Co-Directors,
The Honorable M.P. "Rusty" Duncan, III 6th Annual TCDLA ADVANCED CRIMINAL LAW SHORT COURSE
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Happy Holidays from Crime Stoppers
by Mark G. Daniel

Introduction to the Parallel Civil and Criminal Prosecution of Industrial Espionage — Part 3
by Michael P. Lynn

Summary of Significant Decisions of the Courts of Appeals
by Roy E. Greenwood

How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases — Part 4
by Cathy E. Bennett and Robert B. Hirschhorn

Search and Seizure Under State and Federal Law — Part 10
by Jade Marie Meeker

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CONTINUING LEGAL EDUCATION

Tentative Seminar Schedule 1993
CDLP/TCDLA

June 17-19, 1993
The Honorable M.P. "Rusty" Duncan, III
6th Annual TCDLA ADVANCED CRIMINAL LAWSHORT COURSE
San Antonio

June 18, 1993
TCDLA President's Ball

June 19, 1993
TCDLA Annual Meeting
TCDLA/CDLP Executive Committee Meetings

July 15-16, 1993
CDLP Skills Course
Denton

July 29-30
CDLP DWI Defense Seminar
Dallas

August 19-20, 1993
CDLP Skills Course, Denton

September 30-October 1, 1993
TCDLA Advanced Federal Law Short Course
New Orleans, LA

October 21-22
CDLP Skills Course
So. Padre Island

November 18-19
CDLP Skills Course
To be determined

Join us for the
SECOND ANNUAL
TEXAS ADVANCED CRIMINAL LAW SEMINAR
GRAND CAYMAN ISLAND
July 4-11, 1993

CLE APPROXIMATELY 10 HOURS

Travel arrangements through Buck Royal Travels, Inc., Austin, Texas.
Cost of $669 per person based on double occupancy includes:
Roundtrip charter air out of DFW, 7 nights standard room accommodations at the
Ramada Treasure Island Hotel, hotel taxes, roundtrip airport/hotel transfers, and
departure tax.
Contact Sandra or Charlie at 512/346-1340 or 1-800-856-1340.
Hats Off to the Rusty Duncan Co-Directors

Deborah Gottlieb and Robert Price deserve kudos for a well-planned event.

Once again, a high profile lineup has been recruited to put on the Honorable M.P. "Rusty" Duncan III 6th Annual TCDLA Advanced Criminal Law Short Course which is being held in San Antonio this month. The speakers were carefully chosen and their materials should prove excellent.

Behind the scenes this year were our undaunted, fearless leaders: Co-Directors Deborah A. Gottlieb and Robert A. Price IV, to whom all of us owe a huge vote of thanks for all of their work. I know that spearheading this effort has consumed their time and energies, and will continue to do so throughout the entire institute.

I would like to do more than just give passing reference, however, to our two co-directors. Each of them deserves more. So . . . here is a little information about each.

Deborah A. Gottlieb has been a partner in the Houston firm of Turner and Gottlieb since 1979 and also serves as adjunct judge in the County Criminal Court #9 of Harris County. Deborah is a 1972 graduate of Mills College in California and earned her master's in linguistics/rhetoric from the University of California in Berkeley in 1974. In 1979 she received her law degree from South Texas
College of Law.

Her professional activities include serving as treasurer of the Harris County Criminal Lawyers Association, as an officer of the Texas Women's Legislative Watch, and as a member of the National Association of Criminal Defense Lawyers. She is also on the Board of Directors of the Texas Criminal Defense Lawyers Association and is a frequent lecturer on criminal law issues.

Famous cases she has defended include State of Texas vs. Robin Hood (juvenile charged with over 15 counts of aggravated robbery resulting in probation); "The Mr. Jake Case," which involved over 100,000 pounds of marijuana; and numerous murder cases involving "battered wife/female syndrome" with defense resulting in either not guilty or probation. She reports that she is currently getting hammered in federal court on drug cases on a regular basis.

Robert A. Price IV graduated from Thomas Jefferson High School in San Antonio in 1965; graduated from the University of Texas in Austin with a bachelor arts in 1968; and received his J.D. degree from the University of Texas School of Law in 1971.

His first job was with the Bexar County District Attorney's office 1972-73. From that time, he has been a criminal defense attorney in private practice. He has been Board Certified in Criminal Law since 1979 and is currently on the Texas Board of Legal Specialization Criminal Law Advisory Committee.

Robert is a past president of the San Antonio Bar Association (1985-86) and was on the Board of Directors of the State Bar of Texas from 1987 to 1990. He is currently Chairman of the Board of the San Antonio Bar Foundation, which on Law Day recognized FBI Director William Sessions.

Most importantly, he is on the Board of Directors of the Texas Criminal Defense Lawyers Association and a member of the Texas Bar Foundation, the San Antonio Bar Association and is licensed to practice in Texas and Colorado. He is also licensed in the United States District Court, Western District of Texas; United States Court of Appeals-5th Circuit; and the United States Supreme Court.

Robert is the editor of the current edition of the criminal law manual used for the "Nuts and Bolts Practice Skills Course" published by the State Bar of Texas.

He is also currently on the Board of Directors of the Blue Star Art Space, showing contemporary alternative art; the Board of Directors of the McNay Art Museum, and his last and greatest achievement is being crowned King Anchovy of Coronation at the Fiesta-1993 in San Antonio.
The Legacy of the 73rd Legislature

by John Boston

Plus a look at the on-going problem in Texas capital cases.
Mr. Tom Kramitz
Executive Director
Texas District and County Attorneys
Assn.
1210 Nueces, Ste. 200
Austin, TX 78701

Mr. Bill LaRowe
Center for Correctional Services
P. O. Box 12487
Austin, TX 78711

Mr. Ray Speece
Staff Counsel
Administrative Office of the District
Courts
301 San Jacinto, Room 100
Houston, TX 77002

Gentlemen:

We are in the process of considering
rules for the Board of Pardons and
Paroles. All of you have been very
helpful in the past, and I ask for your
assistance once again.

The attached copy relates to clemency,
pardon, reprieve, and commutation of
sentence. This area deserves close
scrutiny, which is why I ask your as-
sistance. Feel free to discuss this with
anyone, and I would like to have your
comments and suggestions back to me
by Friday, June 4.

If you have any questions, give me a
call. I appreciate your help.

Sincerely yours,
Jack D. Kyle, Chairman.

cc: Mike Miller

4 June 1993

Hon. Jack D. Kyle, Chairman
Texas Board of Pardons and Paroles
2503 Lake Road, Ste. 9
Huntsville, Texas 77340

Re: Your letter of May 18 - clemency,
pardon, etc.

Dear Chairman Kyle:

Thank you for your letter to which I
am just now responding due to the
Legislature's recent adjournment.

I have not had time to thoroughly
consider the areas which you say, cor-
rectly in my view, deserve "close scru-
tiny." However, I will share a few
thoughts with you and make myself
available for further and, hopefully,
more informed discussion at your con-
venience.

At first blush, the most serious area of
concern is clemency in capital cases in
light of the impact that Herrera v. Collins
has, and will have, in death penalty
cases.

In considering clemency petitions to
the Board, I understand your concern is
that the Board should not be expected
to discharge judicial duties that are
normally the responsibility of the courts.
I understand the confusion which could
result from full-blown evidentiary
hearings being relitigated before the
Board if the issues and witnesses were
those heard at the original trial. But
based on the Herrera decision, I see no
reason for the Board and the Governor to
avoid confrontation claims of actual in-
nocence in capital cases based on newly
discovered evidence in some manner or
other.

In Herrera, Chief Justice Rehnquist,
writing for the majority, conceded that
"a truly persuasive demonstration of
'actual innocence' made after trial would
render the execution of a defendant
unconstitutional, and warrant federal
habeas relief if there were no state au-
thority open to process such a claim." (my
emphasis). Earlier in the opinion after
discussion of the limits on the granting
of new trials and that Texas' refusal to
consider Herrera's claim of newly dis-
covered evidence did not violate funda-
mental fairness, Chief Justice
Rehnquist states, "This is not to say,
however, that petitioner is left without
a forum to raise his actual innocence
claim. For under Texas law, petitioner
may file a request for executive clem-
ency. (citations to the Texas Constitu-
tion and Code of Criminal Procedure.)
Clemency is . . . the historic remedy for
preventing miscarriages of justice where
judicial process has been exhausted."
And later: "Executive clemency has
provided the 'fail safe' in our criminal
justice system . . . It is an unalterable
fact that our judicial system, like the
human beings who administer it, is
fallible" (citations omitted). But history
is replete with examples of wrongfully
convicted persons who have been
pardoned in the wake of after-discov-
ered evidence establishing their inno-
cence." (my emphasis).

I suggest an idea which could be a
starting point for discussion aimed at
improving the clemency procedure for
the Board in capital cases: After discov-
ery of new evidence creating a "prob-
ability" of factual innocence and after
exhaustion of state and federal remedies,
then the defendant could apply to the
Board for a hearing to show those
elements by a preponderance of the
evidence. (Presumably, the burden
would be on the petitioner since he has
been found guilty by this point.)

If a majority of the Board was per-
suaded by the defendant's evidence,
then the Board would make a recom-
menation for some form of clemency.

Continued on page 36
The Honorable M. P. "Rusty" Duncan III  
6th Annual TCDLA  
ADVANCED CRIMINAL LAW SHORT COURSE  

June 17-19, 1993  
THE PLAZA HOTEL  
555 S. Alamo Street • San Antonio, Texas • 210-229-1000  

Course Directors: Deborah A. Gottlieb — Houston, Robert A. Price IV — San Antonio  

MCLE 15.25 Hours  

Thursday, June 17, 1993:  
8:00-8:50 am Registration  
8:50-9:00 am Welcome and Opening Remarks  
9:00-10:00 am Search & Seizure  
  Justice of the Peace Jade Meeker  
10:00-10:15 am Refreshment Break  
10:15-11:15 am Jury Charges  
  David L. Botsford, Austin  
11:15-12:00 am Drugs & Taxes from the  
  Comptroller's Office  
  Laura Mello, Austin  
12:00-1:15 pm Lunch (on your own)  
1:15-2:00 pm Hi-Tech Demonstrative Evidence  
  E.X. Martin, III, Dallas  
2:00-2:45 pm Recent Decisions from the Court  
  of Criminal Appeals  
  Honorable Sam Houston Clinton  
2:45-3:00 pm Break  
3:00-3:45 pm Driving While Intoxicated  
  Stuart Kinard, Austin  
3:45-4:30 pm Sufficiency of Evidence Post-Geesa  
  Robert G. Turner, Houston  
4:30-5:30 pm Ethics & Attorney Misconduct  
  Richard A. Anderson, Dallas  
5:30 pm Adjourn  

Friday, June 18, 1993:  
8:30-9:15 am Legislative Update  
  Betty Blackwell, Austin  
9:15-10:00 am Juvenile Law  
  Professor Robert Dawson, Austin  
10:00-10:15 am Refreshment Break  
10:15-11:00 am Cross-Exam of Arresting Officer  
  Mike DeGeurin, Houston  
11:00-11:45 am Creative Drug Defenses  
  Randy Schaffer, Houston  
11:45-12:30 pm Lunch (on your own)  
12:30-1:45 pm Hi-Tech Demonstrative Evidence  
  E.X. Martin, III, Dallas  
1:45-2:30 pm Jury Argument - Opening and  
  Closing Statements  
  Jack Strickland, Fort Worth  
2:45-3:00 pm Extraneous Offenses  
  Edward A. Mallett, Houston  
3:00-3:45 pm Sufficiency of Evidence Post-Geesa  
  Robert G. Turner, Houston  
3:45-4:30 pm Drug Profiles  
  J. Gary Trichter, Houston  
4:30-5:00 pm Jury Selections & Batson  
  Tim Evans, Fort Worth  
Saturday, June 19, 1993:  
8:45-9:15 am State Forfeitures  
  Jim Lavine, Houston  
9:15-10:15 am Pre-Trial Motions  
  Gerald M. Goldstein, San Antonio  
10:15-10:30 am Refreshment Break  
10:30 am TCDLA Board Meeting
Criminal Defense Lawyers Project
Presents
ANATOMY OF A DWI TRIAL:
A View from the Defense by the Superstars
July 29-30, 1993
Southland Center Hotel
400 N. Olive Street
Dallas, Texas

Course Director: J. Gary Trichter
Assistant Course Directors: Mike McCollum and Troy McKinney

July 29 - Thursday
8:00-8:45 a.m. - Course Registration
8:45-9:00 a.m. - Opening Remarks
9:00-9:50 a.m. - An Overview of DWI law
    Stanley Schneider-Houston, Texas
9:50-10:00 a.m. - Break
10:00-10:50 a.m. - Voir Dire Demonstration
    David Burrows-Dallas, Texas
10:50-11:00 a.m. - Break
11:00-11:50 a.m. - Voir Dire Demonstration
    J. Gary Trichter
11:50-12:15 p.m. - Panel Critiques
    J. Gary Trichter, Troy McKinney, Mike McCollum-Dallas,
    Brian Wice-Houston
12:15-1:30 p.m. - Lunch on your own
1:30-2:30 p.m. - Cross-Examination Demonstration of the
    Arresting Officer
    Randy Levitt-Austin, Texas
2:30-3:30 p.m. - Cross-Examination Demonstration of the
    Arresting Officer
    Randy Taylor-Dallas, Texas
3:30-3:45 p.m. - Panel Critiques
3:45-4:00 p.m. - Break
4:00-4:50 p.m. - Demonstrative Evidence Demonstrations
    Troy McKinney and Richard Frankoff-Houston, Texas
4:50-5:00 p.m. - Panel Critiques and Closing Remarks
5:00-6:30 p.m. - Adjourn and Cocktail Social and Intoxilyzer 5000
    Demonstration

July 30 - Friday
9:00-10:00 a.m. - A Real Scientist View of the Intoxilyzer 5000
    Dr. Ken Smith-Houston, Texas
10:00-10:50 a.m. - Opening Statement and Closing Argument
    Demonstrations
    Keith Jagmin and Vic Sasso-Dallas, Texas
10:50-11:00 a.m. - Break
11:00-12:15 p.m. - Preparing Witnesses for Cross-Examination:
    Lecture and Demonstration
    Kimberly De La Garza-Houston, Texas and Tom Pappas-
    Dallas, Texas
12:15-1:30 p.m. - Lunch on your own
1:30-2:30 p.m. - Demonstration of Direct Examination of Defensive
    Intoxilyzer Experts Dr. Ken Smith of Houston, Texas
    and John Castle of Dallas, Texas
    Kimberly De La Garza and Tom Pappas
2:30-2:45 p.m. - Break
2:45-3:45 p.m. - Demonstration of Cross-Examination of the
    Intoxilyzer Operator and Technical Supervisor
    Mike McCollum-Dallas, Texas
3:45-4:45 p.m. - Demonstration of Cross-Examination of the
    Intoxilyzer Operator and Technical Supervisor
    Warren Abrams-Dallas, Texas
4:45-5:30 p.m. - Panel Critiques and Question and Answer
    Session
5:30 p.m. - Adjourn

Hotel Reservation Card
In order to secure your hotel reservations at reduced group rates, this card, letter, or call identifying you with the Criminal Defense Lawyers must be received by the hotel on or before July 20, 1993.

Southland Center Hotel
400 N. Olive Street
Dallas, Texas 75201
(214) 922-8000

<table>
<thead>
<tr>
<th>July 29 - Thursday</th>
<th>July 30 - Friday</th>
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<tbody>
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<td>Break</td>
<td>12:15-1:30 p.m.</td>
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<td>11:00-11:50 a.m.</td>
<td>Lunch on your own</td>
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<td>Panel Critiques</td>
<td>and John Castle of Dallas, Texas</td>
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<td>Kimberly De La Garza and Tom Pappas</td>
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<td>Brian Wice-Houston</td>
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<td>2:45-3:45 p.m.</td>
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<td>4:00-4:50 p.m.</td>
<td>Session</td>
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<tr>
<td>Demonstrative Evidence Demonstrations</td>
<td>5:30 p.m.</td>
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<td>Troy McKinney and Richard Frankoff-Houston, Texas</td>
<td>Adjourn</td>
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<td>4:50-5:00 p.m.</td>
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<tr>
<td>Panel Critiques and Closing Remarks</td>
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<td>5:00-6:30 p.m.</td>
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</tbody>
</table>
AT LONG LAST

TCDLA ANNOUNCES A PROFESSIONAL LIABILITY INSURANCE PROGRAM FOR ITS MEMBERS

Through the joint efforts of TCDLA, TexMark, and National Casualty Insurance Company (Rated A+15 by A.M. Best), TCDLA Members have access to outstanding coverage at highly competitive rates.

Today you can obtain numerous quotes for professional liability insurance. Make sure one of these quotes is from your association sponsored program.

TCDLA has recognized fluctuating trends in this area and is working hard to stabilize premiums for many years to come.

<table>
<thead>
<tr>
<th>Policy Highlights</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Easy to read policy</td>
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<tr>
<td>• Unlimited prior acts coverage available</td>
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<tr>
<td>• Covers all legal and notary services</td>
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<td>• Up to $5,000 may be paid annually with no deductible for defense of disciplinary proceedings</td>
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<td>• Innocent insured protection</td>
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<tr>
<td>• Duty to defend policy</td>
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<tr>
<td>• Annual Aggregate Deductible</td>
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<tr>
<td>• Insured's consent required to settle claims</td>
</tr>
<tr>
<td>• 30-day free &quot;Extended Reporting Period&quot; with options to 60 months</td>
</tr>
</tbody>
</table>

For information please reply to:

TEX MARK

Insurance Agency, Inc.
Martha Stebbins

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Happy Holidays from Crime Stoppers

by Mark G. Daniel

The following article appeared in the Fort Worth Star Telegram on December 15, 1992:

"If you are short on cash for your holiday shopping, Parker County Crime Stoppers has a suggestion: Rat on a crook."

"Officials will speed up the payment process between now and December 24 for people who offer information that leads to the arrest of anyone involved in criminal activity," said Alan Beadel, spokesman for Parker County Crime Stoppers.

"In the past, we've paid up to $1,000.00 for information leading to the arrest and indictment," Beadel said. "That sometimes takes months to get an indictment. So, until Christmas, we will pay the reward when the arrest is made and the case is filed."

"Our intent is to get these people who may be reluctant to go ahead and call us and to give people some Christmas money." Parker County Crime Stoppers can be reached at (817)599-5555 or (800) 942-STOP."

I was certainly comforted by the fact that many will have a joyous holiday season after having received their crime stoppers money on an accelerated basis. It is also comforting to know that not a penny of these accelerated payments will be spent on drugs, alcohol or illicit activities. I am certain that crime stoppers programs in Parker County and throughout the State of Texas were careful to insure that each dollar which they pumped into the holiday season economy was devoted to legitimate Christmas purchases. I am even more comforted to know that accelerated payments for crime stoppers programs such as that instituted in Parker County will certainly do nothing but foster truthful information from the informants benefiting from the crime stoppers tips.

Crime stoppers programs throughout Texas have proven to be an effective law enforcement tool. They have resulted in thousands of arrests and the recovery of millions of dollars of stolen property. However, like any other well intended endeavor, such programs are no less susceptible to the blind ambition and accompanying mistakes so often associated with our war on crime.

Since their inception, crime stoppers programs have enjoyed a highly protective cloak of secrecy. Government Code section 414.007 provides that crime stoppers advisory council records relating to reports of criminal activity are confidential. Further, section 414.008(a) of the Government Code provides that evidence of a communication between a person submitting a report of a criminal act to the statewide Crime Stoppers Advisory Council or a local crime stoppers program and the person who accepted the report is not admissible in a court or administrative proceeding. Still further, Government section 414.008(b) provides that all records of the council in local crime stoppers programs concerning reports of criminal activity may not be compelled to be produced before a court except on order of the Supreme Court.

Those of us who labor in the trenches of the trial courts and encounter crime stoppers information maintained under this veil of secrecy have likely shared many of the following concerns:

1. Who was the initial crime stoppers informant?;

2. Are any of the State's witnesses a crime stoppers informant?;

3. What did the crime stoppers informant initially tell the law enforcement agent and does that differ from the trial testimony?;

4. How much money did the crime stoppers informant receive for this information?;

5. Did the crime stoppers informant even exist?; and

6. Whether the crime stoppers informant became a "confidential and reliable informant" as stated in an arrest or search warrant.

Evidently, the Court of Criminal Appeals recognized some of these concerns and this past June provided a window of opportunity in Thomas v. State, 837 S.W.2d 106 (Tex. Crim. App. 1992). Thomas involved a factual circumstance where the defendant's cousin had seen him in possession of a number of items of the deceased's clothing and had called the Dallas Crime stoppers program and talked with someone for 10-15 minutes. This conversation was recorded. The informant also gave two other statements and ultimately testi-
fied at trial. 
During cross-examination of the informant at trial, counsel for the defendant requested production of the original crime stoppers tape recording. The court denied this request citing the governing statute prohibiting production in sections 414.007 and 414.008 Government Code. The defendant was convicted and sentenced to death at which time he appealed citing denial of the right to further mandated that the trial courts take steps to insure that the information remains confidential and be sealed in order to be made part of the appellate record.

While Thomas provides the first opportunity for a criminal defendant to pierce this veil of secrecy concerning crime stoppers records, the most important lesson learned from Thomas is the method and manner of making a proper request. In the Thomas opinion, effectively cross examine, violation of due process because of the denial of information which might lead to unspecified exculpatory and impeachable material. Finally, the defendant complained on appeal that refusal to release the tape recording initiated his right to meaningful review of the above claims because the recording was not available for inclusion in the record. The Court of Criminal Appeals determined that the confidentiality of the crime stoppers statute are overreaching and operate to totally bar a defendant access to information that may be material, whether in possession of the state or any other person. The court further held that denial of access to information which would have a reasonable probability of affecting the outcome of a defendant's trial abridges his due process right and undermines the court's duties to vindicate Sixth Amendment rights in seeking to balance the State's rights to "foster the detection of crime and encourage a person to report information about criminal acts..." with the defendant's rights to due process and confrontation. The court decided that both interests can be served by providing that crime stoppers information should be inspected by the trial court in camera. Further, the Court found that neither the attorney for the state or the defendant should be present and that it would be the responsibility of the court to determine if the produced information contains Brady material. The Court the Court of Criminal Appeals revisited Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974) where the prosecution had moved for a protective order prior to trial to prevent reference to a juvenile record of a crucial prosecution witness. The United States Supreme Court found that the state's interest to protect the juvenile defender from suffering unnecessarily for his youthful transgressions must give way before a defendant's right to confrontation and the Sixth Amendment. The error in Davis v. Alaska consisted of denying the defendant the right to cross-examine a witness about facts concerning the witness' juvenile record from which the jury could draw inferences of the witness' reliability. The Thomas opinion also distinguishes Pennsylvania v. Ritchie 480 U.S. 39, 107 S.Ct. 989 (1987). Ritchie involved a circumstance where the defendant was charged with sexual abuse of his daughter. The defendant sought to discover records maintained by a child protective agency which the agency and the state refused to disclose. The trial court relied on the statutory authority which made the records confidential. The United States Supreme Court held that there was no confrontation clause violation because the defendant had adequate cross-examination and the trial court placed no limitation on defense counsel's cross-examination.

The overriding distinction drawn between Davis and Ritchie is the limita-

tion on confrontation and cross-examination. The confrontation clause is basically a trial right and does not compel pretrial discovery as was done in Ritchie. Proper preservation of error necessitates the objection and complaint made at trial address how the denial of access to the information hindered effective cross-examination.

I hope that this article will help all of us to have a happier holiday season in 1993.

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Introduction to the Parallel Civil and Criminal Prosecution of Industrial Espionage

by Michael P. Lynn

Part 3

(1) What Is a Corporate Document?
The term "corporate document" has been broadly construed. The Second Circuit, in In Re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, Witnesses v. United States, 657 F.2d 5, 8 (2d Cir. 1981), offered what it termed a "non-exhaustive list" of criteria relevant to the determination of whether documents are personal or corporate: (1) who prepared the document; (2) the nature of its contents; (3) its purpose or use; (4) who maintained possession and who had access to it; (5) whether the corporation required its preparation; and (6) whether its existence was necessary to the conduct of the corporation's business.

The Ninth Circuit, in United States v. Mackey, 647 F.2d 898, 899 (9th Cir. 1981) rejected an attempt to characterize the diaries, calendars, and appointment books of the general manager of a company under investigation for antitrust violations as personal and hence protected by the Fifth Amendment. The court held that the general manager used the diaries and calendar to record business meetings and transactions he conducted as an executive of the corporation and hence held that they were corporate documents. See also, United States v. Lein, 806 F.2d 1443, 1446 (9th Cir. 1986).

(2) Who Is to Produce the Document or Answer Discovery?
(a) The Custodv Problem:
Most attempts to resist production have centered on the theory that voluntary production and authentication of the documents as "corporate" would be testimonial and hence would trigger Fifth Amendment protection. United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984): "where the preparation of business records is voluntary, no compulsion is present when they are produced.

(b) The "Kordel" Problem:
Targets of criminal prosecution have attempted to avoid answering discovery sought of the corporation on the grounds that answers to such discovery may incriminate the corporate officer executing the interrogatories or responding to a document request. In United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970), the Supreme Court held that the corporation in such instances is required to appoint an agent who, without fear of self-incrimination, shall furnish the requested information. The Court reasoned:

The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have. Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.

Id. The danger to the attorney representing the target corporate defendant lies in the cases cited by Kordel which arguably require the attorney to respond to the interrogatories and requests for production if no suitable agent can be found. In United States v. 42 Jars...Bee Royale Capsules, 162 F. Supp. 944, 946 (D. N.J. 1958), aff'd, 254 F.2d 666 (3d Cir. 1959), cited by Kordel at n. 8, p. 7:

It will thus be the clear duty of the corporation to select an officer or agent for the above purpose, who will not have personally participated in such a questionable transaction, and who thus cannot be incriminated by such answers. This the corporation can easily do under its broad corporate powers, using even its attorney, for instance, whose duty it would then be to "furnish such information as is available to the party" — the sum total of the corporate information.

The attorney representing the corporation may be placed in the untenable situation of responding to document...
requests and interrogatories with very little or no knowledge of the actual facts of the case. In such circumstances, the corporation's attorney may be disclosing work product or, worse, swearing to facts about which he has no knowledge.

Kordel and its progeny indicate that the attorney need not agree to his appointment as agent for the corporation and that the appropriate procedure to defeat such discovery is a motion for protective order. See, Casson Construction Co. v. Armeco Steel Corp., 91 F.R.D. 376 (D. Kan. 1980). At least one agency of the federal government maintains that the attorney has no option but to become the corporate agent and answer discovery. See, FTC v. Kane, CA-84-5416 AWT (Px) (S.D. Cal.; L.A. Division) (Motion to Compel and for Sanctions Lodged January 13, 1986) (unpublished).

3) Who Guides the Litigation?

The Kordel issue raises a fundamental difficulty in the defense of a company accused of trade secret theft. Who guides the litigation if the attorney for the corporation is unable to talk to the principal officer under investigation? Who decides when a counter claim should be asserted and who proposes or responds to motions for summary judgment? The corporate attorney in a parallel civil and criminal prosecution may be rendered blind and ignorant and forced to rely on opposition testimony to defeat summary judgments and to answer discovery on counterclaims.

The strain on the corporate defense attorney in transition is intense, and often places counsel in the position of making management decisions on the prosecution of the lawsuit, thus calling for him to act, in effect, as both client and attorney. For example, if after investigating the claims asserted by the corporation's attorney, the lawyer for the corporation decides the government's claims may have merit, to whom does he address a settlement proposal? Who should make the decision whether to cross-claim against the individuals under investigation? The problem is more difficult if the corporation has passive investors not involved in the dispute or if the corporation is in bankruptcy. Further compounding the difficulty for the corporation's lawyer is the possibility that the insurance company paying for the defense of the corporation may have an interest different than that of the trustee in bankruptcy or the management of the corporation. Most insurance policies exclude any recovery on the policy for damages resulting from criminal behavior. Thus, the insurance company's interest could be served by evidence that the principals and the corporation did commit the crime charged while the corporation is served only by a finding it did not engage in the unlawful conduct.

The principals of the corporation under investigation may have an interest antagonistic to the corporation in that the principals under investigation may wish to defeat the criminal charges at any cost even if that means the corporation is more likely to lose the civil case.

Thus, representing a corporation whose officers and directors are under investigation is rife with potential conflicts of interest.

(4) Potential Traps For The Unwary:

(a) Obstruction of Justice:

Through amendment and decisions, the crime of obstructing justice has gradually expanded.


- Corruptly Advising: "Corruptly advising" a person, not your client, to invoke the Fifth Amendment also classifies as obstruction of justice. United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir.), cert. denied, 419 U.S. 917, 95 S. Ct. 195, 42 L. Ed. 2d 155 (1974); Cole v. United States, 329 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954, 84 S. Ct. 1630, 12 L. Ed. 2d 497 (1964); United States v. Fayer, 523 F.2d 661, 663 (2d Cir. 1975), see also United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984); United States v. Arnold, 773 F.2d 823, 831 (7th Cir. 1985) ("Courts . . . have uniformly held that the statute made it a crime to corruptly influence a witness to invoke his Fifth Amendment self-incrimination privilege before a federal grand jury rather than testify."); United States v. Baker, 611 F.2d 964, 967-69 (4th Cir. 1979). But see, Mannes v. Meyers, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975) (attorney who "in good faith" advises his client to assert his Fifth Amendment privilege does not violate 18 U.S.C. §1503). I have not located a clear definition of what "corruptly advising" means. See, Meaning of Term "Corruptly" For Purposes of 18 USCS §1503 Making It a Federal Offense to Corruptly Endeavor to Influence, Intimidate, Impede, or Injure Witness, Juror, or Officer in Federal Court, or to Obstruct the Due Administration of Justice, 52 A.L.R. Fed. 303 for cases interpreting "corruptly influencing." Defense counsel who contacted indicted witness and his counsel and suggested that witness might want to exercise Fifth Amendment privilege did not violate 18 U.S.C. §1503 since such conduct was "legitimate action of defense counsel . . . contacting an important witness . . . and his counsel to discuss matter of mutual importance to them. McNeal v. Hollowell, 381 F.2d. 1145, 1152 (5th Cir. 1973), cert. denied, 415 U.S. 951, 94 S. Ct. 1476, 39 L. Ed. 2d 567 (1974).

Agreement that one of the witnesses would be absent from the trial by arranging to undergo surgery is obstruction of justice. United States v. Minoff, 137 F.2d 402 (2d Cir. 1943).

Thus, the attorney representing the target defendant must be sensitive to the obscure line between vigorous advocacy and "corruptly advising" a person, not your client, to engage in con-
duct which may "impede" a criminal investigation.

(b) Contempt:

Courts may choose to hold the attorney and his client in contempt for obstructing justice or disobeying a discovery order of the court. See 18 U.S.C. §401; Berkery Photo, Inc. v. Eastman Kodak Co., 605 F.2d 263, 305-08 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980); United States v. Weisak, 527 F.2d 676, 680 (3d Cir. 1975).

c. The Required Documents Exception:

If the Defendant is required to keep documents by a comprehensive government scheme of regulations, then no privilege exists as to those documents. Thus, documents required in some government contracts are not covered by the Fifth Amendment privilege and, must be produced. See e.g., Shapiro v. United States, 335 U.S. 1, 108 S. Ct. 1375, 92 L. Ed. 1787 (1948); United States v. Svilain, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927).

4. WHAT ARE THE CIVIL CONSEQUENCES OF INVOKING THE FIFTH AMENDMENT?

(a) Inference and Instruction in Civil Case:


Some courts have applied this rule in a manner similar to a judicial balancing of probative value against the prejudicial effect of permitting the jury to draw an adverse inference from a party's assertion of his Fifth Amendment privilege. See Fanice v. Independent Fire Insurance Co., 699 F.2d 204, 210 (5th Cir. 1983) (dicta could be read as suggesting that trial court may prevent inquiry into Fifth Amendment response under Rule 403 Fed. R. Evid.); Brink's v. City of New York, 717 F.2d 700 (2d Cir. 1983). Courts have refused to allow a party's invocation of the Fifth Amendment to be the sole basis for determining a civil suit. Welting v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979); National Acceptance Company of America v. Bablalter, 705 F.2d 924 (7th Cir. 1983); Spezweck v. Klein, 385 U.S. 511, 515 (1967).

Where a non-party invokes the Fifth Amendment, no adverse inference may be drawn against either party in most cases. United States v. La Couture, 495 F.2d 1237 (5th Cir., cert. denied, 419 U.S. 1053, 1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973).

Where the witness invoking the Fifth Amendment is closely connected with a party, the controlling witness may be treated in the same way as a party witness. Pope v. Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 465 F.Supp. 585 (M.D. La. 1979). Thus, the assertion of the Fifth Amendment by company employee or former employee could hurt the company. Brink's Inc. v. City of New York, 539 F.Supp. 1139, 1142 (S.D. N.Y. 1982), affd, 717 F.2d 700 (2d Cir. 1983).

If the target Defendant invokes the Fifth Amendment, the decision will often be in favor of the Plaintiff. The decision to invoke the Fifth Amendment, while generally a reflexive action on the part of attorneys, should therefore be weighed carefully in the context of the civil investigation. If the defendant has a good defense or the plaintiff cannot make a case on the issue of whether the item allegedly taken is indeed a trade secret, the wise decision may be not to invoke the Fifth Amendment, and to testify. Indeed, if the decision to testify is made, it frees the target defendant to assert more persuasively claims that the purported victim company has violated the anti-trust laws, slander and/or libel laws, and perhaps claim that the plaintiff is conspiring with the government to deprive the defendant of his civil rights.

(b) Difficulty in Asserting Counterclaim:

If the target defendant asserts the Fifth Amendment, his potential for effectively asserting a counterclaim will be severely reduced. The court will usually not dismiss a counterclaim in the face of the assertion of the Fifth Amendment. Welting v. Columbia Broadcasting System, 608 F.2d 1084, 1087 (5th Cir. 1979). ("When... by the silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness... See Heidt, The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1107 (1982).


5. WHAT ARE THE TACTICAL CONSIDERATIONS YOU WILL FACE IMMEDIATELY?

(a) How to Invoke the Fifth Amendment?

["So you want to flip 'em da nicotine!"]

(1) Invoking the Fifth Amendment with dignity is difficult and requires patient and understanding explanation to the accused. The witness will be tempted to testify. You, as counsel for the accused, made the decision to instruct the witness to invoke the Fifth Amendment and you should go on record stating your position. However, at least one court has held, in an unwritten opinion that unless the witness chants the magic words, the privilege has not been claimed.

(2) You should not provide the witness with a card to read. If you are against anyone worth his or her salt,
opposing counsel will introduce the card as a very large exhibit at trial.

(3) You should not state and you should not have your witness state that he or she is invoking the Fifth Amendment because their testimony "will," "may," or "might" incriminate the witness. After all, if the testimony is to come into evidence it is best that the witness and his lawyer not express an opinion on the incriminating nature of the evidence. One acceptable method of invoking the Fifth Amendment is to claim the protection of the Constitution, of the United States under the Fifth Amendment and the applicable provisions of the Texas Constitution without further comment.

b. What to Expect from Skilled Opponent:

(1) Detailed and Precise Questions Compelling Fifth Amendment Response.

Because the skilled opponent is attempting to create as many specific inferences as possible concerning the weakest portion of his case you will be faced with a long tedious and emotionally exhausting day, as specific questions are addressed to which the witness invokes his Fifth Amendment Privilege. Sinclair v. Savings Loan Commissioner of Texas, 696 S.W.2d 142 (Tex. App. — Dallas 1985, writ ref'd n.r.e.).

Your opponent will ask leading questions such as: "You knew the materials you were taking were confidential, isn't that correct?" "You knew the materials you were taking were confidential, isn't that correct?" You intentionally took confidential documents from the pocket bank was involved in an agreement to injure poor victim company, true?" "You knew that the big deep pocket bank was involved in an agreement to injure poor victim company, true?" "You are a guilty son of a gun who enjoys lollipops." etc. For a useful review of how to ask questions when you left the poor victim company, see, W. Raleigh, Confronting the Fifth Amendment Privilege in Depositions, Barrister, Summer of '85, pp. 42-45.

(2) Use of the Protective Order:

You should consider attempting to obtain a protective order sealing the documents and evidence to prevent disclosure of the documents and the Fifth Amendment invocation to the world. Such an order may be helpful in interfering with the cooperation between the government and the victim company. See, P. Donnici, The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues, 5 U.S.F.L. Rev. 12 (1968). A court may seal deposition testimony or enjoin the parties from disclosing information obtained through discovery in any other proceedings. See Waldbaum v. Worldvision Enterprises, 84 F.R.D. 95 (S.D.N.Y. 1979); Securities and Exchange Commission v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978); Martindell v. International Telephone and Telegraph Corp., et al., 594 F.2d 291 (2d Cir. 1979); Palmieri v. State of New York, 779 F.2d 861, 863 (2d Cir. 1985) (protective order granted pursuant to Rule 26(c) expressly providing that all matters related to discovery would not be disclosed to any other person, including any government agency or instrumentality); Annotation, Construction and Application of Provisions of Federal Rule of Civil Procedure 26(c) Providing For the Filing of Secret or Confidential Documents or Information Enclosed in Sealed Envelopes to be Opened Only as Directed by the Court, 19 ALR Fed. 970 (1974).

(3) The Victim Company's Motion to Preclude:

The victim company will usually follow a deposition in which the Fifth Amendment has been invoked with an application to be given reasonable notice prior to trial if the witness invoking the Fifth Amendment suddenly has a change of heart and wishes to testify. If no notice is given, then the witness is precluded from testifying differently from his prior testimony that is, precluded from testifying. Diffy v. Carrier, 291 F. Supp. 810, 815 (D. Minn. 1968); Backs v. United States, 82 F.R.D. 743, 745 (E.D. Mich. 1979); R. Heidt, The Conjuror's Circle — The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1130 (1982).

(4) More Traps: Collateral Estoppel:

(1) The Rule & Its Permutations:

The specific collateral estoppel effect of a prior criminal or civil proceeding depends upon the result in the prior proceeding and upon the burden of proof in the prior and subsequent proceedings. If the criminal prosecution takes place before the institution of the civil proceeding and the defendant is acquitted, the acquittal has no effect on the subsequent civil proceeding, and the government may proceed with and prevail in the civil proceeding. See Helvering v. Mitchell, 303 U.S. 391, 397, 58 S. Ct. 630, 82 L. Ed. 917, 920-21 (1938). The rationale for this rule was recently stated in the Supreme Court in One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972): "The difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" Id. at 235, 93 S. Ct. at 492; see also United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 1104-05, 79 L. Ed. 2d 361 (1984); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §§ 4422, at 209 (1981).

Conversely, "because a defendant is surrounded by greater safeguards in criminal than civil litigation, and the standard of proof to which the complainant is held is higher, a judgment of conviction is conclusive in civil litigation between the same parties as to the issues that were litigated and adjudicated in the criminal prosecution." IB J. Moore, J. Lucas & T. Currier, Moore's Federal Practice, ¶ 0.418 (11, at 552-53 (2d Ed. 1984) (footnote omitted); see also Allen v. McCurry, 449 U.S. 90, 104, 101 S. Ct. 411, 420, 66 L. Ed. 2d 308 (1980) (state court conviction for conspiracy in restraint of trade precludes defendants' reliugion of conspiracy issue in government's subsequent suit to enjoin conspiracy).

If the civil action takes place before the institution of the criminal action and the defendant is held liable for civil damages, the judgment of civil liability is not conclusive of any issue in the subsequent criminal trial and admission of the judgment is prejudicial error. See, United States v. Rylander, 714 F.2d 996, 1002 (9th Cir. 1983); cert. denied, 467 U.S. 1209, 104 S. Ct. 2998, 81 L. Ed. 2d 355 (1984); United States v. Beaver, 678 F.2d 856, 868 n. 10 (10th Cir. 1982); cert. denied, 471 U.S. 1066, 105 S. Ct. 2114, 85 L. Ed. 2d 499 (1985); see also,

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GRANTED PETITIONS FOR DISCRETIONARY REVIEW

Since July 17, 1985, the administrative staff attorneys of the Court of Criminal Appeals have compiled, in the normal course of business, a list of cases and legal issues on which the Court has granted petitions for review. Although originally prepared for internal use only, the Court has authorized release of the list for publication and for use by the bench and bar of Texas. The issues listed are summaries as worded by the staff, and do not necessarily reflect either the reasoning or the phrasing used by the parties or by the Court.

The following are the cases and issues on which the Court of Criminal Appeals granted review but which the Court has not yet delivered a written opinion:

PDR 0583-92 09/16/92, Lubbock (A's PDR), Ray Morales, Injury to a Child: 1. Whether the trial court's application charge improperly charged the jury on the law and standard as regards conduct as opposed to result oriented intent in an injury to a child case?

PDR 0606-92 09/23/92, Jefferson, (SPA), Brice Christopher Chatman, Murder: Can the evidence be sufficient to sustain a parties conviction when the instructional section of the court's charge correctly instructs on the law of parties, and the application paragraph permits the jury to find appellant guilty, "either acting alone or as a party, as that term has been defined," but the jury is not required to find any particular act or acts which demonstrate liability as a party.

PDR 0688-92 09/23/92, Galveston, (S's PDR), Nathaniel Wiliz, Attempted Aggravated Sexual Assault: 1. Whether a subsequent punishment of five years confinement is greater than the previous punishment of 10 years probation? See Lechuga, 532/581?

PDR 0719-92, 0720-92 09/23/92, Bee (A's PDR), Jimmy Martinez and Robert E. Walk, Appeal from a Pretrial Order: 1. The Court of Appeals erred in holding the exceptions set forth in Texas Revised Civil Statute Annotated Article 6252-17, the Texas Open Meetings Act are not exceptions to a criminal offense as that term is defined in the Texas Penal Code Section 2.02. 2. The Court of Appeals erred in holding the exceptions set forth in Texas Revised Civil Statute Annotated Article 6252-17, need not be specifically set out in a charging instrument. 3. The Court of Appeals erred in finding the charging instrument provides adequate notice to the appellee of the charges against him.

PDR 0725-92, 0726-92 09/23/92, Tarrant (S's PDR), Tracy Christine Duke and Julie Lynn Horstman, Appeals from Pretrial Order: 1. A. Whether an indictment for engaging in organized criminal activity, pled under the "did commit the object offense" branch of Penal Code § 71.02(a), must allege as an essential element that the defendant committed an overt act. B. If an allegation of an overt act is necessary, whether that requirement was satisfied by alleging that appellant committed the object offense of aggravated promotion of prostitution with the intent to establish, maintain, or participate in a combination or its profits. 2. Whether an indictment for engaging in organized criminal activity must allege, as an essential element, the names of the other members of the combination. 3. (762-92 only) Whether the offense of aggravated promotion of prostitution requires that the prostitution enterprise be composed of at least two prostitutes other than the defendant. 4. Whether an indictment which alleges all of the essential elements of aggravated promotion of prostitution fails to state that offense because the indictment includes additional language which sought but failed to charge engaging in organized criminal activity.

PDR 0736-92 09/23/92, Brazos, (S's PDR), Samuel King, DWI: Rehearing granted following refusal for non-compliance with Tex. R. App. R. 202(DX7). The trial court properly refused to shuffle the jury panel at appellant's request after the panel had already been shuffled by the state. (See Jones, No. 349-91 delivered 6/24/92)

PDR 0790-92 09/23/92, Bexar, (A's PDR), Thomas Fisher, Murder: 1. Whether the evidence was sufficient to support a conviction for murder when the body of the deceased was never found? Is a body a necessary part of the corpus delicti?

PDR 0819-92 09/23/92, Dallas, (S's PDR), Victor B. Moore, Aggravated Robbery: 1. Does state's waiver of opening statement preclude defense from making opening statement before presentation of state's case? See Art. 36.01(b), V.A.C.C.P.

PDR 0918-92 09/23/92, Harris, (A's PDR), Billie Gean Spiller, Possession of Cocaine: 1. Whether failure to include the qualifying language in notice of appeal after a plea bargain is followed precludes review of merits of pretrial motion when record shows everyone intended to allow appeal of merits. See Tex.R.App. Pro. 40(B)(1). Should Jones, 796/183, be reconsidered?

PDR 0939-92 09/23/92, Bastrop, (A's PDR), Erith Allen Bigley, Possession of 400 grams or more of methamphetamine: Did the Court of Appeals err in reforming the judgement of conviction to reflect a lesser included offense instead of reversing and ordering an acquittal where the evidence was held insufficient?
Summary of Significant Decisions of the Courts of Appeals

by Roy E. Greenwood

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<td>14</td>
<td>Crim. Tresp.</td>
<td>Harris</td>
<td>Reversed</td>
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<td>GRIFFIN, GLENN</td>
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<td>Agg. Sexual Assault</td>
<td>Harris</td>
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<td>Assault</td>
<td>Tarrant</td>
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1. **SUFFICIENCY (TRESPASS)** — Where A, an abortion protestor, was found outside of a yellow “property line” drawn by the abortion clinic to show their private property, and inside a police barricade set up to keep back protesters, and information charged that A trespassed on the property “of the clinic” CA holds that the evidence shows that A was, in effect, on public property since A was found outside of the yellow line marking the property belonging to the clinic, thus evidence insufficient.

2. **COURT’S CHARGE (PAROLE LAW CHARGE)** — Where CCA remanded this case back to CA to determine harm, CA analyses the evidence, and finds that during the final argument, the prosecutor continuously argued parole law, over A’s several objections, and that since the prosecutor’s argument told the jury that a life sentence could be paroled in less than 20 years with good time, where this was an aggravated offense, this argument was a misstatement of the law, and thus harmful and then in this case reversed and remanded.

3. **SUFFICIENCY (INSURANCE DRAFT)** — Where A was indicted for stealing “cash money” in the form of an insurance company draft made in payment for some lost property, where state apparently proved that this insurance claim was fraudulent, CA finds that an insurance draft is unlike a bank check, and is not directly negotiable, and that since this draft had not been converted into cash or credit at the time of A’s arrest, CA concludes that the theft of the insurance draft did not constitute “theft of cash money” and thus the evidence is fatal variance and reversal required.

4. **WITNESSES (EXCLUSION OF DEFENSE)** — Where A was charged for exposing himself to children, and where victims were unsure and challenged as to the identification, and A attempted to present evidence that he had been misidentified by two other women with regard to sexual assault cases of a similar nature, and trial court would not allow such evidence, CA holds that under the Rules of Evidence the right to offer testimony of the witness on behalf of the accused to present a showing of “non-identity” should be allowed, just as the State may show extraneous offenses of identity, and thus in this case A was denied relevant material witnesses in his behalf and reversal required.

COMMENT: Excellent opinion and great job by trial lawyer.

5. **INDICTMENTS & INFORMATION (IDEM SONANS/AMENDMENT OF INFORMATION)** — Where information charged A with assaulting Richard “Hhock” and State filed amendment asking that the information be changed to Richard “Manch” and trial court granted it, CA holds that the names are not idem sonans under any circumstances, and thus the amendment would have been a major change in the pleading, and was thus improper and should not have been allowed and thus judgment reversed and information ordered dismissed.
NOTE: The Defendant was being tried for capital murder, and the careful trial judge submitted a fourth special issue to the jury at punishment under the decision in *Penry v. Lynaugh*, 109 S.Ct. 2934; the jury, after answering the first three statutory special issues in the affirmative, then answered the fourth special issue in the negative; the trial court originally sentenced A to death, but thereafter on MFPIS, the trial judge, based upon the jury's negative answer to the fourth special issue, granted the motion and reformed the death sentence to life. The State appeals.

1. **SENTENCES (DEATH PENALTY VERDICTS)** — Where the State contends that the assessment of the life sentence was improper, since the jury's answer to a fourth special issue was improper, as not being authorized under Texas law, CA notes that under *Penry* the instruction was proper, but that under *Texas law* such a special issue submission was improper under Article 37.07, § 1(a) and thus the submission of such a fourth special issue was improper and requires the case to be remanded.

2. **SENTENCE APPEALS (DISPOSITION)** — CA concludes that when the trial court did finally accept the verdict, that has now been determined to be illegal, that the only alternative the Court has is to remand the case for a new trial, since Article 44.29, V.A.C.C.P., did not apply to this case since it occurred prior to 9/1/91, thus CA cannot remand the case merely for a new punishment trial.

COMMENT: As I understand this opinion, the trial court gave a due and proper fourth special issue to the jury, which the CA says cannot be done; even though CA finds that the requirements of *Penry* require that some "equivalent action be taken," apparently this CA believes that the submission of a fourth special issue is not an authorized option; thus, this writer must conclude that this CA has found that the only option left, assuming that a *Penry* issue is raised, would be to give the jurors an instruction ordering them to "violate their oaths" with regard to one of the three first statutory special issues rather than answer separately a fourth special issue. Obvious PDR here.

1. **SEARCH & SEIZURE (ADMINISTRATIVE SEARCH WARRANT)** — Where A became a suspect in a situation involving the theft of oil field property, and POS secured a search warrant of A's home and business under the provisions of Chapter 88 of the Natural Resources Code, which allows inspection of oil field property in the records of oil production facilities, CA holds that the purpose for obtaining this search warrant was outside of the authority under the administrative guidelines, and thus, under *Crosby v. State*, 750 S.W.2d 768, the searches of these two premises exceeded the authority of the administrative search guidelines, thus illegal search found and conviction reversed.

2. **SUFINENCY (MURDER)** — Where A was charged with killing a child, by "striking the deceased on the head," and the State's evidence shows, at worst, that A inflicted non-fatal wounds to the boy's body, but there was no evidence to show that he struck the deceased in the head, and there was a substantial time frame in which other persons could have administered the fatal blow, thus the evidence is insufficient under *Jackson v. State*, 652 S.W.2d 415, requiring reversal.

2. **COUNSEL (INEFFECTIVE ASSISTANCE CLAIM)** — Even though CA reverses and orders judgment of acquittal, nevertheless, CA notes in this case and A was represented by a law student, qualified under § 81.102 of the family law practitioner; CA finds that errors of omission and commission were "so numerous" as to "defy the conception of sound trial strategy" but under the circumstances, where acquittal is ordered, CA does not review ineffective assistance of counsel claim and suggests to trial courts that it would not be in the best interests of administration of justice for a law student to be able to act under such serious trial circumstances.

**Roy E. Greenwood** graduated from the University of Texas Law School in 1970, and thereafter helped initiate the creation of the office now known as the Staff Counsel for Inmates at the Texas Department of Corrections. In November 1971, Mr. Greenwood was appointed as Administrative Assistant to the Texas Court of Criminal Appeals, a newly created position, where he served until November 1978, at which time he entered private practice in Austin — specializing exclusively in criminal defense practice.

Mr. Greenwood served on Governor Dolph Briscoe's COMMISSION FOR TEXAS CRIMINAL JUSTICE STANDARDS AND GOALS, was chairman of TGCLA's Amicus Curiae Committee from 1983-1985, has been a frequent lecturer at criminal law seminars and has written numerous articles on Texas law for various publications.
How to Conduct a Meaningful and Effective Voir Dire in Criminal Cases

by Cathy E. Bennett and Robert B. Hirschborn

Part 4

VIII. MAKEUP OF THE JURY

It is impossible to generalize about the type of people who you want in a typical criminal case. There are no rules. However, we look for people who have traveled or have been exposed to the world and realize that no one is perfect. But on the other hand, some of the best jurors we have had are people who have never been out of their home state and yet view the world with an open-minded perspective because of something in their background. The only guidelines are to look for flexible, independent, sensitive and open-minded people.

What we have found in all the research that has been done on jurors is that yes, demographics do have something to do with how people communicate, and likewise, what kind of publicity they have been exposed to has a lot to do with how they view the case. More importantly, however, is how a person’s personal life experiences have affected his or her view of the important case issues. That is why the old stereotypes that many defense lawyers rely on are not reliable. As a result, lawyers often strike people who would have been good jurors in their case.

The old profile assumes that military officers, bankers, accountants or conservatives are going to end up being pro-prosecution; everyone who has law enforcement background, or family members who are in law school, is going to be pro-prosecution. We have not found these to be necessarily true. There is a major antiquated blind faith that leads many lawyers to pigeonhole jurors. They jump to conclusions about them without getting enough information.

If a person works in what appears to be a liberal profession, such as the arts or the social sciences, one might assume that he or she is more apt to be open-minded. The stereotype does not hold anymore. Some of the most conservative, pro-prosecution jurors we have seen are in the “artsy” or liberal professions. Our society has become so mobile, we get information from so many different sources, and people are impacted in very different ways from how they formerly were.

In addition to individual jurors, the defense team must examine closely the group dynamics. This means that the defense team must decide who will be the most likely foreperson, who will follow this person, who will resist this person. Also, a close look must be given to the sub-grouping will emerge and how powerful these groups will be. Some questions to consider in the group dynamics are: (1) How many strong people do you want on your jury? (2) How many weak people do you desire? (3) What percentage of your jurors are strong prosecution types and what percentage are defense jurors? These are but a few questions that must be answered before exercising peremptory strikes. All of this, of course, will be figured in with whom the defense team thinks the prosecutor will strike.

In order that the defense counsel might have as many observations as possible, everyone at the defense table should take notes on each juror’s verbal and non-verbal responses. It can also be helpful to set up rating scales for each juror. This would be a 10-point scale with the number 1 signifying pro-prosecution, authoritarian and punitive. Number 10 on the scale should be the opposite from number 1 and would illustrate pro-defense, strong, flexible, non-punitive, intelligent and leader. The inherent problem with this system and most others is that the majority of jurors will get a rating of 4 for what we call the “grey” jurors.

It is with this group that an experienced jury and trial consultant is worth his or her weight in gold. These scales when done on each juror will act as a point of comparison when making choices. This, combined with each person’s notes on the juror and a verbatim account of what the juror said during voir dire, give additional data on which to base your strikes.

A very important dynamic when putting the group together is getting the defendant’s perceptions of how each juror seemed to relate to him or her. This is extremely valuable input, because he or she often can perceive feelings and reactions from jurors that other people in the selection process miss. Another thing that is added into the use of peremptory challenges is how jurors related to one another during the selection process. If the selection was panel voir dire, who nodded at someone else’s answers or gave someone a scornful look when they were answering a question? Who copied someone else’s answers and seemed to value what they said?

When individual voir dire is being conducted, the defense team should have notes on who chooses to sit next to whom and who was talking to whom when the jury was in the hallway or in the bathrooms. Also note people’s neighborhoods, jobs, socio-economic class and hobbies to discover who will have common interests on the jury and who will identify with each other. This will also indicate which people will conflict with one another.

There are an infinite number of areas to look at while picking a jury that will feed into the decision-making process. The sign of a creative attorney during
Vo!e For The Defense

is the one who changes his voir
dire process at the completion of each
trial. This person finds new content
directions, deletes questions that are confusing or
detrimental and is always desiring to improve his or her verbal responses and non-verbal gestures. This person also interviews jurors after trials to find out not only information about how the jury saw the case, but also to find out the jurors' perceptions of him or her, the judge and the prosecutor during voir dire. He or she asks questions of the jurors such as (1) What questions I asked made you want to talk to me? (2) What questions hindered our relationship? (3) What kinds of adjectives would you use to describe my behavior during jury selection? (4) How could I have explained jury selection in a more clear way that would have aided your answering my questions more completely? (5) What question or questions could I have asked that would have gotten to the core of who you are? and (6) What other questions should I have asked you? This attorney also puts as much energy into the selection of a jury as he or she does in the presentation of the case, because he or she realizes that he or she can put on the best play in the world, but without an audience which is receptive to the play, it will be misunderstood and not comprehended.

IX. ROLE OF TRIAL CONSULTANT

A trial team in a criminal case generally consists of the trial lawyer, the investigator, the secretary and the paralegal/legal assistant. More and more lawyers are adding an extra, and necessary, member to the team: a jury and trial consultant. Many lawyers are now acknowledging the tremendous input and assistance provided by competent and experienced trial consultants. Their role is to augment not replace the trial lawyer. They should be the thirteenth juror, not the second chair lawyer.

A jury and trial consultant should be contacted and retained well in advance of the trial. Hiring a consultant on the eve of jury selection is the equivalent to hiring an investigator on the Friday before the trial. Neither the consultant nor the investigator can properly do the job without sufficient time or information.

If the funds are available, the trial consultant should work with the attorney not only during jury selection and the trial, but also on developing a trial theme, assist with the trial preparation and run one or more mock trials. If time or funds are limited, the consultant should be retained to review case materials, prepare a jury questionnaire, write voir dire questions and assist with jury selection.

Many lawyers call consultants and say, "I don't want all the bells and whistles, just give me a juror profile - do I want men or women, young or old, white collar or blue collar, high school educated or college educated?" The consultant can provide a generic profile but in the absence of empirical data (survey, mock trials or focus groups) it is impossible for the consultant to accurately predict how certain demographic groups will react to a particular set of facts. The consultant that says he or she can give the lawyer a demographic based profile without empirical input is either fooling the attorney or is remarkably lucky. Given the tools that are available, you should not leave jury selection to mere guesswork. Do not take a short cut. Jury selection is three-quarters art and one quarter science. The courtroom is the canvas, the consultant has the colors but it is the trial lawyer who controls the paintbrush.

X. CONCLUSION

Jury selection is the point that sets the tone for the rest of the trial. It can be a jury's most valuable educational forum, if used to its limit, and requires sensitivity and awareness on the attorney's part. Openness, flexibility and courage on the part of the attorneys are what make communication during voir dire accomplish its aims.

The art of human relationships is a very demanding one. It is filled with flaws and mistakes because understanding someone and how he or she will behave is one of the most difficult and unpredictable tasks in the world. Most people never really know even the

Continued on page 39
SIGNIFICANT RECENT DECISIONS

editor: Catherine Greene Burnett

Part 5

PROCEDURES FOLLOWING REMAND REVERSAL

REMAND: STATE'S OBJECTION TO APPOINTMENT OF SPECIAL MASTER WAIVED WHEN RAISED FOR FIRST TIME ON MOTION FOR REHEARING.

JANECKA, No. 68,881; January 15, 1992; Opinion by Judge Overstreet; Judges McCormick, White, Campbell, and Benavides dissent.

Court of Criminal Appeals originally remanded at 737 S.W.2d 813.

This is a capital murder appeal; the death penalty was assessed. Originally the Court of Criminal Appeals remanded D's conviction to the trial court for a hearing to allow D to demonstrate harm as a result of the trial court's error in overruling a motion to quash. The trial judge appointed a special master to preside over that hearing and to make findings of fact and conclusions of law. Subsequently the trial judge adopted the special master's findings and conclusions, and the Court of Criminal Appeals reversed the capital murder conviction based on D's demonstration of harm.

On rehearing, the State alleged for the first time that the trial judge lacked authority to appoint a special master. The State's theory was that unlike post-conviction writ of habeas corpus proceedings, there is no statute giving authority to district judges to appoint a special master to conduct a hearing in a case on direct appeal. Arguing that the entire proceeding was void from its inception, the State sought to overturn the reversal.

HELD: State's motion for rehearing denied. RATIONALE: The prosecution elected to fully participate before the master without raising its objection. Had it chosen, the State could have objected to the appointment of the special master at the time it occurred.

COMMENT: In the state of Texas, procedural default rules cut both ways. What applies for waiver by the defense appears to apply with equal force to issues of waiver by the State.

REMAND: COURT OF APPEALS IMPERMISSIBLY EXCEEDS SCOPE OF REMAND ORDER: WILLIAMS, No. 1057-94; April 15, 1992; Opinion by Judge White; Judge Baird dissent.

D's case was remanded to the Court of Appeals to determine whether an out-of-court statement by an accomplice was made in furtherance of an ongoing conspiracy. On remand the Court of Appeals decided that the statements were not in fact made in furtherance of the conspiracy. However, the intermediate court went further and found that the statements were admissible as an exception to the hearsay rule allowing admission of statements against interest. Thus, the Court of Appeals affirmed the conviction.

HELD: Reversed and remanded yet again. RATIONALE: The Court of Appeals erred in not fully complying with the scope of the remand order. The sole charge on remand was for the lower appellate court to consider again D's first point of error concerning admissibility of the accomplice's statement as an exception under Texas Rule of Criminal Evidence 801(e)(2)(E). Neither the State nor D had ever alleged during the course of this appeal that the statement at issue was (or was not) a statement against interest. Thus, the Court of Appeals stepped outside its proper function in addressing that issue.

RETRIAL: INDIGENT ENTITLED TO TRANSCRIPT OF PREVIOUS TRIAL IN WHICH MISTRIAL DECLARED: WHITE, No. 0063-91; January 8, 1992; Opinion by Judge Campbell; Judge McCormick concur.

Here D was tried for delivery of cocaine. During the first trial the prosecution presented four witnesses, three of whom were police officers involved in the arrest. The prosecutor's entire case took approximately two hours to present. However, the jury "hung," and the judge declared a mistrial.

Three days later, D requested a transcript of the testimony of the three officers from the first trial in order to prepare for cross-examination in the upcoming retrial. Upon learning that such a transcript would not be available by the time of retrial, D filed a motion for continuance. That motion was overruled on three grounds: (1) because of the short duration of testimony at the first trial; (2) because the first trial had occurred only four days earlier; and (3) because all persons involved in the first trial were participating in the second trial, including the court reporter. The trial judge did state he would allow D to review with the court reporter any testimony from the first trial if a conflict with prior testimony arose during the retrial. D was convicted at the second trial.

HELD: Reversed. RATIONALE: Using a totality of the circumstances test, the Court concluded it was necessary to presume that by inhibiting D's ability to impeach witnesses through their specific prior testimony, D's defense was unconstitutionally impaired. Significantly, under the facts, D was arrested pursuant to a sting operation; thus, the State's ability to secure conviction rested almost entirely on the
testimony of the three police officers. Here D was not given the assistance of the court reporter before the second trial. Accordingly, D would have been forced to resort to stopping cross-examination and pausing while the court reporter found relevant notes from the first trial and read back the inconsistent testimony to the second jury. A majority of the Court concluded that under such a system, D would lose the full impact of impeachment, thus seriously undermining an effective defense.

LEGAL BACKGROUND: The critical fact here is the availability of a court reporter prior to the second trial. See Britt v. North Carolina, 404 U.S. 226.

PRE-TRIAL: WAIVER OF RIGHT TO TRIAL BY JURY AT FIRST TRIAL DOES NOT PRECLUDE JURY AT SECOND TRIAL. SALDANA, No. 1234-90 and 1235-90; April 1, 1992; Opinion by Judge Maloney; Judges Miller and Benavides concur; Judge McCormick dissents.

The issue in this case is whether D has the right to choose either jury or court-assessed punishment following a remand — regardless of the choice made by D at the first trial. A majority of the Court concludes that D has such a right. Article 44.29 (b) of the Texas Code of Criminal Procedure permits retrial limited to assessment of punishment. D does not waive his choice to have jury assessed punishment following reversal because of his original punishment selection. D is not bound by his original jury waiver.

RIGHT TO COUNSEL

COUNSEL: CONTINUED REPRESENTATION ON APPEAL; MANDAMUS APPROPRIATE TO COMPEL. HARMON v. HARMON, No. 71,286; April 15, 1992; Opinion by Judge Campbell.

This capital murder appeal has had a colorful history concerning representation for the indigent D. After D was indicted for capital murder, attorneys X and Y were appointed. Defense counsel filed two motions to recuse the trial judge [Z]; these motions were denied by other judges. Trial judge Z presided at trial, which was held in another county on change of venue. D was convicted, and the death penalty assessed. At the time of sentencing, trial judge Z announced that attorney X would represent D on appeal. This announcement was objected to by D and by lawyers X and Y. D then sought a writ of mandamus directing trial judge Z to vacate the order which replaced trial counsel X and Y. Trial judge Z responded that he had no ministerial duty to grant a request by D, X and Y to continued representation by trial counsel. In reaching this decision, trial judge Z relied on Article 26.04 of the Texas Code of Criminal Procedure, giving trial courts discretion in the replacement of appointed counsel.

Trial judge Z argued that removing trial counsel from appellate representation is sound as a policy matter because D's trial counsel would be less likely in general to raise issues of ineffective assistance of trial counsel on appeal.

HELD: D entitled to writ of mandamus. However, issuance of the writ was withheld to allow trial judge Z an opportunity to conform his actions to the opinion of the Court of Criminal Appeals. RATIONALE: Although Article 26.04(a) authorizes a trial judge to relieve appointed counsel, the circumstances under which such replacement may take place are narrowly circumscribed. The parameters of that replacement are dictated by state and federal constitutional considerations.

The critical concern must always be D's right to counsel — both at trial and on appeal. The Court of Criminal Appeals strongly recognized that an indigent D does not have the right to counsel of his choice. However, once counsel has been appointed, the trial judge must respect the attorney-client relationship created as a result of that appointment. The Court found that there must be a principled reason apparent from the face of the record in order to justify a trial judge's sua sponte replacement of appointed counsel.

COMMENT: This is a difficult decision on many fronts. Concerns for an independent judiciary would dictate that a trial court's power of appointment should be freely exercised. Additionally, there are the articulated concerns by groups such as the American Bar Association suggesting that different counsel be appointed on felony appeals to promote a critical review of the trial process. Once justification for such a change of counsel is that "new eyes" may bring a new perspective. Balanced against these concerns, however, is the factual basis in this case that the replacement may have been motivated by more personal reasons. Additionally, as a matter of policy, there are strong arguments to be made in favor of continuation of counsel, such as ensuring a consistent treatment of the theory of the case, development on appeal of issues preserved at trial, and an overall recognition of the trial strategy.

It is easy to imagine this case being used to ensure continuation of trial counsel on appeal at every level of criminal conviction, not merely capital murder cases. One unfortunate effect may be that meritorious claims are not raised on appeal by the same counsel that failed to perceive them at trial. However, the more likely scenario is that a convicted defendant D may actually desire new counsel because the very fact of conviction has had a detrimental effect on the attorney-client relationship, eroding client confidence regardless of justification. It remains to be seen which of these scenarios will be encountered more frequently in the years to come.

SCOPE OF REVIEW

Two significant issues were addressed under this topic in the months spanning January through May of this year. One set of these decisions concerns what must be contained in a record on appeal in order for there to be a sufficiency of the evidence determination. The Court of Criminal Appeals resolved that issue by holding that without a full and complete statement of facts, a sufficiency challenge cannot be successfully launched. The other significant topic concerning the scope of appellate review concerns deferred adjudication. Here the Court determined that an appeal from deferred adjudication is limited to the precise issues provided by statute.

RECORD ON APPEAL: FOR REVIEW OF SUFFICIENCY CLAIM, D MUST PROVIDE ENTIRE RECORD OF TRIAL GREENWOOD, No. 025-91; January 29, 1992; Opinion by Judge Benavides; Judges Clinton and Miller concur; Judge武林 concurs except as to part.

C/A affirmed conviction at 802 S.W.2d 10.

A limited appeal, in which D presents only a partial statement of facts, precludes consideration of a sufficiency of evidence attack. Although Rule 53(d) of the Texas Rules of Appellate
Procedure allows D to bring a limited appeal in a criminal case, that rule will not support a presumption that evidence not included in the record was irrelevant to the case disposition. Bottom Line: Presumptions of Rule 53(d) do not apply to sufficiency challenges. Rather, D bears the burden to show that a sufficient record is present to reveal error which compels reversal under Rule 50(d) of the Texas Rules of Appellate Procedure. When a sufficiency claim has been made, the reviewing court bears the responsibility of reviewing the entire record in a light most favorable to the verdict in order to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This test is one of constitutional dimension. It is predicated on the ability of the reviewing court to consider all relevant evidence in the case. This consideration is impossible if D presents only a partial record.

*Accord, O'NEAL, No. 704-91; March 18, 1992; Opinion by Judge McCormick; Judges Clinton and Miller dissent; and SKINNER, No. 206-91; April 1, 1992; Opinion by Judge Baird; Judge Benavides concurs; Judge Clinton dissents.*

**RECORD ON APPEAL: INCOMPLETE RECORD REQUIRES REVERSAL WHERE D NOT AT FAULT. PEREZ, No. 69, 171; February 4, 1992; Opinion by Judge White; Judge Clinton concur.**

This capital murder conviction was reversed because portions of the statement of facts were missing. The Court repukes earlier hearings in capital cases, rejecting the State's argument that a harmless error analysis should be applied. A harmless error analysis is inappropriate because the error in failing to provide a complete record on appeal does not affect the internal integrity of the trial. Rather, such an error prevents the appellate court from assessing the integrity of the verdict. A critical component in each of these cases was that D has not contributed to the missing statement of facts because of negligence, laches, or other fault by D or his counsel.

**NOTICE OF APPEAL: GUILTY PLEA; TRIAL COURT ORDER COMPENSATES FOR DEFECTS IN WRITTEN NOTICE. RILEY, No. 0001-90 and 0002-90; January 29, 1992; Opinion by Judge Maloney; Judges Campbell and Overstreet dissent; Judges McCormick and White dissent.**

In this case the Court of Criminal Appeals looked not only to written notice of appeal, by also to the trial judge's order when determining if D could complain about denial of his suppression motion after pleading guilty pursuant to a plea bargain. Following the denial of D's motion to suppress, she pled guilty to unlawful possession of cocaine and amphetamine. Pursuant to a plea bargain, punishment was assessed at ten years. D's written notice of appeal stated only that she wanted to appeal, that she was indigent, and that she desired court-appointed counsel. Absent from the written notice of appeal were the following important items: a statement that the trial court granted permission to appeal or that the matters appealed were raised by written motion and ruled on before trial. These items are required by Rule 40(b)(1) of the Texas Rules of Appellate Procedure. However, also included in the record on appeal was an order signed by the trial judge styled "Order Limiting D's Appeal." That order recited that D was assessed punishment in accordance with a plea bargain, that the trial judge allowed an appeal, and that a motion to suppress which challenged the legality of the arrest and subsequent search had been raised before trial.

**HELD: Issue preserved for appeal. RATIONALE: Clearly the notice of appeal standing alone did not authorize the Court of Appeals to determine it could address non-jurisdictional defects. However, when D's notice of appeal is combined with the trial judge's order, there is substantial compliance with Rule 40(b)(1). The substantial compliance permits review of properly preserved non-jurisdictional issues.**

**COMMENT: It may not have been easy to predict the outcome of this case in light of the prior decision of the Court of Criminal Appeals in Jones, 769 S.W.2d 183. In that decision, the Court concluded that despite the fact that notice of appeal was sufficient to base jurisdiction in a court of appeals, unless the notice of appeal states that the trial court had granted permission to appeal from a plea in which a plea bargain had been honored, or alternatively, unless the notice states that pre-trial motions have been ruled on prior to trial, then review of the appellate courts is restricted only to jurisdictional defects. Although this decision is somewhat of a surprise, it evidences a willingness by a majority of the Court to give effect to the intent of the trial-level participants if there is anything in the record to demonstrate that intent. It elevates the substance of such an intent over the mechanical form by which it is manifested.**

**CERTIORARI IN THE COURT OF CRIMINAL APPEALS: WRIT WILL NOT BE USED TO SUBSTITUTE FOR APPEAL. Ex Parte BRAND, Nos. 22,607-01 und 22,607-02; January 22, 1992; Opinion by Judge Maloney; Judges Clinton and Benavides concur.**

At issue in this case was the proper use of the Court of Criminal Appeals's power to issue a writ of certiorari. In 1978 the Texas constitution was amended to include such a power. However, generally, the writ of common law certiorari has been available only to cases in which there is no right to appeal. A majority of the Court found that the writ of certiorari, like the writ of habeas corpus, may not be used if there is an adequate remedy at law. Here D was convicted in municipal court of a fine only offense. D had the right to appeal this conviction to a county court at law. He opted not to do so and thus could not substitute a writ of certiorari for the appeal.

**COMMENT: An open question, left for resolution on another day, is the type of cases over which the Court of Criminal Appeals will be willing to exercise common law certiorari.**

**DEFERRED ADJUDICATION: ISSUES FOR APPEAL LIMITED BY STATUTE. OLOWOSUKO, No. 074-91; March 11, 1992; Opinion by Judge Clinton; Judges Baird and Overstreet concur.**

Here once again the Court of Criminal Appeals attempts to delineate just what can be appealed from a deferred adjudication. What follows is a laundry list. APPEALABLE: immediate appeal on pre-trial motions in compliance with Article 44.02 of the Texas Code of Criminal Procedure. NOT APPEALABLE: trial judge's determination to proceed with an adjudication of guilt after having granted deferred adjudication.
STATE'S RIGHT TO APPEAL

The Court of Criminal Appeals handed down five decisions concerning the State's right to appeal. In doing so, it adhered strictly to the time requirements of the statute authorizing such an appeal. (Sutton) as well as the requirements concerning who may execute a notice of appeal. Simultaneously, the Court was more generous in determining the issues that were appealable and the State's right to a second appeal following abatement.

STATE'S APPEAL: TIMELINESS OF NOTICE; TIME BEGINS TO RUN WHEN ORDER SIGNED. STATE Ex Rel SUTTON v. BAGE, No. 71,227; January 15, 1992; Opinion by Judge Campbell; Judge White concurs; Judges McCormick and Baird dissent.

The Court has strictly construed the provisions of Article 41(b)(1) of the Texas Rules of Appellate Procedure. That rule states that notice of appeal by the State must be given 15 days after an appealable order is signed by the trial judge. A majority of the Court stands firmly behind its earlier decisions that the only logical interpretation to be given Rule 41 is that the physical act of signing (or rendering) an order by the trial judge is the triggering mechanism. Appellate timetables begin from that date. This is true despite language in Rule 44.01(d) of the Texas Code of Criminal Procedure which provides that the State's appeal must be filed no later than the 15th day after the date on which the order, ruling, or sentence to be appealed is entered by the court.

STATE'S APPEAL: COMPELLING STATE TO ELECT THEORY OF PROSECUTION IS APPEALABLE. GABRRETT, No. 1181-90; January 22, 1992; Opinion by Judge McCormick; Judge Clinton dissents.

C/A reversed trial court's ruling at 798 S.W.2d 311.

The State appealed the trial judge's action requiring the prosecution to select its theory. D had been indicted for delivery of cocaine in a charging instrument alleging all three methods of delivery provided by statute — actual transfer, constructive transfer, and offer to sell. In pre-trial motion, D asked the trial court to set aside the indictment on the ground that it failed to give adequate notice about the type of delivery the State would attempt to prove at trial. The trial judge granted D's motion on the constructive transfer paragraph of the indictment, but denied the motion on the paragraphs alleging actual transfer and offer to sell. The State appealed; D claimed in a cross-point of error that the ruling of the trial court was not appealable.

A majority of the Court of Criminal Appeals concluded that the trial judge's action was effectively one which dismissed a portion of the indictment. The act of setting aside the constructive transfer paragraph of the indictment effectively terminated the State's prosecution on that theory of delivery. It allowed the prosecution to proceed only on theories of actual transfer and offer to sell. Effectively the ruling "dismissed a portion of the indictment." Thus, the State was permitted to appeal under Article 44.01 of the Texas Code of Criminal Procedure.

STATE'S APPEAL: NOTICE OF APPEAL MUST BE SIGNED BY ELECTED OFFICIAL, NOT ASSISTANT. STATE v. MULLER, No. 160-91; April 1, 1992; Opinion by Judge Campbell; Judges Clinton and Muller concur.
The State's right to appeal is presented in Article 44.01 of the Texas Code of Criminal Procedure. That statute defines the term "prosecuting attorney" to mean the "county attorney, district attorney, or criminal district attorney who has the primary responsibility for prosecuting cases in the court where the case is heard and does not include any assistant prosecuting attorney."

The literal text of this statute requires that the notice of appeal be personally authorized in some manner by the prosecuting attorney. In other words, a general delegation of authority to an assistant to make notice of appeal does not comply with this statute. The Court does note, however, that the prosecuting attorney could personally authorize and instruct a subordinate to sign a specific notice of appeal.

STATE'S APPEAL: PETITION FOR DISCRETIONARY REVIEW FOLLOWING ABATEMENT FOR FAILURE TO HOLD HEARING ON D'S MOTION FOR NEW TRIAL. PRICE, No. 063-92, March 25, 1992; Opinion by Judge White; Judges Clinton, Baird, and Benavides concur; Judge Miller not participating.

The issue here was whether the State could appeal a decision which had been abated to the trial court with orders to conduct a hearing on D's motion for new trial. Earlier, in Williams, 780 S.W.2d 802, and Meador, 661 S.W.2d 732, the Court of Criminal Appeals held that it would not entertain the State's petition for discretionary review filed after an order of abatement by a court of appeals. The rationale in those two decisions was that the decision of abatement by the Court of Appeals did not "decide" the case and thus did not become a final, appealable decision.

In contrast, here the decision of the Court of Appeals did dispose of the case. D had claimed that the trial court erred in not holding a hearing on his motion for new trial. The Court of Appeals upheld D's point and did not address State's argument that the motion had not been presented in a timely fashion in the trial court. Under the abatement order in this case, decision of the Court of Appeals was provided for either of two scenarios: (1) the trial court could either grant or deny the motion for new trial after a hearing, or (2) the trial court could refuse to hold a hearing. There was no reason under these facts to consider the decision an interlocutory one such as would be the case of an abatement for findings of fact and conclusions of law — a scenario under which both parties could have the right to appeal as though a motion for new trial had been granted or denied immediately after conviction. Here if the trial court grants motion for new trial, the Court of Appeals would have no jurisdiction over the case despite the abatement. Thus, the State could appeal anew under Article 44.01 of the Texas Code of Criminal Procedure. On the other hand, if the trial court were to deny the motion for new trial, then D could begin the appellate process under Article 410(b) of the Texas Rules of Appellate Procedure.

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Prosecution of Industrial Espionage
Continued from page 18

Restatement (Second) of Judgments, § 28(4) (1982).

If, in the prior civil action, the court or jury determines that the defendant is NOT liable, the civil judgment should be "conclusive in favor of a subsequent criminal prosecution as to the issues adjudicated in the civil suit." IB J. Moore, J. Lucas & T. Currier, supra at 552; See also Note, Res Judicata, 64 Harv. L. Rev. 1376, 1378 (1951).

The scope of collateral estoppel effect that a prior criminal conviction has on a subsequent civil action is determined by whether "the issue for which estoppel is sought was 'distinctly put in issue and directly determined in the crimeal action." Wolfson v. Baker, 623 F.2d 693, 207 Ct. Cl. 324, 327 (1980); cert. denied, 450 U.S. 966, 101 S. Ct. 1483, 67 L. Ed. 2d 615 (quoting Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 559, 71 S. Ct. 408, 414, 95 L. Ed. 534 (1951), reh'g denied, 341 U.S. 906, 71 S. Ct. 610, 95 L. Ed. 1345 (1951). Moreover, "[w]hen the criminal conviction was based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." Id.

Thus, when a single transaction constitutes the basis for both the criminal and civil proceedings, a prior conviction that involves only some of the transactions precludes in the later civil proceeding only those claims of the defendant that are based upon the actual transactions involved in the criminal action. See, e.g., Brown v. United States, 524 F.2d 699, 207 Ct. Cl. 768 (1975) (contractor convicted of bid rigging on government contracts, in his later suit against government for breach of contract, was stopped from denying his fraudulent activities as to those contracts forming the basis of his conviction).

(2) Related Doctrines

A plea of guilty is conclusive in a subsequent civil suit between the same parties of all issues that would have been determined by a conviction. See, e.g., Branzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); Metros v. United States District Court, 441 F.2d 313, 316-17 (10th Cir. 1970).

A plea of nolo contendere, however, is an admission only for the purpose of the suit in which it is made, and a conviction based on such a plea does not have collateral estoppel effect in a subsequent civil suit. See, e.g., Doberty v. American Motors Corp., 728 F.2d 334, 337 (6th Cir. 1984).

This article will be continued in the next issue of Voice.
Search and Seizure
Under State and Federal Law

by Judge Jade Marie Meeker

This issue does not exist under Texas law given the statutory exclusionary rule in Art. 38.23 (a), V.A.C.C.P.

In United States v. McCrory, 939 F.2d 65 (D.C. Cir. No. 89-731, delivered April 12, 1991), 49 C.R.L. 1085, the Court held that evidence seized in violation of the Fourth Amendment and therefore inadmissible at trial need not be excluded from consideration at sentencing under the federal Sentencing Guidelines. The rules give the judge wide discretion to consider all relevant evidence. The Court suggested that the result may be different if the defendant demonstrated that the Fourth Amendment was purposefully violated in order to obtain the evidence.

B. THE TEXAS RULE.

1. Generally.

Under Art. 38.23, V.A.C.C.P., evidence obtained in violation of any State or federal constitutional provision or law cannot be admitted in evidence against the accused during the trial of any criminal case. The terms of this statute are mandatory.


One issue to consider is whether causation between the law violation and acquisition of the evidence is required under Art. 38.23. The statute refers to evidence obtained "in violation of some law, as opposed to evidence obtained "by" some violation. Use of the term "in" implies that if officers obtain evidence but break some law, that evidence is inadmissible without regard to whether the law violation led to the discovery or acquisition of the evidence. The terminology imposes almost a strict liability rule on use of evidence obtained in violation of a law.

Causation is usually considered in attenuation of taint. If, however, causation is not required under Art. 38.23, then exceptions to the exclusionary rule fashioned by the Supreme Court, such as inevitable discovery or independent source, would not apply to Texas. See generally Oliver v. State, 711 S.W.2d 442 (Tex.App. - Fort Worth 1986).

pet. ref'd). So long as some law was broken, the evidence would not be admissible.

The Texas exclusionary rule is broader than its federal counterpart since it requires exclusion of evidence obtained in violation of federal and State provisions. See Cruz v. State, 586 S.W.2d 811 (Tex.Cr.App. 1979) (Evidence obtained in violation of the State attorney-client privilege was inadmissible); Irvin v. State, 538 S.W.2d 920 (Tex.Cr.App. 1979) (Evidence obtained in violation of Chapter 14 of the Code of Criminal Procedure was inadmissible); and Leighton v. State, 544 S.W.2d 394 (Tex.Cr.App. 1976).

discovered the evidence. Thus, simply under traditional rules on burdens of proof in search cases, an illegal search occurred which rendered the evidence inadmissible. The court did not need to further find the evidence inadmissible because it was discovered from a violation of the law, specifically a trespass.

The federal exclusionary rule applies only to actions by government agents, United States v. Jackson, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), but the Texas rule probably applies to searches by private citizens as well.

There is an argument to be made that the Art. 38.23 (a) reference to "other person" relates only to statutes which also refer to "other person," such as Art. 14.01 and 18.16, V.A.C.C.P., so only evidence obtained in violation of those statutes will be inadmissible. This argument would likely not be universally accepted.

In Pannell v. State, 665 S.W.2d 96 (Tex.Cr.App. 1984), the court held that the disciplinary rules of the Code of Professional Responsibility were not "laws" of the State of Texas. Thus, Art. 38.23, V.A.C.C.P., does not require suppression of evidence acquired in violation of some disciplinary rule. See also Heinrich v. State, 694 S.W.2d 341 (Tex.Cr.App. 1985), on remand 697 S.W.2d 841, cert. denied 107 S.Ct. 3185.

2. Invocation.

A defendant is not required to specifically invoke the Texas exclusionary rule and need only object to admission of evidence on the ground that it was obtained through an illegal search or seizure. Polk v. State, 738 S.W.2d 274 (Tex.Cr.App. 1987). Article 38.23, V.A.C.C.P., is a procedural result which applies after evidence has been found to be illegally obtained and does not constitute an independent basis upon which to object.

In States v. Hobbs, 691 S.W.2d 340 (Tex.App. - San Antonio, No. 4-90-677CR, delivered February 5, 1992), the appellate court noted that the Court of Appeals' holding in Polk was mandatory: once the court finds that the evidence was obtained in violation of the law under Art. 38.23, the judge has no discretion in excluding the evidence.

C. "FRUITS OF THE POISONOUS TREE" DOCTRINE.

1. Federal law.

If evidence obtained as a result of an illegal search or seizure leads to the discovery or acquisition of additional evidence, then the additional evidence must also be excluded. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 411 (1963). The fruit of the illegal search is considered tainted by the initial illegality.

Not all evidence obtained from an illegal search or seizure, however, must be excluded. In Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Supreme Court set forth a four part test to apply when determining whether a confession obtained as a result of an illegal arrest must also be excluded. The Court considered the following factors:

1. The giving of Miranda warnings.
2. The temporal proximity of the arrest and confession.
3. The presence of intervening circumstances.
4. The purpose and flagrancy of the official misconduct.

In Bell v. State, 724 S.W.2d 780 (Tex.Cr.App. 1986), the Court of Criminal Appeals applied the Brown analysis to determine whether an illegal arrest required exclusion of two confessions obtained as a result of the arrest. The Court applied the preceding four part test and found that the factors militated in favor of excluding the first confession but admitting the second. See also Seif v. State, 709 S.W.2d 1662 (Tex.Cr.App. 1986).

Recently, the Court had another occasion to determine whether a confession obtained after an illegal arrest was inadmissible. In Maxine v. State, 753 S.W.2d 151 (Tex.Cr.App. 1988), the defendant was arrested without a warrant because officers believed that he would see a newscast concerning discovery of the victim's body and attempt to flee. The arrest was not justified under the Art. 14.04, V.A.C.C.P., escape exception because the evidence did not show that escape was imminent and there was not time to procure a warrant.

The Court applied the four-part Brown test and found that the defendant was given his Miranda warnings at least three times, that the confession was given two hours after the arrest, and that the officers' mistake was not flagrant or purposeful. Most important, however, was an intervening factor — the defendant was released from custody and informed that he was free to leave before he gave the confession. Apparently, the assistant district attorney recommended that the defendant be released after considering the facts surrounding the arrest. Given this intervening factor and the other considerations, the taint of the illegal arrest was sufficiently purged.

In Jones v. State, 726 S.W.2d 105 (Tex.Cr.App. No. 71,005, delivered March 18, 1992), the Court of Criminal Appeals held that an affidavit used to support issuance of an arrest warrant lacked probable cause and applied the Wong Sun taint analysis to the evidence obtained subsequent to the arrest, which included physical evidence, testimony regarding an oral statement, and two written statements obtained after the illegal arrest. The court ruled that the written confessions were admissible because a magistrate informed the defendant of the charges filed, officers gave the defendant his Miranda warnings, and, other than a lack of probable cause, there was no official misconduct. The defendant waived objection to admission of the physical evidence when counsel affirmatively stated "No objection" when the evidence was offered. Last, even though receipt of the testimony regarding an oral statement was tainted by the illegal arrest, admission of the evidence was harmless beyond a reasonable doubt.

A stricter rule applies if consent to search follows an illegal arrest. In Brick v. State, 738 S.W.2d 676 (Tex.Cr.App. 1987), the court held that before evidence derived from a warrantless but consensual search following an illegal arrest is admissible, the court must find by clear and convincing evidence that the consent was voluntary and that due consideration of the four Brown factors militates in favor of a finding of tainted dissipation. The State bears the burden of proof.

Attenuation of taint was also discussed in Garza v. State, 771 S.W.2d 549 (Tex.Cr.App. 1989) (Footnote 1).

In Sossamon v. State, 816 S.W.2d 340 (Tex.Cr.App. 1991), the Court applied the taint attenuation test and reversed the conviction even though the illegal evidence was never admitted at trial. In this case, the defendant confessed to a crime in Liberty County under the impression that he would not be prosecuted for the crime. Liberty County officials did so, however, and at trial, the defendant moved to suppress the confession. The trial court ruled the confession admissible, but the prosecutor did not introduce the confession at trial; rather, the defendant was convicted on the basis of eye-witness identification.

The Court held that the defendant involuntarily confessed because the promise of immunity was such as was likely to make the defendant speak untruthfully. The Court then noted that before the defendant confessed, the Liberty County officials had no suspects, no leads and no evidence connecting the defendant to the crime. But for the confession, they had nothing to associate the defendant with the crime. Since the confession was involuntary and since the victim would not have been in the courtroom to identify the defendant but for the confession, the invalid confession tainted the entire proceeding. Thus, even though the State never introduced the confession, the proceedings were fruit of the invalid confession and the case was reversed.

D. INEVITABLE DISCOVERY DOCTRINE.

Evidence is obtained after a defendant's rights were violated but the State can prove
by a preponderance of the evidence that the evidence would have been discovered inevitably by lawful means, then the evidence need not be excluded. See e.g., Williams, 467 U.S. at 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). United States v. Andrews, 784 F.2d 1431 (9th Cir. 1986). See also United States v. Mourning, 716 F. Supp. 279 (W.D. Tex. 1989). (Inevitable discovery does not mean that just because the police could have obtained a warrant, the evidence is admissible.)

In United States v. Mancora Londoño, 912 F.2d 373 (9th Cir. 1990), the court held that even though DEA agents discovered drugs in a rented car pursuant to an illegal search, the evidence would have been inevitably discovered in a later inventory search conducted under DEA policy, which directed search of all rental cars before returning them to the rental agency.

In United States v. Espindola, 912 F.2d 9 (9th Cir. 1990), the court applied the inevitable discovery doctrine to evidence obtained when officers entered a residence and found cocaine in plain view but failed to follow the federal knock and announce rule. The court held that the doctrine applied because an ongoing investigation and application for a warrant were in progress before the cocaine was discovered, and the cocaine would have been found independently by officers executing the warrant.

In United States v. Lamas, 930 F.2d 1099 (5th Cir. 1991), the Fifth Circuit articulated a two-part test applicable to determine whether inevitable discovery applies. The government must prove by a preponderance of the evidence that:

1. A reasonable probability exists that the evidence would have been discovered by lawful means in the absence of police misconduct, and
2. The government was actively pursuing a substantial alternative line of investigation at the time of the constitutional violation.

In Lamas, police discovered drugs after a person consented to the search. Probable cause existed to search the house and one officer had already departed to prepare a search warrant affidavit. The consent was later ruled involuntary, and the Fifth Circuit held that the inevitable discovery doctrine supported admission of the evidence. See and cf. United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985) (Police lied probable cause but had not yet actively begun to seek a warrant).

Inevitable discovery arguments were rejected in United States v. Ramírez-Sanitado, 872 F.2d 1392 (9th Cir. 1989), and United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985), and United States v. Jenkins, 683 F.2d 1022 (2nd Cir. 1982). Texas cases discussing inevitable discovery include Garza v. State, 771 S.W.2d 540 (Tex.Cr.App. 1989). Such evidence should not be excluded. See Sheehan-Tyler Co. v. United States, 251 U.S. 385 (1920) and New v. Williams, 467 U.S. 431 (1984). The inevitable discovery doctrine is an extrapolation from the independent source doctrine: given that tainted evidence would be admissible if it were actually discovered through an independent source, it should also be admissible if it would have inevitably been discovered through an independent source. Thus, the former doctrine applies if the evidence is actually found and the latter applies if the evidence would have ultimately been found.

In Murray, 108 S.Ct. 2529, the Court considered whether the search pursuant to the warrant was in fact a genuinely independent source of the information obtained. If the agents' decision to seek the warrant was prompted by what they observed during the prior illegal entry, then the warrant would not be independent of the entry and admission of the evidence later found would be improper. If, however, the warrant would have been sought even without the entry, then the evidence was discovered through a sufficiently independent source so as to permit admission. The Court remanded the case so the trial court could determine whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence.

Independent source was discussed in Garza v. State, 771 S.W.2d 549 (Tex.Cr.App. 1989) (Footnote 1).

P. GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

1. Federal law.

In United States v. Feeney, 447 U.S. 408 (1980), and Massachusetts v. Malley, 477 U.S. 149 (1986), the Supreme Court set forth an exception to the exclusionary rule based on the good faith actions of the officers. The Court noted that the exclusionary rule was a judicially created remedy designed to safeguard the Fourth Amendment generally through deterrence. Whether exclusion is proper is a separate question from whether the Fourth Amendment has been violated. Resolution of the former question requires a balancing between the costs and benefits of exclusion. The exclusionary rule should be applied only in those situations where the objectives of the rule are most efficaciously served. If the exclusionary rule is to adequately deter improper police conduct, then it must relate to police conduct. Suppression is appropriate where the officers were negligent or had knowledge of their improper conduct. No purpose is served in excluding material obtained where the officers acted with objective reasonability. The Court noted four situations in which suppression would be proper:

1. The magistrate or judge was misled by information the affiant knew was false or
would have known wa$ false except for reckless disregard of the truth.

2. The magistrate or judge wholly aban-
dons his or her judicial role, and no rea-
sionable officer would rely upon the finding of
probable cause.

3. The affiant is so lacking in indica-
tion of reliability that a finding of probable cause
based thereon is unreasonable.

4. The warrant is facially invalid, such as
where the description of the items sought or
place to be searched is totally lacking. Leon,
104 S.Ct. at 3421.

Good-faith reliance on a warrant was
justified in United States v. Freitas, 800 F.2d
1451 (9th Cir. 1986), après demand, appeal
denied, 856 F.2d 1452. In this case, DEA agents
requested a warrant to enter a residence
unannounced at night to determine the
existence of seizable physical property, and
to determine the status of a suspected
laboratory. Agents considered the warrant
unusual, and brought its novelty to the
attention of the prosecutor and magistrate,
who both assured agents that the warrant
was valid. The court held that agents acted
reasonably in relying on the warrant, which
was held invalid because the magistrate had
deleted language in the warrant requiring
that the property be described and copies of
the warrant and inventory be left at the
residence. (Note that the Fifth Circuit good-
faith analysis applies in warrantless search
cases. See United States v. Mourning, 716
F.Supp. 279 (W.D.Tex. 1989).)

An officer's actions were held valid under
the good faith doctrine in United States v. De
Leon-Reyna, 930 F.2d 961 (5th Cir. 1991) (en
banc), 49 Cr.L. 1129. In that case, a border
patrol agent stopped a truck. The dispatcher
misunderstood the license number as given
by the agent because the agent failed to use
words rather than use letters when calling
the license plate number in. The en banc
court noted that the good faith doctrine
applied to warrantless arrests. In United States
v. Williams, 622 F.2d 830 (5th Cir. 1980) (en
banc), the court held that the doctrine
should be applied also to investigative stops
when the police rely on an objectively
reasonable belief that grounds exist for a
stop. Even though the erroneous informa-
tion received by the officer in this case
stemmed from the officer's own negligence,
it was objectively reasonable of him to take
that information into account as part of the
totality of the circumstances supporting the
stop. See also Franks v. Delaware, 438 U.S.
154 (1978) (Recklessness, not negligence, is
the standard.)

2. Texas law.

In 1987, the Texas Legislature enacted the
good faith exception by amending Art.
38.23, V.A.C.C.P., to include the following
language in Subsection (b):

"It is an exception to the provisions
of Subsection (a) of this Article that the evidence
was obtained by a law enforcement officer
acting in objective good faith reliance upon
a warrant issued by a neutral magistrate
based on probable cause."

This exception applies to evidence
obtained on or after September 1, 1987. Gor-
1990).

The language of the statute indicates that
the warrant must be based upon probable
cause. Seeerry v. State, 808 S.W.2d 481
(Tex.Cr.App. 1990). See also Flores v. State,
--- S.W.2d --- (Tex.App. Corpus Christi, No.

In Gordon, a majority of the Court of Criminal
Appeals agreed that Art. 38.23(d) requires a
finding of probable cause, which is not
required for the exception to apply under
Leon. Thus, a good faith exception is
permitted under state law only when the
warrant contains a technical violation which
does not preclude a finding of probable
cause. See generally Escamilla v. State,
550 S.W.2d 796 (Tex.Cr.App. 1977) and
Pondexter v. State, 545 S.W.2d 798
(Tex.Cr.App. 1977). Given this interpreta-
tion, the good faith exception will have little
value since most warrant questions concern
probable cause.

In Duncan State, 807 S.W.2d 1876 (Tex.App.
- Corpus Christi 1991), the appellate court
applied the good faith exception. Warrants
were issued for the defendant's arrest because
he failed to pay fines. The jail records
reflected that the defendant had served the
time for the warrant offenses, but the arrest
warrants were never recalled. Several months
after the defendant served out the fines,
police arrested him. A pat-down search
revealed cocaine in the defendant's pocket.
He argued the evidence should have been
suppressed because the warrants were not
withdrawn. The Court of Appeals noted
that the warrants were issued by a neutral
magistrate and were based on probable
cause so the good faith exception applied.
The court noted that the official's negligence
in failing to properly withdraw the warrants
was irrelevant to whether the good faith exception
applied. No purpose would be served by
excluding evidence found after
officers arrested the defendant on facially
valid warrants.

The good faith exception does not apply
to warrantless searches or arrests since the
language refers to warrants issued on
probable cause. In Vicknair v. State, 751
S.W.2d 180 (Tex.Cr.App. 1988) (opinion on
rehearing), however, the Court stated
"Furthermore, the inarticulate hunch, sus-
picion, or good faith of the arresting officer
was not sufficient to constitute probable
cause . . . ." Id., at 190. Whether this
language indicates that good faith may be a
factor to consider regarding warrantless
arrests or searches awaits further discussion
by the Court.

Last, Art. 38.23(a), V.A.C.C.P., states that
evidence obtained in violation of the law is
inadmissible. The legislature created an
exception to the statutory exclusionary rule
when it enacted the good faith exception in
Art. 38.23(b). A good argument could be
made that other exceptions to the exclu-
sionary rule, such as independent source or
involuntary discovery, do not apply since by
enacting one exception, the legislature
implicitly rejected other exceptions. Thus, the
only recognizable exception to the Texas
exclusionary rule is the Texas good faith
exception.

G. "HONEST MISTAKE" EXCEPTION TO THE EXCLUSIONARY RULE. MARY-

1. The federal rule.

In this case, the Supreme Court ruled that
the validity of a warrant must be judged in
light of the information available to the
officers at the time they obtained the war-
tant. The discovery of facts demonstrating
that the valid warrant was unnecessarily
broad does not retroactively invalidate the
warrant.

Officers obtained a search warrant for a
person named McWebb and the premises
known as "2036 Park Avenue third floor
apartment." They believed that there was
only one apartment on this floor, but, in fact,
there were two. McWebb resided on one
side and the defendant lived in the other.
Before the officers became aware that they
were in the defendant's apartment, they
found illegal drugs. The defendant asserted
his conviction arguing that the officers had
no probable cause to search his apartment.

There was no claim that the warrant did
not contain an adequate description of the
place sought to be searched. After the
search was conducted, however, it was
apparent that the description in the warrant
was too broad. The Court held that while
the purposes justifying a police search
limit the permissible scope of the search,
there was a need to allow some latitude for
honest mistakes made by officers in the
dangerous and difficult process of making
arrests and executing search warrants. The
validity of the search actually conducted
depended upon whether the officers' failure
to realize the excessive scope of the warrant
was objectively reasonable and understandable.

Since the officers' actions were reasonable,
the court did not err in admitting evidence
against the defendant discovered pursuant
to that search.

Similarly, in Hill v. California, 401 U.S.
797, 91 S.Ct. 1106, 28 L.Ed.2d 454 (1971),
officers had probable cause to arrest a man
named Hill and went to his apartment.
Thus, they found a man who denied he was
Hill but fit Hill's description. The defendant
was arrested and a search incident to the
arrest disclosed evidence of a robbery. The
Court held that where the officers had
probable cause to believe the arrestee was
the person they sought and this belief was
...
reasonable, evidence secured during the post-arrest search was admissible.

2. The Texas rule.

The affidavit and warrant in Garrison authorized a search of the entire third floor of the apartment building. The warrant was issued on probable cause and the officers acted reasonably in obtaining information concerning the lay-out of the building.

The question under Texas law is: If officers have a valid warrant and during the course of the execution of that warrant find that the scope of the warrant is broader than necessary, will the overreaching render the warrant invalid and the evidence found inadmissible?

Article 18 B.4 (2), V.A.C.C.P., states that the warrant must describe as near as may be the thing to be seized or the person, place, or thing to be searched. To be sufficient, the description must reasonably apprise the officers of where they are to conduct the search. Amates v. State, 640 S.W.2d 273 (Tex.Cr.App. 1982); Palmer v. State, 614 S.W.2d 831 (Tex.Cr.App. 1981); and Bridges v. State, 574 S.W.2d 560 (Tex.Cr.App. 1978).

The description must be sufficiently specific to enable the officers to locate the property and distinguish it from other places in the community. Bebiscosi v. State, 574 S.W.2d 753 (Tex.Cr.App. 1978).

In Cannady v. State, 582 S.W.2d 467 (Tex.Cr.App. 1979), the Court of Criminal Appeals considered a situation similar to that presented in Garrison. In Cannady, the defendant was charged with possession of illegal drugs. On September 30, 1977, Officer Correa and several other Houston police officers went to 6927 Long Point road to execute a narcotics search warrant. The building involved was a large, commercial building containing several offices and businesses. Each establishment had a separate entrance and address.

After unsuccessfully trying to open the door marked 6927, the officers looked through a window and saw several men running from 6927 into 6929 through an opening in the wall between the two addresses. The officers then entered the building through the door marked 6929. During a search of the premises, they found drugs in a tool box.

The record showed that the premises located at 6927 and 6929 were leased by the same person and were being remodeled at the time of the search. Several partitions separating the various offices and rooms at the two addresses had been removed and the premises appeared to be one big room. The defendant stated that the tool box was located in the 6929 premises.

The Court held that the test to be applied to searches outside the scope of the search warrant is whether the search was unreasonable, since only unreasonable searches are prohibited under federal and state law. Under the circumstances presented, the officers did not act unreasonably in searching the box found in the 6929 part of the premises.

Even though the search warrant in Cannady was not rendered overbroad by subsequent observations by the police, the Court noted that admission of the evidence will turn on whether police acted reasonably in seizing the property.

II. "SILVER PLATTER" DOCTRINE

In Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 2d 1819 (1949), the Supreme Court held that evidence independently obtained by state officials in compliance with state law, but in violation of federal law, could be handed over on a "silver platter" to federal agents for use in a federal criminal trial. The converse of this doctrine was recognized in State (Washington) v. Guinnin, Wash. Ct. App., 1st Div., No. 22106-3-1, delivered September 10, 1990, 47 Cr.L. 516, where the court held that if federal agents obtained evidence legally under federal law, but not in compliance with state law, it could still be given to state officials for use in state criminal proceedings. [Note that Lustig would not apply in state proceedings given the wording of Art. 38.23(b), V.A.C.C.P., and that Lustig was decided before Mapp v. Ohio.]

In United States v. McKeever, 905 F.2d 129 (5th Cir. 1990), the Fifth Circuit held that evidence seized under a state warrant obtained by state agents is admissible in a federal court even if the state warrant fails to satisfy federal statutory requirements.

In United States v. Sutherland, 929 F.2d 795 (1st Cir. 1991), the court rejected an exception to the silver platter doctrine. Ditta in several prior cases indicated that suppression might be appropriate as a deterrent if state police knowingly violate state law then offer the fruits of the violations to federal officers. The court stated that the language did not create an exception to the doctrine and merely indicated that in an extreme case of flagrant abuse of by state officials, when federal officers want to capitalize on that abuse, a court may choose to exclude the illegally obtained evidence.

In United States v. Gilben, P.2d. (11th Cir. No. 90-3206, delivered September 25, 1991, 50 Cr.L. 1051), the Court held that evidence seized pursuant to a state search warrant by officers who were not entitled under state law to execute the warrant was admissible in federal court since constitutional considerations controlled in federal court, not state law.

Anticipatory search warrants and the silver platter doctrine were also discussed in State v. Toone, No. 5-91-136CR, Dallas, delivered January 17, 1992.

I. IMPEACHMENT WITH EVIDENCE ILLEGALLY OBTAINED.

In Walker v. United States, 347 U.S. 62 (1954), the Court held that a prosecutor could introduce herein obtained from an illegal search in order to undermine the credibility of the defendant's claim that he had never possessed drugs. In United States v. Hearon, 446 U.S. 620 (1980), the Court recognized exceptions to the exclusionary rule when evidence was introduced to impeach a defendant's answers to questions posed during cross-examination. In Jones v. Illinois, 110 S.Ct. 688, 652, the Court held:

"This Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.' ... However, because the Court believed that permitting the use of such evidence to impeach defendants' testimony would further the goal of truthseeking by preventing defendants from perverting the exclusionary rule "into a license to use perjury by way of a defense, ... and because the Court further believed that permitting such use would create only a 'speculative possibility that impermissible police conduct will be encouraged thereby,' ... the Court concluded that the balance of values underlying the exclusionary rule justified an exception covering impeachment of defendants' testimony."

In Jones, 110 S.Ct. at 652, the Court declined to extend this rule to allow prosecutors to use illegally obtained evidence to impeach credibility of defense witnesses:

"Expanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers. As a result, this expansion would not promote the truthseeking function to the same extent as did creation of the original exception, and yet it would significantly undermine the deterrent effect of the general exclusionary rule. Hence, we believe that this proposed expansion would frustrate rather than further the purposes underlying the exclusionary rule."

XIV. TRIAL RULES

A. MOTIONS TO SUPPRESS.

1. Burdens of proof.

When a defendant ask the court to suppress evidence because of a Fourth Amendment violation, he or she bears the initial burden of proof. Russell v. State, 717 S.W.2d 7 (Tex.Cr.App. 1986). The term "burden of proof" is used to refer to two different concepts: the burden of production and the burden of persuasion. With regard to evidence suppression, the defendant's initial burden is better categorized as that of production. He or she must merely establish that a search or seizure occurred without a warrant. Moreover, the mere allegation that a defendant was a victim of an improper search or seizure is sufficient to establish standing to contest the improper search or seizure. See Russell, 717 S.W.2d at 9, footnote 6. Standing is not a precondition to testing the

In Cannon v. State _S.W.2d _ (Tex.App. Houston 14th, No. 14-90-94-CR, delivered March 21, 1991), the defendant was a passenger in a car stopped by police. Police searched the car and found cocaine. The defendant argued on appeal that he had standing because there was no evidence that he did not have the owner's permission to use the car. The court held that the proponent of a motion to suppress has the burden of establishing that his or her Fourth Amendment rights were violated by the search or seizure. In this case, since the defendant failed to present evidence to establish a proprietary or possessory interest in the car, he did not prove standing.

Given the relevant burdens of proof, however, the defendant should at least be required to allege facts sufficient to confer standing, rather than having to actually present evidence, as required in Cannon. Defendants could include standard recitations in their motions to suppress that they have standing for stated reasons. At this point, then, the burden should shift to the State to prove standing.

After the defendant shows standing and that a search or seizure occurred without a warrant, the burden of proof shifts to the State. Three situations are possible:

a. If the State produces evidence of a warrant and its supporting affidavit, then the burden shifts back to the defendant to show the warrant was invalid. Russell, 717 S.W.2d at 10, citing Rumshe v. State, 675 S.W.2d 517 (Tex.Cr.App. 1984), overruled in part in Miller v. State, 735 S.W.2d 643 (Tex.Cr.App. 1987). The State must produce both the warrant and the affidavit for presentation to the trial court. Miller.

b. If the State is unable to produce a warrant and affidavit, then it must establish by a preponderance of the evidence that the search or seizure was reasonable. Russell, 717 S.W.2d at 10, citing LaLonde v. State, 675 S.W.2d 115 (Tex.Cr.App. 1984). Of course, proof beyond a reasonable doubt would be required if the issue is raised before the jury. LaLonde, 675 S.W.2d at 118, footnote 5.

c. If the validity of the search rests on the defendant's consent, the State must show by clear and convincing evidence that the consent was freely and voluntarily given. Dickery v. State, 716 S.W.2d 599 (Tex.Cr.App. 1986), and cases cited therein at footnote 5.

If the trial court overrules the motion to suppress, the State generally does not have the burden of listing or verbalizing in the trial court every possible basis for holding a search illegal or risk waiving that basis on appeal. See Lewis v. State, 664 S.W.2d 345 (Tex.Cr.App. 1984). If, however, the trial court grants a motion to suppress, the State may be expected to have given the trial court every basis to uphold the search or seizure before such issues could be urged on appeal.

1. The judge's role.

The initial decision of whether to hold a hearing on a motion to suppress under Art. 38.01, V.A.C.C.P., rests within the discretion of the trial judge. Calloway v. State, 743 S.W.2d 615 (Tex.Cr.App. 1988). The judge may determine the matter before trial or may wait until a proper objection is lodged at trial. Id.

Defense attorneys may want to ask the court to defer hearing motions to suppress until the evidence is presented at trial. If the hearing is held before trial, then jeopardy does not attach and the State can appeal an adverse ruling under Art. 44.01, V.A.C.C.P. If, however, the motion is heard after trial has commenced, then the State is not permitted to appeal an adverse ruling because jeopardy has attached.

When evidence is presented on the motion to suppress, the judge determines the credibility of the witnesses and is the sole trier of fact. Carrasco v. State, 712 S.W.2d 120 (Tex.Cr.App. 1986). The appellate court should defer to the trial court's findings of fact absent a clear abuse of discretion. State v. Carr, 774 S.W.2d 379 (Tex.App. Austin 1989, no pet.).

2. Hearsay evidence.

Hearsay is admissible, even over objection, on the issue of probable cause to arrest or search or to show consent to search. See In re Beale, 758 S.W.2d 772 (Tex.Cr.App. 1988), and cases cited therein at footnote 1. The defendant's testimony.

If a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, that testimony may not be admitted thereafter against the defendant at trial. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968). However, the hearsay testimony may, however, be impeached with the suppression testimony if it varies from his or her testimony at trial. Franklin v. State, 606 S.W.2d 218 (Tex.Cr.App. 1978).


As long as the basis for objection is the same as the pralural suppression hearing, the defense attorney need not object again when evidence is presented on the motion to suppress. See United States v. Dickerson, 931 F.2d 251 (4th Cir. 1991). In this case, however, issues were raised in a footnote to the motion to suppress, the trial court overruled the motion, and the defense did not object to the admission of evidence under Texas law. Rather, the defendant need only specify which Texas law was violated by seizure or acquisition of the evidence.

E. AFFIDAVITS NOT ADMISSIBLE AT TRIAL.

Recitals in a search warrant and return are deemed not to be admissible before a jury; thus, admission over objection may be reversible error. Torres v. State, 552 S.W.2d 821 (Tex.Cr.App. 1977). Hearsay statements in an arrest warrant affidavit are likewise inadmissible. Foster v. State, 779 S.W.2d 845 (Tex.Cr.App. 1989).

D. JURY ARGUMENT.

A prosecutor was allowed to argue to the jury regarding a defendant's refusal to consent to a search of his truck in United States v. McNatt, 931 F.2d 251 (4th Cir. 1991). In this case, the defense presented evidence that the officer planted the kilogram of cocaine found in the truck. The prosecutor responded during argument. The appellate court held that the case did not involve cases such as Doyle v. Ohio, 466 U.S. 107 (1984), and Griffin v. California, 388 U.S. 609 (1967), which concerned references to a defendant's Fifth Amendment right. Under the Fifth Amendment, a person has the right to remain silent at all times. Under the Fourth Amendment, however, a person may not prevent a search of his or her person or property. Given that defense strategy in showing that the officer planted the drugs, the prosecutor's response was proper. The court further concluded that even if there were error, it was harmless given the other evidence.

F. JURY INSTRUCTIONS.

Article 38.23, V.A.C.C.P., states that if an issue is raised regarding whether evidence was legally obtained, the trial court must instruct the jury that if it believes, or has a reasonable doubt, that the evidence was obtained illegally, then it shall disregard such evidence obtained.


A defendant is entitled to such an instruction even if his or her proposed instruction is defective. See State v. Stone, 703 S.W.2d 652 (Tex.Cr.App. 1986) (Proposed charge contained a comment on the evidence...
and a misstatement of the law, but was sufficient to apprise the trial court of the basis for the objection.

If the essential facts are not in dispute, the legality of a search or arrest is a question of law, not fact. Campbell v. State, 492 S.W.2d 566 (Tex.Cr.App. 1973). See also Tex. Crim.Evid. 104 (g).

F. GUILTY PLEAS

Under Rule 40 (h) (1), T.R.A.P., if a defendant pleads guilty or nolo contendere in a felony case, and the punishment assessed does not exceed that recommended by the prosecutor, then the defendant may appeal non-jurisdictional errors if the trial court so permits.

If the defendant enters an open plea bargain (without a prosecutor's recommendation on punishment), then the plea of guilty will waive all non-jurisdictional defects and the defendant may not appeal suppression issues. See Helms v. State, 485 S.W.2d 925 (Tex.Cr.App. 1972). In Garcia and Sosa v. State, 801 S.W.2d 20 (Tex.App. - Corpus Christi 1990), the court held that a plea bargain to a lesser charge without an agreement on punishment could not be appealed under Rule 40 (h) (1), so the plea waived all non-jurisdictional errors.

In Collins v. State, 795 S.W.2d 777 (Tex.App. - Austin 1990, no pet.), the court held that appeal provisions in Rule 40 (h) (1) applied only to felonies, and a plea of guilty or no contest in a misdemeanor case waived non-jurisdictional errors.

XV. APPEAL RULES

A detailed discussion of State appeals is beyond the scope of this article. Several specific issues relevant to appeals of search and seizure matters, however, should be considered.

A. STATE'S APPEALS: STATE HELD TO SAME PRESERVATION RULES.

Given the State's right to appeal certain issues under Art. 44.01, V.A.C.C.P., the State will likely be held to the same rules as those applied to defendants regarding preservation of error.

Rule 52 of the Rules of Appellate Procedure speaks in terms of "parties." Thus, the rules regarding timely and specific objections and requests, court rulings on objections, motions or requests, and bills of exceptions apply to the State.

B. COURTS OF APPEALS NOT REQUIRED TO DISPOSE OF ALL STATE ISSUES RAISED ON APPEAL.

Rule 90 (a), T.R.A.P., provides that the courts of appeals shall address every issue raised and necessary to final disposition of the appeal. Price v. State, __ S.W.2d __ (Tex.Cr.App. No. 65-92, delivered March 25, 1992). If the defendant's conviction is affirmed, disposition of State issues raised in a cross-appeal is usually unnecessary.

In Hargrove v. State, 774 S.W.2d 771 (Tex.App. - Corpus Christi 1989, pet. ref'd), the Court of Appeals refused to consider the State's point of error because the defendant's conviction was affirmed, the Court of Appeals thereby addressed every substantial issue raised under Tex.R.App.Pro. 90, and the Court refused to issue an advisory opinion. Thus, even if the State appeals or cross-appeals, the appellate court may not be required to rule on the issues presented if disposition of the State's issues is not dispositive of the case.

C. STANDING RAISED BY THE STATE FOR THE FIRST TIME ON APPEAL.

If the trial court makes no specific findings regarding standing and the State fails to argue the point in its brief, the Court of Criminal Appeals will assume the trial court made an implied finding of standing. Goodwin v. State, 799 S.W.2d 719 (Tex.Cr.App. 1990).

As discussed earlier, standing to contest a search invokes government infringement into an area covered by a reasonable expectation of privacy. Standing to contest a seizure exists if a possessory interest has been violated. Whether the State may contest the defendant's standing for the first time on appeal appears to have been answered by the Court of Criminal Appeals in Angel v. State, 740 S.W.2d 727 (Tex.Cr.App. 1987).

The Court also noted in Angel, at p. 730, footnote 9, that if the State presented a standing issue to the court of appeals, and the court decides the issue in the defendant's favor, then the State will have to file its own petition for discretionary review specifically raising standing. The Court stated that a party should not be expected to seek discretionary review on an issue already decided in its favor. This statement would support a suggestion that standing could be raised in the court of appeals for the first time if the trial court overrules the motion to suppress and admits evidence.

In Boyles v. State, __ S.W.2d __ (Tex.Cr.App. No. 69,743, delivered May 15, 1991) (opinion on State's motion for rehearing), the Court reiterated the rule that the State may raise for the first time on appeal a defendant's standing, citing Wilson. The Court did not, however, discuss the rule in detail.

In State v. Nolan, Holland, Duncan and Dunn, 808 S.W.2d 556 (Tex.App. - Austin 1991, no pet.), the Court of Appeals noted that the State may raise standing for the first time on appeal. A different rationale, however, may apply if the State appeals an order granting a motion to suppress. In such a situation, the State bears the burden of demonstrating trial error and must raise all errors before the trial court in order to preserve error for appeal. In these State's appeals, the State did not raise standing before the trial court. Since these were not cases in which there was an uncontradicted affirmative evidence establishing the defendants' lack of standing as a matter of law, the State had to preserve error and could not raise standing for the first time on appeal.

D. STANDING RAISED BY THE STATE FOR THE FIRST TIME ON MOTION FOR REHEARING.

In Boyles v. State, __ S.W.2d __ (Tex.Cr.App. No. 69,743, delivered May 15, 1991) (opinion on State's motion for rehearing), the Court reviewed the defendant's conviction for capital murder and death sentence on direct appeal. The State did not challenge the defendant's standing to complain of an illegal search until its motion for rehearing. After the Court issued an original opinion noting the State had failed to raise standing. The Court of Criminal Appeals first considered whether it could review the State's claim, raised for the first time in the motion for rehearing. The Court referred to Tex.R.App.Pro. 74, and noted that whether to consider a new ground raised for the first time in a motion for rehearing was left to the discretion of the appellate court. In deciding whether to exercise its discretion, the court looks to whether consideration is appropriate "as justice requires" or "in the interest of justice." Boyles, slip op. at 3. Since in the instant case, the search was justified on valid third party consent, the Court considered the State's claim, found that the defendant had no standing, and affirmed the conviction.

E. STANDARDS OF REVIEW.

1. Error if defense evidence is excluded.

When an appellate court considers a claim that the trial court improperly excluded defense evidence, it must determine whether the evidence, if admitted, would have tended to disprove guilt or aided the jury in determining the ultimate issue of the case. If not, then exclusion of the evidence does not constitute error. Efron v. State, 710 S.W.2d 560 (Tex.Cr.App. 1986).

2. Error if prosecution evidence is admitted.

If a defendant alleges on appeal that the trial court erred in admitting evidence presented by the State, the defendant must establish that the State violated some rule in discovering, acquiring or admitting the evidence. See e.g. Bennett v. State, 742 S.W.2d 664 (Tex.Cr.App. 1987).

3. Reversible error.

Once error has been found regarding the admission or exclusion of evidence, the appellate court must apply Tex. Rule App. Pro. 81(d)(2) to determine whether reversible error exists. See Jones v. State, 752 S.W.2d 566 (Tex.Cr.App. 1988):

1. If there was error,

2. then the case must be reversed,

3. unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

Thus, the old rules regarding error in submission or exclusion of evidence apply
but whether the error was reversible must be determined according to Rule 81 (b)(2).

In Jones v. State, 803 S.W.2d 272 (Tex.Cr.App. 1990), the Court of Criminal Appeals cited Gates and specifically held that an appellate court should review the magistrate’s actions and not conduct a de novo review. The magistrate’s determination of probable cause should be given great deference by the reviewing court. The Court stated that so long as the magistrate has a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.

F. PRIOR APPELLATE COURT CONSIDERATION OF ISSUES BEFORE SUBJECT TO REVIEW BY PETITION IN THE COURT OF CRIMINAL APPEALS.

Before a defendant may raise an issue in a petition for discretionary review, he or she must have presented the issue to the appellate court for consideration. See Tallent v. State, 742 S.W.2d 292 (Tex.Cr.App. 1987), and Degrave v. State, 712 S.W.2d 755 (Tex.Cr.App. 1986).

The State may be held to this rule as well. In Fields v. State, 758 S.W.2d 309, 321 (Tex.Cr.App. 1988), footnote 16, the Court noted that the State alleged in its brief, after review was granted, that the defendant’s contention on appeal differed from the objection raised at trial. The Court held that since that issue was not raised before the Court of Appeals, it would decline to consider it on petition for review.

In Wilson v. State, 772 S.W.2d 118, 120 (Tex.Cr.App. 1989), at footnote 3, the Court of Criminal Appeals noted that the State argued in its brief that the defendant waived complaint by pleading no controversy. The Court held that since the State did not raise this issue on direct appeal, or urge it as a basis for the Court to refuse review in a Reply to the Petition for Review, the error was waived. Procedural defects which bar an appeal should be raised in the Court of Appeals and if rejected, should be presented to the Court of Criminal Appeals in a cross-petition.

G. CROSS PETITIONS.

In Keib v. State, 772 S.W.2d 861, 863 (Tex.Cr.App. 1989), at footnote 4, the Court of Criminal Appeals held that if the State seeks to claim error in the Court of Appeals’ rejection of an argument, that claim should be presented to the Court of Criminal Appeals in a petition or cross-petition for review, citing Wilson v. State, 772 S.W.2d 118 (Tex.Cr.App. 1989) (Procedural defects which bar an appeal should be raised in the Court of Criminal Appeals and if rejected, should be presented to the Court of Criminal Appeals in a cross-petition.). See also Anglin v. State, 740 S.W.2d 727 (Tex.Cr.App. 1987).

H. MOTIONS FOR REHEARING.

In Rochelle v. State, 791 S.W.2d 121 (Tex.Cr.App. 1990), the Court held that if a party raises a new issue in a motion for rehearing and the Court of Appeals overrules the motion for rehearing without issuing a new opinion or addressing the issue, the overruling of the motion will not be considered a ruling on the issue necessary to final disposition of the appeal. Thus, the issue will not be a part of the decision of the Court of Appeals upon which discretionary review could be based.
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people with whom they are closest, such as their spouse, their family and their friends. During voir dire, the complications of human interactions become compounded and require highly developed skills in the art of listening, perceiving and intuiting. Time, effort and practice must go into using these skills. A sense of balance in one's present emerges after many clumsy moments. The ultimate lesson is to analyze one's present voir dire, discover strengths and weaknesses in it, and encourage feedback from clients, other attorneys, social scientists, secretaries, friends and spouses. Developing skills of communicating, educating and persuading others in voir dire and elsewhere is the touchstone of strong defense advocacy. ■

In and Around Texas

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Returning to the Legislature briefly, the House filed 2,876 bills, the Senate filed 1,504, 634 of the House bills and 445 of the Senate bills passed to the Governor for signature or veto. Of 180 joint resolutions (the means by which the Texas Constitution is amended) seven House Resolutions passed and eleven Senate Resolutions made it to enrollment.

The bill of most importance to criminal practitioners, SB 1067 by Whitmire, does not become effective, with certain exceptions, until 1 September 1994, so at the writing there is ample time to digest the significant changes effected by this new law. The most profound change will be the creation of state jail felonies and the reduction of simple possession of some controlled substances (less than one gram) from a 2nd degree felony to a state jail felony, which is a new form of community supervision with split jail time available as a condition of probation and as a sanction for violations that do not involve more serious felonies. The planned impact of state jail felonies is to relieve pressure on the Institutional Division to make room for violent and habitual offenders. Unfortunately, the addition of harsher punishments for controlled substance possession/sale within 1,000 feet of a school and the change of definition of adulterants and dilutants may offset the relief in prison crowding envisioned by the more intelligent use of state jail felony punishment in simple possession cases.

After several sessions of trying to pass an administrative drivers license revocation bill, the Mothers Against Drunk Driving got their bill (SB 1 by Zaffirini) passed, but it does not become effective until September 1995, and with the help of Stu Kinard and others, we were able to get some amendments added. More on this issue in the future.

In the next two or three issues of the Voice, we will discuss further SB 1, SB 1067, and other legislation that passed and that will impact the current penal code that remains in effect through 31 August 1994.
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☐ To improve the judicial system and to urge the selection and appointment to the bench of well-qualified and experienced lawyers.

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