional opinion that postconviction
relief would be granted Stone either in
State or Federal court in the event a
conviction were obtained and upheld on
appeal, even if Stone entered a plea of
guilty. Petitioner testified he had never
before refused an appointment in his 22
year legal career.

There was also testimony regarding the
unavailability of staff counsel funds for
Stone's representation under the circum-
cstances and the collateral hardship such
representation would cause Petitioner. The
county attorney adduced evidence
that Petitioner had made appearances in
the 87th Judicial District Court on an
unrelated matter in his capacity as a
staff counsel attorney in February of
1982.

The county attorney, Robert Gage,
testified it was his understanding from
conversations with him, that Judge
Reiter had appointed Petitioner to
represent Stone because Petitioner
"would have ready access" to Stone at
the Coffield Unit. Gage also testified
there were about four attorneys in Free-
stone County who were competent to
handle criminal cases, and there existed
At the conclusion of the hearing Judge Walker orally announced there was no showing Judge McCain's prior order of contempt was in error, and reduced Petitioner's Punishment to five days in jail and a $300.00 fine. Further, Petitioner was ordered to purge himself of contempt by agreeing to represent Stone in writing or open court, within ten days from that date. Petitioner's existing bond was continued in the event it was his desire to pursue further remedies in this Court. On the same day, April 1, Judge Walker's order was reduced to a written Judgment of Contempt in which its enforcement was stayed for ten days in order to allow Petitioner time to either agree to represent Stone and thereby purge himself of contempt, or file an original habeas corpus action in this Court. Under the written judgment, if Petitioner chose to seek relief in this Court, enforcement was ordered stayed until ten days after this Court "finally disposed of this cause." Salient portions of the Judgment of Contempt are reproduced in the footnotes.9

On April 12, 1982, a Monday, Petitioner timely presented10 an original application for writ of habeas corpus and motion for stay in this Court. On the morning of April 15, this court denied Petitioner leave to file without written order. Since a pretrial hearing in the cases entitled State v. Stone had been set for April 15, Petitioner appeared before Respondent that afternoon and, according to the parties' briefs, he at that time presented additional evidence on and urged his motion to withdraw.11 The record indicates that at this time County Attorney Robert Gage advised Respondent to open court that there was a conflict, or a potential conflict, and that Petitioner should be permitted to withdraw. Defendant Richard Stone was present during this hearing. Respondent requested that law and argument on the issue be submitted in writing no later than April 21, and withheld his ruling.

Thereafter, on April 21, Petitioner personally delivered to Respondent his "brief" as well as his written acceptance of the appointment to represent Stone, along with a letter to Respondent stating that such acceptance was being filed "according to the terms of [Judge Walker's] Judgment of Contempt." Later that day, the letter of acceptance was filed with the district clerk.

Respondent, however, did not agree that Petitioner's "acceptance" was in conformity with the Judgment of Contempt12 and on April 22, issued a written order denying Petitioner's motion to withdraw. Contained in this order were nine "Findings of Fact"13 concerning "competency of counsel," and the conclusions of law that "William L. White is not disqualified to represent [Stone], is fully competent to perform all duties . . . and does not have a conflict of interest in representing the defendant, which would deprive the defendant of his right to effective counsel."

Having received word of Respondent's oral order that Petitioner should be confined, Petitioner's counsel, on Sunday, April 25, contacted Judge Reiter at home by telephone. Respondent advised counsel that he had instructed J. R. Sessions, Sheriff of Freestone County, to expect Petitioner to appear, and to confine him at that time. Counsel told Respondent that if the court were ordering Mr. White to jail, he would voluntarily surrender the following morning, Monday, April 16; Respondent replied that this was satisfactory.

At 8:00 a.m. on April 26, Petitioner appeared at the Freestone County Sheriff's Office. He was stripped and subjected to a body search. He was then given jail garb and placed in a cell at 8:20 a.m.

On the same morning, the original applications for writ of habeas corpus and writ of prohibition before us were presented to this Court on Petitioner's behalf. The cause was ordered filed and set for submission to the Court En Banc on May 26. The Court additionally ordered all proceedings in the trial court stayed pending further orders of this Court.14 Pursuant to our order, Petitioner was released by the Freestone County Sheriff at 1:30 p.m. on April 26, after being photographed and fingerprinted.

According to an affidavit of Petitioner contained in the record before us, on April 27 he consulted with inmate Stone. At this time, Petitioner advised Stone of his rights and guarantees under the State and Federal Constitutions to the effective assistance of counsel. He advised Stone that these guarantees could be waived by him. Petitioner explained to Stone his opinion that his representation of him would create a conflict of interest, but that Stone could waive the conflict if he understood it. Stone indicated an unwillingness to waive any rights to the effective assistance of counsel. Petitioner consulted with Stone in more detail on the matter on April 28. At this time, Stone executed an affidavit stating he refused to waive any conflict with his own interests which might arise through Petitioner's representation of him and desired conflict free counsel.

As stated ante, Petitioner is represented by The Texas Criminal Defense Lawyers Association, and has filed, in addition to his original applications and affidavits by himself, his counsel and inmate Stone, a "Brief for Petitioner." Sheriff J. R. Sessions is represented in this Court by Freestone County Attorney, Robert W. Gage, and has filed a "Respondent's and State's Answer."15 And finally, the Honorable Putnam Kaye Reiter, Judge of the 87th Judicial District Court, Respondent here, has filed a "Motion for Leave to File Brief by Amicus Curiae," a "Brief by Amicus Curiae" and a "Brief by the District Court," alleging in the motion for leave that, "[t]he trial court has asked for representation by the traditional proponents of the court, but such has not been forthcoming. Therefore the offended tribunal . . . is without an advocate before the Court of Criminal Appeals, unless the trial court is permitted to file an amicus curiae brief." We have considered assertions made by Respondent in his briefs in ascertaining matters of fact. Article 1806, V.A.C.S.

I. Habeas Corpus

Turning first to Petitioner's application for habeas corpus, brought to contest Judge Walker's March 9 Judgment of Contempt, inter alia, we find merit in the contention that Respondent unlawfully restrained Petitioner pursuant thereto by verbally ordering his confinement.
in the Freestone County Jail on April 26. *Ex parte Alderete*, 203 S.W. 763 (1918).

"It is well settled that a written order of commitment, which is the warrant . . . by which a court directs a ministerial officer to take a person to jail and to detain him there, is an essential prerequisite to the imprisonment of a person for contempt." *Ex parte Hardin*, 344 S.W.2d 152, 153 (Tex. 1961); see also *Ex parte Baisle*, 453 S.W.2d 185 (Tex.Civ.App. - Eastland 1970, no writ); and Article 43.11, V.A.C.C.P.; cf. *Todd v. State*, 598 S.W.2d 286 (Tex.Cr.App. 1980).

Thus, we are constrained to reject Respondent’s argument made in reply to this contention that Petitioner “voluntarily, without request for hearing, and without objection presented himself to the Freestone County Sheriff for incarceration.” There being no written instruction in any form to the Sheriff of Freestone County to confine Petitioner pursuant to the Judgment holding him in contempt included in the record before us, Petitioner is ordered released.

II. Prohibition/Mandamus
The matter, however, does not end here. Petitioner also has before this Court an application for extraordinary relief denominated “writ of prohibition” which seeks a review of Respondent’s ultimate denial of his motion to withdraw from representing Richard P. Stone and a prohibition of the enforcement of Respondent’s order appointing him.

We doubt the propriety of Petitioner’s first chosen remedy for contest of Judge Reiter’s order appointing him to represent Stone, *viz.*: refusal to accept the appointment, contempt and habeas corpus;16 furthermore, a thorough review of the record clearly reveals the tenacity with which all parties to this litigation are committed to pursuing it—well beyond our disposition today if necessary. Thus, it may be seen there are compelling reasons that this Court fully and completely adjudicate Petitioner’s application for extraordinary relief: and, indeed, the least of these is not the collateral effect this litigation has had, continues to have and will otherwise in the future have upon the integrity of the prosecutions presently pending in Freestone County against Richard P. Stone.

A. Specific Nature of Extraordinary Remedy Sought
It is now settled that in determining the specific nature of the extraordinary remedy sought, this Court is not bound by the denomination contained in the pleadings, but will look to the essence of the pleadings, including prayers, as well as the entire record before us. *Garcia v. Dial*, 596 S.W.2d 524 (Tex.Cr.App. 1980); *Vance v. Clawson*, 465 S.W.2d 164 (Tex.Cr.App. 1971); and see e.g., *Brogni v. Curtty*, 571 S.W.2d 940 (Tex.Cr.App. 1978).

The writ of prohibition appropriately issues to ‘prevent the commission of a future act and not to undo, nullify, or review an act already performed; it will not be granted when the act sought to be prevented is already done, but will lie when such act is not a full, complete, and accomplished judicial act.’ *Vance v. Clawson*, at 168, 169; *Smith v. Blackwell*, 500 S.W.2d 97 (Tex.Cr.App. 1973).

*Garcia v. Dial*, supra, at 529. Because Petitioner essentially seeks a writ from this Court which would set aside Judge Reiter’s order appointing him to represent Stone, the relief sought is mandamus. Compare *Garcia v. Dial*, supra and *Vance v. Clawson*, supra, with *LeBlanc v. Gist*, 603 S.W.2d 841 (Tex.Cr.App. 1980).

B. No Adequate Remedy at Law
"Mandamus is only available where no other adequate remedy at law is available." *Vance v. Routt*, supra, at 907.

It is urged by Judge Reiter’s brief that if a conflict of interest exists in Petitioner’s representation of Stone, that it is Stone and he alone who has a right to complain. Implicit in this argument is the corollary that, should Stone be convicted in one or both criminal cases, a direct appeal from such conviction(s) would constitute a remedy adequate to adjudicate the conflict issue raised in this extraordinary action. We disagree.

Assuming arguendo that the conflict urged by Petitioner exists but Petitioner nevertheless vigorously undertakes the defense of his client, it is true that Stone’s constitutional right to conflict free counsel would be vindicated by a direct appeal, albeit after the expense, anxiety and dissipation of judicial resources incident to a voidable proceeding. Cf. *Garcia v. Dial*, supra. But patently such an appeal would do nothing to rectify the damage done to the interests of every other indigent inmate of TDC who, by necessity, must rely on the cooperative relationship between staff counsel and other TDC employees for speedy, often informal, effectuation of their legal rights.17

Moreover, again for the sake of argument, if we assume that notwithstanding the conflict, Petitioner is so effective in his zealous defense of Stone that the latter is acquitted, how then could the conflict ever be reviewed? Clearly, it could not, yet, again, the interests of all other indigent clients of the staff counsel would be left in a dire state, a result of the shattered relationship between Petitioner and his fellow employees, some of whom he had successfully revealed to have acted illegally, or at least, to have testified less than truthfully, during his defense of Stone. This strikes us as an example of winning a battle while losing the war.

In sum, we cannot agree that Stone has the only interest which may be affected by the action before us.18 We hold that no other remedy is adequate to dispose of the issue raised under the circumstances presented in this extraordinary proceeding.

C. Discretionary Act?
It is also well settled that mandamus will not issue to compel a particular result in what is manifestly a discretionary decision, *Garcia v. Dial*, supra; see, e.g., *Williams v. Plake*, 587 S.W.2d 166 (Tex.Cr.App. 1979); and *Ordonez v. Bean*, 579 S.W.2d 911 (Tex.Cr.App. 1979), though mandamus may be appropriate to impel the consideration of a motion, the issuance of a ruling, an entry of a judgment or other act, the doing of which is not discretionary. Id.

Thus, in order to determine whether extraordinary relief will lie here, it is essential that we examine not only the order denying Petitioner’s motion to
From the briefs filed by Respondent in this Court, it is apparent that the only basis for the conclusion that no potential or present conflict of interest exists in Petitioner's representation of Stone is "Mr. White's superior, W. J. Estelle, Jr., stated he had no objection to the appointment...and that it would not interfere or conflict with his duties as Director of Staff Counsel for Inmates." With all due respect to Mr. Estelle, this Court is unprenred to defer to his determination (if, indeed, he made one; see n. 4, ante) of an issue which is appropriately made only after careful consideration of all relevant facts and circumstances by a member of the judiciary. It follows that Respondent's conclusion upon the issue is not supportable by the fact that the Director of TDC was unable to perceive a conflict six weeks after Stone's alleged commission of the offenses in question. Indeed, we find no evidence at all in the record before us which would support Judge Reiter's conclusion that no potential conflict exists. However, we perceive a conflict with TDC, the conflict is patent. If Petitioner's choices are that he zealously represent Stone or breach his contract with TDC, the conflict is patent. While the overwhelming majority of cases dealing with conflict of interest in the context of a criminal trial address fact situations in which an attorney has jointly represented multiple accused, we caution Respondent against discounting the reasoning of those decisions under the notion that the juxtaposition of the interests are different than those presented here. It should be remembered that our overriding concern must be the protection of Stone's constitutional right to conflict-free counsel.

The affirmative duty upon an attorney to advise the court of any conflict, actual or potential, extant in his representation of a defendant has been performed by Petitioner. See Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 808 (1942); Pete v. State, 533 S.W.2d 908 (Tex.Cr.App. 1976); see also State Bar of Texas Rules and Code of Professional Responsibility (hereinafter C.P.R.) DR 5-105. And though it appears no duty devolves on the trial court sua sponte inquire, Cybler v. Sullivan, 466 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the authorities agree that great deference should be accorded the representations of an attorney that he feels a division of loyalty. In Holloway v.
Arkansas, supra, at 485-486, the Supreme Court observed,

. . . [S]ince the decision in Glazer,25 most courts have held that an attorney's request . . . based on his representations as an officer of the court regarding a conflict of interests, should be granted. * * * In so holding, the courts have acknowledged and given effect to several interrelated considerations. An "attorney . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. * * * Second, defense attorneys have an obligation, upon discovering a conflict of interests, to advise the court at once of the problem. * * * Finally, attorneys are officers of the court, and "when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." * * * We find these considerations persuasive. [Citations, footnotes and emphasis deleted.]"

In Holloway, supra, it was the State's contention that such deference to representations of an attorney would allow "unscrupulous defense attorneys" to abuse the situation, presumably for purposes of delay or obstructing orderly proceedings. The Supreme Court, however, made it clear that a trial court is free to decide no conflict of interest exists where there is no factual support for the attorney's claim and there is affirmative evidence of dilatory intent. Id. But clearly, an ab initio presumption by the trial court that counsel's representations are motivated by bad faith is prohibited.

In complying with this opinion, Respondent is directed to enter new findings of fact which are relevant to the conclusions by way of supplemental directed to forward such findings and motion to withdraw; Respondent is further directed to forward such findings and conclusions by way of supplemental transcript to this Court.

Having determined that Petitioner is entitled to Respondent's plenary consideration of the conflict of interest issue raised by his motion to withdraw from court appointed representation of Richard P. Stone, within the framework of his contract agreement with TDC,26 and under the unique facts to be developed in the prosecutions pending against Stone, as well as in light of both our State Rules and Code of Professional Responsibility and the Sixth Amendment right to conflict free counsel,27 we hold it is appropriate to issue the writ of mandamus to that end. Cf. Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

However, the writ will issue only in the event of a failure to comply with the directives contained herein, since we presume Respondent will act accordingly.

CLINTON, Judge
(Delivered July 21, 1982)
En Banc
Roberts, J., Odom, J., and T. Davis, J., concur in result

FOOTNOTES
1. "Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, certiorari * * * and other such writs as may be necessary to protect its jurisdiction or enforce its judgments." Article V, sec. 2(a) Every court other than a district court, other than the district court, shall upon proper motion therefor have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, certiorari * * * and other such writs as may be necessary to protect its jurisdiction or enforce its judgments." Article V, §5, supra. Article 4.04, V.A.C.C.P., provides in pertinent part:

"Sec. 2(a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail of not more than six months, or both, any person guilty of contempt of the court."

(c) Provided, however, an officer of a court held in contempt by a trial court, shall upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."

8. Judge Walker questioned Petitioner at some length about other cases in which it was known that attorneys
had represented indigents on a court appointed basis in counties other than their counties of residence and practice, Petitioner agreed that this practice was not unusual, but he had never known of an instance in which such an appointment was made over the attorney's objection, and in fact in most cases he knew of, the appointment was made at the attorney's request.

9. "...[T]he undersigned judge...finds that William L. White is in direct contempt of this Court for refusing to accept a lawful appointment as counsel for the indigent Richard P. Stone and hereby assesses his punishment at confinement in the Freestone County Jail for a term of five days and thereafter until a fine of $300.00 is paid or until such time as he will accept the appointment as attorney Richard P. Stone. The enforcement of this judgment is hereby stayed for 10 days, or until April 11, 1982. Further if within 10 days, or by April 11, 1982 William L. White files in the Texas Court of Criminal Appeals an original habeas corpus application contesting this Order, enforcement shall be stayed until 10 days after the Court of Criminal Appeals has finally disposed of this cause."

10. Since April 11 was a Sunday, Petitioner's application was timely presented on April 12. Tex.Cr.App. Rule 7.

11. Up to this point, Petitioner had been ably represented by Assistant Attorney General Douglas Becker. After this Court denied his application without written order on April 15, Petitioner obtained the assistance of The Texas Criminal Defense Lawyers Association, and at this April 15 hearing new counsel made their first appearance.

12. According to briefs of the parties, Judge Reiter called an associate of Petitioner's attorney on April 22 and advised him that there was no opportunity at this point for Mr. White to purge himself and he therefore must now "tender himself to the Sheriff of Freestone County and serve the punishment as assessed by Judge Walker."

13. These findings are paraphrased and discussed post in Part II. C.

14. This Order of the Court was reduced to writing on May 3, 1982.

15. The State in this Court asserts that it "takes no position as to the merit or lack of merit of petitioner's contention that he should be relieved as Richard Stone's counsel," and quite correctly characterizes its own position as being "caught in the middle and unable to perform its duty."

16. The weight of authority is to the effect that even an order of a court which is patently legally unsupportable may not be appropriately contested by a refusal to comply; see Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 43 L.Ed.2d 574 (1975); United States v. Layda, 513 F.2d 774 (CA5 1975); though an order entered by a court which is utterly without authority to enter it, may not be enforced by contempt, Ex parte Gorvaa, 595 S.W.2d 869 (Tex. 1979); see also Ex parte Davis, 353 S.W.2d 29 (Tex.Cr.App. 1962).

17. One need only imagine the myriad ways in which TDC security, records and other personnel could—if so inclined—obstruct the work of 13 staff counsel attorneys attempting to serve the indigents of the more than 33,000 Texas prison inmate population.

18. Accord United States v. Garcia, 517 F.2d 272, 275 (CA5 1975), in which the threshold question was whether a district court order determining a conflict of interest disqualified defense counsel, made pretrial on motion of the adverse party, was appealable. The Fifth Circuit, quoting the Supreme Court, held that such an order, though not a "final judgment" in the traditional sense, "involves a claim separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Twenty years on, the significant issue raised in that instant case remains a critical one. Nevertheless, it may be that some of the analytical reasons behind the decision in that case may not now apply to our instant instance. Congress in 1980 amended 28 U.S.C. § 753 in the following manner:

19. It is true that an attorney's "disqualification" would be due to a "conflict of interest," but patently, not every "conflict of interest" constitutes a "disqualification," the latter being generally a set of circumstances in which the attorney in question does have, or has had, an attorney-client relationship with two or more parties to litigation whose interests, by virtue of the litigation are now adverse. See Pioneer Natural Gas Co. v. Caraway, 562 S.W.2d 284 (Tex.Civ.App. 1978, writ ref'd, n.r.e.).

20. It does appear, however, that Estelle's expressions on the matter do directly rebut Petitioner's contention he could not perform all tasks necessary to the representation of Stone on State time-and with the use of State vehicles.

But by the same token, the fact that his communication with Estelle was the determinative factor on which Respondent entered the written order appointing Petitioner to represent Stone clearly does not support Respondent's repeated assertion that he was appointing Petitioner in his...
“individual capacity” as opposed to his capacity as a staff counsel attorney whose function it is to represent indigents confined in TDC.

21. Attention is called to the following provisions of the State Bar of Texas, Rules and Code of Professional Responsibility:

“EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.”

“EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.”

“EC 5-22. Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.”

“EC 5-23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer’s individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. ** * Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.”

“EC 5-24. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.”

If counsel’s obligation is to determine whether in his professional judgment a conflict of interests exists without regard to the judgments of his employer, surely the trial judge, when presented with the question, is obliged to do no less. See also DR5-107(b).

22. A finding that the facts in question are “uncomplicated” has not a modicum of relevance to the issue to be resolved.

23. The record indicates that the staff counsel’s contract with TDC is a prophylactic measure precipitated by an awareness of the untenable position those attorneys would be in were they allowed to pursue civil rights claims against TDC on behalf of inmates in which it was alleged and, perforce, must be proved that other TDC employees had acted unlawfully, thereby violating the constitutional rights of those in their charge.

While the State prosecutions pending against Stone are not federal civil rights suits, the very policy interest advanced by the contract—that staff counsel lawyers should never be in the posture of attempting to prove other TDC employees have acted illegally—is heavily implicated by the facts determinative of the issue we commend to Respondent for resolution; it therefore behooves Respondent to consider and determine the issue within this framework.

24. “...representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. ** * Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client ** *. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters. ** * But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. [Even with a complete record] it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client. And to assess the impact of a conflict of interests in the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.”

Holloway v. Arkansas, infra, at 489-491 U.S. See also Wood v. Georgia,


26. Respondent's attention is directed to n. 3, ante, for the terms of this contract, as reflected in our record.

27. It is apparent from the record that Respondent has never had the benefit of the sworn averments contained in the affidavit of Richard P. Stone, which are highly relevant to the consideration we order. See CPR, EC5-16, and EC5-21.

CONCURRING OPINION

I concur in the results reached but do not join in all the language and reasoning of the majority opinion. I write only to express my concern for the unnecessary consumption of the judicial resources in this case merely to determine whether the petitioner should have been required to continue with his appointment as counsel for Stone. Surely, early on, it became clear that a serious question about the appointment was involved which could cause the granting of a new trial or a reversal on appeal. Practicality should play an important part in our judicial system and district judges should make the extra effort to remove any questions for reversal when it can be easily done, even when the judge does not regard the question a serious one. The granting of a new trial or a reversal on appeal resulting in a second trial is costly to the taxpayers and delays justice. Judicial wheel spinning should be avoided.

I concur.

ONION, Presiding Judge
Teague, J., joins in this opinion.

(Delivered July 21, 1982)
En banc

Concurring Opinion Footnote

1. Three district judges and nine appellate judges were all involved in the process involving research by this court. This does not consider the time consumed in briefing the question by the parties and the delay of the trial.

Institute on Sexual Offenses and Defenses

Pictures show participants and lecturers at a recent institute conducted by the Criminal Defense Lawyers Project.
A PERSONAL VIEW —

The AYALA Decision

Lawrence B. Mitchell
Dallas

Editor's note: On June 2, 1982, the Texas Court of Criminal Appeals rendered a significant opinion affecting the rights of convicted indigents to a review of their cases and the obligations of a counsel regarding Petitions for Discretionary Review by the Court. The author, immediate past president of the Dallas County Criminal Bar Association and a member of TCDLA, disagrees strongly with the AYALA opinion, noting that several judges have used that case to refuse to appoint counsel for indigent defendants to file PDRs. The following is included in a special statement to the Court of Criminal Appeals prepared for a PDR.

Counsel writes to urge and encourage this Honorable Court to explain the holding of Ayala v. State, 56 S.W.2d 235 (June 2, 1982).

On its face, the opinion holds only that the Fourteenth Amendment to the Constitution of the United States does not require the appointment of counsel for Petitions for Discretionary Review and that counsel appointed to represent the indigent citizen is not ineffective if he does not prepare a Petition for Discretionary Review rendered by the Court of Appeals which in counsel’s opinion is subject to such review. Since the opinion does not state that counsel may not be appointed, and Art. 26.05 §1(e) C.C.P., specifically provides for compensation if counsel is appointed, clarification is warranted with regard to the duties of trial counsel and the duty of the trial court.

Counsel believes that the Ayala opinion has engendered much harm because of two erroneous concepts contained therein.

First, this Honorable Court held that State law does not impose a duty on appointed counsel to file a Petition for Discretionary Review. Such is simply not true.

Attorneys are governed by the ethical considerations of the State Bar Rules. EC8-3 of those rules provides that the fair administration of justice requires the availability of competent lawyers. Further, persons unable to pay for needed legal services should be provided those services. Therefore, State law does, in fact, require representation of the indigent. Also see DR6-101(A)(3); DR7-101(A)(2); A.B.A. Standards Relating to Administration of Criminal Justice: “Criminal Appeals,” 1.1(a); 3.2; “The Defense Function,” 8.2; 8.3; “Providing Defense Services,” 2.1; 2.2; 2.3; 2.4. (The issue of compensation which will be discussed later is not relevant at this point.) While Ayala may correctly hold that counsel is not ineffective if he fails to file a bona fide Petition for Discretionary Review, it does not hold that such conduct on the part of counsel is ethical.

The second misconception contained in Ayala is that the filing of a Petition for Discretionary Review should be “far from a matter of routine.”

No such language is contained in Tex. Crim.App.R.302(c). That rule provides that the granting of the Petition should be far from routine, not the filing of the Petition. In determining the duty of counsel with regard to preparing a Petition for Discretionary Review, it is clear. Ethically he must review the decision rendered by the Court of Appeals which in his opinion is subject to such review. Since the opinion does not state that counsel may not be appointed, and Art. 26.05 §1(e) C.C.P., specifically provides for compensation if counsel is appointed, clarification is warranted with regard to the duties of trial counsel and the duty of the trial court.

The duty of counsel and the duty of the trial court when issues are present that would support the filing of a Petition for Discretionary Review, is unclear under the holding of Ayala.

Actually, the duty of counsel is very clear. Ethically he must review the decision rendered by the Court of Appeals to determine whether meritorious reasons exist that warrant the preparation and filing of a Petition for Discretionary Review. If they do not, counsel should advise his client. If they do exist, the Petition must be prepared and filed: the State Bar Rules so provide. The matter of compensation lessens the ethical duty thus imposed upon counsel.

The duty of the trial court in this area is somewhat less clear. However, the Legislature has provided some guidance. Article 26.05 §1(e) C.C.P. provides that counsel shall be compensated (and thus
appointed) for the prosecution of a "bona fide" appeal to the Court of Criminal Appeals.

Where valid reasons exist for the filing of a Petition for Discretionary Review, counsel should be appointed and thereafter compensated. Where they do not exist, such as where the case is affirmed after the filing of a frivolous appeal, no compensation is required.

It is obvious from the Ayala opinion that this Honorable Court is concerned that it not be unduly burdened by the filing of Petitions for Discretionary Review which do not present valid reasons for review. Hopefully, this Court is also concerned by undue burdens being placed upon counsel.

In this cause, counsel was appointed to represent the Petitioner for an appeal to the Court of Appeals. Total compensation received for the preparation of a thirteen page brief containing three points of error was $600.00. The record was over three hundred pages long. Over thirty-five potential points of error were examined by counsel in the preparation of the brief.

This Petition for Discretionary Review is being prepared and filed (an original and ten copies to this Honorable Court, one for the State's Attorney, one for the District Attorney, one for the Petitioner and two for counsel) without compensation because the trial court, Judge Ron Chapman of Criminal District Court, Dallas County, Texas, refuses to appoint counsel because of the holding in Ayala. I do so grudgingly (see the Thirteenth Amendment to the Constitution of the United States) but in fulfillment of my ethical obligation to my client. In counsel's opinion reasons do exist for the filing of a Petition for Discretionary Review.

Article 26.05 §1(c) C.C.P. as enacted by the Legislature provides that the burden of legal assistance to the indigent citizen is one to be shared by all of the citizens of Dallas County, Texas. This Honorable Court and Judge Ron Chapman have made that burden mine alone. I object.

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October 1982/Voice for the Defense 55
Dear Editor:

Number One—I would like to express my appreciation to the Texas Criminal Defense Lawyers Association for making available to me your publication VOICE for the Defense. I am not sure how many other judges read your publication, but I do from cover to cover. I consider it a fine publication, not only for members of your association, but all others who read it.

Number Two—I was particularly amused with the Editor’s Corner in the August issue. I showed the page to the District Attorney, who passed it on to the Sheriff. Even though it was amusing, I expect the 13 rules are much more factual than fictional. I am in no position to confirm or deny any of the rules.

Number Three—Even though I probably should have known, I was not aware of the scholarships made available to various lawyers as a part of the Criminal Defense Lawyers Project. One of our local attorneys brought by the office a flyer on the Criminal Defense Skills Course scheduled for October 14th and 15th in Amarillo. I immediately wrote a letter recommending the lawyer for one of the scholarships. I received notice of the granting of this scholarship by letter dated September 13, 1982. I want to take this method to express my appreciation to the Criminal Defense Lawyers Project and the TCDLA for making these available. The applicant in this case is on our criminal appointments list.

Yours truly,
Kenneth A. Douglas
Judge, 13th Judicial District Court

Dear Editor:

Reading Ms. Hemphill’s outline and bibliography on scientific evidence encouraged me to supplement the resources available to defense lawyers in this area.

(1) Books: The most up-to-date survey of the forensic state of the art is Professor Imwinkleried’s Scientific and Expert Evidence (2d ed., 1981) available from P.L.I.

This also contains current law on scientific evidence rationally and honestly analyzed. This is also true of Methods of Attacking Scientific Evidence by the same author. This book is available from The Michie Company of Charlotteville, Virginia. Such honest analysis cannot generally be attributed to Моенсенс & Imbuk. For a good criticism of Imbuk’s intellectual proclivities see Police Interrogation and Confessions by Prof. Yale Kamisar (Univ. of Michigan Press, 1980).

(2) Periodicals: The legal publication which carries the most in depth and consistent material on scientific evidence (both law and technology) is The Champion, the monthly newspaper of the National Association of Criminal Defense Lawyers. Professor Imwinkleried publishes in The Champion between four and six times per year. Additionally, other authors on this and related topics are also published. These include Dr. Ray Walker on handwriting analysis, George S. Pearl on cross examining the photograph & photographic forgery and Oliver Selfridge of M.I.T. on wiretapping, all within the last year!

(3) Services: As a service to its members the National Association of Criminal Defense Lawyers often makes referrals to scientific experts around the country. Many lawyers find this preferable to developing their own bank of experts in the forensic sciences. These experts are drawn from the listings of the American Academy of Forensic Sciences and the National Forensic Center. Further information about NACDL’s services in this and other areas may be had by contacting our National Office in Houston.

Hoping that this is of use to you readers, I remain.

Very truly yours,
Louis F. Linden
Executive Director
National Association of Criminal Defense Lawyers

Dear Editor:

Allow me to begin by stating that I am aware that you, and the publishing staff of the VOICE for the Defense, are unable to provide legal assistance or advice. Let me assure you that I am not seeking that which you cannot provide.

I am an inmate in the Texas Department of Corrections. I am a "jailhouse lawyer," though I realize that the particular term "jailhouse lawyer" probably causes many attorneys at law to cringe at the thought that legal advice and/or procedures are being processed by these type of people. However, a point that I wish to make is that in some instances the only interested person may just be the "jailhouse lawyer."

I do accept the premise that in a considerable number of cases the person representing himself as a jailhouse lawyer is in fact ignorant of almost all procedures that must be followed, and usually causes more harm than not.

I have been successful in some endeavors, others are still pending at this time. At the moment, a young lady that I know is in jail under an indictment for the possession of a controlled substance, enhanced by a prior conviction for possession of a controlled substance. In the particular court in which she is indicted, the trial judge has made it known that any "deals" must be worked out in advance of an indictment. In this case, that did not occur. Therefore, the young lady must take the action to trial.

I apologize if the recounting of the above seems out of place, but if you will bear with me, maybe I can present a point that you will agree with.

The attorney (court-appointed) in her defense is disinterested, and is passive in her defense, henceforth, I have entered into the picture.

I have a few questions that you may be able to answer for me. They do not exactly deal in legal advice. I hope that you will consider answering them.

I am aware that there are no provisions in Article 4476-15, V.A.C.S. (Controlled Substance Act), for enhancement. I also understand that present thought is that Section 12.42 of the Penal Code allows for the enhancement of a violation of the Controlled Substance Act. I remember that a few years ago (I’m sorry that I cannot be more specific as to the time) there was a controversy about an offense being enhanced by a previous conviction under C.S.A. The offense that was sought to be enhanced was not a violation under the C.S.A. — I did not make a note of that case at the time, and if you are aware of the quality of the law libraries of TDC then you know
they leave something to be desired. If you, or a member of your staff, can recall that case cite then I would appreciate it if you would pass it along to me. Possibly the "Voice for the Defense" published an article concerning the point of law in question, if so it would be a tremendous help if I could get a copy of it.

I am also in need of any case citings that indicate that the C.S.A. acknowledges that the Controlled Substance Act is a total and separate act than the Penal Code.

And finally, concerning case citations, I am aware that an Act by the Legislature must refer to a penalty section. I do know that the C.S.A. does not refer to any provisions of the Penal Code, specifically, sec. 12.42. Therefore, I am considering an attack on the constitutionality of using sec. 12.42 as authorization to enhance. If there are any case cites that you may be aware of that could help I would appreciate it. Again, maybe the "Voice for the Defense" has published some article about attacking the constitutionality of an act, statute, or whatever.

I have only been able to see a few issues of your publication, as I am without sufficient funds to subscribe, and believe that it is extremely helpful. A jail-house lawyer may not be the ideal advisor, but as I've said, they are sometimes the only one that are truly interested. I hope that you will consider my above requests, with the view in mind that everyone is entitled to a tolerably fair trial once, and if it takes a non-lawyer to achieve this, then so be it. Thank you for any consideration that you may give me.

Very truly yours,
James Dean Cummings #249634
Route 4, Box 1100
Rosharon, Texas 77583

*All citations and suggestions should be sent to Mr. Cummings—Ed.*

Dear Editor:

As a subscriber to "Voice for the Defense" I have enjoyed reading about many legal cases and opinions that are published in the "Voice for the Defense." What I am writing to you about concerns the "Insanity defense" under the "M'Naghten Rule." I have searched and searched for anything pertaining to "M'Naghten" to no avail. However, if you could help me with a couple of issues dealing with the subject matter I would appreciate it.

The "Staffen case and the M'Naghten Rules" by H. Malcolm MacDonald, 7 S.W.L.J. (Tex) 109 (1953) and— "M'Naghten is dead—Or is it?" by Nohn L. Moore, 3 Houston L. Rev. 58 (1965). These are the two cases that I need to help me appeal my conviction. If you could help me in this matter I would appreciate it very much.

Sincerely yours,
Jackie Williams #311521
Ellis Unit H-19
Huntsville, Texas 77340

*All contributions should be sent direct to Mr. Williams—Ed.*
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
Board of Directors Meeting
Saturday, September 25, 1982
State Bar Headquarters
Austin, Texas

The Board of Directors of the Texas Criminal Defense Lawyers Association met in Austin in the Board Room of the State Bar Headquarters on Saturday, September 25, 1982, at 10:00 a.m.

I. Roll Call.
Officers present included Clifford Brown, President; Tom Sharpe, Jr., President Elect; Clifton Holmes, First Vice President; Louis Dugas, Second Vice President; and Knox Jones, Secretary-Treasurer. Charles Butts, Assistant Secretary-Treasurer was absent.


Directors absent included John Boston, Allen Caizer, Woody Densen, Tim Evans, Oliver Heard, Jr., Jack Paul Leon, John O'Shea, and Michael Thomas.

Associate Directors present included Gene Caldwell, Bob Estrada, J. Douglas Tinker, Dain Whitworth and John Yeager. Associate Directors absent included Jack Beech, Joseph Calanita, Malcolm Dade, Buddy Dicken, Geoffrey FitzGerald, Charles Rittenberry, and Jack Zimmerman.

Past Presidents present included Weldon Holcomb, Robert Jones, and Charles McDonald.

Guests in attendance included Michael E. Barrow, Houston; Judge Sam Houston Clinton, Austin; Ed Coultas, Dallas; Lee Ann Dauphistot, Fort Worth (Legislative Committee); Gerald H. Goldstein, San Antonio; Julie Howell, Austin; Orin Johnson, Harlingen; Franklin Jones, Jr., Marshall; Jeanne B. Kitchens (CDLP), Austin; Lynn Malone, Waco; David Reynolds, Austin; and Kent Schaffer, Houston.

II. President's Report.
President Clifford Brown opened the meeting with a review of association business transacted since the annual meeting in July.

A. Amicus Standards.
A request from the Oklahoma Criminal Defense Lawyers for TCDLA standards for amicus cases was referred to the Amicus Committee. President Brown noted that he planned to refer as much as possible to committees rather than the entire Board of Directors.

B. Room Reservations.
President Brown asked Board members to be sure to give the home office their charge card numbers when making room reservations for Board functions in order that the association would not be responsible for room guarantees.

C. Judges Mailing List.
The floor was open to debate regarding a request from Kerry FitzGerald that appellate judges be allowed to pay $20 for subscriptions to the VOICE for the Defense and that consideration be given to charging the same to district judges rather than providing complimentary copies. A motion was made by Weldon Holcomb, seconded by Mike Gibson, that the matter be referred to the "Voice for the Defense" committee, headed by Editor Stan Weinberg. Motion carried. Clifford Brown asked that Mr. Weinberg present his committee's recommendation at the next meeting of the Board on December 11 in Dallas.

D. Fifth Circuit Opinions.
President Brown asked the Board to approve his authorization to renew the association's subscription of Fifth Circuit Slip Opinions and Cumulative Digest. The motion, made by Jan Hemphill, seconded by Louis Dugas, was approved by the Board.

E. Texas Press Association List.
Tom Sharpe moved and Stanley Weinberg seconded the recommendation to a mailing list from the Texas Press Association. Motion carried.

F. Membership Directory.
A letter from Michael Lantrip of Austin was read to the Board commending the design and publication of the 1982 membership directory.

G. Bank Signature Card.
Dain Whitworth of Austin was approved to be added to the signature card at Austin National Bank for the purpose of signing checks when Bob Jones was not available. Motion carried.

H. VOICE Article.
Doug Tinker addressed a letter to the Board noting that the recent article attributed to him in Waggoner
Carr's article was originally the work of Joe W. Henry, Jr. of the Tennessee Bar.

I. Charter Members.
Clifford Brown advised Board members that many of our charter members are presently absent from the roll. He expressed his desire to have Jan Hemphill organize a campaign to check the status on those who are not active.

J. Building Fund.
The Building Fund balance was reported to be $2,858.74. Bob Jones reported that several properties were being reviewed.

III. State Bar of Texas—“51 Percent Rule.”
Orrin Johnson, president of the State Bar of Texas, addressed the Board on the subject of the upcoming Bar referendum on the 51% Rule. Mr. Johnson favors the elimination of the present governing rule, referring to it as “archaic and practically unworkable.” The “51% Rule,” he noted appears in Article 3202-1, Section 8(b) of the 1979 Bar Act.

Due to the low voter turn-out in previous well-publicized campaigns, Mr. Johnson feels that with future growth, the restrictive provision is not only detrimental but also is an unnecessary impediment to the Bar’s improvement. Mr. Johnson noted that those who support the rule feel that it protects special interest groups from controlling the State Bar due to the difficulty in administering it. Past President Franklin Jones then addressed the issue in support of Mr. Johnson.

Bob Jones, past president of TCDLA, asked the Board to support Mr. Johnson and Mr. Jones, opposing the 51% Rule. Arch McColl questioned whether dues increases would be covered in the 51% Rule. Mr. Johnson noted that another dues increase was not contemplated for at least five years, commenting that the plan for reserve funds was working as planned and was on target for next year.

Mr. Johnson and other interested parties were invited by the Board to express their opinions further in the VOICE for the Defense. President Brown referred further discussion of the matter to the Executive Committee to be discussed at the December meeting on a motion by David Bires seconded by Richard Harrison. Motion carried.

Knox Jones reported that our net profit for 1981-82 was a record high at $23,325.66. Profits in previous years, he reported, have never been above the $12,485 profit in 1979. The July 30, 1982 financial statement, our first month under Cliff Brown’s administration, indicated a net profit for the month of $5,425.96. The total income for 1981-82 income was $151,425, also a record. Operating funds include a bank balance of $13,000. We have a $30,000 Certificate of Deposit at Austin National in a seven-day renewal at a floating rate of 8.16%. We also have a $37,000 CD at 9.38% which matures on November 2 at the Austin National Bank.

V. Legislative Committee Report—Ed Mallett.
Ed Mallett reported that ten people attended the Legislative Committee meeting on Friday at the home office. He noted that approximately 700 to 1,000 bills related to our practice are introduced in the legislature each session. Mallett noted that he would briefly review the opinions discussed by the committee for the upcoming session.

A. Effective Assistance of Counsel—Mallett reviewed the past history and goals of this bill for providing fair compensation for lawyers in court-appointed cases and noted that this has long been a goal of this association. Last term, he reported, we accomplished our goal only to have the bill vetoed by the Governor. We hope to do a much better job this year educating the Governor’s office and the legislature. With the State Bar’s endorsement of raising compensation, Mallett said he believes that we will get the bill through.

B. DWI—Mallett acknowledged the national movement to crack down on penalties for drunk driving and related offenses. He reported that the consensus of the committee was at the most intelligent approach to this issue would be for our organization to work with other organizations to see that enforceable, fair and effective legislation is passed. He also noted that the committee is of the opinion that a section of the Penal Code be added that addresses DWI and related offenses in various degrees with public intoxication as the least included offense all the way up to involuntary manslaughter.

C. Grand Jury Reform—We almost passed a bill last session which allowed the accused to have a lawyer present with him in grand jury proceedings. Mallett reported that we will address this subject again, and hope to be successful this year.

D. Search Warrants—We are interested in having special protection for the issuance of search warrants for lawyers’ offices as well as the news media.

E. Rules of Evidence—It is the feeling of the legislative committee—and particularly of both Mr. Mallett and Mr. Duncan, who served on the Joint Committee on Rules of Evidence—that codifying the rules of evidence is not a good idea for criminal cases.

F. Aggravated Offenses—Mr. Mallett reported that we have now been working in this area for two
years. It is the feeling of some of legislative committee members that the inability of district judges to give lower penalties in non-violent "aggravated" cases creates unfair and harsh punishment for persons who are only responsible as "parties." The committee is concerned if it is the proper time to approach this issue and would like input from our members.

G. Death Penalty—This organization has traditionally recommended the repeal of the capital murder statute in Texas.

Legislative Committee Report—Rusty Duncan.

H. CIS Contract—Rusty Duncan discussed the proposed contract with Capital Information Service and moved that the association accept their bid to supply us with hard copies of bills and tracking service during the legislative session. The motion was seconded by Bob Jones and carried by majority vote.

I. Co-sponsorship with DAs—Duncan, co-chairman of the legislative committee, reviewed other legislative items discussed by the committee in the Friday meeting at TCDLA headquarters. He reported that the District and County Attorneys Association have solicited our help in several areas. One area for instance is the proposal to increase the minimum amount for felony theft from $200 to $750. Another area being attacked is the mental health provision relating to psychiatrists and psychologists.

J. TCDLA Independent Stance—Reviewing our stance for this session, Mr. Duncan emphatically noted that the association cannot go into this legislative session as polarized as we did in the last session. We were opposed to every bill that came up, he said, noting that this is no way to maintain credibility. He stated that there are areas that in fact need to be changed; we should, he said, be concerned about these areas publicly—surpassing our position as criminal defense lawyers.

We cannot take the passive approach when attempting to amend major legislative bills, Duncan said, urging both members of the Board and the Association to assist with legislative efforts. If the committee does not get input from the membership, decisions will be made without it. We don't want it that way, though, he stated. He urged TCDLA members to work with the committee; he also stated that all viewpoints are needed and welcomed. Duncan said that the committee would try to have a legislative package to submit to the Board for their approval in December.

K. Penal Code Committee Report—Mr. Duncan noted that he would try to get a copy of the Discovery Bill, as amended by the Penal Code Committee of the State Bar, published in the VOICE.

L. Insanity and Incompetency Defense—Regarding the insanity defense issue, Mr. Duncan said that he was astonished at the number of judges and prosecutors attending the first committee hearing in August with the opinion that the insanity defense should be abolished. (Duncan is chairman of the Insanity and Incompetency Defense Committee of the State Bar.) He said, if they have their way, there will be no insanity defense in January. He noted there is another committee meeting in October and requested assistance from the Board; several members of the Board volunteered to attend the October meeting.

VI. Membership.

Jan Hemphill reported that a membership drive was held in Austin on September 24 with five new members and $550 resulting. She noted that she is drafting a letter to local areas suggesting sources for finding prospects. When soliciting members, she noted, please be careful to have the insert with the new rates in the application. Now brochures are being prepared, she said. Clifford Brown noted that the revised brochure would be submitted to the Executive Committee for approval.

The association's policy on the proration of dues was discussed. A proposal was made that renewal or delinquent members should not receive credit even if their dues are paid late in the membership year. The effect on membership drives was debated. Weldon Holcomb moved that all persons paying full dues from September 15 forward, including new membership and renewal membership, receive credit through the cut-off year of 1983. The motion was seconded by Robert Estrada. Motion carried.

VII. Travel.

Ron Goranson, chairman of the Travel Committee, moved that the association accept the low bid from Journey House Travel in Dallas for a trip to Lake Tahoe, March 6-10, 1983. The motion, seconded by Richard Anderson, carried. Goranson noted that the cost of the trip would be $499, double occupancy from Dallas, Houston, Austin and San Antonio. Las Vegas rates will be $589; Amarillo rates will be $574. (El Paso rates to be quoted.) The seminar fee was set at $100. Several local bar associations have been invited to co-sponsor the seminar realizing a profit which is based on the percent of non-TCDLA members attending. The fee includes roundtrip air, baggage handling and transfers, 4 nights at Harrah's Hotel, baggage handling at hotel, tax, tips, escort.

VIII. Annual Meeting.

Clifford Brown, president, asked the board for a volunteer to chair the Annual Meeting committee.
Jack Beech volunteered from the host city of Fort Worth. Brown asked that plans be made now to line up the hospitality room and room quarters.

IX. Publications Committee.
A. Criminal Law Outline—Mr. Connors noted that the Criminal Law Outline is due at the Home Office around October 1. He reported that there would be no delay in mailing as the home office is ready and waiting for the delivery.
B. VOICE—Joe Connors asked more members of the Board to submit articles for the VOICE; he also solicited advertising prospects.
C. Index—VOICE for the Defense—Mr. Connors noted that he had almost completed a topical index of all "VOICE" articles since 1971. The Board discussed publishing the index in the December issue each year. Mike Brown, of Lubbock, suggested that the list be inclusive each year of all previous years rather than a yearly update. Rusty Duncan noted that he would like to break the index down to a word index versus just author, subject and title. He noted that this could be accomplished by assigning several articles to each member of the Board. He noted that this would involve a major project on the part of the home office.

X. Office Procedures Committee.
President Clifford Brown asked the Board's approval for a salary increase for the association's membership secretary from $4.50 per hour to $8.25 per month. The Board approved his request on a motion by Weldon Holcomb, seconded by Richard Thornton.

XI. Adjournment.
The meeting was adjourned promptly at 12:00 noon.

Respectfully submitted,
Rosalind Brinkley
Executive Assistant to the President

FINGERPRINTS, COURT TESTIMONY.
Fingerprint examiner with 28 years experience in large police department. Have testified in many State and Federal Courts. Can answer any questions you have regarding fingerprints. Call anytime.
References. CARL DAY, 3722 Shady Hollow Lane, Dallas 75233, 214/337-2919.

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Board Meeting

Above: President Cliff Brown reports to the Board; next is a scene of the Board meeting September 25 in Austin; bottom left Ron Goranson reports on plans for the spring trip; and right, State Bar President Orrin Johnson speaks.

Membership Drive

Above: Legislative and Membership Committees break and pose: (l-r) Dick Alexander, Mike Borkland, Weldon Holcomb, Waggoner Carr, J. Kitchens (CDLP), Bill Wischkaemper, Cliff Brown, Dain Whitworth, and Rusty Duncan. Jim Bobo and Jan Hemphill preparing for membership drive. David Spencer, Mike Gibson, and Bobo. For the drive these members came from Lubbock: Dick Alexander, Mike Borkland, and Bill Wischkaemper.
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  - Pharmacology/Toxicology
- Legal Aspects of Chemical Breath Testing
  - Breath Test Case Law
- Reports
- The Regulations
- Trouble Shooting
- Glossary
- Index

Anybody who tries a breathalyzer case ought to have this manual. In fact, I've been trying to find out how to get one for years.

Hugh Lowe
Board Certified in Criminal Law
Austin

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- TCDLA Brief Bank service.
- Publications, including the monthly VOICE for the Defense with its “Significant Decisions Report” of important cases decided by the court of criminal appeals and federal courts.
- Attorney General’s Crime Prevention Newsletter. Summaries of latest court of criminal appeals cases available to private practitioners only through TCDLA’s group subscription, included in dues.
- Organizational Voice through which criminal defense lawyers can formulate and express their position on legislation, court reform, important defense cases through amicus curiae activity.
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- Research service available at a reasonable hourly rate; messenger service in Capitol area.

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