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ON THE COVER

CRIMINAL DEFENSE LAWYERS: When will the Public Trust Them? Pictured on the cover are Ron Goranson, left, Cliff "Scrappy" Holmes and Bill Bratton outside the Texas Department of Corrections' Ellis Unit, where death row inmates are housed.

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When one surveys the status of our criminal law statutes it often seems that in our representative form of government, at both the state and federal level, there is no more viable and politically beneficial source of positive controversy than criminal law. It also appears that no legislator is above yielding to the almost bewitching attraction criminal law matters grant to politicians. Consequently, everyone who is anyone is necessarily compelled to unveil for the public's consideration an up-to-date "anti-crime package."

Such is the situation with the Speaker of the House, Gib Lewis (D-Ft. Worth). According to media reports, Speaker Lewis, naturally at a carefully orchestrated news conference, dramatically announced that he will propose several substantive changes to our criminal codes. He will offer an amendment to the Penal Code that will make multiple murders a capital offense. The reason for this proposal is the tragedy at a night club in Dallas where a number of people were killed for no apparent reason.

But, another tragedy is the popular trend of altering the status of the criminal laws solely in response to a single, bizarre criminal act. If society wants a death penalty, which any capital murder jury voir dire will confirm, then multiple murders would seem to qualify as an appropriate member of this rather select group of offenses. Nonetheless, it is truly unfortunate that legislation of this nature is born from a single incident rather than the creativity of our representatives.

Speaking of tragedies, legislation to unsunset the wiretap law will be offered by Speaker Lewis. In his comments to the press Speaker Lewis said that since its inception there have been fifteen investigations resulting in forty-two wiretaps. From these large numbers arose 122 arrests, and fifty-one convictions. To put this in proper perspective, one must recall that with the passage of the wiretap bill the legislature allocated to the Department of Public Safety over $600,000 to begin its bugging efforts.

Simple mathematics reveals that this has not been a particularly efficient means of utilizing the funds available for law enforcement. But, irrespective of its apparent lack of appreciable success, the wiretap bill will probably be renewed without an expiration period.

In addition to these issues that old demon "fundamental error" found its way into Speaker Lewis' plans. According to Lewis something has to be done about this unfortunate state of events that allow criminals to go free just because someone made a silly little mistake. Really, the solution is quite simple, but historically not particularly likely to occur: have prosecutors read the indictments they are charged by law with preparing, and have the judges impartially read the jury charge before it is given to the jury.
A recent Dallas Life Magazine article by Bill Minutaglio attempts to explore and explain the motivations and psychology of the “death row lawyer.” To spite of the photography (your’s truly looked more like a death row candidate than a death row lawyer), the article is thought-invoking, both for lawyers and the general public. Though limited in approach, the article does address some of the major problems of death penalty lawyering. It portrays the death row lawyer as committed, over-stressed and underpaid. It rightly describes lawyers involved in death penalty works as a close-knit group, but knits the group a little too tight. There are almost 180 inmates now on death row in Texas. Capital cases are being tried week after week across this State. While the article names 8 or 10 lawyers currently active in death penalty cases, we know there are many, many more throughout this State who carry the same burdens. Those other lawyers deserve equal recognition, and the appreciation of the bar, generally, for accepting a responsibility which, in all fairness, belongs to the entire bar.

It interested me that some of the lawyers interviewed had no moral convictions against the death penalty, and some, seemingly, even favored capital punishment. I suppose my own strong convictions in that area of thought had closed my eyes to the fact that criminal defense lawyers are a diverse group of individuals, holding differing views and opinions in all areas of human endeavor. I do hope, however, that criminal defense lawyers are of a single mind when it comes to the proposition that every death row inmate is entitled to a complete and detailed review of his case, by every legitimate tribunal and to counsel who will competently and energetically pursue that review. If that is to be accomplished, something must be done, probably legislatively, to provide the resources required. The public and the organized bar cannot continue to place the entire burden of death row representation on a few lawyers whose commitment costs them dearly. If the public insists on the death penalty, and those who are sentenced accordingly are afforded that complete review, then the legislature should address the issue of how the two requirements are to be met. I have proposed, privately, that the State should provide funding for legal counsel in death penalty cases, beginning with affirmation in the Court of Appeals. There would be little difficulty in designing a system for appointment of counsel, record keeping requirements, compensation notes, and reporting responsibilities. Perhaps this kind of appointment and compensation of counsel could be addressed in the Effective Assistance of Counsel Bill, which will surely be introduced in the upcoming session of the legislature.

It appears reasonable to me that if avenues of review of a death penalty are available to those whose resources pay for such, the State is obliged to provide the same for indigent death row inmates. At the present time, as many of you know, all public resources vanish at affirmation by the Court of Criminal Appeals. From that point forward, through state and federal post-conviction remedies, counsel is pretty much on his own. Some expenses may be covered by some anti-death penalty group, but more often than not, the lawyer simply absorbs them as an added cost of doing pro bono business. Adding to the expenses (travel, telephone, secretarial, printing, duplication, etc.) the countless hours donated by counsel, the financial impact of death row lawyering is evident. More than anything else, it is the prospect the future holds (for stressful hours and economic burdens) that causes lawyers to shy away from capital cases, ab initio. Something should be done to rectify this situation, and the time is ripe for action.

Without a doubt, this session of the legislature will address issues involving the management and direction of the Texas Department of Corrections, the role of the Board of Pardons and Paroles, sentencing practices and judicial administration. The topic of effective counsel for death row inmates and compensation of such counsel is current and important. The idea that “long, dragged-out appeals for death row inmates are just designed to make lawyers rich,” as voiced in a recent Austin American-Statesman “letter to the editor” should be dispelled once and for all. But lawyers who work to provide the representation for the inmates should be fairly compensated. You can bet your bottom dollar that the doctor who performs the appendectomy on a death row inmate is fairly and promptly compensated, as is the dentist who pulls his tooth. Lawyers deserve no less.

A well-placed suggestion to your senator or legislator may move this idea to fruition.

Until December,
Scappy
The fight can stretch over years, and there's a very good chance they'll lose. And if they do, they lose not only the case but the client. Who are the people who take such chances?

Death Row Lawyers

by Bill Minutaglio*

OUTSIDE Richard Anderson's Oak Lawn office, it's a clear, crisp fall day. Inside, surrounded by books and papers, Anderson keeps one eye on a TV set flickering with images of a late-season baseball game. As the Mets make a futile stab at the Cubs, there is a sense of immunity against anything more complex than good conversation and sports.

But Anderson is talking in soft tones about gruesome murders. About, in his polite wording, the most unsavory people in the world. About how he—a bright, bespectacled 36-year-old Dallas attorney—and his peers have found themselves immersed in those murders and faced with more trauma and challenges than they ever bargained for.

"Let me put it this way," says Anderson. "I don't want to have to think five or six years down the road that someone dies because of something I did. That's just a heavy psychological burden. I know from people who maybe have never recovered from it."

Anderson is a member of a special Texas fraternity—a loose network of intense, driven lawyers who represent


Richard Anderson in front of his Dallas office: "Criminal defense lawyers rarely get the chance to play God with their clients. It's pretty heavy."
people destined for death row or already there. These are lawyers for whom winning is everything. If they lose a trial or an appeal, not only do they lose face in the close-knit, competitive world of criminal defense, they may lose a client. And there’s always the danger of earning years of notoriety as an attorney whose client was executed.

Couples that with heated criticism from proponents of the death penalty who think defense lawyers are deliberately obstructing speedy justice. Throw in the fact that most of these lawyers have not been hired but are court-appointed or volunteers—and that death row cases, if a lawyer gives his full attention, will turn into losing financial affairs. Add the intense stress that emerges from philosophical differences between the lawyer and members of his family, his church, his firm, his neighborhood.

The end result is that some attorneys simply shatter under the pressure: Stories abound about nervous breakdowns, severe weight losses and drinking bouts. A Houston attorney who worked on the celebrated case of Ronald Clark “Candy Man” O’Bryan, executed this year for giving his child cyanide-laced candy, had frequent, recurring nightmares. That same attorney, Stanley Schneider, says a friend who represented James David Autry—executed for committing murder at a Port Arthur convenience store—had to be hospitalized after Autry’s death.

Few death row lawyers talk freely about the stress, but they are acutely aware they are playing for keeps. Three people have been executed in Texas since the death penalty was reintroduced almost a decade ago; of the 1,400 prisoners on death row in the U.S., 175 are scheduled to die by lethal injection in Texas. Only Florida, with close to 200, has a greater number or death row.

And basically, no lawyers want to represent the “next loser,” or be put in a position very few people ever encounter: “Criminal defense lawyers rarely get the chance to play God with their clients,” says Anderson. “It’s pretty heavy.”

On a January Day three years ago, a young loan officer at First Texas Savings on Berkshire Lane was killed by a bullet fired at close range into his face. Police said a man named Ricky Eugene Morrow walked into the bank, pointed a gun at Mark Frazier and fired.

The murder sent shock waves through a city proud of pointing to people who migrate here and become overnight successes. The 26-year-old Frazier had come to Dallas from Boston and landed his job within three days of arriving. He was outgoing, popular and described by his mother as a “go-getter.”

Three years before that incident, there had been another, equally grim killing in Dallas, another assault on the Dallas success story.

Beverly Sue Vickers, 37, one of the most proficient of Mary Kay Ash’s saleswomen, had lost her pink Cadillac at the Town East Mall in Mesquite. Police said two men offered to help the personable woman find her car. Instead, they took her to Lake Ray Hubbard. She was raped. The men attempted to strangle her by hand. When that failed, they killed her by stringing her between two trees. Police arrested two men—James Edward Nolan and another man who later committed suicide in jail.

At first glance, there was little to link the two murders—except for the instinctive and collective revulsion that spread through Dallas in each case. The cases were prominently covered in the media. Several interviews with horrified relatives and co-workers were published and broadcast.

The community loathing spread to District Attorney Henry Wade’s office—an office whose prosecutors have a national reputation for being extraordinarily selective when it comes to seeking the death penalty. “Our policy differs from other district attorney offices in other parts of the state,” says Norn Kinne, Dallas’ chief felony prosecutor. “We don’t actively try a case for death unless that’s what we expect to get. A life sentence for us in a capital murder case is a lds.”

Wade’s prosecutors didn’t want a loss in the Frazier and Vickers murders; they sought to convince juries that Morrow and Nolan were no longer fit to live.

That decision thrust each case firmly back into the spotlight. But lost in the miles of publicity surrounding the cases was the fact that they became a harrow-
and Goranson are handling his appeals. They seem inclined to stick with the case as long as possible, even though the accused in a capital murder case is entitled to court-appointed representation only through the trial and the first appeal.

Anderson still meets and corresponds with the two other attorneys. In fact, lawyers around the state who handle trial and appellate work in capital punishment cases frequently share information.

Now, though, Anderson has turned more attention to a new client—another court-appointed case. He represents death row inmate Johnny Dean Pyles, convicted of killing a Dallas County sheriff's officer in 1982. And, Anderson is keeping an eye on other death row cases as one of the members of the Death Watch Committee, affiliated with the Texas Criminal Defense Lawyers Association. The committee monitors death penalty litigation, offering advice on the lengthy and difficult legal maneuverings in those cases.

But more difficult to answer than points of law is one question Anderson and the other death row lawyers constantly address. It is an internal problem, one of their own making—their personal feelings about "legal" death.

"My stand on capital punishment?" says Anderson slowly. "I honestly don't know where I fall. There are a couple of people I've interviewed where I have honestly said I don't think those folks deserve to live. But my feelings are ones that I really prefer to keep private."

Rusty Duncan outside the Denton County Courthouse:
"We are viewed as left-wing liberal, and that's not necessarily true."

What then was Anderson's compensation? He echoes the other death row lawyers—he talks about ego gratification and the knowledge that he gave a condemned man a fair shot at different legal avenues. And he points out that the Nolan case represents the only time since 1973 that the state has sought the death penalty in Dallas County and not gotten it. After a hung jury, Nolan received, instead, three consecutive life sentences for the rape-murder of Ms. Vickers. "In one sense, it was a victory," Anderson says.

There has been no such victory for Morrow. He is on death row, and Brattan

and Goranson are handling his appeals. They seem inclined to stick with the case as long as possible, even though the accused in a capital murder case is entitled to court-appointed representation only through the trial and the first appeal.

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ON A SEPTEMBER DAY IN
Denton, an impeccably dressed and utterly confident attorney named Rusty Duncan is listening to classical music in his wood-paneled office. In Florida, a 46-year-old man named Earnest Dobbert has just died in the electric chair for the murder of his 9-year-old daughter. Duncan is familiar with Dobbert's case; he also knows the difficulties of representing a condemned man.

Most criminal defense attorneys are loners. They do not operate out of large law firms. They are not able to rely on the firm when they need extra manpower or money to work on a case. There are a few exceptions in the Dallas area, and Duncan, a nationally known, high-ranking player in the Texas death row legal frater-
nity, is one: He is a member of Philips, White, Davidge, Griffin, Shelton, Eames, Wood and Duncan. He admits “the other people in my firm do silk-stocking work” while he concentrates on criminal cases.

Duncan is a classic Texas mix of intellect and good of boy-isms. He smoothly shifts from high-minded philosophy to talk about “the s-- hitting the fan.” And when he talks about the latter, he refers to one of the biggest burdens a death row lawyer bears: unyielding and, at times, unbearable community pressure.

“We get typecast,” says Duncan, 39, who as of this writing is the attorney for death row inmate Joseph Jernigan, convicted of the murder of an elderly man during a burglary. “We are viewed as left-wing liberal, and that’s not necessarily true.”

That easy stereotype—that an attorney谁 represents someone the state wants executed is a “crazed pinko,” as Duncan says, or is a zealot trying “to spring” the criminal—is a crushing onus that manifests itself in many ways.

“We (his firm) represent the banks, we represent the savings and loans. It has caused them (the other lawyers) some difficulty, frankly, with me doing the type of work I do,” Duncan says.

More immediate, personal affronts come from people incensed by his representing criminals, by people who assume he’s a fervent opponent of the death penalty: “You’ll get somebody calling your home in the middle of the night. They’ll call and say, ‘I know you’ve got a child; how would you like it if that happened to your child? That can be scary, and if you aren’t scared, then you are damn foolish.’”

At least one case has left Duncan scared:

In December 1982, the Texas Court of Criminal Appeals reversed the death penalty sentence of a Denton man accused of raping and murdering a teenager in 1978. Duncan and his co-counsel, Bill Wood, represented the man. On appeal, he received a 30-year sentence, and then, this past spring, he became eligible for parole. It wasn’t granted, but Duncan and Wood experienced some anxious moments, complete with hate mail, hate phone calls and hateful conversation. “It was an extremely difficult period, one that I had thought at the time, we would never survive,” says Duncan.

It was not the first troubling moment for Duncan on that case. During the original trial, work was being done in the firm’s historical building directly across from the downtown courthouse square in Denton. Duncan recalls a conversation with a construction worker.

“You know I was having coffee with my friends this morning, and I’ve got to say none of us really appreciate what you’re doing,” said the man. “How could you possibly try to get this guy off?”

Duncan got mad: “I haven’t gotten anybody off in my life. I have tried to represent these people the best I can. Besides, the people who criticize me are the first ones to knock on my door when they get in trouble.”

The construction worker replied “Yeah, but those are the people who never get in trouble.”

Duncan, who only handles criminal defense work, became even angrier: “Bull! Those are the kinds of people who subsidize my practicing criminal law. I don’t make any money handling these (death penalty) appointments. It’s those people you’re talking about that come in and pay me.”

Duncan reflects on the exchange. He has gone into a file and pulled out a thick stack of papers detailing the hundreds of hours he has sunk into death penalty cases—hours he will never be paid for.

“That whole kind of thing is typical. It’s a fact of life you have to live with. There is such a contradictory attitude toward people that handle these kinds of cases,” he says. “As much criticism as society imposes, I’ve never had a client come in here and say they do not want constitutional rights. The criticism I get for handling these cases is just selfish criticism.”

In keeping with the fees laid down by Texas’ top defense attorneys, Duncan normally charges $150 an hour for his services. But court-appointed attorneys, thought they are compensated by the counties in which their cases are tried, say they rarely earn what they would if they had been hired rather than appointed. The law provides that attorneys be reimbursed in capital punishment cases at not less than $250 a day for trial work and at least $500 for the first appeal to the Texas Court of Criminal Appeals. Other expenses usually are borne by the attorney.

Duncan estimates hundreds of hours go into research, jury selection and trial
work, and the seemingly endless array of appeals through federal courts and the U.S. Supreme Court go completely uncompensated.

"Take it from there," he says. "It can financially break you."

What he sees as a confused set of standards for death penalty cases has altered Duncan's view of the capital punishment issue. "When I was in law school, Attilla the Hun would have looked like a liberal. I had been raised that way. I thought the greatest thing in the world was blowing up Vietnam. I thought it (the death penalty) was great. I couldn't understand why we weren't executing more people."

"Then all of a sudden you recognize that our criminal justice system ain't what it should be. All I know is that the system is abused, by the police, the judiciary and prosecutors. That can change your opinion.

"Philosophically, I'm not necessarily opposed to the death penalty. This is going to shock a lot of people when it comes out. But my complaint about the death penalty is the socially imposed fallacy that surrounds it. If we want, as a society, the death penalty, why are we so ashamed of our own attitudes about it?"

"Now, I'm not saying I could go into a jury room and say, 'All right, I know what he did, let's kill him.' All I'm saying is that the (expletive) needs a chance. He at least deserves a shot at what the law gives him. That's all I want to do."

ILLY G. HUGHES JR. is a registered lobbyist and an artist. He is also one of Texas' death row inmates. In 1976, he was convicted of shooting a 25-year-old Texas state trooper. He has been imprisoned in the Texas Department of Corrections in Huntsville for close to eight years.

Recently, Hughes wrote The Dallas Morning News: "I have seen and heard about all the problems with lawyers, and I myself have gone through almost eight lawyers and may go through more. As for court-appointed lawyers, they are sell-out artists. These are lawyers who do not have a practice and need the money and make deals with D.A.s (district attorneys)."

In Texas, a court-appointed lawyer's legal obligation to his client ends when a conviction has been affirmed by the Texas Court of Criminal Appeals. At that point, attorneys withdraw for different reasons: Some, in order to convince a court their client deserves acquittal or a lesser sentence, may drop out, telling a court they provided "ineffective counsel." Another attorney can take over and try to prove the client didn't get a fair shake because the previous counsel hadn't done a thorough job. Occasionally, lawyers will even deliberately "flaw" their cases so another lawyer can later "discover" that flaw and argue that the client's previous counsel had been ineffective.

Still others drop out because they've become too emotionally attached. Some leave thinking there might be a lawyer available who is better at appellate work. Then there are those who drop out because, after the first appeal, the money dries up—unless their client is wealthy enough to pay for their services. But, as one Dallas attorney says, "There are damn good lawyers out there." And a Dallas attorney adds, "There are damn few Cullen Davises."

One death row inmate wrote to the Dallas Morning News, "If there's no provision for counsel after the first appeal, knowledgeable sources believe that a considerable number of death row inmates are without counsel," said Dershowitz, in a speech examining the treatment of capital punishment issues in various states. "The names, addresses and phone numbers of lawyers are sold and bartered in prisons—like cigarettes. Occasionally, a lawyer will be found who is willing to take over the case. If that fact becomes known, he is immediately deluged by requests from other inmates."

Death row inmates often have to rely on the different capital punishment monitoring groups: "The major anti-death penalty organizations, often with a tiny budget, race around in a frenzy seeking volunteer counsel, often from out of state, to file papers at the last minute," said Dershowitz. "These organizations feel, often for good reason, appointment of local, often unqualified attorneys by unsympathetic judges. Many of these lawyers, according to several knowledgeable sources, "file a pro-forma motion and get on with their real practice."

CLIFF HOLMES REMEMBERS the call he received from the ACLU just before he left for a vacation in Wyoming. It concerned Delma Banks, 25, sentenced to death for an April 1980 murder in Texarkana.

Banks' trial counsel withdrew from the case and didn't represent him on appeal, says Holmes. Another attorney took Banks' case up on appeal with the Texas Court of Criminal Appeals and the U.S. Supreme Court. Then Holmes received the phone call. The ACLU asked him if he would take the case through the other appellate processes. Holmes took over the case in mid-December of 1983. Banks was facing an execution date of Jan. 4, 1984.

The Monday before Banks was scheduled to die, Holmes drove to Texarkana in an attempt to get Dist. Judge Leon Pesek to postpone the execution. Holmes, whose office is decorated with pictures of John Wayne and Western memorabilia, is usually considered by his peers to be completely unflappable.

But two days before Banks' execution date, Holmes says he was feeling the pressure. After he was turned down in Texarkana, he drove to Austin with a last-minute appeal to the Court of Criminal Appeals. By 8 a.m. Tuesday, Holmes was striding up and down hallways, demanding to see judges, cajoling clerks, pleading for an appointment. Finally, a stay of execution was granted. He hopped back in his car and drove to Huntsville. He wasn't taking chances. He wanted to hand-deliver the stay.

Meanwhile, Banks was waiting to die. He had told other inmates that his "time" had come.

Then something extraordinary happened: When a clerk from the Court of

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Criminal Appeals in Austin called the Texas Department of Corrections in Huntsville with orders to halt the execution, it was discovered that no one at the TDC was aware an execution was scheduled for the next day.

Holmes knew it, Banks was awaiting it, the various judges and prosecutors were all expecting the lethal injection. But somehow, the TDC had not received a death warrant. The case became almost instantly infamous as “The Execution That No One Showed Up For.”

“Why the hell are we in such a hurry to kill these people?” says Holmes now. “It was way too close. It’s scary, it’s wild.”

Like other death row lawyers, Holmes says these dramatic last-minute stays—aside from making good fodder for the media—put gray hairs on his head. And they also reveal for him the humanity behind the condemned person.

“It’s kind of an ultimate trust, and you feel it from them in the way they look at you and the way they talk to you,” he says. “In fact, not just conceptually but in fact, they have said, here is my life, you are responsible for it.

“I read where one lawyer went down and viewed an execution,” he says. “I’ve never had one executed, but I can guarantee you, I won’t be there. Ain’t no way. I couldn’t watch it. I just couldn’t.”

He points to a client’s correspondence on his desk. It is from Emmett Murray Holloway, on death row for the murder of a policeman. “Murray and I are friends. He sends me letters with those little happy faces on them. He’s just a sweet man,” says Holmes. “When I agree to undertake a client’s case, I accept that trust he puts in me and try to do the best I can. I get personally involved, extremely personally involved. I believe you can understand, and I don’t mean condone, but understand what they did and why they did it.”

Richard Anderson provides a partial answer for the motivations of attorneys such a Holmes: “Do we have a legal obligation to represent these people? Not at all. Do we have an ethical obligation? That’s up to the different lawyers to decide.”

VINCENT PERINI is one of Dallas’ most prominent criminal defense attorneys. Often people mention Perini and Mel Bruder as the “grand old men” of Dallas capital punishment cases. Perini is a former president of the Criminal Defense Lawyers Association, and he helped write the Effective Assistance of Counsel Act, which, in part, aims to improve compensation for appointed attorneys.

As of this writing, Perini represents Ronald Chambers, sentenced in Dallas County for the beating death of Mike McMahon, a 22-year-old Texas Tech engineering student.

Though he is concerned with ensuring that criminal defense attorneys get paid for their work, Perini is also worried about the psychological wear and tear on attorneys representing people society seems to have given up on.

“These are very heavy numbers,” says Perini. “You become a Christ figure. You take on the burdens of this man, shoulder ing it together. It’s like carrying Christ’s cross.” Perini describes the network of people involved in the death row legal fraternity as “kind of a righteous underground. It has all the elements of early Christianity.”

Other attorneys forego the religious references, referring to death penalty cases simply as major “life changes.” Ron Goranson, Morrow’s co-counsel along with 35-year-old Bill Bratton, has been appointed to four death penalty cases.

(continued on page 15)
SEARCH AND SEIZURE: A federal agent in Shreveport received a telephone call from a federal agent in El Paso to the effect that based on an anonymous tip from an unidentified person in Florida, two individuals identified as Glass and Flores would arrive in Shreveport on a flight from Ft. Lauderdale. The anonymous tip also contained a description of the two individuals, but it failed to include any allegation that the two individuals could be carrying drugs or illegal substances, etc.

The two individuals deplaned in Shreveport and were identified by law enforcement agents. The two individuals were stopped and when asked, supplied identification. D Glass produced identification and airline tickets in his own name, while Flores produced airline tickets which reflected he was traveling under an assumed name.

The officers then told Glass and Flores that they believed they were carrying illegal contraband. The agents also asked for permission to search their persons and luggage and both said ok. Both men were escorted to the mens room, search and cocaine was found in Glass' socks. A search of Glass' luggage revealed additional evidence.

On appeal, the Court held that the investigative stop, which preceded the request for consent, was invalid and that the consent was the result of the illegal stop. As to Glass, the Court held that the agents had no specific and articulable facts which, taken together with rational inferences, warranted the stop. Under Reid v. Georgia, 448 U.S. 430 (1980), the Court concluded that Glass was illegally stopped.
MISJOINDER: Two Ds were indicted in a six count indictment as follows:
Count 1 - mail fraud in connection with a fire insurance claim on a
restaurant in 1978 (D #1 only); Counts 2 through 4 - mail fraud in
connection with a fire claim on a duplex in 1980 (both Ds); Count 5 -
conspiracy to commit mail fraud in connection with a flower shop in
1980 (both Ds); and Count 6 - perjury before the grand jury relating to
the flower shop (D #2 only). Ds moved to sever counts under Rule 8(b),
F.R.C.P., and the District Court overruled the motion.

On appeal, the Court considered the critical question: whether all
of the counts are part of the same series of acts or transactions. The
Court held that since there were no facts which could be proved to
establish guilt under Count 1 which would also establish any of the
offenses alleged in Counts 2-6, Count 1 was improperly joined. The Court
also noted that Count 1 was improperly joined as to D #2 since he was not
involved in the transaction upon which Count 1 was based.

SUFFICIENCY OF EVIDENCE/MAIL FRAUD: The Court also rejects Ds' argument
that mailings after the date of settlement with the insurance company
cannot be in furtherance of the alleged scheme to defraud, distinguishing
Cir. 1980) by holding that the mailings (proof of loss statements) were
intended to and did have a lulling effect on the insurance company.


JURY INSTRUCTIONS: D, charged with mail fraud, introduced evidence of the
defense of good faith, which is a complete defense. U.S. v. Goss, 650
F.2d 1336, 1344 (5th Cir. 1981). D also requested charge on good faith,
but trial judge refused to give it and based his refusal on the fact that
he was charging the jury on specific intent.

The Court cited Goss and noted that a charge on specific intent is
insufficient since it does not direct the jury's attention to the defense
of good faith. Accordingly, the Court reversed even though the D's
requested instruction "was overly broad." Slip Op. at 4446.


APPEALS: On October 18, 1983, District Judge denied D's motion for a new
trial based on Rule 33, F.R.C.P. On November 2, 1983, D filed notice of
appeal. On November 7, 1983, the District Judge's order of October 18,
1983, was "entered" on the criminal docket of the case. Similarly, on
November 7, 1983, D's notice of appeal was docketed. Since Rule 4(b),
F.R.A.P., provides for notice of appeal within 10 days "after the entry
of the judgment or order appealed from," the Government asserted that
notice of appeal was untimely. However, Rule 4(b), F.R.A.P. also states
that a notice of appeal filed after the announcement of a decision,
sentence or order "but before entry of the judgment or order shall be
treated as filed after such entry and on the day thereof." Accordingly,
the notice of appeal was timely.
JURY INSTRUCTIONS: D, accused with failure to file income tax returns and for filing false withholding forms, raised the defense of good faith belief that wages were not income. Over D's objection, the District Court charged the jury that, as a matter of law, a good faith belief that wages are not income is not a defense.

On appeal, the Government acknowledged that a claim of good faith would negate the specific intent required under the statutes involved, but argued that a claim of subjective innocence (good faith) must be "objectively reasonable." In other words, the Government asked the Court to allow District Judges to review claims of good faith to ascertain if they are sufficiently credible to justify a jury instruction.

The Court noted that although wages are income as a matter of law, it was still up to the jury, not the judge, to ascertain whether D, in good faith, did not know that the law included wages in taxable income. The Court drew a distinction between willful defiance of a statute and ignorance of the existence or meaning of the statute. Thus, the Court held that the judge erred by instructing the jury over the D's objection.

PETITE JURY FOREMAN: On appeal, D urged for the first time that the District Judge had committed reversible error by appointing the jury foreman. The Court did not find that the procedure constituted plain error under Rule 52(b), F.R.C.P., but it did note the potential effect such action could have on the dynamics of jury deliberation and the potential for unwanted and unintended appearance. Accordingly, the Court essentially condemned the practice by stating:

While we are not prepared to strike down the practice, as prejudicial error or as a matter of superintendence, for we are not persuaded that the utility of the practice outweighs its potential for prejudice; it ought then to be judiciously engaged in, if not abandoned for lack of demonstrated worth.

SENTENCING - RIGHT TO ALLOCUTION: D pleaded guilty to wire fraud. Sentencing was deferred (i.e., imposition of sentence was suspended under 18 U.S.C. §3651, as opposed to execution of sentence being suspended) and D was placed on probation. D's probation officer subsequently filed a petition alleging that D had violated three conditions of his probation. After a hearing, the District Judge revoked D's probation and proceeded to impose sentence. However, sentence was imposed without addressing the D personally and ascertaining if the D wanted to make a statement or present any information in mitigation of punishment, as required by Rule 32(a)(1)(c), F.R.C.P.

On appeal, the D asserted that the Court's non-compliance with Rule 32(a)(1)(c) entitled him to a remand for re-sentencing. The Court stated...
that the right of allocution was an absolute right under the Rule and remanded the case.

NOTE: The right to allocution at the probation revocation would not have been available if the District Court had not suspended the imposition of sentencing. If he had previously sentenced D but suspended the execution of sentence, no right of allocution would have been available. Cf. Rule 32.1(a)(2)(c), F.R.C.P.


DOUBLE JEOPARDY: D, a pilot, was involved in four different incidents of smuggling or attempted smuggling of cocaine from Columbia into Louisiana. Four different indictments were returned against D (and various other actors in the four incidents).

Indictment #1, based on a July 1982 smuggle, charged conspiracy to import, conspiracy to possess with intent to deliver, importation and possession with intent to distribute. Each count encompassed the time period of June 1, 1982, through June 24, 1983, and referred to 100 kilograms of cocaine.

Indictment #2, based on an August 1982 smuggle, charged conspiracy to import, conspiracy to possess with intent to deliver, importation and possession with intent to distribute. Each count encompassed the time period of June 1, 1982, through June 24, 1983, and referred to 250 kilograms of cocaine.

Indictment #3, based on an October 1982 smuggle, charged conspiracy to attempt to import and to import, conspiracy to attempt to possess and to possess with intent to distribute, and an attempt to import [this indictment is not directly involved in the appeal].

Indictment #4, based solely on a planned but unexecuted smuggle after October 1982, charged conspiracy to import cocaine and conspiracy to possess cocaine with intent to distribute. Both counts encompassed the period of time after October 1, 1982.

D was tried and convicted of both counts in indictment #4.

Although the opinion is not at all clear as to the procedural history after D's trial on indictment #4, it appears as if D was scheduled to be put to trial on indictment #1 and #2 when he filed motions to dismiss due to double jeopardy, for the Court stated the issues as follows:

"(1) do prior convictions of conspiracy to import cocaine, 21 U.S.C. §§ 963, 952, and conspiracy to possess with intent to distribute cocaine, 21 U.S.C. §§ 846, 841(a)(1), based upon one shipment of cocaine, bar the pending prosecution for the substantive offenses of importing and possessing cocaine with intent to distribute, 21 U.S.C. §§ 841(a)(1), 846; 18 U.S.C. § 2; and (2) do those
convictions bar the prosecution of charges of conspiracy to import cocaine and of conspiracy to possess with intent to distribute cocaine based on earlier shipments?"

With regard to the first issue, the Court cited U.S. v. Kalish, 734 F.2d 194 (5th Cir. 1984) in support of its holding that successive prosecutions for conspiracy and underlying substantive offenses are not barred by the Double Jeopardy Clause.

However, with regard to the second issue, the Court held that the convictions for conspiracy to import cocaine and conspiracy to possess with intent to distribute barred a second prosecution for similar conspiracies based on the earlier shipments. Utilizing the standard announced in U.S. v. Marable, 578 F.2d 151, 154 (5th Cir. 1978), the Court stated:

"we conclude that Nichols participated in a single conspiracy to commit multiple violations of the drug control law. That conspiracy (actually conspiracies since each statute-importation and possession with intent to distribute-may be the subject of a separate conspiracy charge), had an essential continuity in personnel, a consistency in method, an identical base of operation, and a singleness of unwavering purpose."

JONES V. THIGPEN, No. 83-4085, Rev'd in part, Judge Reavley, 9/17/84 (Slip Op. 5711)

CAPITAL MURDER/DOUBLE JEOPARDY: D and an accomplice committed a robbery. During the robbery, the owner of the store was killed. D, tried separately from his accomplice, was convicted and assessed the death sentence. After exhausting state appeals, he filed a writ in federal court. D alleged that under Enmund v. Florida, 458 U.S. 782 (1982), his conviction and the imposition of the death penalty could not stand since there was neither a jury finding or sufficient evidence to show that he killed, attempted to kill or intended to kill the owner of the store. The District Court found, inter alia, that the sentence violated Enmund, but authorized the State to hold a new sentencing proceeding at which D would again face the death penalty.

On appeal, the Court initially held that Enmund applied retroactively to D's case. The Court then held that there was no evidence from which a rational trier of fact could have found that D killed, attempted to kill or intended to kill. Furthermore, the Court held that the trial court's instructions did not require the jury to find that D killed, attempted to kill or intended to kill before it imposed the death penalty. Accordingly, the Court upheld the District Court's conclusion that the imposition of the death penalty constituted cruel and unusual punishment in violation of Enmund.

The Court then addressed the double jeopardy issue. Under Bullington v. Missouri, 451 U.S. 430 (1981) and Burks v. United States, 437 U.S. 1 (1978), the Court held that D could not again face the death penalty.
The Court’s holding was based on the inability of the government to show at the first sentencing hearing that the D killed, attempted to kill or intended to kill.


**JURY INSTRUCTIONS:** D was charged with conspiracy in restraint of trade (bid rigging) and mail fraud. D presented evidence that its agents had merely intended to form a joint venture with an alleged co-conspirator, as opposed to soliciting a complimentary, non-competitive bid (bid rigging). D requested a jury instruction to the effect that it is not unlawful for two bidders to discuss their bids for purposes of joint venture bidding, but the District Court did not charge the jury on this defensive theory.

On appeal, D argued that the failure to charge the jury on this theory constituted error. The Court first noted that since D's objection to the District Court's failure to give the requested instruction came only after the jury began deliberating, the objection was not timely under Rule 30, F.R.C.P. The Court also held that since D's counsel argued the defensive theory to the jury, the failure to charge the jury was not plain error under Rule 52(b), F.R.C.P.

**NOTE:** Rule 30 requires an objection to preserve error. Merely filing a requested instruction, without more, does not preserve error. Thus, the best way to preserve charge issues in federal court may well be the following: (1) have a charge conference (on the record) prior to final arguments; (2) voice all objections to the charge at said conference after the District Judge finalizes the charge and obtain rulings thereon, (3) ask that when the Court retires the jury after final arguments and the reading of the charge, he specifically tells the jury not to begin deliberations; (4) renew all objections after the jury has been retired, as described in (3) above, again obtain rulings thereon, and then have the jury brought back in for an instruction by the District Judge to the effect that the jury can now begin its deliberations. This procedure should avoid any possibility that the judge may retire the jury to begin its deliberations prior to the time you have preserved your objections.


**JURY INSTRUCTIONS:** D failed to testify at his trial. The Court charged the jury that:

"The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so, then you must acquit him."

However, the D objected that the foregoing "burden of proof" charge did not include anything on D's failure to testify.
On appeal, the Court held that the "burden of proof" charge was significantly dissimilar from a "failure to testify" charge and did not satisfy the requirements of the Fifth Amendment. U.S. v. Bain, 596 F.2d 120 (5th Cir. 1979). The Court also held that under the facts of the case, the error was not harmless error under Chapman v. California, 386 U.S. 18 (1967).


GUILTY PLEAS/RULE 11: Pursuant to a plea bargain agreement, D pleaded guilty to two counts and was sentenced. On direct appeal, D asserted that the government had breached the written plea bargain agreement. Although the Court quickly rejected D's argument, it sua sponte reviewed the Rule 11 transcript and found that the District Court had totally failed to ensure that the D understood the nature of the charges against him. The District Court did not read the charge to the D and did not even tell the D what the elements of the offense were. Rather, he merely asked the D if he understood the charges. Since the nature of the charge is one of the three core concerns in Rule 11, F.R.C.P., U.S. v. Dayton, 604 F.2d 931, 940 (5th Cir. 1979), and there was a total failure to address it, the case was vacated and remanded to the District Court with instructions to allow the D to plead anew. See also U.S. v. Patterson, 739 F.2d 191 (5th Cir. 1984).

TUBWELL V. GRIFFITH, No. 83-4659, Aff'd, Judge Davis, 9/24/84 (Slip Op. 5913)

PRISONER RIGHTS: D, incarcerated in a Mississippi prison, violated a regulation. After a hearing, his custody status was reduced. As a result of his new custody status, he was required to wear leg shackles and waist chains when he used the prison library. Thus, when D went to the library, his ability to walk was somewhat impeded and he had the free use of only one hand. Both hands were freed, however, when he wanted to use a typewriter in the library.

D filed suit and sought a preliminary injunction seeking to enjoin the use of the restraints when he was in the library. D argued that the restraints obstructed his access to the library, hindered his ability to pursue litigation, and thereby denied him access to the Courts. The Magistrate and District Judge denied relief.

On appeal, the Court held that D had failed to demonstrate that the restraints effectively blocked meaningful access to the courts. The Court concluded that the restraints entailed, at most, a de minimus interference with D's constitutional right to access to the courts since he was able to prosecute the instant lawsuit.
JURY CHARGE—REVERSIBLE ERROR IN VIEW OF DEFENDANT'S WRITTEN OBJECTIONS: Ds were convicted of felony riot under Sec. 42.02(a)(1) and (f), the underlying felony charge being arson. An offense under Sec. 42.02(a) is a Class B misdemeanor. However, violation of a provision of subsection (a) exposes a D to conviction for any offense of a higher grade committed by anyone engaged in the assembly if the offense committed was (1) in the furtherance of the purpose of the assembly; or (2) an offense which should have been anticipated as a result of the assembly.

Faulk v. State, 602 S.W.2d 625 (Tex. Cr. App. 1980), (opinion on rehearing), held that "knowing participation" in an assemblage under the statute makes the requirement that D know that the conduct of the assemblage is resulting in unlawful activity. HELD: the Court's charge failed to require the jury to find the Ds participated in the assembly knowing that it was resulting in conduct creating an immediate danger of damage of property or injury to persons. The charge therefore, failed to require the jury to find an essential element of the offense alleged.

RAYMOND CASTANEDA, Nos. 68,144 and 68,145, Rev'd and remanded, Judge McCormick, 9/26/84.

ACCOMPlice WITNESS TESTIMONY INSUFFICIENT TO SUPPORT CONVICTION FOR MURDER UNDER ARTICLE 38.14 C.C.P.: D convicted of two murders on basis of accomplice's testimony and corroborative evidence. Accomplice testified that she, at D's suggestion lured first victim outside pool hall where he was gagged, bound, beaten and robbed of $4.00, dragged to a nearby store where his shoes were removed. Accomplice then lured second victim outside pool hall where scenario was repeated except this victim was also stabbed by D and another person. The victim's body was hidden behind dumpster, trousers and boots removed and trousers thrown onto pool hall roof. This robbery netted $2.00. D and friend left with accomplice in accomplice's car but soon decided to return and kill first victim. Accomplice dropped them off a block away from pool hall, and they returned a short time later reporting they had killed the first victim. D gave accomplice the knife used to kill the second victim, which accomplice placed inside her panties where it was discovered as she was being booked into the jail the morning following the offense. Other evidence adduced included blood in the area where the bodies were found, clothes disarranged as testified to by accomplice, blood analysis of the decedents and the stains on the pocketknife found on the accomplice. An autopsy supported accomplice's testimony as to the nature of the attack and wounds inflicted.

HELD: Art. 38.14 VAACP, requires that before a conviction can be obtained based on the testimony of an accomplice witness, there
must be some corroborating testimony tending to connect D with the offense. Eliminating from consideration the accomplice's testimony, the remaining evidence is then examined for sufficient connection of the D with the commission of the offense. This corroborative evidence need not be a direct link, or establish guilt beyond a reasonable doubt, but it must do more than "point the finger of suspicion" at D. The facts which are thus corroborated must connect D to the crime. The corroborative facts established were insufficient to meet the requirements of Art. 38.14.

WILLIE MORRIS YOUNG, No. 128-84, Rev'd and remanded (State's PDR), Judge Onion, 9/19/84.

ATTEMPTED BURGLARY OF A HABITATION INDICTMENT SUFFICIENT: The indictment alleged that the D did unlawfully attempt to enter a habitation owned by X by breaking a windowpane, having intent to commit burglary. The C/A held the indictment for attempted burglary was defective for failure to allege a second specific intent element in light of the D's Motion To Quash, and rev'd the conviction. This C/A opinion conflicted with Hudson v. State, 638 S.W.2d 45 (Tex. App. - Houston, 1st Dist., 1982) (PDR ref'd 1982) which held that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted. In this case it was held that a similar indictment is not subject to a Motion To Quash. Thus, the C/A judgment was rev'd and the cause remanded for consideration of the other grounds of error.

LEONARD GLENN TAYLOR, No. 69,305, Dis'd as moot; Per Curiam, 9/26/84.

APPEAL FROM ORDER DENYING BAIL UNDER ART. I, SEC. 11a, TEX. CONST.—: The T/C, on the State's motion, ordered the D held without bond under Art. I, Sec. 11a of the Tex. Const. The D was arrested and charged with burglary of a building, and thereafter the State alleged that at the time of the commission of this offense the D was already on bond for a prior felony, i.e., burglary of a building which offense occurred prior to this offense. The T/C denied bond and N/A was filed.

A D who has been denied bond under this article must be tried within 60 days from the time of his incarceration upon the accusation, or the order denying bail will be automatically set aside. The court noted that the 60 day period had expired and that there was nothing in the record before the CCA to indicate that a continuance had been obtained upon either the accusation or the pending indictment upon the motion or request of the accused and therefore the court must assume that either the D had been accorded a trial on both the prior indictment and the subsequent accusation or that the 60 days having run the order
denying bail had been automatically set aside. Either way the issue was not moot and the appeal must be dismissed.

U.S. v. Golding, No. 84-1608, Aff'd, Judge Tate, 9/12/84 (Slip Op. 5942)

BAIL: D, charged with four counts of drug violations and one passport law violation, appealed from the District Court's imposition of ONE MILLION DOLLAR BOND.

On appeal, the Court upheld the District Court. The Court noted that the District Court had found that: (1) D had a prior conviction; (2) D was facing 10 to life, if convicted, and forfeiture and fines in excess of $170,000; (3) D had been a fugitive for two years prior to his arrest; (4) D had three passports under various aliases; and (5) D had no significant community ties. The Court also noted and approved the District Court's finding that the government's proof at the bail hearing supported an inference that D would be convicted and that if released, he would flee (since he had several hundred thousand dollars in banks in and outside of the country).

EVIDENCE/BAIL HEARING: D asserted that the hearsay testimony regarding the D's involvement and his financial resources should not be deemed sufficient to support the District Court's factual findings. The Court held that since Rule 1101(d)(3), F.R.E. and 18 U.S.C. Sec. 3146(f) specifically exempted bail hearings from the purview of the Federal Rules of Evidence, the hearsay could properly be considered.

KNIGHTON V. MAGGIO, No. 84-4490, Aff'd, Judge Politz, 8/27/84 (Slip Op. 5609)

DEATH-QUALIFIED JURORS: D asserted that his right to trial by an impartial jury was violated when he was tried by a jury qualified pursuant to the requirements of Witherspoon v. Illinois, 391 U.S. 510 (1968). Relying on Keeton v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984) and Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), the D had asserted that jurors disqualified under Witherspoon could serve at the guilt phase of a capital case and that the scientific evidence available supported the conclusion that excluding such jurors at the guilt phase denied the D a jury chosen from a fair cross section of the community.

The Court stated:

"The argument is not to be gracelessly ignored, but it must be directed to other fora, legislative and judicial. It is not for this court, at this time, in this setting, to plow that legal furrow."
A little bit of humor: Money talks, but big money doesn't—it hires a staff of lawyers.

Recently noted in the Dallas Morning News: Former President Gerald R. Ford says his golf game is greatly improved "And the best evidence is, I'm hitting fewer spectators". In Tucson, Arizona, Sunday, Ford said that in appearances around the country he expects to be asked serious questions about domestic policy or international affairs. "But almost invariably", he said, "people asked, 'how's your golf game?'". Ford said comedian Bob Hope "goes around the country telling huge audiences that I have made golf a combat sport, that I'm the only guy who can play four courses simultaneously, that I'm the hit man for the PGA, and that I played so bad the other day that I lost two balls in the ball washer."

Recently appearing in the Insurance Litigation Reporter, May/July 1984 edition, was the following: Collateral estoppel—conviction in prior criminal proceeding barred relitigation of whether insured intentionally set fire on his business premises—California's rule adopted:

In a case of first impression, the Montana Supreme Court has held that an insured's conviction of arson in a prior criminal proceeding precluded relitigation of whether the insured intentionally set fire to his premises in a subsequent civil action brought by a third party to establish damages and liability coverage.

Insured was convicted of arson in connection with a fire causing extensive damage to his pet shop and adjacent businesses. His insurer thereafter brought a declaratory judgment action to establish that the policy's intentional harms exclusion precluded coverage. The insurer of the surrounding businesses, however, intervened in the declaratory relief action to establish that insured was guilty of negligence in causing the fire and thereby obtain indemnification under insured's liability policy. Insured's insurer moved for summary judgment, arguing that res judicata principles prohibited relitigation of insured's intent in the later civil action. The trial court granted the motion and the insurer of the surrounding businesses appealed.

The Montana Supreme Court affirmed, holding that collateral estoppel prohibited relitigation of whether the fire was intentionally or negligently set. Adopting the California Supreme Court's reasoning in Teitelbaum Fur's, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (Cal. 1962), the court held that three questions are pertinent to the applicability of collateral estoppel in a civil proceeding following a criminal proceeding: (1) Was the issue decided in the prior adjudication identical with the one presented with the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? In this case, the court summarily answered the first and second questions affirmatively.
and turned to the question of whether the insurer of the surrounding buildings was in privity with the insured. In concluding that privity existed, the court pointed out that the insurer of the surrounding buildings and insured had an identity of interests -- establishing that the fire was negligently caused -- in the criminal proceeding. Aetna Life and Casualty Inc. v. Johnson, 673 P.2d 1277 (Mont. 1984).

(Editor's Note: Interestingly, the insurer of the surrounding buildings attempted to collaterally attack a criminal conviction for intentional burning to defraud an insurer. Implicit in the court's rejection of this effort may have been a public policy decision not to weaken the legal position of insurers in resisting fraudulent claims.)
Joe Connors of McAllen has kindly authorized the publication of his motion and brief in support of permitting an out-of-time appeal.

---Ed.

Out-of-Time Appeals

Motion for Out-of-Time Notice of Appeal with Supporting Legal Memorandum

(Article 44.08(e), V.A.C.C.P. (1981))

To the Honorable Court of Appeals:

Appellant, now comes by and through his attorney of record, and files this Motion For Permission To Give An Out-Of-Time Notice of Appeal in this cause. Although notice of appeal herein should have been properly recorded on or before June 23, 1983, there is no record in this cause showing that an oral notice of appeal was timely made in open court or that a timely written notice of appeal was timely filed with either the trial court or its clerk. By authority of Article 44.08(e), V.A.C.C.P. (1981), appellant requests that for the good cause shown in this motion, this Court permit appellant to give notice of appeal in this cause after the expiration of 15 days after sentencing (since no motion or amended motion for new trial was filed). As the basis for the relief requested, appellant shows the Court:

1. Convicting Court: 83rd District Court of Pecos County, Texas.
2. Trial case number and style: No. 1573, State vs. Clifton Eugene Fain.
3. Offense: Rape.
4. Sentence: Life (Habitual Offender).
6. Future deadline: Within 15 days of the order granting this motion.
7. Number of extensions previously granted for this item: None.
8. Court Reporter’s Affidavit: None.
9. Good cause for the granting of this motion is the following:
   a. The supplemental record herein contains the sentencing hearing herein. (R. VIII) No formal notice of appeal was transcribed by the court reporter during the proceedings in open court on June 8, 1983. At that hearing, the trial court did not explain much to appellant about how to properly exercise most of his appellate rights (R. VIII-4 to 5), even though the appellant was an indigent person.
   b. Appellant’s trial counsel, Honorable Robert E. Motsenbocker, has testified herein by his affidavit of May 29, 1984. That affidavit has been attached hereto as Exhibit A, and is hereby incorporated herein for all purposes.
   c. Appellant Clifton Eugene Fain has testified herein by his affidavit of May 11, 1984. That affidavit has been attached hereto as Exhibit B, and is hereby incorporated herein for all purposes.
   d. Appellant Clifton Eugene Fain has also testified herein by his supplemental affidavit of September 21, 1984. That affidavit has been attached hereto as Exhibit BB, and is hereby incorporated herein for all purposes.
   e. Appellant’s second appellate counsel, Honorable Joseph A. Connors III, has testified herein by his affidavit of September 7, 1984. That affidavit has been attached hereto as Exhibit C, and is incorporated herein for all purposes.
   f. Appellant’s first appellate counsel, Honorable Martin Underwood, has testified herein by his affidavit of September 27, 1984. That affidavit has been attached hereto as Exhibit D, and is incorporated herein for all purposes.
   g. Appellant’s trial judge, Honorable Troy D. Williams, has testified herein by his affidavit of September 25, 1984. That affidavit has been attached hereto as Exhibit E, and is incorporated herein for all purposes.
   h. This Court should find as true and credible testimony all the evidence, which has been presented on this motion by each witness’ affidavit.
   i. The failure of the record herein to contain a proper and timely notice of appeal did not occur with the knowledge and consent of the appellant. Appellant did not knowingly and intentionally waive the right to appeal this case when he represented the contrary to trial counsel within 15 days of the June 8, 1983 sentencing in this case. Thus, the appellant’s federally protected right to a meaningful appeal with counsel has been infringed. Steps should be taken not only to provide effective aid of counsel on appeal as the trial court obviously has done already, but also to provide a meaningful appeal for this indigent appellant, who timely indicated to trial counsel his desire to exercise his right to appeal at every opportunity. Since appellant did not knowingly and voluntarily waive his right to appeal this case, but timely asked his trial counsel to exercise that right, this Court should find that sufficient evidence of good cause...
has been shown to permit appellant to now give a late notice of appeal to this Court of the judgement of conviction in this case; and that notice of appeal may now within fifteen days of the granting of this motion be given:

(a) orally in open Court at the trial court; or
(b) in writing and filed in duplicate with the clerk of the trial court.

j. Appellant respectfully requests that this motion be granted so that appellant will not be penalized because of trial counsel’s possible malpractice. Such malpractice will not have damaged this appellant, if this motion is granted. Upon the granting of this motion, appellant will have been afforded that “effective assistance” in perfecting this appeal as guaranteed appellant by the United States and Texas Constitutions.

k. Appellant is not seeking to delay submission of this case for decision by this Court of Appeals. Appellant is only requesting this Court grant this motion so that justice may be done.

l. The facts in this case will authorize the Texas Court of Criminal Appeals to grant appellant an out-of-time appeal by post-conviction writ of habeas corpus. See Ex parte Banks, 580 S.W.2d 348 (Tex.Cr.App. 1979); Viteia v. State, 566 S.W.2d 933 (Tex. Cr. App. 1978); Kent v. United States, 423 F.2d 1050 (5th Cir. 1970) [failure of counsel to timely appeal resulted in ineffective assistance of counsel]. See also Ex parte Moreland, 456 S.W.2d 949 (Tex.Cr.App. 1970).

m. Rather than pursuing a remedy under Article 11.07, V.A.C.C.P., Article 44.08(e) permits the Court of Appeals to promptly facilitate the ends of justice and judicial administration. Once the Court of Appeals has been presented with evidence of good cause and learned that an appellant has received ineffective assistance of counsel in the perfecting of the appeal, the Court of Appeals is authorized to permit appellant to give a belated notice of appeal to solve the Constitutional deficiency hindering the appellant’s exercise of his right to appeal his conviction.

n. After considering all of said evidence and testimony, the Court should be of the opinion that pursuant to Article 44.08(e), V.A.C.C.P., appellant has demonstrated to this Court such good cause. Even though more than 15 days have passed since the judgment was pronounced, this Court should permit appellant to give a late notice of appeal from the judgment of the 83rd District Court of Val Verde County, Texas in trial cause no. 1573, which is styled the State of Texas vs. Clifton Eugene Fain and is pending on the docket of this Court as cause no. 08-84-00028-CR.

WHEREFORE, PREMISES CONSIDERED, appellant requests that the foregoing motion be granted so appellant can give a timely notice of appeal herein.

Legal Memorandum in Support of the Foregoing Motion

Unless the foregoing motion is granted by the Court, this appeal will have to be dismissed. Menasco v. State, 503 S.W.2d 273 (Tex.Cr.App. 1973). However, prior to the issuance of this Court’s dismissal mandate, appellant can seek to give late notice of appeal pursuant to Article 44.08(e), V.A.C.C.P. (1981).

The district attorney filed his appellate brief, questioning whether this Court has jurisdiction of this case because no notice of appeal, either oral or written, was ever given or filed by appellant after his sentence was imposed as required by Article 44.08(b), (c) and (e), V.A.C.C.P. (1981). (State’s Brief at pgs. 8 to 13.) For purposes of perfecting an appeal from this appellant’s original conviction, June 8, 1983 was the date that “...sentence was imposed” in open court. Article 44.08(b) and (c), V.A.C.C.P. (1981). Within the next fifteen-day period, appellant was entitled to give notice of appeal. After that fifteen-day period had expired and no motion for new trial was filed within thirty days of June 8, 1983, the only valid means of perfecting a direct appeal is pursuant to Article 44.08(e).

It states that: “For good cause shown, the court of appeals may permit the giving of notice of appeal after the expiration of such 15 days.” Thus, “... neither this court nor the Court of Appeals has jurisdiction where no notice of appeal is given and there is no showing of good cause for the absence of such notice.” Ex parte Noe, 646 S.W.2d 230, 231 (Tex.Cr.App. 1983) [where the appeal was dismissed]; See also Mosqueda v. State, 646 S.W.2d 589 (Tex.App.–Houston [1st Dist.] 1983, no review) [where the appeal was dismissed for want of jurisdiction]; Martin v. State, 654 S.W.2d 800 (Tex.App.–Houston [14th Dist.] 1983, no review) [where the appeal was dismissed, because the only notice of appeal in the record had been given days after the expiration of the fifteen-day period for giving notice of appeal under Article 44.08(b), V.A.C.C.P. (1981)]; and Ex parte Reese, 666 S.W.2d 675, 678-679 (Tex. App.–Fort Worth 1984, pat. pending No. 466-84, [where the appeal was dismissed for want of jurisdiction, there being no timely notice of appeal].

Appellant has responded to this jurisdictional issue by filing the foregoing motion for out-of-time notice of appeal. Through that motion, permission is sought to give a late notice of appeal, since there is no record herein of notice of appeal having been given previously in this case. See King v. State, 634 S.W.2d 794 (Tex. App.–Fort Worth 1982, no review) [where a similar motion was granted]. Although appellant’s motion was filed before this Court dismissed this appeal, even if this Court had already ordered the appeal dismissed as in Gordon v. State, 627 S.W.2d 708, 710 (Tex.Cr.App. 1982); Martin v. State, supra; Mosqueda v. State, supra; Ex parte Noe, supra; and Ex parte Reese, supra, appellant’s appeal herein could be reinstated if as part of a timely motion for rehearing, appellant moved to reinstate the appeal and presented good cause for an out-of-time appeal as required by Article 44.08(e), V.A.C.C.P. (1981). Chappell v. State, 519 S.W.2d 452 (Tex.Cr.App. 1974), appeal reinstated, 519 S.W.2d 453 (1975); and Smith v. State, 424 S.W.2d 228 (Tex.Cr.App. 1968) [where the appeal was dismissed on January 24, 1968, since notice of appeal was given prior to sentence being pronounced; but on Feb-
uary 21, 1968, the appeal was reinstated where a supplemental transcript showed that the appellant properly gave notice of appeal in open court on January 30, 1968, with permission of the trial court under the authority of Article 44.08(e), V.A.C.C.P. (1967).

In *Hurd v. State*, 548 S.W.2d 388, 391 (Tex.Cr.App. 1977), Judge Odum dissented but summed up much of the applicable law, saying:

Criminal procedure in Texas provides several means by which appellate review may be secured. First, appellate review may be secured by giving timely notice of appeal. Article 44.08, Vernon’s Ann.C.C.P. Second, for good cause shown the trial court may permit a late notice of appeal. Article 44.08(e), supra. In that event, however, the finding of good cause must be supported by evidence in the record and is subject to review by this Court. *Reed v. State*, 481 S.W.2d 814 (Tex.Cr.App. 1972); *Perez v. State*, 496 S.W.2d 627 (Tex.Cr.App. 1973); *McDonald v. State*, 501 S.W.2d 111 (Tex.Cr. App. 1973); *Horton v. State*, 502 S.W.2d 121 (Tex.Cr.App. 1973); *Menasco v. State*, 503 S.W.2d 273 (Tex.Cr.App. 1973); *Robinson v. State*, 505 S.W.2d 298 (Tex.Cr. App. 1974); *Martinez v. State*, 511 S.W.2d 934 (Tex.App. 1974); *Garrison v. State*, 517 S.W.2d 553 (Tex.Cr.App. 1975). Third, by post conviction habeas corpus action, upon a showing that one has been deprived of his right to appeal, relief in the form of an out of time appeal may be secured.

In *Flores v. State*, 419 S.W.2d 202, 203 (Tex.Cr.App. 1967), the Court said:

Article 44.08(e), V.A.C.C.P. (1965) provides that ‘Notice of appeal shall be given or filed within ten days after sentence is pronounced.’ The giving of notice of appeal prior to pronouncement of sentence is ineffective compliance with such provision and, as in the case at bar, is not sufficient notice upon which to predicate an appeal. *Hollingsworth v. State*, Tex.Cr.App. 419 S.W.2d 854 (July 26, 1967). However, as is pointed out in *Hollingsworth*, Arti-

icle 44.08(e), V.A.C.C.P. (1965) provides that for good cause shown the trial court may permit notice of appeal to be given after the expiration of such ten day period provided in subsection (c). In the case at bar the trial court may, if good cause be shown, still permit the giving of notice of appeal, and if he permits the giving of such notice, proceedings may then be had in the trial court pursuant to Article 40.09, V.A.C.C.P. (1965).

The appeal is dismissed.


In *Menasco v. State*, 503 S.W.2d 273, 275-276 (Tex.Cr.App. 1973) (On Appellants’ Motion To Reinstate the Appeals), the Court said (footnotes omitted):

The phrase ‘good cause,’ as used in Article 44.08(e), V.A.C.C.P., authorizing the trial court to permit the giving of late notice of appeal, necessarily implies that such a finding will be based upon sufficient evidence. When the trial court does permit the giving of a late notice of appeal it is subject to the review of this court to determine whether ‘good cause’ has been shown. Evidence in the record must support the trial court’s order. The supporting evidence should be by affidavit or sworn testimony.

This record does not contain an affidavit or sworn testimony supporting the trial court’s order granting delayed notice of appeal. In the absence of supporting evidence in the record, we cannot determine whether ‘good cause’ was shown in support of the order granting delayed notice of appeal.

The appellants’ motions to reinstate the appeals are denied. It is so ordered.

Opinion approved by the Court.

In *Abron v. State*, 531 S.W.2d 643, 645-646 (Tex.Cr.App. 1976), the Court said through Judge Roberts:

This Court has continually held that, where a late notice of appeal is filed, ‘good cause’ must be shown to the trial court through affidavits or evidence submitted as to why the notice of appeal was not timely perfected. Without reasons or evidence to support the finding of good cause, an out-of-time appeal cannot be allowed, and of course the trial court’s findings are reviewable by this Court. See *Morrow v. State*, 481 S.W.2d 144 (Tex.Cr. App. 1972); *Reed v. State*, 481 S.W.2d 814 (Tex.Cr.App. 1974); *Menasco v. State*, 503 S.W.2d 273 (Tex.Cr.App. 1973); *McClain v. State*, 504 S.W.2d 512 (Tex.Cr.App. 1974); *Robinson v. State*, 505 S.W.2d 298 (Tex.Cr. App. 1974); *Farris v. State*, 514 S.W.2d 946 (Tex.Cr.App. 1974); App. 1975).

In the case at bar, the record is replete with evidence that the appellant voluntarily, knowingly and intelligently waived his right, both orally and in writing, to appellate review of his convictions. See *Ex parte Ross*, 522 S.W.2d 214 (Tex. Cr.App. 1975); *Smith v. State*, 513 S.W.2d 586 (Tex.Cr.App. 1974). When an appellant makes a voluntary and intelligent waiver of his right to appeal at the time of sentencing, such waiver is effective unless and until a timely notice of appeal is filed. See *Reed v. State*, 516 S.W.2d 680 (Tex.Cr.App. 1974).
However, in the case at bar, no timely notice of appeal was submitted.

In the record before this court the trial court has not actually made a finding in this case that 'good cause' has been shown, and without any findings as to the credibility of appellant's testimony at the hearing, we hold that appellant's uncorroborated, self-serving testimony is insufficient to show 'good cause' for granting the relief requested. See Ex parte Young, 479 S.W.2d 45 (Tex.Cr.App. 1972); Ex parte Rocha, 482 S.W.2d 169 (Tex.Cr. App. 1972).

The appellant having failed to establish good cause for perfecting the belated appeals, the appeals are dismissed.


In Proctor v. State, 465 S.W.2d 759, 760 (Tex.Cr.App. 1971), the Court said:

It is observed that upon a showing of good cause, the trial court in the case at bar may still permit the giving of notice of appeal, and in such event, proceedings may then be had in the trial court pursuant to Article 40.09, V.A.C.C.P. See Herbert v. State, (Tex.Cr.App.), 422 S.W.2d 456; Hollingsworth v. State, (Tex.Cr.App.), 419 S.W.2d 854; Flores v. State, (Tex.Cr.App.), 419 S.W.2d 202.

In the event that the trial court does permit the giving of notice of appeal under Section (e) of Article 44.08, supra, then this indigent appellant must be furnished a complete record on appeal. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891.

Even if timely notice of appeal had been given in the case at bar, this court would have been unable to have passed on the sole ground of error presented in light of the partial record brought forward. Under any circumstances, the appeal would have to have been abated until a complete record was furnished.

For the reasons stated, the appeal is dismissed.


Therefore, this Court should grant appellant's motion so that the movant's appeal may be perfected to this Court, for as in King v. State, 634 S.W.2d 794, 795 (Tex.App.—Fort Worth 1982, no review), where the Court said:

For good cause shown, this court is authorized to permit late filing of a notice of appeal. Art. 44.08(e), supra.

We must conclude that, upon the facts, good cause has been shown and movant has been denied reasonably effective assistance of counsel through no fault of his own.

The brief filed in support of the motion asserts that if permitted, an appeal will present an arguable meritous issue challenging the sufficiency of his indictment. We may not consider that issue here.

The proper relief, therefore, is to grant an out of time appeal. Ex parte Banks, 580 S.W.2d 348 (Tex.Cr. App. 1979).

The motion is granted in order that the movant's appeal may be perfected to this court.

See also Chappell v. State, 519 S.W.2d 452 (Tex.Cr.App. 1974), appeal reinstated, 519 S.W.2d 453 (1975) and Smith v. State, 424 S.W.2d 228 (Tex.Cr.App. 1968) [where following the appeal's dismissal, it was reinstated].

Respectfully submitted,
JOSEPH A. CONNORS III,
Attorney for Appellant

MARTIN UNDERWOOD
Attorney for Appellant

Beepers
by Walter Boyd

The following poem was inspired by Knox Jones' search and seizure jeremiad at the Advanced Criminal Law Institute in San Antonio this summer. See U.S. vs. Karo, S.Ct., July 3, 1984, 35 Cr.L. 3246, conviction reversed.

The State can go pretty far
Because there's simply no bar
To placing a beeper in a jar
And planting the jar in a car.

So all this has Knox Jones really weeping
For the fourth amendment he thinks we're not keeping
Into our lives he sees the Government seeping
And the loss of all our freedoms is what we're reaping.

But there's limits on a scientific beeper
The State may not use a beeper
To spy on a housekeeper
A driver is unlike a sleeper.

We all started getting behaved
Even the Supreme Court finally got in the groove
Saying homes unlike automobiles do not move
And residents have the right to be soothed.

The Court reversed the home beeper conviction
Thus removing some of the defense lawyers' friction
But it nevertheless sounds so much like fiction
That Jones still refuses to say the benediction.

Changes in the Texas Controlled Substances Schedules

Pursuant to Subchapter 2., Section 2.09, Paragraph (e), Article 4476-15, Vernon’s Texas Civil Statutes, and at least 30 days having expired since the hereinafter action was taken by the Federal Drug Enforcement Administration and published in the Federal Register, and in my capacity as Commissioner of the Texas Department of Health, I do hereby order that Subchapter 2., Section 2.03, Paragraph (d), Article 4476-15, Vernon’s Texas Civil Statutes, be amended to delete the substance Sufentanil and to read as follows:

(h) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, ethers, and salts, is possible within the specific chemical designation:

1. Allylproline;
2. Alphamethylfentanyl or any other derivative of Pentany;  
3. Benzethidine;
4. Betaprodine;
5. Clonitazene;
6. Diampropamide;  
7. Diphenylbutylamine;  
8. Difenoxin;
9. Dimenoxadol;
10. Dimethylthiambutene;  
11. Dioxaphosphoryl butyrate;  
12. Dipipanone;
13. Ethylmethylthiambutene;
14. Benzodiazepine;
15. Butoxeridine;
16. Fentanyl;
17. Hydroxypropylene;
18. Ketanestone;
19. Levopropoxyethylmorphine;
20. Megadone;
21. Methadone;
22. Norbimo;
23. Norcurarine;
24. Norcurarin;  
25. Norlevorphanol;  
26. Normethadone;
27. Norguanyline;
28. Phenadoxone;
29. Phentamorphone;
30. Phencyclidine;  
31. Phenoperidine;
32. Phenergan;
33. Propitramide;
34. Proheptazine;
35. Proheptazine;
36. Propiram;
37. Trimipramine;
38. Tilidine.

I further order that Subchapter 2., Section 2.04, Paragraph (c), Article 4476-15, Vernon’s Texas Civil Statutes, be amended to add the substance Sufentanil and to read as follows:

(c) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

1. Alphaprodine;
2. Anileridine;
3. Beztramide;
4. Dextropropoxyphene. Bulk (non-dosage forms);
5. Dihydrocodeine;
6. Diphenoxylate;
7. Fentanyl;
8. Isomethadone;
9. Levomethadone;
10. Levomethadone;
11. Methadone;
12. Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
13. Norphadiodane-Intermediate, 2-methyl-3-morpholinol-1, 1-diphenyl-propanoic acid;  
14. Norphendine-Intermediate-A, 4-cyano-1-methyl-4-phenylpipеридине;  
15. Norphendine-Intermediate-B, 4-cyano-1-methyl-4-phenylpipеридине-4-carboxylic acid;  
16. Norphendine-Intermediate-C, 1-methyl-4-phenylpipеридине-4-carboxylic acid;  
17. Phenacazine;  
18. Phenicclidine;  
19. Racemorphine;  
20. Sufentanil.

Done at Austin, Texas on this 14th day of August 1984 in witness whereof I have hereunto set my hand and seal of office.

Robert Bernstein,  
M.D., F.A.C.P., Commissioner of Health

Death Row Lawyers from p. 10

“When I got my first one,” he says, “I understood it was kind of a rite of passage, that you weren’t a trial lawyer until you had done one death penalty case. There are some lawyers who say you are not a trial lawyer unless you have done several death penalty cases.”

Goranson, 39, now qualifies as a veteran in death penalty work; the distinction does not make the task any easier to understand. He has found himself weighing the advice of Stu Kiner, an Austin attorney: “He said to go to a funeral, watch what happens. Then go to a nursery at a hospital. Then go to a grade school. Then ask yourself what could take those innocent souls, and wind up with the person sitting next to you in the courtroom. You have to make the accused human.

It just so happened that I was going to a funeral, and I watched people. It changes you a bit. And now, looking back on the trial (Morrow’s), I’m sure we could have done a bit better. I don’t know if we would have done anything strategically different. There just would have been better ways of expressing ourselves.

“That’s Monday morning quarterbacking. But the day I die, I’ll be thinking about that. Particularly if Ricky Morrow dies. That will stay with me forever.”

RUSTY DUNCAN—Criminal; Mafia hit man
RON GORANSON—Banker
RICHARD ANDERSON—Obstetrician; Car salesman
VINCENT PERINI—Preacher
SCRAPPY HOLMES—Mean Cop
BILL BRATTON—Prosecutor
MEL BRUDER—Insurance adjuster

(submitted by George Roland, Attorney)
Quote of the Month: “It is difficult to speak of anything as ‘normal’ that happens in the 176th” - Judge William Hatten (176th Houston). True, Judge, true!

Interesting story about three County Criminal Court Judges who played golf in Galveston during the recent Judicial Conference. Judge Sherman Ross and Judge Don Hendrix enjoy playing practical jokes - Ask Judge Neil Richardson about the “exploding golf ball” trick. I cannot learn whether there was a golf rematch between Judge Jack Treadway and Judge Hendrix . . . Michael Guarino, Mr. D.A. in Galveston County and father, Judge Joe Guarino (183rd Houston) visited during the conferences.

If Diogenes had stumbled into the Harris County Criminal Court House maintenance building, he would have found his honest man - Mollie Childs left her purse in the 176th District Court room. . . . Michael Guarino, Mr. D.A. in Galveston County and father, Judge Joe Guarino (183rd Houston) visited during the conferences.

CDLP Executive Director Jeanne Kitchens toured New England during a fall vacation. The colors of changing foliage were brilliant. She headquartered in Pennsylvania, but spent an extended weekend in Vermont. Rumor is she stayed at the Stratford Inn and enchanted Bob Newhart with conversation . . . David Zavoda, who received a call from the 14th Court of Appeals that his case had been affirmed, was relieved when I explained that they call everyone - He thought they were rubbing it in . . . Charlotte Harris sponsored 3 movies on the death penalty at the Rice Media Center . . . Carolyn Hebert and Stefan Presser (Staff Counsel ACLU) recently married.

Don’t get caught in Jefferson County since 72% of all felony cases end with plea time. Ironically, Judge Gist from Jefferson County is a frequent lecturer at our seminars on “Creative Sentencing” . . . A statewide report on prison sentences indicates that whites, hispanics and blacks receive comparable prison terms. Among males convicted of murder, blacks receive an average sentence of 14.7 years, Hispanics 23.1 years and whites 21.1 years. Among males convicted of robbery, blacks received an average sentence of 12.8 years. Hispanics 9.9 years and whites 11.9 years. Increasing numbers of first offenders sentenced to prison. In 1980, 63.2% were handed prison sentences; in 1983, 68.2% went to prison. . . . Jefferson County has experimented with a “No plea bargain policy” for all felonies - After a year, backing off policy to allow plea bargaining in 2nd and 3rd degree felonies - backlog of cases making docket unmanagable.

Editor M.P. “Rusty” Duncan III has a protective secretary - “Hearsay” called and his secretary said he had a grievance committee meeting scheduled - learning who was calling, she quickly added: “He’s on the committee!!” - Would not give “Hearsay” her name . . . Yours truly (A.C.I) had one “snatched from the jaws of victory” when the Court of Criminal Appeals accepted State’s P.D.R. and unanimously held the evidence to be sufficient in a burglary case based on an identification of a jar of pickled pig’s feet - Unkindest part of all was that my co-author (W.B.) had told me it would be and should be and that I owe him 9 jars of this culinary delight - this case has become well known in Harris County as “The Pickled Pigs Feet Case.”

Criminal defense lawyers are better in racquetball than civil lawyers - at least, they did very well in the “Battle of the Courts” racquetball tournament sponsored by the UMCA - George Parnham won 2nd in the “Men Over 40” group, and 3rd in the “Mens A” (category of highest expertise) - Jacqueline Taylor won 1st in the “Women Over 30” - George and Jacqueline are partners, and their two person firm won more trophies than any other law firm, including the “big” civil law firms.

Clyde Williams and Cathy Greene Burnett are organizing a criminal law institute for the Harris County Criminal Lawyers Association for November on representing people accused of homicide - H.P.D. homicide detectives will be on the faculty, lecturing on how they investigate homicides . No news of events from Jack Strickland President of Tarrant Criminal Lawyers Association - “Hearsay” has heard several names mentioned as president of the Dallas County Criminal Lawyers Association - Please someone give “Hearsay” a report from Dallas.

Valerie Davenport has finished her duties as briefing attorney for Justice Sam Bass (1st Court of Appeals) to enter private practice - Rumor is she prefers a personal injury firm because she heard how little criminal defense lawyers make
Criminal defense lawyers Ken Sparks and Randy Schaffer took a 2-week hiatus to the Civil side of the street, trying a false arrest case—verdict for $575,000.00.

The 1st and 14th Courts of Appeals have moved from their old locations to the South Texas Law Building—nicer facilities, but criminals are everywhere it seems—Mary Jane Smart, Clerk of the 14th, was mugged in broad daylight at the facility—our good friend is back and doing well—culprit still at large . . . All Courts of Appeals do not have the same number of judges, so comparisons must be on a "per judge" basis. For the past twelve months, the 1st Court of Appeals has come in 1st in the number of cases disposed of per judge—thanks, in part, to their efficient central staff . . . The 1st Court also rendered the second largest number of decisions, regardless of the size of the Court—promised my source that I would not say it was second in gross opinions for the year . . . Bill Habern is lecturing to the staff of the 1st Court of Appeals, in its in-house C.L.E. program—Do other Courts of Appeals have in-house C.L.E. programs? Let "hearsay" know.

Ed Paynter (Abilene) gets national publicity for winning a "Burning Bed" case in Abilene by successfully defending mother and daughter who poured gasoline on sleeping husband . . . Ask Ed Gray (Dallas) and Randy Taylor (Dallas) the "joy" of making an unscheduled landing in a private plane at a military base . . . On their way to McAllen for the recent DWJ seminar, the weather forced the unscheduled stop—greeted by dogs, M.P.'s and other "concerned" persons . . . Speakers at the seminar included Ed Gray (Dallas), Randy Taylor (Dallas), Prez "Scrappy" Holmes (Longview), Dr. Ken Smith (Houston), Kerry FitzGerald (Dallas), and Gary Trichter (Houston)—despite last minute severe scheduling problems, Nance and Laurie ran a good seminar . . . Next Board meeting is December 15, 1984, in El Paso.

Charles Correll, Republican and Johnny Klevenhagen, Democrat, candidates for Sheriff of Harris County, debated at the October luncheon of the Harris County Criminal Lawyers Association Ben Durant is chairman of the luncheon committee.

Justice Ross Sours of the 14th Court of Appeals (Houston) has spoken recently to the Fort Bend and Galveston Bar Associations—John A. Convery ex-briefing clerk for Judge Michael McCormick and co-author of Judge McCormick's recent article on fundamental error on jury charges in Volume 15 of St. Mary's Law Review has gone to work in Gerry Goldstein's office—Judge David Hittner's Saturday morning in Court seminars have become so successful in Houston that they are going statewide.

Have you gotten a faster verdict? Garland Mclnnis got a "Not Guilty" on a marijuana possession charge in 6 minutes.

Let us know what is happening in your area. We need more input from areas other than Houston. Write to us at 202 Travis, Suite 208, Houston, Texas 77002, or call 713/236-1000.

In a relatively recent Oklahoma case, the defendant, who wore an artificial leg, was convicted of a rape-murder. As a part of the State's evidence a medical examiner testified that marks found in the mud around the victim's body were marks that could have been left by someone with an artificial leg.

Also, other circumstantial evidence supported the State's assertion that the Defendant was at the scene of the murder. For example, soil samples connecting the Defendant with the location of the crime were found in the Defendant's truck, and hair similar to the deceased's hair was also found in the Defendant's truck. In addition, a fiber was removed from the victim's fingernail that was similar to that which comprised the Defendant's shirt. There was also an inculpatory statement made to a cell mate in which the Defendant admitted that he raped and killed the victim.

On appeal, the Oklahoma appellate rejected the Defendant's challenge to the State's evidence, including his complaint concerning the testimony about imprints left by prosthetic devices, and affirmed the conviction. Unfortunately, the opinion more or less ignores this complaint and judged all the evidence as sufficient to support the conviction.

The question however remains, is testimony about prosthetic device imprints scientifically reliable enough to be admissible evidence? In Oklahoma, at least according to this case, it seems to be. See: Jones v. State, 660 P.2d 634 (Okla. Crim. App. 1983).

In an unrelated matter, on December 8, 1983, the Georgia Supreme Court affirmed the convictions of Wayne Williams which arose from the celebrated Atlanta murder cases. On November 9, 1984, the Dallas County Criminal Bar Association will present a criminal law institute. One of the speakers on the program is Larry Howard who is the Director of the Georgia Crime Laboratory.

Mr. Howard was responsible for collecting and testing the scientific and trace evidence that resulted in the convictions of Mr. Williams. Larry Howard is truly one of the most noted authorities on fiber evidence in the United States. Anyone who is interested in scientific evidence should not miss his presentation.
Dear Rusty:

RE: September issue

In response to your rhetorical question, "what's wrong with the picture?", my guess is:

Tim Evans has shaved his legs.
Thank you.

Sincerely,
JACK V. STRICKLAND
Attorney at Law
Fort Worth, Texas

Dear Mr. Duncan:

What's wrong with the cover picture on the September issue?
There are too many pictures of Cliff Holmes--two too many!

Yours truly,
DOUGLAS TINKER
Tinker, Tor & Brown
Corpus Christi, Texas

Dear Rusty:

I saw with interest our reprint of David Hershel's article entitled "What we can Learn from the English Approach to the Problem of Illegally Seized Evidence." I enclose my reply to Mr. Hershel published in that publication.
I would humbly suggest that if the English approach to protection of the citizen's rights to privacy had been as hot as Mr. Hershel suggests, we would not have needed a revolution to escape the abuses of that despot King George.

Sincerely,
GERALD H. GOLDSTEIN
For Goldstein, Goldstein & Hilley
San Antonio, Texas

Dear Rusty:

I thought you might find the following amusing:

After a burglary with intent to commit rape trial in Dallas County, the punishment hearing was before the trial court. The following is a complete transcript of the evidence and the prosecution's opening argument:

The Court: Call your first witness.
The Prosecutor: State will rest on punishment.
The Defense Counsel: Defense would rest.
The Court: Let's have the recommendation of the State of Texas.
The Prosecutor: Time and fine, all of it.
Result--50 years T.D.C.

Sincerely yours.
RONALD L. GORANSON
Attorney at Law
Dallas, Texas

Dear Rusty:

RE: Death Watch Committee

Enclosed please find a letter from Richard Brody of the NAACP Legal Defense and Education Fund concerning activity on the Texas Death Row. I am advised by Mr. Brody that there are three cases of immediate need arising in the very near future, with particular need, one out of Galveston and one out of Amarillo.

I would appreciate your including this letter in the next available issue of the VOICE for the Defense.

By copy of this letter I am notifying Nance and Laurie that any calls that come in in response to the letter should be forwarded to me.

Thanks for your help.

Sincerely,
RICHARD A. ANDERSON
Attorney at Law
Dallas, Texas

Dear Attorney:

The State of Texas houses the second largest death row population in the nation. Though most of the inmates under sentence of death have so far found legal counsel, we have to find new attorneys to represent capital defendants in their post-conviction appeals. If this trend continues, inmates with valid legal and constitutional issues may go to their death because counsel was not available to press their claim in court.

Regardless of one's views on capital punishment, defense lawyers surely know the importance of raising effective appeals in criminal cases. This is even more vital in capital cases. Indeed, out of all capital cases affirmed on direct appeal, close to 60 percent have been reversed by the federal courts due to error of constitutional magnitude. Clearly there are valid issues presented by all capital defendants which deserve the assistance in court of competent appellate counsel. Allowing these issues to escape judicial scrutiny will not only cost lives, but will result in bad legal precedent affecting all criminal cases.

We therefore ask your assistance in volunteering to represent capital defendants as the need arises. With the increasing pace of capital sentencing and the burgeoning death row population, your assistance as criminal defense lawyers is absolutely vital.

If you wish to volunteer your services as counsel or wish to assist in any other capacity, please contact the Texas Criminal Defense Lawyers Association as soon as possible.

Sincerely,
RICHARD BRODY
Director of Research
Capital Punishment Project

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**STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION**

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- To promote educational activities to improve the skills and knowledge of lawyers engaged in the defense of criminal cases.
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