

# VOICE For The Defense

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOL. 1 NO. 2

SPRING, 1972

## President's Report

By: Frank Maloney

### CHALLENGES AHEAD! TO THE MEMBERSHIP:

350 of us are doing the work of the many hundreds who practice in the field of criminal law.

How many times have you heard a fellow practitioner say that he was hurt in the trial court by an arrogant judge, or in the Court of Criminal Appeals by an unreasoned opinion, or in the legislature by a ridiculous law?

Why don't WE DO SOMETHING ABOUT IT! Who are the "we"? The answer is obvious.

Unless we do something about it, we are faced with the following which will occur next year:

1. A police-oriented revision of the Penal Code.
2. Police-oriented conforming amendments to the Code of Criminal Procedure.
3. The possibility of judge sentencing.
4. Stiffening of penalties in all crimes as suggested in the prosecutors' version of the Penal Code.
5. Non-unanimous jury verdicts.
6. Obliteration of the exclusionary rule.
7. Necessity of State's consent to waiver of jury.
8. Oral confessions.
9. Obliteration of the *Wade-Gilbert-Stovall* lineup rule.
10. Many other changes, all restricting individual rights by way of "better law enforcement".

If you can stand any one or more of the above, you do not belong in this organization. The Texas Senate and the House have become conservative. Absent strong opposition, criminal law legislation will also become conservative.

This coming year is crucial. It will be one of continuous challenge and testing of TCDLA's purpose: "to protect and insure by rule of law those individual rights



## HOUSTON PRE-CONVENTION INSTITUTE DEFENSE OF DRUG; D.W.I. CASES

A full-day institute on Defense of Drug and D.W.I. Cases will begin the State Bar Convention activities in Houston on Wednesday, July 5. TCDLA is co-sponsoring the Institute with the Criminal Law and Procedure Section.

John Hill, Attorney General-Elect of Texas is the principal speaker. Other outstanding speakers are Charles Tessmer of Dallas, on Preparation for Trial; Warren Burnett of Odessa, on Voir Dire Examination; George Gilkerson of Lubbock, on Jury Argument; and Marvin Teague of Austin, on Your Case on Appeal. Teague is Executive Assistant to the Court of Criminal Appeals.

Direct and Cross-Examination of expert witnesses on drug and D.W.I. will be a major portion of the program. Sgt. Ben Jordy of the Houston Police Department, an expert breathalyzer operator and instructor will be examined on direct by Er-

guaranteed by the Texas and federal Constitutions."

**It is imperative that each one of us bring in at least one new member:**

**It is imperative that at least the great majority of us become sustaining members.**

win Ernst, of the Harris County D.A.'s office, and cross-examined by Frank Price of Houston. Floyd McDonald, City Chemist of Houston will be examined by Ernst, and Jimmy James of Houston will conduct the cross-exam.

William F. Alexander, former First Assistant D.A. in Dallas, will represent the State and Phil Bureson of Dallas the defense in the direct and cross-examination of the expert on drugs. The witness is Dr. Arthur Briggs, Chairman of the Department of Pharmacology at the U.T. Medical School in San Antonio.

The institute will be from 9:00 a.m. until 4:00 p.m. on July 5, in the Continental Room, Shamrock Hotel, Bar convention headquarters. TCDLA's annual meeting immediately follows the institute. A cocktail party for those attending the institute will begin at 5:00 p.m. Institute registration is \$20.00.

## ANNUAL MEETING

Houston, July 5, 1972

Follows Institute

Shamrock Hotel, 4:00 P.M.





Frank Maloney of TCDLA, Judge T. Gilbert Sharpe, Chairman of State Bar Penal Code Committee, and Bob Smith, Vice-President of Texas County and District Attorneys Association, discuss Penal Code revision at a March 24, 1972, meeting.

## Defense Penal Code Study Grant Approved

On June 9, TCDLA's grant request for \$16,782.00 was approved by the Texas Criminal Justice Council. The funds will assist in review of the Penal Code from the defense viewpoint. The prosecutors' have had such financial support for their Penal Code work for over a year. The federal funds are distributed under the Omnibus Crime Control and Safe Streets Act of 1968.

The proposed revision of the Texas Penal Code will be a major issue facing the Sixty-Third Legislature when it convenes in January 1973.

TCDLA's Penal Code Committee is preparing the defense position on the revision. The Texas District and County Attorneys Association has substantially completed a prosecutors' version of the revised Penal Code.

The State Bar presented its proposed revision of the Penal Code to the Legislature in 1971. It was reported by a House committee, but not voted on in either House or Senate. The State Bar Penal Code is the product of over five years work and cost an estimated

\$500,000.00 including donated goods and services. The Code's major critics were prosecutors.

TCDLA's Penal Code Committee is headed by Emmett Colvin of Dallas. Others serving are George Gilkerson, Lubbock; Sam Daugherty, Dallas; Frank Maloney, Austin; Charles W. Tessmer, Dallas; R. Sam Rea, Houston; Travis Shelton, Lubbock; Hume Cofer, Austin; and Phil Burlison, Dallas.

Representatives of TCDLA, Texas District and County Attorneys Association and the State Bar Penal Code Committee met March 24, 1972, in Austin to discuss ways to identify areas of agreement and disagreement. The State Bar Committee is reviewing the Code in light of defense and prosecutorial objections and updating the Bar version to resolve as many differences as possible.

The Bar Committee met June 9-10 to implement these objectives. TCDLA Penal Code Committee members Colvin, Daugherty, Maloney, Shelton and Cofer also serve as members of the Bar Committee.

## Defense Lawyers Say Bail Reform Needed

TCDLA polled the membership through a Bail Bond Reform Questionnaire distributed in January and February. Over 100 replies were received. Many of these volunteered to help push reform.

Questionnaire results indicate that the great majority of defense lawyers support legislative reform to up-date and revise the present bail bond system.

Seventy-three percent favor a 10 percent cash deposit system, similar to the Illinois program. Seventy percent favor establishment of personal bond offices, and 76 percent think legislative guidelines should be adopted to indicate when personal bond should be granted.

Fifty-three percent of the respondents feel that it is ethical and necessary for attorneys to make bonds. The balance feel it is unnecessary, unethical, or both.

An overwhelming 97 percent favor regulation of commercial bondsmen in these areas in order of importance: prohibiting giving advice and counsel to clients; compulsory State licensing, prohibiting recommendation of attorneys, fee-splitting, and solicitation; rate regulation; limiting bonded liability in relation to net worth; and prohibition of advertising.

The Bail Reform Committee met February 11, 1972, reviewed the poll results, and determined to prepare draft legislation in accordance with the thoughts of those responding.

Committee Chairman is Charles Orsburn of Houston. Other members are Sam Daugherty, Dallas; Whitley Sessions, Dallas; Richard Thornton, Galveston; Jack Beech, Ft. Worth; C. David Evans, San Antonio; Sam Callan, El Paso; Bill Fitzgerald, Austin; and Robert D. Jones, Austin.

Orsburn is working with the State Junior Bar, Harris County Bar Association, Harris County Criminal Lawyers Association, Texas District and County Attorneys Association and other interested groups and individuals in an effort to coordinate and prepare reform legislation.

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**OFFICERS:** President, **Frank Maloney**, 612 Capital Nat'l Bank Bldg., Austin, Texas 78701; First Vice President, **George E. Gilkerson**, 1607 Broadway, Lubbock, Texas 79401; Second Vice President, **Randell C. Riley**, 202 Union Bank Bldg., Ft. Worth, Texas 76102; Secretary-Treasurer, **Joe Kegans**, 600 State Nat'l Bldg., Houston, Texas 77002; Asst. Secretary-Treasurer, **Stuart Kinard**, 723 Main Street, Houston, Texas 77002; **DIRECTORS:** **C. Anthony Frloux, Jr.**, Houston; **Phil Burlison**, Dallas; **Percy Foreman**, Houston; **Richard Haynes**, Houston; **Emmett Colvin, Jr.**, Dallas; **Roy R. Barrera**, San Antonio; **Fred Erisman**, Longview; **Joe B. Goodwin**, Beaumont; **Warren Burnett**, Odessa; **Earl W. Smith**, San Angelo; **Ned Wade, Jr.**, Houston; **Thomas G. Sharpe, Jr.**, Brownsville; **Fred Samean**, San Antonio; **Charles W. Tessmer**, Dallas; **Sam Daugherty**, Dallas; **Richard Thornton**, Galveston; **Harry Lee Hudspeth**, El Paso; **Weldon Holcomb**, Tyler. **STAFF:** Editor-in-Chief, **Wesley H. Hocker**, 310 Houston First Savings Bldg., 711 Fannin St., Houston, Texas 77002; Law Editor, **Ray Moses**, South Texas College of Law, 1220 Polk Street, Houston, Texas 77002; Chairman, Publications Committee, **Phil Burlison**, 4400 Republic Nat'l Bank Bldg., Dallas, Texas 75201.

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**JOIN NOW!**  
**YOUR "VOICE FOR**  
**THE DEFENSE"**  
**TCDLA**

## "Interview"

*EDITOR'S NOTE: Chief Justice Robert W. Calvert (born February 22, 1905) is chairman of the Chief Justice's Task Force for Court Improvement. He will retire from the Court in December but intends to continue his work for judicial reform.*

*Calvert has served as Chief Justice for 12 of his 22 years on the Supreme Court. He was elected Chairman, National Conference of State Chief Justices in 1970.*

*Calvert received his LL.B. from the University of Texas Law School in 1931, and practiced law in Hillsboro from 1931 to 1950, when he was elected to the Supreme Court.*

*He was a member of the Texas House of Representatives from 1933 to 1939, serving his last term as Speaker. He was Chairman, State Democratic Executive Committee from 1946 to 1948.*

*Calvert was Criminal District Attorney of Hill County for two terms, and defended criminal cases in private practice.*



**TCDLA:** Justice Calvert, how was the Task Force for Court Improvement initiated?

**JUSTICE CALVERT:** This project goes back to 1969 when the Bar's Judicial Section set up a judicial reform committee. I was named chairman.

In our work, we found many groups working on judicial reform, but no coordination. Furthermore, we found that any significant reform required Constitutional amendment.

When the Task Force first met on October 29, 1971, we agreed that a thorough revision of Article V of the Constitution was indispensable to most of the improvements sought by various groups.

The 14-member Task Force consists of members of the Supreme Court, Court of Criminal Appeals, Chairmen of the Senate and House Judiciary Committees, leadership of the State Bar, members of the Texas Civil Judicial Council, Court of Civil Appeals Justices, and others.

We have reached agreement, and submitted our draft to the Advisory Committee on May 25. Your Association is among the many groups represented on that Committee.

**TCDLA:** I understand that one of the Task Force's major goals is a strong court administration system.

**JUSTICE CALVERT:** Yes. The Chief Justice would be administrative head, with court administrators at every level, paralleling the courts.

Cases could be transferred, and judges assigned, both horizontally and vertically wherever they are needed.

We have over 2,500 judges in Texas, with more appellate judges than any other state, and more district judges than New York. Our problem is getting judges and cases together.

Our judges are elected to their little kingdoms, and nobody can tell them how much to work or what cases to try. There has been some improvement in the metropolitan areas with the central docket and active presiding judges. However, the presiding judge can be deposed if he gets too rough, and so all too often he doesn't exercise his full authority.

**TCDLA:** Are problems with criminal cases a major reason for reform?

**JUSTICE CALVERT:** Yes, but we are looking at the entire system, not just a part.

Delay in criminal cases is one of our most critical problems. The total trial court caseload, much of it criminal, will increase 54 percent by 1977. The Court of Criminal Appeals has the heaviest caseload of any appellate court in the nation, and it is increasing.

Delay in criminal cases results in much greater injustice than in civil cases. A slow civil process is inconvenient, but people's lives and liberty are not at stake.

**TCDLA:** What reforms are proposed for criminal appeals?

**JUSTICE CALVERT:** We recommend Courts of Appeal with civil and criminal jurisdiction. If this is done, there is no need for two courts of last resort.

Texas lawyers immediately ask "why combine these courts?" A better question is why did we ever separate them? That is what I am asked by judges from the 48 states with single courts of last resort.

While some specialization at the trial level is inevitable, I think specialization at the appellate level is terrible.

We refuse to have it on the Supreme Court. We don't have a tort judge, a transportation judge, or a water litigation judge.

Contact with a variety of cases gives a judge enough perspective to avoid ridiculous technicalities. I think specialization was the cause of the Court of Criminal Appeals' unpopular "stomping" and "drowning" decisions a few years ago.

**TCDLA:** Would the Courts of Appeal be able to handle the criminal cases without expansion?

**JUSTICE CALVERT:** Frankly, about half of our Courts of Civil Appeals don't have enough to do. I heard a rumor that one judge is considering resigning because he's worked hard all his life and can't stand the inactivity.

**TCDLA:** Why does the Task Force recommend eliminating specialized district courts?

**JUSTICE CALVERT:** We need courts of general jurisdiction at the district court level to permit better coordination of the work. All judges should be subject to assignment to cases that need to be tried.

This would not completely eliminate specialization. The presiding judge would normally assign a criminal case to a judge most experienced in that area. However, it would eliminate the present waste of judicial time where one judge is overburdened and another remains idle just because he doesn't handle that kind of case.

*Continued on page 4*





**TCDLA's** record of amazing growth and outstanding success during its first year is the result of hard work by many people. Not the least of these is Bill Reid, Executive Director and General Counsel.

Reid's service began days after **TCDLA** was chartered on August 12, 1971, when officers and directors made up two-thirds of the total membership.

He holds a B.A. from Harvard University, and is an honor graduate of U. T. Law School. He was Associate Editor, *Texas Law Review* and Order of the Coif.

He served as a Ford Foundation Texas Legislative Intern in 1964-65. He staffed the House Committee on Criminal Jurisprudence when the Revised Code of Criminal Procedure was considered and enacted.

Reid served as director of the State Bar Committee on Revision of the Penal Code 1966-1970. During a part of this time, he was also the first administrative director of the University of Texas Criminal Justice Project, an experimental program in legal education sponsored by the Ford Foundation.

In 1970, Reid was a legislative aide to Senator Ralph Yarborough in Washington. He moved to the U. S. Senate Committee on Labor and Public Welfare to serve as associate counsel to subcommittees chaired by Senator Alan Cranston of California.

Members are most welcome to visit the State Office in Austin, and Reid encourages all to call for help, or just to drop by.

## AMICUS ACTIVITY

**TCDLA** directors established an Amicus Curiae Committee at their first meeting to recommend action in causes involving issues of major significance to rights of individuals in criminal cases. Director Thomas G. Sharpe, Jr. of Brownsville was named chairman.

The first amicus action taken was the filing of a brief in *Williams v. State*, No. 44,437, decided Feb. 23, 1972, motion for rehearing granted, argued April 5, still pending. *Williams* involved admission of an extraneous offense committed by an unknown person. In his dissent in the first opinion, Judge John Onion criticized the adoption of a "a broad, new and dangerous rule—an exception to an exception which finds no support in the law. . . ."

On April 3, 1972, **TCDLA** joined in filing an *amicus curiae* brief with Harris County Criminal Lawyers Association before the Supreme Court of Texas. The brief supports a petition for writ of mandamus to require a Harris County District Judge to order payment of the statutory minimum attorneys fee required by Art. 26.05 Texas Code of Criminal Procedure. The Judge involved is the Honorable Lee Duggan, Jr. of Houston, who was the only Judge who could be found to take a stand on a common practice, and help get the issue decided. The Supreme Court is holding the matter in abeyance pending a decision by the Cost of Living Council in Washington, D.C. on the applicability of the Economic Stabilization Act on Article 26.05 C.C.P. as amended in 1971.

In addition to Chairman Sharpe, Amicus Curiae Committee members are Joe B. Goodwin, Beaumont; Gil Jones, Big Spring; Pat Priest, San Antonio; Don Stokes, Marshall; Charles Fairweather, Amarillo; Oren Hamlin, Bay City; Gordon Metcalf, Temple; Randell Riley, Ft. Worth; and Alvan Wells, Jr., Killeen.

**TCDLA:** What do you think of the objection that judges of the Supreme Court, Court of Civil Appeals, and civil district courts are not qualified or competent to handle criminal cases?

**JUSTICE CALVERT:** That is utterly ridiculous. While there are a good many who might not want to deal with criminal cases, it is an unsound generalization that they are not competent.

Look at the federal system. Very few of the United States Supreme Court Justices have had criminal law backgrounds, yet they decide our most important criminal cases. Chief Judge John R. Brown of the Fifth Circuit was an admiralty lawyer, and he decides criminal cases every day. Nobody says that he is incompetent or unqualified.

In Texas, there is not a judge on the Supreme Court who could not decide a criminal case as well as a civil one. Many Court of Civil Appeals judges have been district judges handling both civil and criminal cases.

Any experienced lawyer who can read a statute, check annotations, and look up decisions of the U.S. Supreme Court can decide an appeal in a criminal case just as easily as in a civil case.

It may be a little different at the trial level, but not much. All of our district judges outside the urban areas try both criminal and civil cases.

**TCDLA:** What criminal appeals would go beyond the intermediate appellate court?

**JUSTICE CALVERT:** Appeals would be handled very much as in civil cases. The Legislature would provide that the judgment of the Court of Appeals would be final in misdemeanor and many felony cases, except perhaps in cases of dissent and conflict. The Supreme Court would review only on writ.

We do recommend direct appeal to the Supreme Court in extraordinary cases, such as where the death penalty is imposed, and perhaps others.

**TCDLA:** What do you propose as to selection of judges?

**JUSTICE CALVERT:** First, the draft of Article V provides for non-partisan popular election of all judges. This would simply take the party labels off of judges.

Our alternative, to be submitted as a separate Constitutional proposition at the same election, would require selection of appellate judges by the merit, or so-called Missouri Plan, and would authorize the Legislature to extend this to trial judges.

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