VOICE For The Defense

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOL. 1 NO. 1 WINTER, 1972

CRIMINAL BAR NOW REALITY

The Texas Criminal Defense Lawyers Association exists! The idea of providing an organized voice for criminal defense lawyers was made a reality in less than a year.

TCDLA began with a purpose and strong leadership. The enthusiastic support of defense lawyers in all parts of the State has built it into a viable organization.

TCDLA was formed and the leadership named at an organization meeting held during the State Bar convention in Dallas on July 2, 1971. The officers and directors were nominated and the structure designed by a committee co-chaired by Tony Friloux of Houston and Phil Burleson of Dallas.

The Association was incorporated August 12, 1971, under the Texas Non-Profit Corporation Act. The charter states the purposes of the Association:

"to protect and insure 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 through educational programs and other assistance; and through such cooperation, education and assistance to promote justice and the common good."

President Frank Maloney of Austin named the co-chairmen of the initial organization committee, Friloux and Burleson, to head the charter membership drive.

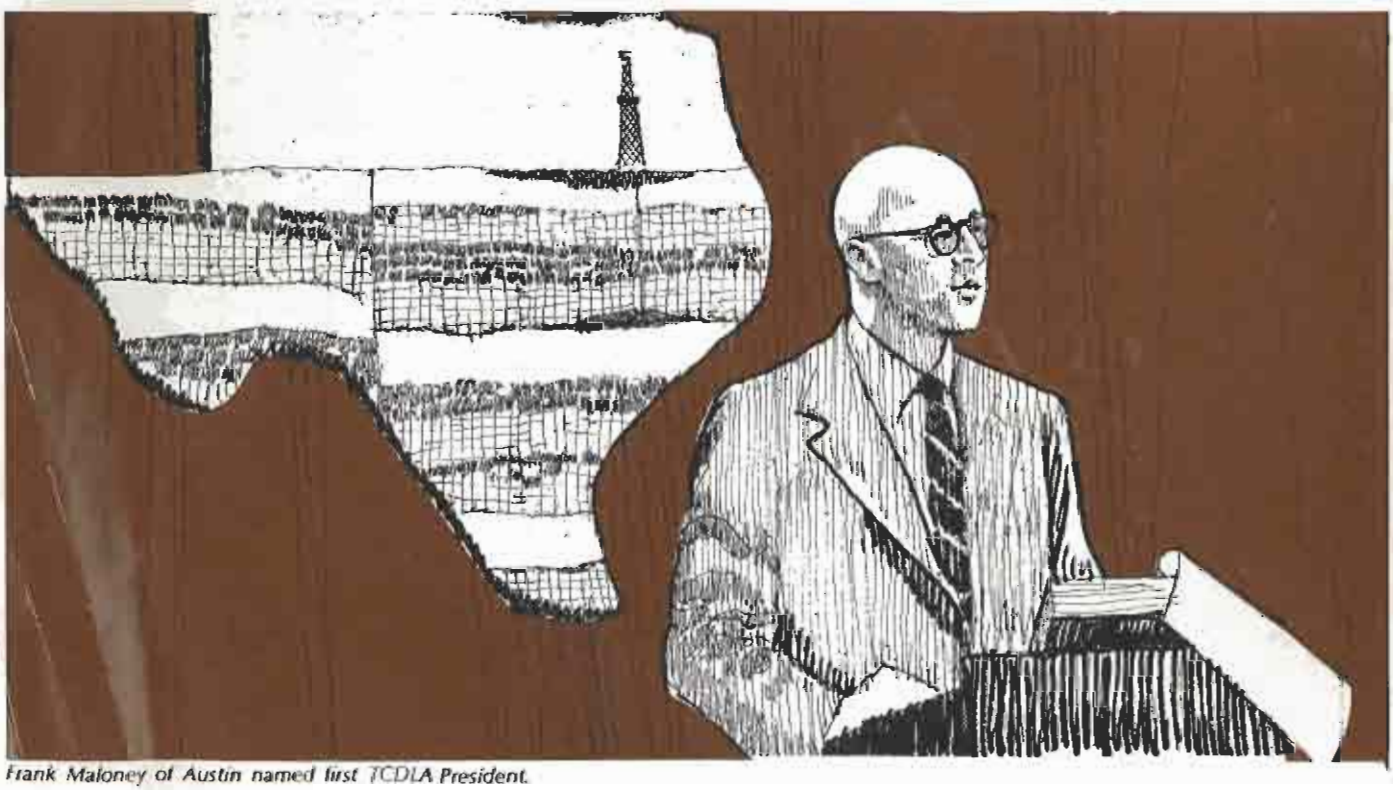
The present general counsel, Bill Reid, was engaged temporarily to assist in the organization and membership drive. The first director's meeting, scheduled for mid-October, marked the critical date to determine whether the infant group could muster enough support to survive.

A formidable first step in bringing the State's criminal defense lawyers together was to identify them. Recommendations of well-qualified defense lawyers were sought from district judges, local bar presidents and members.

The tremendous need for a Statewide **VOICE FOR THE DEFENSE** is reflected in the great success of the initial membership drive. Over 150 had joined by the mid-October charter membership deadline.

This strong support throughout the State permitted the directors to act positively, authorize projects, an office and staff.

Following the successful charter membership campaign, the work of launching committees and projects began. Planning for the general membership drive was a concurrent task. That drive is now well underway. It will provide **TCDLA** the broad base of support essential to make the young Association strong and effective.



Frank Maloney of Austin named first TCDLA President.

President's Report

By: Frank Maloney

The Texas Criminal Defense Lawyers Association will — for the first time — provide a **VOICE FOR THE DEFENSE** in matters affecting the administration of criminal justice in Texas.

The enthusiastic reception and rapid growth of our Association is a clear indication of real concern about recent trends toward more regressive and repressive laws. The trend can be clearly seen in judicial, executive and legislative decisions and actions, both State and Federal.

In speaking about the Association's purposes and goals to trial lawyers' associations in Corpus Christi on October 22, in San Antonio on December 10, and in El Paso on December 22, 1971, it was evident that this concern is widespread.

Only through a well-organized and active organization can criminal defense attorneys effectively work and speak out against the increasing erosion of fundamental constitutional rights.

Work has commenced on our most immediate task — a thorough study of the porposed Penal Code revision — to insure that individual rights are fully protected when that massive work is enacted in 1973. Certainly we must resist efforts to diminish the function of the jury in sentencing, work to prevent multiple prosecutions and other proposals which have been made to restrict rights and fair trials.

We must take an active part in judicial reform in Texas. A task force established by the Texas Civil Judicial Council has began a thorough study of our constitutional and statutory provisions on the judiciary. **THE VOICE FOR THE DEFENSE** must be heard on these proposed improvements.

TCDLA must look at our entire Texas judicial system with a view toward substantial change and improvement at the appellate level, in the organization and operation of our trial courts, and in the selection of well-qualified persons to serve the bench.

The need for improvement is demonstrated by one example: In 1970, each judge of the Court of Criminal Appeals wrote an average of 207 opinions, compared to an average of 14 written by judges of the Supreme Court.

We must assist and promote efforts to make our judicial system function more fairly. We must consider and express ourselves on proposals to reorganize the appellate system through mergers, establishing intermediate Courts of Appeals, or other means. We should actively support the creation of a strong judicial administration office.

Individually and collectively, we must seek out and encourage men of integrity, ability, and courage to seek judicial office. It is particularly important that criminal cases be heard by judges who know the law and have the courage to rule in accordance with law, regardless of political pressures.

The State, our clients, and justice will best be served by our assuming an active role in basic reforms such as these.

Another essential function of the Association is to provide criminal defense lawyers with up-to-date educational and informational services. **TCDLA** co-sponsored a most successful and helpful criminal law seminar in San Antonio on January 29. We are planning a practice-oriented institute in Houston on July 5, the day before the State Bar Convention.

We need to compile and distribute a directory of expert witnesses and investigators. A brief, motion, and charge bank must be established, and other practice aids should be developed for members. We can only accomplish these objectives with the active participation of the members.

In creating this Association, we have assembled an outstanding pool of talented and knowledgeable criminal defense lawyers. The potential for gathering and sharing practical information now exists, but in order to realize that potential, each member must take an active role and contribute his talents to our committee and project work. Each member must produce as well as receive the benefits of our joining together.

Cooperation is one of the most important reasons for **TCDLA's** existance. For the first time in Texas, a ready reference of practicing criminal defense attorneys in all parts of the State is at hand — your membership roster. We must use it, and stand ready to render aid and assistance when called upon by our fellow members.

It is imperative that we, as lawyers dedicated to representing the people, actively seek to improve our laws, our courts, and our own competence in the defense of criminal cases. With your help and cooperation, **TCDLA** will move toward and accomplish these goals.

Law Notes For The Defense

By: Ray Moses,
Law Editor

"Crediting The Defendant's Sentence With Time Served"

It has been said that time is the stuff of life. In the vernacular of the criminal defense attorney, "time" is equivalent to the period which his client will have to serve in confinement. With the exception of the issue of guilt, the client's concern is generally centered on the question of how much time he will receive. This brief discussion focuses on the present state of the law with reference to the defendant's right to credit for time served.

Sentence Following Retrial - In *North Carolina vs. Pearce*, 395 U.S. 711 (1969) the Supreme Court held that a defendant whose conviction is set aside and who is subsequently retried and convicted must be given credit for the portion of his first sentence already served. The Texas Court of Criminal Appeals has recognized the validity of this rule and given it retroactive application. See *Ex Parte Ferrell*, 445 S.W.2d 729 (Tex.Crim.App. 1969).

Increasing Severity of Sentence on Retrial - If the defendant is sentenced by the judge at the original conviction, there is no constitutional bar to the imposition of a more severe sentence by the same judge on retrial **provided** that the factual data underpinning the reasons for the more severe sentence appear affirmatively in the record of the cause. These reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. See *North Carolina vs. Pearce*, 395 U.S. 711 (1969). Noted in 23 Sw. L. J. 933 (1969).

In an interesting twist, the Texas Court of Criminal Appeals has taken the position that while this rule of *North Carolina vs. Pearce* is perfectly valid in cases where the judge is the arbiter of punishment, the rule is inapplicable in cases where the defendant's punishment at retrial is assessed by a jury. See *Gibson vs. State*, 448 S.W.2d 481 (Tex.Crim.App. 1970). As Judge Onion suggested in his

Continued on page 3

dissent in *Gibson*, the logic of the majority makes it rather risky for a defendant to elect to have the jury assess his punishment upon retrial.

Time Served Prior to Imposition of Sentence - There is apparently no federal constitutional right to credit for time spent in jail prior to sentence. See *Gremillion vs. Henderson, Warden*, 425 F.2d 1293 (5th Cir. 1970).

In construing Art. 42.03 CCP, The Texas Court of Criminal Appeals has upheld the discretionary authority granted to the sentencing court to withhold or grant the defendant credit on his sentence for the time, or any part thereof, which the defendant has spent in jail from the time of his arrest until his sentence by the trial court. See *Bennett vs. State*, 450 S.W.2d 652 (Tex.Crim.App. 1970) which recognizes the trend in the more progressive jurisdictions toward the requirement of credit for presentence custody yet holds that the issue is not one of federal constitutional dimension.

In the case of retrial after the original conviction is set aside, the Texas appellate court holds that the trial judge at the second trial has no authority to grant credit for time served prior to the imposition of the first sentence is no credit was originally given by the judge who presided over that trial. It is discreionary with the judges who sentence the defendant at the time of his original conviction and at the time of the second conviction to grant his credit for the time he has spent in jail prior to sentence under Article 42.03 CCP. *Ex Parte Washburn*, 459 S.W.2d 637 (Tex.Crim.App. 1970). As yet the court has not indicated whether under Article 42.03 CCP credit could be given at the second trial for both periods of time if the judge who grants the request for credit presided over both trials.

Time Spent in Jail Pending Appeal - A defendant who appeals his conviction has a constitutional right to credit on his sentence for the time spent in jail pending his appeal, i.e., in non-capital cases from the date of sentence to the date of issuance of the mandate of the Court of Criminal Appeals; in capital cases from the date notice of appeal was given to the date of the issuance of the mandate of the Court of Criminal Appeals. In *Robinson vs. Beto*, 426 F.2d 797 (5th Cri. 1970) the court stated: "Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts."

The Texas Court of Criminal Appeals has taken cognizance of the fact that *Robinson* has the effect of destroying the statutory discretion vested in the trial judge by Article 42.03 CCP as to the granting of credit for post-sentence confinement pending appeal. Thus, in Texas today it is constitutionally mandatory that (such) defendants receive credit for time spent in confinement pending appeal. See *Ex Parte Griffith*, 457 S.W.2d 60 (Tex.Crim.App. 1970).

With respect to *pre-Robinson* convictions where credit was not given for time spent in custody pending appeal, the convict is entitled to have the convicting court certify the amount of such time credit to the appropriate penal institution (i.e., the authorities of the Texas Department of Corrections in the case of convicted felons or the local sheriff's department in the case of convicted misdemeanants). The time credit issue may be raised by application for writ of habeas corpus. If the court grants the credit, the issue is moot and the application may be denied.

It seems clear that in the case of retrial after the original conviction is set aside, the trial court presiding at the retrial is constitutionally required to grant credit for the period of time spent in jail pending appeal of the original conviction and also the period of time spent in custody pending appeal subsequent to retrial. See *Vessels vs. State* 467 S.W.2d 259 (Tex.Crim.App. 1971).

Judge Archie S. Brown of San Antonio (R) accepts plaque from TCDLA President, Frank Maloney at a Criminal Law Seminar held in Brown's honor in San Antonio on January 29, 1972.

JUDGE BROWN HONORED AT TCDLA SEMINAR

A "How To Do It" Seminar attracted over 200 lawyers and law students at San Antonio on Saturday, January 29, at St. Mary's University Law Center.

The Seminar was co-sponsored by **TCDLA** and the San Antonio Trial Lawyers Association. It was presented in honor of Judge Archie S. Brown, 144th Judicial District Court.

Judge Brown, who has been on the bench since 1959, was praised by **TCDLA** President Frank Maloney and SATLA President Pat Maloney for his outstanding contributions to the administration of justice in Texas as a distinguished and courageous jurist, law teacher, civic and professional leader.

Frank Maloney said, "We need more judges like Archie Brown. He knows the law and has the courage to rule in accordance with the law, regardless of political considerations."

The principle speaker was Chief Justice Robert W. Calvert of the Supreme Court of Texas. He addressed the luncheon on the subject of "Supreme Court Jurisdiction in Criminal and Ancillary Matters."

Other speakers included: Presiding Judge John F. Onion of the Court of Criminal Appeals, who spoke on "Current Developments in Criminal Law", Warren Burnett of Odessa, on "Investigation of a Criminal Case"; Roy R. Barrera of San Antonio, on "Preparation for Trial", and George Gilkerson of Lubbock, on "Jury Argument".

Pat Maloney, President of the San Antonio Trial Lawyers Association, and Charles Butts and David Evans, the co-chairmen of the program committee, are all **TCDLA** members.

FRANK CASE COMMENTS

By: Frank Maloney

Hunt, Smith, Talbot vs. State February 9, 1972
Nos. 44,127-29

Photos of nude woman, however vulgar, not constitutionally obscene.

Correct charge is in terms of "contemporary community standards" not "contemporary national community standards" as urged by appellant.

Bradley vs. State, February 9, 1972
No. 44,564

Defendant robbed owner of liquor store, tied him up and took his money; then before robbers left a customer entered store and was robbed. Defendant tried and convicted for robbery of owner and then tried and convicted for robbery of customer. Second conviction appealed.

Affirmed: Owner robbery not same transaction, not "former conviction".

Price vs. State, February 2, 1972
No. 43,140 — 43,141

Defendant abducted and assualted woman. Transaction covered 10 - 12 minutes. Defendant charged on separate information with false imprisonment and aggravated assault, and tried for both offenses at same time before same jury. Jury returned guilty verdicts first of false imprisonment, and second for appravated assault.

Held: Single transaction. State carved therefore second conviction (aagravated assault) reversed.

Adair & Via vs. State, February 2, 1972
No. 43,666] 43,667

Search Warrant - Probable Cuase. Affidavit stating "...Although the informant has not given information in the past, their reliability, and credibility has been established by the fact of their lack of a criminal record, the reputation in the neighborhood, and are well thought of by their fellow associates.".

Held: Sufficient to satisfy the second prong of the *Aguilar* test.

Sufficiency of Evidence -Defendants seated in living room with three others, two others co-defendants in bathroom behind closed door. Officers found plastic bag of marijuana in bathroom (excluded from consideration under *Culmore*) and two marijuana cigarette butts in living room, one from floor and one from an ashtray. Officers testified to visible smoke in room and aroma of marijuana and that physical condition of defendants was as follows: eyes in more or less fixed position, speech slurred and mumbly, irrelevant answers to officer's questions, moved slowly with deliberate steps and officers expressed opinion that defendants and others were under the influence of marijuana.

Held: Evidence sufficient to sustain convictions.

Stoddard vs. State, February 2, 1972
No. 44,389

Affidavit for Search Warrant held insufficient because did not satisfy second prong of *Aguilar* (i.e., didn't state why informant "credible and reliable"). (Among allegations of probable cause was defendant's refusal to consent to search; - case suggests exercise of constitutional right is of no value in establishing probable cause.)

State attempted to justify search of car parked outside defendant's office where he was arrested. First, court holds it was not search incident to arrest (when car searched, defendant was at police station under arrest), and that police had no authority to take possession of defendant's car and conduct inventory search because they'd arrested defendant in his office. Court rejected State's theory that probable cause existed for search of the car and that obtaining warrant unnecessary because of mobility of car. Court said exigent circumstances did not exist (i.e., defendant was in custody at time of search and police held one set of keys, an officer had car under surveillance, and no evidence indicated car about to be moved).

Martin vs. State, January 26, 1972
No. 44,185

Murder - photos of scene and body - such photos held admissible just as a verbal description of scene and body was admissible - issue need not be raised by defendant for State to get photos before jury.

Palmer vs. State, January 26, 1972
No. 44,290

Opinion on Rehearing (unchanged in substance). Defendant took stand during **penalty stage** and on proper cross examination admitted possession of heroin.

Held: Defendant cannot question lawfulness of search wherein heroin was seized.

Burchfield vs. State, January 26, 1972
No. 44,325

Murder - Witnesses said that deceased said that X said that Defendant had gun and was coming to kill the deceased. State introduced this to show why deceased armed himself and court limited by instruction for jury not to consider as true, but that such conversations took place to show deceased's state of mind.

Held: Error. Such conversations not admissible because not shown that defendant know of conversations between witnesses and deceased.

Brooks vs. State, January 26, 1972
No. 44,520

Murder - State introduced temporary restraining order obtained by deceased against defendant's husband.

Reversed: Contents of temporary restraining order inadmissible as hearsay.

Buntion vs. State, January 18, 1972
No. 44,518

Defendant driving her car with one passenger. Marijuana cigarette stubs found in car.

Held: Evidence sufficient to support conviction.

Nash vs. State, January 11, 1972
No. 44,421

Murder. Defendant (IQ of 76 and intelligence - emotional level of 12 year old) arrested, warned by Justice of the Peace and jailed. Four days later defendant subjected to all night interrogation by relay of three deputies. Record unclear but apparently next day defendant taken to scene and stated orally he did it. Next morning defendant taken to Assistant District Attorney who gave warnings and defendant said he wanted lawyer appointed. After further conversation, defendant gave written confession.

Held: Confession admissible. Expression of desire to have lawyer appointed does not preclude re-waiver; Court refuses to follow *U.S. vs. Priest*, 409 F2d. 491 (5th Cir. 1969).

Continued on page 6

"Interview"

EDITOR'S NOTE: John F. Onion, Jr., (born March 27, 1925) Presiding Judge, Texas Court of Criminal Appeals, is a native of San Antonio, Texas and was educated in the public schools of Bexar County and San Antonio. In World War II he served overseas with the United States Marines on Saipan at Okinawa and in Japan. In 1950 he graduated from the University of Texas School of Law.

In 1950 Onion was admitted to the Texas Bar and shortly thereafter became an Assistant Criminal District Attorney of Bexar County. Seven months after entering the District Attorney's office, he was appointed Chief of the Civil Department in which capacity he served for nearly four years.

In 1954 he was elected Justice of the Peace, Precinct No. 1, Place No. 1, Bexar County. In 1956 Onion was elected Judge Criminal District Court No. 2. He became, at 31 years of age, the youngest elected District Judge in Texas.

In 1966 Onion was elected in a state-wide election to the Court of Criminal Appeals.

In 1962 he was chosen as one of three members most deserving of recognition for their outstanding services to the legal profession and the State Bar of Texas. He is a member of the San Antonio Bar Association, which organization twice elected him Director and he has served on various committees of the American Bar Association.

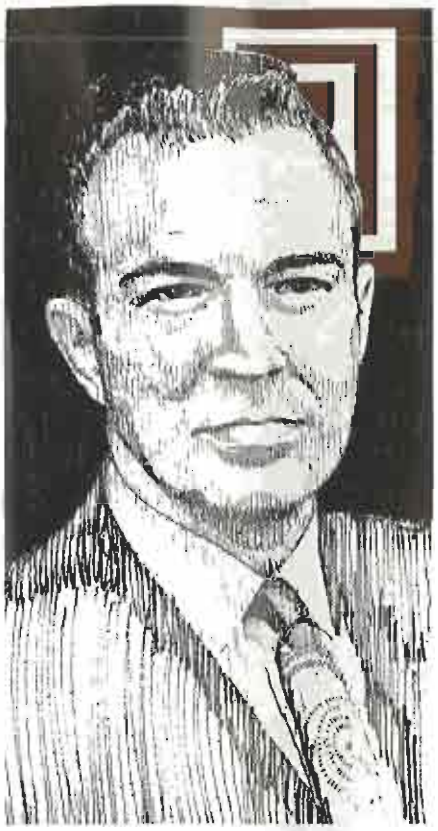
His legal writings have appeared in law reviews and journals from South Dakota to Texas and in publications of the American Bar Association.

Judge Onion is married to the former Nancy Lee Vogelsang and they have two sons, John Frank Onion, III and David Scott Onion, and a daughter, Carol Lee.

TCDLA: Judge Onion, this fall **TCDLA** noted that the Court had adopted the practice of having "tear-off sheets" prepared on each case, summarizing the issues and the law. **TCDLA** suggested that these be made available to defense council, especially if they were available to the State's Attorney.

JUDGE ONION: I discussed this innovation at the San Antonio Seminar, and would like to clarify what the tear-off sheets are and how we use them. These tear-off sheets are **only** for the Court's own use during oral argument, and they are not given to any other persons.

TCDLA: What do you consider the major problem facing the Court of Criminal Appeals at this time?



JUDGE ONION: This Court is confronted with the heaviest caseload of any State appellate court in the nation. In 1970, we wrote an average of 209.6 opinions per judge. On the civil appellate side, including all fourteen courts of Civil Appeal and the Supreme Court, the average was 25.5 opinions a year. The national average is between 25 and 35 opinions a year.

Just trying to keep up with the volume is mentally and physically exhausting, and it affects the quality of our decisions.

TCDLA: What do you think should be done to solve this problem?

JUDGE ONION: Our Courts of Civil Appeal should be made general Courts of Appeal. A good many criminal cases could be satisfactorily terminated at that level. This was proposed by the Judicial Section of the State Bar and introduced in the 62nd Legislature in 1971. However, it was defeated 19 to 7 in the Senate and died. I still support that measure.

TCDLA: Would you favor a single Supreme Court with both civil and criminal jurisdiction?

JUDGE ONION: A Task Force for Court Modernization headed by Chief Justice Calvert is now at work on revision of the judicial article of the Constitution. I am a member of that Task Force. We are considering that issue now.

Personally, I think we need a single court of last resort, if we are looking for a court system that will meet the demands of modern times and the future. With the criminal appeals separated as they are now, we have lost the continuing interest and concern of the Bar as a whole. On the civil side, the trial lawyers, personal injury lawyers, and civil defense lawyers get together and are an effective lobby for reform. That type of concern and support has not been given to the criminal side.

TCDLA: Do you think **TCDLA** can help get some of these reforms accomplished?

JUDGE ONION: I think that the organization of criminal defense lawyers as such is long overdue. It is certainly going to be a far more effective voice than there has been in the past. Spokesmen for the organization can appear before the legislature and urge reform. Individual criminal defense lawyers just cannot do that. They are too likely to be criticized for trying to get a better deal for their "criminals", and they know that would be the kiss of death for any proposal they make.

At the same time, the Texas District and County Attorneys Association is finally getting organized and active. They have had a similar problem. As individual elected officials, they don't want to get involved in these Statewide controversies.

I certainly hope that both organizations can agree on some needed reforms. They can become a very effective force to get things done.

TCDLA: There is a long delay between the time the court hands down its opinions and when they appear in the advance sheets. While the slip opinions are available from a private service, it is too expensive for most lawyers to subscribe. **TCDLA** will note the more important cases, but is there any plan to make the opinions more easily available?

JUDGE ONION: The Court does not have any plan. We have so many other problems that we have never given it much attention. We have complained to West Publishing Company about the delay, and I think there has been some improvement.

Last year, there was a proposal by the State Bar Criminal Law and Procedure Section and the Texas Tech Law School to put out a newsletter with most of the opinions in it, but it never got off the ground.

TCDLA: Our Amicus Curiae Com-

Continued on next page

PENAL CODE STUDY BEGINS

The Penal Code Study Committee held its first meeting on December 17, 1971, at Dallas.

The Committee Chairman is Emmett Colvin of Dallas. Members are Sam Daugherty, Phil Burleson and Charles Tessmer, all of Dallas; George Gilkerson and Travis Shelton of Lubbock; Earl W. Smith of San Angelo; Hume Cofer and Frank Maloney of Austin.

Seven of the nine members of **TCDLA's** Penal Code Committee served on the State Bar's Penal Code Committee which prepared the proposed Penal Code which was submitted to the 61st Legislature in 1971. Tessmer and Burleson did not, but served on other Bar committees which considered and helped prepare the Penal Code.

The Texas District and County Attorneys Association began its study of the Proposed Penal Code in September. The prosecutors' association has received over $250,000. in Federal grans through the Texas Criminal Justice Council during the past two years to finance its Penal Code study and other activities. The well-financed prosecutors began plans on their study long before **TCDLA** was organized, and have almost completed their work.

At its first meeting, **TCDLA's** Penal Code Committee divided the Proposed Code into nine parts for study. Each committee member was named chairman of a subcommittee and subcommittee members were appointed.

The Committee has arranged to exchange recommendations with the Texas District and County Attorneys Association, and will also work closely with the State Bar Committee on Revision of the Penal Code and legislative study groups.

TCDLA must hurry to catch up with the prosecutors' efforts on this important project. Most observers predict that a new Penal Code will be enacted in 1973. The issue now is which version will become law. We must be prepared with our own proposals to insure that the Penal Code adequately protects individual rights.

JOIN NOW!
YOUR "VOICE FOR THE DEFENSE"
TCDLA

Interview
Continued from page 5

mittee intends to take action in cases involving issues of major importance to the criminal defense bar. Do you think this would be helpful to the Court?

JUDGE ONION: I don't know of any instance since I've been on the Court when a request to file an amicus curiae brief has been denied. We need all the help that we can get, and would certainly appreciate it if somebody can shed more light on the matter or further develop the authorities that are brought to our attention.

TCDLA: Many of our members have expressed concern that the United States Supreme Court as now constituted is turning away from its concern for the protection of individual rights and is restricting rather than expanding those rights. What is your view on the present direction of the Supreme Court?

JUDGE ONION: In ten years or so, we will look back on what was done by the Warren Court and see it as the starting point for our criminal law evolution and revolution. Up until that point, we were trying cases very much as we had a hundred years or so before. This was the fault of everybody concerned — the bench, the bar, and the public. The Warren Court caused us to start looking at some of the proceedings that we were using.

The Warren Court was far more liberal than the present Court. It is too early to say how it will turn out with the addition of Justices Powell and Rhendquist, but there was pretty clear evidence of some retrenching before their appointments. It may have been that Chief Justice Burger did not have a firm majority, and that he will retrench even further now. I think there is evidence, like *Harris vs. New York*, that, if he can, the Chief Justice will backtrack even further from the full impact of *Miranda* and some other landmark cases.

TCDLA: What do you consider the most serious problem in the Texas criminal justice system?

JUDGE ONION: The greatest danger to the proper administration of juctice in Texas today lies in the long delay from trial until the appellate record reaches the Court of Criminal Appeals. The problem of volume creates delay after it gets to us, but it is not as great as the time it takes to get here.

In late 1970, a survey was made to determine the delay from trial and conviction until the cases reaches this Court. The average time in the ten most populated counties was 11 months. These counties provide 71.7 percent of the cases appealed. The Statewide average was 10 months and 6 days.

When you take into account the four to six month delay before our Court can reach the case, the problem is critical. There are a great many horrible examples. In one recent case, the man was in jail for five years before his case got here. There was a four year delay between judgment and sentence. The man just got lost in the system. In another case, which we reversed because of insufficient evidence, the man had been in the Harris County Rehabilitation Center for about two and a half years. In another, the court had granted 12 separate 30 day extensions to the prosecutor, and the case finally came to us without his brief.

We have started to take action. Last September in a talk to the Judicial Section, I recommended that the Presiding Judges of the Administrative Districts require a report from all their judges on criminal cases pending in their court and the reason for the delay.

We are just now getting these reports in, and it is having the desired effect in making judges aware of the problem and taking action to move the appealed cases. They are becoming more strict on granting extensions to court reporters, and the attorneys, both prosecution and defense.

Frank Case Comments
Continued from page 4

Onofre vs. State, January 11, 1972
No. 44,453

Officers approached car parked behind closed tavern at 2:30 A.M., saw defendant "dump something under seat", and shined flashlight into car and saw marijuana cigarettes.

Held: Approach to investigate possible criminal activity okay even though no probable cause for arrest, citing *Terry vs. Ohio*. Expressly overrules *Pruitt vs. State*, 389 S.W.2d 475, where held search illegal where officer stopped car for driver's license check, shined flashlight into car, and found illegal liquor.

Southit vs. State, December 21, 1971
No. 44,266

Cross Country Rape Case. Complainant abducted in Travis County, intercoursed in Hays County, and intercoursed in Williamson County, all in approximately 24 hour period. Defendant tried for rape and acquitted in Williamson County; tried for assault to rape in Travis County and convicted.

Continued on page 7

TCDLA Membership Chairman, C. Anthony Friloux of Houston, points to Texas map showing distribution of Association members.

STRONG MEMBERSHIP DRIVE UNDERWAY

The general membership campaign has begun under the leadership of C. Anthony Friloux of Houston. The tremendous success of the charter membership campaign established the Association as a strong **VOICE FOR THE DEFENSE.** This momentum must be sustained and increased. It can only be done by encompassing all dedicated criminal law practioners.

Our ranks must be considered from the standpoint of how effectively we can speak for the criminal defense lawyers of Texas.

TCDLA numbers among its members many of the most outstanding and well-recognized criminal defense lawyers in Texas, but it is also true that we are a small group compared to many Statewide Associations. A broader base of support is essential.

TCDLA intends to be the **VOICE FOR THE DEFENSE** effecting Texas criminal defense lawyers. Decision makers will listen to our messages more attentively if they are amplified through a broad membership which actively supports that voice.

TCDLA leadership is committed to the proposition that the Association must not be another social organization. This means action, projects, participation, communication, and coordination. While our most valuable resource is the knowledge and skills of our members, it is still an expensive proposition to get people together from all parts of the State to communicate their ideas and information, and to maintain a State Office through which these activities can be supported and sustained. A firm financial base is essential to achieve and maintain the level of activity **TCDLA** must accomplish.

A membership committee has been appointed, and area and city chairmen are being named. The State office is contactting those persons invited to become charter members who did not join last fall.

This is not enough. Each of us who helped build this Association has an obligation to keep it growing and moving. Each member should consider himself a member of the membership committee and seek out well-qualified defense lawyers who have not yet joined and urge them to do so.

Frank Case Comments
Continued from page 6

Held: Offense to assault to rape complete when assault made with intent to rape even though planned to consummate offense in another county.

Further Held: "Carving" doctrine and "Former Acquit" do not bar prosecution for assault to rape in Travis County after acquittal of rape in Williamson County.

Haynes vs. State, December 14, 1971
No. 44,217

Police officer's testimony that envelope addressed to defendant found in box wherein marijuana also found held admissible over objection that it was "mere evidence", hearsay, and not best evidence. Such testimony relating "only to the fact that such an envelope was found, not to the truth of the matter stated therein" held to supply the "affirmative link" to the contraband that was absent in *Culmore.*

Rivello vs. State, December 14, 1972
No. 44,345

Joint trial for murder. One defendant did not take stand, and other defendant did to say he was "sorry".

Held: *DeLuna* rule not violated, attorney for "sorry" defendant had no duty to comment on co-defendant's failure to testify and Court's restriction of his argument was proper.

Reid vs. State, January 11, 1972
No. 44,381

Marijuana - Insufficient evidence. Defendant arrived at X's apartment 15 minutes after raid commenced. Defendant had needlemarks. Defendant's driver's license found in cigar box enclosed with seeds, particles, pipe and papers (license itself not admitted.) Defendant had not been observed in surveillance. Marijuana not in open view, not burning, no odor. No testimony Defendant under influence.

Reversed: Insufficient evidence. Needlemarks have no probative value on issue of possession of marijuana; nor in proving Defendant a user of injectible narcotics.

Kinkle vs. State, January 11, 1972
No. 44,464

Same raid as *Reid,* except Defendant present when raided. One officer said under influence, other said normal.

Reversed: Insufficient evidence.

JOIN TCDLA NOW!

DRUG/D.W.I. INSTITUTE SLATED

A full-day skills institute on Defense of Drug and DWI Cases will be held in Houston on July 5, 1972, the day before the State Bar convention convens.

The institute will be held in the Continental Room of the Shamrock Hotel, which is the Bar Convention headquarters.

TCDLA will co-sponsor the institute with the State Bar Criminal Law and Procedure Section. Charles Tessmer of Dallas and Joe Kegans of Houston are co-chairmen of the Association's institute committee. Tessmer is a **TCDLA** Director, and President-Elect of the National Association of Criminal Defense Lawyers. Kegans is **TCDLA** Secretary-Treasurer. Joe Goodwin of Beaumont is Chairman of the Bar's Criminal Law and Procedure Section, and a **TCDLA** Director.

The institute program will be practice oriented, and plans are to demonstrate the proper methods for direct and cross-examination of expert witnesses.

Outstanding defense lawyers and experts are now being invited to participate in this valuable presentation. Plan now to come to the convention early and attend this program.

EDITORIAL

By: C. Anthony Friloux

On a recent newscast, shown throughout the Harris County television area, the District Attorney, Carol Vance, while speaking to a prosecutors group, advocated eliminating the historially unanimous verdict requirement for conviction in a criminal trial.

It is understandable that a district attorney would feel this way after a 13 week trial resulted in an eleven to one hung jury; however, short term emotion and frustration should never be allowed to cloud the real issue.

Our legislative bodies and courts, local, state and federal, are constantly grinding out new and more restrictive statues, the Congress is actually considering a proposal by Senator Lloyd Bentson of this state, to seriously impair the effectiveness of the exclusionary rule and its applicability to illegally seized evidence.

A shocking result is quickly obtained when an open minded investigator reviews the legion of restrictive and punitive statutes, regulations and decisions which are already in force and effect; our "free society" is rapidly becoming one of the most regulated societies in the so called free world.

To allow tampering with the historic constitutional right to a trial by a jury of one's peers, and the heretofore unquestioned desirability of a unanimous verdict requirement for conviction or acquittal cannot be tolerated.

Today's district attorney is generally tomorrow's most vociferous advocate for the defense against the "short cuts" on due process. Tragically, the district attorney has immediate media access to this politically popular position which is generally unavailable to the defense bar.

One wonders what any present prosecutor in Texas who advocates eliminating this historic protective device would say if he awoke one morning and found himself charged with a violation of one of the innumerable federal statutes covering criminal charges resulting from infringement of civil rights.

Cutting corners with due process; with constitutional prohibitations, and with constitutional rights, however popular, is alien to our concept of Anglo-Saxon justice and must be vigorously opposed. The defense can do no less.

VOICE FOR THE DEFENSE
Official Publication of the Texas Criminal Defense Lawyers Association.
Vol. 1 **Winter, 1972** **No. 1**

VOICE FOR THE DEFENSE STAFF

WESLEY H. HOCKER
Editor-in-Chief
310 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

RAY MOSES
Law Editor
South Texas College of Law
1220 Polk Street
Houston, Texas 77002

PHIL BURLESON
Chairman, Publications Committee
3400 Republic Nat'l Bank Bldg.
Dallas, Texas 75201

VOICE FOR THE DEFENSE is published quarterly by the Texas Criminal Defense Lawyers Association, Suite 1005, Brown Bldg., Austin, Texas 78701, as a service to the profession. Contributions from authors are welcomed, but the right is reserved to select material for publication.

One copy of each issue is furnished free of charge to Texas Criminal Defense Lawyers Association Members. Subscription rate for all others is $2.50 per year, and requests should be addressed to the Editor at 310 Houston First Savings Building, 711 Fannin Street, Houston, Texas 77001.