Eyewitness Identification:
Challenging a Confident Witness and Common Misconceptions
by Steven Rubenzer, Ph.D.
15th Annual
Rusty Duncan
Advanced Criminal Law
Short Course

June 6–8
San Antonio
Marriott Rivercenter Hotel
1-210-223-1000
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The purpose of TCDLA is to
protect and ensure
by rule of law
those individual rights
guaranteed by the
Texas and Federal Constitutions
in criminal cases;

TO RESIST THE Constant EFFORTS
which are now being made
to curtail such rights;

TO ENCOURAGE
cooperation between lawyers
engaged in the furtherance
of such objectives
through educational programs
and other assistance;

AND THROUGH SUCH cooperation,
education, and assistance
TO PROMOTE
justice and the common good.

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Assistance with Legal Questions. You can e-mail a question to the TCDLA home office and we will help you get your question answered through the assistance of over 2000 criminal defense attorneys.
On June 7th, TCDLA will induct five new members into the Hall of Fame. It is a very special honor that we reserve for members such as Percy Foreman, Richard "Racehorse" Haynes, Charles Tessmer and Warren Burnett. Early this year, the Hall of Fame Committee met and recommended that the Board induct five new members. In Galveston, on March 16th, the TCDLA Board of Directors unanimously concurred. The five are: Les Procter of Austin, Knox Jones of McAllen, Judge Frank Maloney of Austin, Doug Tinker of Corpus Christi, and Gerald Goldstein of San Antonio.

The ceremony will be at noon, Friday, June 7th, 2002, in San Antonio, Texas, during the lunch break of the Rusty Duncan Seminar. The luncheon will cost $90.00 to attend and be located in the San Antonio Marriott Rivercenter Hotel. (See the registration form in the May VOICE or the mailed brochure.)

In order to be considered for the Hall of Fame honor, an attorney must have practiced for over 30 years or have passed on to the ever after? In addition, the attorney must have made a substantial commitment to the defense of persons accused of crimes, not based on a won-lost record or publicity, but in court excellence, and they must have made significant contributions to the profession.

Les Procter was the elected District Attorney of Travis County in the 1950's. He left public office to pursue private practice in criminal law. Les was known for his flair and audacity - he could charm the last nickel out of Scrooge. Unfortunately, he and Knox Jones will be awarded this honor posthumously. Knox is a former President of the Texas Criminal Defense Lawyers Association. During his tenure the association grew from a very small group into a robust association able to purchase its own building in downtown Austin.

Doug Tinker is special. That is the only way to describe him. For those who don't know him, he is a sailor lawyer who resembles Ernest Hemingway. He can condense the greatest advice on trying criminal cases into easy to remember phrases. For example: "Defense lawyers on D.W.I. cases want jurors who fit the three Bs. That is, look for jurors with bellies, hoots, and belt buckles." At an advanced State Bar seminar, he gave the defense lawyer speakers T-shirts that said "if this lawyer can't get ya off your probably guilty." He is a wonderful asset to our profession.

Frank Maloney is the first president of the Texas Criminal Defense Lawyers Association and a former president of the National Association of Criminal Defense Lawyers. While maintaining an active practice of law in Austin, he also taught at the University of Texas Law School. In 1991, he was elected to the Texas Court of Criminal Appeals. He wrote the Grunsfeld decision that so angered prosecutors limiting their use of extraneous offenses at punishment, that they convinced the Legislature to rewrite the law. He now sits as a visiting judge, trying criminal cases.

Gerald Goldstein is also a past president of TCDLA and NACDL. He has represented many high profile cases and won numerous acquittals. His greatest achievement in the eyes...
of the criminal defense bar, is the case of *The Texas Criminal Defense Lawyers Association vs. Davis Ware, District Attorney*. Travis Ware indicted two police officers and a defense attorney when they *tried* to expose *professional misconduct* by a medical examiner named Ralph Erdman. Erdman was later profiled on 60 Minutes as the examiner who conducted autopsies without ever *making an incision* in the bodies. Garrison persuaded a nationally prominent civil firm and criminal defense lawyers from across the state of Texas to drop what they were doing and join him in *federal* court to stop this DA. In a very rare move, the federal judge ordered an injunction prohibiting the state criminal prosecution.

So, it is with great excitement that we can all look forward to inducting these great lawyers into the Texas Criminal Defense Lawyers Association Hall of Fame. The stories *that will be told* will be colorful, and the time will be delightful. Please plan on *joining* the party on June 7th and *make* your reservations soon.

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**2002 Schedule of Events**

**TCDLA/CDLP**

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<tr>
<th>June 6-8</th>
<th>September 5-6</th>
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<tr>
<td>15th Annual Rusty Duncan Seminar</td>
<td><em>Federal Law Short Course</em>*</td>
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<td>Marriott Rivercenter Hotel</td>
<td>Renaissance Pere Marquette</td>
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<td>San Antonio</td>
<td>New Orleans</td>
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**June 8**

*Board Meeting*

**July 11-12**

*CDLP Hits the Beach*

Omni Bayfront Hotel

Corpus Christi

**July 25**

What Do You Have To Hide?

Challenging Searches

Phone Seminar

4-6pm

**August 22**

Immigration Consequences

Phone Seminar

4-6pm

**Open Only to Criminal Defense Lawyers**
Preparations continue for the 15th Annual Rusty Duncan Criminal Law Short Course on the beautiful Riverwalk in San Antonio, June 6-8, 2002. We take this time each year to honor past contributors, educate criminal defense attorneys and celebrate our accomplishments of the past year.

This year's seminar will have outstanding presenters such as Barry Scheck and Gerry Goldstein. There will also be a special recognition ceremony to honor the new members being inducted into the TCDLA Hall of Fame. There will be the annual golf tournament on Thursday afternoon, the annual Pachanga party at Los Goldstein's on Thursday evening, a Hawaiian luau on Friday evening, and special activities for spouses and children throughout the seminar. Childcare will be available, so bring the whole family.

By the time you read this article, we will have a new Communications Director and a new Research Attorney. Cynthia Hampton will be the new Research Attorney. She has extensive background in legal research as well as appellate research and will be a tremendous asset to the organization.

We are about eight months away from the convening of the 78th Texas Legislature. What to anticipate? First, the largest incoming freshman legislative group in recent history; second, a five billion or more budget shortfall; third, discussion of the implementation and local cost of SB7, the Texas Fair Defense Act; and fourth, focus on the funding of public education.

The following months will be important as the foundation for the legislative session is set. TCDLA is actively involved in all issues that relate to the fair dispensation of justice in Texas.

We continue to look for a new home office. We are reviewing several options, one of which is to build a new home office.

We are giving serious consideration to moving our seminar registration and membership update capabilities to our Web site. This would allow for a more efficient service to our members.

We hope to co-sponsor three to four seminars with local criminal defense attorney groups across Texas. No group is too small. If you are interested, please call us at the home office.

We currently have more than 500 lawyers who receive our Capital Litigation Update. We hope to increase this group to 700 within the next few months. Please let us know if you want to be included in the mailing list or know of anyone who might benefit by receiving it.

Scholarships are available for all of our TCDLA and CDLP seminars. Please call the home office for more information.

We are currently working on our grant submission to the Court of Criminal Appeals for FY 2003. The grant is due in July 2002. Although the grant is funded from Fund 540, taken from court costs generated from criminal cases and not the general revenue, we are uncertain what impact the state budget shortfall will have on our grant.
## TCDLA Welcomes New Members

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<th>New Member</th>
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<td>Deborah A. Beasley</td>
<td>Tanya Davis</td>
<td>Javier Francis Oliva</td>
<td>Hector Gonzalez</td>
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<td>Forney</td>
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<td>Stephanie A. Doyle</td>
<td>Celeste Ramirez</td>
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<td>Jim Biggio</td>
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<td>Ambrosio A. Silva</td>
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<td>Dana D. Taylor</td>
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<td>Robert Harris</td>
<td>Mario A. Trevino</td>
<td>H. Todd McCray</td>
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<td>Anthony Smith</td>
<td>Tina L. Tussing-Cooper</td>
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<td>Jeffrey S. Mitchell</td>
<td>Steven Pickell</td>
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### New Student Member

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<tr>
<th>New Member</th>
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<tr>
<td>Charlie Roadman</td>
<td>Bill Hines</td>
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The State's Burden Ain't What It Used to Be

The Voice's review of the wholesale rewriting of Texas Criminal Jurisprudence by the Court of Criminal Appeals continues unabated. We all learned, early in our practice, whether as prosecutors, law clerks, or defense counsel, the cardinal principal of law that descriptive averments in an indictment must be proved as alleged. See e.g., Easley v. State, 167 Tex. Crim. 156, 319 S.W.2d 325 (Tex. Crim. App. 1959). It was a simple noncontroversial rule fair to all parties. The state gets to draft its charging instruments with the allegations it deems appropriate. (Yeah, yeah, the grand jury does it blah, blah, blah...trust me on this one, the state controls the charge.)

Now, just in case someone made a mistake, charging instruments may be amended pursuant to the procedures set forth in article 28.10 of the Texas Code of Criminal Procedure. Anyway, every prosecutor knew his or her burden, to prove, beyond a reasonable doubt each and every fact alleged in the indictment. This has been reasonable because the law has never required that an indictment allege any more than what must be proven to show the commission of an offense. Tex. Code Crim. Proc., art. 21.03. New lawyers learned to make a checklist of everything they must prove before resting their case so as to avoid a directed verdict or an insufficient evidence reversal.

That cardinal principle was restated many times over the years by the Court of Criminal Appeals. See e.g., Gibbs v. Sfate, 610 S.W.2d 489 (Tex. Crim. App. 1980). In Franklin v. State, 659 S.W.2d 831 (Tex. Crim. App. 1983), the court stated "the allegation in the indictment is descriptive of that which is legally essential to charge a crime because it elaborates on and describes the essential elements of the offense that must be pled. The State was bound to prove the allegations in the indictment." Id. at 834.


More recently, the court dealt that grand old principal the death blow with its decision in Fuller v. State, Cause No. 1283-98, decided on March 27,2002. The defendant had been convicted of injury to an elderly individual. The indictment alleged the complainant was Olen M. Fuller. The complainant at the trial was referred to as "Mr. Fuller" or "Buddy? The jury charge instructed the jury to convict if it found that the defendant committed the offense against "Olen M. Fuller." The conviction was reversed by the court of appeals based on insufficiency of the evidence under the Jackson v. Virginia standard.

The Court of Criminal Appeals reversed, holding that because the name of the complainant is not an element of the offense, the federal constitutional sufficiency of the evidence standard in Jackson v. Virginia does not apply and the evidence was sufficient under the Gollihar hypothetically correct jury charge standard. Rather than sufficiency of the evidence being an issue, this is a case involving a variance, which the court found to be immaterial: "The variance between the indictment and the proof is also immaterial. There is no
indication in the record that Appellant did not know whom he was accused of injuring or that he was surprised by the proof at trial." Fuller v. State, slip op. at 4.

Did you catch that part? -- "There is no indication in the record that appellant did not know whom he was accused of injuring..." Wasn't the appellant presumed innocent? When did it become the defendant's burden to show what he did or did not know? This is a disturbing attitude for a court to take, whether in Gollihar or Fuller.

Next time a notice defect is raised to a charging instrument, we can all be secure in the fairness of the affirmation of the conviction because there was no indication in the record that Defendant did not know to what the indictment was referring. I hate to make the slippery slope argument (maybe it is better phrased as the give them an inch and they will take a mile argument), but the Court of Criminal Appeals builds and builds upon its various precedentially unsound, seemingly result-oriented decisions and continues to chip away at the rights of accused citizens to a fair trial. Will improper allegations of venue raised in the trial court now be immaterial?

If the law requires that an indictment allege more than the mere language of the Penal Code section a defendant is alleged to have violated in order to satisfy State and Federal Constitutional notice requirements and due process of law, doesn't it make sense that the facts alleged in an indictment be the same as those the State should prove at trial? Assuming that Buddy Fuller and Olen M. Fuller were the same person, and there is information in the record, but not in the evidence, to suggest that they were, this is a case of prosecutorial error. Why does the Court of Criminal Appeals bend over backwards to prevent what it must see as an adverse result due to prosecutorial error but not give the same consideration to errors by defense counsel, in order to protect the integrity of the process?&
It Doesn't Have to Pass the Smell Test to Be the Law of the Land

There should be some rule somewhere that says that an individual convicted of capital murder and assessed the death penalty does not have to die when the justices of the United States Supreme Court cannot agree among themselves as to what the law is — even if five of them can join together in denying relief.

Perhaps no recent case demonstrates this better than Mickens v. Taylor, 535 U.S. 577 (2002).

Walter Mickens, Jr. was indicted by a Virginia grand jury for the murder of Timothy Hall during or following the commission of an attempted forcible sodomy. At the time of the murder, Bryan Saunders was representing Hall, a juvenile, on assault and concealed weapons charges. Later, Saunders was appointed to represent Mickens. The sequence of events is important to understanding the case:

- On March 20, 1992, Saunders was appointed to represent Hall.
- Between March 20th and March 28th, 1992, Hall came to Saunders’ office and met with him for 15-30 minutes.
- On March 30, 1992, Hall’s body was discovered.
- On April 3, 1992, Judge Aundria Foster dismissed the charges against Hall, noting that he was deceased. She entered a handwritten order on the docket sheet that reflected, among other things, the identity of his court-appointed lawyer, Bryan Saunders.
- On April 6, 1992, Judge Foster appointed Saunders to represent Mickens in his trial for the capital murder of Hall. She did not inquire as to whether Saunders would have a conflict in representing Mickens, and he raised no objection to a conflict of interest.

Saunders represented Mickens at both the guilt/innocence and sentencing phases of his capital murder trial. When a re-sentencing hearing was required, Saunders appeared a second time on Mickens’ behalf. During his representation of Mickens, Saunders worked with Warren Keeling, who was also appointed by the court to represent Mickens; however, Saunders was responsible for about 90% of the workload. Saunders never told Mickens or Keeling that he had represented Hall.

In Tyler, we have an old saying: “Brains and skill are very neat, but East Texas luck can’t be beat.” They must have that same rule in Virginia. After Mickens had exhausted his state court avenues for relief, counsel was appointed to represent him in a federal habeas proceeding. While investigating Mickens’ case, his federal habeas attorney went to the Newport News Juvenile and Domestic Relations Court to review Mickens’ juvenile case file. While there, he also asked the clerk on duty for any files having to do with Timothy Hall. Although Virginia law requires that juvenile case files be kept confidential, the clerk mistakenly produced Hall’s file which revealed that Saunders was representing him at the time of his death. The file also revealed some of the allegations concerning the assault charge against Hall. Hall’s mother had sworn out a warrant alleging that he had grabbed her repeatedly by her...
arms and shoved her to the ground. The file also revealed that, in a separate incident, police had found him in possession of a concealed weapon, to wit: a serrated bread knife wrapped in paper. Thus, Hall was not a tritively-white victim and Saunders knew it.

A petition for writ of habeas corpus was filed in the United States District Court for the Eastern District of Virginia. Although Mickens raised a conflict of interest claim, the district court rejected his argument after concluding: "The possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby;" *Mickens v. Taylor*, 74 F.3d 220 (E.D. Virginia 1999).

Mickens appealed to the United States Court of Appeals for the Fourth Circuit and was granted relief by a divided panel of that ultra-conservative court. Relying on *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981), the court found that the Judge Foster, who appointed Saunders to represent Mickens, knew or should have known that the back-to-back representation presented an apparent conflict and that Saunders had an actual conflict of interest because of his representation of Hall. 227 F.3d 203 (4th Cir. 2000).

Unfortunately for Mickens en banc review was granted and the court affirmed the judgment of the district court which had denied Mickens' relief. *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001). Seven judges of the court constituted the majority; the two judges from the divided panel together with one other judge dissented. For Mickens, this must have been something of a victory. When only 70% of the judges of the Fourth Circuit join to deny relief in a habeas case, it's an unusual day in Richmond.

The Supreme Court granted certiorari and we all now know what happened. Mickens lost. It is how he lost that is worthy of note. As the opinion reflects:

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion. GINSBURG, J., joined.

Justice Scalia noted that, "The question present in this case is what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known."

Having had success before a divided panel of the Fourth Circuit, Mickens again relied on *Wood v. Georgia*, supra; however, the court summarily rejected his contention that Judge Foster neglected a duty to inquire into Saunders' potential conflict and that Mickens — to obtain a reversal — need only show that Saunders was subject to a conflict of interest and that he need not show that the conflict adversely affected Saunders' performance.

The court held that, because Saunders failed to employ a formal objection as a means of bringing home to Judge Foster the risk of a conflict, that Mickens should be denied relief. With-out such objection, the court reasoned that Mickens should get no relief absent a showing that the risk turned into an actual conflict with an adverse affect on the representation provided to him at trial.

Justice Stevens (dissenting) expressed concern about Saunders' decision to conceal his representation of Hall from Mickens. He determined that Saunders' concealment of such information was a severe lapse in his professional duty and was indefensible. He also expressed concern over the failure of the trial judge to "make a thorough inquiry and to take all steps necessary to ensure the fullest protection" of his right to counsel. Justice Stevens' strongest language came in his criticism of his brethren on the court: "The court's novel and naive assumption that a lawyer's divided loyalties are acceptable unless it can be proved that they actually affected counsel's performance is demeaning to the profession." After trotting out the old standby, "justice must satisfy the appearance of justice," be concluded that setting aside Mickens' conviction was the only remedy that could maintain public confidence in the fairness of procedures employed in capital cases.

Justice Souter (dissenting) took the court to task for requiring a formal objection when Judge Foster knew or should have known of the risk and was obliged to inquire further. He asked what an objection would have added to the obligation that the state judge failed to honor. He went on to suggest that the majority had misread *Wood*, supra, and found the court's requirement of an objection to be irrational on its face for the reason that it taxed defendants with a heavier burden for silent lawyers.

Justice Breyer (dissenting), joined by Justice Ginsburg, found Saunders' representation of Mickens and Hall to be egregious on its face. He pointed out that it was the Commonwealth of Virginia that had created the conflict in the first place because it was Judge Foster who dismissed the case against the victim and appointed Saunders to represent Mickens. He determined that Judge Foster should get relief. Mickens is going to die; and Scalia's opinion (in which Rehnquist, O'Connor, Kennedy and Thomas joined) will never, ever pass the smell test.

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May 2002 VOICE FOR THE DEFENSE 13
Attorney General Opinion Regarding Pre-trial Diversion Fees Paid

General Cornyn rendered an opinion that states that the accumulated "pretrial diversion fees" and the interest earned on those fees must be returned to the individuals who paid those fees. He also concluded that unclaimed fees and interest earnings on those fees may become abandoned property that must be reported and delivered to the Comptroller of Public Accounts. Opinion No. JC-0463

Address Changes

Mark S. Snodgrass has moved to 1212 Texas Avenue, Lubbock, TX 79401.

Darla Snead has moved to 2010 SW HK Dodge Loop, Suite 31, Temple, Texas 76504.

dsnead@sbcglobal.net

Reagan Wynn has a new e-mail: rwynn@kearneylawfirm.com

Nancy Hohengarten has opened a new office at 1409 W. 6th Street, Austin, Texas 78703, 474-9900; hohenlaw@texas.net.

S. James McHale has a new office address at 111 Soledad, Suite 700, San Antonio, TX 78205.

Lawyers Wanted

Haben, O'Neil and Buckley is anticipating opening a branch office in the Dallas area. Their intention is to have that office staffed by Yolanda Torres who has been with the firm almost a year. Ms. Torres is the lawyer whose activity in federal court forced the Texas prison to abandon listening in on attorney-client phone calls. If there is a group of criminal lawyers in the Dallas area that might be interested in having a corrections law firm in their group and have an office to lease, our partnership would be interested in investigating that prospect.

Member Running For State Representative

TCDLA member, Mike Head of Athens, has filed for the State House Representative District 4 seat.

Correction

Lex Johnston has joined the Law Firm of Mimi Coffey as an associate attorney.

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Amendment to Bylaws Proposed for Annual Meeting

By Stuart Kinard, Bylaws Committee Chair

Over the three decades of its existence, TCDLA has been blessed with the leadership of some outstanding and dedicated executive directors. And the excellent start of our new director, Joseph Martinez, promises quality leadership for the foreseeable future. So while the running is smooth, the Board of Directors has thought it a good time to review the process of both the hiring and terminating of the Executive Director.

Reflecting on the couple of times in our recent history when that process has gotten a little rocky, it appears that a major culprit resides in the procedure currently dictated by our bylaws. It reads as follows: Appointment and removal of the Executive Director ... shall be by the President subject to the approval of the Board of Directors. Though appropriate to the time when the board was much smaller and communications between president, executive director and board members more frequent, it has become more unwieldy as the board has increased in size.

The current difficulties are threefold. The first relates to hiring. Once the president has identified the top candidate, the lag time pending the board's acceptance or rejection decision may be too long for the candidate to remain in limbo. The more qualified the candidate, the higher the risk of loss to a finalized offer elsewhere. As to the two-stage detonation process for termination, the concern is that the first fuse, the decision of the president alone, is too short, with the follow-up fuse of board approval, in some circumstances, too long.

Three conceptual changes have been proposed by the Bylaws Committee and unanimously approved at the March 2002 meeting of both the Executive Committee and the Board of Directors. For hiring, the power to initiate and finalize the hiring process would be exclusively carried out by the Executive Committee, subject only to the Board's having established in advance the requisite qualifications for the position. Two changes are proposed for termination. First, no step in the process would be the sole responsibility of the President. Second, the entirety of the process could be independently initiated and finalized either by the Board or by the Officers, with termination requiring a 2/3 vote of that respective group. The thought behind this is that if the Executive Director's relationship with either of these two entities has deteriorated to that degree, it has become unworkable.

This plan will be presented in the form of a proposed amendment at the 2002 Annual Membership Meeting to be held on the Saturday following the Rusty Duncan Advanced Seminar. The following represents the substance of the proposed change:

Current Language:
Article VII - Sec. 4. Duties of the President ... Appointment and removal of the Executive Director and Editors of the Voice for the Defense and Significant Decisions Report shall be by the President subject to the approval of the Board of Directors.

Proposed Amendments:
The italicized phrase above is deleted and Article VII, Sec. 10, currently entitled "Duties of the Executive Director" is retitled "Executive Director," The current content, remaining unchanged, becomes "(a) Duties of the Executive Director." A new (b) and (c) are added so that the entirety of the amended Sec. 10 will read as follows:

Sec. 10. Executive Director
(a) Duties of Executive Director
The Executive Director shall act as the Recording Secretary of the Association and shall be the custodian of the records of the Association. The Executive Director shall also perform all duties usually required of an Executive Director and such other duties as may be assigned by the President or the Board of Directors.
(b) Hiring: Subject to any advance determination of qualifications by the Board of Directors under Article VII, Sec. 2(b) above, the Executive Committee shall on behalf of the association, select and hire the Executive Director and determine the terms of his/her employment, said terms to be consistent with Subsection (c) below.
(c) Termination of Employment: the Association shall be authorized to terminate employment of the Executive Director by, and only by, one of the following two procedures:
(1) By Board of Directors: Conclusive vote on termination can be undertaken at either a regular quarterly or special meeting of the Board of Directors upon written request to the President by at least eight (8) members of the Board of Directors. Prior to said meeting written notice shall be given complying with the 14 days advance written notice required by Sec. 5 (b) of Article V above, and shall include a statement that the agenda for that meeting will include a vote on termination of the Executive Director. Provided there is a quorum at said meeting, termination shall result if supported by vote of two-thirds (2/3) of those present.
(2) By Designated Officers: Conclusive vote on termination can be undertaken at a meeting requested for this purpose, at which the nine (9) officers of the Association designated in Sec. 1 of this article are eligible to vote, except that the Immediate Past President shall be substituted for the Executive Director as an eligible vote. Said meeting must be requested by at least three (3) of the eligible voters with at least 72 hours advance notice to each eligible voter, communicated either directly, in writing, or by phone message. Attendance and vote may be either in person or by phone. Termination shall result if supported by the votes of six (6) or more of those voting in said meeting.
"No, You Can't Talk to Your Lawyer?"

By Robert Alton Jones, with John Perry

I was both pleased and proud to read Buck Files' article in the November issue of the Voice, regarding the Fifth Circuit Court of Appeals decision in United States of America v. Troy Anthony Marks, aka "Wooster." I was pleased because the article acknowledged that the Sixth Amendment right to assistance of counsel had been reaffirmed. I was proud because, with the assistance of John Perry, I was the attorney who appealed Marks' conviction, and protected that right. Because a victory by any member of TCDLA reflects the professionalism and dedication of all of its members, I felt it was appropriate to offer these insights into the appeal of Troy Marks.

As anyone who lives in Southeast Texas knows, the Sabine River separates Texas and Louisiana so completely that much of what goes on in Louisiana isn't noticed in Texas. That is why, when I received a call from Troy Marks' mother, I had not heard of the drug conspiracy called "Aces Split" and had never heard of Troy Marks, who had just been convicted in the Western District of Louisiana, Lake Charles Division, as the kingpin of a major Louisiana drug conspiracy. Although Marks' family did not have a great deal of money, something about the desperation of the call and the family's perceived lack of fairness, piqued my interest and led me to meet with the whole family at Marks' mother's house in Lake Charles.

During a full afternoon of discussion with the family, over red Kool Aid and cookies, John and I learned about Troy Marks, the alleged conspiracy, and a trial which the family perceived as being basically unfair. Marks' mother's description of the trial included a fleeting mention that the trial judge did not allow Marks and his lawyer to speak with each other during the period of nearly five days while Marks was testifying.

Instinctively, I knew we had an appellate issue, if it had been preserved. Although I knew the Federal Rule of Sequestration, and I could not have cited a single case which upheld a defendant's right to speak to his lawyer during his testimony, I knew enough about the Sixth Amendment to know that Marks' right to counsel had been violated. I conveyed these feelings to the family, and explained that I would want to be involved in sentencing, prior to any appeal, in order to try to preserve the Sixth Amendment issue on the record. Encouraged by this hope for their son, the family retained me to represent Troy Marks at sentencing and on appeal.

Before I left Lake Charles, I visited Marks in the Calcasieu Parish Jail, where he had been held in administrative segregation since his trial, and had not been allowed to speak to his family, due to vague claims by the Government that he was a threat to others both inside and outside the jail.

Marks was bitter and angry at the system that had convicted him, but he was bright and articulate, and we had a productive discussion. Although Marks kept trying to control the conversation, I was able to keep him on course, and was able to identify some other potential appellate issues, and to confirm the judge's directive that Marks could not talk to his
attorney during the breaks in his testimony, despite the fact that his testimony spanned a period of nearly five days.

During our meeting with the family, we also met with Marks' trial counsel, who had been able to obtain an acquittal on several of the counts against Marks, despite Marks' continuing attempt to direct the defense, and despite the discord between Marks and the trial judge throughout the trial. Marks' counsel also confirmed the judge's order that he not confer with his client until Marks' testimony had concluded. He was concerned, however, that he had not done enough to raise the objection, even though he had protested the Court's order on more than one occasion.

I determined that I needed to raise the Sixth Amendment issue at sentencing, in order to be sure that it was preserved. In order to do that, we filed a motion for release pending appeal, in order to get my concerns on the record. The Federal Rules require that to obtain release pending appeal, a defendant must show that significant issues would be raised on appeal, which would result in a reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a sentence less than time already served.

I intended to raise the Sixth Amendment issue as part of the sentencing hearing, but what I got was a call from a United States District Judge, informing me that I could not come into his court and waste time on issues that needed to be raised on appeal. Besides, the judge asked what authority do you have to support your contention that Marks' Sixth Amendment rights were violated? When I cited Geder v. United States, 425 U.S. 80 (1976), the judge asked me to fax a copy of the decision to him. I faxed the pertinent part, and sent the decision to him by Federal Express. After reviewing the decision, the judge granted a continuance and allowed me time at sentencing to develop my record.

During the sentencing hearing, I called Marks' trial counsel to testify, hoping that he would clarify his somewhat weak objection to the judge's order that he not talk to his client, and also that he would discuss some of the important issues which he would have discussed with Marks, if he had been allowed to talk to him during the trial. Although he tried to be helpful, he didn't really add much to what was already on the record. At the conclusion of the hearing, the judge expressed regret for what he was about to do, and imposed a life sentence on Marks. Following the sentencing, I was encouraged about Marks' chances on appeal when I was approached by the Assistant United States Attorney, who told me that, "When this case comes hack, we will be trying it again." I assured him that if I was still Marks' lawyer, I would be ready.

The appeal progressed uneventfully, but took a strange turn when I was retained to represent an individual from Houston who was charged with drug conspiracy in the Western District of Louisiana, Lake Charles Division. The case had been assigned to none other than the same judge whose ruling in the Marks case I was in the process of appealing. When I was scheduled for oral argument in the Fifth Circuit, I made my way to New Orleans the night before. Because I was scheduled to argue along with lawyers for four co-defendants, I got to the Court early, to discuss the order of argument, and to determine my best use of the ten minutes which had been allotted by the Court to argue for my client.

After some discussion about who would go first and last, and some jostling for position, the other lawyers agreed that I should go last, because my argument was the strongest, and my client had received the longest sentence. I presented my argument to a panel including Circuit Judges Politz and Barksdale, and District Judge Eldon Fallon, sitting by designation. The judges listened to my argument, questioning me mostly on the issue of whether Marks' attorney had waived the issue by failing to present an ameotrenuous objection, and thanked me for my argument. Judge Politz even asked whether a lawyer might want to talk to his client just to ask him if he was ready to stop lying. On September 19, 2001, the Fifth Circuit Court of Appeals reversed the conviction of Troy Marks, writing, "This proscription on trial counsel's ability to confer with his client, as much as either of the two deemed necessary is constitutionally unacceptable," finding that these restrictions were violative of Troy Marks' Sixth Amendment right to the assistance of counsel. Some time after the decision, after I had filed a motion to withdraw, I received a call from the Marks trial judge, asking me to accept appointment to represent Marks in his new trial. I accepted. I come away from this experience, after 29 years of practice, with a renewed sense of purpose for what we do, and renewed confidence in reliance upon the principles found in our Constitution.

As defenders of those accused of crimes, we are the only ones in the way of those who would limit the rights of citizens. If there are lessons to be learned, they are that we must be vigilant in the defense of basic constitutional rights, raising objections whenever we perceive injustice and making our objections evident in the record, even where the objection may be nothing more than reference to the basic right we feel is being violated, so that the Courts of Appeals can readily see the injustice and, hopefully, make it right.

By the way, my other trial in that court resulted in a mistrial, and the judge subsequently granted a Rule 29 judgment of acquittal to the two brothers John and I had represented. I'll keep you posted on the second trial of Troy Anthony Marks, aka "Wooster."  

Robert A. Jones has been a successful practitioner in specialized areas of the law since passing the bar exam in 1972. Today, his practice is primarily concerned with complex criminal litigation in both state and federal courts throughout the United States. Known for his smooth humanistic style and intense cross-examination, Robert Jones frequently guest lectures on all aspects of criminal law.
The Senate Criminal Justice Committee Has Interim Tasks!

It is a busy interim for criminal justice and criminal procedure issues. The Senate Criminal Justice Committee has been charged with the following interim tasks:

1. Review available rehabilitation programs that provide alternatives to incarceration for non-violent, drug-dependent offenders to determine their effectiveness, and recommend for further use any suitable community-based programs that safely reduce recidivism among such offenders.

2. Study the impact that the revocation of technical violators of community supervision has upon the state's prison population, and make recommendations for reducing the revocation rate among such offenders without unduly interfering with local judges' discretion.

3. Monitor the implementation of the Texas Department of Criminal Justice's revised inmate classification system; monitor TDCJ employee recruitment and retention efforts; review the good conduct time credit system used by TDCJ; and recommend changes, if any, needed in these areas.

4. Review the management and oversight of private prison facilities and recommend changes, if any, to the current system.

5. Monitor efforts to increase the availability and effectiveness of state and local mental health services for adult and juvenile offenders, and recommend improvements where applicable.

The interim charges for the Senate Jurisprudence Committee are for the committee to study the following areas of legislative concern:

1. The effectiveness of the progressive sanction guidelines for juvenile offenders. Determine whether the guidelines established by HB 327, 74th Legislature, are bringing consistency, uniformity, and predictability to juvenile dispositions in an effort to facilitate juvenile justice planning and improve the allocation of resources within the juvenile justice system. The Committee shall make recommendations for improving the
effectiveness of juvenile sanctions in protecting public safety and rehabilitating offenders.

2. The judicial system's revenue structure and make recommendations for improving the collection, dispersal, and accounting of court costs, fees, and fines by state and local entities. This study should include a review of all court costs and fees (except those related to the Crime Victims Compensation Fund) to ensure that they are necessary and are adequately fulfilling their intended purpose.

3. The reapportionment of judicial districts pursuant to Article V, Section 7a, Texas Constitution.

4. Improving the structure of the state's trial court system, including, but not limited to: improving the quality, cost-effectiveness and uniformity of the visiting judge program; devising objective criteria to be used by the Legislature to determine when and where additional trial courts should be created; and clarifying jurisdictional conflicts between courts.

5. The implementation of SB 1074, 77th Legislature, relating to the prevention of racial profiling by certain peace officers.

If you have any concerns or recommendations on any of these issues, please email me at hamplaw@swbell.net, or call me at 512-762-6170.

Keith Hampton is the Legislative Chair for TCDLA. He is Board Certified in Criminal Law, a Fellow of the Texas Bar Foundation and was a former briefing attorney for the Honorable Judge Sam Houston Clinton.
Eyewitness Identification:
Challenging a Confident Witness and Common Misconceptions

by Steven Rubenzer, Ph.D.

As she was being raped, Jennifer Thompson was possessed by a single thought: She would study her assailant's face, remember it, and bring him to justice. The prosecution found her to be an exceptional witness — educated, articulate, sympathetic, and confident. But she was wrong. Ronald Cotton served 11 years in prison until exonerated by DNA evidence.

The National Institute of Justice has recognized the problem with the publication of Convinced by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial.

Of 28 wrongful convictions, 23 were convicted on eyewitness testimony — one defendant by five separate witnesses. Studies have shown that misidentification rates in laboratory studies are typically 20-40%, and can be raised to 95% with aggressive techniques. Common sense suggests the eyewitness identification process is straightforward. Closer analysis and research indicate it is not.
Information Processing in Eyewitnesses

Errors may creep into the identification process in many places. Eyewitness accuracy is affected by some of the same factors that allow for better photography, such as lighting, distance, and viewing angle. But human information processing is not like a video camera, and memory is not like replaying a tape of the scene. Elizabeth Loftus and others have shown that what people report that they remember is influenced by their expectations at the time they observed the event and how they are questioned about it. Other information that they learn may support or invalidate their memory.

Expectations influence what people see — or think they see. Fans watching a football game see many more infractions from the opposing team than they do from their own. If a witness has a negative view of a local homeless man, and sees a vague figure generally similar in appearance commit a crime, there is a strong tendency to put two and two together.

The importance of leading questions (and nonverbal attitudes) comes into play when the witness gives a report to the police. It is crucial to learn about this process in each individual case. What was the verbal description given? Did the interviewer have a suspect in mind while asking the questions? Did the witness look at mug shots in a book? Or were they handed a picture and asked, "Is this the guy?" Every occasion that the witness was exposed to the defendant's face should be discovered. Ideally, every verbal and nonverbal communication, before and after each exposure, would be discoverable — because it may subtly influence the witness's subsequent choice and confidence in that choice. What questions were asked of the witness? Leading questions can create biased descriptions. For example, witnesses to a motor vehicle accident who are asked to estimate how fast the cars were traveling when they smashed into each other provide higher estimates than those who are asked how fast the vehicles were traveling when they hit each other.

Next, examination of the lineup and the way it was conducted is required. Did the lineup foils know they were foils? (If so, they may act less guilty or nervous than actual suspects.) Were they matched to the verbal description of the witness or to the suspect? (For aparticlely bad example in Texas, see http://www.psychology.iastate.edu/faculty/gwells/badandgoodlineups.htm.) Were the police who conducted the lineup "blind" to who was the suspect? We expect clinical trials of new drugs to be conducted "double-blind," so that doctors' and patients' expectations don't taint the results. The same standards should apply to criminal identification, where subtle (and not so subtle) communications may influence an eyewitness' choice and his or her confidence in that choice.

The National Institute of Justice recently issued guidelines regarding eyewitness evidence handling. The publication (available at http://wwwv.ncjrs.org/pdffiles/nij1178240.pdf) advises police agencies to impress upon witnesses the importance of clearing an innocent suspect, and that the perpetrator may not be present in the lineup that is shown. Still, witnesses may reasonably assume that the police would not go through the trouble of creating a lineup unless they had a legitimate suspect. Before the lineup, police should ask the witness how confident he or she is about being able to identify the perpetrator, if he is present. However, witnesses are rarely asked if they could state, confidently, that the perpetrator is not there, if that is the case. A recent study suggests that adding this simple question can dramatically reduce rates of false identification.

Research suggests that many subjects, when faced with a lineup or photo spread, pick the suspect who looks most like their recollection of the perpetrator. In other words, the judgment is not that this is the guy, but rather that this guy looks most like the guy I saw. This relative judgment is fine if the perpetrator is in the lineup. If not, an innocent person will be identified. For this reason, psychologists who study eyewitness processes recommend that the traditional photo spread or lineup be replaced with a sequential presentation of suspects and foils. The witness would be shown one photo at a time and asked, "Is this the guy?" This forces the witness to directly compare each picture to the image in memory. If there is a match, one does not need to see other defendants to know this. Recognition is a rapid, automatic process. An identification that takes more than ten seconds is probably not based on recognition, but other factors. Numerous studies have shown that sequential presentation of mugshots substantially reduces false identifications and has little impact on accurate identifications. Although recognized in the National Institute of Justice recommendations, sequential presentation of suspects is not included as a formal standard. Apparently, prosecutors on the committee were concerned that their hometown police departments would not meet published standards. Sequential identification has been officially adopted by the state of New Jersey, but is not widely used elsewhere.

Another cause of misidentification, related to the previous issues, is called "transference." Transference occurs when an eyewitness remembers the suspect, but from another context. The subject is picked because he seems "familiar." Sometimes by-standers at a crime will be identified in this way — sometimes the person just knows he or she has seen the suspect before, and he unfortunately bears a resemblance to the perpetrator.

The effect of stress on an eyewitness' accuracy has been studied extensively. Several studies found a "weapon focus" effect, where the presence of a gun or knife decreased the accuracy of identifications. Although it was initially believed the loss of accuracy was due to fear and stress, the weapons focus effect has been duplicated with a celery stick replacing the gun or knife. An exceptionally attractive, or ugly, accomplice can also reduce accuracy. The new and improved formulation is that reducing a witness' attention to the perpetrator's identifying characteristics is likely to decrease accuracy of the identification.

The eyewitness research literature now composes about one thousand studies and is growing rapidly. A typical issue of Law and Human Behavior has two newstudies. Fortunately, a helpful summary expert opinion was published recently. Table 1 identifies factors that were reliably demonstrated in the scientific literature by at least 80% of 64 "blue ribbon" experts of eyewitness testimony (Kassin, et al., 2001), and the percentage of experts agreeing that the position articulated is adequately established in the scientific literature.
Table 1

<table>
<thead>
<tr>
<th>Factor</th>
<th>Percentage agreeing</th>
<th>Is this common sense?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wording of questions will influence accuracy of identifications</td>
<td>98</td>
<td>25</td>
</tr>
<tr>
<td>Lineup instructions will influence identifications</td>
<td>98</td>
<td>39</td>
</tr>
<tr>
<td>The eyewitness' confidence is malleable</td>
<td>95</td>
<td>10</td>
</tr>
<tr>
<td>Showing the defendant's mugshot will increase subsequent lineup identifications</td>
<td>95</td>
<td>13</td>
</tr>
<tr>
<td>Information the witness receives after the crime can influence his identification</td>
<td>94</td>
<td>17</td>
</tr>
<tr>
<td>Children are more suggestible</td>
<td>94</td>
<td>73</td>
</tr>
<tr>
<td>Eyewitnesses' attitudes and expectations influence what they see, remember, and report</td>
<td>92</td>
<td>31</td>
</tr>
<tr>
<td>Hypnosis increases suggestibility and susceptibility to false information</td>
<td>91</td>
<td>19</td>
</tr>
<tr>
<td>Intoxication reduces eyewitness accuracy</td>
<td>90</td>
<td>95</td>
</tr>
<tr>
<td>Cross-race identifications are less accurate</td>
<td>90</td>
<td>65</td>
</tr>
<tr>
<td>A weapon reduces accuracy of identifications (weapon focus)</td>
<td>87</td>
<td>34</td>
</tr>
<tr>
<td>There is little relation between a witness' confidence and the accuracy of his identification</td>
<td>87</td>
<td>5</td>
</tr>
<tr>
<td>Memory deteriorates rapidly; most information lost over first few hours and days</td>
<td>83</td>
<td>29</td>
</tr>
<tr>
<td>Greater exposure time leads to greater accuracy</td>
<td>81</td>
<td>97</td>
</tr>
<tr>
<td>Sequential presentation format less prone to false identifications</td>
<td>81</td>
<td>0</td>
</tr>
<tr>
<td>Witnesses may falsely identify someone who seems &quot;familiar&quot; (transference)</td>
<td>81</td>
<td>19</td>
</tr>
</tbody>
</table>

Eyewitness Confidence

A confident eyewitness can be highly persuasive. Everyday experience tells us that, for normal adults with no incentive to lie, a person's confidence in his or her ability to fix your air conditioner, for example, is related to actual competence. However, this assumes that people have experience and feedback about their performance. Eyewitnesses do not. The conclusion of most psychological research, until very recently, was that there is no relationship between witnesses' confidence and their accuracy. This position has evolved into a more conservative claim: that the relationship between confidence and accuracy is modest — but positive.

It is common for an eyewitness' confidence to increase substantially between the time of the first identification and the trial. In the Dror Goldberg case, victim Roberta Ingrando initially told police she was 80% sure of her identification. In two subsequent court appearances, she described herself as "totally sure". Repeated, suggestive exposures to the suspect will likely lead to increases in feelings of familiarity, which may inflate confidence and be confused with a correct identification. The eyewitness may be told that his or her testimony is vital to convict a criminal who the police "know" is guilty. An identification that is immediately followed by a cheer in the next room, within earshot of the witness, is likely to have a dramatic effect on the witness' confidence in the identification. Once on the witness stand, it would take a courageous witness to say he or she isn't sure. Further, eyewitnesses whose confidence is artificially inflated (by the cues of the experimenters) tend to overestimate all the factors that lead up to good recognition, such as the length of time they viewed the suspect and the lighting conditions. In other words, they seek reasons to justify their level of confidence.

Admissibility

Eyewitness factors testimony should provide information to the trier of fact that is not available through common sense. Some have argued that eyewitness research does not meet this criterion. However, it is also true that some of the best-supported findings flatly contradict common perceptions. Table 1 shows that of the sixteen eyewitness factors deemed most reliably demonstrated, only four (accuracy of children, intoxication, cross-racial identification, and exposure time) approach being "common sense."

Conclusion

An eyewitness' recollection is fragile forensic evidence. It will degrade over time, more rapidly at first, and can easily be contaminated by suggestive investigative procedures. Even without these problems, an eyewitness will sometimes be wrong. There are now clear guidelines in place established by the Department of Justice, and these represent standards of practice for police investigators. Other recommendations from research psychologists (sequential presentation) have not been implemented in Harris County or most other jurisdictions. An energetic defense lawyer should be able to identify multiple factors that make an eyewitness identification less convincing than it once was.

Essential References

Essential References (Continued)


- www.psychology.iastate.edu/faculty/gwells/homepage.htm. Web page of Gary Wells, Ph.D., renowned expert on eyewitness issues, with a lot of information, publications, examples and demos.
- www.ncjrs.org/pdffiles1/nij/178240.pdf


Steven Rubenzer, Ph.D., received his doctorate in 1990 in Clinical Psychology from the University of Houston. He has performed over three thousand Competency to Stand Trial evaluations, including the one for Andrea Yates, and over 2600 "sanity" evaluations for Harris County courts. For four years, he performed almost all of the out patient psychological evaluations for the Houston community mental health system (MHMRA). His research on the personalities of US presidents has garnered national and international attention from both the public and research community. He has published in this area and on clinical personality assessment. He currently specializes in Forensic Psychology, with emphasis in competency and sanity evaluations, risk assessment, personality assessment, personal injury, and eyewitness testimony. Other interest areas include trial consulting and false confessions.

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When Is Resisting Arrest NOT Resisting Arrest?

By Robert D. Bennett and Matthew R. Patton IV

Resisting arrest, Texas Penal Code 38.03, is a charge that, by its nature, is most often seen in conjunction with another crime. It is one that seems to be a favorite of officers, and is often filed with a minimum of provocation on the part of the defendant.

However, a review of the statute and case law reveals the term “resisting arrest” is actually a misnomer, indicating a much lower degree of culpability than is actually mandated by the statute. It is this mistake that, with proper handling and a little luck, can lead to an acquittal in an otherwise hopeless case.

38.03 Resisting Arrest

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer’s presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another. (Emphasis added)

While force is not defined in the statutes, it has been interpreted by many courts. See, e.g., Sample v. State, 626 S.W. 2d 515, 518 (Tex.Crim.App. 1981) (opinion on motion for rehearing) (punching arresting officer in the face is sufficient force); Humphreys v. State, 565 S.W.2d 59, 60 (Tex.Crim.App. 1978) (repeatedly pushing arresting officer to the ground and striking officer’s arm to dislodge his grip is sufficient force); Washington v. State, 525 S.W.2d 189, 190 (Tex. Crim.App. 1975) (dragging two officers across the street is sufficient force); Mayfield v. State, 758 S.W.2d 371, 373 (Tex.App.-Amarillo 1988, no pet.)(using elbows and shoulder to shove arresting officer out of moving car is sufficient force); Schrader v. State, 753 S.W.2d 733, 736 (Tex.App.-Austin 1988, pet.ref’d) (kicking, hitting and biting officers is sufficient force); Cates v. State, 752 S.W.2d 175, 178 (Tex.App.-Dallas 1988, rev’d on other grounds, 776 S.W.2d 170, 1989) (smashing arresting officer in the mouth is sufficient force); but see Young, 622 S.W.2d 99, 101 (Tex.Crim.App. 1981) (merely pulling away from arresting officer’s grasp is insufficient force); Raymond v. State, 640 S.W.2d 678 (Tex.App.-El Paso 1982 pet.ref’d) (merely requiring police officer to pull accused out from under a car and then repeatedly jerking arm from officer’s grip is insufficient force).
The very language of Section 38.03 indicates that the required force must be directed at the officer or applied to him. In 
Raymond, the court reversed a conviction and held Appellant not guilty. This case involved the testimony of two arresting officers that an officer had grabbed Appellant's arm on two occasions and both times Appellant pulled his arm out of the officer's grasp. The court reasoned this action does not constitute "using force against the peace officer," stating, "Striking an arresting officer's arm away constitutes force directed against the officer. This is distinctly different from the direction of force employed in simply pulling one's arm away. There is no danger of injury to the officer in the latter action." Id. at 679.

The courts appear to be making a distinction as to the manner in which the force is used in the effort to avoid arrest. In 
Bryant v. State, 923 S.W.2d 199,207 (Tex.App.-Waco 1996 pet. ref'd) the court carefully examined the dictionary definitions and drew a well reasoned, although somewhat confusing, distinction between the terms "against" and "toward: appearing to focus on the danger to the police officer created by the type of resistance. In 
Bryant, the court found the resistance used by the accused to justify the charge of resisting arrest, declining to follow the other courts "liberal" interpretation of the statute, Id. at 207, and honing in on Defendant's attempt to jerk back from arrest and "coming close to hit[ting] [the arresting officer] in the face." Id. at 208.

A more effective terminology to be used when arguing this distinction to the court may be to use the terms "aggressive resistance" and "passive resistance," with "aggressive resistance" being those type of actions which involve a greater danger to the arresting officer by virtue of the actions, such as flailing the arms while struggling to break free, while "passive resistance" would be actions such as Defendant grasping a doorway to prevent being arrested, or clasping his own hands together to prevent being handcuffed.

As the case law indicates, an incident involving "passive resistance" should properly be charged as evading arrest under Section 38.04 instead of resisting arrest. 

Alejos v. State, 555 S.W.2d 444,449 (Tex.Crim.App 1977), Raymond v. State, 640 S.W.2d 678 (Tex.App.-El Paso 1982 pet. ref'd). This proposition is also supported by the practice commentary following Section 38.03, V.A.T.C., which states:

The section applies only to resistance by use of force. One who runs away or makes an effort to shake off the officer's detaining grip may be guilty of evading arrest under Section 38.04, but he is not responsible under this section.

This commentary was cited with apparent approval by the Court of Criminal Appeals in 
Washington v. State, 525 S.W.2d 189,190 (Tex.Crim.App. 1975) and is also discussed in virtually all of the cases referenced in this article.

However, the tendency to bring these charges incorrectly may be too firmly ingrained in law enforcement to change at this point. The term "resisting arrest" appears to have taken on a life of its own outside the language of the statute. While this is beneficial in catching officers and prosecutors unprepared in the correct circumstances, it also presents a difficult task in persuading the judge as to the true meaning of the law, not to mention the burden of convincing a jury that resisting arrest is really not what they think it is, regardless of how many times they've seen it on television.

This misperception on the part of the jurors makes it particularly important to request some type of instruction or definition be given as to the phrase "using force against the peace officer." At the end of this article are two instructions/definitions which were requested in a recent trial for resisting arrest. The trial judge chose not to grant either of these as worded but instead amended the last request and included this in the charge. The instruction/definition is indicated by italicized language and allowed us to successfully argue our client had been charged with the wrong offense, and the correct offense was for another trial on another day.

THE STATE OF TEXAS

VS.

(DEFENDANT'S NAME)

DEPENrANT'S REQUESTED INSTRUCTIONS/DEFINITIONS

1. Force, as used herein, must be directed at the peace officer or applied to him. Actions such as running away, efforts to shake off the officer's detaining grip, or refusing to submit to handcuffs does not mean the defendant is responsible under the law of resisting arrest.

Cause No. $ IN THE COUNTY COURT

$ AT LAW No. _____ OP

$ __________ COUNTY, TEXAS

DEPENlANT'S REQUESTED INSTRUCTIONS/DEFINITIONS

1. Force, as used herein, must be directed at the peace officer or applied to him. Actions such as running away, efforts to shake off the officer's detaining grip, or refusing to submit to handcuffs does not mean the defendant is responsible under the law of resisting arrest.

Granted

Denied

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May 2002 VOICE FOR THE DEFENSE 25
2. **Force**, as used herein, **must** be directed at the peace officer or applied to him, not a simple effort to disengage.

 Granted

 Denied

 PRESIDING JUDGE

 DATE

 Requested by: ________________

 Attorney for Defendant

 DATE

 Requested Instruction/Definition based upon:


 4) *Bryant v. State*, 923 S.W.2d 199,207 (Tex.App.-Waco 1996, pet. ref'd)

 CAUSE NO. ________________

 THE STATE OF TEXAS § IN THE COUNTY COURT

 VS. §

 (DEFENDANT'S NAME) § AT LAW NO. _____ OF

 COUNTY, TEXAS

 DEFENDANT'S REQUESTED CHARGE OF THE COURT

 MEMBERS OF THE JURY:

 The defendant, (DEFENDANT'S NAME), stands charged with the offense of intentionally obstructing a peace officer from effecting an arrest by using force against such peace officer. The offense is alleged to have been committed on or about the 6th day of January, A.D., 2001, in Cherokee County, Texas. The defendant has pleaded not guilty.

 1. Our law provides that a person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer from effecting an arrest by using force against such peace officer. *Force, as used herein, must be more than a simple effort to disengage.*

 2. A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

 3. A peace officer may, without warrant, arrest anyone violating the law when the offense is committed within his presence or when and to a degree he reasonably believes that force is immediately necessary to make or assist in making an arrest if (a) he reasonably believes the arrest is lawful and (b) before using force, he manifests his purpose to arrest and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known or cannot reasonably be made known to the person to be arrested.
A "reasonable belief" as used herein means a belief that would be held by an ordinary and prudent man in the same circumstances as the peace officer.

4.

Now, if you find from the evidence beyond a reasonable doubt that on or about the ___ day of __________, A.D., 200___, defendant, did then and there intentionally and knowingly obstruct ____________, a peace officer, a person he knew to be a peace officer, from effecting an arrest and search of ____________, and ____________ reasonably believed the arrest was lawful, and that ____________ did attempt to arrest ____________ and used force, if any, as he reasonably believed the arrest was lawful, and that ____________ intentionally obstructed ____________ in such attempt by resisting arrest by using physical force against ____________, then you will find the defendant, ____________ guilty as charged.

Unless you find so beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

5.

You are limited in your deliberations upon a verdict to the consideration and discussion of such facts and circumstances only as were in evidence, or as reasonably deducible from the evidence, and you cannot legally and must not consider nor discuss any fact or circumstance not thus in evidence or reasonably deducible from the evidence nor thus in evidence or reasonably deducible from the evidence. Nor may a juror relate to any of the others any fact or circumstance of which he may have or claim to have knowledge or information that was not introduced in evidence, and neither may any of the jurors lawfully discuss anything else, so far as the evidence is concerned, other than the evidence introduced by the parties and admitted by the Court.

During your deliberations in this case, you must not consider, discuss, or relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this ease that is not shown in evidence.

You will not talk about this case with anyone of your jury, and even among yourselves, only when you are together in the jury room, prior to being discharged by the Court.

You are instructed that the information is no evidence of guilt. It is a means whereby the defendant is brought to trial in a misdemeanor prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.

In all criminal cases the burden of proof remains on the State throughout the trial and never shifts to the defendant. All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at this trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant.

The prosecution has the burden of proving the defendant guilty and must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes doubt concerning the defendant's guilt. In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict Not Guilty.

After you retire to the jury room, you should select one of your members as your Presiding Juror. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon your verdict, to certify your verdict by signing the same as Presiding Juror.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and of the weight to be given to their testimony, but you are bound to receive the law from the Court, which is herein given to you, and be governed thereby.

After you have retired to consider your verdict, no one has the authority to communicate with you except the officer who has you in charge.

Suitable forms for your verdict are hereto attached. Your verdict must be in writing and signed by your Presiding Juror. Your sole duty at this time is to determine the guilt or innocence of the defendant under information in this cause, and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

In the event you desire to communicate with the Court on any matter in connection with your deliberations, your Presiding Juror will notify the Bailiff, who will inform the Court thereof. Any communication relative to the cause must be written, prepared by the Presiding Juror and submitted to the Court through the Bailiff.

Your verdict must be unanimous.

PRESIDING JUDGE
Robert D. Bennett did his undergraduate work at Northwestern State University in Louisiana before attending Baylor Law School in Waco, Texas. After receiving his Juris Doctorate in 1992, he began work in the areas of criminal defense, personal injury, and general civil litigation. Bennett is a frequent lecturer at continuing legal education seminars, and he has published articles and papers on a variety of legal subjects which has led him to become involved in cases as far away as London, England. He has appeared in the trial and appellate courts of both Texas and Louisiana and the Supreme Court of Texas.

Matthew R. Patton IV is a third generation attorney whose areas of practice are criminal law, tax law, bankruptcy, personal injury and family law. He obtained a bachelor's of business administration from the University of Texas at Tyler in 1990 and obtained his CPA license prior to attending South Texas College of Law. Following graduation from law school, Matthew went into practice with his father M.R. "Pat" Patton III (1943–2001), before joining the law office of Robert D. Bennett & Associates in Gilmer.

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Dallas Bar Association Appellate Seminar
The Dallas Bar Association's Criminal Justice Committee is hosting an appellate law seminar on Friday, May 31, 2002, from 10:00 a.m. - 3:00 p.m. at the Belo Mansion. Speakers and topics include:

Judge Cathy Cochran of the Court of Criminal Appeals - recent significant decisions Justice Molly Francis of the Court of Appeals for the Fifth District of Texas - a view from the bench on handling criminal appeals Justice Ed Kinkade of the Court of Appeals for the Fifth District of Texas - informative and entertaining luncheon speech on ethics Gary Udashen of Sorrels & Udashen - exculpatory evidence John Jasuta, Chief Staff Attorney for the Court of Criminal Appeals - Post conviction writs of habeas corpus Lori Ordway Chief of the Appellate Division of the Dallas County District Attorney's Office - jurisdictional issues in appeals.

Robert Udashen of Sorrels & Udashen - ineffective assistance of counsel

The cost of the seminar is $25.00. Lunch is not included in the cost, but a buffet lunch is available at Belo. To register, please contact Christina Lizaso at 214-220-7484.

Lubbock Criminal Defense Lawyers Association announces its New Board:

President, Dwight McDonald
Vice President, Fred Stangl
Secretary, Aaron Clements
Vice President for Education, Steve Hamilton
Vice President for Court Liaison, Chuck Lanehart

Coastal Bend Criminal Defense Lawyers Association's CLE Schedule

May 15, 2002  Douglas Tinker, Esq
A View from the Palm Trees
June 19, 2002  Roxana LeCocke, Breath Test Technical Supervisor
Intoxilyzer 5000

Life Sentence For Yates
Wendell Odom and George Parnham obtained a life sentence for their client, Andrea Yates.

Harris County Criminal Lawyers Association News
Elections for executive board & board positions are 4/26 through 5/10.
The Harris County district courts, who refused to follow the recommendations of the HCCLA panel on implementation of the Fair Defense Act, rated very poorly on the recent review by the Equal Justice Center and Appleseed, while the county courts, who worked diligently with the HCCLA panel, passed most of the categories with high ratings.

Not Guilty Verdicts
William D. Cox II received two not guilty verdicts recently. On February 13, 2002, received a not guilty from a jury. Client was charged with Unlawful Possession of a Firearm by a Felon. The facts are that Client was driving a friend's car at night. The police pulled him over because of no license plate light. He was arrested for outstanding traffic warrants. While police were searching the car, Client allegedly said, "My gun is in the car." Police found the gun under seat where client was sitting, driving the car. Defendant had felony priors for Murder, Aggravated Assault and Possession of Cocaine. Six months prior to this, at a trial, a judge found Client guilty and was sentenced to eight years. Mr. Cox successfully argued a Motion for New Trial based on a conflict of interest between Client's prior lawyer and a trial witness.

On February 19, 2002, Mr. Cox received another not guilty from a jury. Client was charged with DWI. The facts are that Client was driving a Corvette in popular bar area. It was alleged he ran a stop sign at 20 mph. Client told the officer who had in-car video/audio he had two beers. Client allegedly failed the HGN. Client could not say his ABC's correctly, nor walk the line or do the one leg stand.

Sam Adamo, of Houston, received a not guilty verdict in ten minutes from a Conroe jury deliberating on a Boating While Intoxicated case. The state's case fell apart when, during cross-exami-
Jeff Harrelson of Texarkana received a not guilty verdict from a Bowie County jury in a DWI trial on March 20, 2002. Client was arrested after field sobriety tests following a two vehicle accident. Defendant refused to provide a sample, but admitted to officers he had drunk a pint of vodka that day. A videotape, Defendant's testimony, and cross examination of two lay witnesses and two officers revealed the testimony of the state's witnesses to be greatly exaggerated as to the issue of Defendant's intoxication.

Kenneth Nash with assistance from Scott Pawgan, both of the State Counsel for Offenders Office in Huntsville, received a not guilty verdict from a Walker County jury. Client, an inmate in the Texas Department of Criminal Justice, was charged with Possession of a Deadly Weapon in a Penal Institution. It took the jury a little over an hour to find Client not guilty.

Mark Ash of Houston received his first not guilty verdict from a Harris County jury after 25 minutes of deliberation on a DWI case. The jury did not believe the state proved Client was intoxicated after viewing Client on the videotape.

Brick Platten of Tyler received a not guilty verdict from a Smith County jury in an aggravated assault case. The jury believed Client was not guilty due to an illness that causes hallucinations. Client's doctor testified that Client was suffering from this illness when he fired the weapon at his wife because Client thought he was seeing rats.

Motions To Suppress Granted

TCDLA board member Eric M. Albritten, Elizabeth L. DeRieux, and Odis R. Hill recently convinced the Honorable T. John Ward, US District Judge, to suppress a large quantity of methamphetamine and a pistol due to the unconstitutional detention of their client.

Guy Womack received a good news on a motion to suppress he was able to secure. The Fifth Circuit upheld U. S. District Judge Kenneth Hoyt's suppression of four kilograms of heroin from the luggage of a bus passenger in the case of US v. Hernandez.

The District Court's ruling was mentioned in an earlier issue of Voice. On February 7, 2002, the Fifth Circuit issued its opinion and the government has since dismissed all charges against Dr. Hernandez, who is now awaiting return to Venezuela. Mr. Womack represented Client before the US District Court for the Southern District of Texas and before the Fifth Circuit. Client has been in custody for two years while this wound its way from the District Court through the 5th Circuit and back to the District Court.

Appellate Relief

Mark Woerner of Corpus Christi had a murder conviction reversed by the 13th District Court of Appeals. Defendant received a life sentence for murder and engaging in organized criminal activity in December 1998, after a jury trial on a plea of not guilty wherein the trial court admitted the non-testifying codefendant's confession as a Statement Against Interest over Defendant's objection that it violated Defendant's Sixth Amendment right to confrontation. The 13th District Court originally affirmed the conviction finding that counsel waived error by failing to object and that any error was harmless anyway. The Court of Criminal Appeals granted discretionary review and found that Defendant had in fact properly objected and remanded it to the 13th District. They agreed in an unpublished opinion that admission of the confession as a Statement Against Interest was improper in view of the U.S. Supreme Court's ruling in Lilly v. Virginia and reversed the conviction, finding that the error was not harmless after all. The State's Petition for Discretionary Review was then refused on January 30, 2002, and the trial is now pending in the 105th District Court.

TCDLA board member John Young, of Sweetwater, was successful in obtaining a writ of mandamus. In an unpublished opinion, the 11th Court of Appeals directed Judge Robert H. Moore of the 118th District Court to vacate its order requiring Mr. Young to represent a defendant in a capital murder case without compensation.

Probation From A Jury

Chip Rudden of Corpus Christi received probation from a Nueces County jury on a murder case. The jury found the driver guilty of murder, four counts of aggravated assault with a deadly weapon, and deadly conduct under the law of parties. At punishment, acting lie he was giving the "Sinners In The Hands Of An Angry God" sermon, the district attorney asked for 50 years.

Mr. Rudden did not do classic mitigation. He simply told the jury not to pretend to know for a minute what a Texas prison was, not to ignore the fact that the shooter had already gone to trial and been sentenced to big years, and not to give one ounce of sympathy to the crocodile tears of the victim's parents. The same people who knew they had reared a gangster, who were housing his fellow gangsters, and whose main object was, not to

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STATE OF TEXAS

VS.

CAUSE NO. ___________

DEFENDANT

THE JUDICIAL DISTRICT COURT OF COUNTY, TEXAS

DEFENDANT'S MOTION TO EXCLUDE USE OF PREJUDICIAL TERMS

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant stands charged by indictment with the crime of aggravated sexual assault, which crime is alleged to have occurred more than ten years ago. The complainant is Defendant's sixteen year-old daughter who did not make the allegation against Defendant until after Defendant's daughter had been subjected to almost a year of counseling, together with the administration of psychotropic medications. There is no evidence in the contemporaneous medical records relating to this child that would corroborate her allegation of having been sexually assaulted when she was four or five years old.

Defendant therefore moves that the prosecution be prohibited from the use of prejudicial terms at trial, during jury selection, or in the presence of witnesses. These prejudicial terms include the use of the word “victim” in referring to the witness against whom the crime of sexual assault was allegedly committed.

The purpose of this motion is to prevent the prosecution from ignoring its duty to prove beyond a reasonable doubt the crime of sexual assault was actually committed and that Defendant committed the crime as charged. The purpose of this motion is also to prevent the prosecution from interjecting the prosecutor's personal opinion that a crime has in fact occurred, or that the witness actually suffered an attack as alleged in the indictment.

In support of this motion, Defendant relies upon the argument set forth in the memorandum accompanying this motion.

MEMORANDUM IN SUPPORT

Due process requires minimal injection of error or prejudice into these proceedings. Use of terms such as “victim” allows the focus to shift to the accused rather than remain on the proof of every element of the crime alleged by the complainant. As a threshold inquiry, the prosecution must first offer enough evidence for a court to conclude that a rational trier of fact could find that the essential elements of the crime have been established. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Isasv. State, 908 S.W.2d 217 (Tex. Crim. App.1995)(en banc); Short v. State, 874 S.W.2d 666, 667 (Tex. Crim. App. 1994)(en banc); Article 38.03, Tex. Code Crim. Proc.

The sufficient evidence requirement is a part of every criminal defendant's due process rights. It is an attempt to give a concrete substance to those rights, by precluding irrational jury verdicts. Jackson, 443 U.S. at 315, 99 S.Ct. at 2786. As the Jackson court explained:

In re Winship, 397 U.S. 358 (1970) doctrine [requiring proof of guilt beyond a reasonable doubt] requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A reasonable doubt at a minimum, is one based upon reason. Yet a properly instructed jury may occasionally convict even when it can be said that no rational kier of fact could find guilt beyond a reasonable doubt. 443 U.S. at 316-317, 99 S.Ct. at 2788.

Defendant is presumed to be innocent of the charges against him. Blue v. State, ___S.W.3d ___, 2000 WL 1827705 (Tex. Crim. App. MOO). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 503 (1976). Working from the premise that an accused is innocent until proven guilty, it is
prosecution's burden to prove beyond a reasonable doubt the essential elements of the crime alleged. This presumption continues throughout the trial and into deliberations.

Defendant denies that criminal sexual conduct occurred in this case. The burden of the prosecution should not be alleviated, minimized or diminished by the use of loaded words which imply that the prosecution has met its burden of proof that the crime alleged has actually been committed. The use of the word "victim" by the prosecution is an attempt by the prosecution to imply, from the outset of the case in voir dire, and throughout the trial, that the State has met its burden of proof that the alleged crime has in fact been committed.

Respectfully submitted,

L.T. "Butch" Bradt #02841600
5718 Westheimer, Suite 700
Houston, Texas 77057
(713) 681-2696
Fax: (713) 978-6434

CERTIFICATE OF SERVICE

On this 19th day of February, 2001, I, the above-signed attorney, certify that a true and correct copy of the foregoing was hand-delivered / faxed / mailed, proper postage affixed in a wrapper addressed to:

Name of prosecutor:

CAUSE NO. _________

STATE OF TEXAS $ IN THE _____ JUDICIAL

VS. $ DISTRICT COURT OF

DEFENDANT $ COUNTY , TEXAS

ORDER ON DEFENDANTS MOTION TO EXCLUDE USE OF PREJUDICIAL TERMS

Defendant's Motion to Exclude Use of Prejudicial Terms having been presented to this Court, this Court is of the opinion that the Motion SHOULD be granted. It is, therefore,

ORDERED that the State of Texas, through its District Attorney, all witnesses called on behalf of the State, shall be prohibited from the use of prejudicial terms at trial, during jury selection, or in the presence of witnesses, including, without limitation, the use of the word "victim" in referring to the witness against whom the crime of criminal sexual conduct was allegedly committed.

SIGNED this ___ day of February, 2001.

JUDGE PRESIDING

L.T. "Butch" Bradt is a general practitioner in solo practice in Houston. Licensed for more than 25 years and in 23 different courts, he has handled cases throughout the country. Recognized as an experienced trial and appellate attorney, he handles civil, criminal and family law matters. A frequent speaker at CLE events, in and out of state, Bradt earned a B.A. in English from the University of Houston and a J.D. from South Texas College of Law.
RULE 11 VIOLATION SUBJECT TOplain ERROR ANALYSIS: UNITED STATES v. VONN, No. 00-973, cert to 9th Circuit (224 F.3d 1152) vacated and remanded, 3/4/02; Opinion: Souter.

FRCP 11 lays out steps that a judge must take to ensure that a guilty plea is knowing and voluntary. Rule 11(h)'s requirement that any variance from those procedures "which does not affect substantial rights shall be disregarded" is similar to the general "harmless-error rule" in Rule 52(a). When Vonn pled guilty to two felonies, the court advised him of the constitutional rights he was relinquishing, but skipped the advice required by Rule 11(c)(3) that he would have the right to assistance of counsel at trial. District court denied his motion to withdraw the plea. Ninth Circuit reversed and vacated, ruling that Vonn's failure to object before the District Court to the Rule 11 omission was of no import because Rule 11(h) subjects all Rule 11 violations to harmless-error review. Court also held that the Government had not met its burden, under harmless-error review, of showing no effect on substantial rights, and vacated the convictions.

HELD: 1. A defendant who lets Rule 11 error pass without objection in the trial court must satisfy Rule 52(b)'s plain-error rule. Vonn claims that Rule 11(h)'s specification of harmless-error review shows an intent to exclude the plain-error standard with which harmless-error is paired in Rule 52. However, Court rejects this argument because the harmless- and plain-error alternatives are associated together in Rule 52, having apparently equal dignity with Rule 11(h), and applying by its terms to error in the application of any other Rule of Criminal Procedure. To hold that Rule 11(h)'s terms imply that the latter half of Rule 52 has no application to Rule 11 errors would amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored.

HELD: 2. A reviewina court may consult the whole record when considering the effect of any Rule 11 error on substantial rights. The Advisory Committee intended the error's effect to be assessed on an existing record, but it did not mean to limit that record strictly to the plea proceeding, as the Ninth Circuit did here. In addition to the transcript of the plea hearing and Rule 11 coloquy, the record shows that Vonn was advised of his right to trial counsel during his initial appearance and twice at his first arraignment, and that four times either he or his counsel affirmed that he had heard or read a statement of his rights and understood them. Since the transcripts of Vonn's first appearance and arraignment were not presented to the Ninth Circuit, this Court should not resolve their bearing on his claim before the Ninth Circuit has done so.
FIFTH CIRCUIT


Neal (described by Court as a “moderately retarded man with an IQ of between 54 and 60”) essentially posited a claim of ineffective assistance of counsel based on trial counsel’s failure to investigate and present mitigating evidence. Court reviewed counsel’s conduct and the prejudice from that conduct. To determine whether counsel’s conduct was unreasonable, Court must determine whether there was a gap between what counsel did and what a reasonable lawyer would have done under the circumstances. While the Court will not engage in hindsight, Court concludes that a reasonable attorney would have investigated further and put on a more compelling defense during sentencing.

Held: Because of the extent to which available materials could reasonably have been expected to augment Neal’s case, we conclude that his trial counsel was deficient in failing to investigate, gather and consider it for purposes of presentation at Neal’s sentencing hearing. Trial counsel only put on two witnesses: the defendant’s mother and a psychologist. Mom’s testimony was only nine pages in the record and addressed the defendant’s school history, his learning difficulties, etc. The psychologist’s testimony was 24 pages and addressed the defendant’s low IQ, and his organic brain damage. That is the essence of the mitigating evidence that defense counsel presented to the jury. Although it seems to touch many relevant points, it was presented to the jury in an abbreviated form with no elaboration. State habeas counsel introduced 42 pages of affidavits which presented a much more detailed picture of Neal. Court found most troubling the fact that counsel never interviewed any of the witnesses listed in these affidavits who could have “added to and developed the skeletal evidence before the jury.” The records were easily and readily available.

Held: The Mississippi Supreme Court’s conclusion that the additional mitigating evidence was merely redundant and not prejudicial is erroneous. Court rejected the state’s argument that the habeas evidence was not admissible. What is noteworthy about this discussion is that: (1) the court found admissible witnesses’ personal opinion of Neal’s character and more importantly, (2) the court dismissed the State’s argument that it could have been a strategy decision by trial counsel to not put on such evidence because "Neal’s attorneys simply could not have made a decision strategically to withhold information that they had not obtained." Court also rejected State’s argument that the brutality of the offense nullified any prejudices suffered by Neal for his attorney’s errors. After noting the factual differences between the Supreme Court’s Williams v. Taylor and the instant case, Court determines that "given the amount and character of the mitigating evidence in this case, we believe that there is a reasonable probability that a jury would not have been able to agree unanimously to impose the death penalty if this additional evidence had been effectively presented and explained to the sentencing jury.

Held: In the absence of clear guidance from the Supreme Court, we conclude that our focus on the "unreasonable application" test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence.

Court ruled that Neal had to go further to establish that the Mississippi Supreme Court’s decision involved an unreasonable application of Strickland. The Court went on to hold that a federal habeas court does not look to the reasoning of the state court decision:

It is not immediately clear to us whether a federal habeas court looks exclusively to the objective reasonableness of the state court’s ultimate conclusion or must also consider the method by which the state court arrives at its conclusion. This question takes on some significance in a case such as Neal’s, where the state court’s holding (that Neal suffered no prejudice under Strickland) may be objectively reasonable, but in reaching that holding, the court did not adequately evaluate and weigh the substantial evidence—the implicit suggestion being that the state court may have reached a different, but still "reasonable," conclusion if a more thorough method of reasoning had been applied.

Neal’s conviction was affirmed.

***Editor’s note: This is a very important case for a lot of reasons. First, it was obviously set up to go to the Supreme Court. The Court makes it clear that but for their narrow reading of 2254, they would have reversed. Second, if Neal is upheld or not reviewed by the Supremes, then it will be virtually impossible to secure relief in the 5th Circuit on a writ claim. Third, if Neal is reversed, then the 5th is opening the door to a lot of claims. Neal’s IAC claim isn’t that much stronger than a lot of IAC claims on mitigation.]

OUT OF TIME APPEAL: CCKERHAM V. CAIN, No. 99-31044, 2/20/02

Here defendant appealed his conviction and then was granted out of time appeal. He raised a Cage v. Louisiana jury instruction issue in habeas corpus. Because he could only raise that issue if Cage were decided before his conviction became final, which was between the first appeal and the out of time appeal. Court holds that for purposes of Teague v. Lane, the conviction did not become final until after the out of time appeal was completed.

COA STANDARD OF REVIEW WILLIAMS V. PUCKETT, No. 00-60547, 2/13/02.

We engage in the following “double barred reasonable inquiry with respect to each constitutional claim: Is the district court’s determination that the state court did not unreasonably apply clearly established federal law debatable among
reasonable justice? See Hurley, 221 F.3d at 772 ("[I]f there
determination of whether a COA should issue must be made by
viewing Williams’s arguments through the lens of the declin-
ential scheme laid out in 28 U.S.C. §2254(d)).")

COURT OF CRIMINAL APPEALS

PDR OPINIONS

STATE TRIED NOT PROVE BB GUN WAS LOADED TO
GET DEADLY WEAPON FINDING; RUBBY ADAMS v State,
No. 90-01, State’s PDR from Hill County; Reversed, 3/6/02;
Offense: Agg. Rob.; Sentence: COA: Reversed (377/141 - Waco
2001); Opinion: Hervey, joined by Keller, Womack, Reeker,
Holcomb & Cochran, Concurring Opinion. Meyers, joined by
Price Concurring Opinion: Johnson.

Appellant robbed a convenience store clerk with a BB gun,
and an affirmative finding of a deadly weapon was entered in
the judgment. A cop testified that the BB gun, if pointed
and fired, could cause serious bodily injury. COA held the evidence was insufficient to support the
death weapon finding because the State presented no evidence
that the BB gun was loaded. State’s PDR was granted to sec-
tend this ruling.

HELP: In proving use of a deadly weapon rather than a
deadly weapon per se, the State need only show that the weapon
was capable of causing serious bodily injury or death in
its use or intended use. Here, the evidence showed that Appell-
ant pointed the BB gun at the clerk and demanded money. It
was not a significant factor whether the gun was loaded or un-
loaded, only that it was capable of causing death or serious
bodily injury. It is not necessary to place an additional eviden-
tial burden on the State to affirmatively prove that a BB gun,
which is not a deadly weapon per se, was loaded. Because there
was sufficient evidence through cop’s testimony, COA erred,
thus judgment is reversed and trial court’s judgment is affirmed.

IMMUNITY AGREEMENT NOT RENDERED UNEN-
FORCEABLE BY TRIAL COURTS FAILURE TO AP-
PROVE ITS SPECIFIC TERMS; SHANNON ALLEN SMITH v State,
No. 180-92, Appellant’s PDR from: Randall County; Reversed, 3/
13/02; Offense: Murder; Sentence: 30 yrs (probated) + 510,000
fine; COA: Affirmed (979/379 - Amarillo 1998); Opinion:
Womack, joined by Meyers, Price, Johnson & Holcomb, Con-
currence: Johnson, Concurrence: Cochran; Dissent: Keller,
joined by Reeker & Hervey.

Appellant and 5 co-defendants were charged with capital
murder. Appellant entered into an immunity agreement with
the DA – he gave a videotaped statement, took a polygraph,
and offered to testify against the others. Defense counsel drafted
a motion to dismiss the charges, and at a hearing, an assistant
DA represented that the DA’s office joined the motion. Based
on this joinder, the trial court construed the motion as one by
the State and quoted its language in its dismissal order, stat-
ing that he found, in the interests of justice and based on the
evidence, the motion should be granted. After the charges were
dropped, they were reconstituted two years later when a new DA
was elected. The trial court denied Appellant’s motion to re-
force the agreement he made with the prosecutor, and he was
subsequently convicted by a jury. COA held that the immunity
agreement was not enforceable because the trial court had not
approved the agreement. Appellant’s PDR was granted to de-
termine what is required for the court to “approve” an immu-
ity agreement.

HELP: If the trial court approves the dismissal that results
from an immunity agreement, and is aware that the dismissal
is pursuant to an immunity agreement, the judge does not have
to be aware of the specific terms of that immunity agreement
for it to be enforceable. TCCP § 32.02 gives DAs the authority
to dismiss, and a grant of immunity is, conceptually, a promise to
dismiss a case. A dismissal must be approved by the trial court,
and its approval is essential to establish immunity. Here, the
trial court approved the dismissal order, but did not signify
that it approved the immunity agreement separately from the dis-
missal. After reviewing prior law and statute, COA notes that
§32.02 requires the State to list in writing the reasons for dismis-
sal, and for the trial court to incorporate those reasons into its
judgment of dismissal. However, COA has previously held that this
requirement is directory and not mandatory, that substantial
compliance is sufficient. Here, the only reasons given for dis-
missal and incorporated in the judgment were “in the interests
of justice,” thus could refer to any rational basis that the pros-
ecuting had to dismiss. If filling the statement of reasons is not
mandatory, it follows that neither is the requirement for the judge
to incorporate those reasons into the order. Here, that the judge
did not do so did not render the immunity agreement unen-
forceable. Similarly, neither does the failure of the order of dis-
misal to recite “with prejudice” render the immunity agree-
ment unenforceable. As to the trial court’s awareness of the
agreement’s terms, because it is the prosecutor who initiates
the dismissal and sets out the reasons, the prosecutor is respon-
sible for crafting the conditions of the immunity agreement. To
require that courts become familiar with terms of every immu-
nity agreement before approving the DA’s request for a dismissal
would place the courts in a position of duplicating the DA’s
work. Terms of an immunity agreement are wholly within the
beginning process of the parties, subject to zero power of the
court. Courts shouldn’t be required to supervise the perfor-
ance of every witness under an immunity agreement. COA
erred when it held the agreement was unenforceable because it
was not approved by the judge. Judgment is reversed, and case
is remanded to COA to address existence of and performance
under the immunity agreement.

Dissent: The agreement is no good because it does not say
dismissal is “with prejudice.”

TRIAL COURT CAN EXCLUDE ALL STATEMENTS IF DE-
fendant FAILS TO SPECIFY WHICH ONES ARE ADMIS-
SIBLE: CRAIG JONATHAN WILLOVER v State, No. 748-01,
State’s PDR from: Waller County; Reversed, 3/13/02; Offense:
Agg. Sex Assault, Sentence: Life; COA: Reversed (344/6/2 - Hous-
ton, 1st 2000); Opinion: Holcomb, joined by Keller, Meyers,
Johnson, Hervey & Cochran; Womack joins except for footnotes
10; Price & Reeker join only judgment.

Appellant was convicted of sexually assaulting his eight-year
old daughter. He wanted to introduce two videotaped inter-

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views of the child by a child abuse specialist, Holcombe. The victim said in the first interview that no one had touched her, but later said her brother had touched her in an inappropriate place. In the second interview conducted 2 months later, she said that Appellant had touched her private parts and had touched her with his private parts. The trial court refused to allow the tapes after the State objected on hearsay grounds. Both Holcombe and the child testified at trial. COA held that under TRE 801(e)(2) (party-opponent) the tapes were not hearsay, were proper for impeachment purposes, and thus should not have been excluded. State's PDR was granted to second-guess this determination.

HELD: Because Appellant did not specify and extract the statements he wanted to use for impeachment purposes, it was not an abuse of discretion for the trial court to exclude the videotapes. COA held that even though the parties treated the evidence as hearsay, it was really not, and therefore admissible. However, in order to have evidence admitted pursuant to a hearsay objection, the proponent must specify which exception he is relying on. Here, everyone assumed the videos were hearsay, and thus it was for Appellant, not the judge, to specify which exception applied. Appellant wanted to introduce the tapes in their entirety, which may have contained inadmissible as well as admissible statements. When the judge is presented with a proffer containing both inadmissible and admissible statements and the proponent fails to segregate and specifically offer the admissible statements, the trial court may properly exclude all the statements. COA did not properly apply the abuse of discretion standard. Judgment is reversed and case is remanded to COA for disposition of Appellant's remaining points of error.

MISDEMEANOR DEFENDANT PLEADING TRUE WITHOUT COUNSEL AT REVOCATION HEARING HAS NO RIGHT TO BE WARNED OF DANGER OF SELF-REPRESENTATION: FREDDIE M. HATTEN v. State, No. 2942-00, State Prosecuting Attorney's PDR from Harrison County; Reversed, 3/13/02; Offense: Assault (misdemeanor); Sentence: 365 days + $4000 fine; COA: Reversed (32111868 Texarkana 2000); Opinion: Hervey, joined by Keller, Meyers, Price, Womack & Holcomb; Concurrence: Johnson. Disposition: Affirmed.

Appellant pled guilty to three offenses (charged in a 3-count indictment) per a plea agreement, and was assessed 4 yrs deferred adjudication community supervision. He was later adjudicated for the POCs, a state jail felony, and the trial court signed an order severing the felony, but retaining jurisdiction over the other two, both misdemeanors. On appeal, COA reversed because the two misdemeanors were misjoined with the felony, thus rendering Appellant's deferred adjudication and community supervision order void, as was the felony conviction. SPA's PDR was granted on three issues to second-guess this ruling.

HELD: Misjoinder of misdemeanor offenses did not render void the ultimate felony conviction, and besides, Appellant cannot show harm. Appellant argued the charges were misjoined because the district judge had no jurisdiction over the misdemeanors, and thus, the felony was rendered void. Neither party disputed that the judge did not have jurisdiction over the misdemeanors; thus, a jurisdictional defect in the trial court's order existed as to those offenses, which could be raised at any time - trial, direct appeal, or on a writ. However, that does not render the conviction void. Here, the State waived the misjoined offense, thus Appellant's guilty pleas to those disappeared. Moreover, the two-year statute of limitations had run on the misdemeanors. Appellant does not claim he would not have pled guilty to the original indictment he had known he could be punished for three offenses instead of one. Also, when the jurisdictional problem was brought to the trial court's attention, Appellant received a better result than he originally got - severance of the two misdemeanors and the right to object to having them refiled in county court. The misjoinder did not render void the ultimate felony conviction, and Appellant has shown no harm. Thus, COA's judgment is reversed, and trial court's judgment is affirmed.

APPELLANT NOT DEPRIVED OF RIGHT TO PRESENT HIS DEFENSE: RONALD CRAIG WILBY v. State, No. 1778-00, Appellant's PDR from Williamson County; Affirmed, 3/27/02; Offense: Arson; Sentence: 10 yrs; COA: Affirmed (NP - Austin 2001); Opinion: Cochran, joined by everyone but Johnson and Keasler, who concurred in the judgment, and Womack, who did not participate.
Appellant was accused of burning down his restaurant for the insurance proceeds. During trial he wanted to offer evidence that a man ("Moose" Thomas) with a prior attempted arson was in the restaurant a few days before the fire and was, in fact, standing across the street when the building was burning. COA held the trial court did not err because no prejudice was shown under TREC 403. Appellant PDR'd and got a summary grant and remand because COA did not address his constitutional claim that he was denied his right to present a defense. COA again affirmed, and PDR was again granted to address the issue.

HELD: COA properly held that Appellant was not deprived of his constitutional right to present a defense because the trial judge did not abuse its discretion in excluding testimony concerning Moose under Rule 403. Appellant did not dispute that the fire was caused by an arsonist. However, he did contest the identity of the arsonist, and indeed, that was his only defense. The evidence, he argued, went to the very heart of his defense. CCA rejected all his arguments. Although trial court ruling did effectively preclude Appellant from presenting some of his evidence that perhaps Moose was somehow involved in commission of the arson, Appellant has failed to show how the ruling was erroneous, much less so clearly erroneous that it violated his constitutional rights. Evidence was only marginally relevant—it was highly speculative. Evidence "is precisely the type of emotionally-freighted but speculative evidence that trial judges properly exclude under Rule 403, whether offered by the State or the defendant."

[***CCA says it was OK for the trial court to exclude all evidence of Moose because he was incompetent, and also the evidence was "meager," "speculative," and not credible. CCA misses the point here. The fact finder, not the appellate court, is supposed to determine the credibility of testimony. This opinion also places the burden on the Appellant, in establishing his innocence by showing that someone else committed the crime, to prove "that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record to show a nexus between the crime charged and the 'alleged alternative perpetrator."\]

VARIANCE DID NOT RENDER EVIDENCE INSUFFICIENT: MICHAEL ANTHONY FULLER v. STATE, No. 1283-98, State Prosecuting Attorney's PDR from Navarro County, Reversed 3/27/02; Offense: Injury to elderly person; Sentence: 10 yrs; Opinion: Meyers, Price, Holcomb & Cochran; Concurring Opinion: Keller; Concurring Opinion: Womack, joined by Keller and Johnson; Dissent: Keasler.

Appellant received an appellate acquittal after COA held the evidence was insufficient due to a variance between the pleading and the proof at trial. The indictment alleged the victim's name as "Olen M. Fuller" (Appellant's father), but at trial, he was only referred to as "Mr. Fuller" or "Buddy." The charge authorized conviction if the jury found Appellant had committed the offense against "Olen M. Fuller." COA held the evidence legally insufficient under Jackson v. Virginia, and that a "hypothetically correct jury charge" required the prosecution to prove the victim's name as alleged in the indictment. SPA claims this was a variance case, not a Jackson v. Virginia case.

HELD: State's failure to prove the victim's name exactly as alleged in the indictment does not make the evidence insufficient to support Appellant's conviction under either Jackson or Gollihar. The victim's name is a "substantive" element of the offense, thus evidence that Appellant injured the elderly victim by hitting him in the face with his fist satisfies the Jackson standard. In Gollihar, 46/1/243 (CCA 2001), CCA held that in a variance case, the Appellant is not entitled to a reversal unless the variance is "material." A material variance usually presents only a notice problem and does not present a problem with the State's failure to prove the defendant guilty of the crime charged. Here, State's failure to prove the victim's name exactly as alleged does not render the evidence insufficient. The variance between the indictment and the proof is immaterial because there is nothing on the record to indicate that Appellant did not know who he was accused of injuring, or that he was surprised by the proof at trial. COA's judgment is therefore reversed, and case is remanded for further proceedings.

HABEAS CORPUS OPINION - Nondeath Penalty

PINE NOT ASSESSED BY JURY DID NOT RENDER SENTENCE VOID: EX PARTE DAVID PENA, No. 74035, from Nueces County; Relief Denied, 3/13/02; Opinion: Per Curiam; Dissent: Holcomb, joined by price; Keasler concurred w/o opinion.

Applicant was convicted by a jury of deadly conduct, and the jury recommended probation for ten years. The state wanted 180 days, but the judge instead imposed a $10,000 fine. Applicant's probation was subsequently revoked, and he was sentenced to ten years and the $10,000 fine. He now complains that the sentence is void because the jury did not recommend the fine.

HELD: The sentence, though inaccurate, was not void or illegal, and thus is not cognizable on habeas corpus. Such a claim is neither one of constitutional defect nor a violation of constitutional or fundamental rights and as such, it is not a basis for relief on an 11.07 writ. A $10,000 fine is authorized by statute, and did not render the sentence void. Besides, Applicant did not complain about its imposition at the time he was sentenced, thus he has waived his complaint.

Dissent: In Texas, the defendant has the right to have the jury assess punishment. Here, the jury here assessed punishment at 10 yrs, and no fine. The trial court had a ministerial duty to enter a judgment of punishment exactly as prescribed by the jury. Because the trial court was without authority to impose the fine, it was illegal. Also, this error was not one that can be waived, because an illegal sentence can always be attacked. The remedy here would be simply to delete the illegal fine. The majority ignores CCA precedent as well as the will of the legislature.

TRIAL COURT CAN'T CHANGE SENTENCE ONORALLY IMPOSED: EX PARTE LEON VANCE MADDING, No. 74,082, from Upshur County; Relief Granted, 3/6/02; Offense: Burglary of Building; Sentence: 17 yrs; Opinion: Cochran, joined by Meyers, Womack, Johnson, Hervey & Holcomb; Con-
Hanson, Applicant and the co-defendants had already shot the murder of three persons. Applicant was tried first, and convicted primarily on the testimony of eyewitness Anita Hanson, who said she heard Applicant plan the killings. According to Hanson, Applicant and the co-defendants had already shot the three victims while she was still outside. When she entered the victim’s residence, Applicant made her shoot one of the victims, who was still alive, with an Uzi, threatening to kill her if she refused. Hanson was placed in protective custody for a year and gave the police six sworn statements. Applicant was convicted and sentenced to death. Two co-defendants were acquitted, and the third was never tried. In this writ, Applicant alleges the State intentionally elicited perjured testimony of Hanson, and that they suppressed Brady material.

HELD: The state failed to disclose evidence that was exculpatory and material to the defense. The habeas court held a 15-day hearing during which several police officers testified regarding Hanson’s credibility and her shenanigans during the year she was in protective custody. The suppressed evidence was the diary of one of the many police officers who had protected Hanson prior to trial, who said that Hanson was not a truthful person, and that she kept the diary to protect herself from false accusations Hanson may have made. The diary entries also identified fellow officers who had protected Hanson and included information they conveyed to her. The officers called to testify at the hearing did not believe Hanson was a truthful person.

The trial court recommended relief, and CCA agreed, finding that Hanson’s testimony was crucial to the State’s case against Applicant: it placed him at the murder scene at the time of the killings and assigned primary responsibility for them to Applicant. The other witnesses only established a motive, and saw him fire a machine gun on another occasion. Hanson’s credibility was fatally impeached in the trials of the co-defendants, by her own self-admitted perjurious statements, and her story completely unraveled. Had the diary been timely disclosed, and had the officers testified at Applicant’s trial, Hanson’s credibility would not have been impeached, but severely undermined. CCA agrees with the habeas court, who found as a matter of law, the evidence would create a probability sufficient to undermine confidence in the outcome of the proceedings. All requirements of Brady/Bagley are met and relief is granted. Applicant’s conviction is set aside, and he is remanded to the custody of the Lubbock County sheriff to answer the indictment.

DEATH PENALTY OPINION ON REMAND FROM U.S. SUPREME COURT:

APPELLANT WAIVED ERROR BY FAILING TO OBJECT TO RacialLY PREJUDICIAL EXPERT TESTIMONY: VICTOR HUGO SALDANA v. SMITE, No. 72,556, from Collin County; Affirmed, 3/13/02; Opinion: Womack, joined by all others in part I, and with Keller, Meyers, Keasler, Hervey, Holcomb & Cochran joining part II; Price & Johnson dissent to part II; Concurrence by Keller, joined by Keasler, Hervey & Cochran; Dissent: Price; Concurring & Dissenting opinion: Johnson.

Supremes summarily granted cert and remanded case to CCA for determination of “whether a defendant’s race or ethnic background may ever have been used as an aggravating circum-
stance in the punishment phase of a capital murder trial in which the state seeks the death penalty." The AG, in response to Appellant's cert petition, confessed error, and stated that the state's introduction of race as a factor for determining whether dangerousness constituted a violation of Appellant's rights to due process and equal protection. Recall this is the case where the expert testified that Appellant would be a future danger because he was Hispanic.

HELD: Texas law gives the authority to represent the state in criminal cases in cert proceeding in the Supreme Court to the DA or county attorney who had authority to prosecute the case in the Texas courts: the Attorney General is authorized only to provide assistance at the request of the state prosecutor, or when an assistant AG is appointed to assist the prosecutor under Tex.Gov't Code § 402.028. In addressing this "threshold question," CCA determines, after 16 pages of analysis, that the Texas Attorney General has no authority to represent the state in any criminal proceeding unless asked to by the local prosecutor. However, here, the DA presumed the AG would represent the state in its response to Appellant's cert petition. Thus, its silence in the face of a long practice whereby the AG has always responded to such petitions should be construed as an implied request for such assistance in this case. Thus, AG's representation in this case was authorized by law.

HELD: State's confession of error in the Supreme Court is contrary to our state's procedural law for presenting a claim on appeal, as well as Supreme Court's enforcement of such procedural law when it is presented with equal protection claims. Appellant's trial counsel did not object, but cross-examined the expert and undermined his credibility, and also put on his own expert to testify that race is not a "causative" factor in recidivism. Appellant does not claim his attorney was ineffective for not objecting. After more discussion, CCA determines that the AG's confession of error was erroneous. CCA rejects the AG and amici, who argue that the Supreme Court's action in granting review is a binding determination that Appellant's 14th Amendment claim has been decided by CCA. Supremes only summarily granted cert and remanded "for further consideration in light of the confession of error by the Solicitor General of Texas." Because everything is waived, CCA can't reach the question presented by the Supreme Court on remand. Case is therefore, affirmed.

Dissent: Admission of the evidence was a fundamental error which should have been reviewed even in the absence of an objection.

That there may have been ample evidence supporting a finding of intimated dangerousness and that there were factors other than race included in [the expert's] testimony are of no moment. If a skunk is allowed into the jury box, nothing will remove its stench.

I cannot condone a decision to impose the death penalty when I am uncertain whether racial prejudice was a component of that decision.

DEATH PENALTY OPINION: GENO CAPOLETTI WILSON

v. State, No. 73,747, from Harris County: Affirmed, 3/20/02; Opinion: Meyers (unanimous)

Facts: No facts are set forth because Appellant does not challenge sufficiency of the evidence, or anything else at the guilt/innocence phase. Appellant raised three points, all dealing with the trial court's alleged error in allowing the state to ask a defense witness at punishment "did you know" questions about his specific criminal acts.

Improper questions by state: Rev. Delaney was called as a character witness. On cross the state asked, without objection, whether Delaney knew about incidents in Appellant's violent past, and he responded in the negative. He then asked whether Delaney knew Appellant had driven a stolen car to the scene of the crime. Delaney again answered "No" and then counsel objected. On re-cross, the state questioned Delaney about his knowledge of Appellant's behavior in jail, and whether he knew that Appellant had committed several incidents of extortions while incarcerated there. Counsel again objected. The state then asked a series of "did you know" questions regarding additional charges filed against Appellant while in jail.

HELD: Appellant has failed to preserve error for appellate review. Appellant's complaint about the stolen vehicle was untimely and did not comport with his objection at trial (no evidence of stolen car put on by state). He also failed to make a proper objection to the other "did you know" questions about acts while he was in jail. And again, his issue on appeal did not comport with his trial objection (questions outside scope of re-direct, and prosecutor badgering).

HELD: Even if error was preserved, claims are meritless. Because Delaney testified as to his opinion of Appellant, the state was entitled to test his knowledge of specific instances of conduct under TRE 405. He argues that it was improper for the state to question Delaney this way over objection because the acts had not been proven before the jury. Quoting the commentary to Fed.R.Evid. 405 (nearly identical to TRE 405), CCA reasons that not only was the State required not to prove to the jury that those acts had actually occurred, it would have been improper for the state to do so. Judgment is therefore, affirmed.

PDRS GRANTED IN MARCH 2002
1718-01 ROY, RAYMOND JOSEPH 03/06/02 A Cameron POCs: 055111153
1. Did the Court of Appeals err by holding that no detention occurred when Appellant was not stopped?
2. Did the Court of Appeals err by holding that the subsequent search 'for weapons' was reasonable?
1733-01 DRAGOQ, RANDY LEE 03106102S Tarrant Poc./firearm by Felon: NP
1. Whether the Court of Appeals' opinion exhibits a fundamental misunderstanding of speedy trial jurisprudence when it holds that an alleged assurance by the state will excuse Appellant's 3-1/2 year delay in asserting his federal constitutional speedy trial right.
2. Did the Court of Appeals opinion fundamentally misinterprete (continued on page 42)
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pret federal constitutional speedy trial jurisprudence when it held that a record silent on the reasons for the delay weighs 'heavily' against the state?

3. Did the Court of Appeals err by concluding that the mere passage of time (3-1/2 years) satisfies Appellant's responsibility to show he was prejudiced?

4. Assuming that the mere passage of 3-1/2 years creates a presumption of prejudice, did the Court of Appeals err when it failed to find that such a presumption was rebutted by (a) the absence of any legitimate defense to Appellant's crime, and (b) Appellant's pre-existing imprisonment for murder?

5. Does the Court of Appeals assertion that Appellant was prejudiced by the possibility of being impeached by a former conviction transform illusory prejudice into real prejudice?

6. Did the Court of Appeals err when it relied upon a trial court conclusion which was not supported by the any evidence and was made long after the trial court had rejected Appellant's speedy trial claim?

7. Did the Court of Appeals misconstrue the rules of appellate procedure when it decided that it lacked the authority to abate, and in refusing to abate this case?

1808-01 GOLLIHAR, DOUGLAS CHARLES 03/06/02 A Hood Felony Theft: 056//606

1. The Court of Appeals erred in applying the harmless error test for non-constitutional error, where the error involved the denial of Appellant's right to due process and his right to trial by jury on all elements of the offense.

2. The Court of Appeals erred in holding the failure to obtain a jury verdict an essential element of the offense, which increased the punishment range, can be reviewed for harmless error where the only way to uphold the jury verdict in such a case is to reform it.

2115-01 WATTS, JOHN 03/06/02 A Harris Water Pollution: 056//994

2. The trial court and appellate court misread 
American Plant Food Corp. v. State, 587 S.W.2d 679 (Tex.Crim.App, 1979) to hold that 'a ditch is water in the state when, in fact, the specific holding of American Plant Food Corp v. State, supra, was, 'this drainage ditch water' was surface water. 'This being so, the oral instruction misstated the law to the jury.

3. Even assuming for argument's sake that a drainage ditch is water in the state, the appellate court ignores prior case law when it summarily concludes that since the oral instruction was a correct statement of law, it therefore, was not a comment on the weight of the evidence.

2289-01 MONREAL JR., ALFREDO 03/13/02 A Tarrant Aggravated Robbery:

1. Did the Court of Appeals err in holding that Monreal had waived his right to appeal, and, therefore, could not appeal his conviction without permission from the trial court.

2053-01 HERNANDEZ, ARTURO CHAVEZ 03/20/02 S Klegurg POM:

1. Must a party seeking to introduce evidence of a scientific principle always present evidence sufficient to satisfy the test of Kelly v. State, 824 S.W.2d 568 (1992), regardless of the particular scientific principle?

2. If the Court of Criminal Appeals or a court of appeals has determined the validity of a particular scientific principle nevertheless to satisfy the first two prongs of the test of Kelly v. State, 824 S.W.2d 568 (1992)?

3. Did the Court of Appeals in this case err in holding that the trial court had abused its discretion by admitting evidence of the results of a urinalysis test of the Appellant's urine sample? 2082/5-01 GREGORY, GLENN GORDON 03/20/02 S Gillespie POM:

1. A nurse employed by a non-profit organization, "Child Abuse and Beyond" performed a sexual assault examination on the victim pursuant to a "law enforcement referral." Were statements the victim made to the nurse admissible under the medical diagnosis - treatment exception to the hearsay rule? TRE 803(4).

2254-01 MCCAFFREY, VIRGIL L. 03/20/02 S Gillespie POM:

1. Does art. 38.23 prohibit the use of information obtained in violation of law when that information is not admitted into evidence against the accused at trial?

2. For purposes of art. 38.23, does Appellee have standing to complain about a breach in the divorce decree between third parties?

3. Did the Court of Appeals err in holding that art. 38.23 requires suppression of evidence obtained in the course of a private party's violation of the criminal trespass statute?

4. Was the search of the residence and seizure of the marijuana lawful pursuant to the good faith exception of art. 38.23(b)?

2156-01, CONSUBLO FREEMAN 3/27/02 S Nueces Retaliation

Did the COA err when it effectively held that failure to seek recusal of the trial judge was per se ineffective assistance of counsel?

2360-01, TOMMY TREVINO, 3/27/02 S Tarrant Murder

1. Did the COA err in deciding that Appellant was entitled to the sudden passion instruction without addressing the state's argument that Appellant's reaction was not one that society would be willing to recognize as justified, in violation of the relevant language of the Rules of Appellate Procedure requiring appellate courts to address every issue raised and necessary to disposition of the appeal?

2. Did the COA err in applying only selective portions of the applicable harm analysis upon which the state had relied and thereby violate not only the dictates of the biune precedent from this Court, but also the language of the Rules of Appellate Procedure requiring that issued opinions address every issue raised and necessary to disposition of the appeal?

3. Did the COA err in finding error in the trial court's refusal of Appellant's requested instruction on sudden passion on Appellant's part such that the jury could have reached such a conclusion only through sheer rationality or pure speculation, either of which would violate this Court's binding precedent?

2189-01, HAROLD WAYNE BAILEY 3/27/02 A Harris Failure to Stop and Render Aid:
1. When must the defendant file a notice of appeal from a condition of probation imposed after time to file notice of appeal has expired?

2. Did the Court of Appeals err by dismissing Appellant's appeal for failure to file notice of appeal within 30 days of the judgment when the restitution order Appellant sought to appeal was not signed until 30 days after the judgment?

COURT OF APPEALS
ACQUITTAL ORDERED FOR LACK OF AFFIRMATIVE LINKS: JENKINS V. STATE, Nos. 13-00-0062-CR & 13-00-0065-CR; 2/28/02.

Appellant was a passenger in a car that was stopped when the driver crossed over the center stripe. Over 100 lbs of pot and 1200 gms of cocaine were found in the trunk, along with paraphernalia, cash, and other items. Two guns were found in the car, one under the front passenger seat. Appellant complains that the evidence was insufficient to link him to the contraband. Appellant was a passenger, had no control over the vehicle, and was not intoxicated. The dope was not in close proximity to Appellant, and in fact was locked away in the trunk. No contraband was found on his person or in his luggage. He had no cash on him, and nothing linked him to the dope. He was nervous, but not as nervous as the other two in the vehicle. He made no attempt to flee, and made no movements toward the gun under the seat. In the light most favorable to the prosecution, the evidence does not support Appellant's guilt either as principal or a party. Because the evidence does not link Appellant to the contraband in such a manner and to such an extent that a reasonable inference may arise that he knew of the contraband’s existence and exercised control over it, trial court’s judgment is reversed, and an acquittal is ordered. [**Good discussion of affirmative links doctrine.]

COMPLAINANT’S HEARSAY STATEMENTS WERE NOT ADMISSIBLE UNDER EXCITED UTTERANCE OR STATE OF MIND EXCEPTION: GLOVER V. STATE, No. 06-00-00169-CR, 2/8/02.

The 26-year-old Appellant had sex with the 14-year-old complainant, who had sneaked out of her father’s house. The mother found out and confronted complainant, who became emotionally distraught and not only confessed that she had sex with Appellant that day, but on a prior occasion. Both complainant and her father were deceased at time of trial. The state argued during the confrontation with her mother under TRE 803(3), and as excited utterances under TRE 803(2), COA rejects both theories of admissibility. The statements went beyond any state of mind, but were offered as a description of past facts, and to establish that the complainant had sex with Appellant. Neither were they admissible as excited utterances. After a lengthy analysis, COA holds that the statements do not fall within the excited-utterance exception to the hearsay rule. COA cannot say the statements in issue were spontaneous and unreflecting, or made without the opportunity to contrive or misrepresent. They had nothing to do with the original offense, and were intended to elicit details of past events that the questioner was already aware of. Moreover, COA holds the admission of this hearsay violated Appellant’s confrontation rights. Because this was constitutional error, COA analyzes harm under TRAP 44.2(a), and holds Appellant was harmed. Judgment is therefore reversed. [**Good discussion of rules of evidence, especially excited utterance rule, which is continually misapplied by trial courts in these types of cases.]

GUILTY PLEA & TRAP 25.2: GARCIA V. STATE, No. 04-99-00513-CR, 1/30/02.

A plea of guilty to the jury does not trigger the limitations of Tex.R.App. Proc. 25.2; thus, a general notice of appeal will suffice.

APPELLATE COURT JURISDICTION: LUCAS V. STATE, No. 06-01-00162-CR, 1/31/02.

Just as the rules of appellate procedure may define how the courts of appeals may acquire jurisdiction, the legislature may limit the appellate court’s jurisdiction. Here, the notice of appeal recited that the appeal was based a jurisdictional defect but no jurisdictional issues were raised on appeal. Court holds that, in spite of the notice, it has no jurisdiction to hear appeal. DEADLY CONDUCT: BENJAMIN V. STATE, ___ S.W.3d ___ (Tex.App. - Waco, 1/30/02).

Deadly conduct is not a lesser included offense of manslaughter or any other offense involving death or bodily injury because it is limited to conduct which does not result in bodily injury.

FELONY DWI: VRBA V. STATE, ___ S.W.3d ___ (Tex.App. - Waco, 1/30/02).

The defendant offers to stipulate, in a felony DWI trial, to his priors to avoid their mention at trial but will not stipulate to their finality Because finality is an essential element of those priors, even though it is defined differently, i.e. probation is a final conviction, the stipulation does not have the same evidentiary effect as the prior judgments and thus, Tamez, 11/11 198, does not apply.

IMPORTANT CASE: DEFENDANT DENIED RIGHT TO PRESENT DEFENSE: FOX V. STATE, No. 14-00-01367-CR, 1/31/02.

Grounded in the constitutional theory that a defendant has the right to present a complete defense, court holds that trial court erred in excluding evidence of similar allegations made against the defendant by the complainants. Court reasons that the excluded evidence was admissible under the doctrine of chances on the theory that while an unusual and abnormal element might be present in one instance, the more often that the event occurs with similar results, the less likely is the abnormal element likely to be the true explanation of the event. It is necessary that the prior events are similar because the probative effect is the likeness of the events.

TRIAL JUDGE’S HYPO TO JURY VENIRE WAS MISSTATEMENT OF LAW, AND DEEMED HARMFUL: TAYLOR V. STATE, No. 13-99-414-CR, 3/14/02

In this aggravated robbery prosecution, Appellant moved unsuccessfully to quash the venire after the trial judge gave jurors a hypothetical in which the imaginary victim was allowed to testify that he didn’t want the defendant to go to jail. Appellant had objected, arguing that a victim may not make a punishment recommendation. Appellant asked for extra peremptories, but his request was refused, and he identified
several objectionable jurors. At punishment, Appellant didn't put on any evidence because of the trial court's hypo. He was sentenced to 50 years. COA, relying on settled CCA precedent, *Satteieweite*, 786/1271 (CCA 1989) (experts cannot make punishment rec), other COAs that have extended its holding to non-experts as well, and its own decision, *Hughes*, 787/193 (Corpus Christi 1990, PDR ref'd) (defense wanted to introduce complainant's idea of an appropriate punishment), holds the trial court misstated the law, and therefore, should have sustained the objection. Moreover, the error was harmful under both TRAP 44.2(a) constitutional error, or (b) non-constitutional error. [*** Good discussion of harmless error rule, former TRAP 81(b)(2), and differences between constitutional and non-constitutional error.]

EGREGIOUSLY HARMFUL PUNISHMENT CHARGE: *BLUITT* v. STATE, No. 2-00-241-CR, 2/14/02.

Defendant complains on appeal of the absence of a jury instruction at punishment about the state's burden of proof for extraneous offenses at that stage. Defense counsel specifically stated on the record he had no objection. COA holds that such a statement does not waive the error and issue is evaluated under *Almanza*. Though other courts disagree, COA here holds that to apply an affirmative waiver standard would be inconsistent with *Almanza*. Because the prosecutor specifically referred to the extraneous offenses and asked the jury to assess the maximum punishment because of them, a request the jury obliged, egregious error was shown and case reversed for new punishment hearing.

MENTALLY ILL DEFENDANT'S STATEMENT ADMISSIBLE: *MCNAZR* v. STATE, No. 04-01-00015-CR, 2/6/02.

COA holds that a mentally ill defendant may still make an admissible admission against interest or a declaration against penal interest. As nothing in the rules addresses that issue, COA does not impose that requirement

"EXPERT" OPINION THAT CHILD VICTIM WAS TRUTHFUL RULED INADMISSIBLE: *AGUILERA* v. STATE, No. 04-00-00059-CR, 2/6/00.

COA rules that trial court should not have admitted expert testimony that the complainant was telling the truth. COA also holds that evidence of the complainant's prior sexual history was admissible to rebut the physician's testimony about lack of apparent injury to genitalia of child complainant. Also, statement by complainant to her boyfriend and aunt one year after offense was not an excited utterance. To be so admissible, the excitement producing the utterance must have been a continual state between the event and the statement.

WAIVER OF APPEAL VALID IF DEFENDANT AGREES; *PRICE* v. STATE, No. 05-01-00067-CR, 1/28/02.

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