VOICE For The Defense

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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President's Report

Phil Burleson, *Dallas*

A two month long search came to an end on February 12, 1974 when Gary F. DeShazo of Austin accepted the postion of Executive Director of TCDLA. The position initially became vacant with the exit of William G. Reid last November, and has been filled in the interim by Executive Secretary Diana Pace. Gary's acceptance followed an exhaustive selection process carried on by a ten man committee consisting of Phil Burleson, George Gilkerson, C. David Evans, I. J. "Boots" Krueger, George Luquette, Charles McDonald, Peter Torres, Jr., Ned Wade, Jr., and C. Anthony Friloux, Jr. Past President Frank Maloney advised and counseled with the committee during the many interviews that were taken.

DeShazo, 29, holds a B.A. (1967) and M.A. (1970) degree in Economics from T.C.U. and a J.D. from Texas Law School (1973). At T.C.U. he was President of Sigma Alpha Epsilon and was a member of Omicron Delta Epsilon Honor Society in Economics.

Following graduation from T.C.U. in 1967 he held the position of Contract Administrator with General Dynamics Aerospace for three years during which time he was largely involved in contract negotiations with the Federal government and traveled extensively representing the company.

In 1971 he left General Dynamics to enter law school which he completed in 27 months while working as a legislative assistant with the Trial Lawyers Association.

President Phil Burleson (left) observes as State Bar President Leroy Jeffers (right) addresses TCDLA Board of Directors in Fort Worth.

Upon graduation, DeShazo practiced law and worked with the Legislature.

He is married to the former Carolyn Youngblood and they have a son, Scott, age 3.

I think the hiring of this man signifies the beginning of a new outlook for the Association. We have grown from an initial membership of about 30 to nearly 900 members in less than 3 years. While our basic goals remain the same we are now able because of our size to look towards and reach new goals that have not been possible in the past.

Membership will continue to be one of our highest priorities. Skills Courses and services for the members will be expanded, updated, and improved. We will continue to offer our members more aids for their practice than any other professional association and to be their voice in Austin. I believe that our regular publications, the VOICE FOR THE DEFENSE and NEWS NOTES will reflect both our enthusiasm and our determination.

But the most immediate and important concern is in the legislative area. Delegates to the Texas Constitutional Convention are currently considering drastically changing our system of criminal justice. We now have sufficient members and force to make a significant impact on the Legislature. TCDLA represents criminal lawyers from all over the state of Texas who are concerned over the proposed changes to the Court system. We want to protect criminal justice as we know it in Texas, and to resist its dilution by such changes as abolishment of specialized courts and appointing judges rather than letting the people elect them. We have every reason to expect that 1974 will be a good year for the Association. Our outlook is optimistic, but we cannot rely on prior accomplishments. We will continue to work to be a strong voice for the Defense in Austin.

Editor-in-Chief
EMMETT COLVIN, JR., Dallas

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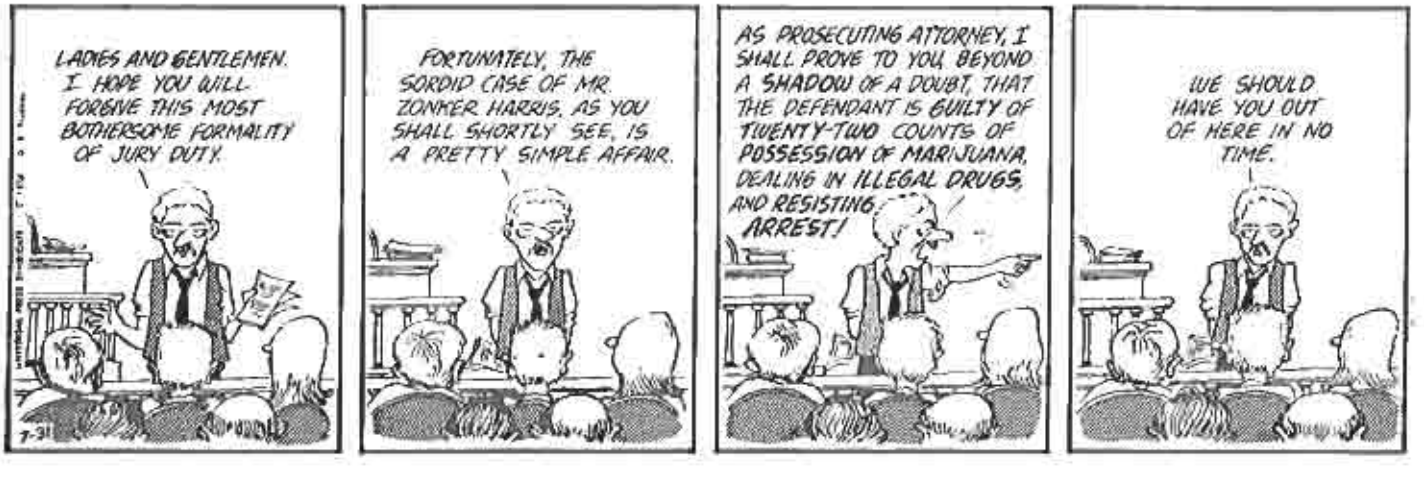
DOONESBURY by Garry Trudeau



VOIR DIRE QUESTIONS

Accomplice to Murder with Malice

by

Thomas G. Sharpe, Jr.

The following voir dire examination questions were recently used in a case where the accused was indicted of being an accomplice to murder with malice. Seventeen days were required to select a jury, and the ensuing trial lasted two months with a verdict of guilty resulting. The prosecutor demanded the death penalty, and the punishment was set at seven years probation.

VOIR DIRE EXAMINATION QUESTIONS

1. Of what does your immediate family consist?
2. What is your religious preference?
3. What is the extent of your educational background?
4. To what clubs, societies, professional associations or other organizations do you belong?
5. What is your occupation and how long have you been so engaged?
6. Have you ever been a member of the Armed Forces, and if so, in what branch and for what length of time did you serve and what was the highest rank or grade you attained?
7. Is any member of the jury panel friendly, associated or related to any one in the District Attorney's office or any law enforcement agency whether it be city, county, state, or federal?
8. Were you or any of your relatives ever a member of a law enforcement agency either in civilian or military life?
9. Have you ever been the victim of a crime?
10. Have any members of your family or close friends ever been victims of a crime?
11. Have you or any members of your family ever been the complaining witness in a criminal case?
12. Have you ever served as a juror on civil cases?
13. Have you ever served as a juror in a criminal case?
14. Have you ever served as a juror in a case involving alleged acts of violence, or allegations charging someone as an accomplice?
15. Was an agreement as to a verdict reached in each case in which you have served as a juror?
16. The State has indicated the following persons will be called as witnesses in this case. State your relationship to each witness whom you know.
17. You realize, of course, that the indictment in this case is no evidence of any kind? That it is merely a piece of paper used to bring the defendants into court, the same as a complaint in a civil case?
18. Of course, you know a man is presumed innocent until he is proven guilty beyond a reasonable doubt?
19. You also realize, of course, that you must give the defendant the benefit of this presumption of innocence without any mental reservations whatsoever? And that you are to consider this presumption of innocence as actual proof of innocence until it is overcome by proof of guilt beyond a reasonable doubt. Now do I have your promise that you will give the defendant the full benefit of that presumption of innocence?
20. Do you understand that all the elements of the crime charged must be proved beyond a reasonable doubt, and that if any element is in doubt, would you then vote not guilty?
21. If the prosecution fails to prove the guilt of the accused with that degree of moral certainty that amounts to proof beyond a reasonable doubt, would you then vote not guilty?
22. You understand, do you not, that the burden of proving the defendant guilty beyond a reasonable doubt rests with the prosecution, and that the accused need not introduce any evidence whatsoever?
23. Knowing that, would you require the accused at any time to satisfy you as to his innocence?
24. And, knowing that, you realize that the defendant is not bound to explain his side of the case since the burden of proof does, in fact, rest with the prosecutor. So that you would not consider the accused's failure, if any, to testify as an indication of his guilt, would you?
25. Knowing the charge against the accused, John Doe, could you give him the same fair trial that you would give him if he were charged with a lesser crime?
26. Do you know anything about the facts of this case other than what you have heard in court today?
27. Have you read about this case in the newspapers or heard about it over the radio or television?
28. Have you formed some opinion as to the guilt or innocence of the accused or about the merits of the case from what you have read in the newspapers or from what you have heard on the radio or television?
29. Would you require evidence to remove or change your opinion or to remove suspicion or evidence assumed?
30. Knowing what you know about this case and any opinion you have formed about it, would you be satisfied to be tried by a juror having your frame of mind?
31. Would you set aside any opinion you may now have and judge this case solely on the evidence introduced during the trial and the instructions of law given to you by the court?
32. Do you realize that the court will instruct you as

to the law, but that you are the sole and exclusive judge of the facts?

33. Would you judge this case solely on the evidence before you, and not allow the fear of later criticism to affect your verdict?
34. Would you give the accused the benefit of your individual judgment in arriving at a verdict in this case?
35. Now, if you came to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you find that a majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?
36. Would the fact that you were in the minority influence your vote at all?
37. You understand, of course, that an impartial trial by an unbiased jury is a constitutional guarantee no matter what the charges are against the defendant?
38. Do you realize that you are bound to reach a verdict solely on the evidence introduced during the trial?
39. If from your experiences you believe or have the feeling that certain facts exist, but these facts have not been proven by satisfactory evidence, would you discard your beliefs or feeling and decide this case only on the evidence or lack of evidence?
40. Do you understand that the comments of the prosecutor are not evidence in this case?
41. In deciding whether or not you are going to believe a witness, would you consider the witness's conduct on the stand, his opportunity and ability to observe, his bias or prejudice, and the probability or improbability of his story?
42. Do you know that circumstantial evidence is like a chain which must bind the defendant to the crime, and that the chain is only as strong as its weakest link?
43. Do you agree that every element of a circumstantial evidence case must be totally inconsistent with innocence; consistent with and pointing to guilt, and that if the evidence does not point directly to guilt, you must render a verdict of not guilty? Will you faithfully apply that rule of law?
    (Re: 42 and 43 above—Do not refer to this until closing argument unless the State qualifies on it.)
44. In this case, John Doe, is charged with offering $2,000 to Bob Tough, on or about June 13, 1968, said allegation being made that the act was the one which made him an accomplice, and further that the $2,000 was offered in order that Ralph Victum be killed.
45. You understand that it is the first obligation of the State to prove the offense of murder, against Bob Tough, and the mere fact that a body was found in Hidalgo County, Texas, is not sufficient to prove murder by anyone.
46. You further realize, that if the State of Texas does not prove that Bob Tough committed the offense of murder, then you must find by your evidence "not guilty."
47. If evidence is offered in this case to show that John Doe and Bob Tough knew each other, and talked on several occasions, would you consider this as evidence of guilt in this case?
48. In all likelihood, one or more police officers, sheriffs, Texas Rangers, and agents of the State of Texas, will testify in this case. Would you be inclined to believe a witness who was employed by the State more than any other witness? Also, would you give more weight to the testimony of a law enforcement officer than to any other witness in the case?
49. This case will involve the use of many witnesses and many exhibits. The evidence will be lengthy and complicated. Would the fact of such complexity inhibit you in any way from arriving at a reasonable, fair, objective judgment as to the defendant on trial?
50. Would the mere complexity of this case alone incline you to believe that the defendant on trial was guilty without a careful weighing and sorting of the evidence?
51. A witness may be called in this case who has a criminal record. Do you have any opinion at this time as to whether you would believe such a witness more or less than any other witness?
52. There were 1500 persons called on this jury panel. Do you recognize any of the panel as your close friends or associates?
53. This is an election year, and the State's public officials in this County are running for election. Are you aligned with any political party, backing or opposing Mr. Smith? Have you voted for him before?
54. Are you acquainted with Mr. Smith, or his associates in the District Attorney's office? (names)
55. Have you ever had the occasion to use the services of the District Attorney's office, on a hot check, a complaint, or any miscellaneous matter?
56. Our Texas law provides for a bifurcated, or two part procedure in the Trial Court. The first part is what is known as the innocence-guilt stage, and the second part, if necessary, is the sentencing stage. The second stage is not necessary in many cases, however, we are required to ask you about your opinions regarding sentencing at this time. The offense charged has a range of punishment from two years to death. A probated sentence may be available to a defendant who has no prior felony conviction, if the sentence imposed is ten years or less.
57. Do you understand what capital punishment is?
58. Do you have an opinion as to the type of case that capital punishment should apply to?
59. Have you ever known anyone whose father was executed under a death sentence? Have you seen

continued on page 7

Thomas G. Sharpe, Jr., was admitted to the Texas Bar in 1963 after graduating from the University of Texas with a B.A. in 1960 and a J.D. in 1963. He is admitted to practice before the United States Supreme Court, the United States Court of Appeals—Fifth Circuit, and the United States District Courts Southern and Western Districts of Texas. Mr. Sharpe is past president of the Cameron County Bar Association, a Director of TCDLA, and a member of the National Association of Criminal Defense Lawyers, the American Judicature Society, the American Bar Association, and numerous other legal organiations. He practices law with the firm of Hardy, Sharpe, and Rodriguez in Brownsville.

Dilemmas in Psychiatric Testimony

by

Richard J. Alexander, M.D., F.A.P.A.

Presented as an original paper at
Titus Harris Society Meeting at University
of Texas Medical Branch, Galveston, Texas
on February 2, 1974.

With the exception of civil commitment, most psychiatrists have little experience with courtroom procedures. Their practice generally does not demand expert testimony from them. However, there are a number of situations which can arise where psychiatrists may be called upon to testify or give opinions in civil and criminal matters. Examples of such instances involve divorce, child custody, determination under Workmen's Compensation, personal injury suits and criminal commitments. While such hearings are often easily settled and determination of the outcome is only a formality, it is not unusual for a few cases to become charged with controversy. Herein lies the dilemma in psychiatric testimony. Many times the psychologic truth lies across or on both sides in an advocacy proceeding. In addition, the rules by which one judges the relevance of psychiatric testimony to law are often crude and ill-fitting to the situation at hand. In such instances, the involved physician finds himself drawn increasingly onto one side or another since courts do not ordinarily provide funds or umbrage for an amicus curiae or friend of the court. Unfortunately, in such matters, psychiatrists cannot sit above the clouds like the Emperor but must face one another in the so-called "battle of the experts." It is the purpose of this paper to provide some guidelines to psychiatrists who are drawn into such situations.

Assuming that the psychiatrist is approached by one advocate or another to testify in court and he is giving serious consideration to testimony, he should begin the preparation of a written report. This report should include a summary of the first contact he had with the case and the reasons for the evaluation. This is important because once the psychiatrist enters the case, he tends to change and alter the course of events and it is easy to lose sight of his original reason for entering the case. (When you're up to your ass in alligators you often forget that your original intention was to drain the swamp.)

Next, he should hold exhaustive interviews with the accused, plaintiff or defendant, and collateral sources, taking copious notes and if possible, recording each interview. Then the notes and recordings must be carefully reviewed and a report prepared which is detailed and thorough from the standpoint of historical data and psychiatric observations. The generous inclusion of quotes from the people involved helps to catch the flavor and tenor of personalities and attitudes. The psychiatrist must omit nothing from the report which contradicts the advocacy point of view he may be involved with.

It may be well to digress and point out that there is rarely a truly objective viewpoint that can be held. This is particularly so in psychiatry. We all have our philosophical framework, prejudice, bias or value system that causes us to agree with and emphasize certain aspects of our world of experience while seeking to ignore those events which do not agree with our preconceived notions of how things "ought to be." It is this bias which frequently determines how we become initially involved in a court situation. Once involved in a case, there is a natural tendency for the participants to become more exaggerated in stressing their own point of view. Careful recording and documentation of information acts as a restraining influence and if the weight of information contrary to his own bias is sufficiently great, the psychiatrist may find that his original reasons for involvement are no longer valid.

After the written report is collated with necessary physical, laboratory and psychologic tests results, the physician should arrive at a psychiatric diagnosis. The report may include any additional or explanatory comments which emphasize his understanding of the underlying mental mechanisms or "dynamics" involved.

At this point, it is necessary to meet with the attorneys involved and to discuss the relationship between the psychiatric findings and the provisions of the law as they may or may not apply to the case. The attorney and physician try to understand one another's jargon and see if there is enough valid overlap in meaning and connotation in their interpretation of the case to go on with court proceedings. The physician needs to be particularly mistrustful and demanding of the attorney who ignores contradictory aspects of the documented record. It is important that the physician assert himself and make sure that the attorney understands the conflicts, ambivalence, ambiguities and contradictions within the client that guided the psychiatrist in reaching his conclusions. Psychiatrists study contradiction and try to understand it. Advocates try to ignore contradiction. This is a natural point of tension between expert witnesses and lawyers that needs to be faced and dealt with. The psychiatrist and attor-

ney are, in a sense, testing one another's attitudes as they pertain to the particular case to see if their strengths can be welded into one viewpoint. This phase generally involves more than one meeting and it is interesting to watch the process of accommodation and assimilation to one another's viewpoint as these conferences proceed. If after or during these contacts, a decision is made to go ahead with psychiatric testimony, then the attorney and physician will find themselves going over those points which need emphasis on direct examination in the court room. The case may be compared to a puzzle in which the pieces can be arranged in more than one way to provide several different interpretations. The psychiatrist is entitled to his own interpretation or configuration of the various pieces of the puzzle but may not dispose of or hide any pieces which do not fit the picture he wishes to present. All the parts, if possible, must be fitted into a whole.

After actually entering court, the questioning of the expert witness starts with the direct examination by the friendly advocate. The first pertinent question after qualifying the expert is generally the question which has to do with the legal point on which the witness is qualified to pass an opinion. For example:

Question: Doctor, do you have an opinion as to whether John Doe, on _____ __ __ date knew the difference between right and wrong or understood the nature or consequence of his acts while he was robbing the A-1 Finance Company?

Answer: I do.

Question: What is your opinion?

Answer: In my opinion, he did not know the difference between right and wrong or understand the nature and consequence of his behavior.

Question: Now Doctor, will you please explain to the jury how you reached your opinion?

After this series of questions, the process of introduction of psychiatric concepts begins. It is important that the physician systematically present those facts which led him to his conclusions. They should include the salient features of the written report. It is essential that the psychiatric concepts be related to specific instances of observed behavior or to quotations from the interviews with the client. The psychiatrist is trying to provide the jury with information which they can understand from their own experience. This has to be in "down home" quotes. He will then try to weave these strands into a psychiatric concept that he wants to convey. Juries take their tasks seriously and generally are positive in their attitude toward expert witnesses. Given enough information in terms that are familiar to them, they can generally retain and comprehend the most sophisticated concepts and apply them to the case in hand. It is a serious error to underestimate them and try to impress them with labels and titles. It is important to address the jury by looking straight at them and talking in a friendly deliberate manner. Humor should be used sparingly, if at all.

To the extent that the picture is consistent and harmonious, the expert witness can anticipate that following direct examination, cross examination will strengthen his viewpoint. He must also be prepared on cross examination to candidly admit to those parts of the history which contradict his viewpoint. It should be added that most courts and cross examining attorneys will allow an expert witness to qualify and add to his answers and will not hold him to an unqualified yes or no. However, some judges are fairly restrictive and will not allow an expert witness the latitude he needs. If this is the case, it should be understood between the psychiatrist and the attorney he is working with to anticipate these points and on re-direct examination to go back over those points brought out on cross examination which need further clarification. It is important to maintain a courteous and open demeanor during cross examination. This, however, does not include being passive and acquiescent.

An additional word is in order about the expense and time. A physician must charge for the time he spends interviewing, conferring, researching, dictating and being out of his office for testimony. This may involve five or six hours of work in a fairly simple, straightforward situation or it may involve easily 30 to 40 hours of work in a complicated case. It is very important in preparation to meet with attorneys repeatedly until all the concepts and manner of presentation are understood.

The following case is presented to illustrate some of the above points:

> AB was a 22-year-old single white male majoring in English at a major university. He confessed to the strangling death of two girls he had known casually. For several months prior to this killing, he had had a fantasy of possessing a woman's body to do with as he pleased. At times he would ejaculate during this fantasy. One Sunday, one of the girls, whom he had previously known, telephoned unexpectedly and asked if she and a friend could come by and use his shower since their new apartment was not yet ready for use. He agreed and shortly after they came to his apartment he became highly agitated. He attacked first one girl in the bedroom and the other as she emerged from the bathroom. After he had placed both girls on the bed, he found that they were still alive and atacked them both again. This time he killed them. Then, "to make it seem right," he raped them. He placed both bodies in the closet and after showing friends through his apartment, with the exception of the closet, and going out on a date to a

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Dr. Alexander attended the University of Texas at Austin and received his M.D. from the University of Texas Medical Branch at Galveston in 1955. He completed his residency requirements in psychiatry at Galveston and then entered the private practice of psychiatry. Dr. Alexander was Director of Mental Health at the Austin-Travis County MHMR 1968-1969. He is a member of numerous professional associations including the Texas Medical Association, Travis County Medical Association, and Titus Harris Society. He is a Fellow of the American Psychiatry Association.

movie, he dumped their bodies in a field in the early morning hours.

He soon became a prime suspect and was interrogated repeatedly over the next few weeks by detectives who described his manner as cool, confident and condescending. Finally, after he was advised by his father that if he knew anything he should tell the police, he made a full, detailed, lucid statement of what had happened. Clinical and psychological evaluation revealed a markedly schizoid, controlled individual who outwardly appeared to be a gentlemanly, congenial, courteous person

The trial was a typical battle of the experts. The defense took the position that AB had a dissociative reaction and that he did not know the difference between right and wrong nor did he understand the nature and consequence of his acts at the time he committed them.

It was also felt, at the time of the trial, he was not competent to aid in his own defense. This statement was made by two examining psychiatrists who gave a lengthy description of AB's background, and personality decompensation prior to the crime, exphasizing the splitting off of content from any type of feeling.

The psychiatrist who routinely did examinations for the District Attorney's Office agreed that AB had a schizoid personality but felt that he was legally sane at the time of the crime and was competent to stand trial.

The jury found AB sane but set the penalty at life imprisonment instead of death, as had been asked by the prosecution.

Psychiatric preparation for the defense took an average of 35 hours of work by each of the two psychiatrists. One-half of the time was spent interviewing and listening to taped interviews; the remainder was spent in dictating notes or in conference with the attorneys and going over the psychiatric aspects of the case, trying to see how it could be applied to the law. Trying to apply McNaghton's rule, which is a cognitive test, to these circumstances was awkward to say the least; somewhat like trying to measure the circumference of a circle with a straight ruler. However, the failure to attempt to do so would have removed the only legitimate line of defense open to AB. Under the new Texas penal code, effective January 1, 1974, the legal test for sanity concerns itself with capacity for restraint in behavior at the time of the crime. Today AB's case would clearly fall under such new guidelines. At the time of the trial, however, observers that the author consulted felt that the presentation of psychiatric testimony, especially in narrative form, was mitigating insofar as the death penalty was concerned.

It has been the author's experience that by following the guidelines suggested above, one can derive a great deal of satisfaction from testifying in court, from the standpoint of thorough presentation of psychological facts and opinions in matters of crucial importance, and hopefully shedding some light on very difficult legal psychologic problems.

Voir Dire Questions

by Thomas G. Sharpe, Jr.

Continued from page 4

the effect on a family whose father or mother was executed under a death sentence?

60. On the offense charged here would you consider two years probation a suitable punishment if a guilty finding were entered by you?
61. Do you know what probation is?
62. Have you ever been in a penitentiary?
63. Have you ever been in a jail?
64. Do you have a religious belief regarding capital punishment?
65. Are you the type of person you would want to have on the jury if you were being tried in a capital case?
66. Italians—do you have a pre-conceived idea about them as a group?
67. Do you have conscientious scruples against imposing the death penalty in any criminal case?
68. Do you have beliefs either religious or otherwise which relate specifically to the imposition of the death penalty and if so, would those beliefs allow you to impose the death penalty in a particular case?
69. This trial may take three weeks to complete. Would the fact that you are required to be in this courtroom Monday through Friday for the next three weeks interfere with your business and/or your management of your affairs to the extent that you would not be able to devote your entire attention to the testimony offered in these proceedings?
70. You understand that during the course of the trial many objections will be made relating to the legal points regarding admissibility, and competency of the particular testimony and exhibits to be offered. This is a necessary part of a judicial proceeding. Do you have any opinion regarding the making of these objections and do you believe that an attorney in making an objection is merely attempting to confuse or otherwise exclude testimony without legal basis therefor? Further, you realize when the court rules on an objection he is not taking sides in the controversy but merely ruling on a point of law based on his knowledge and experience and that such ruling does not in any way control your duty as a fact finder on the evidence you will take before the jury room. The fact that a document is offered in evidence does not bind you to believe that it is authentic, in proper form, or of any merit to the State's position because you are the fact finder and the ultimate decision regarding the facts which may be included in an exhibit is yours to believe or disbelieve; to believe but to find that the information is not relevant to any matter you have to decide.
71. Do you assume evidence of guilt, otherwise, the Grand Jury would not have indicted the Defendant?
72. Would you require proof of innocence to overcome the assumption of guilt you have from the indictment being returned?

—THOMAS G. SHARPE, JR.
PERCY FOREMAN

Prosecutorial Misconduct in Texas

by

Fred Time

"(A Prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . He may prosecute with earnestless and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Mr. Justice Sutherland in
Berger v. *United States*,
295 U.S. 78, 88 (1935)

The law in Texas regarding prosecutorial misconduct is a vast and varied amalgamation of numerous kinds of trial error. The good or bad faith of a prosecutor in suppressing evidence at trial, the State's use of improper, perjured or false evidence, a district attorney's improper questioning of witnesses and a prosecutor's improper reference to the fact that the defendant failed to testify are all categories falling under the general heading of prosecutorial misconduct. To analyze each of the above areas, and the others not listed as to the current law and practical applications of that law would be totally beyond the limits of this article. However, attorneys and practicing criminal defense lawyers of this state do undoubtedly come into contact frequently with the one form of prosecutorial misconduct with which this article is intended to deal, i.e., the district attorney who deliberately makes improper sidebar remarks, who deliberately asks improper prejudicial questions and who transcends the bounds of proper final argument to the jury. It is this particular segment of prosecutorial misconduct which has been the subject of recent decisions from our Court of Criminal Appeals and with which this article is intended to deal.

Until very recently, the law on what exactly constitutes improper final jury argument has not been clear cut. The Court of Criminal Appeals of the State of Texas seemed to use a very undefinable and loose test. The standard seemed to be phrased in quite broad and ambiguous terms. Arguments that were manifestly improper, of a material character, and calculated to prejudice the defendant would result in a reversal, *Evans* v. *State*, 168 Tex. Crim. 591, 330 S.W. 2d 455 (1959). The law in this area has been refined and fairly well categorized. The reason for this recent definitive statement of the law in this area can best be seen from Judge Odom's opinion in *Alejandro* v. *State*, 493 S.W. 2d 230 (Tex. Crim. App. 1973): "Recently we have had an alarming number of improper jury arguments to consider and it is hoped that the warning signal has been heard." 493 S.W. 2d 231.

The Court of Criminal Appeals has set forth four areas in which jury argument by a prosecutor will be proper. See *Alejandro* v. *State*, *Supra; Stearn* v. *State*, 487 S.W. 734 (Tex. Crim. App. 1972). The four areas are: (1) Summation of the evidence, e.g., *Ward* v. *State*, 474 S.W. 2d 471 (Tex. Crim App. 1972); (2) Reasonable deduction from the evidence, e.g., *Frazier* v. *State*, 480 S.W. 2d 375 (Tex. Crim. App. 1972); (3) Answer to argument of opposing counsel, e.g., *Turner* v. *State*, 482 S.W. 2d 277 (Tex. Crim App. 1972); and (4) Plea for law enforcement, e.g., *Minafee* v. *State*, 482 S.W. 2d 273 (Tex. Crim. App. 1972). If the complained of argument falls within any of the above four areas, it seemingly would not constitute reversible error. But, even if the argument falls outside the above four areas, it still must be shown that the argument was prejudical to the defendant. Where the line is drawn between prejudicial error which calls for reversal, and harmless error which calls for affirmation, is a decision which the Court must make by reference to the entire record, facts of the particular case, and on the basis of the probable effects on the minds of the jurors, *Jett* v. *State*, 489 S.W. 2d 101 (Tex. Crim. App. 1972). The difficulty facing the Court of Criminal Appeals in making this decision was reflected in Judge Roberts' opinion in *Stein* v. *State*, 492 S.W. 2d 548 (Tex. Crim. App. 1973) wherein he stated:

"We all recognize the difficulty in drawing the line between harmless argument outside the record and arguments calculated to deprive the defendant of a fair and impartial trial—the difficulty lies in actually applying such a necessarily enigmatic standard. 492 S.W. 2d 551-552.

Before a ground of error will even be reviewed, it must be properly preserved. Failure to properly protect the record at trial can be costly to your client on appeal.

Assuming the prosecutor is making an argument which is improper and constitutes reversible error, the above three steps must be taken or no ground of error is preserved for appeal, *Wheeler* v. *State*, #46,-424 (June 27, 1973); *Law* v. *State*, 487 S.W. 2d 320, (Tex. Crim. App. 1972); *Turner* v. *State*, 482 S.W. 2d 277 (Tex. Crim. App. 1972).

Fred Tinsley received his B.A. in 1958 and J.D. in 1963 from Southern Methodist University and was admitted to practice in Texas in 1962. At S.M.U. he was Associate Editor of the Southwestern Law Journal. He is admitted to practice before the United States Supreme Court, the United States Court of Claims, the United States Court of Appeals—Fifth Circuit and U.S. District Courts in Texas. He is a member of TCDLA, Texas Trial Lawyers Association, Association of Trial Lawyers of America, National Association of Criminal Defense Lawyers, and the American Bar Association. The law offices of Fred Tinsley and associates are located in Dallas.

STEP NO. I

DEFENSE ATTORNEY: "Your Honor, I object to the District Attorney's argument. His comments are outside the record in this case and prejudicial to the Defendant."

JUDGE: "Sustained."

STEP NO. II

DEFENSE ATTORNEY: "Your Honor, I request that the jury be asked to disregard that last statement and not consider it for any purpose."

JUDGE: "Ladies and Gentlemen of the jury, you will disregard that last statement of the District Attorney and not consider it for any purpose."

STEP NO. III

DEFENSE ATTORNEY: "Your Honor, in view of the extreme prejudicial nature of the Prosecutor's remarks, I ask the Court to declare a mistrial."

JUDGE: "Overruled!"

In order to preserve reversible error, the complained of matter must be pursued until an adverse ruling is received from the court, *Burks* v. *State*, 432 S.W. 2d 925 (Tex. Crim. App. 1968). If no mistrial is asked for, then on appeal, the appellate argument that must be made is that the prosecutor's argument or remark is so prejudicial and inflammatory that the impression such argument left, within the minds of the jury, was of such character that it could not have been withdrawn by mere instruction, *Terry* v. *State*, 481 S.W. 2d 870 (Tex. Crim. App. 1972). Furthermore, technically, the objection lodged at the improper statement must be specific. A general objection will not be considered on appeal as preserving the error, *Dyche* v. *State*, 478 S.W. 2d 944 (Tex. Crim. App. 1972); *Rodriguez* v. *State*, 417 S.W. 2d 165 (Tex. Crim. App. 1967) *But* see, *Alejandro* v. *State*, *Supra*, (Douglas, J. dissenting).

Even if the State's argument is error, and proper objection has been made at trial, the ground of error must be properly presented to the Court of Criminal Appeals. Section 9 of Article 40.09, Texas Code of Criminal Procedure, requires that the Appellant's brief set forth, separately, each ground of error of which the defendant desires to complain on appeal. As is frequently the case, in an improper jury argument plea, the prosecutor has made several, or many, improper remarks. Objection to these remarks has been made, sustained and the jury asked to disregard them. Therefore, any error in such argument has technically been cured. However, in a case where the district attorney has continually, almost perfunctorily, made improper remarks and argument, the separate and independent ground requirement of Article 40.09 deprives Appellant's counsel of the argument that the cumulative effect of all these improper remarks deprived Appellant of his right to a fair and impartial trial by an unprejudiced and impartial jury.

In the past the law in Texas seemed to be well-settled that a cumulative error argument was not a proper ground of review on appeal, *Washington* v. *State*, 484 S.W. 2d 721 (Texas Crim. App. 1972); *Rae* v. *State*, 423 S.W. 2d 587 (Tex. Crim. App. 1968). However, the recent case of *Stein* v. *State*, 492 S.W. 2d 548 (Tex. Crim. App. 1972) seems to this writer to throw the holding of *Washington* and *Rae* in question.

Stein was a case which was tried twice and appealed. On appeal, appellant was faced with a record full of improper remarks and argument by the State's attorney. However, many of the remarks had been properly sustained and the jury was directed not to consider them. On appeal, appellant raised in one ground of error, over twenty different improper remarks made by the prosecutor. Appellant argued that regardless of the technical "curing" of any prejudice, the overall effect of the prosecutor's remarks was to prejudice the jury in such an irreparable way that he was deprived of his right to an impartial jury trial. The case was reversed, but the exact basis of the Court's holding is uncertain.

Another ground of error was based upon the State's violation of several pretrial motions in limine which had been granted by the trial judge. The Court of Criminal Appeals seems at first to rest its opinion upon the violation of the Court's order regarding these motions in limine, but the Court goes on to cite various improper remarks by the prosecutor. Many of the quotations set out in the opinion do not in any way

deal with the Motions in Limine and were remarks which were embodied in our cumulative error ground. Therefore, as to improper jury argument, the seemingly settled rule against cumulative error is, in this writer's opinion, open to dispute. More importantly, the ultimate decision in the *Stein* case points up the necessity and significance of such pretrial planning as the motions in limine.

Even if all the proper steps are taken to get your error before the Court of Criminal Appeals, and you succeed in getting a reversal based on prosecutorial impropriety, you are still back where you started after much time and expense. Certainly, your position as to plea bargaining might be enhanced, but ultimately you can be forced back to trial before the same vociferous prosecutor. To insure better chances for success at the start, and to secure a beneficial position on appeal, certain steps can be taken prior to trial to thwart the possibility of prosecutorial rampage and its prodigy-the guilty verdict. One such device is the motion in limine. See *generally*, Rothblatt and LeRoy, *The Motion in Limine in Criminal Trials*, 60 Ky. L.J. 613 (1972).

Appellant used the Motion in Limine in the *Stein* case because he had been through one mistrial and was intimately acquainted with the trial tactics of defense counsels counterpart for the state. Stein had been arrested during a Sunday rock concert in a city park in Dallas called Lee Park. An estimated crowd of five thousand young people, many of whom could generally be said to be a part of the "counter-culture" were listening to a rock band. After several arrests for swimming in a creek had been made, the crowd became incensed, and subsequently, quite unruly. Stein was singled out as a "ring leader", arrested and tried for interfering with a police officer during a civil disturbance. The first trial resulted in a hung jury, but throughout the first trial the prosecutor made continual comments on Stein's life-style, his appearance and dress on the day of the arrest, his involvement with the publication of an underground newspaper, references to the "state of America" and the use of the United States flag in the courtroom as a prop for his arguments. Several pretrial motions in limine were filed requesting the trial judge to instruct the District Attorney:

> "to refrain from mentioning, referring to or alluding to, in any manner, directly or indirectly, by statement or question, at any time, to any witness, to the jury panel or to the jury or within the hearing and presence thereof, the following:
> (1) That the Court should specifically instruct the State to refrain from the use of the term, "hippie" as it has no specific descriptive or generic value in that it encompasses numerous and sundry forms of dress, demeanor and behavior, and will be and has been used heretofore in a deprecating manner to prejudice the rights of the Defendant in the eyes of the jury.
> (2) The State should be specifically instructed to refrain from alluding either generally, specifically or by analogy to any other riot or disturbance such as in Chicago or Los Angeles. Said remarks being purely inflammatory and prejudicial to the Defendant and beyond the scope or reference to the crime alleged.
> (3) Further, the State should be instructed to refrain from mentioning any prior or subsequent disturbances in any form or manner which have taken place at Lee Park. Said occurrences would be used solely to prejudice the minds of the jury toward this Defendant.
> (4) Any and all reference either express or implied to the life style of the Defendant or witnesses for the defense, whether made by generalization or implication, said references being made solely to denigrate and demean the Defendant and/or witnesses for the defense in the eyes of the jury.
> (5) Any and all reference either express or implied to community standards of conduct or general morality, since said standards bear no relation to any matter before this Court and are so vague that they do not fall within the purview of common knowledge.
> (6) The State should be specifically instructed to refrain from the use of epithets and inflammatory remarks and to refer to the Defendant at all times as Brent Stein; said requested instruction is in the spirit and decorum of our system of courts and justice.
> (7) Finally, the State should be specifically instructed to refrain from making reference to the activities of the Defendant on April 12, 1970, prior to the incident alleged in the indictment. Said references bear no relation to the conduct of the Defendant for which he has been brought to trial and would be used to prejudice the rights of the Defendant in this trial. Said testimony would not relate to the alleged crime and would engender testimony of conduct and imputed conduct beyond the scope of this specific case.
> (8) That the State should be instructed to refrain from any reference as to who or what agency or group incurs the cost of damage to police vehicles as such reference is beyond the scope of the crime alleged by indictment (and prior testimony heretofore adduced) and such testimony would be used purely to inflame and prejudice the minds of the jurors toward this Defendant.
> (9) Any and all references either express or implied to the contents, physical appearance, editorial opinion or social importance of the publication "Notes from the Underground."
> (10) The state should specifically be instructed by the Court to restrain the District Attorney from using the flag of the United States in any manner as a backdrop for presenting his evidence. Such behavior is improper, prejudicial and of such a theatrical nature as to demean the Defendant, this Court and our system of justice.

As it turned out, I was still forced to object many times more than I wished, but the filing of such motions protected our position on appeal. It should be noted that even if a Motion in Limine is granted prior to trial, objection to the excluded evidence still must be made at trial to preserve error on appeal, *Brazzell v. State*, 481 S.W. 2d 130 (Tex. Crim. App. 1972).

Another method that can be utilized to forestall the prosecutor's tactic of pre-prejudicing the jury venire is to file a Motion for Sequestered Voir Dire. The decision as to whether voir dire should be conducted individually or in the presence of the entire jury panel is in the sound discretion of the trial judge, Art. 35.17, Tex. Code Crim. Proc. However, if there has been much publicity or if you can show that the prosecutor's statements to the entire jury panel will prejudice your client, the judge may grant your motion.

Regardless of the trial court's decisions regarding sequestered voir dire, always attempt to prepare the venire for possible actions or remarks of the prosecutor during trial. Sometimes you may be able to adroitly and subtly suggest to the venire that the prosecutor may pull such tactics and to watch out for them—that they are unlawful and the District Attorney is merely using a smoke screen to divert their attention for the real issues; sometimes you can, in this manner, elicit some needed sympathy for your client.

Finally, a motion should be filed to have the court reporter take all voir dire examination and final arguments. If such action is not taken, then any error in the way of improper arguments or voir dire examination will have to be preserved by a bill of exceptions. Bills of Exception can often become burdensome during trial and many times ineffective to properly get your error before the appellate court.

In the last analysis, every strategy and argument on appeal is aimed at securing the client's precious right to a fair trial. The Court of Criminal Appeals has begun to take a critical look at arguments of prosecutors which are prejudicial and inflammatory. Reversal due to prosecutorial misconduct is premised on the Defendant's right to a fair trial. The Court of Criminal Appeals aptly stated this idea in *Harrison* v. *State*, 491 S.W. 2d 920 (Tex. Crim. App. 1973).

" 'a litigant is entitled to at least one tolerably fair trial' regardless of the nature of his offense, * * * and to this end we have made our ruling."

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Due to the wide-ranging appeal of the State Bar-TCDLA 1973 Criminal Defense Skills Courses, they are being offered again in 1974. The State Bar of Texas has taken the responsibility of the administration of our skills courses and the TCDLA the responsibility of supplying instructors for the courses. The following is a proposed schedule for the nine Criminal Defense skills courses of 1974:

May 23-25	Dallas
June 6-8	San Antonio
June 20-22	Houston
August 22-24	Lubbock
Sept. 5-7	Corpus Christi
Sept. 19-21	Longview
Oct. 3-5	Fort Worth
Oct. 17-19	Houston
Oct. 31-Nov. 2	San Antonio

Further information concerning the individual courses will be supplied as the time for the individual course arrives. These courses are sure to be a success again this year with the continued enthusiastic support of both attorneys and the judiciary.

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THE DOCKET CALL:
Short notes of interest
—Gary F. DeShazo

The Constitutional Convention continues to plug away at a Judiciary Article for the new Constitution. Righ now it looks like they will recommend a single Supreme Court, election of judges and a two tiered trial court system. Make sure your delegates (your State Representatives and Senators) know where you stand on each of these issues and why. Mail to the delegates should be addressed to P. O. Box 13286, Capitol Station, Austin, Texas 78711.

—o—

TCDLA membership should be over the 900 mark by the time you read this. If you know of an attorney who engages in a criminal law practice, send his name to us or have him fill out an application form. To be more effective we need all members of the criminal bar.

—o—

If you are in Austin before the Court of Criminal Appeals on any Wednesday, please drop by and visit TCDLA's executive offices at 505 West 12th Street, Suite 105, just three blocks west of the Supreme Court Building. We always have coffee and refreshments available as well as plenty of good conversation. We can also help you with transportation to and from the airport, make reservations for you, and point you in the right direction if you're to be in town for awhile.

—o—

A TCDLA committee is currently working on needed revision to the Texas Penal Code. If you have any advice or suggestions for this project, let us know and we'll see that they are considered.

—o—

Remember that TCDLA represents you, a member of the criminal bar, and is working for you in Austin. You are encouraged to become active in the Association and to feel free to make suggestions as you see fit. Should you have news items, please send them to us for inclusion in either the VOICE or NEWS NOTES.

Gary F. DeShazo, newly appointed Executive Director of TCDLA.

FEDERAL GRAND JURIES AND 18 U.S.C. 1504
—Phil Burleson

The defense attorney in a criminal matter submitted a letter in behalf of his client to the foreman and members of a Grand Jury and to opposing counsel setting out the results of his client's polygraph test, and an affidavit pertaining to the case. The opposing counsel was an Assistant U.S. Attorney for the Western District of Texas. Shortly thereafter the defense attorney was summoned to appear before the U.S. Grand Jury for the Western District of Texas sitting in San Antonio investigating his alleged violation of a Federal Statute prohibiting defense counsel to communicate with a Grand Jury.

Sound incredible? Incredible, yes . . . but it's also a true story. The Statute is 18 U.S.C. 1504 and if construed strictly, it could affect the way Chapter 36 of the Penal Code is applied to Texas attorneys.

Texas attorneys have customarily communicated legitimately with Grand Jurors on behalf of their clients and have provided opposing counsel with copy of same. The Grand Jury in Texas has never been a rubber stamp for the prosecution and has always been able to hear all of the relevant facts and circumstances. It must be allowed to hear both sides rather than restricted to only the prosecution's side. Where the communication is handled in a legitimate manner and is not an attempt to influence the Grand Jury, but is merely a representation of needed facts, it is difficult to see the rationale in the Federal prohibition keeping the defense side from communicating. This has not been the practice in Texas and should not be the Federal practice provided notice is given to the prosecution and only facts are presented.

Only a contrived reading of Chapter 36 of the Texas Penal Code could yield a similar result to 18 U.S.C. 1504, a reading that was not intended by the Legislature. However, 18 U.S.C. 1504 remains and unless Congress creates an exception, such communications to Federal Grand Juries will continue to be prohibited. An exception to the Federal Statute is needed and should embody those instances where the communication is merely factual or legal in nature and is not otherwise intended to influence.

Grand Jury proceedings should rightfully be kept secret, but they should never be kept one sided.

—PB

A.G. Opinion on Witness Expenses

Attorney's General's Opinion

Re: Out of State Witness Expenses (Opinion No. H-107)

Comptroller Robert S. Calvert requested Attorney General Hill to rule on several questions regarding out of state witness expenses that must be paid by the State under Articles 24.28 and 35.27 of the Texas Code of Criminal Procedure as amended by House Bill 844. The following is a summary of that opinion.

"1. Under the provisions of Articles 24.28 and 35.27, Texas Code of Criminal Procedure, as amended by House Bill 844, both out-of-state witnesses and out-of-county witnesses can be legally paid reasonable and necessary expenses if they are requested in writing by the prosecuting attorney or the court to appear as a witness in this State.

2. The $25 per day provided for in Article 35.27, T.C.C.P., is not a fixed per diem but is a reimbursement for actual expenses not to exceed $25 per day.

3. The 12¢ per mile provided in Article 35.27, T.C.C.P., is a legislatively determined and fixed amount for each mile traveled.

4. A witness who travels by bus, train or air is reimbursed for his actual out-of-pocket expense, provided that such method of travel is reasonable and necessary.

5. Under Article 24.28 the State can pay an out-of-state witness compensation for appearing to testify in any misdemeanor, but a merely out-of-county witness can only be paid for testimony in a misdemeanor case for which a jail sentence may be the punishment under Article 24.16.

6. The State Comptroller can pay a witness who is summoned to appear in Texas by a judge of a state that has not adopted the Uniform Act.

7. If more than one witness rides in the same car, only the owner of the car can be legally paid 12¢ per mile.

8. When a witness travels back and forth by personal automobile between his home and the court either during a trial or when a case has been set for trial and postponed, he is entitled to 12¢ per mile for each trip providing the same is reasonable and necessary and is approved by the judge.

9. The 'other expenses' in addition to travel and living expenses, contemplated by Section 3 of Article 35.27 should be applied for by the attorney for the state, paid to the party who incurred the expenses and money has been appropriated for such payment."

Bob Flowers, Executive Director Criminal Justice Council, William Whatley, General Counsel CTC, Phil Burleson, President TCDLA and Leroy Jeffers, President State Bar, at a recent TCDLA Board Meeting.

Impeachment of Accused with Inadmissable Statements

by

Peter Torres, Jr.

Since Walder v. U. S., (347 U. S. 62, 98 Led² 503, 74 S. Ct. 354, 1954) and more recently Harris v. New York, (401 U. S. 222, 28 Led² 1, 91 S. Ct. 643, 1971), it is not uncommon to hear a prosecutor in both state and federal Courts first invite a Defendant on cross examination to elicit certain testimony pointing to his innocence then seek to impeach the accused with a prior inconsistent statement, not otherwise admissible. State and federal prosecutors alike insist that the above cited Supreme Court cases are controlling on this issue and will argue to trial Courts, sometimes effectively, that such impeachment evidence amounts to an exception to the exclusionary rule decided in the Miranda v. Arizona (384 U. S. 486, 16 Led² 694, 86 S. Ct. 1602, 1966) and Escobedo v. Illinois (378 U. S. 478, 12 Led² 977, 84, S. Ct. 1758, 1964).

It is significant to note that the Texas Court of Criminal Appeals firmly decided this issue in favor of the exclusionary rule in Whiddon v. State (492 SW² 566, 1973) and although the Court noted the Supreme Court's holding in Harris v. New York (supra), the Court ruled that where Article 38.22, CCP, had not been complied with, the Defendant's declaration was inadmissible for any purpose.* Thus, the Court followed a number of prior decisions that a confession made by an accused while in confinement or under arrest can not be used for impeachment (Carter v. State, 414 S.W.² 663; Freeman v. State, 354 S.W.² 141; McCullen v. State, 372 S.W.² 693 and numerous cases cited at Volume 1, Branch's Annotated Penal Code, Article 46, Section 96, p. 107). It has of course been the rule in our state Courts that oral statements made by an accused while in custody are inadmissible (Shelton v. State, 328 S.W.² 445; Rubenstein v. State, 407 S.W.² 793, and other cases cited at Volume 1, Branch's Annotated Penal Code, Article 46, Section 83, p. 82).

The defense advocate in federal Courts, however, continues to be plagued by what prosecutors refer to as the thrust of Harris v. New York, supra). That thrust has limitations of significance to defense counsel when we consider first, the Court criteria that a prior statement could be used to impeach the Defendant's credibility only where:

1.) The statement is inconsistent with his trial testimony bearing directly on the crime charged, and

2.) Where the accused make no claim that the statement was coerced (Harris v. New York, supra).

* Unlike a ruling by the Sixth Circuit in Roland v. Michigan, 475 F² 892, 1973.

The Court repeatedly referred to Harris v. New York to the Defendant's *prior inconsistent statement*. That phraseology becomes significant when we note that the Court in the Harris decision relied on Walder v. U. S. (supra). In Walder, Justice Frankfurter writing the majority opinion for the Court stated "the situation here involved is to be sharply contrasted with that presented by Agnello v. U. S., (269 U.S. 20, 70 Led 145, 46 S. Ct. 4, 51 ALP 409). In Agnello, the government after having failed in its efforts to introduce the tainted evidence i nits case in chief, tried to smuggle it in on cross-examination by asking the accused the broad questions "Did you, ever see narcotics before?" After eliciting the expected denial, it sought to introduce evidence of narcotics located in the Defendant's home by means of an unlawful search and seizure, in order to discredit the Defendant." Agnello on direct examination was not asked and did not testify concerning the can of cocaine he was charged with possessing. The Court in reversing Agnello's conviction held that he did nothing to waive his constitutional protection or to justify cross-examination in respect to the evidence claimed to have been obtained by the search.

Thus, the distinguishing factor between the Agnello decision and the Walder and Harris decisions is readily apparent. In Walder, the Defendant was charged with selling narcotics. On direct examination ,he testified that he had never sold or possessed narcotics and repeated this on cross-examination. The government then introduced evidence of a heroin capsule that had been found in his possession over the objection that the capsule was obtained through an unlawful search and seizure.

In the Harris case, the Defendant had confessed to police about every facet of a murder and the confession was first held by the trial court to be inadmissible. He later took the stand in his own behalf and denied the murder. The trial court then ruled the prior statement admissible for impeachment purposes with which ruling the Supreme Court agreed.

Two holdings by the District of Columbia Circuit Court lend credence to the limitation I feel has to be placed on the Walder and Harris decisions though the cases were decided prior to Harris v. New York. In the first o fthese, White v. U. S. (349 F² 965, 1965) the Defendant was convicted of murder. The D. C. Court held that the use by the prosecution of an inadmissible statement for impeachment purposes was error where the prosecutor purposely elicited from the

Defendant references to the statement. In Inge v. U. S. (356 F² 345, 1966) the Court made a similar holding in ruling that an inadmissible statement can be used for impeachment only when the accused makes sweeping claims "that go far beyond the crime charged, or where the statement relates to lawful proper acts, or is collateral to the issue before the jury; or is questioned about minor points."

In both decisions the District of Columbia Circuit Court quoted from the Walder decision that an accused must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. The Court concluded that inadmissible evidence is not admissible by the mere fact that the accused takes the stand on his own behalf.

Several cases decided by federal appellate Courts since Harris v. New York (supra) touch on this point. And although the convictions in these cases were affirmed, there is nothing in the Court's rulings to dissuade or detract from what has been said here. If anything, the holdings lend support to the proposition that upon a trial of a Defendant, that if he does take the stand, defense counsel will have to carefully instruct him against making sweeping generalizations that could open the door to otherwise inadmissible evidence.

In United States v. Ramirez (441 F² 950, 5th Circuit, 1971, cert. den. 404 U. S. 869, 92 S. Ct. 91, 30 Led² 113), the Defendant took the stand and told the jury he was coerced into selling heroin by strangers who kept him under constant threat of harm. The government cross-examined him about remaining silent during his arrest and thereafter. The Court quoted from Harris that, "the shield provided by Miranda can not b eperverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances," and that prosecution was entitled to show Defendant's prior inconsistent act of remaining silent at the time of his arrest (See also Burt v. State of New Jersey 475 F² 234, 3d Circuit, 1973; Roland v. State of Michigan, 475 F² 892, 6th Circuit, 1973; U. S. v. McIntyre, 467 F² 274, 8th Circuit, 1972; U. S. v. Quintana Gomez, 488 F² 1246, 5th Circuit, 1974).

In United States v. Nadaline (471 F² 340, 5th Circuit, 1973), the Defendant testified that he was not a violent person and was impeached by evidence of a prior conviction for breaking and entering. Defense counsel complained that the prior conviction was void because he had not been represented by counsel in the prior case. The Court disagreed and ruled that the exclusionary rule does not apply "if the impeachment is justified by specially false testimony."

In United States v. Caron (474 F² 506, 5th Circuit, 1973), the defendant took the witness stand and denied on direct examination engaging in illegal bookmaking activities or that he was a bookmaker. He denied on cross-examination that he had engaged in certain telephone conversations. The Fifth Circuit held that tape recordings of such conversations obtained by illegal wiretap could be used for impeachment purposes. The Court noted that by categorically denying on *direct* examination that he was a bookmaker that he opene dthe door to the prosecutor's questions. The Court cited both Walder and Harris in its decision.

Peter Torres, Jr. received his B.A. and LLB from St. Mary's Law School in San Antonio, and was admitted to the bar in 1963. He is a member of the Board of the San Antonio Trial Lawyers Association and TCDLA. He is also a member of the Texas Trial Lawyers Association, the Trial Lawyers Association of America, Bexar County Bar Association, and the National Association of Criminal Defense Lawyers. The law offices of Peter Torres are located at 320 Lexington Avenue, San Antonio.