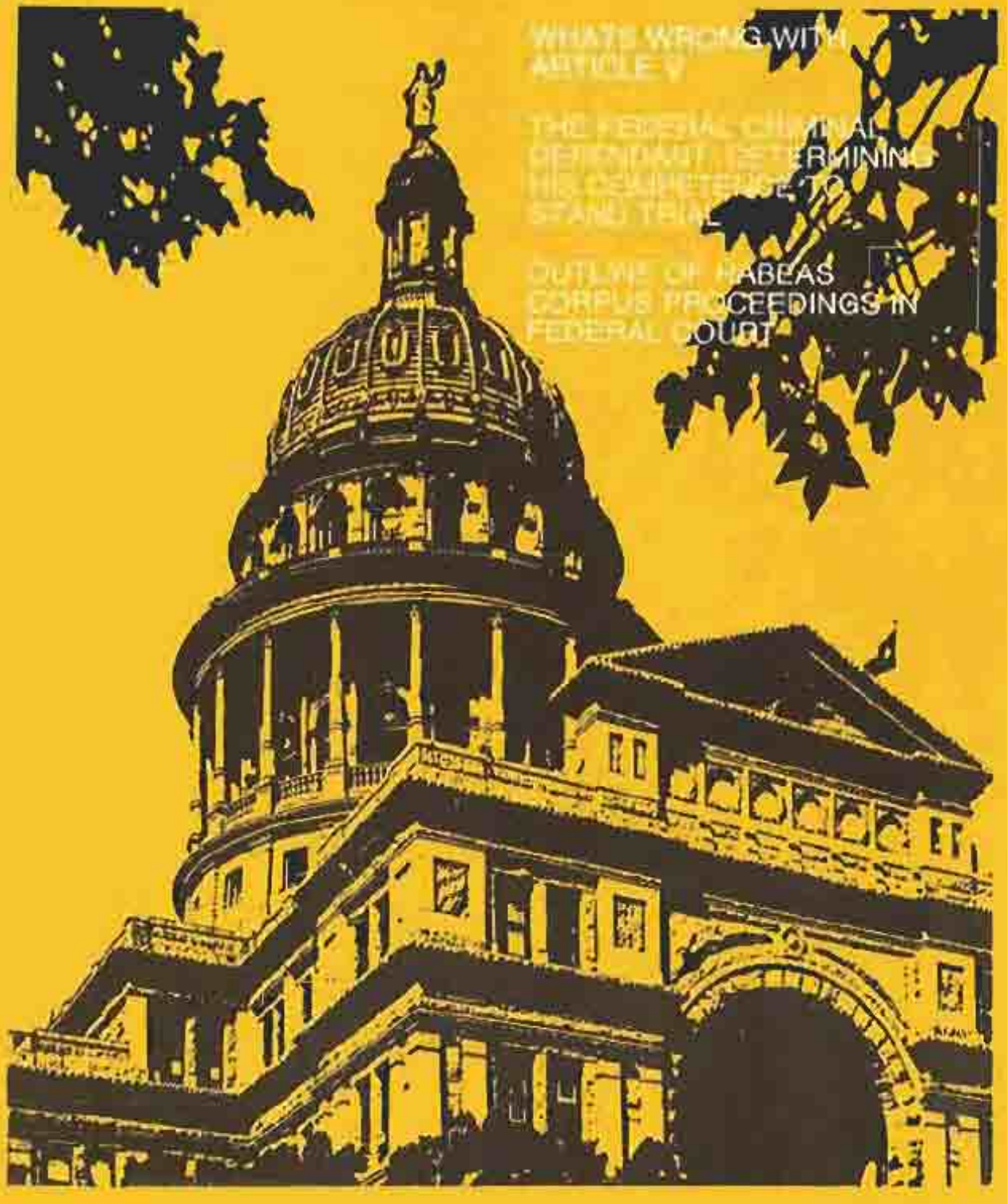
Voice for the defense

FALL / WINTER 1975



The President's Report

C. David Evans

A New Fiscal Year

As TCDLA begins its fifth year of operation those who have been with the Association since its inception must marvel at the impact that this young organization has made in Texas and the Nation in the field of criminal law. The growth of the Association long ago surpassed the 600 members invisioned by the founders. Along with increased membership has come an increased defense influence in the administration of criminal justice.

The Association is governed by a Board of Directors elected for three year terms by the voting members present at the Annual Meeting. This year the Board was increased to 36 members to broaden the geographic representation.

A by-laws amendment now limits Directors to two three year terms. In addition 12 Associate Directors who serve 1 year terms were added this year. Of the 42 officers, directors, and associates elected at the annual meeting only 10 have served on the Board previously.

A fact that I think may not be widely known among the general membership is that TCDLA officers and directors have always paid their own way to every TCDLA Board meeting and other functions. If you happen to live in El Paso for instance and be on the Board I think it's evident that a great deal of time and expense is involved in attending all the various meetings. For that reason the location of Board meetings are rotated to the major cities of the state to distribute the burden. Although TCDLA members have always been welcome to attend, this year all TCDLA members who live in the area where the Board meetings are to be held will be specially invited to be present and bring whatever business they may have to the attention of the Board. I believe this special invitation will serve to include more members in the affairs and policy making of the Association.

Special Benefits

Again in 1975-76 each TCDLA member will receive at no extra cost a copy of the Judges Criminal Law Outline prepared by the National College of the State Judiciary in Reno, Nevada. This is an outstanding publication citing all the major cases in criminal law. It is updated annually and is undoubtedly the best publication of its kind available.

In addition to this fine publication each member will receive a complimentary copy of the Federal Rules of Evidence by Commerce Clearing House. This also is a fine publication in pamphlet form including over 100 pages of explanation in addition to the rules themselves. One of the main purposes of TCDLA has been to provide as many benefits to the membership as possible. It will be one of my aims in 1975-1976 to see that these benefits continue.

Continuing Legal Education

Last year TCDLA co-sponsored and solely sponsored almost 30 criminal law institutes in all parts of Texas. This year we will continue to co-sponsor with the State Bar of Texas under the federally funded Criminal Defense Lawyers Project, institutes on federal and state practice. Aside from the Project institutes which are primarily limited to the large urban areas, TCDLA will bring CLE into the more remote and less populated parts of the state. In September the first of these "outreach" institutes was held in McAllen, Texas with approximately 40 lawyers attending. Another is planned in Beaumont in November and in Amarillo after the first of the year.

By these and other means we are trying to increase our membership services and to encourage greater participation by the general membership in the workings of their Association. In this regard I would welcome your comments and suggestions.

C. David Evans

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VOICE FOR THE DEFENSE is published quarterly by the Texas Criminal Defense Lawyers Assn., Suite 1632, American Bank Tower, Austin, Texas 78701. Contributions from authors are welcomed, but the right is reserved to select and edit material for publication. Copyright 1975 by TCDLA. Annual subscription rate for members of the association is $5, which is included in dues. Non-member subscription—$10 per year
Single copy—$2.00
Second class application pending at Austin, Texas.

Texas Criminal Defense Lawyers Association

Fall / Winter 1975

WHAT'S WRONG WITH ARTICLE V

All members of the bench and bar, as well as all citizens of Texas, should take an interest in the proposed new Constitution to be voted on November 4, 1975, particularly in Article V (the Judiciary Article), which will be Proposition #2 on the ballot.

Legislative Control Over Judiciary

My objections to the proposed Judiciary Article are based on a number of factors. First, the Article extends the Legislature's control over the Judiciary, a supposedly independent branch of government by over 40 reservations of authority to the Legislature in the 17 sections of the Article and more in the transitional provisions. For instance, the jurisdiction of each level of courts is not spelled out in the proposal as in the present Constitution, but is subject to change at the whim of the Legislature. Moreover, it is proposed the Legislature reserve unto itself the right to establish the qualifications of Justices and Judges (Sec. 8)—the only qualification being that a Judge within the so-called "unified system" must be a lawyer. Thus, the qualifications may fluctuate from legislative session to session. In the present Constitution the qualifications of Judges are spelled out and cannot be changed except by a vote of the people. Further, the present Constitution establishes the lay members as well as the judicial members of the Judicial Qualifications Commission, but the proposed Article leaves the makeup of the Commission strictly to the Legislature (Sec. 10). The Legislature could legally provide that a certain number of Senators and Representatives shall constitute the Commission and pass on the removal, suspension, or censure of all Judges. What greater control can one branch of government have over another—despite our doctrine of separation of powers?

Further, note the provisions of proposed Section 7(f) of Article V. It provides the Supreme Court may promulgate rules of civil procedure not inconsistent with general law and subject to the veto power by the Legislature. Other procedural rules, including criminal rules, may not be promulgated unless the Legislature so decides. Thus, in moving to meet court problems, the Supreme Court is handicapped.

These are only a few of the examples of the legislative controls over the judiciary found in the proposed Constitution drafted by the Legislature. A Constitution drafted solely by the Executive or Judiciary would undoubtedly have similar defects. The Constitution should be drafted by duly elected delegates to a People's Constitution Convention.

No Judicial Districting

One of the most serious problems confronting the Judiciary for years has been the lack of judicial redistricting. Each session the Legislature continues to create judgeships where they are not needed while refusing in many cases to heed the call for Judges in areas where they are desperately needed. The proposed Constitution fails to come to grips with or even mention judicial redistricting.

Increase in Length of Criminal Appeals and the Creation of Additional Appellate Judges

Most importantly, despite claims to the contrary by proponents who ought to know better, the proposed Article V will lengthen the delay in disposing of criminal appeals and will result immediately in the creation of additional appellate judgeships which we do not need.

There is built-in delay in the proposed Constitution which adds a second possible step to the criminal appellate process. We are all concerned with the rise in the crime rate, the lack of deterrence to crime. I believe that it is not necessarily the severity of the punishment but the swiftness and certainty of punishment that deters crime. What good are speedy trials if we don't have speedy appeals? Under the proposed Constitution the first appeal would apparently[1] go to intermediate Courts of Appeals in the area where the case originated (now the 14 Courts of Civil Appeals), then the losing party, be it the appellant or the State, has the right to seek review at the discretion of the merged Supreme Court.[2] The time taken to forward the record to the Supreme Court, file briefs, to consider the record, etc., and to decide upon review will result in a second step in the appeal in nearly every criminal case. Where review is actually granted, a full-blown second step is assured. Presently, we have only a one-step appeal to the Court of Criminal Appeals—a court of last resort and a court of specialization. Under the proposal the transfer of cases to the Courts of Appeals would more than double their collective case load immediately causing delay, resulting in the creation of unneeded appellate judgeships.

Further, under the proposal, even the first step in a criminal appeal will take longer than the *only* step now provided. In addition to the great increase in case load, the lack of staff in the Courts of Appeals, there will be a loss of specialization at a crucial time when a new Penal Code is being interpreted.

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1. I Use the word "apparently" because proposed Article V reserves the right of the Legislature to determine the jurisdiction of each level of courts and no criminal jurisdiction is granted to the proposed Courts of Appeals by the proposed Constitution. Sections 14 and 15, however, would clearly indicate the right of appeal by the State or accused from a Court of Appeals in a criminal case, and Section 16(f) of the Transitional Provisions provide for the transfer of all cases docketed but not heard by the Court of Criminal Appeals to the Court of Appeals.

2. The proposal would merge the Supreme Court and the Court of Criminal Appeals, now Courts of Last Resort, giving that Court 14 Judges and two Commissioners with a provision that the first vacancies in the judgeships will not be filled.

It is strange indeed that at a time when the State Bar is now certifying lawyers as specialists in criminal law and other fields we would abandon specialization in our appellate courts which speeds the disposition of cases—both civil and criminal.

Since many proponents and some newspapers have lauded the proposed Article V as providing for quicker criminal appeals, I think a look at the court figures are in order.

The 1974 Texas Judicial Council report at p. 127 shows that at the end of 1974 the 14 Courts of Civil Appeals had 1,383 dispositions, but had a 673 case backlog reflecting a 24% increase in backlog over 1973. The average time for disposition of a case was 4.8 months. In 1974, the Court of Civil Appeals disposed of 68% of cases filed or carried over.

The Judicial Council report at p. 123 shows in 1974 the Court of Criminal Appeals had 2,631 dispositions, including 1,819 cases on appeal and 823 habeas corpus, mandamus and other matters. In the process, the court wrote 1,933 opinions. 1,546 new cases were filed in 1974, which was added to a backlog from 1973 of 695 cases, but at the end of 1974, the Court of Criminal Appeals had disposed of 80% of its docket, leaving a 464 case backlog of which only 283 were unsubmitted cases. The backlog was reduced in one year by 34%.

The Court of Criminal Appeals records for 1975 reflect that by use of new methods, new rules, and staff the Court is disposing of frivolous appeals within a week or two, of pleas of guilty, revocation of probation matters, habeas corpus applications, etc., within one month, and all appeals with "meat" within three to four months. The Court has long been heavily burdened, but it is no bottleneck in the criminal appellate process. Any real delay in the process now is in the trial court who can grant unlimited extensions of time for the preparation of the appellate record. See Article 40.09, Code of Criminal Procedure. An amendment of the statute is all that is needed, not a constitutional change.

In light of the figures, it makes little sense to advocate that quicker criminal appeals will result if the entire criminal appellate case load is added to the civil case load, which is now being handled at a slower rate with a possible second step being added after a decision is reached in intermediate court.

The Court of Criminal Appeals figures show that approximately 25% of our cases come from Dallas County and 25% from Harris County. This means that approximately 400 to 500 each would be transferred to the Courts of Appeals in those areas. The Judicial Council report shows the Dallas Court of Civil Appeals handled 118 civil cases in 1974 and transferred 162 cases to other courts. The addition of criminal cases to their docket will call for at least four additional justices and the same will be true in Houston. The Courts of Appeals in San Antonio and Fort Worth and perhaps elsewhere will need additional judges. We are looking at the immediate creation of 12 or more appellate judges. We now have more elected appellate judges than any other State except California, which has one more.

The main thrust behind all of the judicial reform in Texas for years was to eliminate the delay in the criminal appellate process and to better utilize our appellate Judges without creating additional judgeships. The proposed Constitution does just the opposite. The purpose of the reform is not accomplished.

Further, the much ballyhooed "unified system" of the proposal is not that at all. Justices of the Peace, Municipal Judges and County Judges who preside over the courts with whom most Texans have contact are not included in such system.

Under the proposed Constitution, the cost of the Judiciary will go up. The State Comptroller figures the cost will be 3.6 million dollars a year for the State to pick up the cost of what are now County Courts at Laws, which will become Circuit Courts and Courts of Domestic Relations and Juvenile Courts which will become District Courts. These courts are now supported by the various counties. This figure does not include the cost of new appellate judgeships and the cost of still another agency—a court administrator and staff. The overall cost can be estimated at 5 million dollars a year with ensuing increases every biennial. The taxpayers will be getting less for more.

A reform is not a reform if it does not solve or remedy the problems at hand. Article V is not the reform Texas needs.

JOHN F. ONION was born in San Antonio on March 27, 1925. After graduation from the University of Texas School of Law, he was admitted to the Bar in 1950. He served as Assistant District Attorney in San Antonio where he was appointed Chief of the Civil Department. He has served as Justice of the Peace in Bexar County and in 1964 he was appointed Judge of Criminal District Court #2. He was re-elected in both 1960 and 1964. He was elected Judge of Court of Criminal Appeals in 1966. He has been the Presiding Judge of the Court of Criminal Appeals since 1970.

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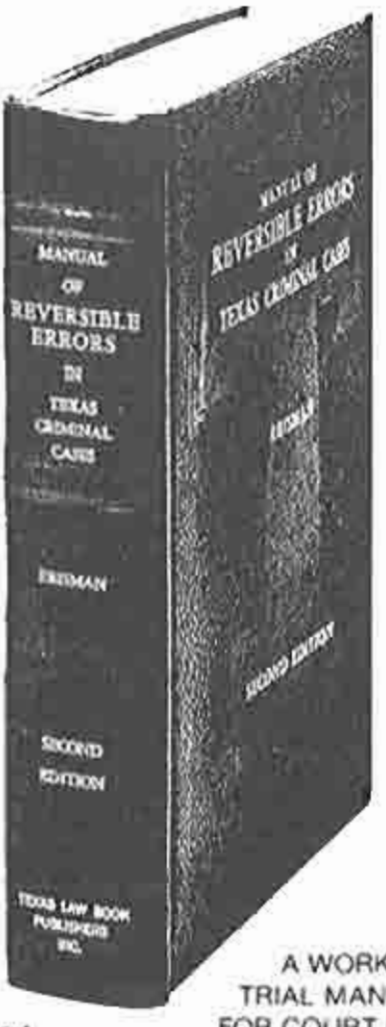

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by Robert T. Baskett

THE FEDERAL CRIMINAL DEFENDANT: DETERMINING HIS COMPETENCE TO STAND TRIAL

The conviction of an accused person while he is mentally incompetent violates due process.[1] Clearly, then, in every criminal case some determination of a defendant's mental competency must be made. Very often, of course, there is no substantial issue, and consequently the determination may properly be made informally, without resort to psychiatric evaluation or any form of expert opinion. In other instances, there may be, for any number of reasons, a question as to the competence of the accused. When such question arises, the Constitution requires that there be afforded an adequate hearing on the issue.[2] In the case of an accused charged with a federal crime, the procedure to be followed is defined by statute.

Title 18 U.S.C. §4244, enacted by Congress in 1949, provides:

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

1. *Pate v. Robinson*, 383 US 375 (1966).
2. *Id.*

ROBERT T. BASKETT was licensed in 1970, after graduation from the University of Texas School of Law. His undergraduate degree, also from the University of Texas, is in accounting. He was for three years an Assistant District Attorney in Dallas, entering private practice in 1974. He is a member of several professional associations and is with the Dallas firm of Burleson, Boudlin, Baldwin & Pate.

The issue of competency is raised by motion, which may be filed any time after arrest and before imposition of sentence or the expiration of a probation period. The motion may be made by the prosecution, or by the defense, or the court may proceed on its own motion. This article will, however, be limited in scope to the procedures to be followed in those cases where the motion is to be made by or on behalf of the accused.

While it is without question that a written motion would be the better practice, the statute contains no such requirement, and an oral motion, if otherwise complete, should be entertained by the court.[3] The motion must allege that there is reasonable cause to believe that the accused is incompetent and must clearly set forth the grounds upon which that belief is based.[4] When a motion is properly prepared and filed, and is not made frivolously or in bad faith,[5] the court has the mandatory duty to order a psychiatric evaluation of the accused.[6] The only question that need be raised by the motion is whether the accused *may* be lacking in sufficient competency to be put to trial.[7] In most cases there should be no need to conduct an evidentiary hearing on the sufficiency of the motion itself,[8] although there is authority that the court may have the discretionary power to conduct such a hearing, so long as the purpose of the hearing remains within the scope of the statutes; that is, it can only be designed to determine whether there is reasonable cause to believe that the accused may be incompetent (and additionally whether the motion is frivolous or in bad faith).[9] But it is inappropriate for the court to make a determination of the actual question of competence prior to the psychiatric examination.[10]

As stated, the court generally has no discretion to deny a motion under §4244. Once a good motion is presented, the court must order that the accused be examined by at least one qualified psychiatrist. To facilitate the examination, the statute empowers the court to order the accused committed to a suitable hospital for a reasonable period. There is no set period required for a mental examination,[11] but commitment to a medical facility must, as stated, be "reasonable," the matter being assigned to the sound discretion of the court.[12] The reasonableness of a commitment is to be judged upon the particular facts involved. In some cases, courts have upheld commitment to the federal hospital in Springfield, Missouri, even though such procedure requires many miles of travel, and even if there could be found locally a sufficient place for examination.[13] But it is suggested that a court should consider all the relevant factors in determining whether to commit, where, and for what length of time a commitment should run.[14] Little has been said by the courts on the question of commitment, but the general rule probably is that confinement may properly be ordered whenever same is necessary to insure the accuracy and adequacy of the examination.[15]

An accused has no right to be examined by an expert of his choice.[16] However, the designated expert must be an officer of the court, and should be independent of and not responsible to either the prosecution or the defense.[17] While there is authority that defense counsel has no right to be present for the examination,[18] it is certainly not improper for counsel to request that he be present, and he should be so allowed if the examining psychiatrist voices no objection.[19] It has, however, been noted that there may be a need to protect the constitutional right to effective assistance of counsel at the competency examination, and to the extent that actual presence of counsel may be inappropriate, it has been suggested that the examination be in some fashion recorded or documented so as to be available for use by the attorney.[20] At the very least, defense counsel should be given complete reports as to the psychiatrist's findings and conclusions.[21]

Under §4244, the examination is for the purpose of determining the competency of the accused to stand trial (or enter a plea of guilty). The test is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[22] It is not enough merely that the accused is oriented as to time and place and has a recollection of the events,[23] but failure of memory is, as a general rule, not alone sufficient to establish incompetency.[24]

Although §4244 is designed to provide a procedure for determining competence to stand trial (or be sentenced or serve a probation), the courts have held that it is not improper for the appointed expert to make a concurrent determination of the defendant's sanity at the time of the commission of the offense.[25] However, it has been held that if the scope of the examination is to embrace the issue of sanity at the time of the offense, notice of that fact

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3. *U.S. v. Irvin, 450 F2d 968 (9th Cir. 1971); U.S. v. Burgin, 440 F2d 1092 (4th Cir. 1971); Featherston v. Mitchell, 418 F2d 582 (5th Cir. 1969), cert. denied, 397 US 937 (1970); cf. Krupnich v. U.S., 264 F2d 213 (8th Cir 1959).*
4. *Johnson v. U.S., 344 F2d 401 (5th Cir. 1965); U.S. v. McEachern, 465 F2d 833 (5th Cir. 1972).*
5. *White v. U.S., 470 F2d 727 (5th Cir. 1972); U.S. v. McEachern, 465 F2d 833 (5th Cir. 1972).*
6. *Id.; U.S. v. Roca-Alvarez, 451 F2d 843 (5th Cir. 1971), rehearing granted, 474 F2d 1274; Brinkley v. U.S., 498 F2d 505 (8th Cir. 1974).*
7. *U.S. v. McEachern, 465 F2d 833 (5th Cir. 1972); White v. U.S., 470 F2d 727 (5th Cir. 1972).*
8. *Id.*
9. *U.S. v. Varner, 467 F2d 659 (5th Cir. 1972).*
10. *Id.*
11. *Long v. U.S., 360 F2d 829 (D.C. Cir. 1966).*
12. *Featherston v. Mitchell, 418 F2d 582 (5th Cir. 1969).*
13. *Id.*
14. *Guy v. Ciccone, 439 F2d 400 (8th Cir. 1971), concurring opinion.*
15. *Williams v. U.S., 250 F2d 19 (D.C. Cir. 1957); Featherston v. Mitchell, 418 F2d 582 (5th Cir 1969).*
16. *U.S. v. Davis, 481 F2d 425 (4th Cir. 1973); U.S. v. Mattson, 469 F2d 1234 (9th Cir. 1972); Perry v. U.S., 347 F2d 813 (D.C. Cir. 1964).*
17. *U.S. v. Pogany, 465 F2d 72 (3rd Cir. 1972); but see, U.S. v. Theriault, 440 F2d 713 (5th Cir. 1971).*
18. *U.S. v. Mattson, 469 F2d 1234 (9th Cir. 1972).*
19. *U.S. v. Albright, 388 F2d 719 (4th Cir. 1968).*
20. *Thornton v. Corcoran, 407 F2d 695 (D.C. Cir. 1969).*
21. *In re Harmon, 425 F2d 916 (1st Cir. 1970).*
22. *Dusky v. U.S., 362 US 402 (1960).*
23. *Id.*
24. *U.S. v. Knohl, 379 F2d 427 (2nd Cir. 1967); U.S. v. Borum, 464 F2d 896 (9th Cir. 1972).*
25. *U.S. v. McCracken, 488 F2d 406 (5th Cir. 1974); U.S. v. Wade, 489 F2d 258 (9th Cir. 1973).*
26. *U.S. v. Driscoll, 399 F2d 135 (2nd Cir. 1968).*

should be given the accused.[26] This holding involved a special factual setting and was grounded in considerations of fundamental fairness. It has not often been followed by other courts;[27] nevertheless, counsel should be alert to insure that he is fully informed as to both the scope and the result of any examination.

After the examination is complete, the expert must report to the court. Under the terms of the statute, if the psychiatrist indicates that the accused is mentally incompetent, the court must hold a hearing, hear evidence and make a finding as to the competency of the accused. However, if the psychiatrist's report does not indicate insanity or incompetence, no hearing is necessary,[28] but the statute does not preclude same, that decision lying within the discretionary powers of the court.[29]

On the other hand, in any case where the report expresses a doubt as to any or all of the elements of the incompetency standard, even if the overall opinion is that the accused is sane, it is error for the court to refuse to conduct a hearing.[30] The question whether the error is such as to require reversal of a conviction depends upon whether the accused was in fact incompetent at the time of trial, and in such cases, the reviewing court may remand to the trial court for the limited purpose of determining the question.[31]

As heretofore noted, if the report does indicate incompetence, the court must conduct a hearing and judicially determine the issue. The same mandate would seem to apply in any case where the competency of the accused is open to a "bona fide doubt."[32] Courts generally are more likely to require hearings where there has been a history of mental disorder even though the report indicates that the accused is competent.[33]

Under the terms of the statute, the accused is entitled to "due notice" of the hearing. In addition, the defendant has the right to be present and offer evidence in his own behalf.[34] The question is one for the court, not a jury.[35]

The trial court is to apply the test of competency heretofore noted and must enter a finding that the accused is or is not competent under that test.[36] The testimony of the experts, though not absolutely binding on the judge, is entitled to some probative weight and may not be arbitrarily disregarded.[37] The court's ruling involves a question of fact and may be reversed on appeal if clearly erroneous,[38] or if arbitrary and unwarranted.[39]

If the court finds the accused competent to stand trial, the proceedings against him may continue, although the court has the power, perhaps the obligation, to inquire further if anything subsequently raises a new doubt as to the mental condition of the accused.[40]

The court's finding as to competence cannot be used against the accused in the trial, nor can it be brought to the attention of the jury in any manner.[41] This provision of the statute apparently means, however, only that the court's *order* that the accused is competent cannot be introduced, but does not prohibit introduction of testimony on the question by the experts who examined him.[42] The statute appears to cut both ways, so that an accused, later found competent, could not introduce a previous finding of incompetence, although he would not be barred from presenting to the jury any evidence formerly adduced on the issue at a competency hearing.[43] But the statute does not prohibit the same experts from testifying as to the mental condition of the accused at the time of the offense, even though they formed their opinions at the examination to determine competence to stand trial.[44]

Section 4244 also provides that no statement made by the accused during the examination can be admitted against him on the question of guilt. In the case of an examination that was ordered under the statute, but included evaluation of sanity at the time of the offense, the prohibition against using the defendant's statements applies fully to any statements, no matter in what context they were made.[45]

It must be remembered, however, that the statute only prohibits admission of statements when such statements deal with the issue of guilt. Thus, the mere fact that a statement was made during "the course of" the examination does not alone render it inadmissible.[46] The courts have developed the dichotomy that statements germane to the issue of *insanity* are admissible, while statements germane to the question of *guilt* are not.[47] But it has been suggested that when a statement might be simultaneously relevant to both questions, the better view is that it should not be admitted, even with a limiting instruction to the jury.[48]

As a note of caution, though no authority on the issue has been found, it is suggested here that statements made during the examination might be admissible for the purpose of impeaching a defendant's testimony.[49] This

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27. *See U.S. v. Mattson, 469 F2d 1234 (9th Cir. 1972); U.S. v. Jacquillon, 469 F2d 380 (5th Cir. 1972); U.S. v. Matos, 409 F2d 1245 (2nd Cir. 1969).*
28. *Cheely v. U.S., 367 F2d 547 (5th Cir. 1966), cert. denied 387 US 923 (1967); U.S. v. Williams, 468 F2d 819 (5th Cir. 1972); U.S. v. Stevens, 461 F2d 317 (7th Cir. 1972); U.S. v. Ives, 504 F2d 935 (9th Cir. 1974).*
29. *U.S. v. Robertson, 507 F2d 1148 (D.C. Cir. 1974); Whalem v. U.S., 346 F2d 812 (D.C. Cir. 1965).*
30. *U.S. v. Makris, 483 F2d 1082 (5th Cir. 1973).*
31. *Id.*
32. *Floyd v. U.S., 365 F2d 368 (5th Cir. 1966); Welf v. U.S., 430 F2d 443 (10th Cir. 1970).*
33. *Morris v. U.S., 414 F2d 258 (9th Cir. 1969); cf. U.S. ex rel. Roth v. Zelker, 455 F2d 1105 (2nd Cir. 1972).*
34. *Eskridge v. U.S., 433 F2d 440 (10th Cir. 1971).*
35. *U.S. v. Huff, 409 F2d 1225 (5th Cir. 1969); U.S. v. Davis, 365 F2d 251 (6th Cir. 1966).*
36. *U.S. v. David, 511 F2d 355 (D.C. Cir. 1975).*
37. *U.S. v. Gray, 421 F2d 316 (5th Cir. 1970).*
38. *U.S. v. Schaffer, 433 F2d 928 (5th Cir. 1970).*
39. *U.S. v. Gray, 421 F2d 316 (5th Cir. 1970); Hall v. U.S., 410 F2d 653 (4th Cir. 1969).*
40. *U.S. v. Harlan, 480 F2d 515 (6th Cir. 1973); U.S. v. Davis, 365 F2d 251 (6th Cir. 1966); Beltran v. U.S., 302 F2d 48 (1st Cir. 1962).*
41. *Taylor v. U.S., 222 F2d 398 (D.C. Cir. 1955); U.S. v. Davis, 496 F2d 1026 (5th Cir. 1974).*
42. *U.S. v. Hereden, 461 F2d 611 (5th Cir. 1972).*
43. *U.S. v. Collins, 491 F2d 1050 (5th Cir. 1974); but see U.S. v. Davis, 496 F2d 1026 (5th Cir. 1974).*
44. *U.S. v. Moody, 462 F2d 694 (5th Cir. 1972); U.S. v. McCracken, 488 F2d 406 (5th Cir. 1974).*
45. *U.S. v. Malcolm, 475 F2d 420 (9th Cir. 1973).*
46. *U.S. v. Bennett, 460 F2d 872 (D.C. Cir. 1972).*
47. *Id.; Ashton v. U.S., 324 F2d 399 (D.C. Cir. 1963).*
48. *U.S. v. Bennett, 460 F2d 872 (D.C. Cir. 1972).*

possibility should certainly be considered if the accused intends to testify in his own behalf. The same consideration should apply where the accused might have admitted to extraneous offenses during the examination, although a broad construction of the statutory language might prohibit introduction of such statements where same would be pertinent to the issue of guilt.

In those cases where the accused is found incompetent to stand trial, the court is empowered to have him committed to the custody of the Attorney General until he is competent or until the pending charges against him are in some fashion disposed of.[50] The language of the statute, §4246, is permissive and not mandatory. Additionally, no unconvicted person should be subjected to confinement unless there has been a judicial finding that he would probably endanger the officers, property or interests of the United States.[51] Absent such a finding, no commitment after a determination of incompetency under §4244 can be for more than a reasonable time and only for so long as it takes to determine whether there is a substantial chance that the accused will attain competence in the foreseeable future.[52] If the chances are good that he will attain competency within a reasonable time, he may be held, otherwise, he must be released or granted the hearing provided in 18 U.S.C. §4247.[53]

Orders of commitment are reviewable, either through application to the committing court,[54] or by direct appeal.[55]

It should be also noted that in cases where competency was not determined prior to trial, or the entering of a plea, and the Director of the Bureau of Prisons certifies that there is probable cause to doubt the competency of the accused, a hearing must be held under the provisions of §4244. Upon a finding that the accused was incompetent, the court "shall vacate the judgment of conviction and grant a new trial."[56]

The question of competence may also be raised by a motion to vacate pursuant to Title 28 U.S.C. §2255,[57] but at least in those cases where the issue was decided at trial, there should be a showing of new facts or circumstances relative to the question.[58]

Conclusion

In federal criminal prosecutions, the procedures established to deal with questions of the defendant's competence to stand trial are fairly ordered and well structured. A basic general understanding of these procedures will stand defense counsel in good stead. Observation of the guidelines and principles discussed herein, particularly regarding the manner and means suggested for raising the issue of competence in a timely and proper fashion will result in a full and fair determination of the matter, to the benefit of all concerned.

The purpose of these procedures is, of course, to insure that no person be required to stand trial unless he is fully competent. The system is not infallible, as the number of reported attacks, both direct and collateral, will attest. But by properly raising and determining the issue at the first available opportunity, the rights of the accused are best protected. The chances that an incompetent person may be imprisoned rather than treated are greatly diminished and the judicial system is spared the strain of unnecessarily re-trying cases. Justice is served.

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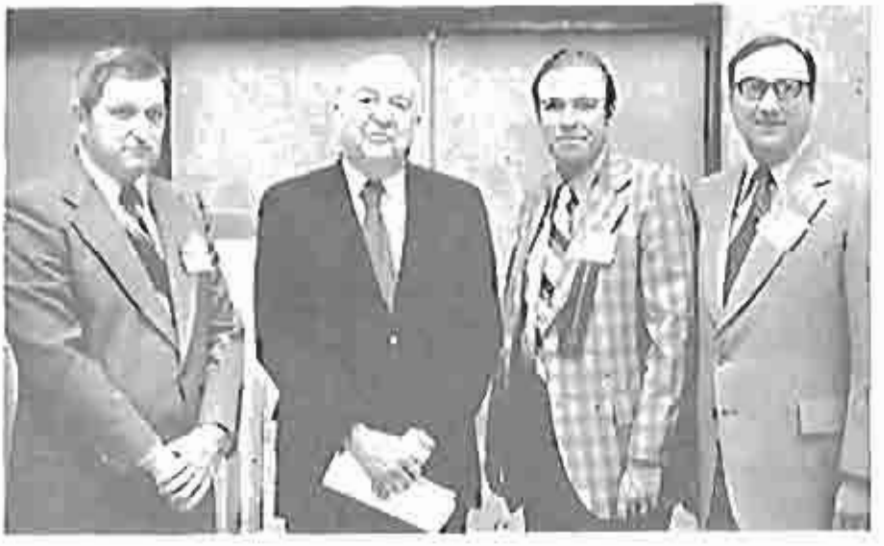
49. *See Harris v. New York, 401 US 222 (1971).*
50. *Title 18 U.S.C. §4246.*
51. *U.S. v. Wood, 469 F2d 676 (5th Cir. 1972), 18 U.S.C. §§4246-4248.*
52. *Id.; Jackson v. Indiana, 406 US 715 (1972).*
53. *Id.*
54. *Henry v. Ciccone, 440 F2d 1052 (8th Cir. 1971).*
55. *U.S. v. Klein, 325 F2d 283 (2nd Cir. 1963); Huggins v. U.S., 205 F2d 650 (9th Cir. 1953).*
56. *Title 18 U.S.C. §4245.*
57. *U.S. v. Williams, 468 F2d 819 (5th Cir. 1972), Sanders v. U.S., 373 US 1 (1963).*
58. *Eskridge v. U.S., 443 F2d 440 (10th Cir. 1971); Grill v. U.S., 363 F2d 32 (5th Cir. 1966).*



Tom Hanna, Sen. Sam Ervin, Judge Onion and George Gilkerson at the Criminal Law Institute, July 1975.

Travis Shelton of Lubbock, new V.P. of the State Bar of Texas.

OUTLINE OF HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT

I. Statutory provisions 28 U.S.C. §2241–2255
   A. State convictions—§2254
   B. Federal convictions—§2255

II. §2254 Petitions
   A. Applicable State provisions
      Art. 11.01 et seq. Code of Criminal Procedure (Texas Statutes Annot.)
   B. Requisites for Federal jurisdiction §2254(b), (c), (d), (i)–(7)

III. §2255 Petitions
   A. Custody
      1. Physical or constructive
         See *Jones* v. *Cunningham*, 371 U.S. 236 (1962)
         Simmons v. *U.S.*, 437 F.2d 156 (5th Cir., 1971)
         cf. *Heflin* v. *U.S.*, 358 U.S. 415 (1959)
      2. Writ of *coram nobis*—*U.S.* v. *Morgan*, 346 U.S. 502, 511 (1954)
   B. Necessity of hearing—waiver by petitioner of Attorney-client privilege
      U.S. v. *Woodall*, 438 F.2d 1317 (5th Cir., 1971) en banc, cert den., 403 U.S. 933
   C. Areas most frequently confronted
      1. Rule 11, Federal Rules Criminal Procedure violations See also Amendment to R. 11, effective date 12-1-75 17 Cr. L. 3215 (August 6, 1975)
         a. Remedy-*McCarthey* v. *U.S.* 394 U.S. 459 (1969) vacation of plea—right to plead anew
      2. Breach of plea agreement
         a. *Santobello* v. *New York*, 404 U.S. 257 (1972)
         Remedy: vacation of guilty plea or "specific performance:
         b. *Bryan* v. *U.S.*, 492 F.2nd 775 (5th Cir., 1974)
         en banc decision—Accused placed under oath and inquiry made, cf. Amendment provisions of Rule 11, *Bryan* procedure is conclusive on §2255 Petition—U.S. v. *Barnett*, *514 F.2d 1241* (5th Cir., 1975)
      3. Pre arraignment conduct of law enforcement official.
         a. Effect of guilty plea—plea bars all non-jurisdictional defects—i.e. waiver of non-jurisdictional defenses e.g. illegal search and seizure, coerced confession.
         b. Conviction after trial
            (1) Res judicata—not strictly applied to §2255 petitions, but petitioner may not assert contentions previously adversely decided on direct appeal or prior collateral attack.
            (2) Waiver — objections not timely raised are deemed waived. However may not timely raised are deemed in conjunction with allegation of ineffective counsel. Even in absence of incompetence of counsel, courts may entertain relief cf. *Payne* v. *U.S.*, 508 F.2d 1391 (5th Cir., 1975).
      4. Tucker violations
         Tucker v. *U.S.*, 404 U.S. 443 (1972)—precludes consideration of prior illegal convictions.
         a. *Lipscomb* v. *Clark*, 468 F.2d 1321 (5th Cir., 1972) Procedure to be followed in considering *Tucker* petitions.
         b. *Burgett* v. *Texas*, 389 U.S. 109 (1967)—effect on State convictions in which prior illegal convictions were considered.
         c. Bases for attack
            (1) Constitutional infirmity *Leary* v. *U.S.*, 395 U.S. 6 (1969), see also *Harrington* v. *U.S.* 444 F.2d 1190 (5th Cir., 1971)
            (2) *Gideon* v. *Wainwright* violations — *Mitchell* v. *United States*, 482 F.2d 289 (5th Cir., 1973).
      5. Mental competency during criminal proceedings
         a. Insanity as a defense—standard is found in *U.S.* v. *Blake*, 407 F.2d 908 (5th Cir., (1969) en banc decision; however insanity as a defense is waived by guilty plea.
         b. Incompetency as a function of "understanding plea" under R.11—standard is found in

WILLIAM F. SANDERSON received his B.A. from Vanderbilt University and later an L.L.B. from the University of Texas in 1968. He is currently Assistant United States Attorney for the Northern District of Texas.

Dusky v. *U.S.* 362 U.S. 402 (1960).

c. Competency issue as basis for evidentiary hearing under §2255—*Rice* v. *U.S.* 420 F.2d 863 (5th Cir. 1969) cert. den. 397 U.S. 1067.

d. Pre-plea adjudication of competency—18 USC §4244

6. Competency of counsel during criminal proceedings

a. Pleas of guilty—Standard is found in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970).
cf. *Lamb* v. *Beto*, 423 F.2d 85 (5th Cir., 1970); *Walker* v. *Caldwell*, 476 F.2d 213 (5th Cir., 1973);
also see *Herring* v. *Estelle*, 491 F.2d 125 (5th Cir., 1974).

b. Pleas of not guilty—Standard is found in *MacKenna* v. *Ellis*, 280 F.2d 592, 599 (5th Cir., 1960) cf. *U.S.* v. *Prince*, 491 F.2d 655 (5th Cir., 1974).

c. Competency of counsel—State action through 14th and 6th Amendments of Constitution
(1) *Herring* v. *Estelle*, 491 F.2d 125 (5th Cir., 1974) court appointed counsel
(2) *Fitzgerald* v. *Estelle*, 505 F.2d 1334 (5th Cir. 1974) reversing panel opinion at 479 F.2d 420.

IV. Habeas corpus generally
Petitioner must be in custody in District in which relief is sought, *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), unlike §2255 where petition is filed in sentencing court regardless of defendant's location.

a. Computation of time served on Federal sentence—exhaustion of administrative remedies—*Ray* v. *U.S.* 334 F.Supp., 901, affirmed 450 F.2d 340 (5th Cir., 1971)

b. Parole revocation hearings—*Scarpa* v. *Board of Parole*, 477 F.2d 278 (5th Cir., 1973) en banc decision, vacated 414 U.S. 809 (1973).

THE PROSECUTOR'S VIEW OF JURY SELECTION IN A CRIMINAL CASE

It may come as a shock to the newly licensed practitioner or court-appointed attorney that the *average* prosecutor does not look for a fair juror, but rather for a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than in degree.

Jon Sparling, chief of the Specialized Crime Division of the Dallas County District Attorney's Office recently presented a paper at a training session for prosecutors held in Dallas, Texas. Mr. Sparling's topic was jury selection in a criminal case and contained the following statements:

"You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different in kind, rather than in degree."

"I don't like women jurors because I can't trust them."

"You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused."

"Look for physical afflictions. These people usually sympathize with the accused."

"Intellectuals such as teachers, etc. are generally too liberal and contemplative to make State's jurors."

Mr. Sparling's thoughts should remind us all that the trial of a criminal case is an adversary proceeding and not a search for TRUTH.

CJO Executive Director Robert Flowers and Judge Trumm

Stu Kinard was Master of Ceremonies at the TCDLA Annual Awards Banquet.

THE SMELL OF MARIJUANA

Re: *Borner & Ebeling*, #49, 635, 636, 4/16/75

Gentlemen:

With regard to your recent newsletter wherein you inquire as to a possible "deodorizing mechanism" to combat the fantastic ability of police officers, and especially Border Patrol agents, to ferret out the smell of marihuana, I recently tried a federal case before Judge O'Conor in Laredo with the following results:

In United States of America v. Lloyd Byron Scheide, Criminal No. 75-L-58, the Defendant had been stopped through the use of a "chekar device" near Hebbronville, Texas. The Border Patrol agent approached the car and, upon utilizing his acute sense of smell, the Defendant was asked to open the trunk. Approximately 150 pounds of marihuana were thereby discovered.

I filed a motion to suppress, and before this motion was heard I stopped by the local exotic food store and picked up approximately one ounce of each of the following substances: marjoram, tarragon, basil, oregano with coriander seeds, and moulukudya. I then placed these substances in "baggies"; very similar to the type ordinarily seen by police officers in the course of their duties. On cross-examination, after I had re-qualified the Border Patrol agent regarding his nasal prowess, I took one of the substances that I had brought with me out of my coat pocket and handed it to him, asking him to tell the Court whether or not, in his expert opinion, it was marihuana. After careful visual scrutiny, and also placing his nose inside the "baggie," the officer identified the substance as marihuana. I then made four trips to the counsel table and produced the other four substances, one at a time, which the officer also identified as marihuana.

The next step was to announce to the Court that none of the substances were in fact marihuana, but were the five items listed above which I had purchased the day before at the local exotic food establishment. A better procedure would, of course, have been to call the owner of the store or some other "expert"—but I got away with it. After observing the dilated pupils and ashen gray complexion of the Border Patrol agent, Judge O'Conor stated into the Record that there was no probable cause to conduct the search in this particular case. The Court then announced that he would nevertheless deny the motion to suppress on the ground that the search was a "functional equivalent of a border search."

When *Ortiz*, *Brignoni-Ponce* and the *Penilez* case (Fifth Circuit) came out, I filed a motion for reconsideration of the judgment, Judge O'Conor granted this motion and acquitted the Defendant of all charges.

I would suggest that if you have a situation similar to the one discussed above, defense counsel should not stand still and let a police officer or Border Patrol agent establish probable cause simply by stating that he smelled marihuana. A request should be made by defense counsel that he be allowed to use a sample of the actual contraband in order to test the officer's olfactory senses. Defense counsel might then use a "comparison test," bringing along with him some other substances and asking the officer to discern which substance is marihuana. Another possibility would be to ask the Court to conduct out-of-Court experiments, utilizing several automobiles and placing "Exhibit A" in one of them; then asking the officer to ferret out which automobile contains the contraband.

In my opinion, most law enforcement officers will be completely baffled by any one of the above "experiments"; the point is that you have absolutely nothing to lose. If you don't try something, probable cause is going to be established while you sit idly by and shake your head.

I hope this information will be of some use to our association and wish to thank the Honorable Richard C. Smith, a fellow member practicing in Edinburg, Texas, for calling your recent newsletter to my attention.

AWARDS DINNER

Dallas July 1975

U.S. Judge Robert O'Connor and Attorney General and Mrs. John Hill

Former Sen. Ralph Yarborough and Judge H. P. Green.

Paul Chitwood of Dallas

CORRELATION SHEET FOR FEDERAL RULES OF EVIDENCE AND McCORMICK ON EVIDENCE

ADMISSIONS OF A PARTY—OPPONENT Fed. Rules 801, 408-410	McCormick, Ch. 26, p. 628-669
AUTHENTICATION OF WRITINGS Fed. Rules 901-903	McCormick, Chapter 22
BURDENS OF PROOF AND PRESUMPTIONS Fed. Rules 301-302	McCormick, Ch. 36, p. 783-835
BURDENS OF PROOF AND PRESUMPTIONS—CRIMINAL CASES Fed. Rules 301-303	McCormick, Ch. 36, p. 783-835
CHARACTER AND HABIT Fed. Rules 404-406	McCormick, Ch. 17, p. 442-465
THE CLIENT'S PRIVILEGE Fed. Rules 503	McCormick, Ch. 10, p. 175-211
COMPETENCY OF WITNESSES Fed. Rules 601, 603, 605, 606, 611, and 614	McCormick, Ch. 7, p. 139-150
CONTENTS—*THE BEST EVIDENCE RULE* Fed. Rules 1001, 1008	McCormick, Ch. 23, p. 559-579
CROSS EXAMINATION, IMPEACHMENT, SUPPORT Fed. Rules 607-610, 613, 801(d)(1)	McCormick Ch. 4-5, p. 43-65, & 66-108
DECLARATIONS AGAINST INTEREST Fed. Rules 804	McCormick, Ch. 27, p. 670-679
DECLARATIONS OF PHYSICAL AND MENTAL STATE Fed. Rules 803, 804 (b)(2)	McCormick, Ch. 29
DEMONSTRATIVE AND EXPERIMENTAL EVIDENCE	McCormick, Ch. 20, 21, p. 484-523, 524,542
DIRECT EXAMINATION Fed. Rules 611, 612, 614	McCormick, Ch. 2, p. 7-19
DYING DECLARATIONS Fed. Rules 804 (b)(3)	McCormick, Ch. 28, p. 680-685
EXPERT TESTIMONY; FIRST HAND KNOWLEDGE; OPINION RULE Fed. Rules 602, 701-706	McCormick, Ch. 3, p. 20-65
THE HEARSAY RULE Fed. Rules 801, 806	McCormick, Ch. 24, p. 529-613, Ch. 34, p. 751-756
JUDICIAL NOTICE Fed. Rules 201	McCormick, Ch. 35, p. 757-782
MARITAL PRIVILEGES Fed. Rules 501, 505	McCormick, Ch. 9, p. 161-174
THE PATIENT'S PRIVILEGE Fed. Rules 504	McCormick, Ch. 11, p. 212-228
PRIOR TESTIMONY Fed. Rules 804	McCormick, p. 614-627
PRIVILEGES FOR GOVERNMENTAL SECRETS Fed. Rules 509-510	McCormick, Ch. 12, p. 229-243
PRIVILEGES, SOME ADDITIONAL	McCormick, Ch. 8, p. 151-160
SPONTANEOUS STATEMENTS Fed. Rules 803 (1), 803 (2), 804 (b)(3)	McCormick, Ch. 29, p. 686-711
RECORDS: REGULARLY KEPT AND OFFICIAL Fed. Rules 803 (6) (7) & (8)	McCormick, Ch. 31-32, p. 717-742
RECORDS OF PAST RECOLLECTION Fed. Rules 803 (5)	McCormick, Ch. 30, p. 712-716
RELEVANCY Fed. Rules 401-403	McCormick, Ch. 16, p. 433-441
SIMILAR HAPPENINGS Fed. Rules 401-403	McCormick, Ch. 18, p. 466-478

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- Evening Free.

January 16
- Coffee & Registration ..... 9:45 a.m.
- Seminar ..... 10:00 to 1:00 p.m.
- Lunch ..... 1:00 to 2:00 p.m.
- Seminar ..... 2:00 to 4:30 p.m.
- Cocktail Party at Tom Sharpe's Home ..... 6:00 p.m.

January 17
- Coffee ..... 9:00 a.m.
- Board of Directors Meeting and Lunch ..... 10:00 to 1:30 p.m.
- Seminar ..... adjourn 3:00 p.m.

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