VOICE For The Defense
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
VOL. 3, NO. 2 SUMMER, 1974

President's Report

Phil Burleson, *Dallas*

Joe Kegans of Houston presents her new book, *Defense of Juveniles*, to Phil Burleson at a Board of Directors meeting in Dallas. The book was developed under a CJC grant and is a part of the materials received by Skills Course registrants.

Criminal Law Specialists. On March 8, 1974, the State Bar Board of Directors tentatively approved a set of standards for specialization in criminal law presented by the Board of Legal Specialization of the Bar. These standards are the product of several years of study and follow the establishment of the Texas Plan for Recognition and Regulation of Specialization by the State Bar in 1971. The text of the standards were published in the April issue of the *Texas Bar Journal* and comments were solicited from criminal law practitioners at that time.

Recognition of criminal law as a separate and distinct segment of our jurisprudence worthy of certification is a great step towards our ultimate goal of upgrading the quality of criminal law practice in Texas. TCDLA has been active in the development of the standards and requirements for certification of Criminal Law Specialists and our Board of Directors has endorsed the concept.

Certification will benefit both the client and the members of the Bar by establishing high standards that must be met. Consequently, attorneys will be provided with a goal to attain that will increase their proficiency in the process. It will give the criminal lawyer the opportunity to be recognized for his achievement in his chosen field and it is an opportunity that is not available in most other states.

While President of TCDLA I have worked with the State Bar on this program as vice-chairman of the Board of Legal Specialization and am confident that the concept and standards will meet the approval of Texas' criminal lawyers. Your comments or suggestions regarding this plan may be sent to me or to Mr. William J. Derrick, P. O. Box 2800, El Paso 79999, who is chairman of the Board of Legal Specialization.

I hope you will take time to evaluate the standards as set out in the April *Bar Journal* and give us the benefit of your thoughts on the subject.

Editor-in-Chief

EMMETT COLVIN, JR., Dallas

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One copy of each issue is furnished free to TCDLA members. Subscription rate for all others is $5.00 per year.

THE WIZARD OF ID — **by Brant parker and Johnny hart**

The How's and Why's of a DWI Voir Dire

by
Jim D. Lovett

Preliminary Considerations

Voir dire examination in a DWI case is uniquely different than in other crimes because the defense attorney has a greater opportunity, and indeed duty, to precommit the jury to follow the law and, consequently, to acquit the defendant. A competent voir dire lays the predicate for the entire defense and especially the final argument. A properly conducted DWI defense is orchestrated from voir dire through final argument with the questions and statements made during voir dire reappearing during final argument.

Several preliminary matters should be considered in deciding the form of the voir dire in a particular case. One matter is whether the DWI is being tried as a misdemeanor or felony. You can generally expect more patience and latitude from a district judge in a DWI felony voir dire than from a county judge in a DWI misdemeanor voir dire, although this general rule is certainly celebrated by its many exceptions. The main difficulty is that DWI cases are usually considered "routine" cases and the judges are reluctant to spend more than a few minutes on "routine" cases. So, depending upon what the particular situation of a particular court and judge may be, the defense attorney may structure the voir dire as: 1). a substantially individual examination of each prospective juror with some or all of the questions being asked individually, or 2). a statement of the questions and the law to the panel as a whole and only brief individual examination, or 3). some arrangement between the first two. The second alternative has been generally found to succeed in getting the necessary information to the jury panel without unduly upsetting the court by taking too much time, although any time the court will permit individual examination, it should be utilized to whatever extent permitted. It is recommended that, no matter what method you use, at least some questions be asked to each individual panel member in order to let the defense attorney talk to, observe and judge each prospective juror. The verbalization and body language thusly elicited can be most helpful and revealing in discovering those misguided individuals who are not willing to level with you in answering your voir dire questions, and who really want to get on the jury and hang anyone who has imbibed of devil rum.

You will also want to consider whether the case is being tried in a wet, dry or mixed precinct county and the type of panel you are likely to draw. If you are in a county which has voted 70% dry, then you can reasonably expect your jury panel to be composed 70% of "drys." This type of analysis of your panel will have some effect upon which of the voir dire questions should be emphasized.

There are seven different matters to be covered in any DWI voir dire:

I. Statement of the defendant's position the case
II. The laws which are involved
III. The uniqueness of DWI as an opinion crime
IV. The Breathalyzer (or the refusal to submit to the test)
V. The possible prejudices of the prospective jurors
VI. The defendant's rights
VII. Personal information about the individual questions to the prospective jurors.

The following form of voir dire has been successfully used in many cases without objection from the court or prosecutor. With a little imagination it can be varied to meet any objections, and completely individual examination of each individual juror is still always recommended if the judge will permit.

I. Statement of Facts

Ladies and gentlemen of the jury panel, my name is Jim D. Lovett. I practice law in Clarksville, Texas, and I am the attorney for John Doe, who is seated at counsel table. In order to save time for both you and the court, I would like to make some statements of the defendant's position in this case and pose a series of questions to the whole jury panel, and then come back and ask each of you individually whether or not you feel qualified to serve on this jury in view of all the questions.

The state of Texas has brought criminal charges against Mr. Doe alleging that he drove his car on a public street while he was intoxicated or under the influence of intoxicants. I tell you right now that Mr. Doe is going to testify in this case, although he has a right to remain silent, since this is a criminal case. I expect that Mr. Doe will testify that he went over to a friend's house about 8:00 P.M. where he stayed until he left at about 11:00 P.M. During this approximate three hour period, he will testify that he drank seven bottles of beer before he left to make the drive

Jim D. Lovett practices law in Clarksville, Texas, and holds B.A. (1954) and J.D. (1956) degrees from the University of Texas. He is the author of several legal articles and materials. Those dealing with DWI trials include: *Defense on Charge of Driving While Intoxicated*, 19 Am. Jur. Trials 123, published 1972 by Bancroft-Whitney Co.; *DWI: Police Procedures and the Breathalyzer*, published in three *Trial Lawyers Forum* in two issues (April-June and July-September, 1973) by the Texas Trial Lawyers Association; *Texas Traffic Laws and How To Defend Yourself*, one volume published in 1971 by Layman's Law Publications.

Mr. Lovett is a member of TCDLA, the Texas, Dallas, California and American Trial Lawyers Associations, has served as editor-in-chief of the *Trial Lawyers Forum* since 1973 and is a member of all required bar associations.

to his apartment, which was about three miles away, and that he was on a direct route between his friend's house and his apartment when he was stopped by the city police, who told him that the only reason they stopped him was because he had one taillight out. After he was stopped, the police requested a Breathalyzer test, which Mr. Doe willingly took. We understand the result showed a reading of .11%. It will be our position throughout this trial that the State must prove Mr. Doe's guilt beyond a reasonable doubt, and that, unless or until it does, the jury is duty-bound to find the defendant "not guilty."

(Note: It is very necessary, with one caveat hereafter noted, to tell the jury how much the defendant is going to testify that he drank, and if the defendant cannot testify in his own behalf, you should not be there trying the case anyway, unless you are depending upon a technicality. You should secure a copy of the National Safety Council study chart showing the relationships of the amount consumed with the amount of time used to consume the alcoholic beverage and the body weight. These three factors substantially determine the degree of blood alcohol content. Your case can be hurt by the state chemist if the prosecutor can put a hypothetical question to the chemist using the testimony given by the defendant to corroborate the Breathalyzer finding. Ideally, the charts are used by the defense attorney to discredit the Breathalyzer test results. But it is important to let the jury panel know what the defendant is going to testify about concerning the amount consumed in order to start eliminating any preconceived opinions or prejudices held by any prospective juror concerning the point at which a person comes "under the influence." In one instance, a long-haul out-of-state truck driver who was tried in a historically dry northeast county testified that he had consumed seven beers and three swallows of whiskey from a bottle over a period of about three hours. The Breathalyzer reading was .25%, but he was acquitted, partly because the jury had been precommitted in the voir dire to a position that they had no preconceived opinions or prejudices that seven beers and three swallows of whiskey was sufficient to put a person "under the influence."

II. Statement of the Law

The slogan, "If you drink don't drive, and if you drive don't drink," is familiar to us all, and it is a good slogan, but it is not the law in the state of Texas. Our laws permit a person to drink and drive so long as he is not "under the influence." As I told you, I expect Mr. Doe to testify to you that he drank seven beers, so I am not here to defend him for drinking and driving, which I could not do. Nor am I going to suggest to you that drinking and driving is a proper thing to do, even though it is legal. But before Mr. Doe can be found guilty of DWI, the State must prove beyond a reasonable doubt that he was actually intoxicated or under the influence at the time and on the occasion in question. It is on this point that I defend Mr. Doe.

I also think that the Court may define the legal terms "intoxication" or "under the influence of intoxicants" for you as the loss of normal use of one's physical or mental faculties. While we use the terms such as "drunk," "high," "tight," etc., in our daily language, those words really have no meaning in this Court. You are bound to judge all the evidence by the Court's definition as the loss of the normal use of one's physical or mental faculties. Unless the State can prove beyond a reasonable doubt that Mr. Doe had lost the normal use of his physical or mental faculties at the time and on the occasion in question, then the State will not have proven that he was intoxicated or under the influence and in turn will have failed to prove Mr. Doe's guilt beyond a reasonable doubt.

III. DWI is an Opinion Crime

As a defense attorney, I feel duty bound to point out to you that DWI is different from all other kinds of crimes because it is a crime of opinions and not of facts. If this were a murder case, there is no doubt that the State would have to produce actual facts showing the guilt of the defendant. But since this is a DWI case, the State is simply going to offer some opinions that the defendant was guilty. This causes me great concern as a defense attorney because I am afraid that some members of the jury panel may be willing to allow my client to be opined into jail with-

out sufficient corroborating facts. The police officers will probably be allowed to testify that, in their opinion, Mr. Doe was intoxicated when they stopped him, which is the same thing as saying that, in their opinion, he was guilty. I know of no type of crime, other than DWI, where witnesses are permitted to state their opinion of the guilt of a defendant, and I fear that some of you may be willing or tempted to abandon your duties as jurors to make an independent decision based upon the facts of this case as to whether the State has proved Mr. Doe's intoxication, and therefore his guilt, beyond a reasonable doubt.

IV. The Breathalyzer

I expect the State to offer some evidence concerning a Breathalyzer test which Mr. Doe willingly took. I think the State will try to convince you that the Breathalyzer result is a "fact" and not merely an "opinion." However, I will want to know whether or not any of you have any preconceived opinions or prejudices about Breathalyzers. (Note: If the Breathalyzer test was refused, you would substitute a statement of what the defendant will testify was his reason ("I don't trust machines!"; "I didn't trust the police to give me a fair test!") followed by a question of whether the prospective jurors have any preconceived opinions or prejudices against the defendant for either his refusal or his reason for the refusal. If the Breathalyzer test was not offered, you can say that the law required the test to be offered to the defendant and ask that since it was not offered, whether that would cause anyone to have any preconceived opinions or prejudices against the defendant).

The State will probably offer evidence from a police officer that he is a licensed Breathalyzer operator and that he gave a test to Mr. Doe which showed a reading of .11% blood alcohol. You will probably also hear testimony from a state chemist to the effect that my person is intoxicated or under the influence at a .11% level. In addition, I further expect the judge to tell you in the jury charge that the law presumes every person to be intoxicated who has a .10% or higher blood alcohol content, but that the presumption is not conclusive and can be rebutted by other facts and circumstances, and that the presumption must be weighed along with the presumed innocence of the defendant.

I will want to know whether any of you presently hold any opinions that the Breathalyzer can and does provide an accurate test of blood alcohol content, whether any of you is either tempted or willing to allow the Breathealyzer test to be substituted for the opinion or verdict of each juror based upon the actual facts of the case, and whether, in view of the test, each of you would still require the State to prove Mr. Doe's guilt beyond a reasonable doubt.

V. *Prejudices Against Alcohol*

It is certainly no secret that some people in this world have such hard feelings against alcohol that they would have great difficulty in being fair and impartial jurors toward a man such as Mr. Doe, who is going to testify that he had, in fact, consumed seven beers. I did not come here to criticize anyone's personal feelings against alcohol, whether for religious, moral or purely personal reasons. But in all fairness to my client, I think you will agree with me that if you do hold strong feelings against alcohol that you may not be able to be fair and impartial and therefore should not serve on this jury.

In order for each of you to better search your mind and conscience, I would like to mention several things which could certainly indicate or bear upon such feelings: membership in a church or organization, such as the W.C.T.U. (Women's Christian Temperance Union) or TANE (Texas Alcohol Narcotics Education) which opposes alcohol; signing temperance pledges; campaigning against liquor elections; bad experiences with alcoholic relatives or friends; loss of, or injury to, a relative or friend in an auto wreck where the other person involved had been drinking.

In addition to these matters, there has been a concerted campaign for many years by the National Safety Council against drinking drivers. I have already mentioned the slogan, "If you drink don't drive, and if you drive, don't drink," but there have been several well-produced horror films on TV depicting the drinking driver crossing over the center stripe and hitting another car headon, at which time there is an electronic scream to get the drinking driver off the road. These ads must surely have some effect upon each of us, even though it may be subconscious.

It has also been demonstrated by at least one poll[1] that about one third of the people think that one drink causes legal intoxication and nearly another one third think that two drinks are sufficient. This means that, as I face you, probably two thirds of you think that two drinks cause intoxication, and, since in the last wet-dry election in this county the "drys" polled 70% of the votes, you can begin to understand my concern about the fairness and impartiality of the people selected to serve on this jury.

It may also be that some of you do not know how to drive a car, perhaps because of some personal fears, and this could certainly cause problems in trying to be fair and impartial to Mr. Doe.

I will be interested in knowing whether any of you feel you could not be fair and impartial and require the State to prove Mr. Doe's guilt beyond a reasonable doubt.

VI. Defendant's Rights

Since this is a criminal trial, Mr. Doe is presumed to be an innocent man as he sits here. This is true although the arresting policemen obviously think, and

[1] Driver Opinion Poll covering 9,228 person renewing driver's licenses, California Traffic Safety Foundation, San Francisco ,1965, 21pp.

will probably testify, that he was intoxicated. Neither do the facts that charges were filed or his trial is being held affect the fact that Mr. Doe is presumed to be an innocent man. I will be interested in knowing if each of you agree at this time that he should be presumed to be innocent and whether each of you do, in fact, presume him to be innocent.

Also, as previously stated, he must remain an innocent man unless and until the State proves his guilt beyond a reasonable doubt. It is not Mr. Doe's obligation to prove that he is innocent. The State has made its charges and must now prove them by competent evidence beyond a reasonable doubt. I will be interested in knowing if each of you accept and agree with these rights and will abide by them.

VII. Individual Questions

a. Name, address, occupation, family, religious and political affiliation, previous experience.

b. Knowledge of facts, parties, attorneys, witnesses.

c. Do you agree with the laws concerning drinking drivers or the legal definition of intoxication or under the influence?

d. Have you heard of the Breathalyzer?

1. Do you have any present opinion as to what it is or how it works?

2. Do you believe that it is a scientific and reasonably accurate device for determining degrees of intoxication?

3. Do you believe that it can measure individual tolerances to alcohol or tell if a particular individual has lost the normal use of his physical or mental faculties?

4. Will you disregard the test unless the State proves its accuracy beyond a reasonable doubt?

5. Would evidence be required to overcome any such opinions? (Note: If the Breathalyzer test was refused, ask whether the defendant's refusal or the reason for his refusal would cause any preconceived opinions or prejudices against the defendant. Ask the same question if it was not offered, but also make the point that the law required the test and that the juror agrees with that law).

e. Based upon all the things I listed which could possibly cause a prejudiced or preconceived opinion against alcohol and drinking drivers, and based upon anything else in your own experiences, would you tell us whether you feel you could be a fair and impartial juror toward Mr. Doe?

f. Do you recognize that a policeman's testimony to the effect that a person is intoxicated is merely an opinion?

1. If the facts do not justify the opinion, can you reject it?

2. Will you listen to the facts and judge the validity and conclusiveness of the opinions against those facts?

3. Would you give any more weight to a policeman's opinion than to a qualified layman's opinion or the defendant's opinion?

4. Will you listen to the facts and form your own opinions and conclusions, or require the facts to prove Mr. Doe's guilt beyond a reasonable doubt before you will vote for guilt.

5. Would evidence be required to change your present opinions?

g. Do you presently presume Mr. Doe to be innocent? Will you require the State to prove Mr. Doe's guilt beyond a reasonable doubt before you will vote for conviction?

CONCLUSIONS

Notice that no questions are normally asked concerning the ability of the juror to consider the full range of punishment and especially probation. While some circumstances could dictate the necessity of such questions, it has been the author's experience that it weakens the defense when you talk about the defendant applying for probation. As a matter of fact, if you get a jury qualified under the foregoing voir dire questioning, it is not likely that the jury would give fair consideration to the minimum punishment, especially probation. So do not weaken your defense by even discussing it.

If the voir dire is conducted in substantially the suggested manner, then it should be the rock upon which the entire defense is built. The direct and cross-examinations should be aimed at developing reasonable doubt, minimizing the facts tending to show intoxication (walking, turning, balancing, talking, attitude) and thereby tending to impeach opinions of intoxication and the Breathalyzer results.

The final argument should then be utilized to tie together the "promises" made to you by the jurors during voir dire that they would not find someone guilty merely because he was drinking and driving; that opinions of intoxication and the Breathalyzer test

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TCDLA-STATE BAR SKILLS COURSES

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 remaining Criminal Defense skills courses of 1974:

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.

PRE-TRIAL MOTIONS

by

L. J. "Boots" Krueger

L. J. "Boots" Krueger was admitted to the Texas Bar in 1964. He attended the University of Wisconsin and Oxford University and holds a J.D. degree from South Texas College of Law. Mr. Krueger is a Director of TCDLA and a member of the Liberty-Chambers Counties Bar Association. The law offices of Boots Krueger are located in Liberty.

The following checklist of pre-trial motions was devised to leave no stone unturned. It is followed by a *Motion for Court Reporter* that can be used to insure that a full transcript, including proceedings before the bench, is obtained.

DATE FILED	DATE HEARD	RULING

1. Continuance
2. Change of Venue
3. Speedy Trial
4. Discovery
5. Depositions
6. Suppression of Evidence
7. Minutes of the Grand Jury
8. Motion in Limine
   a. Reference to when Defendant was a juvenile
   b. Reference to the Defendant's military service
9. List of Jurors State Proposes to have Testify
10. Investigative Funds (if defendant indigent)
11. Sanity Hearing
12. Application for Probation
13. Quash Indictment
14. State to Elect Which Count to Proceed On
15. Jury to Assess Punishment
16. Severance (TEX. CODE CRIM. PROC. art 36.09)
17. Special Venire (TEX. CODE CRIM. PROC. art 34.01)
18. Serve Defendant with List of Jurors Summoned (TEX. CODE CRIM. PROC. art 3404)
19. Motion Court Reporter to take Voir Dire etc.
20. Motion Court Reporter Approach Bench
21. Immunity from Prosecution
22. Motion for Pre-Trial Hearing
23. Motion to List State's Witnesses
24. Motion to Shuffle Jurors
25. Motion to Reveal any Agreement Between State and Witnesses for the State

NO._____

THE STATE OF TEXAS

VS.

_____

IN THE DISTRICT COURT OF
LIBERTY COUNTY, TEXAS
75TH JUDICIAL DISTRICT

MOTION FOR COURT REPORTER

COMES NOW the Defendant in the above entitled and numbered cause, and prior to trial respectfully requests the Court to instruct the Court Reporter, out of the presence of the jury, to approach the bench or the Attorney for the State or Defense Counsel requests permission to approach the bench, in support of which he would show unto the Court as follows.

I.

That during the trial of said cause there will undoubtedly be numerous times when the Court will request that the Counsel for the State and Counsel for the Defendant approach the bench for a conference or Counsel for the State or Counsel for the Defendant may request permission to approach the bench outside the hearing of the jury. To have such conferences and consultation recorded is an integral and vital part of the process of this hearing so that all conversations and instructions by the Court can be properly recorded in the event appellate review shall become necessary. For Defendant's counsel to be required to ask the Court on each and every occasion to have the Court Reporter approach the bench will convey to the jury an unfavorable impression of this Defendant or his Counsel that they are distrustful of the proceedings before the bench and will do irreparable harm to this Defendant in the minds of the jury.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the Court Reporter, out of the presence of the jury, be instructed by the Court, prior to the trial of this cause on its merits and before the jury voir dire, to approach the bench at the same time that Counsel for the Defendant and Counsel for the State either ask to approach the bench or are requested to do so by the Court so that it will not be necessary for the Defendant's Counsel to make repeated requests in the presence of the jury to have the Court Reporter approach the bench to record the discussions between the Court and Counsel.

_____

L. J. KRUEGER
P.O. Box 305
Liberty, Texas 77575
336-6429
ATTORNEY FOR DEFENDANT

ORDER

The above and foregoing Motion was duly presented to the Court and after due consideration, the Court is of the opinion that the same should be and it is hereby (GRANTED) (DENIED), to which action of the Court the Defendant duly excepted, and it is ordered that this Motion and Order shall be made a part of the record hereof.

_____

JUDGE PRESIDING

CERTIFICATE

I, L. J. KRUEGER, Attorney for the Defendant, do certify that a true copy of the foregoing Motion was (handed, in person, to the attorney representing the State) (mailed to the attorney representing the State by depositing same in the U.S. Mail) on the _____ day of _____, 197___.

L. J. KRUEGER

_____

LOVETT, continued from page 6

would be disregarded unless the underlying facts supported them beyond a reasonable doubt; that, although they may have some prejudices concerning alcohol and drinking drivers; they would lay aside those feelings; and that they really presumed Mr. Doe to be innocent unless, and until, his guilt, and each individual element involved in the crime of DWI, was proved beyond a reasonable doubt.

All of these matters are utilized for the one ultimate purpose of creating a reasonable doubt, which is the first and foremost defense in DWI cases.

Psychological Approaches to Plea Negotiations[1]

by

Morris A. Shenker

Morris A Shenker, a St. Louis, Missouri, attorney, provides a checklist of plea negotiation for the attorney representing a person accused of crime.

I. PREPARATION FOR NEGOTIATIONS
  A. Be Fully Prepared and Know Every Aspect of the Case Prior to Plea Negotiations
  B. Conferences with Accused
    1. Client's family, school, church, armed forces, work, physical and mental background and his financial resources.
    2. Prior criminal convictions and arrests.
    3. Background of the case and identity of all other possible criminal proceeding.
    4. Client's involvement in the crime.
    5. Statements client has given and possible confessions or other incriminating evidence that needs to be suppressed.
    6. Explanation and understanding of the pleas and the defenses to the crime.
    7. Determine client's attitude about the case and his receptiveness toward a guilty plea.
    8. Determine if client is willing to testify against others.
  C. Conferences with Prosecutor
    1. Learn the prosecutor's evidence.
    2. Prosecutor's attitude toward accused and the seriousness of the offense.
    3. Know the policy of the prosecutor's office on the type of case involved.
    4. Learn the disposition of previous similar cases in which plea negotiations have been worked out favorable to the defense
    5. Point out the weaknesses in prosecution's case.
    6. Find out the prosecution's recommendations on a plea of guilty.
  D. Investigation of the Case, Interview of Witnesses, etc. from the Viewpoint of Plea Negotiation
  E. Filing of Pre-Trial Motions from the Viewpoint of Plea Negotiation
    1. Make the prosecutor aware of the pitfalls in trial.
    2. Obtain useful discovery information..
    3. Weaken prosecutor's case.
II. RESPONSIBILITY FOR PLEAS
  A. Ultimate Responsibility of Accused.
  B. Advice of Lawyer to Accused.
III. THE CHOICE TO PLEAD GULTY
  A. The Probability for Acquittal—Factors Involved in the Choice
    1. Strength of the prosecutor's case.
    2. Whether there is a good defense in the case.
    3. Individual characteristics of the accused (i.e., whether he is a highly publicized individual, so that the jury is likely to be biased).
    4. Prejudicial nature of the offense charged.
    5. Prior record of accused that would create damage in trial of accused if he testified.
    6. Attitude of the community from which a jury is to be selected.
    7. Jurisdiction and venue of the case (federal as opposed to state).
    8. Absence of reversible error in pretrial rulings.
    9. Attitude of the judge in similar cases.
    10. Absence of legally debatable evidentiary or substantive matters for future reversible error.
    11. Appearance of defense witnesses and the accused before a jury.
  B. The Consequences of a Conviction—Comparing the Alternatives of a Conviction on a Trial with a Conviction on a Plea
    1. Probable length of sentence or amount of fine.
    2. Special statutory provisions for:
      a. Youthful Offenders
      b. Recidivists, habitual criminals, etc.
      c. Sexual Psychopaths
      d. Addicts, etc.
    3. Statutes, rules and regulations for proba-

[1] This material appeared originally in a Practising Law Institute course handbook: "Criminal Defense Techniques Advanced Workshop" (Order No. C4-3167). It also appeared in PLI News, Vol. 10, No. 65, August 13, 1973. Reprinted by permission of the author and publisher.

tion and parole.
4. Civil disabilities imposed by law.
   a. Revocation of occupational and other licenses and privileges
   b. Loss of public office
   c. Loss of voting rights
   d. Deportation
5. Privately imposed sanctions.
   a. Restrictions on employment, admission to professions
   b. Restriction on residence
   c. Restrictions on admission to educational institutions

C. The Nature of the Plea Bargain
1. A plea of guilty to a lesser offense with no sentence recommendation.
2. A plea of guilty to only one offense when more than one is charged, dismissal of the others, with no sentence recommendation.
3. A plea of guilty to the offense charged or to a lesser offense on the proscuter's promise of a sentence recommendation.
   a. Recommendation of a specific sentence
   b. Recommendation of a sentence not greater than a certain amount of years
   c. Recommendation of concurrent sentences
   d. Recommendation that sentence has [*sic*] served in a specialized facility
   e. Recommendation that defendant be sentenced under a specialized sentencing provisions such as the Youth Offender Act
   f. Recommendation of suspended imposition of sentence, probation, early parole or other judicial clemency
4. A plea of guilty to the offense charged with no sentence recommendation on the prosecutor's promise that the plea will be taken before a particular judge.
5. A plea of guilty to a new offense, which is not a lesser offense included in the crime charged (reduction from a felony to a misdemeanor, etc.).
6. A plea of guilty to the offense charged on the promise that the prosecutor will secure the dropping of charges in other jurisdictions.

D. Risks Involved in a Plea of Guilty
1. Sentencing recommendations need not be accepted by the court.
2. In some jurisdictions, the court is not given recommendations and the sentence imposed rests in the unfettered discretion of the court.
3. The court might not accept the plea of guilty.

E. Alternates to Sentencing Involved in Plea Negotiation
1. Immunity granted for cooperation to incriminate or convict other persons.
2. Give evidence with respect to unsolved crimes.
3. Accused voluntarily entering treatment programs or changing his residence or doing some act that could not be compelled by law.
4. Accused voluntarily making restitution, etc.

F. Weigh the Probabilities for Acquittal in the Trial of the Case, Against the Consequences of a Verdict of Conviction and the Plea Bargain.

G. Consider a Jury-Waived Trial as an Alternative to a Plea of Guilty.

IV. TECHNIQUES AND STRATEGY IN PLEA NEGOTIOTION
A. Techniques in Negotiating with the Prosecutor
1. Impress the prosecutor with your ability to win the case.
2. Impress the prosecutor with the innocence of the accused.
3. Docket congestion in the court.
4. Time involved in preparing the case for trial.

B. Time to Begin Plea Negotiations
C. Timing of the Guilty Plea
1. Select the sentencing judge.
2. Prior- or post-arraignment pleas.
3. Pleas entered during trial.

V. COUNSEL THE CLIENT ABOUT THE GUILTY PLEA
A. Accurately Explain Defense Counsel's Reasoning to the Defendant for a Guilty Plea
B. Explain the Consequences of the Plea and of Conviction
C. Limitation of the Accused's Right to Appeal
D. Reach a Clear Understanding with Client as to His Decision and Make Notes of all Discussions with the Client

VI. THE "INNOCENT" ACCUSED — CAN THE ATTORNEY PERMIT A GUILTY PLEA, WHICH IS A FAVORABLE DISPOSITION TO THE CLIENT

VII. PREPARING THE ACCUSED FOR ENTERING THE PLEA
A. Inform Accused He Will Be Interrogated by Court
B. Prepare the Accused to Admit His Participation in the Crime
C. The Necessity of a Voluntary Plea of Guilty
D. Handle the Question by the Court Whether the Accused Has Been Promised Anything in Return for the Plea of Guilty

* * *

THE DOCKET CALL:

—Gary F. DeShazo

Each November, Georgetown Law School devotes a $5.00 issue of its *Law Journal* to criminal law. Since a number of members have expressed interest in this issue, we have contacted Georgetown and find that we can get them for $3.00 each in groups of 20. Should you want the criminal law issue, send your check for $3.00 to TCDLA and we will start a list. Thanks to Paxton King Littlepage of Mart for initially bringing this to our attention.

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The American Journal of Criminal Law published by the University of Texas Law School is one of the few quarterly criminal law journals in the nation. Many TCDLA members currently subscribe at a discount rate of $5.50 yearly. The regular price is $7.50 yearly. This offer is still open should you want to take advantage of it by writing our office.

—o—

The House Committee on Criminal Jurisprudence chaired by Hon. Bob Hendricks of McKinney is currently conducting an in-depth study of the effect of the new Penal Code (1973) and the Code of Criminal Procedure (1965). Representative Hendricks has asked for comments regarding these laws to help his committee evaluate their impact. TCDLA will have a committee to do a complete analysis of both codes based on the input of our members and Directors. The committee will begin work soon in order to have a position established by September. Your ideas for changes or comments should be sent in letter form to the TCDLA office. It is critical that you take part in this important effort.

—o—

Membership. The membership drive has pushed us over the 1000 mark and we should reach 1100 by the time this is printed. This means we have almost doubled since last July. Congratulations to all membership chairmen who have contributed and especially to State Membership Co-Chairmen C. David Evans of San Antonio and George Luquette of Houston, and to President Phil Burleson.

—o—

George Luquette was recently elected President of the Harris County Criminal Bar replacing TCDLA Director Stuart Kinard.

Association member Stan Weinberg has not gone unnoticed as President of the Dallas Criminal Bar and is doing a fine job there.

—o—

Brief Bank Service activity is booming. If you have business in Austin, need briefs, legal materials, or research, let us do it and save yourself some money. Our new law clerk Kyle Morrow (Phi Beta Kappa) is a mid-law at Texas and does excellent research. Also new on the staff is Pat Allen who comes to us with ten years' experience at the Texas Hospital Association. Most of you are already aware of the fine job that our Administrative Assistant Diana Pace has been doing. Our secretary, Tina Williamson, has moved to part-time since deciding to finish her degree at U.T.

—o—

TCDLA moves to new and larger quarters at Suite 1635, American Bank Tower in Austin on July 1. Our growth has expanded us right out of our present location. When in Austin drop by and visit your headquarters—I think you will be proud of it.

Phil Burleson and "Boots" Krueger of Liberty talk things over at a recent Skills Course seminar.

Recent Developments with Respect to the Defense of Insanity and Related Defenses

by

Frank Maloney

The following outline was presented at the Eleventh Annual San Antonio Bar Association Criminal Law Seminar in May 1974. It is a concise and complete presentation of the cases and law in the area of insanity and related defenses.

I. INCOMPETENCY
- a. Test
  TEX. CODE CRIM. PROC. art 46.02 § 2, a, (hereinafter cited as art. 46.02 § . . .).
  Dusky v. U.S., 362 U.S. 402 (1960)
  Quintanilla v. St., Tex. Crim. App. 48,200 (May 1, 1974)
- b. Due Process requires Defendant be Competent
  Pate v. Robinson, 383 U.S. 375 (1966)
  Morales v. St., 427 S.W. 2d 51 (1968)
  Towensend v St., 427 S.W. 2d 55 (1968)
  McCarter v St., 438 S. W. 2d 575 (1969)
- c. Procedure
  In advance of trial on merits: (art 46.02 § 1)
  During trial on merits: (art 46.02 § 2)
- b. When compelled
  Vardas v. St., 488 S.W. 2d 467 (1973)
  Perryman v. St., 494 S.W. 2d 542 (1973) compare:
  Ainsworth v. St., 493 S.W. 2d 517 (1973)
  Noble v. St., Tex. Crim. App. 47,219 (Feb. 20, 1974)
  Carpenter v. St., Tex. Crim. App. 47,982 (April 10, 1974)
- e. Can it (hearing on competency) be waived?
  Ex parte Adams, 430 S.W. 2d 194 (1968)
  White v. St., 456 S.W. 2d 935
  Sandlin v. St., 477 S.W. 2d 870 (1972)
  Boss v. St., 489 S.W. 2d 580 (1973)
  Gomez v. St., 492 S.W. 2d 486
  Zapata v. St., 493 S.W. 2d 801 (1973) Cert. den. U.S. S.Ct.
- f. Submission
  TEX. PEN. CODE art. 34 and 35 repealed. Presumption person sane is based on case law. See f.n. 1, TEX. PEN. CODE art 35, *Carter v. St.*, 12 T 500, 62 Am. Dec. 539
  MCCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE (1973):
  Trial before Trial on Merits
  During trial on Merits
  Gross v. St., 446 S.W. 2d 314 (1969)
  Art 46.02 § 2
- g. Right to Speedy Trial (6th & 14th Amendments) v. Prohibition of Trial of Incompetent (14th Amendment)
  Ex parte Hodges, 314 S.W. 2d 581 (1958)
  U.S. v. Pardue, 13 LR 2008 (D. Conn 1973)

II. INSANITY
- a. Test
  TEX. PEN. CODE art. 801 (1974)
- b. Procedure
  Art. 46.02 §§ 2, c
- c. Submission
  NEW TEXAS PENAL CODE FORMS § c. 8.01 (Morrison & Blackwell ed. 1973)

III. DECISION PROCESS AND PRACTICAL APPROACH
- a. The science of psychiatry

Continued on page 14

Frank Maloney holds a B.A. (1953) and J.D. (1956) from the University of Texas and was admitted to the Bar in 1956. He is a former First Assistant to the Travis County District Attorney, former Chief of the Law Enforcement Division—Attorney General's Office, and former Special Assistant to the Attorney General of Texas. Mr. Maloney is a Director of the National Association of Criminal Defense Lawyers and of TCDLA, and Chairman of the Criminal Law and Procedure Section of the State Bar. He is a past President of TCDLA. Frank Maloney is a partner in the Austin firm of Stayton, Maloney, Hearne, Babb & Cowden.

Counsel for Indigent Parolees

by

W. C. "Bill" LaRowe

W. C. (Bill) LaRowe, a 37-year-old professional administrator and political scientist, educated at the University of Texas at Austin, Texas A & M, and the L.B.J. School of Public Affairs, has been appointed staff director of the Counsel for Indigent Parolees Project by the State Bar of Texas.

The State Bar of Texas has initiated a program to provide legal representation to indigent parolees at on-site hearings to consider revocation of parole.

The program, which was made possible by a $69,000 grant from the Criminal Justice Division of the Office of the Governor, has the enthusiastic support of the Board of Pardons and Paroles and has been endorsed by Phil Burleson, President of the Texas Criminal Defense Lawyers Association.

Hume Cofer, Chairman of the State Bar Committee on Legal Aid to the Poor, said that the program will establish a panel of attorneys who are qualified and willing to handle this type of hearing and who will do so at the fee schedule specified in the grant award which provides a maximum fee of $50.00 per day. Participating attorneys will be volunteering most of the time spent on each case. Cofer said that the program will be administered by a staff project director at the State Bar Headquarters in Austin and will be operated in close cooperation with the Texas Criminal Defense Lawyers Association.

Each parolee who is alleged to have violated the conditions of his parole is entitled to two hearings before parole is actually revoked: an on-site hearing presided over by a hearing officer who is a staff representative of the Board of Pardons and Paroles; and a board hearing which is held at the Texas Department of Corrections. The on-site hearing is required by the ruling of the United States Supreme Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), wherein the court concluded that the requirements of due process necessitate several procedural safeguards in the parole revocation process. One of these is the requirement that a preliminary hearing be conducted at or near the place of the arrest or the alleged violation to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts which constitute a parole violation. An opinion issued by Attorney General John Hill states that an attorney should be provided to represent a parolee at a revocation hearing when the parolee disputes the allegation of a violation or offers substantial reasons to justify or mitigate the violation of the conditions of parole, citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656 (1973), as authority. Since there has heretofore been no mechanism to provide such legal counsel to parolees, a Counsel for Indigent Parolees Program was proposed to fill the gap.

The parole revocation process begins with an arrest or some other alleged parole violation. At that point, the supervising field officer submits a violation report. That report is reviewed by the Board of Pardons and Paroles and a decision is made to either issue a pre-revocation warrant or to continue parole pending the disposition of the charges. If a pre-revocation warrant is issued, it is passed to a local law enforcement officer who then takes the parolee into custody. The parolee may either admit the alleged violation and waive his right to an on-site and board hearing, or request that an on-site hearing be held. If, after explanation of his rights, the parolee elects to waive either or both of his hearings, the waiver must be signed by two witnesses who are not representatives of any law enforcement agency. If the parolee requests an on-site hearing, the area supervisor will schedule

Continued on page 15

MALONEY, continued from page 12

b. Expert witnesses
c. Objective Testing
d. Lay witness testimony
e. The facts of the offense, the type of offense
f. Pre-trial; trial, Incompetency, Insanity, both:
   1. Degree of illness and availability of proof.
   2. The effect of finding of competency on jury charged with determining insanity as a defense.
   3. Mental Illness in mitigation or as proof of diminished responsibility.
   4. Treatment facilities art 46.02 §§ 2, a, 1

IV. RESTORATION Art 46.02 §§ 3, d
   a. Test
      Art. 46.02 §§ 3, d, 4.
   b. Submission
      WILLSON, TEXAS CRIMINAL FORMS § 3526.5 (Morrison & Blackwell, ed. 1966)

(See definition of sanity TEX. CODE CRIM. PROC. art 46.02 §§3,d,4. (1969),different from form) Applicable only when Defendant has been found incompetent (and also insane at the time of act).

TCDLA Board of Directors meeting in Dallas, May 25.

Clif Holmes presents the opening remarks at a recent Skills Course

LA ROWE, from page 13

a time and place and send a copy of a notice of hearing to the parolee, his attorney, the district parole officer, and the assigned on-site investigator. The parolee and all others concerned will be notified in writing of the date, place, and time of the hearing ten days prior to the hearing.

The on-site hearing includes an explanation of how the parolee is alleged to have violated the conditions of his parole, the presentation of the findings of a preliminary investigation, the facts surrounding the allegations, and presentation of testimony and/or documents to sustain the allegation. The parolee has the opportunity to confront witnesses against him and to present witnesses and/or documents rebutting the allegation.

The hearing officer prepares a full report of the hearing for submission to the Board of Pardons and Paroles. The report includes the date, time, and place of the hearing, the identity of those present and what they contributed, a statement regarding what, if any, rule violation the parolee admits, a statement regarding whether or not the parolee is requesting a board hearing, and a statement from the hearing officer indicating whether or not in his opinion the alleged parole violations actually occurred and specifying the evidence which he considers to have sustained the findings. The Board of Pardons and Paroles then reviews the hearing officer's report and either continues parole or orders return of the parolee to the Texas Department of Corrections and sets a date for a parole board hearing at that institution. The parolee is notified of the Board's findings and the scheduled date for the final board hearing for consideration of parole revocation if one is to be held.

It has been estimated that as many as 80% of the parolees who would otherwise have had legal representation at on-site revocation hearings have not had such representation simply because they couldn't afford it. The Counsel for Indigent Parolees Program will make equal protection under the law available to all parolees in Texas regardless of their financial ability.

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