MARCH 1985 VOL. 14, NO. 9

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Searches in School: The Case of the Purloined Heirloom

Cover Photo by Jim Lincoln

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Dr. Robert Gordon is a nationally known forensic and clinical psychologist. He is also an attorney. Last year Dr. Gordon began publishing *The Trial Science Poll*, a monthly report that documents the prevailing attitudes of randomly selected Dallas County residents on questions of interest to the bar in the areas of civil litigation, family law and criminal law.

For example, the Family Law Report, published in August, 1984, asked those surveyed the following question: “Are you willing to give custody of a child to a parent who is separated from their spouse and who is living with a member of the opposite sex?”

The results were divided into General Community Attitude and ten specific demographic areas. The General Community Attitude was consistent with Dallas County’s prevailing conservatism: 38% of those polled answered “yes,” while 62% answered “no.”

The demographic results revealed that 37% of the males responded “yes,” whereas 39% of the females answered the same, 63% of the males and 61% of the females answered “no.”

Those polled between ages of 18 years and 29 years answered “yes” by a margin of 62% to 38%. Those in the age group 30 years to 50 years almost reversed the percentage: 34% “yes” to 66% “no.”

The January 1985 issue, serving as a “Special Report,” published the results of this inquiry: “What are the most important characteristics expected of a great trial lawyer?” By a great trial lawyer, is meant, according to the poll, a lawyer that is most likely to persuade the jury to agree with their client’s point of view.

The responses given by those interviewed confirmed some established beliefs, contradicted others, and were at times surprising.

According to the report, “a random sample of 100 registered voters in Dallas County were interviewed by telephone.” Additionally, the backgrounds of those contacted were compared to those citizens of Dallas County who had been previously summoned for jury duty “in order to insure that the sample was representative.”

The results of those polled revealed that the most important characteristics a great trial lawyer can possess are, in declining order of significance:

1. Honesty
2. Knowledge of the law
3. Preparation
4. Effective communication.

Not surprisingly, “honesty” is the predominant characteristic expected of trial lawyers. Those polled stated they were willing to “consider negative facts and plausible explanations for all facts.” They are, however, offended by lawyers who offer untrue or exaggerated facts. In addition, according to the poll, attorneys are viewed as the “alter ego” of their client and as a result the lawyer is tried at the same time as the client.

Coming in second to “honesty” is “knowledge of the law.” It seems that jurors want lawyers to know the law. The lawyer’s knowledge is judged and evaluated, according to those polled, beginning with the voir dire examination. In addition, the lawyer’s prevailing on objections and their closing statements are also subjective criteria employed to test the lawyer’s knowledge.

“Placing” in this race for superiority is “preparation.” As trial lawyers must know, preparation is essential to success. However, jurors seem to make their judgments about the lawyer’s preparedness in a manner that lawyers are not prone to do. The poll comments that conclusions about an attorney’s being prepared are based upon “the manner and tone witnesses are examined and from the presentation of graphs, charts, drawings, and photos.” In addition, those polled commented that they were “also influenced by the Court’s approval or scolding.”

Bringing up the rear of this race is “effective communication.” Although jurors would like to be entertained by a Perry Mason-like trial advocate, they really do not expect to see this occur. One aspect of this response that should be noted is that “Some admit to trying to help other than tell the truth.”

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Today brought with it a double dose of jurisprudential sorrow. I received notice that our Court of Criminal Appeals had denied leave to file a motion for rehearing in a death penalty case of mine, reviewing courts to accord a "presumption" (and our clients die with it]. Query: it: one uncommonly willing to condemn a man to die!

Mrs. Colby (the veniremember made the basis of Witt's Witherspoon claim) told the court "I think so," when asked "Would it [the death penalty] interfere with judging the guilt or innocence of the Defendant in this case?" On that basis alone, she was excused. The Supreme Court reaches into its witch's kit to find that the trial judge could have had much more at hand from which to gain its "definite impression" that Mrs. Colby would be unfaithful to her oath; e.g., he saw and heard her. The Court recognizes the "serious duty" of the trial court to determine the question of actual bias, and the trial court's duty to be "zealous" to protect the rights of the accused, but then, with the finely honed sword of a "brazen revisionist" (see Justice Brennan's dissent) carves out of constitutional jurisprudence those safeguards that assured that trial court's adherence to those duties. Gone are Witherspoon's stringent standards of proof. "The Court no longer prohibits exclusion of uncertain, vacillating or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath. Instead the trial judge at voir dire is instructed to evaluate juror uncertainty, ambiguity or vacillation to decide whether the juror's views about capital punishment 'might frustrate administration of a state's death penalty scheme'. . . If so, that juror may be excused." (Brennan, J., dissenting) Cold blooded? You bet!

Before this revision, our constitution

Clifton L. "Scappy" Holmes
seemed, at least, to require a jury of one's peers in capital cases. That requirement presupposed a cross-section of the community. The most recent poll I've seen regarding popular views on the death penalty revealed that 27% of those polled approved of the death penalty in all murder cases, 57% approved of its use under certain circumstances (and 53% of these believed it is applied unfairly), 12% disapproved of the death penalty, and 4% were undecided. (Media General-Associated Press poll, reported by Lawrence Kilman, AP writer, February 2, 1985). Under the Witt decision, it seems that less than one-third (27%) could pass muster in a court inclined toward "definite impressions."

The horror of this decision lies in its real purpose—not to discover and apply true and meaningful Constitutional principles, but to, by hook or crook, withdraw the Supreme Court from its role as guardians of Constitutional rights, and forfeit that place in our society to the judiciaries of the several states, to be filled in whatever manner each deems appropriate. I am afraid our Supreme Court, as presently constituted, has such a bias toward "States' rights" methodology, that it has, and will continue to discard precious baby after precious baby in its zeal to discard bathwater. As Justice Brennan states, "we [the Supreme Court] have lost our sense of the transcendent importance of the Bill of Rights to our society... Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution's fundamental guarantees." As the court in Witherspoon must never have foreseen, we now have not just juries, but a Court "uncommonly willing to condemn a man to die."

On many prior occasions within these pages, both as Editor and President, I've attempted to sound an alarm regarding death penalty litigation. I've warned that the access to federal courts, where our problems found frequent solution, was being foreclosed. Now, that day has come. we must—have to—develop meaningful and successful approaches to capital punishment cases which have their roots in State law and State procedure. That can only be accomplished by caring and careful attention to our business, and a sharing of ideas and efforts among us.

For example, does the Court's opinion in Holloway (supra) really mean that we, as lawyers, cannot demand that a client's constitutional rights be respected by law enforcement officers until we've secured from that client some form of "consent" which can be affirmatively proved?

Until April,
Scappy

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Report of the 1985/86 Nominating Committee

The TCDLA Nominating Committee met on January 26, 1985, at the home office headquarters and, after deliberation, offered as its recommendation for nomination as officers and directors of TCDLA for 1985-86 the following:

**OFFICERS**

President Louis Dugas, Jr., Orange
President-Elect Knox Jones, McAllen
First Vice President Charles Butts, San Antonio
Second Vice President Ed Mallett, Houston
Secretary-Treasurer J. A. "Jim" Bobo, Odessa
Asst. Secretary-Treasurer Tim Evans, Fort Worth

**DIRECTORS**

District 1 Mike Brown, Lubbock
District 3 Bill Bratton, Dallas
District 3 Charles Caperton, Dallas
District 3 Jeff Kearney, Fort Worth
District 5 Bill Habern, Houston

**ASSOCIATE DIRECTORS**

District 1 Chuck Lanehart, Lubbock
District 1 Bill Wischkaemper, Lubbock
District 2 William B. Smith, Midland
District 2 Bill Glasy, Mesquite
District 3 John Linebarger, Fort Worth
District 3 Vernard Solomon, Marshall
District 5 Robert Pelton, Houston
District 5 (Ms) Clyde Williams, Houston
District 7 Mark Stevens, San Antonio
District 7 Gus Wilcox, San Antonio
District 8 David Botsford, Austin
District 8 David Sheppard, Austin

District 5 Lum Hawthorn, Beaumont
District 5 Richard Thornton, Galveston
District 5 Jack Zimmerman, Houston
District 6 Doug Tinker, Corpus Christi
District 7 Allen Cazzee, San Antonio
District 7 Gerry Goldstein, San Antonio
District 8 Merrilee Harmon, Waco

March 1985/VOICE for the Defense
The Sunday, January 20, edition of the Fort Worth Star-Telegram, along with the stories concerning the upcoming inauguration ceremonies, the celebration of President Ronald Reagan's second term, also had followup articles about a high school drama student's tragic final scene, and the Supreme Court's decision approving a teacher's search for pot in a fourteen-year-old pupil's purse.1

The article about the school search case, by Associated Press correspondent Christopher Connell, titled "Analysis," noted that "for years, President Reagan and other critics have complained that the courts had given too much liberty to the Fort Worth Star-Telegram, along with other critics have complained that the courts had given too much liberty to the Fort Worth Star-Telegram, along with other critics have complained that the courts had given too much liberty to teachers. This individual interprets the teachers. This individual interprets the teachers. This individual interprets the teachers. This individual interprets the teachers. This
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teachers. However, to lawyers, the ground rules...
are all important, and will remain so until, someday, they once again become important to the American people. "... the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351-52, (1967).

In the meantime, we lawyers should contemplate the effect of the new standard on that quality of life that we call "privacy." The latest weakening of the Fourth Amendment by the "Burger Court" should not surprise us. It is certainly consistent with the professed "mission" of the court's activist majority; and in all probability, we ain't seen nothing yet.

Those of us who are no longer eligible for membership in the Junior Bar Association should be most concerned. Although twelve years have passed, one can still vividly recall Senator Sam Erwin, during the nationally televised "Watergate Hearings," applying the Fourth Amendment to the Daniel Ellsberg incident. As an historical observation, Daniel Ellsberg had publicly blown the whistle on a gross abuse of governmental power. So the "President's Men" sent their "plumbers" to clean out the office of Ellsberg's psychiatrist. These agents rifled the files containing the innermost private thoughts of the doctor's patients, and removed all of those pertaining to Ellsberg.

One who has the privilege to remember Senator Sam, with silver mane of hair, jowls, courtly Southern manners, and deep melodious voice, reach back into history and use it to defend the Fourth Amendment is thereby charged with a higher standard of care than our younger brethren to once again protect and defend that precious birthright of the American people.

It is only natural that we graybeards would have a deeper feeling for the Fourth Amendment from having seen and heard Sam Erwin when he quoted Pitt's immortal words:

"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter--all his force dares not cross the threshold of the ruined tenement."

---Speech to the House of Commons, (1637).

Today, society apparently welcomes the Supreme Court's emasculation of the Fourth Amendment in the schoolhouse. This sentiment is consistent with the cash rewards now being paid to high school "tattle-tales." It is a decision which the newspaper's reports and editorials claim will help restore respect for the law.

On the other hand, almost a century ago, James Bryce wrote in *The American Commonwealth* that:

"Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a State make bad laws, they will suffer for it. Suffering, and nothing else, will implant that sentiment of responsibility which is the first step to reform.

Lawyers have a duty to keep the suffering suggested by Bryce to a minimum. However, when one assumes that responsibility and emulates Sam Erwin by quoting Pitt, one should be prepared for such bumper-sticker mentality as "William Pitt never met John DeLorean or Timothy Leary." The name of the juvenile dope pusher who is central to the Supreme Court's latest decision is publicly unknown, but it's a cinch William Pitt never met her either.

Nevertheless, as Justice Frankfurter opined in his dissent in *U.S. v. Rabino-witz*, 339 U.S. 56 (1950):

"The old saw that hard cases make bad laws has its basis in experience. But petty cases are even more calculated to make bad law...It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby deceiver, we must deal with his case in the context of what are really great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.

It is also true of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out of a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the court approached it in *Boyd v. U.S.;* in *Weeks v. U.S.;* in *Silverthorne Lumber Company v. U.S.;* in *Gouled v. U.S.,* or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely that it was a safeguard against recurrence of abuses so deeply felt by the colonies as to be one of the potent causes of the revolution, or one thinks of it as merely a requirement for a piece of paper.

Nineteen years later, Justice Frankfurter's views were vindicated when Rabinowitz was overruled by *Chimel v. California*, 395 U.S. 752 (1969).

William Pitt, in the same speech so eloquently quoted by Sam Erwin, put it another way: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants, it is the creed of slaves."

One can only speculate on the impact of the new, improved "school child exception" to the Fourth Amendment on the teaching of American history, civics and government. How comfortable will the high school teacher feel in dwelling on his students' lost constitutional rights? If nature takes its course, the instructor will probably rather concentrate on more positive subjects.

Seven or eight years from now, a new group of lawyers will be licensed, the high school class of 1985. These new lawyers, of course, can surely be expected to remember the day they lost their Fourth Amendment rights. However, what about the law school graduates of twelve years from now? Can one really expect today's sixth graders, who were raised without the Fourth Amendment, to fully appreciate its significance? Today's middle schoolers are tomorrow's lawyers, legislators and our future judges. What will "reasonable cause" come to mean? We already know what it replaces.

Probable cause has historically meant: "Would a reasonable person conclude from the circumstances that a crime occurred or that evidence of a crime is lo-

March 1985/VOICE for the Defense
In Brinegar v. United States, 338 U.S. 160 (1949), the court explained:

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection; because many situations which confront officers (or school teachers for that matter) in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts, leading reasonably to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromises that have been found for accommodating these often opposing interests.3 Requiring more would unduly hamper law enforcement. To allow less would leave law-abiding citizens at the mercy of the officers’ whim or caprice.

All of American society has been afforded this protection from cradle to grave. Today, however, our children are provided with something less. Only history will tell what is left for our children’s children.

Because of this, those of society who are in a position to fully appreciate the Fourth Amendment, and who have taken an oath to protect and defend it, should help the high school teachers to remind our children of their former birthright, because it makes all the difference in the world.

An educational program in our schools should be instituted before it’s too late. That program should certainly include a film clip of the old country lawyer again quoting William Pitt: “Those who cannot remember the past are condemned to repeat it.”—Santayana, The Life of Reason, (1906).

Dear Sir:

The Texas Council on Crime and Delinquency has just completed a two-year research study on the Mentally Retarded Adult Offender in Texas. On March 24–26 we will produce a conference in Austin which will give a state and national perspective on this special needs offender group. The registration fee is $100.

For more information, call or write Judy Deaver, TCCD, 4000 Medical Parkway, Suite 200, Austin, Texas 78756, call all attorneys filing copies in this Court and follow the call with a letter. I am to inquire whether or not a copy was filed in the Court of Appeals.

Perhaps we can all save time if, when copies are sent to the Court of Criminal Appeals, a cover letter be sent to me, informing me of the filing of the original in the Court of Appeals.

If you could help me distribute this information via the VOICE for the Defense I would certainly appreciate it.

Thanking you in advance for this courtesy I am

Yours truly,

THOMAS LOWE
Clerk, Court of Criminal Appeals

Dear Rusty:

Re: Petition for Discretionary Review

Rules 304(b) and 304(d8), of the “Rules of Post Trial and Appellate Procedure in Criminal Cases,” require the original petition for discretionary review to be filed with the clerk of the Court of Appeals which delivered the decision in the case.

Rule 304(d8) allows the filing of copies with either the clerk of the Court of Appeals or the clerk of the Court of Criminal Appeals.

Several times recently all copies were filed in this office, resulting in untimely filed petitions.

The Court has instructed me now to call all attorneys filing copies in this Court and follow the call with a letter. I am to inquire whether or not a copy was filed in the Court of Appeals.

Perhaps we can all save time if, when copies are sent to the Court of Criminal Appeals, a cover letter be sent to me, informing me of the filing of the original in the Court of Appeals.

If you could help me distribute this information via the VOICE for the Defense I would certainly appreciate it.

Thanking you in advance for this courtesy I am

Yours truly,

THOMAS LOWE
Clerk, Court of Criminal Appeals

Sincerely,

NEAL R. JOHNSON
Executive Director

### Activity of the Court of Criminal Appeals for 1984

#### ON DIRECT APPEAL

<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
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<tbody>
<tr>
<td>Cases pending January 1, 1984</td>
<td>339</td>
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<tr>
<td>Cases filed for the year ending December 31, 1984</td>
<td>170</td>
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<tr>
<td>Cases reinstated on the docket</td>
<td>19</td>
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<tr>
<td>Cases pending December 31, 1984:</td>
<td></td>
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<tr>
<td>Under submission on rehearing</td>
<td>25</td>
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<tr>
<td>Under original submission</td>
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<tr>
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<td>Unsubmitted cases</td>
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#### Disposition of motions for leave to file motions for rehearing:

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<tr>
<td>Appeals abated</td>
<td>5</td>
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<tr>
<td>Reversed and remanded</td>
<td>27</td>
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<tr>
<td>Reversed and dismissed or reformed to show an acquittal</td>
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<tr>
<td>Remanded to the trial court for hearings</td>
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<td>Habeas corpus relief granted</td>
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<td>Habeas corpus relief denied</td>
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<td>Mandamus relief granted</td>
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<td>Mandamus relief denied</td>
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<td>Mandamus and prohibition relief granted</td>
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<tr>
<td>Order denying bail set aside</td>
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<td>Mandamus and prohibition application dismissed</td>
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#### Disposition of motions for leave to file motions for rehearing:

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<td>Leave to file motions for rehearing granted</td>
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#### Disposition of motions for rehearing disposed of by the Court:

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<td>Motions granted with written opinion</td>
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#### ON PETITION FOR DISCRETIONARY REVIEW

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<td>Petitions discretionary review pending January 1, 1984</td>
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<td>Petitions refused as untimely filed</td>
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<td>Petitions dismissed</td>
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#### ON APPLICATION FOR WRIT OF HABEAS CORPUS, ETC.

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<td>Applications for writ of habeas corpus, etc., denied with written order (rehearings included)</td>
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<td>Applications for writ of habeas corpus, etc., denied without written order (rehearings included)</td>
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<td>Applications for writ of habeas corpus, etc., granted with written order</td>
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<td>Applications for writ of habeas corpus, etc., dismissed</td>
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<td>Applications for writ of habeas corpus, etc., ordered filed and set for submission</td>
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<td>Applications for writ of habeas corpus, etc., marked &quot;no action&quot;</td>
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<td>Hearings ordered on applications for writ of habeas corpus, etc.</td>
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<td>Out of time appeals granted</td>
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OPINIONS WRITTEN BY THE COURT OF CRIMINAL APPEALS FOR THE YEAR ENDING
DECEMBER 31, 1984

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<th>JUDGE</th>
<th>Per Curiam Opinions</th>
<th>Signed Opinions</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
<th>Opinions Concurring in Part &amp; Dissenting in Part</th>
<th>Opinions Granting Rehearing</th>
<th>Opinions Denying Rehearing</th>
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Applications for writ of habeas corpus, etc. under consideration of the Court on December 31, 1984 ............. 219

Direct appeal cases disposed of for the period mentioned . 257
Petitions for discretionary review handled for the period mentioned .................................................. 1776
Applications for writ of habeas corpus, etc. disposed of for the period mentioned ................................. 1720
Applications for extensions of time to file, transcriptions of court reporter's notes, bills of exception, briefs and petitions for discretionary review considered and disposed of for the period mentioned ........... 634
TOTAL ........................................................................................................................................... 4387

TCDLA Goes to London

Since the ABA has prepared for a 1985 meeting in London, TCDLA President Scrappy Holmes thinks it is time for London to experience Lawyers from Texas, otherwise known as TCDLA. The meeting will occur the week of July 14-20 and is the result of two years of planning. If you are interested in attending, you may obtain registration information and forms from the ABA Meetings Department, Chicago, IL 60611, or call (312) 988-5870. The deadline for housing is May 31, 1985.
ANDREW SAMUEL, 1064-83, Opinion on State's PDR: Conv. rev'd, Judge Clinton, 2/20/85.

PROSECUTOR ERRED IN USING D'S SILENCE AFTER D HAD BEEN ARRESTED AGAINST D: Facts showed that D went into a liquor store and tried to pass a check. When the C/W determined that the check was unauthorized, D at first attempted to retrieve the check and license and then, failing that, fled. C/W pursued D and cornered him with a shotgun. On direct examination of the C/W the prosecutor carefully developed that during the time after D was under arrest and while the C/W was guarding him, D never protested his innocence or lack of knowledge as to the check. Defense counsel at first objected to the prosecutor's question as being "leading" (parenthetically, court found question was leading) and after that objection was overruled defense counsel objected "to statements made after he was under arrest", which objection was overruled. During jury arguments, the prosecutor emphasized the D's silence. The state now argues that the defense objection was insufficient to preserve error as a matter of state law. Initially by footnote Judge Clinton observed that "... Such an objection made during trial under state law in a state court presumptively invoked state law rather than federal, so that it is the latter that must be specified." The court then held that under Zillender, 557 S.W.2d 515 (1977), the objection was sufficient to inform the judge of the import of the D's complaint.

"A number of exceptions to the general rule that a party cannot complain on appeal to the overruling of a general objection or an imprecise specific objection have been created..."
Thus, where the correct ground of exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection." Zillender, 557 S.W.2d 515, 517.

The court further noted that the proper objection was as stated in Hicks, 493 S.W.2d 833, 837 (1973):

"The proper objection ... would be that at the time the question was asked, that the appellant was under arrest and that such a question is in violation of the appellant's rights against self incrimination and of the confession statute. Article 38.21, Article 38.22, V.A.C.C.P."

Finally, the court held that as a matter of state law this post-arrest silence type evidence is inadmissible. Gardner, 34 S.W. 945 (1896); Taylor, 42 S.W.2d 426 (1931); Sharp, 217 S.W.2d 1017 (1949); Harrison, 491 S.W.2d 920 (1973); Hicks, supra.

The state did not contend otherwise, i.e., that the D's silence during a vigilante arrest was admissible under state law. Instead the state argued procedural default and that the matter was governed by federal law, i.e., that as a matter of federal constitutional law post-arrest but pre-Miranda silence may be considered not only for purposes of impeachment (Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 [1982]) but also for purposes of establishing guilt. By footnote 7 the court rejected the argument notwithstanding Fletcher, supra. W. C. Davis and McCormick dissented.

* * * *

RICHARD HARRISON, 0110-84, Opinion on State's PDR: Conv. aff'd, Judge Campbell, 2/20/85.

ADMONISHMENTS OF TRIAL COURT TO D ON PLEA OF GUILTY, AS TO AVAILABILITY OF PROBATION HELD NOT REVERSIBLE ERROR: D, after being certified as an adult, and after some plea negotiations, pled guilty to one count of aggravated robbery; in return therefor, two other aggravated robbery counts were dismissed and the state made no recommendation as to punishment. The T/C set punishment at 10 years and 1 day TDC. The CCA held the T/C had failed to properly admonish D insofar as D's eligibility for probation was concerned. See Art. 42.12 Sec. 3P(a)(1)(E) C.C.P.

At the time of the guilty plea, the T/C inquired as to the existence of a plea bargain and admonished D in accordance with Art. 26.13 C.C.P. The CCA held that the T/C erred in admonishing D as regards probation but found D had failed to show he was misled to his detriment as required by Art. 26.13(c) C.C.P. and thus the error, if any, was harmless. The trial record showed that although no motion for probation had been filed by the D, the T/C admonished D on probation that if the court accepted the
plea of guilty he would accept all parties' request for a presentence investigation before the assessment of punishment and that it would rest entirely within the discretion of the court as to what punishment would be imposed, that it could be anything allowed by law. The D may or may not be accorded probation, that would rest solely in the discretion of the court.

The court first held that the state's argument that the T/C could have granted deferred adjudication type probation was based upon pure speculation. The state's argument that the court could have found D guilty of the lesser included offense was likewise rejected.

The court concluded that the D utterly failed to show any reliance on the T/C's misstatement of the availability of probation. No probation motion had been filed prior to trial and no protest was made when the court sentenced the D to prison time. Thus, the court could not find that the D had met his burden in showing he was harmed or misled by the incorrect admonishment of the T/C. The court did admonish that a cautious trial judge would be wise to admonish a D who is not eligible for probation of that fact; however, absent a showing of harm, such failure is not reversible error. McNew, 608 S.W.2d 166 (1980).

Ramirez, 655 S.W.2d 319 (Tex. App. - Corpus Christi, 1983, no PDR) was held correct insofar as it is error to advise a D that he may receive probation when he is statutorily ineligible; but the Ramirez court noted that such is error only when it is apparent that a D is affirmatively seeking probation and the record is clear that the D is pleading guilty in anticipation that he may receive probation.

As a general rule, a T/C has no duty to admonish as to the availability of probation. Shields, 608 S.W.2d 924. The court also noted that it had previously found error where a T/C improperly admonished as to probation when a D was ineligible and it was apparent from the record that the D was seeking probation. West, 661 S.W.2d 305; Lewis, 630 S.W.2d 809; Jones, 596 S.W.2d 910.

* * * *

WILLIAM MAYNARD, 410-84, Opinion on D's PDR: Conv. rev'd, Judge Campbell, 2/20/85.

EXTRANEOUS OFFENSE WAS PROPERLY PRESERVED AND WAS REVERSIBLE ERROR AS TO PUNISHMENT: Evidence showed D illegally entered C/W's house by forcing open a window screen, disrobed, and got into her bed and forced her to have intercourse. D left the house after raping the C/W but soon returned in less than 30 minutes, parked his car near the C/W's driveway, and went to the back and began rattling the backdoor. The C/W immediately called the police who responded. D hid in some bushes and then bolted and ran and escaped. A records check and a telephone call showed that the automobile left by the prowler belonged to the D and the
vehicle was impounded and its contents inventoried. The inventory produced a baggie of marijuana, a roach clip, a switchblade knife, a lock blade knife, and several other items. At trial the D filed a Motion In Limine to suppress evidence complaining of the admission of these items which would constitute proof of an extraneous offense not relevant to the burglary of a habitation with intent to commit rape indictment. Orally at trial defense counsel made reference to the switchblade knife which was not mentioned in the written motion. The T/C denied the motion as written but granted the motion as orally amended. During the direct examination of the officer, the prosecutor asked what if anything the officer found in the D's vehicle. The witness responded "found a baggie of -- ", whereupon the D lodged his objection and asked for a hearing outside the presence of the jury which was granted. At this time the evidence was presented regarding the seizure from the D's vehicle of the baggie of marijuana, switchblade knife, and lock blade knife. At this time the defense counsel objected that these items were not part of the res gestae and it wasn't necessary to prove identity and did not bear on intent or show motive and malice and did not show a plan or system and had no bearing on any defensive theory and didn't show flight. The trial judge overruled this objection after the prosecutor argued that the evidence was in the nature of res gestae. The court then asked whether the defense counsel wanted to renew the objections in the presence of the jury or simply wanted the court to consider them as having been made and defense counsel responded that he wanted to object in the presence of the jury. When the evidence was introduced in the presence of the jury the defense counsel objected to the evidence on the ground that it was immaterial, irrelevant to any issue in the cause and was only offered and introduced to inflame and prejudice the minds and attitude of the jury toward the D. This objection was overruled. The C/A held that nothing was presented for review because it concluded that the "Motion To Suppress" was filed on the day of trial and was unsupported by evidence, citing Writt, 541 S.W.2d 424 and that defense counsel's objection in the presence of the jury failed to state that the evidence was proof of an extraneous offense. The CCA held that the D's objection in front of the jury was too global to preserve error citing Garcia, 573 S.W.2d 12 and Russell, 468 S.W.2d 373. However, it held that the overruling of the D's objection made at the hearing outside the jury's presence was sufficient to preserve the asserted error for appellate review. Art. 40.09 Sec. 6(d)(3) C.C.P. The objection outside the jury's presence, while never using the phrase "extraneous offense" was clearly sufficient to provide the trial judge and the prosecutor with notice that the D was in fact complaining of an extraneous offense; this is particularly true in view of the prosecutor's remark that the evidence was admissible under the res gestae exception to the rule prohibiting the admission of extraneous offenses.

The CCA emphasized that the purpose of an objection is two-fold: first, a specific objection is required to inform the trial judge of the basis of the objection and afford him/her an opportunity
to rule on it; and second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony. See *Zillender*, 557 S.W.2d 515 (Tex. Cr. App. 1977). "Since the record clearly reflects that all parties involved at trial were aware of Appellant's complaint, we hold that his objection preserved the issue for appellate review."

Next, the state argued waiver because the D testified concerning the objects found in his car in the presence of the jury. The D stated the roach clip, the lock blade knife, and the ice chest were his and that he knew they were in the car; he admitted owning the switchblade knife but said he did not know that it was in the car. He denied ownership of the marijuana or knowing it was in the car. Generally, when the D offers the same evidence to which he earlier objected, he is not in a position to complain on appeal. *Womble*, 618 S.W.2d 59 (Tex. Cr. App. 1981). This principle is known as the doctrine of curative admissibility. The corollary to this rule is that the harmful effect of improperly admitted evidence is not cured by the fact that the D sought to meet, destroy, or explain it by the introduction of rebutting evidence. *Eyers*, 576 S.W.2d 46; *Alvarez*, 511 S.W.2d 493. Under these authorities, the D did not waive his objection to the legal admissibility of the inventory if he testified to meet, destroy, or explain the existence of the marijuana and the switchblade knife in his car. The court principally relied upon *Thomas*, 572 S.W.2d 507 to explain the operation of this corollary:

"If a defendant takes the witness stand to refute, deny, contradict, or impeach evidence or testimony properly objected to, no waiver of the objection occurs. But if a defendant in testifying admits or confirms the truth of the facts or evidence objected to, even if attempting to create a defense based on or beyond those facts, a waiver of the objection does occur. The one possible exception to this principle is that no waiver will be found where a defendant objects to evidence or testimony not tied directly or indirectly to the elements of the case and then in testifying himself admits those facts to be true. This exception is illustrated by *Alvarez v. State* (511 S.W.2d 493 [Tex. Cr. App. 1973]), in which a portion of a confession saying 'I always carry a pistol with me because I shot and killed a man in Lubbock not too long ago and am afraid of his people', was properly objected to as showing an extraneous offense. This court found that the objection was not waived when the D took the stand and admitted on direct examination that the statement was true in attempting to explain the incident. This was an extraneous offense, not tied to the elements of the case.

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but useful only to show the character of the defendant. However, this case appears to contradict Robbins v. State, 481 S.W.2d 419 (Tex. Cr. App. 1972); Cook v. State, 409 S.W.2d 857 (Tex. Cr. App. 1966); and Meadowes v. State, 368 S.W.2d 203 (Tex. Cr. App. 1963), all of which held that objection to improper evidence of an extraneous offense was waived when the defendant on direct examination confirmed such facts. We express no opinion now as to this point."

The court then stated that it was now squarely confronted with that issue and the court held that no waiver occurs when, after the admission over objection of evidence of an extraneous offense, the D subsequently testifies to essentially the same facts to which he had earlier objected. This is sound policy as it is fair policy. An extraneous offense is collateral to the facts in issue at trial and is inherently prejudicial. That it actually took place does not affect its lack of relevance. To require the D to sit moot in the face of such harmful evidence to preserve the issue for appellate review is to unfairly hamstring the D at trial. Once the evidence is admitted, correctly or incorrectly, the D is compelled by the exigencies of trial to mitigate such inherently prejudicial evidence as best as he/she can. To the extent that Robbins, Cook, and Meadowes, supra are inconsistent with this holding, they are overruled.

As to whether the evidence was res gestae of the offense: to qualify as "res gestae", the evidence of extraneous offenses must be so closely interwoven with the offense on trial that it shows the context in which the offense occurred. Archer, 607 S.W.2d 539. In this case the record does not show any evidence that the D had the switchblade or marijuana on his person at the time of his arrest or that the D used the knife in connection with the charged offense or that he appeared to be under the influence of marijuana. Thus, the evidence did not relate to proving that the D committed the crime of burglary with intent to rape and its only purpose was to prejudice the D's defense. Maddox, No. 049-84 (del. 1/9/85).

Was the evidence "harmless error"?: The test for harmless error is not whether a conviction could have been had without the improperly admitted evidence, but whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction—or to the punishment imposed. While the court was persuaded that the improperly admitted evidence did not contribute to the conviction of the D to the offense, it could not hold same evidence harmless with respect to the seven year punishment imposed by the jury. The D was eligible for probation. The trial was a one-day trial. The D introduced ample evidence as to his character and reputation and employment record. The C/W was not injured and no weapons were used. The state presented no evidence at the punishment phase of trial. The court concluded that it was "unable to say that there
is not a reasonable possibility that the improperly admitted evidence contributed to the number of years assessed as punishment by the jury."  [Ed: In my opinion, Judge Campbell did an excellent job in authoring this opinion.]

* * * * *

Masters, 773-83, Appellant's PDR: Conv. aff'd, Per Curiam, 2/20/85.

Article 46.02 (Unlawfully Carrying a Weapon) Does Not Violate Article I, Section 23 of the Texas Constitution or the Second Amendment to the U.S. Constitution.

* * * * *

Ralph Siqueiros, 551-84, Opinion on State's PDR: Conv. aff'd, Judge White, 2/20/85.

Extraneous Offense Admissible on Issue of Identity and Burglary of a Habitation Case: State's evidence showed that D entered 15 year old's window after midnight and raped her, then fled. Cross examination showed C/W had consumed three or more beers and smoked marijuana before going to bed; had mis-described the assailant as to his hair and mustache; had given an inaccurate composite drawing; had made only a tentative identification from photographs and had not identified D's voice. T/C permitted a second 15 year old to testify that 26 days later D entered her bedroom and attempted to force her to have sex. A latent fingerprint examiner identified D's fingerprints as being found in the house although the six fingerprints found on the window to the C/W's bedroom in the extraneous offense were not those of D. The C/A held that because of the C/W's identification of D had not been completely undermined and because D did not raise an alibi defense, the extraneous offense was not admissible.

The court applied the rule that before an extraneous offense may be admitted, it must be shown that there is a relationship between such evidence and the evidence necessary to prove that the accused committed the crime for which he stands charged. The relationship should consist of some distinguishing characteristic common to both the extraneous offense and the offense charged. Albrecht, 486 S.W.2d 97; Cobb, 503 S.W.2d 249; Blackmon, 644 S.W.2d 12. If this test is met and the identity of the D is in issue, an extraneous offense is admissible to prove identity. Cross examination of the state's identifying witnesses can raise the issue of identity.

In essence, the court held that the defense counsel's cross examination raised the issue of identity as the defense strategy was aimed at undermining the C/W's identification. The actions of defense counsel amounted to the equivalent of testimony in support of the D. [Ed: There is nothing like penalizing a defendant for having the services of a competent trial lawyer who successfully cross examines a complainant in a burglary of a
habitation case. It seems as though situations such as these, the more successful the defense lawyer is in representing his client, the more defense counsel can indirectly also inadvertently assist the state.

* * * * *

RICHARD GOMEZ, 64,705, Et al, Conv'd aff'd, Judge McCormick, 2/20/85.

REVOLVER IS A FIREARM: A revolver is a firearm. Since a firearm is a deadly weapon per se under Sec. 1.07(a)(11)(A), and a revolver is a firearm, the state sustained its burden of proof as to the firearm allegation. The aggravated robbery indictment alleged that the D placed the C/W in fear of imminent bodily injury and death by using and exhibiting a deadly weapon, namely a firearm, and the proof showed that the weapon used by the D was a gun or a revolver.

* * * * *

NEIL SCHWARTZ, 669-83, Case remanded, Per Curiam, 2/20/85.

ILLEGAL ARREST HOLDING OF C/A REMANDED IN VIEW OF ILLINOIS V. GATES, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): C/A held that because D's arrest was based upon an informant's tip that failed to meet the two-pronged test that was announced in Aguilar v. Texas and explicated in Spinelli v. United States, the court erred in overruling D's pretrial motion to suppress the evidence in possession of narcotic case. In view of Illinois v. Gates, not decided when C/A delivered its opinion, cause was remanded in order that C/A could reconsider issue in light of Illinois v. Gates.

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DONNIE WAGNER, 61,601, Opinion on Appellant's Motion For Rehearing: Over'd, Judge Clinton, 2/13/85. (Onion, McCormick, and Campbell concur in result; Teague dissented).

REPUTATION WITNESS TESTIMONY--STANDING ALONE, KNOWLEDGE OF A SPECIFIC ACT OF MISCONDUCT WILL NOT QUALIFY A WITNESS TO TESTIFY THAT HE KNOWS THE REPUTATION OF AN ACCUSED TO BE BAD--BUT HARMLESS ERROR IN THIS CASE: D was found guilty of shooting and killing Laura Smith on 9/28/78, when D forced his way into the decedent's home in an effort to see her daughter Willie Smith. Though not married to D, Willie Smith had one child and miscarried another by D. A few days prior to the offense, Willie Smith and D had taken a blood test preparatory to getting married, though Smith testified her participation was coerced. Sometime after the offense was committed, and after Willie Smith had married Charles Gans, D apparently threatened their lives. At trial, Officer Long at the punishment phase testified that he was a patrol sergeant with the Orange Police Department, that he had known of the D for about two months and that he knew D's
reputation in the community for being a peaceful and law abiding citizen to be bad. On voir dire, D established the basis for the officer's knowledge of D's reputation was a discussion with Charles Gans with regard to the above-mentioned threat. On original submission this ground of error was overruled relying upon Crawford, 480 S.W.2d 724 wherein it was said that although officers could not testify to specific acts it was not improper for them to discuss specific acts with other persons as a basis for determining what the D's reputation is in the community. However, it was clear from Crawford and Prison, 473 S.W.2d 479 that the testimony of the respective officers in those cases was not based solely on discussions as to specific acts. The court on rehearing emphasized that it is imperative a reputation witness discuss the accused's reputation with members of the community as a basis for his opinion that such reputation is bad. Mitchell, 524 S.W.2d 510. Henceforth, Crawford stands for the proposition that discussion of specific acts which occur during the course of conversations as to an accused's reputation in the community will not serve to taint or invalidate the officer's understanding of that reputation. This is not the same, however, as holding that reputation testimony may be granted solely on the officer's knowledge of specific acts.

In this case, the court held that standing alone, knowledge of such a specific act of misconduct will not qualify a witness to testify that he knows the reputation of an accused to be bad. The court relied heavily upon the C/A decision in Moore v. State, 663 S.W.2d 497, 500 (Tex. App. - Dallas, 1983), authored by Judge Akin, at a time when the C/A was bound by Romo, 593 S.W.2d 690. Wagner, however, now overrules Romo. Wagner quoted from the Moore decision as follows:

"Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule. For reputation testimony to be an exception to the hearsay rule it must meet two basic criteria: (1) that there is some necessity for the introduction of the testimony; (2) that the testimony has some circumstantial probability of trustworthiness. 5 Wigmore, Evidence Section 1580, 1611 and 1612 (Chadbourn Rev. 1974); 1A R. Ray, Texas Law at Evidence Civil and Criminal, Section 1321 (Texas Practice 3d Ed. 1980) (Footnote 6: Section 1321 states: 'The reasons for this (hearsay) exception are two: (1) the inherent difficulty of obtaining any satisfactory evidence of the desired fact other than proof of tradition and reputation recreates a necessity for this evidence. (2) the fact that a prolonged observation and discussion of certain matters of general interest by a whole community will sift possible errors and bring the result down to us in a fairly trustworthy form furnishes a guarantee of correctness.'

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The trustworthiness of reputation testimony stems from the fact that a person is observed in his day to day activities by other members of his community and that these observations are discussed. Over a period of time there is a synthesis of these observations and discussions which results in a conclusion as to the individual's reputation. When reputation is based solely on specific acts, this synthesis is lost, as well as its reliability. When reputation testimony is given by police officers who have investigated an individual's offenses and by victims of an individual act who have spoken only with others who are also victims, it is obvious that the witnesses' conclusions as to the appellant's reputation will be slanted against the individual and will not have the trustworthiness implicit in the exception to the hearsay rule. The conclusion of such witnesses as to the reputation may be vastly different from those who have had the day to day contact within the community envisioned in the traditional exception to the hearsay rule for reputation testimony. What is actually occurring with testimony of this type is that a witness takes the specific acts of the individual and then infers what the reputation of the person would be. In this respect, this evidence could easily be fabricated, and thus, loses its reliability. Consequently, if this were an open question, we would likely hold that such testimony was inadmissible." (Reference here is made to Romo v. State, 593 S.W.2d 690).

The Wagner opinion emphasizes that this case serves as a perfect example of the reason that knowledge of specific acts alone as a basis for reputation testimony violates the rationale for admitting such testimony in the first place. The officer based his knowledge of Appellant's reputation on a single terroristic threat which was related to him by Gans. While strictly speaking this incident was not part of the transaction for which the D was being prosecuted, both incidents were a product of the tumultuous relationship between the D and Willie Smith. The officer's testimony could not possibly constitute the kind of synthesis of observation and discussion in the community which is the basis for deeming reputation evidence reliable. His testimony was not indicative of the climate of opinion in the community. Rather, it reflected a single unproven allegation made by an obviously biased third party.

However, although erroneously admitted, the court concluded the evidence was harmless error. Although the officer was the only witness to testify on behalf of the state at the punishment
hearing, his testimony was concise and unimpeached. The jury never learned of the extraneous incident which was the purported basis for this testimony. The D himself offered no evidence in his own behalf during the punishment hearing.

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FLOYD GEARING, 906-83, Opinion on State's Motion For Rehearing on Appellant's PDR: Conv. aff'd, Judge Onion, 2/13/85.

LEGAL DETENTION AND THEREFORE LEGAL SEARCH AND SEIZURE OF PISTOL FROM D'S VEHICLE: D filed a Motion To Suppress a pistol found in his vehicle. He was thereafter convicted of possession of a firearm by a felon and sentenced to life because of the enhancement paragraphs. On original submission the court rev'd the C/A decision and held that the police officer who arrested the D acted unlawfully, in a 5/4 decision. This opinion is a 6/3 decision. The following is a quotation from the opinion which summarizes the facts the court deems paramount in justifying the detention, etc.:

"The instant case shows that Vaughn, a nine year veteran of the Pasadena Police Department, left his apartment about 3 a.m., on the date in question to return to duty. He was in police uniform and in a marked police vehicle. He was also the security officer for the apartment complex, was familiar with the criminal activity in the parking lot or lots thereof, and of recent arrests etc. After driving 300 feet, he observed a 1978 Lincoln automobile parked without lights with the motor running, the windows rolled up, and an individual slouched down in the front seat. He considered the individual may have fallen asleep with the motor running and was in danger, and he was further suspicious of criminal activity being afoot, given the hour and other circumstances. Officer Vaughn approached the parked car to investigate the situation. As he did, appellant rolled down the window, and when asked what he was doing there, appellant stated he was there to see a friend, Holly Rogers. Vaughn knew threats had been made against the Rogers two nights before, and further suspected narcotic trafficking at the Rogers' apartment, and he had made recent arrests for narcotic offenses on the parking lot in question. Officer Vaughn also testified he didn't know who else or what might be in the automobile, and for his personal safety he didn't want to be in a position where the car door could be swung against his person. At this point the officer, being where he had a right to be,
asked appellant to step out and show him some identification. When appellant stepped out, the officer saw a pistol in a holster. We agree upon further study with the Court of Appeals that Vaughn acted reasonably in attempting to secure more information, and that the pistol was properly subject to seizure when Vaughn saw it in plain view under the circumstances described. The pistol was properly admitted into evidence."

See Johnson, 658 S.W.2d 623 (Tex. Cr. App. 1983); Leighton, 544 S.W.2d 394 (Tex. Cr. App. 1976); Florida v. Royer, 103 S.Ct. 1319 (1983). Somewhat troubling is Judge Onion's observation in the opinion: "We do not interpret Article I, Section 9, Texas Constitution, to require more than the Fourth Amendment in the above described situation." As noted by Judge Clinton in his dissenting opinion, neither the state nor the appellant relied upon state law in this case and therefore Judge Onion's reference apparently was not invited but nonetheless offered. Judge Clinton dissented, relying predominantly upon Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) which pointed out that the S.Ct. has "required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity".

Interesting is Judge Teague's "dissenting opinion", which I submit is really a concurring opinion, in which Teague takes to task the opinion of the Houston Court of Appeals which recited that "appellant was 'slouched over' the steering wheel ...", facts which were adopted by the author of the majority opinion on original submission. Judge Onion in the present opinion states that appellant was not slouched over the steering wheel but was rather slouched down in the driver's seat, remarkably different postures. Judge Teague states that he dissented originally, thus voting to affirm the judgment of conviction; but under the present state of facts, would not have so voted, save and except for the waiver involved in this case. As to the C/A opinion Judge Teague wrote:

"It is now axiomatic that an appellate court judge should never misstate the facts of a case in an opinion he authors for his particular court. Just recently, in Lagay v. State, ___ S.W.2d ___ (Tex. Cr. App. 399-84, 1/9/85), this court explicitly pointed out that if a case is assigned to a particular appellate court judge, he, and no other person, including any member of his staff, has the responsibility to read the entire record on appeal, from the first to the last page, in order that the opinion he authors for his court will be factually correct. Otherwise, if an opinion erroneously states the facts of a case, this might not only cause the author
of the opinion to be embarrassed, such can also cause his fellow judges to be embarrassed. Of course, it can cause other appellate court judges who rely on the opinion to also be embarrassed. I confess, I am embarrassed, because had the opinion of the Court of Appeals correctly stated the facts of the case, I would not have voted to dissent to the majority opinion on original submission."

Which next leads to the waiver problem in this case. After the majority opinion reviews the facts and decides that the detention, etc. was lawful, the court addresses the state's attorney's contention that the error was not preserved properly to begin with. In this case the trial judge suggested to carry along the D's pretrial motion to suppress evidence with the jury case and pass upon it when the issue was raised. No ruling was thus obtained on the motion to suppress. Later trial by jury was waived. At the bench trial when the pistol was offered, appellant's counsel expressly stated: "No objection". After the conclusion of all the testimony, the trial judge permitted oral argument on the motion to suppress and overruled it. The majority concluded that "It would appear he waived the error, if any, unless it can be argued that in permitting counsel to argue the pretrial motion after trial and ruling upon the same, the court in an unorthodox manner allowed the preservation of error, if any. Be that as it may, no error in our opinion is presented upon consideration of the merits."

Rather than defense counsel in the future putting too much reliance upon preservation of error in the manner done in this case, it is strongly suggested that the following rules recited in the opinion be followed:

"It is settled that when a pretrial motion to suppress evidence is overruled, the accused need not subsequently object to the admission of the same evidence at trial in order to preserve error. Ebarb v. State, 598 S.W.2d 842 (Tex. Cr. App. 1980); Riojas v. State, 530 S.W.2d 298 (Tex. Cr. App. 1975); Harryman v. State, 552 S.W.2d 512 (Tex. Cr. App. 1975). However, when the accused affirmatively asserts during trial he has 'no objection' to the admission of the complained of evidence, he waives any error in the admission of the evidence despite the pretrial ruling. Harris v. State, 656 S.W.2d 481 (Tex. Cr. App. 1983); Mayberry v. State, 532 S.W.2d 80 (Tex. Cr. App. 1976); McGrew v. State, 523 S.W.2d 679 (Tex. Cr. App. 1975)."

If Judge Teague believed that the D in this case did not preserve his ground of error for review but felt that he must "dissent to (the majority's) holding that appellant's detention in the
ensuing search and seizure were lawful. Such is pure dictum. I have seen disagreements with dictum but never before a dissenting opinion which agreed that error was waived and therefore no reversible error was presented and therefore the judgment of conviction should have been affirmed and therefore total agreement with the majority opinion and therefore a concurring opinion. Or something like that.

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PREDDY CHRISTIAN, 436-84, Opinion on D's PDR: Conv. aff'd, Judge Clinton, 2/13/85.

EVIDENCE SUFFICIENT TO PROVE UNLAWFUL CARRYING OF A WEAPON UNDER SECTION 46.02--ELEMENT OF "ASPORTATION" STRESSED IN UCW CASE: Arresting officer answered a dispatch on a suspicious vehicle call at 10:04 a.m. on 1/11/83 and found D behind the wheel of a Ford auto parked on some grass off the street in the 600 block of W. Center Street in Sherman. The car was running but not moving when he arrived at the scene. The officer approached the auto and obtained D's driver's license for identification. A routine warrant check revealed an outstanding traffic warrant. D was arrested and placed in the patrol car. Proceeding to inventory the vehicle, the officer found a pair of nun-chucks protruding two to three inches from beneath the driver's side of the front seat, with the connecting chain visible. Nun-chucks are a swinging type of club, capable of causing injury that would be serious if not fatal in some cases. The car did not belong to the D. "On or about the person" extends to cover at least the interior of the automobile, i.e., within such distance of the D that he could get his hands on the item without materially changing his position. Courtney, 424 S.W.2d 440. The court held the evidence sufficient to show the D knew the nun-chucks were there since as they protruded two to three inches with the connecting chain portion exposed, the nature and existence of the nun-chucks were open to plain view. The final question remained as to whether the facts were sufficient to show the D had been or was in the act of "carrying", i.e., personally transporting the nun-chucks. In order to give effect to the entire phrase "carry on or about (the) person", it is necessary to construe "carry" to denote an element of asportation. The court concluded that the jury could reasonably infer the D was unlawfully "carrying" the nun-chucks from the fact that he was found alone behind the wheel of an automobile which, though parked, was running. It perceived no other reasonable inference that could be drawn from such circumstances, regardless of the ownership of the automobile or the weapon. Teague dissented. Judges McCormick and Campbell concurred, taking issue only with the fact that "asportation" should not be a required element of the offense of unlawfully carrying a weapon.

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GEORGE OLIVER, 535-83, Opinion on State's PDR: Conv. aff'd, Judge McCormick, 2/13/85.

COURT'S CHARGE NOT FUNDAMENTALLY ERRONEOUS: D was charged in a two-count murder indictment with causing the death of X by shooting him with a firearm and intending to cause serious bodily injury to X by committing an act clearly dangerous to human life, i.e., shooting X with a firearm, under Sections 19.02(a)(1) and (2) P.C. The application paragraph of the court's charge tracked the first theory but as to the second, instructed the jury that if it found the D intended to cause serious bodily injury and committed an act clearly dangerous to human life that caused the death of an individual, to find the D guilty. In other words, the charge omitted the language under the second theory, i.e., shooting the said X with a firearm. The C/A rev'd finding unassigned fundamental error. The CCA has previously found fundamental error in the court's charge for failure to properly apply the law to the facts only when there was a total absence of any attempt to apply the law to the facts of the particular case. Harris, 522 S.W.2d 199; Perez, 537 S.W.2d 455; Williams, 547 S.W.2d 18; Williams, 622 S.W.2d 578. In those cases the court reasoned that the jury was not instructed under what circumstances they could convict or acquit and thus the error was calculated to injure the D's rights and reversal was mandated under Art. 36.19 C.C.P. In this case the only evidentiary theory relied upon by the state was that the D shot the victim with a to the circumstances under which the jury was authorized to convict. Further, the charge under the first theory did specify "by shooting the said X with a firearm" and the court found that the jury could just as well apply this to the second theory.

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DAVID COTTON, 035-84, Opinion on D's PDR: Conv. rev'd, Cause remanded for dismissal of information, Judge Miller, 2/6/85.

SECTION 61.71 OF ALCOHOLIC BEVERAGE CODE PRESCRIBING SELLING BEER TO A PERSON SHOWING EVIDENCE OF INTOXICATION HELD UNCONSTITUTIONAL: The code basically provided that a retail dealer's license may be suspended if it is found that the licensee sold, served, or delivered beer to a person showing evidence of intoxication. Section 61.77 provided that an act of omission or commission which is a ground of cancellation or suspension of a license is also a violation of the code punishable as a criminal offense provided in another section. The court found that there was a substantial distinction between the criteria "an intoxicated person" or a person "under the influence of alcohol ... to the degree that he may endanger himself or another" and the criteria "a person showing evidence of intoxication". This latter category encircles and describes not only those who are so intoxicated that they exhibit outward signs of that condition, but also those who are not intoxicated, yet nevertheless exhibit one or more of the classic symptoms of intoxication that are universally accepted as "evidence" in criminal cases and therein lies the problem. Individual symptoms
of intoxication, when manifesting themselves alone instead of in concert, bear little relation to ascertainable criminal conduct. Slurred speech, bloodshot eyes, a staggering gate, or simple drowsiness are each individually "evidence of intoxication", but common experience teaches that each may be demonstrated by the intoxicated or the abstemious, the soused, or the sober. So is serving a person exhibiting one of these symptoms a violation of the law or not? Similarly, since alcoholic breath is "evidence of intoxication", if while receiving a patron's order for a second beer the tavern owner detects the odor of the first on the customer's breath, is it or is it not a violation of Section 61.71(a)(6) for the licensee to consummate the sale of that second beer? The court's inability to answer these questions, except with a guess, demonstrates clearly that Section 61.71(a)(6) is unconstitutionally vague.

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EX PARTE JAMES CHANDLER JR., No. 69,150, Relief Granted, Judge Tom Davis, 2/6/85.

PEA BARGAIN AGREEMENT--IMPOSSIBILITY OF PERFORMANCE--RELIEF GRANTED: D pled guilty to theft and received 8 years TDC. Under the plea bargain agreement, the TDC time was "to run concurrent with federal parole time". The D now maintains that the agreement to give him credit on his federal parole time by running his punishment with his federal parole time is an agreement which the state is unable to perform. The majority first noted that the T/C and the CCA would be unable to order specific enforcement of the plea bargain since this is a matter for determination by the federal parole commission. Moody v. Doggett, 429 U.S. 81, 97 S.Ct. 274 (1976). Where the inducement for a D to enter a plea of guilty is a representation by the state which it cannot keep, doubt is raised as to whether a guilty plea under such circumstances can be regarded as truly voluntary. Ex Parte Burton, 623 S.W.2d 418; Bass, 576 S.W.2d 400. When a D enters a plea of guilty or nolo contendere pursuant to a plea bargain agreement, the state is bound to carry out its side of the bargain. DeRusse, 579 S.W.2d 224. Thus, the D (applicant) is entitled to relief sought. This was a 5/4 decision. The dissent stated that if there was a plea bargain that the Texas sentence is to run concurrently with the sentence from a federal court, it means simply that and no more; the reverse is not true. The Texas court has no authority to control or place conditions on a sentence from a foreign jurisdiction. If the Texas sentence is running concurrently with the prior sentence of a federal court or a sister state, then the plea bargain is being kept, despite what the proper federal or sister state authorities do with the sentence from their jurisdiction.

An almost identical situation was again presented in ...
PLEA BARGAIN AGREEMENT--STATE'S REPRESENTATION NOT FULFILLED--RELIEF GRANTED: In this case the D pled guilty to aggravated robbery, felony escape, and three theft cases and punishment was set as 12 years TDC in the aggravated robbery case and 10 years in the other four cases. The D contends that his plea of guilties were involuntary because they were induced by a plea bargain, the conditions of which were impossible to perform. The D was told that his sentences in Texas would run concurrently with his sentence out of Colorado. The sentences imposed in Texas include the notation: "Defendant's time is to run concurrently with cases in Colorado". Judging from the dissent, at the time the D pled guilty in Texas he was on parole out of Colorado and expected to have his parole revoked in Colorado. Instead, crafty Colorado withdrew the warrant and detainer and tolled the running of the Colorado sentence while the D was incarcerated in Texas; Colorado requested that TDC notify it prior to the D's release and has specifically informed the D that his Colorado sentence cannot be run concurrently. And obviously now the Colorado sentence is not running concurrently with the Texas sentences. The court held that the D's pleas were not voluntarily entered into and he was entitled to withdraw the pleas. Ex Parte Burton, 623 S.W.2d 418.

Again, Judge Onion et al. diggested stating:

"The majority continues to labor under the misconception that when a Texas court orders a Texas sentence to run concurrently with the sentence from a sister state or federal court, etc., the court is also ordering the foreign sentence to run concurrently with the Texas sentence."

While there may have been two sides to the story in Ex Parte Chandler, this case is quite clear to the extent that the D was told his Texas sentences would run concurrently with his Colorado sentence, which obviously assumed that his Colorado sentence would commence running within the foreseeable near future but instead Colorado put everything on hold. The dissenters are tied up in the legallies of the situation, whereas the majority and the D were quite concerned with what representations were specifically made to the D which justified the relief in this case, and probably the relief in Ex Parte Chandler.

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WADE V. MAYS, No. 69,329, Writ of Prohibition denied, Judge Clinton, 2/6/85. (5/3 decision, W. C. Davis not participating).

INTERACTION BETWEEN SPEEDY TRIAL ACT AND ARTICLE 28.061 C.C.P.: This was a very unique situation. The decedent was killed
3/12/84, the date of the arrest of the two Ds, Cathy and Joe Cody. The Codys were indicted for murder in April and the state announced ready in due time. The Cody's were indicted for aggravated robbery of the decedent in mid-July 1984. On July 31, or 140 days after the commencement of the criminal action against Cathy Cody, the state announced ready; three days later the state announced ready as against Joe Cody. The Cody's moved to set aside their indictments for aggravated robbery alleging that the state failed to be ready within the 120 days of their arrest for the offense of murder, arising out of the same transaction, and thus they were entitled to discharge under Art. 32A.02 C.C.P.

With not a wimper from the state, the T/C granted the motions and discharged the Ds from the aggravated robbery indictments. The Codys then moved to dismiss the murder charges based on Art. 28.061 because a discharge under the Speedy Trial Act is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction. Judge Richard Mays of Dallas tended to agree and after a hearing notified the state of his intention to enter written orders of dismissal within 10 days which in turn gave the state notice enabling the state to seek relief if any was available. It strikes me that that is the epitome of fairness. In any event the state sought a writ of prohibition, and mounted an attack on the Speedy Trial Act based upon its caption, ironically enough citing Ex Parte Crisp, 661 S.W.2d 944 (Tex. Cr. App. 1984). In part the court stated that when there is any reason which could justify the action of the T/C, a writ of prohibition requiring the court to do otherwise cannot issue and thus the writ was denied.

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JOHN STASEY, 1140-83, Opinion on D's PDR, Judgment reformed, Judge Campbell, 1/30/85.

SHOCK PROBATION--PREMATURE ORDER RELEASING D ENTITLED PARTIAL RELIEF: D pled guilty to delivery of a controlled substance and was sentenced to 10 years TDC. Thereafter D was placed on shock probation which was still later revoked. Now D challenges the original ground of shock probation and alleges the T/C was without authority to grant him shock probation and he was therefore entitled to jail time credit for the time he was erroneously on probation, which was a considerable period of time.

Actually, the D filed a motion for shock probation 43 days after sentencing but requested a hearing be held on the 60th day after sentencing. The court prematurely granted shock probation on the 57th day. D tried to argue the "erroneous release" doctrine in his own favor:

"... If a defendant through no fault of his own is erroneously released from incarceration he is entitled to flat time credit for the time he was erroneously out of custody. Ex Parte Downe, 471 S.W.2d 576; Ex Parte
Tarleton, 582 S.W.2d 155.

However, a corollary to this doctrine is the premise that if the defendant was a 'moving factor' in his erroneous release he would not be entitled to credit. In Ex Parte Moneyhun, 274 S.W.2d 546, this court found that 'when appellant's attorney requested his release he became the moving factor and cannot now take advantage of a void order ...'

The court eventually held that these rules actually penalized the D for asserting a statutory right to probation. A D should not be penalized if the relief requested is proper and only through the improper actions of the T/C does the order become void. The bottom line: the D is entitled to credit for the time between premature release and the date jurisdiction to grant shock probation attaches. Stasey, in this case, thus received an extra five days credit.

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ARTHUR BERGHAN, 125-84, Opinion on Motion For Rehearing on D's PDR, Judge W. C. Davis, 1/30/85.

While controlling authority continues to be Bolden, 489 S.W.2d 300, particularly as there was no trial objection, the court writes:

"We granted appellant's motion for leave to file a motion for rehearing to clarify our original opinion. The record from the post-trial hearing conducted by the trial court demonstrates that appellant's attorney was in no way responsible for the omitted not guilty verdict form. The omission was purely a clerical error. The implication in our original opinion, that appellant's counsel 'directed' the omission, is incorrect."

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EX PARTE HERBERT HUERTA, 69,352, Relief granted, Judge Miller, 1/30/85.

PLEA BARGAIN AGREEMENT--IMPOSSIBILITY OF PERFORMANCE--RELIEF GRANTED: D pled guilty to a number of felonies and received a 7 year TDC sentence. It was also part of the plea bargain that the sentences were to run concurrent with other state cases and a specified federal case out of the western district in San Antonio. However, when the D reached TDC, TDC received a detainer for the D which indicated that upon release from state custody the U.S. Marshall would assume custody of applicant on behalf of the U.S. Parole Commission as a possible federal parole violator; the D was notified that his federal term would not
commence until he was either returned to federal custody or re-paroled following a revocation hearing, a matter exclusively within the province of the parole commission. *Saulsbury v. United States*, 591 F.2d 1028 (5th Cir. 1979). Thus, the D's state convictions are not running concurrently with his federal sentence, contrary to the provisions of the plea bargain. Under the circumstances, as the plea bargain was not kept the D's plea of guilty was not voluntarily entered into. *Ex Parte Burton*, 623 S.W.2d 418. By footnote Judge Miller recapped a portion of the plea of guilty transcript: "The district attorney would recommend 7 years and that they would all run concurrently, and that in addition, I think he's on parole from federal and that has been revoked and it will run concurrently with that."

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**Vernon Middaugh, 69,415**, Per Curiam, 1/30/85.

**Court found this applicant lied to the court, and court imposed appropriate sanctions:** In 1978 the D received a life sentence for felony theft plus two enhancement paragraphs. In a sworn petition filed in the CCA, the D swore that the T/C had granted him relief from the conviction and had reassessed punishment at 15 years TDC and ordered his immediate release; and stated that all records of his conviction had been lost by the Clerk of the convicting court other than for a docket entry. Purported letters from the District Clerk were attached to the application. The D asked for a writ of mandamus to compel TDC to release him.

The court found that the materials filed by the applicant were forgeries and that he had falsely sworn to the truth of the allegations. In view of the workload of the court, the court would not tolerate the filing of such perjurious material. Thus, the Clerk of the CCA was ordered not to accept or file any further applications of this D attacking this conviction unless the D could first show that any contentions presented had not been previously raised and that they could not have been presented in an earlier application. *Ex Parte Dora*, 548 S.W.2d 392; *Ex Parte Bilton*, 602 S.W.2d 534. The court also directed the Clerk of the CCA to forward a copy of this order and the appropriate documents filed in this case to the prosecuting authorities of Houston County.

On the lighter side, I'm just surprised that with all the writ writers in TDC that someone did not inform this D that the allegations he was making in this application would send up an immediate red flag in the CCA. On the more serious side, it probably took a number of hours to dig into the matters involved in this case and it is obvious that the court was seething when the opinion was written. During the past fiscal year the court stated that there were 1,797 writs of habeas corpus, mandamus, prohibition, and other extraordinary matters filed in the CCA, which were carefully scrutinized by an already over-burdened court. If there is a shame as far as we are concerned it is that this D took valuable hours of time which rightfully belonged to
other deserving appellants and applicants. I'm just surprised that someone did not think of sending a copy of the order of the court together with the records filed in the case with a cover letter to the Texas Board of Pardons and Paroles, which should frown on matters such as this.

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THOMAS BREAZEALE and WALLACE Higgs, JR., Nos. 387-83 and 604-83, Opinion on State's Motion For Rehearing: granted, Judge Teague, 1/23/85.

RECITATIONS IN FORMAL JUDGMENTS OVERCAME ABSENCE OF WRITTEN WAIVER OF RIGHT TO JURY TRIAL IN APPELLATE RECORD: On original submission the court affirmed the C/A decision reversing the convictions because each record of appeal did not reflect a formal written waiver of the right to a jury trial, notwithstanding that the felony judgment in each cause affirmatively recited that a written waiver of the right to trial by jury was in fact executed. The court initially held that the presumption of regularity did not apply to a waiver of a jury trial in light of Art. 1.13 and that in order to show a valid waiver the state must comply with said article and include in the record a waiver of a jury trial signed by the D. Here, the court rev'd itself, first noting that it would indulge every presumption in favor of the regularity of the documents in the T/C, i.e., the recitations in the records of the T/C such as the formal judgment are binding in the absence of direct proof of their falsity. While it is true that a silent record cannot support a presumption that the D formally waived his right to a trial by jury, it is equally certain that the formal judgment of the T/C carries with it a presumption of regularity and truthfulness, and such is never to be lightly set aside. Ex parte Morgan, 412 S.W.2d 657. In these cases, neither appellant made any objection to the judgment that was entered and filed in his respective case nor did either make an issue in the respective trial court over whether a formal written waiver of jury had been properly signed and filed, nor did either request, through a designation of record, the inclusion of the formal written waiver of the jury in the record on appeal.

The burden of reciting and the formal judgment that a jury was waived by the accused is one established by statute, see Art. 42.01 C.C.P., and if such recitation is present, the burden is then on the accused to establish otherwise, if he claims that the contrary is true. In these cases, neither of the appellants overcame the presumption that his respective formal judgment spoke the truth and was in all things regular. Thus the state's motion for rehearing was sustained. Appellant Higgs' case was ordered remanded to the 14th C/A for that court to review the grounds of error that had not yet been reviewed. The judgment of the C/A in Breazeale's case was rev'd and the judgment of the T/C aff'd.

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RUFINO GONZALES, 310-84, Opinion on State's PDR: Rev'd, remanded to C/A for consideration of D's other grounds of error, Judge Onion, 1/23/85.

IMPROPER CROSS EXAMINATION OF DEFENSE WITNESS AS TO ARREST OF D WHICH DID NOT RESULT IN FINAL CONVICTION NOT REVERSIBLE ERROR AND CURED: D was convicted of delivery of marijuana. There were two enhancement paragraphs, both involving possession of marijuana convictions. One enhancement paragraph was dropped but both convictions were proved. During the punishment phase the D called his wife who testified as to her 12 year marriage to the D, their children, the fact that the D was a good father and provider, etc. On redirect examination, counsel asked the D's wife if during the 12 years she was married to the D, he had ever been charged with anything other than the case on trial and the other two possessions of marijuana. Counsel immediately corrected himself and asked if the D had ever been convicted of anything other than those two possessions of marijuana, and the witness responded that that's all she knew about. The prosecutor then asked if it wasn't a fact that the D was charged on March 4, 1978 with delivery of marijuana to X and the witness responded "That he was what, convicted?". The jury was removed and the prosecutor complained about the manner in which the question had been phrased by defense counsel but then withdrew his question on recross which had not been answered. Defendant asked for a limiting instruction and moved for a mistrial. The court then instructed the jury to disregard the last question and answer if any and not to consider it for any purpose and the D's wife was not questioned any further. At no time did defendant call the court's attention to the order granting his motion in limine and object to the question on the basis of a violation thereof nor did he use it as a basis for his motion for mistrial.

The court on appeal phrased the question: whether the attempt by the state to introduce evidence of a "charge" without a showing of a final conviction could be cured by the court's instruction to the jury to disregard? Yes, as the question was never answered and remedial instructions were immediately given. To cause a reversal the question must be obviously harmful to the D. Pearce, 513 S.W.2d 539, 543 (Tex. Cr. App. 1974). If the unanswered question was harmful it had to be harmful on the issue of punishment. The court noted that the maximum punishment with one prior felony was 20 years and a possible $10,000 fine and the punishment assessed was 11 years TDC. The court had to then conclude the error was harmless in view of the T/C's instructions.

The court then noted that the C/A had rev'd the conviction, holding that when the prosecutor violated the order granting the motion in limine harm resulted as a matter of law. The CCA disagreed, primarily because at the time of the complained of question, the defendant did not object on the basis of a violation of the order granting the motion in limine nor was this the basis for his mistrial motion. Defendant thus did not
preserve any error on this basis for appeal. In fact, the D's stated ground of error concerning the overruling of his motion for mistrial does not mention the ruling on the motion in limine.

"What the Court of Appeals overlooked is that this Court has declared many times that the granting of a motion in limine will not preserve error. For error to be preserved with regard to the subject matter of the motion in limine it is absolutely necessary that an objection be made at the time when the subject is raised during the trial..." Armitage, 637 S.W.2d 936, 938 (Tex. Cr. App. 1982).

Judge Teague's dissent, joined in by Judge Miller emphasized that the question was so prejudicial in and of itself as to mandate a reversal because of the punishment imposed. Mounts, 185 S.W.2d 731 (Tex. Cr. App. 1945).

* * * * *


POSSSESSION OF CONTROLLED SUBSTANCES: D was tried for possession of controlled substances with the intent to distribute and a jury convicted him. The District Judge granted D's motion for judgment of acquittal and the Govt. appealed.

On appeal, the Court extensively reviewed the evidence and concluded that the evidence was sufficient to prove that D had constructively possessed the drugs involved. Relying on U.S. v. DeLeon, 641 F.2d 330 (5th Cir. 1981), the Court found the following facts sufficient: (1) D flew to Dallas from Miami; (2) D engaged in suspicious activities after his arrival; (3) D and one other person were present in a hotel room for 3 1/2 hours and the drugs were seized in plain view in that room; (4) other individuals arrived at the hotel room; and (5) long distant calls to D's residence in Miami had been made from Dallas prior to D's arrival in Dallas. According to the Court, in law, unlike plane geometry, the whole may be greater than the sum of the parts.

NOTE: D attempted to raise additional arguments, but the Court noted that since he was appellee, he was limited to responding to the Govt's arguments. U.S. v. Williams, 679 F.2d 504 (5th Cir. 1982). Thus, D would have to wait until he was sentenced and filed notice of appeal.

* * * * *
STATUTORY CONSTRUCTION: D allegedly urged and advised a potential witness to testify falsely (Note: the facts are not set forth in the opinion). D was subsequently indicted, inter alia, for obstruction of justice under 18 U.S.C. Sec. 1512. D's conduct towards the potential witness apparently formed the basis of both charges. D was convicted of both charges.

On appeal, D asserted that since 18 U.S.C. Sec. 1512 expressly addresses the type of conduct that is illegal vis-a-vis potential or actual witnesses, he could not be convicted under 18 U.S.C. Sec. 1503. The Court acknowledged but disagreed with the Second Circuit (i.e., U.S. v. Hernandez, 730 F.2d 895) and held that the creation of 18 U.S.C. Sec. 1512 in 1982 (and the corresponding amendments to 18 U.S.C. Sec. 1503 deleting the term witness) did not eliminate obstructions of justice involving witnesses from within the purview of Sec. 1503.

ENTRAPMENT: Reversing a panel decision, 727 F.2d 1373 (5th Cir. 1984), the en banc Court held:

1. If the government's evidence raises an entrapment issue, in order to be entitled to an entrapment instruction the defendant may simply rest on his plea of not guilty and require the government to prove beyond reasonable doubt that he is guilty both of performing the acts charged and of his criminal intent in doing so.

2. If either the government's or the defendant's evidence fairly raises the issue of entrapment, the defendant may take the stand or adduce evidence on his own behalf that negates his criminal intent and yet be entitled to have his entrapment defense decided by the jury. However, he may not, in that event, deny that he has committed the acts charged, because this would create an impermissible inconsistency in his defense.

Thus, the Court adopted the view of the preponderant decisions of the circuit and overruled those cases which indicated that to raise entrapment a defendant must concede the acts and the culpable mental state.

NOTE: Elimination of the rule of law the panel opinion would have created means that a D can raise entrapment without
testifying. The tension between the Sixth Amendment right to present a defense and the Fifth Amendment right against self-incrimination may have compelled the Court to overrule the panel. Otherwise, a non-testifying D could not raise entrapment.

* * * * *


CONSENT/DECEPTION: Federal agents received information that D's uncle was in possession of a machine gun. The agents confronted D's uncle, who denied any knowledge of the gun, but who did state that he had been shooting snakes down at the river with his nephew, the D. The agents then talked to the wife of D's uncle and she told the agents D might have brought some machine guns back from Texas. She also told the agents that D had a prior felony conviction.

The agents then verified D's prior felony conviction and then went to interview D. D denied possessing a machine gun but admitted he owned other guns. The agents asked to look at the guns and D then took the agents into his house and showed them the guns. The agents then told D it was illegal for him to possess the guns and D signed a form abandoning the guns to the agents.

D was later indicted for possession and receipt of firearms by a convicted felon. D filed a motion to suppress arguing that but for the agents' misrepresentations, he would not have consented to the agents entry into his house and subsequent abandonment of the guns. The district court granted the motion to suppress and the government appealed.

On appeal, the Court relied on U.S. v. Andrews, 746 F.2d 247 (5th Cir. 1984) to conclude that the agents failure to inform D of everything they might be interested in did not render D's consent involuntary. According to the Court, the agents made no false statements and D was not under a false impression. In other words, the agents could properly tell D that they were only concerned with machine guns whereas they also were interested in whether he possessed any weapons.

* * * * *
BRADY VIOLATION: D convicted of 1st degree murder and sentenced to death. On petition for writ, district court held D's right to due process under Brady violated during the post-conviction relief period and ordered State to reconsider D's motion for new trial. D contends court should have ordered state to grant his new trial.

Court found that D had failed to show that his right to a fair trial was prejudiced by the post-conviction suppression of evidence, and thus is not entitled by law to a new trial. D's rights will not be prejudiced because a state hearing will be held in which all of the information will be considered.

ABUSE OF THE WRIT: D in first federal writ raised issues identical to those raised and ruled upon in D's state appeal. D returned to state court seeking relief on previously unraised Brady claim. Relief was denied and D brought his second federal writ raising the same claim. D's Brady claim was raised by way of pre-trial motions in the original case. D contends that his failure to raise the Brady claim in his first federal writ is excusable because he had not exhausted the issue as of the time of the filing of the first federal writ.

Relying on Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983), the Court holds that "the sole fact that the new claims were unexhausted when the earlier federal writ was prosecuted will not excuse their omission."

SEARCH: D charged with possession of marijuana while inmate in federal prison. Authorities received tip that after visitation, D would have narcotics concealed in his rectum. Attempts to conduct a digital search were unsuccessful so D placed in cell w/o toilet facilities. After a day D was observed sitting on trash can where 5 balloons filled with marijuana were later recovered.

On appeal, D contends balloons subject to suppression because product of digital search which was violative of his fourth Amendment right to be free from unreasonable searches. Court finds that balloons not product of digital search but from independent source, i.e. tip of a reliable informant and use of the "dry cell", and thus, there was no need for the Court to reach the question of the constitutionality of that search under the Fourth Amendment.

D also contended that he was denied due process because digital search did not comply with prison rules. Court found that attempted search was in compliance with rules and was not excessive use of force. D
also contended that his conviction should be reversed for the failure of prison officials to consent to be interviewed by defense counsel. Court found no constitutional violation where FCI officials merely informed officials of the right to refuse to be interviewed.

CELESTINE V. BLACKBURN, No. 84-4745, Aff'd and stay vacated, Judge Williams, 12/28/84 (Slip Op. 1791)

INEFFECTIVE ASSISTANCE OF COUNSEL: D convicted of murder and sentenced to death. D contends his attorney's failure to put on evidence at the penalty phase prejudiced his ability to avoid the death sentence. D would have offered evidence by relatives and friends.

The Court relying on Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984) found that such evidence, given the aggravating circumstances of the crime, would not with reasonable probability, have changed the jury's conclusions.

U.S. V. PRICE, No. 84-1445, Aff'd, Judge Jolly, 1/2/85 (Slip Op. 1825)

COLLATERAL ESTOPPEL: D was charged with conspiracy to obtain gratuities, making false statements before the grand jury, and income tax evasion. D acquitted of last two grounds and conviction for conspiracy subsequently reversed. D convicted of conspiracy on retrial. D appealed second conspiracy conviction alleging that under doctrine of collateral estoppel trial court improperly permitted introduction of evidence from first trial which should have been barred as a result of acquittal on perjury and tax evasion charges.

On appeal, the Court examined the elements of each of the three offenses and found that some evidence admitted to prove the necessary elements of one offense established the necessary elements of the other offenses. The Court found, however, that since the first jury found against D on the conspiracy count they had resolved factual issues against him and the testimony of the same witnesses at the second trial was introduced solely to prove conspiracy. Court affirmed conviction holding that because of D's conviction in first trial, collateral estoppel does not bar the introduction of evidence in the second trial which directly supports the conspiracy, even though same evidence offered in first trial on counts on which D was acquitted.

U.S. V. HERNANDEZ, No. 84-2218, Rev'd and remanded, Judge Rubin, 1/3/85 (Slip Op. 1891)

EVIDENCE: D convicted of possession and distribution of cocaine. DEA Agent testified that customs had identified D as being a drug smuggler. D objected. Gov't contended statement not hearsay but showed agent's state of mind. D's objection overruled. At closing argument prosecutor stated that D identified as "known cocaine trafficker".
The Court found that the evidence was clearly hearsay. Based on the closing argument it was evident the evidence was relied on as evidence of D's guilt in violation of Fed. R. Evid. 802. Court went on to hold that state of mind of DEA agent for beginning investigation of D not relevant. The Court held the inadmissibility of the testimony coupled with its use at closing argument denied D a fair trial.

D's conviction reversed, the court considered his other grounds of error. Even though D also argued that Court erred in sentencing him to two consecutive terms for possession and distribution of cocaine stemming from same transaction, Court held consecutive sentences permissible because of independent evidence of possession separate from the actual act of distribution. D also unsuccessfully challenged the constitutionality of special parole term.

SEATON V. PROCUNIER, No. 83-1882, Aff'd, Judge Rearley, 1/11/85
(Slip Op. 1638)

SUFFICIENCY OF EVIDENCE: D contends evidence insufficient to show he compelled his victim to submit by threatening imminent infliction of death and serious bodily injury. D argues that proof of a verbal threat is lacking and under Texas law this element of the crime of aggravated rape is absent where D only beats victim without verbally threatening greater harm.

The Court holds that since the highest Texas court has ruled on the issue the federal court will not review the state's interpretation of its own law.

STRAHAN V. BLACKBURN, No. 83-3512, Aff's, Judge Politz, 1/14/85
(Slip Op. 1803)

DELAYED WRIT: D was convicted of aggravated rape in April 1970 and filed a federal writ in March, 1981.

Court extensively reviews all appellate level cases applying Rule 9(a), 28 U.S.C. foll. §2254. The Court finds that D's failure to obtain complete transcript after trial prejudiced the state because portions of the transcript are now unavailable as a consequence of the delay. Judgment of district court denying habeas relief affirmed.
LEE EISENHAUER, No. 01-82-0501-CR (1st Hou.) Possession of Controlled Substance conviction reversed on remand, Judge Bass, Panel Opinion, 12/31/84

PROBABLE CAUSE FOR WARRANTLESS ARREST DECIDED ON STATE GROUNDS ONLY: CA had originally reversed conviction, but case was remanded on PDR for consideration of state law. CA held that under Texas law, an affidavit for a search warrant based on hearsay must satisfy two-pronged test that (1) magistrate be informed of circumstances which render information reliable and (2) magistrate be informed of specific factual allegations which render the source of the information reliable. Here the officer testified to his receipt of an anonymous phone call. He had no idea whether the information was reliable when he acted upon it, and the informant had never seen the cocaine D was to obtain. There was no testimony concerning the credibility of the informant or even an affirmative showing that officer had previously received information from informant. Although an anonymous phone call could provide sufficient justification for officers to initiate investigation, it would not justify an warrantless arrest or search.

CONSENT NOT GIVEN VOLUNTARILY: Facts: D was intercepted by four officers at airport. They told him they knew he had gone to Miami to purchase cocaine and that they believed it to be on his person or in his hand-carried luggage. D was asked several times where the contraband was. The officers indicated that D could withhold consent for search and force them to get a warrant; however, they immediately searched his bag without consent of any kind. After an unsuccessful search of the bag, officers indicated they intended to begin to search D's person and commented that the contraband was probably in his sock. One officer told D "to give it up" because he had been "caught". Another officer continued to question D about the location of the cocaine. D responded by taking off his jacket and handing it to one of the officers, saying only, "It's in the pocket". Held: After examining the totality of the circumstances, CA concluded that once D was told to "give it up", he simply acquiesced to lawful authority and complied with an unequivocal demand. Evidence insufficient to support finding that consent was voluntarily given.

DONALD DAVIS, No. 01-84-00345-CR (1st Hou.) Burglary of Habitation conviction affirmed, Judge Duggan, Panel Opinion, 12/27/84

ARGUMENT NOT COMMENT ON D'S FAILURE TO TESTIFY: At guilt-innocence prosecutor argued: "And you know he took a calculated risk, one that he decided measured in his own mind, one that he decided, just as you decided to go to work everyday ---" CA held argument was not improper because eye-witness testimony supplied facts as to D's actions prior to burglary, and argument did not call jury's attention to absence of evidence that only D's testimony could supply.

IS A BURGLARY INDICTMENT FUNDAMENTALLY DEFECTIVE FOR FAILING TO NOTIFY D OF CHARGE OF USE OR EXHIBITION OF DEADLY WEAPON WHICH IS LATER MADE BASIS OF AN AFFIRMATIVE FINDING AT PUNISHMENT? CA says no, reasoning that use or exhibition of a weapon is not among several descriptive manners or means of commission of the primary offense of burglary. In a related ground D argued that because the finding of deadly weapon involved inquiry concerning circumstances of the case in chief, that issue should have been submitted at the guilt-innocence phase, if at all. CA rejected argument on 2 grounds: (1) D did not show how he was harmed by t/c's requiring jury finding to be
made at punishment phase, (2) deferring deadly weapon inquiry until punishment phase not only avoided any suggestion to jury about gravity of "use or exhibition" factor in determining guilt, but also averted any inferential comment on weight of evidence that might encourage finding of guilt.

NO FATAL VARIANCE BETWEEN PROOF AND ALLEGATION OF DATE OF FINAL CONVICTION IN INDICTMENT'S ENHANCEMENT PARAGRAPH: Indictment alleged D was convicted of felony on 11/24/80. Record of prior conviction introduced at trial showed that written plea bargain agreement, jury waiver, stipulation of evidence, judicial confession, waiver of time for sentencing and right to appeal were all signed by D on 11/13/80. Judgment was signed 11/24/80 and did not reflect date of conviction; however, sentence form signed that same day stated that verdict and judgment were rendered against D on 11/13/80. On appeal State conceded variance in allegation of date of final conviction in enhancement paragraph. CA held this was not fatal variance because the indictment's incorrect allegation of date of final conviction for prior offense would not have prevented D from finding record of it and presenting defense; indictment did allege correct cause number, court number of prior offense, as well as correct name of offense and characterization of it as a felony.

ROBERT LEE HOLLADAY, No. 01-82-0753-CR (1st Hou.) Capital Murder conviction reversed and remanded, Judge Levy, Panel Opinion, 12/13/84

JURY CHARGE: ACCOMPlice WITNESS CHARGE FOUND DEFECTIVE: Upon D's request in a capital murder case, jury must be instructed that accomplice witness's testimony must be corroborated as to specific elements that make offense a capital crime, i.e., corroboration requirement must be related to the aggravating element which elevates murder to capital murder. Here t/c charged jury that: "The witness, M____V____K____, is an accomplice, if an offense was committed, and you cannot convict the defendant upon his testimony unless you first believe that his testimony is true and shows that the defendant is guilty as charged, and then you cannot convict the defendant upon said testimony unless you further believe there is other testimony in the case, outside of the evidence of the said M____V____K____, tending to connect the defendant with the offense committed, if you find that an offense was committed, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission,..." Charge was defective for not directing jury's attention to requirement that accomplice testimony be corroborated as to the particular robbery with elevated this murder to capital murder. State argued that D's objection was waived because too general and not distinctly specified; CA rejected that argument and found following to be a timely and specific objection: "For example, after putting intending, after the words M____V____K____, in the charge, where it says, 'tending to connect the defendant with the offense committed,' I think it has to say that tending to connect the defendant with, first, that a robbery was, in fact, committed, or attempted to be committed, and second, that a murder of one P____J____ was committed or along those lines."

JAMES BAKER, No. 01-84-0028-CR (1st Hou.) Attempted Murder conviction reversed and rendered, Judge Duggan, Panel Opinion, 12/13/84

CA MAY REVIEW INSANITY DEFENSE DEFENSE BOTH AS MATTER OF LAW AND AS A FACT QUESTION UNDER "GREAT WEIGHT AND PREPONDERANCE" TEST: D raised affirmative
defense of insanity. CA held that although Court of Criminal Appeals was restricted to review of whether D's insanity defense was established as a matter of law, CA had jurisdiction to entertain a factual challenge to jury's verdict on ground that it was contrary to "great weight and preponderance of evidence". In passing on challenge that jury verdict rejecting affirmative defensive issue of insanity was against great weight and preponderance of evidence, CA is to consider all relevant evidence presented. If after doing so it determines that D carried his burden of proof as to the affirmative defense, and that jury's verdict was manifestly unjust, CA has duty to reverse and remand for new trial, regardless of whether record contains some evidence of probative force in support of verdict.

Under Secs. 8.01(a) and 2.04(d), P.C., D has burden of proving affirmative defense of insanity by preponderance of evidence. Because CA has factual review authority, if affirmative defense of insanity is raised by credible evidence, State must either negate defense or risk establishment of D's burden of proof either as matter of law or fact. Facts: 2 psychiatrists, D's mother and 1 brother all testified unequivocally that D was insane at time of offense; the complainant [D's brother], another family member, and D's caseworker each strongly corroborated the long term nature and severity of D's illness. Severity of D's chronic mental illness and his previous psychotic conduct was shown by introduction of 8 years of medical records and testimony of D's clinic caseworker, his treating psychiatrist, and family members. State vigorously cross-examined D's evidence of insanity and introduced testimony of 4 witnesses showing D's normal behavior after incident. Based on this rebutting evidence, CA overruled D's claim of "no evidence", but reversed and remanded after finding jury's verdict was "so against the great weight and preponderance of the evidence as to be manifestly unjust."

D's STATEMENT TO ARRESTING OFFICERS WAS NOT PRODUCT OF "CUSTODIAL INTERROGATION": 12 hours after stabbing D phoned police, telling them he had stabbed his brother and asking them to meet him at a restaurant parking lot 4 to 6 miles from his family's home. Officer first encountered D as D was walking toward patrol car; officer asked D if he was the one who had called the police and what the problem was; in response D answered, "that he thought he had killed his brother" when he stabbed him after an argument. Officer testified D was not under arrest or in custody at this point. CA found D's statement to arresting officer was admissible and not the product of custodial interrogation because D was not under arrest or in custody; additionally, the 2 questions officer directed to D were not words officer should have known were likely to elicit incriminating response.

JACK JACKSON, No. 02-84-167-CR (Ft. Worth) Driving While Intoxicated conviction reversed, Judge Hughes, Panel Opinion, 12/19/84

NO PROBABLE CAUSE FOR INVESTIGATORY STOP: Facts: While D was stopped at red light, patrolman brought his vehicle alongside D's and saw "what appeared to be a beer bottle" in D's right hand being held up slightly. When signal light turned green, D drove forward and was followed for 4 blocks. Officer testified D committed no traffic violations and pulled over promptly after officer activated his lights. CA reversed, finding no probable cause to stop D's vehicle. Because Texas does not have an "Open Container" law, act of drinking while driving is not offense as long as driver is not intoxicated. By presuming that D was intoxicated, officer was acting on a hunch. Sole fact of holding beer bottle no less consistent with innocent conduct than with criminal activity.

March 1985/VOICE for the Defense SDR-31
DAVID CROSBY, No. 05-83-1201-CR (Dallas) Possession of Cocaine conviction reversed and remanded for acquittal, Judge Guillot, 12/17/84

ADMINISTRATIVE SEARCH AND SEIZURE HELD REASONABLE; EXPECTATION OF PRIVACY: Facts: D had contracted with Cardi's, a club licensed to sell alcoholic beverages by Texas Alcohol Beverage Commission, to perform musical concert. At 11:45 p.m., 2 officers arrived at Cardi's parking lot to provide back-up assistance to other officers who had responded to call about man who would not leave premises. After assuring themselves everything was under control, 2 officers decided to go inside bar to make routine inspection for liquor law violations. While inspecting premises, officers walked through public area of club to stage. D had taken break and was not performing at this time. Wanting to look out over entire club, one officer stepped onto stage. When on stage, man standing by curtain drawn across doorway put his fist in officer's chest, shoved him back, and said, "You can't go in there." Officer became curious and on "hunch" that there might be criminal violations occuring in dressing room, he pushed man aside and entered dressing area where he saw D with propane torch in one hand, a glass pipe in the other, and an unzipped athletic bag on his lap. Looking inside unzipped bag, officer found baggie of cocaine. D was arrested and taken to jail. While waiting to ride the elevator at jail, officer noticed D's bag felt unusually heavy; upon searching it, he found revolver which formed basis of second charge against D for unlawfully carrying handgun in tavern. CA determined that because D had exclusive use of dressing room (which was provided under terms of his contract with club) and a reasonable expectation of privacy, he could challenge search under 4th Amendment. Club manager said no one from public was allowed in dressing room and security people were positioned outside it to make sure no one entered. CA then determined search did not fall under scope of Texas Alcoholic Beverage Code. 4th Amendment prohibition against unreasonable search and seizure is fully applicable to administrative search. Use of force to perform administrative inspection is unreasonable. Instant case involved officer forcing his way into D's dressing room by countering block efforts of man at door.

RITA SNABB, No. 13-84-115-CR (Corpus Christi), Escape conviction reversed and remanded for acquittal, Per Curiam, 12/20/84

WHEN IS PERSON UNDER ARREST? Facts: D's keys were found in restaurant of airport. She responded to public address page, and when she claimed her keys from officer he determined D was intoxicated. He returned keys on condition someone else would drive D, otherwise she would be arrested if he caught her driving. D agreed to officer's condition but then disregarded his warning. When D attempted to leave parking lot in her car, officer and partner persued her on foot and eventually stopped her. Officer advised D she was under arrest and ordered her to gather her possessions, lock her car, and come with him. D became abusive, refused to cooperate, and then ran from officer. She disregarded command to stop, and did not stop until officers pulled her down and grabbed her by arm. CA rejected State's argument that verbal commands sufficient to effect arrest when D refused to submit to those commands. Essential to escape conviction is that D was under arrest; however, arrest does not occur until D's liberty of movement is restricted or restrained. State could have chosen to prosecute D for intentionally fleeing from officer attempting to arrest her. By choosing to prosecute for escape, State assumed burden of proving completed arrest and custody. It is not enough for State to show officers had a difficult time apprehending D as she did not want to be detained.
LEE EISENHAUER, No. 1-82-501CR, Possession of cocaine, Reversed, Judge Bass, Panel opinion, 12/31/84.

REFUSAL OF COURT TO SUPPRESS THE EVIDENCE DUE TO ARREST WITHOUT PROBABLE CAUSE WITHOUT APP.'s CONSENT WAS ERROR: On a plea of guilty, the trial court granted App. permission to appeal his MTS. On appeal rev'd (No. 889-83) the State filed a PDR which was granted based on the fact that CCA found that the CA based their decision solely on federal constitutional law and reversed and remanded cause to CA to be decided with regard to Texas law.

At 1:00 p.m., Feb. 16, 1982, Officer F. received a phone call from an unknown informant who advised Officer F. that Appellant would depart from the airport at 1:30 enroute to Miami and would return the same day with cocaine. The informant gave Officer F. a detailed description of Appellant. Officer F. went to the ticket desk and ascertained that the above information was correct. Officer F. observed Appellant deplane carrying a piece of luggage. Officer F. stated none of Appellant's actions were unusual. Officer F. and Officer B. approached Appellant, told him that they believed him to be in possession of cocaine, and requested permission to search him. Appellant did not respond. Appellant then stated "What happens now?" Officer F. said that Appellant could consent to a search or they could procure a warrant. At this point Appellant was standing backed into a phone cubicle with four officers surrounding him.

Appellant's luggage was searched but no contraband was found. Officers commented that cocaine was probably in Appellant's sock, asked where the cocaine was and told Appellant to "give it up", that he was "caught". Appellant responded by handing Officer B. and saying "It's in the pocket". The court stated that there was no evidence on how the informant had received his information and that the Officer had no knowledge as to the reliability of the informant. The court stated that the Officers had justification to initiate an investigation, but not information to justify a warrantless arrest or search. Further the court stated that the State failed to prove that the Appellant gave his consent to search freely and voluntarily in light of the totality of the circumstances.

DONALD DAVIS, No. 1-84-345CR, Burglary of a habitation, Affirmed, Judge Duggan, Panel opinion, 12/27/84.

SPEEDY TRIAL ACT NOT VIOLATED: Jury arguments were not improper; Due process and equal protection rights were not violated by state peremptorily challenging all black members of panel; Indictment is not fundamentally defective for failing to notify Appellant of a deadly weapon and the court did not err in charging the jury at the punishment stage instead of the guilty/innocent state to find use of a deadly weapon; the court did not err in allowing evidence of a prior conviction admitted during the punishment phase of the trial.

Appellant filed a motion to dismiss for violation of the STA. The State had filed an announcement of ready within 120 days. No evidence was
offered by Appellant in rebuttal. The court held requirements of the STA were met.

Appellant objected to state's argument outside the record, asked that the jury be instructed to disregard which was granted and asked for a mistrial which was denied. The court held that the argument was outside the record but that it did not constitute harmful error and that error was cured by trial court on Appellant's second objection to jury argument, no motion was made to instruct the jury nor was a mistrial requested. Therefore, Appellant obtained all the relief he sought.

The third object to improper jury argument was:

And you know he took a calculated risk, one that he measured in his own mind, one that he decided, just as you decided to go to work every day... The court held the argument was neither a direct allusion to the Appellant's failure to testify nor of such character that the jury would naturally and necessarily take it to be a comment on his failure to testify.

In this case the state peremptorily struck all prospective black jurors, jury members were all white, and Appellant was black. No other evidence was presented by Appellant. The court held that the burden was on Appellant to show that there has been a systematic use by the state of peremptory challenges against blacks over a period of time and not just in this instant case which Appellant did not do.

Appellant was found to have exhibited or used a deadly weapon by the jury in the punishment phase of his trial. Appellant argued that since he was charged with burglary of a habitation, (the indictment tracked the statute), he had no notice of use or exhibition of a deadly weapon and that since the inquiry of a deadly weapon concerned the circumstances of the case in chief, it should have been submitted at the guilt/innocence phase of trial, if at all. The court rejected Appellant's argument of notice stating use or exhibition of a weapon is not one among several descriptive manners on means of commission of the primary offense and therefore does not have to be set out in the indictment.

The court did concede that Article 42.12 does not state when, during the bifurcated trial, a jury is to be charged to find use or exhibition of a weapon, but that Sec. 3, 3a, and 3f of Article 42.12 suggest that inquiry is proper at punishment phase. Further, the court states that the Appellant does not show how he was harmed by the court's requiring a jury finding to be made at the punishment phase and therefore, if there is any error it is harmless.

The trial court allowed into evidence during the punishment phase a prior conviction. On 11/13/80 Appellant was sentenced and on 12/4/80 Appellant was delivered to TDC. On 4/6/81 Appellant was purported to have been granted shock probation, but the court was without jurisdiction to do so. On 12/17/82 the shock probation was revoked. Appellant argued that since the second judge was without authority to grant shock probation, the conviction was void and could not be used for enhancement purposes. The court ruled that the conviction was not void, only the
grant of shock probation was void and the date of the final conviction was 11/13/80. Appellant also complains that the indictment states that "on the 24th day of November, 1980,... (appellant) was convicted of a felony... and the actual date of conviction was 11/13/80 and that there is a variance between proof and allegation of final conviction. The court held that the Appellant had adequate notice of the prior conviction and that this error was not a fatal variance.

WILLIAM BENNETT, No. 7-82-256CR, Murder, Affirmed, Judge Contiss, Panel opinion, 12/31/84.

CONFESSION WAS ADMISSIBLE: Although police prepared "Affidavit for Search and Arrest Warrant", the document failed to request an arrest warrant and they were issued only a search warrant for Appellant's car. Officers went to residence, knocked on door, got no response, kicked in door and arrested Appellant for murder. A few hours later, Appellant gave a confession. Appellant was arraigned and counsel was appointed. A week later Appellant made two requests to talk to police. After the second request, officers met with Appellant, read him his rights again, and discussed the fact that he had a lawyer and that he could have his lawyer present. Appellant made second statement. At trial the second statement was introduced. The court held that although the first statement was properly admitted because it was sufficiently separated from the arrest to be purged of the primary taint and from the totality of circumstances the Appellant waived his right to counsel knowingly and of his own free will.

CLAYTON ROBERTSON, No. 13-84-7CR, Aggravated Sexual Assault, Affirmed, Judge Utter, Panel opinion, 12/28/85.

INDICTMENT WAS NOT FUNDAMENTALLY DEFECTIVE AND THE COURT'S CHARGE WAS NOT ERRONEOUS; EVIDENCE WAS SUFFICIENT; APPELLANT WAS COMPETENT TO STAND TRIAL: Indictment alleged that Appellant committed the offense "on or about the 1st day of September, 1983". On 9/1/83 the offense of Aggravated Rape of a child was repealed and was replaced with Aggravated Sexual Assault on a Child. Appellant claimed that the indictment should have alleged that "on the 1st day of September; or that "on or after the 1st day of September". Appellant filed no motion to quash and made no objection to the charge. The court held that the indictment sufficiently alleged the offense with such certainty as to enable the accused to know what he was called to defend against and was not fundamentally defective and since the charge tracked the indictment it was not fundamentally defective.

Appellant also asserted that the evidence was insufficient to prove venue. There was some evidence presented as to venue which was not objected to by the Appellant. The court held that venue need only be proven by preponderance of the evidence and that the burden of objecting to prosecutor's failure to prove venue is on the D.

Appellant contended that Appellant's competency to stand trial was never determined. The trial court ordered a psychiatric examination of Appellant which indicated that Appellant was competent to stand trial.
No motion was made nor any evidence presented that Appellant was incompetent to stand trial. The court held that a competency hearing is only required where there is evidence to support a finding of incompetency.
The Board of Directors of the Texas Criminal Defense Lawyers Association met on South Padre at the South Padre Hilton Resort on Sunday, October 7, 1984.

The board meeting was called to order by President Clifton L. "Scrappy" Holmes at 9:20 a.m.

ROLL CALL


Associate Directors present: William Bratton, Bill Habern, Harry Heard, Jeff Kearney, Chuck Lanehart, Fred Rodriguez, Jack Strickland, Gus Wilcox and Bill Wischkaemper. Absent: Charles L. Caperton, Chris Gunter and Grant Hardeway, Sr.


ANNOUNCEMENTS

Scrappy opened the meeting with discussion of the TCDLA/CDLP Evaluation-Interim Report prepared by Dick Drongeole August 30, 1984, and a Computer Evaluation Report prepared by Gene Hayes. He stated that efforts are currently being made to have the two administrations working together in harmony; however, he would like the Board's approval of the work that has been recently done.

FINANCIAL REPORT

In comparison to last year, Ed Mallett reported the Association is currently operating on a firm foundation financially.

A motion was made by Rusty Duncan for the Association to pay off the CPT word processor. Scrappy reported that we currently owe $8,300 on the CPT, with a 20% interest rate. The association has several CD's at this point, drawing interest of only approximately 10%, and it was suggested that the board approve the use of a CD to pay off the CPT. Motion carried.

COMMITTEE REPORTS

Amicus Curiae

Richard Anderson spoke with Amicus Chairman Roy E. Greenwood regarding the matter of a case in which Richard is representing one co-defendant, and Jan Hemphill is representing one co-defendant. There was a murder case filed back in January. It started out as Capital Murder with two co-defendants indicted for murder. Sometime in late June they came back and re-indicted Aggravated Robbery. Motion for Speedy Trial was filed and Aggravated Robbery was dismissed. There was a hearing at the 28061 out of the same transaction and Judge Mays has decided to dismiss the murder case under the mandate of the 28061 in Kalish. The State of Texas objected upon the constitutionality of the Speedy Trial Act, sought a Writ of Prohibition and has obtained a stay of Judge Mays’ proceedings. Judge Mays has until Thursday, October 11, to respond. The Court of Criminal Appeals, as of Friday, has invited Richard and Jan to respond. It’s probably going to be the quickest case in which the court is going to issue a decision on the constitutionality of the Speedy Trial Act. Richard stated that they need the help of members who have done any cases, have authority, or have done any research first of all upon whether or not the State is allowed to attack its own statute, and secondly the jurisdiction on Writs of Prohibition and Mandate. We need help to bolster keeping the Speedy Trial Act while we still have a chance to question it. Ron Goranson is writing the defense.

Continuing Legal Education

Cecil Bain reported that the DWI Semi-
Correction and Rehabilitation

There was some discussion on the provision of funding for death row inmates and also on the Death Watch Committee which still exists. If you would like to serve on this committee, please contact Bill Habern, Chairman.

Legislative

Chairman David Bires announced that his committee is being formed. So far the Legislative Service has been ordered, and the committee has spent only approximately $2,000. Bill Habern, Robert Turner, Ron Goranson and Dain Whitworth are working closely together on representing the Association in this respect. If you have any interest in serving on this committee, contact David Bires. Richard Anderson added that by December 15th most legislation will be pre-filed.

Mike Brown moved that we purge the Texas Systems Council Bill and our policy regarding the support of the Legislative Committee, and then have prepared for the Board at the December board meeting a proposed policy to be either accepted or rejected. So moved.

Membership

Jan Hampill gave a brief report of the membership status since July 4, 1984. Jan and Charles Caperton have prepared a list of people working on the committee. Alice Rodriguez (Mr. Caperton's retired secretary) is handling all the letter writing for the committee. The three of them will work the TCDLA and CDLP seminars. Committee members in the designated site of a seminar will be expected to work with the committee on signing up new members.

Joe Connors stated that last year a decision was made to allow members who joined the Association after the cut-off date to receive benefits for the final months of the current year even though the membership should not begin until January 1st of the next year. After a brief discussion regarding whether this rule should apply to both new and renewals or just new members, it was approved that there would be no restrictions.

Office Procedures

Jim Bobo, Chairman of the Office Policy and Procedures Committee, announced that Tim Evans, Richard Anderson, Ron Goranson and Mike Brown are currently serving on his committee. He stated that the group would meet in Austin on October 19th to review the current procedures and office situations so that some determination may be made as to the feasibility of the CPT word processor, and to prepare a policy manual for the Association. Jim stated that they would hopefully return with resolutions for the Board in December. Scrappy Holmes referred to the July 5th Executive Committee meeting when it became apparent that the meshing of TCDLA and CDLP was not working. It was then decided that Dick Dromgoole would be secured to conduct a management survey for both TCDLA and the Project at half cost to each administration, and to prepare a report to present to TCDLA President Scrappy Holmes and CDLP Chairman Bob Jones. Gene Hayes was also secured to conduct a computer evaluation to determine the functioning feasibility of the Association's CPT word processor and the Project's computer.

A report was also prepared. Scrappy asked for the Board's approval for the allowance of about $500 for the committee to complete its task and obtain a policy to be put into effect. Moved and seconded—carried.

The Board of Directors went into Executive Session and asked that Nance Nelle and Laurie Ramil leave the room. After a brief discussion, a motion was made by Richard Anderson, seconded by Arch McColl to increase the salaries of the three TCDLA staff members. The effective date was October 1, 1984. There was another motion made by Richard Anderson, seconded by Shel Weisfeld to provide a group insurance program for TCDLA's full time employees. The staff was complimented by the Board of Directors on the fine job they have been doing.

Past Presidents

A Past Presidents' seminar has been
planned in Las Vegas in order to encourage members to pay more for the building. Tom Sharpe, chairman of the committee, has worked with the Dunes Hotel in Vegas and has secured more than reasonable room rates for our group and has also secured good rates for air travel. The trip will be for three nights, with the seminar on Friday and Saturday. Hopefully the Association will be able to obtain $200 to $250 more than actual cost of room and travel to cover the building fund donations. The seminar is tentatively set for the last week of March 1985. There was some discussion over the current plans made, and it was decided that it would be brought up to the Executive Committee for a final decision.

The Association has also planned a February spring trip into the sun. Louis Dugas has been checking into several Caribbean locations.

The American Bar Association is planning a July 19, 1985, trip to London, and Louis is trying to make arrangements for the Association to attend also.

SPECIAL REPORTS

Scrappy announced the appointed members of the Nominating Committee. They are: Chairman Louis Dugas, Rusty O'Shea, Jeff Hinkley, Tim Evans, Kerry FitzGerald, Buck Files, Ed Mallett, Grant Hardeway, Sheldon Weisfeld, Cecil Bain, Dain Whitworth and Buddy Dicken.

The next Board of Directors meeting will be held in El Paso on December 15, 1984.

The Bar Convention will be held the first week in June next year and it is also the 15th anniversary of TCDLA. Ron Goranson is working on the details for a big formal affair in order to celebrate the occasion. Motion made to approve. Second—carried.

Stan Weinberg requested that the Association have an Open House at the new home office in conjunction with another function such as the New Lawyer Induction Ceremony. It was agreed that it would be done in November if possible.

ADJOURNMENT

Scrappy entertained a motion to adjourn. Seconded—carried.
No form book is all-inclusive and all form books are duplicative of others to some degree. None should be relied upon blindly. An evaluation of one's needs and expectations should generally be made within these inherent limitations. However, as is often my custom, I disregarded these practical considerations and bought this form book anyway. I was not displeased.

*Texas Criminal Defense Forms Annotated* is a compilation of forms from the case files of one of Texas' finest trial lawyers, W. V. (Bill) Dunnam, Jr., of Waco has done his time where it counts—in the courtroom. The advantage of this form book is that one is able to plagiarize the mind of such a lawyer and, in effect, rummage through the files of many of his past successes. The disadvantage is that many of the forms are of specific rather than general application and each must be read carefully and often modified.

In the preface Mr. Dunnam recognizes that he followed his father's advice and did not become a "form book lawyer." Such advice is well founded and an examination of this book will reveal that one neither could nor should use it as the sole source of motions and forms. Its greater value is as a source of ideas. In addition it contains some unusual forms that are not readily available from conventional sources, but nonetheless essential. For example, the book includes a "Defendant's Answer to Bail Forfeiture Proceedings," "Petition to Secure Attendance of Out of State Prisoner," "Bench Warrant (Witness in Penitentiary)" and "Application for Court Order to Authorize Patient Identifying Information" (alcohol and drug abuse patient records).

A reading of the table of contents will serve as a good check list for trial preparation. The book is divided into State and Federal forms which are grouped in chronological order of bail, pre-trial, trial, appeal, writs, and ancillary matters such as a petition for the expunction of records. The forms are also annotated and many contain practical suggestions. It should be noted that no attempt was made in this brief review to check the accuracy or applicability of the annotations.

The section on bail contains good practice notes and the forms cite the Texas as well as the United States Constitution. This is a practice which should be followed where available in any instrument filed in State court in these times. However, in the applications for Writs of Habeas Corpus, there was no form for the Writ itself. Therefore, care should be taken to see that such a Writ is completed because without it there is no foundation for an appeal even if the lower court conducts a full hearing on the application.

A special section has been devoted to misdemeanors and contains a good general discussion of DWI with helpful examples of cross-examination questions. The pre-trial section contains some good but unusual motions. Some of the standard motions are a little too global and all-inclusive. I often worry that these do not preserve error, and prefer to divide motions into succinct, specific requests. In other words, ask specifically for what you know you're entitled to in an individual request. Then in separate paragraphs ask for things you are not too sure about, hope to make new law with, or feel are equitable. In this manner, overruling one does not include or spill over onto the other.

In the area of motions to suppress, it is now advisable to allege standing in every motion. Further, one should be cautious about alleging too much factual detail in the motions because it allows the police to anticipate one's defense and thereafter tailor their adverse testimony. For example, the burden is on the State to produce a sufficient warrant when called upon to do so and I don't know that I would do their job for them by attaching a copy of the affidavit and warrant. There are good general notations to
the cases in this area. Some motions that are missing in the pre-trial section are "Brady" requests that probably should be filed in all "issue" cases, requests for Gaskin statements and Franks v. Delaware challenges to warrant affidavits.

The trial section also contains some good practical suggestions. Caution, however, should be exercised in relying on "fundamental error," because this concept could become extinct.

A good example of specific requests for items to be included in the transcript can be found in the appellate section as well as notations as to time limitations. This section even includes a form for Recommendation for Commutation of Sentence commonly referred to as a "time-out" by our Clients in the penitentiary.

The second section of the book is devoted to federal criminal practice and, like the first, contains examples of motions previously used by the author in federal cases. As he notes, the majority of these forms were filed in the Western District in compliance with local rules. Care should therefore be taken to modify the forms if required by the rules of another district.

There are many forms of practical value in this section, but some of my favorites deal with motions to assign or release bail money to the attorney. The forms in the federal section are by and large short and simple. A valuable addition is the inclusion of short briefs to accompany the motions. These are handy for those many instances in which the requirement of a brief is mandatory under local rules. Obviously, these briefs should be updated and modified in cases of a substantial legal issue. Similar to the state section, an appellate time table, sample briefs and communications with the federal appellate courts are also included.

The Comprehensive Crime Control Act is now the law in federal court. Substantial revisions have been made in many areas, especially in federal bail. This book went to press before this Act became law. Therefore, each form should be compared with the Act before it is relied upon.

In summary, one should not expect this book to be the "cure all and be all" to the practice of law. One can expect to find a source of ideas and some relief from the time-consuming busy work required of us all. I'm glad I bought the book, but I plan to heed Mr. Dunnam's advice and refrain from becoming a form book lawyer.

Tim Evans
Fort Worth

New Members

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C. Edward Cresswell
Mike Moore

ARLINGTON
Michael J. Wigton

AUSTIN
Lewis A. Jones

DALLAS
W. John Allison, Jr.
Edward W. Moore
Stuart E. Parker
B. Carter Thompson

EDINBURG
J. M. Ramirez

FORT STOCKTON
Richard Banajas

HEBBRONVILLE
Jose Luis Ramos

HOUSTON
Richard Frankoff
Alicia Garcia Klosowsky
Robert A. Morrow, III
Oliver Wendell Sprott, Jr.

LAREDO
Charles R. Borchers

ENDORSED BY
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March 1985/VOICE for the Defense 15
The October 1984 issue of the Journal of Forensic Sciences has a rather interesting article by Alfred A. Biasotti on the relationship between alcohol determinative tests and the law, including prosecutors, judges and defense attorneys.

Mr. Biasotti is identified as "Manager/Criminalist, California Department of Justice, Bureau of Forensic Services, Sacramento." After noting that the prevailing chemical tests for the quantitation of alcohol in blood, breath or urine have undergone substantial review, he comments that such extensive examination has had both positive and negative influences on the criminal justice system.

As an example of the review's benefit to the criminal adversary system, he notes that the chemical tests' accuracy and reliability have improved. On the other hand, Mr. Biasotti, reflecting a pro-prosecution posture, notes rather paradoxically that "One detrimental effect of this intensive review and study has been to add an undeserved measure of credibility to defense arguments and motions in driving under the influence (DUI) litigations." He further comments that "the net effect [of this extensive review and verification of testing devices] has been to saturate an already overburdened court system with unwarranted and, therefore, wasteful arguments."

Mr. Biasotti then asserts that the fundamental purpose of a chemical test's presumption [now per se criminal liability in Texas] "is to codify in the law established scientific truths."

Despite expressly rejecting the position that "scientific truths" should not be subject to legal challenges, he immediately blames the "defense community" for "directly thwarting the legislative intent of chemical test laws" by questioning their reliability.

Mr. Biasotti at first glance seems to be suggesting that chemical tests for alcohol should be immune from adversarial attack because they have reached a point of infallibility, an elevated position never previously recognized in the law. But apparently this is not what he is advocating because he then goes on to briefly discuss the five prominent areas used by the defense "to discredit the reliability and accuracy of breath alcohol tests."

Accordingly, this part of the article will appeal to defense counsel because the author necessarily concedes that several of the defense arguments are valid and then suggests a method of resolving any questions as to the tests' accuracy.

Space does not permit a discussion of all defense arguments discussed by Mr. Biasotti; only the most significant will be reviewed. For example, Mr. Biasotti without reservation concedes that "Random error in breath testing can occur intermittently and undetected for a number of different causes." He then comments that the "only truly effective way of eliminating the possibility of such random error is to apply a scientifically valid test procedure, such as replicate subject samples that must agree within an accepted degree of accuracy (that is ±0.01%) together with a blank sample before and after each subject sample. Or, in other words, give the suspect more than one test; because "the common practice in many states [Texas included] of performing a simulator test contemporaneously with each subject tested while requiring only one subject sample per test cannot rule out the possibility of random error in a subject test." At best, this procedure only indicates that no random error occurred in the simulator tests. With only one subject sample, it is not possible to know, with a reasonable degree of certainty, that a random error did not occur in the subject test."

Although deferring to the authority of the appellate courts, Mr. Biasotti does concede that preservation of a suspect's breath sample for "referee analysis" could be of value to the scientific community.

The weakest part of Mr. Biasotti's otherwise astute view of the defense and chemical testing is that dealing with the "Falsification of Test by Breath Test Operator." After recognizing that "the possibility of intentional falsification of breath test results is an inherent weakness of all evidential breath testers (EBT)," he concludes merely by stating that an improved chemical test program will be more successful than adding "tamper-proof" features to the EBTs." The obviously significant concession in this part of the article is that all breath tests' results can be falsified.

Although Mr. Biasotti's article takes a slap at the defense lawyer for questioning the reliability of chemical alcohol tests, the article's honest comments about breath testing devices and those who operate them can become an ally of the defendant. The article is certainly something to read and take to the courthouse the next time a DPS chemist testifies in a DWI case.


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# TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

## SUPPORT STAFF SEMINAR-CRIMINAL LAW

March 29-30, 1985  
Loews Anatole Hotel-2201 Stemmons Freeway-Dallas

### PROGRAM

#### FRIDAY, MARCH 29, 1985

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<td>8:00 a.m.</td>
<td>Registration</td>
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| 8:30 a.m. | Welcome and Opening Remarks  
Moderator: Cecil W. Bain, San Antonio                                                      |
| 8:45 a.m. | WHAT CAN YOUR STAFF DO FOR YOU?  
Ethical Considerations  
Speaker: Camille Milner, Gainesville                                                      |
| 9:30 a.m. | THE CLIENT INTERVIEW:  
With and Without the Attorney  
Speaker: R. William Wood and Cheryl Cooper, Denton                                         |
| 10:30 a.m. | Refreshment Break                                                                         |
| 10:45 a.m. | AN OVERVIEW OF THE TYPES OF CRIMINAL CASES  
Speaker: M. P. “Rusty” Duncan III and Mary Pracht, Denton                                |
| 12:00 p.m. | Lunch Break (On Your Own)                                                                |
| 1:30 p.m. | VOIR DIRE AND THE CRIMINAL TRIAL  
Speaker: Ronald L. Goranson and Legal Assistant, Dallas                                    |
| 3:00 p.m. | Refreshment Break                                                                         |
| 3:15 p.m. | RESEARCH AND THE APPEAL  
Speaker: Kerry P. Fitzgerald, Dallas                                                       |
| 5:00 p.m. | Adjourn to Happy Hour: Cash Bar                                                           |

#### SATURDAY, MARCH 30, 1985

<table>
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| 8:30 a.m. | NATIONAL ASSOCIATION OF LEGAL ASSISTANTS: CERTIFICATION PROGRAM  
Speaker: Jan Browning (CLA), Dallas                                                   |
| 9:30 a.m. | OFFICE MANAGEMENT FOR THE BUSY CRIMINAL ATTORNEY  
Speaker: Clifton L. “Scrappy” Holmes and Linda Harper, Longview                       |
| 10:30 a.m. | Refreshment Break                                                                         |
| 10:45 a.m. | COMPUTERIZING LEGAL RESEARCH  
Speaker: Richard Alan Anderson, Dallas  
AND  
USF OF COMPUTER IN THE COMPLICATED TRIAL  
Speaker: Jan Woodward Fox, Houston                                                    |
| 12:30 p.m. | ADJOURN                                                                                   |

For more information call (512) 478-2314.
"Color us amazed," Stan Brown and John Kennedy won an acquittal based on the insanity defense in Abilene (buckle of the Bible Belt), and the client had two priors! ... Ed Mallett was appointed to represent Houston school children in a desegregation litigation many years ago. Case now settled. His court-ordered fee of Baptists, Birchers and on the insanity defense in Abilme (buo via a CB radio. Sorry fellows, only Quo hue results for his clients. lm. Sure enough, he was, and now this crime wave has swept the county. Just like W. B. said it would.

Jan Fox chairs the Texas Trial Lawyers Criminal Law Section. She is working on the evidence code committee. ... The Texas Board of Pardons and Paroles finds that 16% of those paroled are back in jail within one year. Of course, this means that 84% are not. Vigilantes and armed citizens are increasing. After several burglaries, one man posted a sign that burglars would be shot. No more burglaries, but the pizza man won’t deliver.

Battle over hypnosis-elicited testimony continues. Problem is that hypnosis heightens imagination. A Los Angeles police psychologist asserts that as an investigatory tool, it elicited “somewhat to extremely accurate” information in 80% of the cases checked. An American Medical Association committee finds, however, that “there is no evidence to indicate that there is an increase of only accurate memory during hypnosis” ... A new defense asserted in at least two murder trials (pre-menstrual syndrome) may have a cure. A psychologist has devised a therapy which requires an isolation tank filled with 11 inches of water and 1000 pounds of Epsom salts. Effective, if the patient does not drown ... Charles J. Rittenberry (past TCDLA Director) is scheduled to speak at the Upper Midwest Symposium on: DEFENDING THE DRINKING DRIVER on March 15 in Bloomington, Minnesota.

Lots of lively discussion at the February Board meeting in San Antonio. TCDLA has filed an amicus curiae brief in McGraw v. State (5th Court of Appeals), in which the court chewed out the defense lawyer for not supplementing the record with a written jury waiver. Emman Colvin, really heated up over the original opinion, complains that the court used the bench to take a cheap shot at the lawyer ... Media tactics of San Antonio District Attorney Sam Millsap to intimidate the judiciary sparked the meeting. Charles Butts has accumulated various media remarks of Millsap into video and audio tapes. ... Butts authorized to pursue a counterattack ... David Bires and Dain Whitworth reported on proposed legislation. ... Lou Dugas looking into a possible TCDLA trip to England during the ABA convention in July ... Gerry Goldstein spoke about money reporting and forfeiture problems for lawyers under the new federal laws. If your cash fee is only $9,999.99, you do not have to report to the federal government who your client is!

Send us some news that we can share. 202 Travis, Suite 208, Houston, Texas 77002, or call 713/236-1000 ...
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

Past Presidents Seminar
the Annual Spring Trip

DUNES HOTEL – LAS VEGAS, NEVADA
APRIL 18-21, 1985

Come join your fellow attorneys for the Past Presidents Seminar and the Association’s annual Spring Trip to be held in Las Vegas, Nevada. April 18th and April 21st have been reserved for travel days.

Approval has been received from the State Bar of Texas for six (6) hours of CLE credit for the Past Presidents Seminar. Subject matter will be Criminal Law and Procedure/State and Federal Court.

PAST PRESIDENTS SEMINAR
April 19th: Seminar 9:00 a.m. - 12:30 p.m.  April 20th: Seminar 9:00 a.m. - 12:30 p.m.
Seminar Speakers will be Past Presidents of the Texas Criminal Defense Lawyers Association, and topics will include:

- Orwell's 4th and 5th Amendment
- Pleas of Guilty on Federal Circuit
- Conflicts on Multiple Representation & Attorney Privileges
- Obstruction of Justice & Other Related Lawyer Nightmares
- Hypnosis Dilemma

REGISTRATION FEE: $150.00 per person. Please make your check payable to the Texas Criminal Defense Lawyers Association, and mail to 600 West 13th Street, Austin, Texas 78701.

RESERVATIONS: Call the Dunes Hotel at 1-800-634-6971 to make your reservations. Room rates have been confirmed at $48.00 for a single or double room. You are responsible for booking your own hotel reservations by calling the 800 number above. Be sure to indicate you are with our group, so you will receive these rates.

AIRFARE: Braniff Airlines will be reserving seats for the special rate of $218.00 PER PERSON ROUND TRIP—DEPARTING ONLY FROM DFW IN DALLAS.

- Braniff will depart from DFW Airport on Thursday, April 18, 1985 at 7:00 p.m. and arrive at the Las Vegas airport at 7:35 p.m.
- Braniff will depart from the Las Vegas Airport on Sunday, April 21, 1985 at 11:00 a.m. and will arrive DFW airport at 3:30 p.m.

To insure flight reservations at the reduced rate, your written or verbal confirmation MUST BE RECEIVED ON OR BEFORE APRIL 8TH at the TCDLA headquarters office.

SEMINAR REGISTRATION FORM
$150.00 per person

Name ______________________  Address ______________________

Phone ______________________  Number Attending ______________________

AIRLINE RESERVATIONS
$218.00 per person

Name(s) ______________________  Number Attending ______________________

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Charles M. McDonald
Former President of TCDLA and The Texas Association of Certified Criminal Law Specialists

"Most of the forms in the book have annotations which amount to as complete and up to date a brief on the subject as you can find anywhere. The book will reduce the time expended in criminal matters at least 75%.”

W. T. Phillips
Former Judge, Texas Court of Criminal Appeals

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