Voice for the defense

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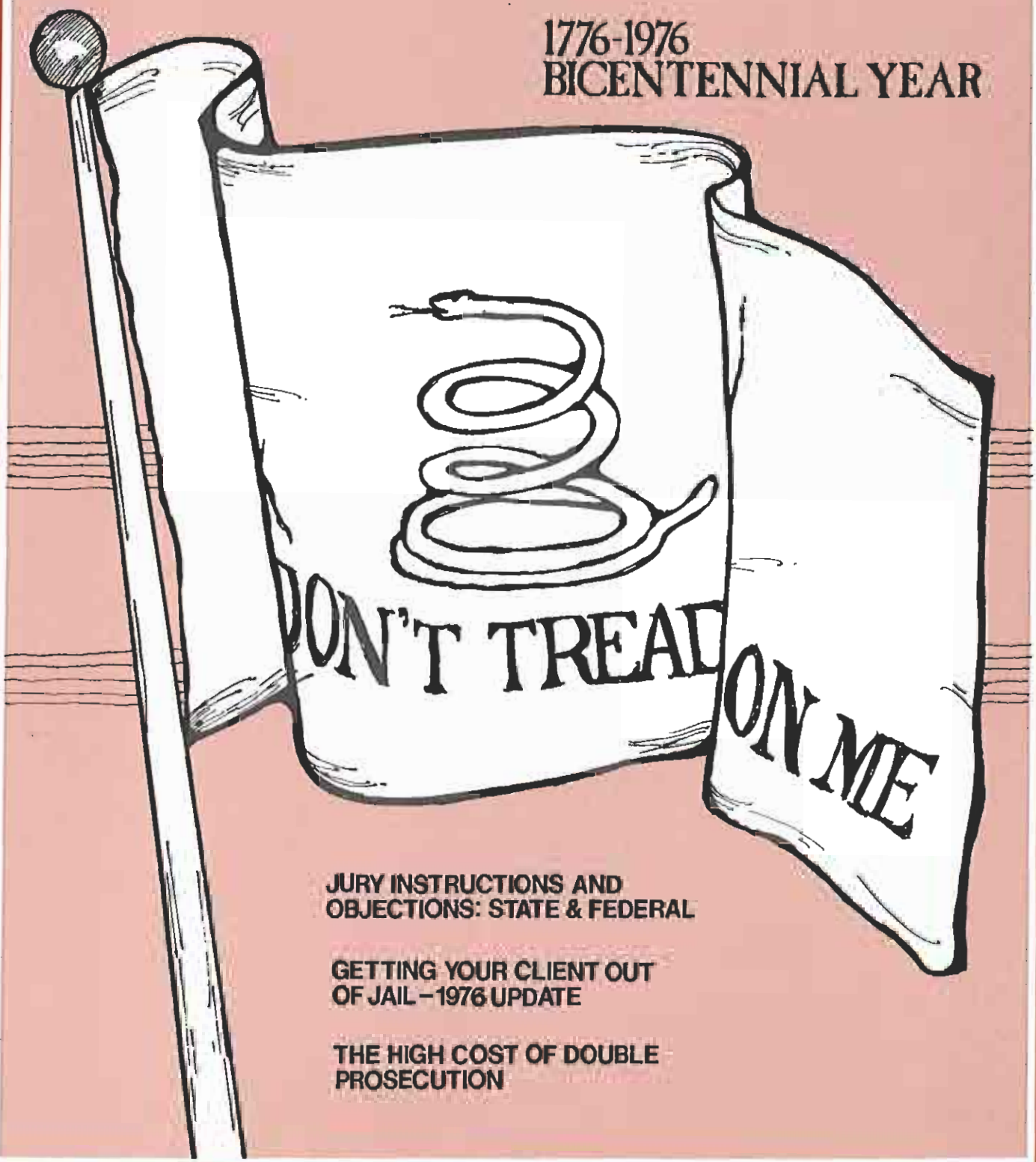
1776-1976 BICENTENNIAL YEAR



JURY INSTRUCTIONS AND OBJECTIONS: STATE & FEDERAL

GETTING YOUR CLIENT OUT OF JAIL – 1976 UPDATE

THE HIGH COST OF DOUBLE PROSECUTION

Special House Task Force on Crime

On February 27th Speaker of the House of Representatives, Bill Clayton, appointed a special Task Force to provide Texas with an "effective mechanism to control and eradicate crime." Speaker Clayton says that he has been hesitant to recommend changing the laws as long as other remedies to control crime have been available. He has concluded by noting a "15% per year crime increase" that other remedies have not been effective. The Task Force is composed of Representatives Spurlock, Chairman, Washington, Thompson, Earl, Kaster, Maloney, Uher, Vale and Cates. They may all be written at P.O. Box 2910, Austin, 78767. I don't think it can be stressed too much how important it is for the defense lawyer to communicate his views on the matters the Task Force will be considering.

Although there has been a great deal of press concerning proposals before the Task Force, Speaker Clayton denies having an anti-crime package that he will place before the house. Speaker Clayton is leaving the development of the anti-crime package to the Task Force which will be holding public hearings in all parts of the state during the next months. Two bills that have been laid out for the Task Force's consideration relate to the commission of a felony while carrying a firearm. One bill would automatically prohibit parole and probation for a felony conviction involving a firearm while another one would tack on an automatic 5 years to the sentence. Other matters sure to be considered include the states right to appeal, denial of bail for repeat offenders, use of wire taps and electronic surveillance equipment and admission of oral confessions.

It is highly questionable whether any type of legislation can do away with the crime problem. Texas has the largest and most congested prison system in the Nation with approximately 19,000 persons currently incarcerated out of a total population of 12 million. California with a population of 20 million has 17,000 persons incarcerated and Illinois with a population of 11 million has but 9,000 persons incarcerated. Apparently Texas law enforcement is already doing a good job of apprehending, convicting and incarcerating criminals.

From the evidence we have available it would seem that more stringent laws with the object of leading to the incarceration of more individuals are unnecessary. It goes without saying that we all are against crime and concerned with the threat that it makes on our lives. There must be an answer in all of the proposals and ideas we have heard, however, tampering with laws that affect individual freedoms requires great care. I am sure that Speaker Clayton is sincerely interested in reducing crime but I would suggest that we move very cautiously in the area of legislation. This is a very knotty problem and as with most difficult problems there are no easy solutions.

As officers of the court we must continue to zealously defend our clients remembering that the system will not work unless each side of the docket exerts utmost effort. We must protect our client's constitutionally guaranteed freedoms. This is a very difficult situation for the lawyer to be in, but your satisfaction will lie in the knowledge that you have done your best to represent your client.

C. David Evans

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SUMMER 1976

Jury Instructions and Objections: State and Federal

By
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San Antonio

The purpose of this paper is to serve as a guide in requesting jury instructions. It is divided into four parts:

1. Introduction
2. Federal law
3. State law
4. How to do it (Federal and State)

Introduction

More appeals are based around what the Judge tells the jury prior to their deliberations than any one thing. It is the most fertile ground for reversal in the criminal trial. It is also an extremely important part of winning your case at the trial level. The jury, if it follows the law, must operate within the framework of the jury instructions in arriving at their verdict. You, as the defense attorney, can build this framework to your specifications.

Federal law refers to requested "jury instructions"; state law refers to requested "special charges." They mean the same thing. It is the set of words that tells the jury what rules they are to follow in arriving at that important answer of "not guilty" or, sigh, "guilty."

Federal Law

Fed. Rules Crim. Proc., Rule 30, 18 U.S.C.A.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

Case Discussion of Rule 30

1. The court is required to instruct on all essential questions of law, whether requested or not. *Morris v. U.S.*, 156 F.2d 525, 527, 169 A.L.R. 305 (9th Cir. 1946).

2. The court is not required to give any specifically requested instruction so long as the instructions given present an accurate statement of the applicable law. *Dranow v. U.S.*, 307 F.2d 545, 568, 569 (8th Cir. 1962).

3. The defendant is entitled however, to instructions on any defense theory for which there is a foundation in the record. *Perez v. U.S.*, 297 F.2d 12, 15, 16 (5th Cir. 1961).

4. In reviewing instructions for error, appellate courts will consider the charge as a whole and a conviction will not be reversed solely because some part of the charge considered individually failed to state the law properly. *Parr v. U S.*, 255 F.2d 86, 89 (5th Cir. 1958), cert. den. 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed.2d 64.

5. The Court must advise counsel of intended rulings on all instructions proposed to be given, prior to commencement of argument, and that it is not sufficient simply to indicate rulings on such instructions as counsel have requested. (*United States v. Bass*, 425 F.2d 161 (7th Cir. 1970).

6. The requirement that the court inform counsel of its proposed action on instruction requests prior to the beginning of argument is not so inflexible as to preclude the giving of a supplemental or modified instruction designed to avoid confusion. *United States v. Shirley*, 435 F.2d 1076 (7th Cir. 1970).

7. The failure of the trial judge to advise counsel of his action on requests for instruction does not require reversal in the absence of a prompt objection (prior to commencement of argument), and showing of prejudice. *Whitlock v. United States*, 429 F.2d 942, (10th Cir. 1970).

8. The court is not obliged to accept an oral request for instruction. *United States v. Sanchez-Mata*, 429 F.2d 1391 (9th Cir. 1970).

9. There is no reversible error in refusing requested instructions which were filed on second day of trial, in violation of pre-trial order requiring requests to be furnished at beginning of trial, where the substance of the requested instructions were covered by the charge. *McGuire v. Davis*, 437 F.2d 570 (5th Cir. 1971).

10. The court is not required to

give counsel a copy of the charge prior to argument. *United States v. Price*, 444, F.2d 248 (10th Cir. 1971).

11. When a point of law is important to the defense, counsel should request an instruction prior to arguing the point to the jury, and, if he fails to do so, he takes the risk that the court will not instruct in accordance with his theory. *United States v. Sawyer*, 443 F.2d 712, 714 (1971).

12. When grand jury testimony was received without objection, the defendant could still preserve error by requesting instruction that it could not be considered as substantive evidence. *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971).

13. A judge commits error in granting request for charge and then saying, "I think that's bad law." in the hearing of the jury since he dissipates the force of the instruction and makes argument difficult. *United States v. Williams*, 447 F.2d 894 (5th Cir. 1971). Also, after giving the Allen charge, the judge should not leave the bench immediately telling counsel to dictate exceptions to the reporter. He should hear the exceptions.

14. The provisions of Rule 30 for the making of objections out of the presence of the jury are mandatory, and failure to grant counsel's request for permission to do so is reversible. The defendant is not obliged to show that he was prejudiced, for it cannot be determined what comments would have been made had the rule been followed. There must be reversal in order to ensure proper administration of criminal justice. *United States v. Schartner*, 426 F.2d 470, 478 (3rd Cir. 1970).

15. Plain error in comments on evidence, so as to excuse failure to make objections, was found in *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971).

Important

1. Requested instructions must be in writing.

2. Copy must be served on opposing counsel.

Objections

If the court refused to give an instruction, or gives one you do not like:

1. Must object before the jury retires.

2. If not timely made, it is waived unless the error is so prejudicial that it comes under Fed. Rules Crim. Proc., Rule 52(b), 18 U.S.C.A. as "plain error." *Finn v. U.S.*, 256 F.2d 304, 308 (4th Cir. 1958); *U.S. v. Levy*, 153 F.2d 995, 998 (3rd Cir. 1946).

State Law

State Statutes Governing Jury Charges
(Code of Criminal Procedure, 1965)
Art. 36.14: Charge of Court

"Subject to the provisions of Article 36.07 in each felony case and in each misdemeanor case tried in a court of record, the judge shall, before the argument begins, deliver to the jury, except in pleas of guilty, where a jury has been waived, a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury. Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts, and in no event shall it be necessary for the defendant or his counsel to present special requested charges to preserve or maintain any error assigned to the charge, as herein provided. Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof. In no event shall it be necessary for the defendant to except to the action of the court in over-ruling defendant's exceptions or objections to the charge."

Art. 36.15: Requested Special Charges

"Before the court reads his charge to the jury, counsel on both sides shall have a reasonable time to present written instructions and ask that they be given to the jury. The court shall give or refuse these charges. The defendant may, by a special requested instruction, call the trial court's attention to error in the charge, as well as omissions therefrom, and no other exception or objection to the court's charge shall be necessary to preserve any error reflected by any special requested instruction which the trial court refuses.

"Any special requested charge which is granted shall be incorporated in the main charge and shall be treated as a part thereof, and the jury shall not be advised that it is a special requested charge of either party. The judge shall read to the jury only such special chages as he gives.

"When the defendant has leveled objections to the charge or has requested instructions or both, and the court thereafter modifies his charge and rewrites the same and in so doing does not respond to objections or requested charges, or any of the objections or requested charges shall not be deemed to have been waived by the party making or requesting the same, but shall be deemed to continue to have been urged by the party making or requesting the same unless the contrary is shown by the record; no exception by the defendant to the action of the court shall be necessary or required in order to preserve for review the error claimed in the charge."

Art. 36.16: Final Charge

"After the judge shall have received the objections to his main charge, together with any special charges offered, he may make such changes in his main charge as he may deem proper, and the defendant or his counsel shall have the opportunity to present their objections thereto and in the same manner as is provided in Article 36.15, and thereupon the judge shall read his charge to the jury as finally written, together with any special charges given, and no further exception or objec-

tion shall be required of the defendant in order to preserve any objections or exceptions theretofore made. After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15. The failure of the Court to give the defendant or his counsel a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the appellate court.

General Rules Concerning Jury Charges

(*Christian v. State*, 161 SW 101)

1. The charge must submit to the jury every phase of the case made by the evidence and every legitimate deduction to be drawn therefrom.

2. The charge should be framed with reference to the whole evidence adduced on the trial.

3. The court is not limited or restricted by the testimony of appellant in his own behalf as to the issues to be submitted but, notwithstanding his testimony, should submit each and every phase of the case suggested by the evidence, whether the theory be presented by the evidence of the state or defense, or both. 134 (2) 262.

4. The charge should instruct the jury as to the law applicable to every theory within the scope of the indictment which the evidence tends to establish, whether favorable to the state or defendant.

5. If the testimony creates a reasonable doubt in the mind of the trial judge as to the necessity of a charge on manslaughter (murder without malice) and self-defense, or defense of another, in a murder trial, the doubt should be resolved in favor of the accused and such charge given, in which event, if he gives such charge or charges, no reversible error is caused thereby.

6. In determining the sufficiency of a charge, it must be construed as a whole and not by isolated extracts, excerpts, or paragraphs. It must be treated as an entirety, and regard must be had to the connection and interdependence of its several parts. A charge in a murder case should not and cannot properly all be given in one paragraph as a whole. It should necessarily be given in separate and distinct paragraphs.

7. The charge and the language thereof must have a reasonable and not a strained and unreasonable construction, and the jury must be considered to be reasonably intelligent and capable men (and women), sufficiently so to put such reasonable construction on the charge, and not a strained and unreasonable construction thereon.

8. No conviction should necessarily and must not ordinarily be reversed for unnecessary instructions in favor of the accused.

Cases to make your hair turn white

See *Furth v. State*, 422 S.W.2d 931 (1967) Attorney made verbal objections and special requested charge. Judge told him he could reduce them to writing at a later time. Judge Onion, Court of Criminal Appeals, said the trial judge was without authority to permit such procedure and that appellant waived his right to have his objections and special requested charges considered.

Smith v. State, 415 S.W.2d 206 (1967) Attorney dictated to the court reporter a requested charge prior to jury going out. Held, requested charges must be presented to the court in writing. Both the charge and objections are waived.

Charge To The Jury—How To Do It

1. Prior to the selection of the jury, prepare your requested instructions.

These instructions are the blueprint of your defense. A man would be a fool to try to build a house without plans, and he is not much smarter to try to defend a case without his requested instructions well in mind.

2. Use the instructions that present your theory in voir dire.

It makes no sense to try your case before a juror who will not be guided by your defense, even if proved. Therefore you should commit him to following the legal principles that you are relying on. Get the juror used to the language that he will hear from the Court at the conclusion of the evidence.

3. Present your requested instructions to the court at the proper time.

In a federal case, this may be at the beginning of the case or at any time during the trial. State court judges usually do not ask for the requested instructions until the close of evidence. In either case though you are ahead of the game if you have them prepared before trial begins.

4. Make a minimum of three copies in State court and four copies in Federal court.

Federal court wants two copies of everything, plus a copy for the government and one for yourself. Ditto in state court except usually only one copy is required for the Court.

5. There are several places where you can go to get the instructions.

Two ready sources of instructions are (1) for federal cases: *Federal Jury Practice and Instructions*, by Devitt and Blackmar, and (2) for State cases: *Jury Charges for Texas Criminal Practice* by Paul McClung. You can choose and pull the desired instructions directly from these books.

6. The absolute deadline for requested instructions for both Federal and State Courts is before the jury retires to deliberate. It must be in writing. Violate this rule only if you have developed a severe dislike for your client or a great friendship with the prosecutor because you have gutted the appeal.

7. The procedure is different in Federal Court than it is in State Court.

In Federal Court, as soon as the evidence closes, if not before, the Court will want to see your requested instructions. He will then tell you what he proposes to

do about them, and what his charge will consist of. If it is obvious the Court is not going to give you what you have asked in writing for him to give, make your objections then.

The whole thing gets cloudy though when the Court agrees to give your requested instructions "in substance," but not as you requested. The Court is within its rights to do this, but you should be on the alert because your obligations are not over. You are going to have to argue as soon as the private chat between you and the Court is over. Therefore it is imperative that you know what charge the Court is going to give to the jury so that you can fashion your argument accordingly. The first time through can be a real shocker in Federal Court. The argument is *First*. The charge *Second*. When the charge of the court is read, you must resist the temptation to reflect on your stirring closing argument and instead concentrate on what the court is saying because as soon as he finishes, you will stand up, ask that the jury be excused and then tell the court where it went wrong. Unfortunately, this must be done from memory unless the court furnishes you a copy of its charge which it has no obligation to do. If you convince the court, it will call the jury back in and amend or correct the charge and then send them out to deliberate. If you do not convince the Court, it will send them to deliberate based on what has already been said. Once the jury leaves to deliberate, all error not previously complained about in writing is gone unless it is so prejudicial as to be "plain error" (and that is pretty hard to come by).

8. In State Court, the procedure goes like this.

Evidence closes. The Court asks to see your requested instructions. You give them to him in writing. He tells you what he will do. You make your objections then, and only then. You will never have another chance. Again, the "in substance" granting of a request is troublesome. However, in State Court you can look at it on paper and make your comments accordingly. The Court then reads the charge to the jury, you make your argument, the charge is given to the jury for use in the jury deliberation and you hope for the best.

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How To Get Your Client Out Of Jail

Allen Cazier

The average client of the criminal defense lawyer wants two things. He wants to get out of jail and he wants to stay out of jail. Accordingly, your success as a criminal defense lawyer will depend as much upon your ability to obtain your client's release from jail as it will upon your skill in presenting an effective defense. Hopefully the following outline will give you some ideas on your client's first priority which is getting out of jail.

The Writ of Habeas Corpus

Our Texas Constitution provides that the writ of habeas corpus is a writ of right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual.[1] The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.[2]

The Court of Criminal Appeals, the District Courts, the County Courts, or any judge of said courts, have power to issue the writ of habeas corpus; and it is their *duty, upon proper motion*, to grant the writ under the rules prescribed by law.[3] (emphasis added).

Either the party for whose relief the writ is intended, or any person for him, may present a petition to the proper authority for the purpose of obtaining relief.[4] The person for whose relief the writ is filed is the applicant and the person presenting and signing the application is the petitioner.[5]

The petition must state substantially all of the following:

1) That the person for whose benefit the application is made is illegally restrained in his liberty, and by whom, naming both parties if their names are known, or if unknown, designating and describing them:

2) When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained;

3) When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained in his liberty;

4) There must be a prayer in the petition for the writ of habeas corpus; and

5) Oath must be made that the allegations of the petition are true, according to the belief of the petitioner.[6]

You are entitled to make an application for writ of habeas corpus on behalf of your client when he has been taken into custody by the police or booked into jail, but, has not been formally charged with any offense or, although charged, has no bond set. Whether your client is arrested with or without a warrant the law requires that he be taken "without unnecessary delay" before the magistrate who issued the warrant or before some magistrate in the county where the arrest was made.[7] Upon his appearance be-

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LIST OF AUTHORITIES

1. *Art. 1 Sec. 12 VA Tx. Const.*
2. *Art. 11.01 VACCP*
3. *Art. 11.05 VACCP*
4. *Art. 11.12 VACCP*
5. *Art. 11.13 VACCP*
6. *Art. 11.14 VACCP*
7. *Art. 1406 and 15.16 VACCP*

fore the magistrate the magistrate shall issue the statutory *Miranda* type warnings and allow the accused a reasonable time and opportunity to consult counsel and to be admitted to bail if allowed by law.[8] As a practical matter, what actually happens upon the initial presentation of the application for writ of habeas corpus is the judge enters an order directing the sheriff or other law enforcement officers to produce your client at a specified time and place to show cause why your client should not be released. At the same time the judge enters an order setting bond pending the writ hearing. Upon presentation of the order setting the writ hearing and the writ bond, approved by the judge, your client will be released from jail.

You are also entitled to make an application for writ of habeas corpus for your client when charges have been filed, but the amount of the bond set is excessive or oppressive. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident.[9]

In setting the amount of bail, the court is bound by the following rules:

1) The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with;

2) The power to require bail is not to be used so as to make it an instrument of oppression;

3) The nature of the offense and circumstances under which it was committed are to be considered;

4) The ability to make bail is to be regarded, and proof may be taken upon this point.[10]

The question of the amount of bail is a matter within the trial court's sound discretion.[11]

At the hearing on application for writ of habeas corpus for bond reduction you have the burden of proving the following:

1) That the applicant cannot make bond in the amount set and that it is excessive:[12]

2) That the applicant has tried, but has failed to make the bond in the amount set.[13]

The evidence should be offered by the applicant as to what amount of bond he can make. If this evidence is not presented and the case is appealed the appellate court has nothing upon which to render a decision reducing the bond.[14]

Evidence may be presented concerning the facts and circumstances of the offense, however, the state has no duty to present any such evidence and such evidence may or may not benefit the applicant. In any case, the applicant's ability to make bond is not the sole criterion in setting bond, and the court may consider the nature of the offense charged.[15]

In a capital murder case, the court may deny bail where the proof is evident. In such a case, the burden of proof is on the state to establish that the proof is in fact evident. The state must present evidence that the jury would not only convict, but would return findings so as to require the death sentence under Article 37.071 VACCP.[16]

In the case of *Ex Parte Skinner*[17] a hearing had been held in the trial court on application for writ of habeas corpus to reduce a $100,000.00 bond in a case where the defendant was charged with assault with intent to rape. The defendant proved that he could make bond up to and including $10,000.00. He further proved that he was 35 years old, married, father of four children and a life-long resident of the county. He had never before been convicted of a felony. He owned his own home and had an earning capacity of $10,000.00 per year. The application for writ of habeas corpus for bond reduction was denied, however, one day before the writ was to be heard before the Court of Criminal Appeals, the trial court entered an order reducing bail from $100,000.00 to $50,000.00. Prior to the *Skinner* case, a line of cases had established the rule that the defendant would then have to go back to the trial court to show that he was unable to make the new $50,000.00 bond. In *Skinner*, the appellate court said this would require the defendant to do a "useless thing", overruled the prior line of cases and set the bail at $5,000.00.

Making Bail

Bail is the security given by the accused that he will appear and answer before the proper court the accusation brought against him and includes a bail bond or a personal bond.[18]

The following types of bonds are acceptable depending upon the case and the person approving the bond:

1) A 100% cash bond to be deposited with the custodian of funds of the court in which the prosecution is pending;

2) A commercial surety bond signed by a professional bail

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8. *Art. 15.17 VACCP*
9. *Art. 1 Sec. 11 VA Tx. Const.*
10. *Art. 17.15 VACCP*
11. *Ex Parte Dueitt, 529 S.W.2d 531 (Tx.Cr.App. 1975)*
12. *Holliman v. State 485 S.W.2d 912 (Tx.Cr.App. 1972); Ex Parte Alonzo, 208 S.W.2d 651 (Tx. Cr.App.1948)*
13. *Ex Parte Henton, 468 S.W.2d 850 (Tx.Cr.App. 1970)*
14. *Ex Parte Sellers, 516 S.W.2d 665 (Tx.Cr.App. 1974)*
15. *Ex Parte Sierra, 514 S.W.2d 760 (Tx.Cr.App. 1974); Ex Parte Redline, 529 S.W.2d 68 (Tx.Cr. App. 1975)*
16. *Ex Parte Sierra, 514 S.W.2d 760 (Tx.Cr.App. 1974); Ex Parte Wilson, Ex Parte Kibbe, 527 S.W.2d 310 (Tx.Cr.App. 1975)*
17. *Ex Parte Skinner, 496 S.W.2d 633 (Tx.Cr.App. 1974)*
18. *Art. 17.01 VACCP*

bondsman. In larger cities the commercial bail bondsman must be licensed by the bail bond licensing board.[19]

3) A non-commercial surety or property bond. Generally this type of bond will be posted by friends or relatives of the accused who own property, not subject to execution, worth double the amount of the bond. The sureties must be accepted by the sheriff or the court.

4) A personal recognizance bond may in the discretion of the court be permitted.[20]

Article 17.08 VACCP sets out the requisites of a bail bond. A conflict exists in the law as to who may approve a bail bond. Article 17.11 VACCP indicates that it is the duty of the court, judge or magistrate to approve the bond, however, Article 2372p-3, Sec. 14, VACS provides that the sheriff of the county has the sole responsibility for receiving and approving bail bonds.

A Client In Custody On Motion To Revoke Probation

The statutes make no provisions for setting bond in a case where the defendant is in jail on motion to revoke probation. The case law is fairly clear however, that in the case of a felony probation the defendant is not entitled to bail as a matter of right. Bail is strictly a matter within the discretion of the court.[21]

In a misdemeanor probation case, however, the defendant is entitled to have bail set.[22] The reasoning is that in a misdemeanor case no judgment of guilt is entered by the court when probation is granted. Also, it is entirely possible for the defendant to stay in jail pending a hearing on motion to revoke misdemeanor probation for a longer time than he might serve upon conviction.

As a practical matter you should consider that many judges, as well as probation officers, subscribe to the theory of "jail therapy." You may do your client a disservice by rushing to the courthouse to obtain a bond setting and obtain his release from jail if he has been placed in jail for a rather minor violation of his conditions of probation. Many judges are reluctant to revoke probation for a minor violation and would be less willing to do so after the defendant has received a short period of "jail therapy." In the event of revocation a recent change in the law permits the court to back date the sentence to the date the defendant entered jail on a motion to revoke probation.[23]

Bond Pending Appeal

A defendant who is convicted of a misdemeanor, or who is convicted of a felony and whose punishment is assessed at a fine or confinement not to exceed fifteen (15) years or both, shall be entitled to bail pending disposition of his motion for new trial, if any, and pending disposition of his appeal, if any, and until his conviction becomes final.[24] The defendant may remain out on bond during the appeal until the issuance of the capias after mandate.[25] A practical consideration in obtaining your client's release from jail pending an appeal is that if he has been in jail for a substantial period of time prior to undertaking the appeal this time will be lost if there is a break in custody. The sentence can only be backdated to the date when the defendant last entered custody.[26]

Civil Contempt Cases

In the event your client is placed in jail for having been found in contempt of court for the violation of a court order in a divorce case, wife or child support case, or child custody case your remedy is by application for writ of habeas corpus to the Court of Civil Appeals for the Supreme Judicial District.[27] Generally speaking leave of court must be obtained before filing an application for writ of habeas corpus in the Court of Civil Appeals. This however, is your only avenue of appeal from a commitment order in such a case.

Attorney As Bondsman

It is not unethical for a lawyer to act as surety on his client's criminal bond when there is no element of advertising, solicitation, touting or serving as a "feeder" for his law practice apparent or inherent in the action of the member.[28] An attorney may act as surety on his client's criminal bond so long as the attorney-client relationship existed prior to the signing of the bond by the attorney. However, for the attorney to sign as a bondsman on a criminal bond, at a time when he did not represent the principal, and to thereafter represent the principal as his attorney is solicitation in violation of the cannons of ethics. Further, it is unethical for an attorney to allow his name to be shown to prisoners in

19. *Art. 2372p-3 VACS*
20. *Art. 17.02, 17.03 and 17.031 VACCP*
21. *Ex Parte Jones, 460 S.W.2d 428, (Tx.Cr.App 1970); Valdez v. State, 508 S.W.2d 842 (Tx.Cr. App. 1974)*
22. *Ex Parte Smith, 493 S.W.2d 958 (Tx.Cr.App. 1973)*
23. *Art. 42.03(2) VACCP; Guerra v. State, 518 S.W.2d 815 (Tx.Cr.App. 1975)*
24. *Art. 44.04(a) VACCP*
25. *Art. 44.06 VACCP*
26. *Art. 42.03(3) VACCP*
27. *Art. 1824(a) VACS*
28. *Bar Committee Opinion 251(June 1962)*

the county jail on a list of bondsmen authorized by the court to write bonds.[29] As a practical matter many local court rules prohibit attorneys from signing bonds in criminal cases.

Attorney's Relations With Bail Bondsman

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.[30] A lawyer or law firm shall not share legal fees with a nonlawyer.[31] No bondsman or agent of a bondsman may, by any means, recommend or suggest to any person whose bail bond has been posted by that person the name of any particular attorney or firm of attorneys for employment in connection with a criminal case. Any person who violates the foregoing provision commits a misdemeanor punishable by fine of not more than $500.00.[32]

The Attorney As Prisoner

Criminal defense trial lawyers have been known to become slightly over zealous in the defense of their clients to the occasional displeasure of the trial judge. In the event the trial judge over reacts to your zealousness and holds you in contempt you should be familiar with the provisions of Article 1911(a) VACS. This Article provides that in the event an officer of the court is held in contempt the trial court shall, upon proper motion filed in the offended court, release the officer upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court other than the offended court, said judge to be appointed for that purpose by the presiding judge of the administrative judicial district wherein the alleged contempt occurred. This however, does not apply in a case where the court's power to confine a contemnor is exercised in order to compel obeyance of a court order.[33]

Allen Cazier of San Antonio received both his B.A. and J.D. degrees from St. Mary's University. After being admitted to the Bar in 1972, he served as administrative assistant to Judge Archie Brown until he became associated with his present firm of Evans and Marshall in 1973. He is an Associate Director of TCDLA for 1975–76 and is Chairman of the Law Office Economics Committee for the Association.

29. *Bar Committee Opinion 347 (August 1969)*
30. *State Bar Disciplinary Rule 2-103(b)*
31. *State Bar Disciplinary Rule 3-102*
32. *Art. 2372p-3 Sec. 15 VACS*
33. *Art. 1911(a) VACS*

Georgetown Law Journal Circuit Note Issue on Criminal Law

TCDLA has purchased a number of copies of this outstanding issue of the Georgetown Law Journal which outlines the United States Courts of Appeals 1974–1975 criminal law and procedure cases. These are available through the TCDLA office for $5.00 per copy. Please make your order early as supplies are limited.

The High Cost of Double Prosecution

By Robert Heard

When criminal cases must be retried because of misconduct by the prosecution, taxpayers pick up the tab. Dallas has a startling lead in such use of your dollars.

This article originally appeared in the Feb. 1976 edition of Texas Parade Magazine and is reprinted here with their permission.

In 1971 Rene Adolfo Guzman and Leonardo Ramos Lopez received death sentences for the slaying of three Dallas policemen. But Dallas Dist. Atty. Henry Wade twice reached too far in his argument to the jury in Belton, where the case had been moved because of extensive news coverage in Dallas. He told the jury that when the defendants and their attorneys entered not guilty pleas: "you know they were lying to you at that time."

The Texas Court of Appeals ruled on Oct. 24, 1973, in reversing the case, "An argument that counsel and accused did not tell the truth when they entered pleas of not guilty constitutes an effort to deny an accused the presumption of innocence to which he is entitled."

Wade also had told the Belton jury, "I'm concerned about the open season that is coming on police officers. I believe the same week these officers were killed there were 11 killed in America."

The appeals court said, "The argument that 11 officers were killed the same week was not based on evidence in the trial. Patently, such evidence would not have been admissible had it been offered."

Why wouldn't it have been admissible? Because it had nothing to do with the crime these defendants were being tried for. What is striking about Wade's argument is its pointlessness. It was overkill. He had a cinch case, as proved later by the defendants' guilty pleas when the second trial got underway. But he couldn't resist grandstanding. Quoted in the Dallas newspapers, Wade's argument may have been ballot box gold, but it cost Dallas taxpayers perhaps as much as $2,000 each additional day to move the second trial down to Belton again.

Guzman and Lopez drew life sentences on their guilty pleas. The U.S. Supreme Court had struck down the old Texas death penalty law that was used at the first trial.

Such hotheaded blunders in the jury arguments of Texas prosecutors frequently force agonizing reversals on appeal, and the cost to the state's taxpayers is great, averaging $1,000 to $1,500 a day. Some taxpayers may think prosecutors' remarks about "hippies" or "addicts" or "perverts" need saying, but it takes money from their pockets that could be going for groceries and gasoline.

"There is an old saying among prosecutors: 'Your guilty and not guilty cases are on the front page; your reversals are inside,' " says Dist. Atty. Bob Smith of Austin. Smith deplores the cynicism of that attitude. And he criticizes the Texas Court of Criminal Appeals for reversing one of his own cases "to send a message" to the city that has the state's worst reversal record: Dallas.

The 24 largest metropolitan areas in Texas that had one or more reversals from 1971 through 1975 recorded a total of 489 (see box). (These do not include the habeas corpus writs granted, which frequently amount to the same thing as a reversal.)

Dallas County, with only 11.6 percent of the state's population, accounted for more than a third of that total, 34.2 percent. Harris County (Houston) has half a million more people than Dallas, but Dallas has 62 percent more reversals.

Put another way, Dallas County has fewer than 1.5 million people, yet it had four more reversals than the total for three other counties with combined population of more than 3.5 million: Harris, Bexar (San Antonio) and Tarrant (Fort Worth).

Either Dallas has a lot more crime than other cities, or it is twice as good as anybody else at catching criminals, or it has a different attitude toward prosecution.

Dozens of those Dallas cases were reversed for improper prosecutor jury argument, the most common transgression being a violation of a rule every freshman law student knows: you cannot state incriminating matters as facts when they are not part of the sworn testimony of the case.

Even if those matters would have been admissible as evidence —and they frequently would not have been—when a prosecutor uses them in his argument, he is testifying without being subject to

the penalties of perjury, and the accused is denied his right to cross-examine witnesses against him.

Reversal is as automatic as bouncing a ball against a wall. And the cost is high.

For TEXAS PARADE, Austin's Smith figured the percentage of the judge's salary, the prosecutor's salary and several other factors to reach an estimate of $926 as the cost per day of the average felony trial. Trials usually last three or four days. "These figures may not be high enough, but are in the ballpark," Smith says.

He added them up this way: judge $170, chief prosecutor $82, assistant prosecutor $75, district attorney's investigator $53, district attorney support services $50, assistant district clerk $40, district clerk support service 50, jury costs $60, bailiff $30, court reporter $73, court facilities $100, defendant's court-appointed attorney $100, jail costs $10 and guard $33.

This does not include the cost of meals and locking up the jury in a hotel each night during highly publicized trials. And some capital murder trials last for weeks.

The Texas Judicial Council estimates the cost of felony trials in the neighborhood of $1,053 a day.

Sometimes dozens of state witnesses are needed. Even if only one is needed, that $25. One state expert witness, e.g., ballistics expert, chemist, get $110. A substitute court reporter gets $76 and a visiting judge $48. Add all these in and the cost per day jumps to $1,422.

Moving the trial to another city on a change of venue increases the cost substantially. The prosecutors and their support personnel turn in expense vouchers for hotels, meals and transportation.

The five judges and two commissioners on the Court of Criminal Appeals have combined salaries of more than $300,000 a year. For a second review of a case, add the proportionate cost of their time and that of their briefing clerks, court clerks and secretaries and the estimate goes higher.

And what about the cost in agony to a defendant who has to stand trial a second time?

"But the real damage is to the criminal justice system itself," says Smith. "It is the swiftness and certainty of punishment that deters crime. Dallas may not subscribe to that, but everybody else does."

Reversals mean other trials have to be postponed, he says, and that clogs dockets and worsens conditions in overcrowded jails. "Society is the victim."

Although Dallas' Wade prosecuted the Guzmans—one of the most famous of the Dallas reversals—he seldom tries cases himself. But he hires the lawyers who do, and his influence is crucial. Just as a college football team frequently reflects the personality of its coach, there tends to be a sameness about a DA and his assistants.

". . . two senseless crimes were committed. We were never unmindful of that fact," the appeals court wrote last Feb. 26 in reversing the Marshburn case. "What is regrettable is that a prosecutor, who certainly must have been aware of the vice in his chosen line of argument, should pursue a path which could only lead to reversal and the waste of time, energy and state funds by the requirement of a retrial of these cases."

Over and over again, the appeals court has indicated its reluctance to reverse convictions where the evidence against the accused is overwhelming. But it keeps telling Dallas to follow the rules, and Dallas keeps breaking them.

The court in the last couple of years has even taken the unusual step of naming the offending Dallas prosecutors in some of its opinions. The opinions are read, of course, by lawyers and judges all over the state, so apparently the appeals court hopes the professional notoriety of being identified with reversals will act as a brake on intemperate argument.

Tommy Preston Marshburn was sentenced to 500 years for robbery by assault and 15 years for attempted escape at his March 1973 trial. He and four others—all with records of previous felony convictions—failed in an attempt to escape the Dallas jail.

Asst. Dist. Atty. Harry Zimmermann impermissibly hinted at possible action of the Board of Pardons and Paroles when he told the jury, "I would suggest to you the only way that you are going to do any good and help us here in Dallas County is to make examples of each and every one of the five . . .

"You know the big verdicts you hear about are not reasonable . . . you know no person has lived

The following figures on criminal cases reversed in the past five years are for counties. The names of the principal cities are substituted for the less familiar county names.

	1971	1972	1973	1974	1975	Total
Dallas	25	33	33	33	43	167
Houston	14	13	19	38	19	103
San Antonio	5	9	3	5	14	36
Austin	14	3	3	5	3	28
Fort Worth	6	2	4	7	5	24
Abilene	1	2	1	7	5	16
Lubbock	1	5	3	0	3	12
Tyler	3	4	1	2	2	12
Belton-Temple-Kileeen	1	1	3	3	3	11
El Paso	4	2	0	2	3	11
Waco	3	0	1	1	4	9
Amarillo (two counties)	0	3	2	0	3	8
Beaumont-Port Arthur	0	0	4	2	2	8
Corpus Christi	4	2	1	0	0	7
Midland	1	2	1	2	1	7
Odessa	0	1	0	2	3	6
Wichita Falls	1	1	1	1	2	6
Brownsville-Harlingen	2	1	1	0	1	5
Victoria	2	1	0	1	1	5
Big Spring	1	2	0	0	0	3
Longview	0	1	1	0	0	2
Galveston	0	1	0	0	0	1
Laredo	0	0	0	1	0	1
Marshall	1	0	0	0	0	1
						489

2,000 years . . . You know no man can live that long, but I say you have to do something to draw attention, to make these people different than the rest of the people in the jail, to make somebody, somebody who decides how long they are actually going to serve, say: 'This is different than the rest of the life cases that we see. There is something special about this case. I can see right here by the verdict—it stands out—I better look into this.' "

The appeals court cited an earlier decision in which it laid down the rule, "Jury arguments need to be within the areas of (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; (4) plea for law enforcement."

"The arguments of the prosecutor (Zimmermann) do not come within any of the permissible areas of jury argument," the court said. "On the contrary, the prosecutor's arguments were calculated to introduce prejudice into the minds of the jurors."

The first of the 1,000-year sentences that Dallas has become famous for was given to Joseph Franklin Sills in the $73.10 armed robbery of a dry cleaners in 1969. Sills had 33 prior convictions.

The appeals court affirmed the case on Oct. 31, 1971. "In view of the fact that the legislature has provided no maximum punishment, it is suggested that a jury could give a sentence of 25,000 or 1 million years if they chose to do so. It is further suggested that 1,000 years or a million years is an impossible punishment and should not be assessed."

Dallas prosecutors ignored the suggestion. They sought longer and longer sentences as if they were playing the old television game "Can You Top This?" By mid-1973, their record reached 5,005 years, the sentence slapped on each of the Ransonette brothers, Woodrow and Franklin, in the kidnaping of the daughter-in-law of Joe Dealey Jr., president of the Dallas *Morning News*.

Under the new Penal Code, passed in 1973, the maximum sentence, except for death, is life or 99 years. Wade, incidentally, is credited by some legislators with single-handedly defeating the first attempt in the 1971 legislature, to revise the 115-year-old code.

Dallas is not alone, only dominant, in the area of improper jury argument by prosecutors.

The reversal that particularly angered Dist. Atty. Bob Smith of Austin involved a first-offender, David Lott, who had been sentenced to 10 years for possessing 72 pounds of marijuana.

Lott's lawyer told the jury, "Don't send this boy to the penitentiary where he may be taught to be a hardened or perhaps a professional criminal. Give him one more chance."

"It is regrettable that a prosecutor would continue to engage in improper conduct when (it) is totally unnecessary to secure a conviction," says appeals court.

Smith's assistant, Terry Scarborough, thought that opened it up for him to argue, "There are different units in the Texas Department of Corrections, and, of course, we have the one unit for the young offenders, the first-offenders . . . the Ferguson unit, with young offenders . . ."

Because of the defense counsel's remarks, the appeals court said, the prosecutor "was authorized, indeed even obliged, to answer such argument." But when he mentioned a specific unit by name he went outside the record—the sworn evidence.

"I felt they reversed that (Lott) case to send a message to Dallas," says Smith.

Actually, the court already had sent the message in its reversal three weeks earlier, on Dec. 13, 1972, of the 12-year sentence for Roy Stearn on a charge of burglary in Dallas.

Asst. Dist. Atty. L. E. Eubanks told the jury, "We couldn't bring you all of the circumstances surrounding the arrest." State District Judge Ed Gossett overruled defense objections to this argument.

The appeals court said, "There seems to be a growing tendency by the prosecution to go outside

the record in jury argument and then, on appeal, submit that such was . . . harmless error."

In the Stearn case, the court said, "the jury could logically surmise from the complained of argument that there was inadmissible evidence that, if revealed, would show them other acts committed by (Stearn) during the arrest that they should know about; thus, such additional evidence would justify a finding of guilty. We cannot say that such argument is harmless error."

The appeals court reversed a statutory rape case from Waco last July because Asst. Dist. Atty. Ward Casey, in his final argument, made several references to the defendant, George Washington Hicks. He looked down at him and said, "But there is somebody that we haven't heard from in this case. And I think you all know who it is."

Every television fan knows prosecutors are forbidden even to hint at a defendant's failure to testify. The burden is on the state to prove its case without bolstering it with references to the defendant's silence. The Fifth Amendment to the U.S. Constitution outlawed the old English Star Chamber practice of compelling a defendant to testify.

The appeals court said Casey had made a similar statement at a previous trial, then claimed on appeal he referred to the defendant's mother, not the defendant. The defense had no answer to that, and Casey won.

In the Hicks case, Casey claimed he referred to a doctor, but the appeals court noted, "The alert defense counsel (Charles Cantrell) stated for the purpose of the record" that Casey stood behind the defendant and looked down at him when he made the statement.

"It is regrettable that a prosecutor would continue to engage in improper conduct depriving a defendant of a fair and impartial trial when such conduct is totally unnecessary to secure a conviction," the appeals court said.

The appeals court found so many errors in the flag desecration conviction of David Edmanson Renn in October 1970 that it couldn't list them all. Renn displayed a United States Flag with a peace symbol replacing the field of stars.

"Without going into the repeated improper questions and arguments of the prosecution (John Stauffer and Winfield Scott) during the trial, suffice it to say that the record is replete with such remarks as 'hippie', 'anti-Christ,' 'swastika' and 'Communist,' " the court said in reversing the case on June 20, 1973.

Stauffer, 48, also told Renn's jury he feared he would get emotional. "If I do, I hope that you will be good enough to excuse an old man who, in his day, has tried to serve this flag." He spoke of Iwo Jima, the "ghosts of Argonne" and "those men lying in Flanders Field like poppies, row on row." He even recited the words of The Star-Spangled Banner.

That argument was error, but in taste, not law.

Stauffer also won headlines in the mistrial of Brent Stein, an underground newspaper editor who allegedly interfered with police during an April 12, 1970, disturbance of Dallas' Lee Park. The mistrial followed Stauffer's statement in court to Stein: "It's too bad they didn't kill you."

"The present case is rather easily resolved, since the prosecutor left little room for reasonable minds to differ as to whether his actions could be labeled harmless," the appeals court said. ". . . Recently, this court has been faced with numerous cases where improper arguments and sidebar remarks by the prosecutor have forced us to reassert the critical importance of convicting an accused only upon the evidence presented, without attempting to inflame or prejudice the minds of the jurors."

Stein, who wrote under the name of Stoney Burns, later was convicted of possessing enough marijuana to make one and a half cigarettes. A Dallas jury gave him 10 years and one day. The one day made him ineligible for probation. Under present law, Stein's maximum punishment would be a $200 fine. Gov. Dolph Bricoe commuted the sentence in 1974 to time served.

The Dallas reversals continued on through 1974 (33 cases) and 1975 (43 cases). As recently as last Dec. 17, the court reversed five Dallas convictions for exhibition of the movie "Deep Throat" because the prosecutor, Norman Kinne, told the jury, "We might as well quit prosecuting obscenity cases if this film here isn't obscene, and concentrate on sex crimes and other matters that arise after people view things like that."

"There was . . . no evidence in the record of the relationship between exposure to sexual material and the commission of sex crimes," the appeals court said.

Space does not permit a discussion of another dozen flagrant Dallas cases. In addition to the prosecutors already mentioned, other assistant district attorneys involved in reversals for improper conduct include: Fred Davis, Jay Ethington, Edward Gay, Richard Mays, John Ovard, Mike Schwille, Bob Whaley, Richard Worthy, and Richard Zadina.

Wade says the press should talk about how many Dallas cases are upheld on appeal. That's like a doctor saying, "So what if I've lost a lot more patients on the operating table than anybody else? Look at how many broken arms I've fixed and sore throats I've swabbed."

Crested Butte

Back in January when about 65 TCDLA members and guests accepted Tom Sharpe's invitation to visit Crested Butte, Colorado (at their own expense of course), the Bo Callaway incident had not broken and few of us had ever heard of the place. Crested Butte, population 450, is an 1870's gold and silver mining town nestled in a pristine valley of the Gunnison National Forest at the foot of 12,162 foot Mt. Crested Butte. They don't allow any new construction there so you won't find a 7-11 or a Pizza Hut around anywhere. What they do have is a bunch of "nature children" who have fixed up the old places into really enjoyable restaurants, bars and shops that are a delight to visit.

There's a place called "Beau Jo's" that looks like it used to be a general store which serves a 10 inch pizza complete with elk sausage that weighs at least 10 pounds. I would defy the fattest man I know to eat a whole one. Down the street there's a combination Conoco station and store in which hangs the world's record head of the largest elk ever shot. In season, I understand they still hunt a lot of elk, and in the summer, fly fish for trout. You can only look at the bears.

Many of us frequented the "Wooden Nickel Bar" which looks like it has always been a bar. It's furnished with antiques, probably the original decor, and has a roaring fireplace that you can look into while you're getting smart and good looking over a few drinks. Across the street was the "Grub-

It snowed the night before our arrival (and was 28 below)

(continued on page 18)

stake Baloon", a pool hall that appeared to be favored by the locals. "Penelope's" is a charming gourmet type restaurant with excellent service and food that would be considered a little kinky in Dallas or Houston, but was elegant in Crested Butte.

We didn't actually stay in Crested Butte proper, but up the hill in the resort area complete with condos and all the modern amenities. But even up the hill there are no commercial franchise type establishments.

During the day the lawyers met for business and educational purposes. There was some skiing, some learning and some good times had.

A pictorial essay of some major events follows.

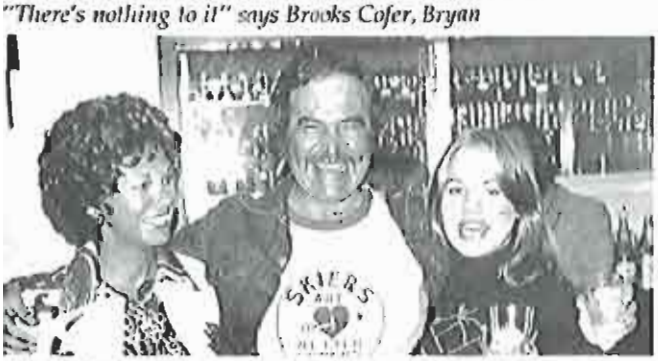
Ski school for Tinker and Gerry Goldstein, San Antonio

What! Us ski? (John Mann & Wife, Lubbock; Clif Holmes & Wife, Kilgore.

Downhill Racer! Doug Tinker, Corpus Christi

Mike Matheny, Beaumont, and date back at the lodge. Again!

"There's nothing to it" says Brooks Cofer, Bryan



Jack Rawitscher, Houston, shows his style with Ms. Ray and Cindy Walters, Austin.

First prize for longest distance driven goes to Mr. and Mrs. Benny Ray of Brownsville.

Court of Criminal Appeals Candidates

Candidates for contested races for the Court of Criminal Appeals were asked to submit personal statements of their qualifications to the Texas Criminal Defense Lawyers Association. Their responses are printed below.

Jerome Chamberlain, Judge, Criminal District Court, Dallas

My opponent, by virtue of having served one six-year term on the Court of Criminal Appeals, will naturally assert that his incumbency makes him more qualified to serve on that appellate bench than any other person. In actuality, the opinions of the Court of Criminal Appeals have become more divided, with dissents being written more frequently, during his incumbency than at any other time within recent history.

Figures from the state's highest court for criminal cases show that over the last two years he has signed more published opinions of reversal than of affirmance, and that he is the only Judge on the Court to do so. He defends this record by asserting that it takes three members of the court to reverse a case. What he does not add is that this is also true of the other four Judges.

By actual count over this period he has voted for reversal 45 per cent more often than any other member of the court, and twice as often for the average of the other Judges, and in Coleman v State *he criticized the other members of the court for not reversing more cases.*

He has established a philosophy that the trial Judges of this State cannot conduct an acceptable trial–even half the time! By any fair measure, it is he who is out of line with the vast majority of the bench and bar in the interpretation of our criminal statutes.

A review of the decisions of the Court of Criminal Appeals, especially in the areas of search and seizure and extraneous offenses, reveals such contradictory and conflicting decisions that another of the court's Judges felt compelled to write in a recent opinion, "No doubt to the bewilderment of trial judges and lawyers, this court is inconsistent in its holdings on the same point."

Generally, a reversing appellate Judge is popular with defense attorneys. It is my belief, however, that the great majority of attorneys in the field of criminal law, whether they be for the prosecution or the defense, want opinions that are consistent with each other, intelligently written, and directed to a body of law which will enable them to correctly evaluate their respective positions. A fair trial which establishes the truth of a given situation is their predicate for justice.

At a time when the effectiveness of our criminal courts is losing ground in the public's esteem, this avalanche of reversals and inconsistent rulings is undermining respect for our criminal justice system, increasing the cost of criminal prosecution, and forcing defense attorneys to retry many cases, often without additional fee.

It is my belief that we must all strive to establish some finality in the disposition of criminal matters. Criminal prosecutions should be resolved in the trial courts, as our forefathers intended, and our appellate courts should endeavor to sustain trial court decisions within the limitations of constitutional rights and honest trial presentation.

Actively conducting the Criminal District Court of Dallas County for almost eight years and after having served as an assistant criminal district attorney for five years and as a criminal defense attorney for over three years, I am keenly aware of today's criminal trial problems. By both experience and practice, I feel qualified to serve as a Judge on the Texas Court of Criminal Appeals.

Truman Roberts, Judge, Court of Criminal Appeals, Austin

Having served for over five years on the Texas Court of Criminal Appeals, I am now seeking re-election for a second term.

During those first five years, the Court delivered 7,630 opinions, virtually all of which I participated in; personally preparing 1,015 opinions in that period. I hope that this experience, as well as my twenty previous years of interest, experience, and efforts in the area of criminal law and criminal justice will furnish a solid basis for your support.

If re-elected, I will continue to devote all of my ability and energy to achieving the goals that are fundamental to any system of criminal justice: the speedy, fair, and equitable enforcement of the law.

What this means most of all is that those who appear before the courts must always be treated fairly and equally, whether they be rich or poor, guilty or innocent.

It also means that every accused must be given a speedy trial and appeal. We simply cannot tolerate the long delays between arrest and trial on the one hand, and between trial and final appeal on the other. To solve this latter problem, we must find a way to decide criminal appeals more rapidly and efficiently under the present system; if we are not able to do this, we must adopt a new court structure that will give the people of Texas an even-handed system of criminal justice which works swiftly to punish the guilty and free the innocent.

As many of you know, I was admitted to practice in 1949, the year of my graduation from Baylor Law School and began the practice of law in Hico and Hamilton, Texas, later becoming County Attorney of Hamilton County. In 1956, I was elected District Attorney of the 52nd Judicial District and in 1961 became District Judge for that District. For ten years I presided over the 52nd Judicial District and also served as visiting judge in many areas of the state.

In 1960 I served as President of the Texas District and County Attorneys Association, in 1969 I was Chairman of the Judicial Section of the State Bar and have been a member of several State Bar committees, including the Committee on Revision of the Penal Code, the Committee on Pattern Jury Instructions, and the Bar-News Media Conference Committee on Free Press and Fair Trial, and have served for five years as a member of the Executive Committee of the Governor's Criminal Justice Council.

I am a member of the Methodist Church and an active supporter of Baylor University, having served as President of the Baylor Law Alumni Association and in 1973 was chosen as Outstanding Baylor Lawyer.

I was born in 1917 in Crawford, in McLennan County and attended public schools in Crawford and Abilene. In 1940 I enlisted in the U.S. Army beginning my service in WW II as a private, and was released from active duty in 1946 having achieved the rank of Captain.

Miss Gloria Stevens of Valley Mills and I were married in 1947. We have two children: a daughter, Mrs. Harrison Cole; and a son, Tracy, who is a student at Central Texas College in Killeen.

Carl Dally, Commissioner, Court of Criminal Appeals, Austin

Balanced experience–experience as a Commissioner in the Aid of the Court of Criminal Appeals, as a defense lawyer and as an Assistant District Attorney–has prepared me to be a Judge of the Court of Criminal Appeals. On September 15, 1971, the five elected Judges of the Court selected me to serve as a Commissioner and I have served the Court and the people of this State since my appointment. During my service as a Commissioner I have diligently attempted to improve my skills. In the summer of 1972 I attended the Senior Appellate Judges' Seminar at New York University College of Law. In 1974 I attended the first Appellate Judges' Opinion Writing Seminar at the University of Colorado.

I have written more than 750 original opinions of which over 450 have been published. These published opinions are an indelible record by which my qualifications for the position I seek may be judged. The reading of a number of these opinions that cover many facets of the criminal law permit a lawyer to predict with some degree of certainty my future performance as a Judge on the Court.

Even among lawyers who practice before the Court the function of a Commissioner may not be well understood. Commissioners sit with the elected judges to hear the oral arguments when the cases are submitted. We are invited by the Court to participate and ask questions of the attorneys while they are arguing their cases. The cases on which we write an opinion are selected by lot and chance from all of the cases submitted. In each case we make an original decision as to the result of the appeal and prepare an opinion for the Court. Our opinions are considered and studied and revised if necessary in exactly the same manner that an elected judge's opinion is considered and studied. We participate, discuss, and sometimes argue in conference about the opinions written by the judges and other commissioners. The important difference between a judge and a commissioner is that a commissioner does not have the right to a vote on the result of an appeal or the right to prepare a dissenting or concurring opinion. However, on some occasions, opinions I have prepared have been adopted by one or two judges as their dissenting or their concurring opinion.

Our increasing population and more complex society appear to make necessary and do in fact, provide an impetus for the enactment of more laws to govern society. These laws have criminal penalties which apply to more and more people; as an inevitable result, even greater problems will be faced by law enforcement agencies. Consequently, the problems presented to the Court of Criminal Appeals will become ever more difficult.

The Court of Criminal Appeals is now as highly regarded as it has ever been. As the field of criminal law becomes more complex, the importance of the Court to all of the people in our State will become even greater. I am confident that the stature of the Court of Criminal Appeals and its approval by the people of this State will continue to grow.

If you acquaint yourself with my qualifications and my performance as a Commissioner for more than four and a half years I believe you will want to promote me and you will support my election to the Court of Criminal Appeals.

Jim Vollers, State's Attorney, Austin

I have announced my candidacy for Judge of the Court of Criminal Appeals for the unexpired term of Judge W. A. Morrison, who resigned on March 31, 1976. Although I have been practicing law since 1954, the last 19 years of my practice have been devoted primarily to criminal law. I practiced law in Beaumont for ten years, approximately six of this in the District Attorney's Office and four years in private practice. In 1967 I worked for Attorney General Crawford Martin in the newly organized Crime Prevention Division for over a year. On January 1, 1969, I was appointed as State's Attorney before the Court of Criminal Appeals, where I now serve. In the last seven years I have represented the State of Texas in more than 10,000 cases before the Court of Criminal Appeals. I am serving as a Director of the Criminal Law Section of the State Bar and I have lectured on criminal law and procedure before many prosecutor seminars, law enforcement seminars, criminal defense lawyers skill courses and continuing legal education programs sponsored by the State Bar. I also had the opportunity to work with the District and County Attorneys Association Penal Code Revision Committee.

I feel that my work in the trial of criminal cases, in the preparation and presentation of cases to the Court of Criminal Appeals, as well as lecturing before various groups, has been an educational process which adds to my qualifications to become a Judge on the Court of Criminal Appeals. My duties as State Prosecuting Attorney keep me in daily contact with trial lawyers, both prosecutors and defense attorneys, which keeps me constantly abreast of development and tactics in the trial court. I feel that the real world of the development of criminal law is, and should be, in the trial court. An appellate court should afford a full and fair review of what occurs in the trial of a criminal case, with full cognizance of the Constitution, the statutory law, legal precedent and the practical application of such rulings to the trial court. Every appellant is entitled to a full and fair review of his complaints. The appellant should ask no more, and the law should demand no less. I feel that my background and experience qualify me to provide the fair review which our law demands.

W. T. Phillips, Attorney at Law, Waco,

I received a B.A. degree from Baylor University in 1935 and an L.L.B. degree from the Baylor University School of Law in 1937 and have thirty-nine years experience in all fields of law. I have served as Special Prosecutor and as Defense Counsel in criminal cases throughout the State. In World War II I served three years in the U.S. Navy in the South Pacific. The day after my announcement for said office my home bar association (the Waco-McLennan County Bar Assn.) met and endorsed my candidacy.

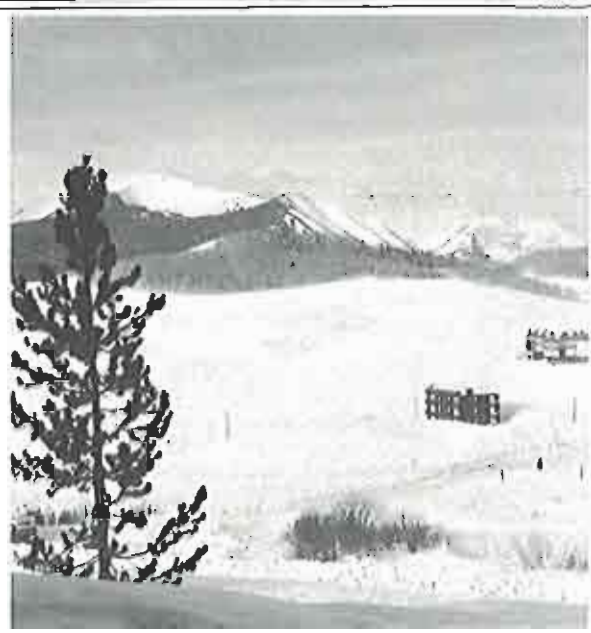
Crested Butte (continued from page 14)

Honolulu 3,401 miles.

David Evans, S.A., and Rodger Zimmerman, San Marcos, inside where it's warm.

Jerry Wolfe, Houston, and Clif Holmes

Where's the bus? Weldon Holcomb, Tyler, Jack Rawitscher, Ramie Griffin, Beaumont, and friend, and a distraught travel agent.



View from the lodge.

Allen Cazier, San Antonio

Mr. and Mrs. Richard Thornton, Galveston, and Chris Goldstein, San Antonio

Mr. and Mrs. Brooks Cofer and Mrs. Lou Dugas, Orange.

Richard Anderson and James Finstrom, both of Dallas, with wives

Ken Korth, Victoria, Weldon Holcomb, Tyler, and Leonard Hoffman, Dallas.

CRIMINAL LAW INSTITUTE

Defending The Federal Criminal Case

MAY 13-16, 1976 • LAS VEGAS, NEVADA

MEETINGS ON FRIDAY, MAY 14
& SATURDAY, MAY 15

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THE PROGRAM

FRIDAY, MAY 14, 1976		
10:00 A.M.	Mechanics of a Federal Criminal Trial	C. Anthony Friloux, Houston, Texas
12:00 P.M.	Pre-Trial & Motion Practice	Gerald Goldstein, San Antonio, Texas
1:00 P.M.	*LUNCH*	
2:30 P.M.	Speedy Trial Act—1974	Thomas Sharpe, Brownsville, Texas
3:30 P.M.	The Jury in Federal Court	Richard Haynes, Houston, Texas
4:30 P.M.	Psychodynamics of a Jury Trial	G. L. Spence, Casper, Wyoming
SATURDAY, MAY 15, 1976		
10:00 A.M.	The Grand Jury and Immunity	Oscar B. Goodman, Las Vegas, Nevada
11:00 A.M.	Constitutional Safeguards Against Mistaken Eye Witness Testimony	Stuart Kinard, Houston, Texas
12:00 P.M.	Developing Psychiatric Defenses	Frank Maloney, Austin, Texas
1:00 P.M.	LUNCH	
2:30 P.M.	Tax Fraud	Morris Shenker, St. Louis, Missouri
3:30 P.M.	Courts Charge	Emmett Colvin, Dallas, Texas
4:30 P.M.	COCKTAIL HOUR	

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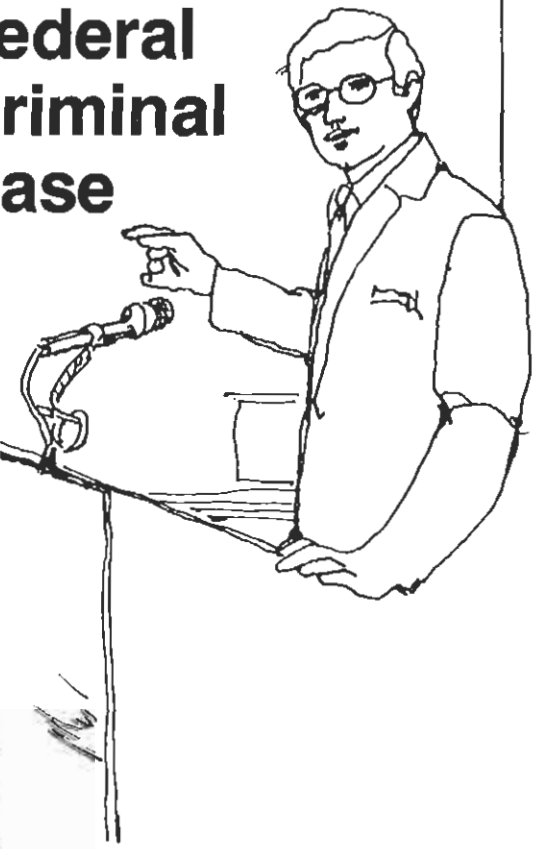


Letters to the Editor

Gentlemen,

The letter of Knox Jones that appeared in the Fall/Winter 1975 edition of Voice for the Defense reporting on a "true life" experience in connection with the identification of marijuana by the smell test has prompted me to write you about a "true life" experience that I had in a case wherein I moved a U.S. District Court to appoint a psychiatrist to evaluate the mental competency of a defendant under 18 U.S.C. 4244 about which Robert T. Baskett writes in the same edition.

I was appointed by the Court to represent a bank robber who was one of the ten most wanted criminals in the United States. I had very little to work on as he committed the robbery in broad daylight, in a crowded bank, unmasked and was arrested at the airport trying to board a plane with a gun tucked in his belt and a suitcase full of money. Aside from his ineptness which inclined toward insanity, but was hardly proof of such, the defendant's past history, while not being spotless, at least indicated no propensity for robbing banks. Having little else to go on but a hunch, I applied for the appointment of a psychiatrist to inquire into the defendant's mental competency.

Suffice it to say, in addition to hitting the ceiling, the Judge made it apparent that he felt that the application was being made by the wrong party on behalf of the wrong party, but he appointed the psychiatrist nonetheless.

The time for the psychiatrist's report came and the U.S. Attorney appeared in Court with a letter from the psychiatrist wherein he wrote that he had examined the defendant and found him to be mentally competent. He moved to file the letter. I objected and asserted that I wanted to cross-examine the psychiatrist as to the extent of his examination. This time the U.S. Attorney and the Judge both hit the ceiling, but the Judge ordered the U.S. Attorney to bring in the psychiatrist into court.

My previous experience with psychiatrists under similar circumstances had taught me that the tests that they make are cursory at best. Drawing on this I cross-examined the psychiatrist as to the extent of his examination of the defendant and the type of examinations that he gave him. As I suspected, he had examined the defendant for only an hour or so in jail. I asked him whether the tests he gave him excluded the possibility of organic brain disfunction. Of course he had to say no. I then asked him if a more extensive examination would not reveal such if it were present. He answered yes. I then asked him if he did not think that the defendant should be given complete testing. He answered that he "guessed" that he should.

The Trial Judge ruled that he had no alternative but to send the defendant to an institution for further testing.

On the way out the door the defendant asked me where they would send him. I told him probably Springfield. Then he asked me if they had to find him insane. I answered "Yes." He said with finality, "They will."

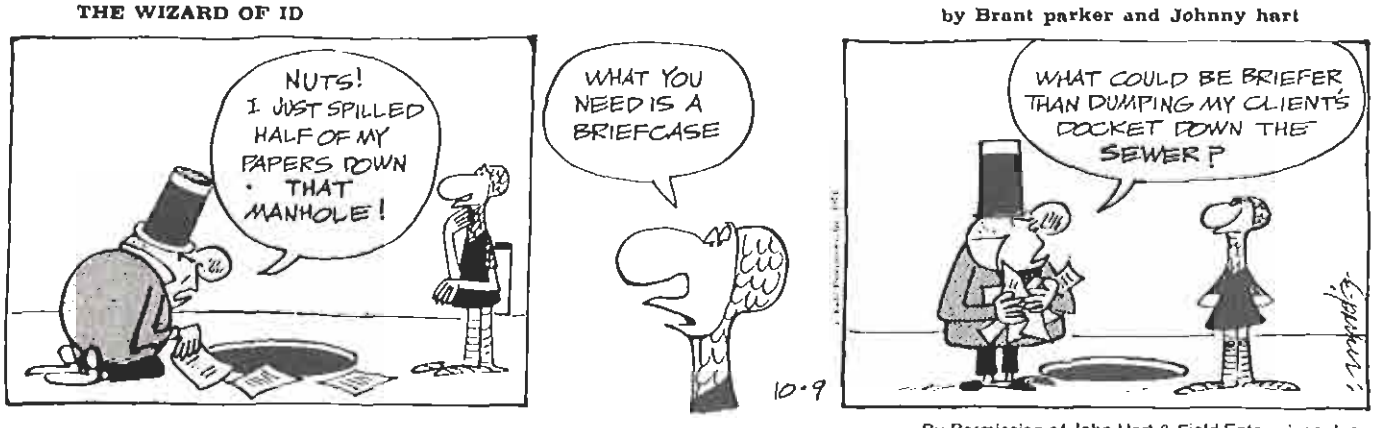
Three months later the U.S. Attorney in shock called me to tell me that he had received a report from Springfield and that they had found the defendant mentally incompetent.

The story does not end here. Six months later the defendant died in Springfield of a brain tumor.

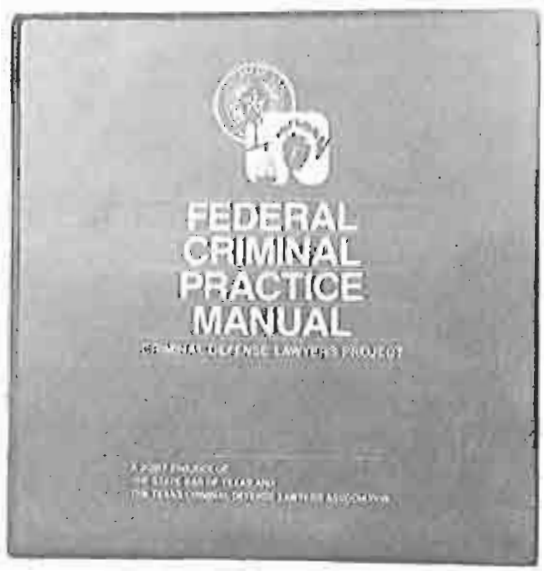
This is a long way of cautioning that the report of one psychiatrist as is contemplated under 18 U.S.C. 4244 is unreliable, at best, and more particularly should not be taken at face value. I do not know if another Judge would have allowed me the latitude that the Judge in my case did, but I think that they should, and all lawyers should try.

Your publication is great and the content very helpful. Keep the "practical" information coming. Reports of actual experiences that are never reported in law books are exceedingly valuable, but we rarely hear about them. Ask your members to write you about the everyday experiences that they have in their practice that no one ever hears about, but which we may experience too.

GERARD H. SCHREIBER
New Orleans



FEDERAL CRIMINAL PRACTICE MANUAL



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