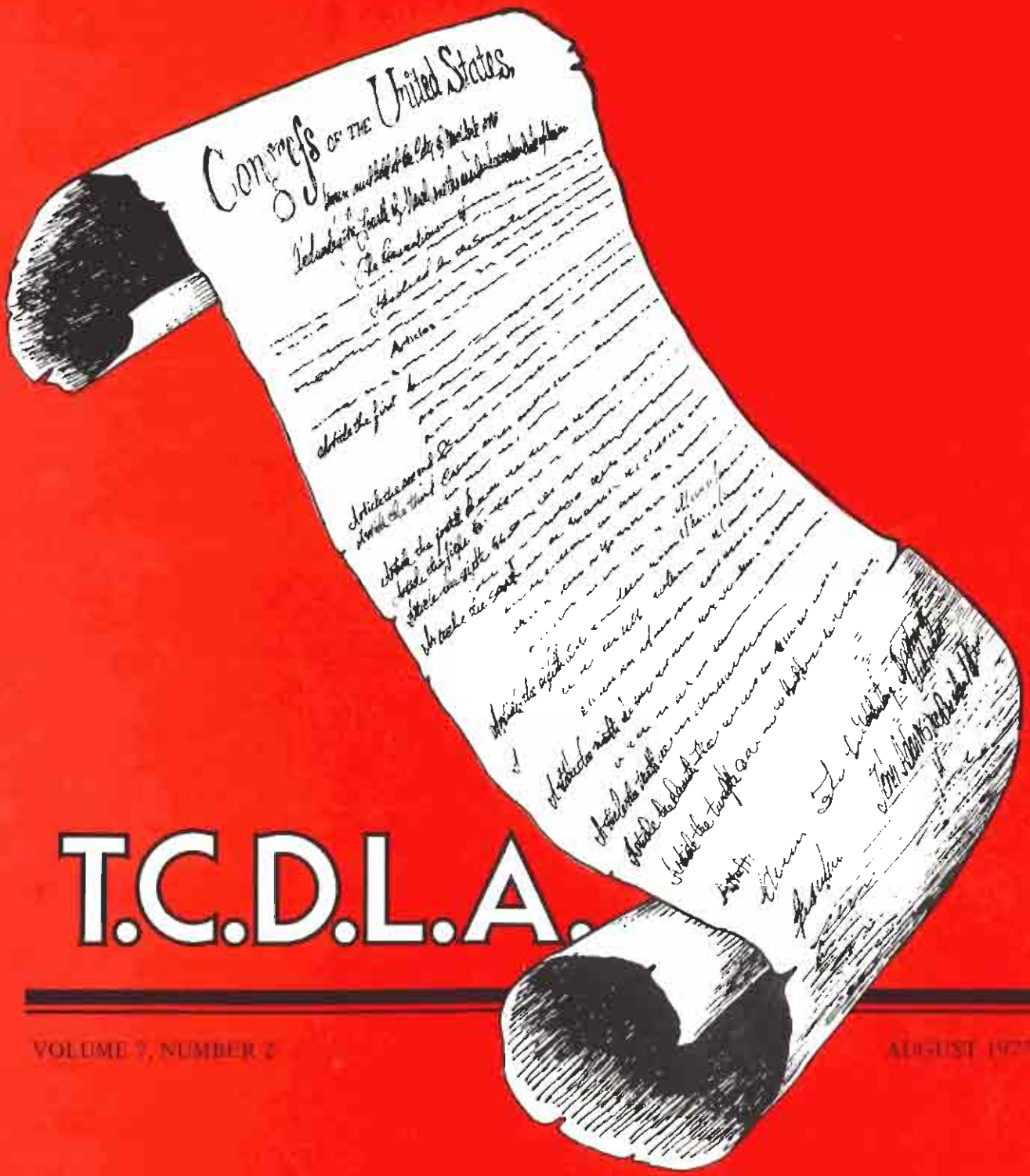
# VOICE for the DEFENSE




# T.C.D.L.A.

VOLUME 7, NUMBER 2 AUGUST 1977

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# IN THIS ISSUE

## ARTICLES



## REGULAR FEATURES



## NEWS






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Texas Criminal Defense Lawyers Association

AUGUST 1977

The legislature is taking a rest; I've seen no jingles on TV proclaiming, "DWI for $125," and Race and Phil have eight jurors. All in all, I guess, it's been a pretty good year, thus far. Emmett has taken a firm hold on the reins of TCDLA, and, judging from past performance, probably will have these old horses moving at more than a trot. From what I hear, membership prospects are bright, and things, generally, are looking up. Basically, everything's in just the right kind of shape for us to lie back, and go to sleep—which is exactly what we ought not to do, and cannot afford to do.

TCDLA has many responsibilities, and it's a full-time job for all of us to see they are met. We have a workable method of identifying and meeting each of them—our committee system. Emmett has appointed chairmen for each standing and special committee. Membership on those committees has been designated. They all have agendas and goals. If we can put them to work, churning out ideas and solving problems, TCDLA can have the effect it should have. I've asked Steve to list the committees, chairmen and present membership in this issue. If you're on a committee, contact your chairman and get the ball rolling. If you're not on a committee, volunteer for the one(s) to which you feel you can best contribute. If you're a chairman, and I have to suggest what you should do, I'd be wasting both our time. We have a scheduled Board Meeting on August 20, 1977, in Corpus Christi. I can personally assure each committee chairman who has had a committee meeting and filed a report by that date a ride on Doug Tinker's sailboat, complete with complimentary Shiner beer. (Perhaps I could offer the same deal as punishment for those who haven't?)

At any rate, the committee system we have is only so good as the members make it. But if we really want a motivated, vibrant organization, we must formulate goals and plans, then see that they are followed and completed. There are too many needs to be met in our criminal justice system for us to rest on any supposed success.

*P.S. Let us know what you think of the* **VOICE**. *We get a little paranoid when we don't hear from you.*

*Clif Holmes*

# News & Notes

## BRIEF BANK

The following **Opinions** have been handed down by the Attorney General:

H-1020:

Juveniles charged with traffic offenses under Article 67011-4, V.T.C.S., are subject to the same laws with regard to bail as are adults charged with minor traffic offenses, and may be incarcerated upon failure to make bond. Any minors so detained must be segregated from adult detainees and may, if arrested on a warrant ourside the county of the alleged offense, be transported to the county where charges are pending. Juveniles charged under Article 67011-4 may not dispose of the charge by paying a predetermined fine without an appearance in open court with a parent or guardian.

H-1026:

Article 45.22, Code of Criminal Procedure, controls the venue of actions in justice precinct courts in counties of over 225,000. Its provisions are mandatory, and thus, an officer should file a speeding case under State law in the precinct in which the alleged offense occurs. A case filed in the wrong precinct should be dismissed. A magistrate who refuses to observe the provisions of Article 45.22 is subject to fine under that article, and a corrupt and willful violation of Article 45.22 could constitute official misconduct and subject the magistrate to removal. Attorney General Opinions C-602 (1966); V-496 (1948); and O-6940 (1945) are overruled.

H-1021:

A former district judge is eligible for assignment as a special judge if he fulfills certain requirements under Article 200a, V.T.C.S., without regard to whether or not he is presently eligible for retirement. A former district judge, not yet retired, who is assigned as a special judge under the provisions of article 200a, accrues additional creditable service toward retirement during the period of such assignment.

The following **Open Records Decision** has been handed down by the Attorney General:

ORD-166:

A report on the mistreatment of a nursing home resident who is receiving state assistance may not be released since Article 695j-1, V.T.C.S., makes it "Unlawful. . .to. . .disclose. . .any information concerning persons. . .receiving. . .public assistance or medical assistance. . . ."

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The Travis County Bar, Criminal Law and Procedure Section, made up of defense lawyers, prosecutors and judges, has elected TCDLA Executive Director Stephen H. Capelle president for the coming year. TCDLA members Joe Martines and Mila Cameron were elected vice-president and secretary-treasurer, respectively.

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The Honorable Carlos C. Cadena has been appointed to replace Judge Charles Barrow as Chief Justice of the Court of Civil Appeals, for the Fourth Supreme Judicial District.

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## NEW DISTRICT JUDGES

TCDLA member Jon Nelson Hughes of Houston has been appointed to replace Judge Garth Bates in the 174th Judicial District in Harris County.

The new judge of the 134th Judicial District in Dallas is Joe Burnett, replacing Judge Charles E. Long, Jr.

# President's Report

As members are probably aware, one of our objectives for this year, common to all years, is the active support of an independent judiciary with particular interest in the support of the Constitutional Amendment allowing for the expansion of the Court of Criminal Appeals. The Amendment has the apparent support of the State Bar, the prosecution and the defense, but unless our organization makes it clear to the voters of the absolute necessity of relief for our high court, it may not be forthcoming. I therefore call upon all members to become active in supporting such needed change, throughout all of Texas. It is vital that we contact leaders in our communities to acquire their support and action before the election.

In connection with our active support of an independent judiciary, I have encountered recently two situations giving me some concern.

In Dallas, Juvenile Judge Craig Penfold was the subject of a motion by the District Attorney's office to recuse the judge from a certification hearing because he had in several prior unconnected cases refused to certify the juveniles as adults. The prosecution apparently publicized their motion in the media. I promptly contacted Judge Penfold to assure him that we as an organization supported his independent judicial action, assuring him that while we did not desire to influence his decision one way or the other, he had our full support. It is my opinion that in any such instance as this, we should come quickly to the support of such independent judges.

My other concern deals with an instance relating to Federal District Judge John W. Wood, Jr. Gerald H. Goldstein was involved in a trial and pre-trial proceeding in Judge Wood's court recently. The judge would not allow the freedom of attending a criminal defense lawyers project executive meeting one Saturday, and because of his absence, and the lack of a quorum, the meeting could not be held. This meeting was vital to our work in the continuing education field. Further, Gerald was unable to spend any time in Dallas at the Advanced Criminal Law course for 1977, he being the director of such program. While there may have been justification for this, far too often Federal judges from the Supreme Court to the District Court are free with their criticism of lawyers and yet unwilling to reasonably allow such fine young lawyers as Gerald to freely give of their time to develop the competency of the Bar as a whole. While we expect our members to be efficient, we also expect Federal as well as State judges to meet their responsibilities to the Bar and the public in developing more efficient lawyers. If they are sincere in their criticism, we expect the same sincerity in the area of education. For the organization I will continue to make it clear that simply because one mounts the bench, Federal or State, he is not above justified criticism or comment. For the organization I am requesting of Chief Justice Warren Burger that the Federal judiciary be urged to reasonably cooperate with lawyers participating in progressive educational programs.

*Emmett Colvin*

## 1977 COMMITTEES

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**MEMBERSHIP:**
*David Carlock*, Chairman

**PUBLICATIONS:**
*Edward Mallett*, Chairman

## COURT OF CRIMINAL APPEALS AMENDS RULES

The Texas Court of Criminal Appeals has amended Rule 13 of the Court of Criminal Appeals, which is to be effective on the 1st of September, 1977.

RULE 13

(As Amended July 5, 1977, effective on September 1, 1977)

All motions for extension of time under Article 40.09, Section 16, V.A.C.C.P., effective May 25, 1977, shall be in writing and shall be filed with the Clerk of the Court of Criminal Appeals. Each such motion shall specify: (1) the trial court where the case is pending; (2) the number and style of the case in the trial court; (3) the offense for which the appellant was convicted; (4) the punishment assessed against the appellant; (5) the present deadline for the filing of the item in question; (6) the length of time requested for the extension; (7) the number of extensions of time which have been previously granted regarding the item in question; (8) the facts relied upon to show good cause for the requested extension, and (9) when an extension of time is requested for the filing of a transcription of the court reporter's notes, the facts relied upon to show good cause must be supported by the affidavit of the court reporter which shall include the court reporter's estimate of the earliest date when the transcription can be completed.

### NEW ADDRESS

We want to remind you again that your Home Office has moved. The new address is Suite 211, 314 West 11th Street, Austin 78701.

# IMPACT DECISIONS OF THE UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS IN CRIMINAL LAW

**John F. Onion, Jr.**
**Presiding Judge**
**Texas Court of Criminal Appeals**

## PART I

### UNITED STATES SUPREME COURT DECISIONS 1976 TERM

#### CAPITAL PUNISHMENT

*Witherspoon Question*

*Davis v. Georgia*, ___ U.S. ___, S.Ct. 399, 50 L.Ed.2d 339 (12/6/76), holds that unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he may not be excluded, and if a *single venireman* is improperly excluded, any subsequently imposed death penalty cannot stand.

The per curiam opinion reverses the Georgia Supreme Court ruling which admitted that one juror had been improperly excused but held that this did not constitute reversible error where there was no evidence of a systematic and intentional exclusion of a qualified group of jurors.

*Disclosure of Pre-sentence Report in Death Cases*

*Gardner v. Florida*, ___ U.S. ___, 97 S. Ct. 1197, 51 L.Ed.2d 393 (3/22/77), involved a Florida death sentence. Petitioner was convicted of first degree murder and the jury advised the court to impose a life sentence on the ground that statutory mitigating circumstances outweighed the aggravating circumstances. The trial judge is not bound by such recommendation in Florida, and he imposed the death sentence based in part on a pre-sentence investigation report, portions of which were not disclosed or requested by counsel. He found a certain aggravating circumstance justified the penalty and there was no mitigating circumstance. The Florida Supreme Court affirmed. The court did not expressly discuss the contention the trial court had erred in considering the pre-sentence report, including the confidential portion, in deciding to impose the death penalty, and did not review the confidential portion which was not in the record.

The court held that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain.

The court observed that since death is a different kind of punishment from any other the trial and sentencing process must satisfy due process, and the procedure followed in the instant case was not warranted by any of the justifications offered by the State, including: (1) an assurance of confidentiality is necessary to enable investigators to obtain relevant but sensitive disclosures about a defendant's background or character; (2) full disclosure of a pre-sentence report will unnecessarily delay the proceeding; (3) such full disclosure, which often includes psychiatric and psychological evaluations, will occasionally disrupt the rehabilitation process; (4) trial judges can be trusted to exercise their sentencing discretion in a responsible manner, even though their decisions may be based on secret information.

The court also held that even if it was permissible upon finding good cause to withhold a portion of the pre-sentence report, nevertheless the full report must be made a part of the record to be reviewed on appeal. If the State is to administer capital sentencing procedures with an even hand, the record must disclose to the reviewing court the considerations motivating the death penalty or the sentencing procedure would run afoul of the holding in *Furman v. Georgia*, 408 U.S. 238. The court observed that the failure of counsel to request access to the full pre-sentence report cannot serve as an excuse for submission of a less complete record to the reviewing court than the full record upon which the trial court acted in imposing death, and the omission of counsel to request the full report does not constitute an effective waiver of the constitutional right.

The cause was remanded to the Florida Supreme Court with directions to order further proceedings in the trial court not inconsistent with the opinion. The court stated this was the proper disposition rather than to remand to the State Supreme Court with directions to have the confidential portion of the report made part of the record for review because that procedure could not fully correct the wrong. "For it is possible that full disclosure followed by explanation or argument by defense counsel would have caused the trial judge to accept the jury's advisory verdict."

#### CONFESSIONS

In *Hutto v. Ross*, ___ U.S. ___, 97 S.Ct. 202, 50 L.Ed.2d 194 (11/1/76), the defendant and prosecutor reached a plea bargain agreement of a recommended sentence. Two weeks later, the prosecutor asked the defendant to make a statement concerning the crime. Although advised by counsel that the bargain was available regardless of his willingness to comply with the request, the defendant gave a statement, in the office of his counsel, who was present, and following *Miranda* warnings. Subsequently the *defendant* withdrew from the plea bargain, obtained new counsel and demanded a jury trial. At trial, defendant's statements were introduced, resulting in conviction.

Applying the test of *Bram v. United States*, 168 U.S. 532 (1897), whether the confession was "extracted by any sort of threats or violence, obtained by direct or implied promises, however slight, by the exertion of any improper influence," the court upheld the use of the confession.

*Brewer, Warden v. Williams*, ___ U.S. ___, 97 S.Ct. 1232, 51 L.Ed.2d 424 (3/23/77), involved the question whether respondent had waived his right to counsel prior to confession.

Respondent Williams was arrested, arraigned and committed to jail in Davenport, Iowa, for abducting a 10-year-old girl in Des Moines. The charges had been filed in Des Moines and warrant issued. Williams' Des Moines lawyer and his lawyer at the Davenport arraignment advised respondent not to make any statements until after consulting with his Des Moines lawyer upon his being returned to Des Moines. He was given the *Miranda* warnings five times. The police refused to let

his Davenport lawyer accompany the respondent upon return trip to Des Moines but agreed not to question him during the trip. During the trip, respondent expressed no willingness to be interrogated in absence of his lawyer but stated several times he would tell the whole story after consulting with his Des Moines lawyer. However, one of the police officers, who knew Williams was a former mental patient and was deeply religious, sought to obtain incriminating remarks from respondent by stating they should stop and locate the girl's body so that her parents could give her a Christian burial and because it was dark and snowing that it might be impossible later to locate the body. Respondent eventually made several incriminating statements during the trip and finally directed the officers to the girl's body. Respondent was convicted of murder in which evidence was admitted, over objection, of statements he made during the trip. The Iowa Supreme Court affirmed the conviction holding there was a waiver of the right to counsel. On petition for habeas corpus Federal District Court held evidence in question had been wrongly admitted. The Court of Appeals affirmed. The United States Supreme Court held that the right to counsel granted by the Sixth and Fourteenth Amendments means a person is entitled to a lawyer's help at or after judicial proceedings have been initiated, and when such person is interrogated by police after adversary proceedings have commenced, he is entitled to legal representation (*Massiah v. United States*, 377 U.S. 201). The court then held that the police officer's "Christian burial speech" was tantamount to interrogation and that respondent was entitled to assistance of counsel at the time he had made incriminating statements since the record shows no reasonable basis for finding that respondent waived his right to counsel since the State did not sustain its burden to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464.

*Oregon v. Mathiason*, 429 U.S. ___, 97 S.Ct. 711, 150 L.Ed.2d 714 (1/25/77), involved the question of whether *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), warnings were required to be given prior to the confession taken under the circumstances in question.

Mathiason, a parolee, was named as a possible suspect in a burglary. Twenty-five days after the burglary an officer left his card at Mathiason's apartment asking him to call. The next day the call was made and Mathiason agreed to meet the officer at the local patrol office about two blocks from Mathiason's apartment. When he arrived, Mathiason was told he was not under arrest but was taken into a room where the door was closed and a police radio was on in another room. The officer told Mathiason he wanted to talk about the burglary, that his truthfulness would possibly be considered by judge and prosecutor. The officer stated his belief Mathiason was involved and falsely stated that Mathiason's fingerprints had been found at the scene. After a few minutes, Mathiason stated he had taken the property missing. The officer then gave the *Miranda* warnings, took a taped confession, and permitted Mathiason to leave.

Following conviction after use of the confession, the Oregon Court of Appeals affirmed. The Supreme Court of Oregon reversed, saying that while Mathiason had not been arrested or otherwise formally detained, the interrogation took place in a "coercive environment" of the sort to which *Miranda* was intended to apply.

Certiorari was granted and the United States Supreme Court reversed, saying that the Oregon Supreme Court read *Miranda* too broadly. The court held that police officers are not required to administer *Miranda* warnings to everyone they question, nor is the requirement to be imposed simply because questioning takes place in the station house or because the questioned person is one whom the police suspect. The court noted again that "custodial interrogation" within the meaning of *Miranda* means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The court held that Mathiason voluntarily came to the police station, was told he was not under arrest, then gave a confession and left without hindrance and that such was a noncustodial situation which did not require *Miranda* warnings, even if the reviewing court found the questioning took place in a coercive environment.

As to the false statement about fingerprints, the court wrote:

> "Whatever relevance this fact may have to other issues in the case it has nothing to do with whether respondent was in custody for the purpose of the *Miranda* rule."

## DOUBLE JEOPARDY

In *United States v. Sanford*, ___ U.S. ___, 97 S.Ct. 20, 50 L.Ed.2d 17 (10/12/76), where a first trial ended in a hung jury, a manifest necessity existed for discharging the jury allowing the defendant to be retried, and in the second trial, where indictment was dismissed before the impaneling of the jury, but successfully appealed by the government and reinstated, double jeopardy was not a bar to trial.

*United States v. Morrison*, ___ U.S. ___, 97 S.Ct. 24, 50 L.Ed.2d 1 (10/12/76), and *United States v. Kopp*, ___ U.S. ___, 97 S.Ct. 400, 50 L.Ed.2d 336 (12/6/76), held that double jeopardy will not bar a government appeal, nor the success of that appeal which results in the reinstatement of a verdict of guilty.

In *Morrison*, a motion to suppress was denied at trial and defendant was found guilty. Three months later, the District Court granted the original motion to suppress based on a retroactive application of *Almeida-Sanchez*. The government appealed and the Supreme Court held that the motion to suppress should have been denied, reinstating the conviction.

*Kopp* involved a similar situation, except was a bench trial, not a jury trial.

## GRAND JURY

*Discrimination in Selection of the Grand Jury*

*Castaneda, Sheriff v. Partida*, ___ U.S. ___, ___ S.Ct. ___, 51 L.Ed.2d 498 (3/23/77), involved a claim of discrimination in selection of the grand jury. Partida, a Mexican-American, was convicted of a crime in Texas and having exhausted his state remedies on his claim of discrimination in selection of the grand jury that indicted him filed habeas corpus petition in federal district court alleging a denial of due process and equal protection under the Fourteenth Amendment because of gross under-representation of Mexican-Americans on the Hidalgo County grand juries. On the basis of the evidence before it, the federal district court concluded that the respondent had made out a weak prima facie case of invidious discrimination, and, on balance, the court's doubts about the reliability of population and grand jury statistics offered by respondent from census and county records, coupled with court's opinion that Mexican-Americans constituted a "governing majority" in Hidalgo County, caused it to conclude the prima facie case had been rebutted by the State. The record showed that 3 of 5 of the grand jury commissioners had Spanish surnames, that 50% of the grand jury that indicted respondent had Spanish surnames, that 7 of the 12 petit jurors who convicted him had Spanish surnames, as well as the District Judge and Sheriff.

The Court of Appeals reversed, holding prima facie case was not rebutted. The Supreme Court affirmed and held that based on all the facts that bear on the grand jury discrimination issue, such as the statistical disparities (the county's population was 79% Mexican-American, but, over an 11-year period, only 39% of those summoned for grand jury service were Mexican-American), the method of jury selection, and any other relevant tes-

*(Continued on p. 13)*

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SIGNIFICANT DECISIONS
# Report
RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

VOLUME III, NO. 13
JULY, 1977

COMMENT: IF YOU ARE HANDLING A DEATH PENALTY CASE, KEEP IN MIND THE DISTINCTION BETWEEN A MOTION FOR STAY OF EXECUTION AND A MOTION TO STAY THE MANDATE. IF YOUR CLIENT HAS NOT RECEIVED A DATE TO BE EXECUTED, THEN YOU SHOULD FILE THE LATTER. IF HE HAS RECEIVED A DATE THEN YOU NEED THE FORMER. IF HE HAS BEEN EXECUTED, GO GET DRUNK.

RULES, RULES AND MORE RULES OR BUREAUCRACY WILL GET US YET. RULE 13 HAS NOW BEEN AMENDED. SEE ART. 40.09, SEC. 16, C.C.P. EFFECTIVE SEPTEMBER 1, 1977. A MOTION FOR EXTENSION OF TIME MUST SPECIFY THE FOLLOWING: 1) NAME OF TCT; 2) STYLE AND NUMBER OF CASE; 3) OFFENSE AND PUNISHMENT ASSESSED; 4) PRESENT DEADLINE FOR FILING OF INSTRUMENT; 5) LENGTH OF TIME REQUESTED; 6) NUMBER OF EXTENSIONS PREVIOUSLY OBTAINED; 7) FACTS STATING GOOD CAUSE FOR EXTENSION; 8) IF THE EXTENSION REQUEST PERTAINS TO THE COURT REPORTER, YOU NEED AN AFFIDAVIT FROM THE COURT REPORTER AS TO WHY HE OR SHE HAS NOT GOTTEN THE THING OUT AND HOW LONG HE OR SHE ESTIMATES IT WILL TAKE TO GET IT OUT.

EX PARTE BUFKIN, CRUZ AND BOWKER, #55,067, 7-6-77, J. Green, with J. Odom concurring and J. Douglas dissenting, GET BAIL REDUCED FROM $150,000.00 TO $15,000.00. (Travis County).

Ds charged with conspiracy to commit capital murder. Bail set at $200,000.00. After writ hearing, bail reduced to $150,000.00. The State's evidence consisted only of the Indictment charging the Ds with the offense. Held, "We find the bail set by the trial court is excessive." "It is ordered reduced, and bail is set for each appellant in the sum of $15,000.00." J. Odom would have set bail at $25,000.00. J. Douglas, by his dissent, would have left it at $150,000.00.

HOWEVER, CF. EX PARTE SLAVIN, #55,195, WHERE, ON WRIT TO REDUCE BOND, BECAUSE "AT NO TIME WAS ANY TESTIMONY OFFERED ON THE ISSUE OF EXCESSIVE BAIL," CCA HELD "THERE IS NOTHING BEFORE US FOR REVIEW ON THE ISSUE OF EXCESSIVE BAIL." 7-6-77, J. Brown. (Tarrant County).

SLAVIN, supra, is important to those persons who have succeeded in getting relief via void indictments. Slavin had his case reversed, see 548 (2) 30, See Vol. III, No. 9, March, 1977, S.D.R., because Indictment for indecency with a child was void. He was reindicted and now attacks that indictment claiming that the Statute of Limitations precludes State from retrying him. Held, "THE STATUTE OF LIMITATIONS WAS TOLLED BY THE FIRST INDICTMENT." Thus, no relief.

COMMENT: It would seem that if a D had filed a motion to dismiss on the ground that it was void and subsequently had the CCA reverse on that same ground that some sort of due process violation could be found as such a case certainly comes within the "taint fair rule."

IT APPEARS BY SOME OF THE LATEST CASES COMING DOWN FROM THE CCA, AS FAR AS BEING IN GOOD SHAPE ON AN APPEAL, THE BEST CASE YOU CAN NOW HAVE IS ONE INVOLVING WELFARE FRAUD OR FOOD STAMPS.

In VALDEZ, #54,477 & 478, 7-6-77, J. Dally, THE CCA REVERSED A "FOOD STAMP" CONVICTION BECAUSE THE OFFENSE CAME WITHIN THE PROVISIONS OF A SPECIAL STATUTE, ART. 695C, V.A.C.S., AND NOT THE GENERAL THEFT STATUTE. Held, "The specific statute controls over the general theft statute, and the district court did not have jurisdiction of these prosecutions." Reversed and prosecutions ordered dismissed. (Bexar County).

MULTI-COUNT CONVICTIONS ARE STILL BOTHERSOME TO D'S ATTYS AND TJS. PARKS, #55,085, 7-6-77, J. Davis, ONCE AGAIN TELLS US THAT IF YOU HAVE MULTI-COUNT CONVICTIONS, YOU MUST HAVE A SENTENCE FOR EACH CONVICTION. Otherwise, the CCA will get out the ouija board to decide which conviction was first and then dismiss the other convictions for lack of having a proper sentence. (Harris County).

Thus, if your client is found guilty on a multi-count indictment, make sure that the TJ enters a judgment and sentence on all counts, if that is what is to occur. Otherwise, you are going to lose some of your precious time screwing around with something that should have already occurred. Check your Record on Appeal before the case goes to Austin to make sure the record is complete.

IF A COP SAYS YOU TURNED LEFT WITHOUT ANY VISIBLE SIGNAL, EVEN IF YOU MAY HAVE USED A HAND SIGNAL WHICH THE OFFICER COULD NOT SEE FROM HIS VANTAGE POINT, THIS, NEVERTHELESS, GIVES THE OFFICER LEGAL JUSTIFICATION FOR STOPPING YOUR VEHICLE AND, IF THERE IS MOVEMENT, ODOR, ETC., LOOK OUT FOR IF HE FINDS GOODIES, YOUR CLIENT WILL BE CONVICTED. PRASKA, #52,994, 7-6-77, J. Brown. (Travis County).

NOTE: I have used "You" and "Your" interchangeably as I assume that if you were driving, being a lawyer, you had enough sense to switch seats with your client without the cop seeing this occur. Like some of our brethren have found out, "It's a lot more fun to represent someone than to be represented."

D SCOTT, #53,164, 7-6-77, J. Davis, GETS REMAND FOR PUNISHMENT HEARING ON ISSUE OF PUNISHMENT AS STATE'S PROOF DID NOT SHOW THAT OUT OF STATE SENTENCES WERE PROPERLY AUTHENTICATED. THEY WERE THEREFORE INADMISSIBLE. Depending on what happens at the punishment hearing, it is not known what the D gained by his appeal. (Harris County).

COMMENT: This case, as many others, emphasizes that if you are dealing with a habitual case, you should always, always elect to have the jury assess punishment and enter a plea of either not true or not guilty. Here, the D would have gotten a new trial. Don't ever go to the Court for punishment on a habitual case as 5 will get you 10, in about 999 out of 1,000 cases, your client will get life if you do.

In short, the chances are good, either with a judge or a jury, that a habitual D will get life. However, there are several things that can go wrong with the State's proof and, if a jury assesses punishment, but the proof doesn't float, then the Defendant will get either a new trial or a reformation to something lesser. If the punishment is assessed by the judge and you get a remand for a hearing on the issue of punishment, guess what the D is going to get if possible?

WHAT IS THE LAW REGARDING AUTO STOPS AND SEARCHES AND SEIZURES?

In AMORELIA, #54,913, 7-13-77, J. Green, with J. Douglas concurring with short opinion, the CCA affirmed an order revoking probation where the facts showed an automobile parked next to a Woolco store at 1:30 O'Clock A.M., which store was located in a "high crime area," with 2 men inside and 1 man standing at back of the vehicle, which had its trunk

open and its motor running. Only reason given by the cop for going to the car was because of the above and "I felt like it was my duty under suspicious circumstances to stop the vehicle and find out who and what they were doing there." After the cop drove by, the car drove off with the cop shortly thereafter stopping it. Investigation revealed that the D had an outstanding warrant. A "roach clip" was found on the D's person and, at the jail, D dropped into a holding cell ashtray a cellophane bag containing grass. (Tarrant County). Affirmed.

IN TUNNELL, #53,402, 7-13-77, J. Roberts, with J. Douglas dissenting with opinion, THE CCA REVERSED WHERE THE FACTS SHOWED OFFICER SAW 3 MEN IN AN AUTOMOBILE, WITH LIGHTS OFF, PARKED IN A WELL-LIGHTED HOSPITAL PARKING LOT, ABOUT A MILE FROM A KRAFT FOOD PLANT, WHICH OPERATED 24 HOURS A DAY. OFFICER WENT DOWN ROAD, TURNED AROUND AND, AS HE WAS APPROACHING OTHER CAR, THAT CAR TURNED ITS LIGHTS ON AND STARTED OFF, COP STOPPED CAR. WHEN HE WENT TO CHECK ON THE I.D. OF THE OCCUPANTS, HE SMELLED THE STRONG ODOR OF BURNING MARIHUANA. A FELLOW OFFICER SEARCHED CAR AND FOUND A VIAL LOCATED IN THE FRONT OF THE CAR. (DALLAS COUNTY).

Held, "WHEN AN INVESTIGATIVE DETENTION IS BASED ON NOTHING MORE THAN AN INARTICULATE HUNCH THE FRUITS OF THE DETENTION AND SUBSEQUENT SEARCH ARE INADMISSIBLE IN EVIDENCE."

"THE FACTS SURROUNDING D'S DETENTION IN THIS CASE ARE INDISTINGUISHABLE FROM THOSE IN CENICEROS (SEE VOL. III, NO. 11, MAY, 1977, p. 6, S.D.R.), EXCEPT CENICEROS WAS AFOOT, WHILE THIS D WAS IN AN AUTOMOBILE." REVERSED.

IN DRAGO, #53,685, 7-13-77, J. Phillips, INTERSECTION SIGNS WERE D'S DOWNFALL AS HE WAS ACCUSED OF MAKING A TURN FROM A WRONG LANE. HERE, COPS TESTIFIED THAT WHEN ONE OF OFFICERS WENT TO CAR TO TELL D WHY HE STOPPED HIM, HE SMELLED ODOR OF MARIHUANA AND SAW D PLACE HIS HANDS DOWN CLOSE TO THE FLOOR OF THE CAR. MARIHUANA FOUND. (Travis County). Affirmed.

COMMENT: As I have mentioned before, if you have a case where you claim there was an illegal arrest, search or seizure, the only recommendation I can make is to simply get out the cases the CCA has reversed and show these to the judge before the prosecutor gets to him first with cases that have been affirmed. Better yet, see if the prosecutor will roll you high dice to see who wins on the motion to suppress. That way, no one gets confused on the law. Of course, if you lose, you can tell your client that if he gets busted in the future that your luck may change with the dice and next time you, not the prosecutor, may roll the high dice.

WILLIAMS, SEE VOL. III, NO. 12, JUNE, 1977, S.D.R., RETURNS BUT DOESN'T GET EX PARTE VASQUES, #55,140, 7-13-77, J. Davis, ANY RELIEF. (HARRIS COUNTY).

WILLIAMS HELD THAT A D WAS ENTITLED TO GOOD TIME CREDIT ON A STATE CONVICTION FOR TIME SPENT IN FEDERAL CUSTODY AFTER HIS STATE CONVICTION BECAME FINAL.

HERE, D IN FEDERAL CUSTODY, SERVING CONCURRENT TIME ON A STATE CONVICTION, WANTED TDC TO GO AHEAD AND GIVE HIM GOOD TIME CREDIT EVEN THOUGH HE STILL HAD TIME TO DO ON HIS FEDERAL SENTENCE. HELD, "WE FIND D'S REQUEST TO BE PREMATURE." "THE TDC CANNOT DECIDE TO AWARD D "GOOD TIME" UNTIL HE IS IN "PHYSICAL CUSTODY" AND NOT MERELY "CONSTRUCTIVE CUSTODY."

COMMENT: If CCA had ruled in this D's favor, depending on how many Federal prisoners are subject to future State incarceration, it probably would have run the boys at T.D.C. nuts.

IF YOU GET A CASE WHERE A D IS CHARGED, INDICTED, ETC., AND THEN THERE IS A LONG PERIOD OF TIME, HERE ALMOST 3 YEARS, BEFORE D'S ARREST, READ GREEN, #53,683, 7-13-77, J. Brown, AS TO PERFECTING YOUR RECORD RE SPEEDY TRIAL DENIAL. HELD, "WHERE THERE IS NO SHOWING THAT THE WITS WERE MATERIAL OR RELEVANT TO THE CASE AND WHERE NO SUBPOENAES WERE ISSUED FOR THE WITS AND THE D MAKES NO DILIGENT EFFORT TO SECURE THEIR ATTENDANCE, THERE WAS NO PREJUDICE TO THE D." (HARRIS COUNTY).

CCA WRITES ON 3 BAIL CASES DURING WEEK OF 7-13-77.

IN EXPARTE BRANCH, #54,853, 7-13-77, J. Davis, CCA HELD THAT BAIL OF $500,000.00 WAS EXCESSIVE AND ORDERED BAIL SET IN THE AMOUNT OF $20,000.00. (JEFFERSON COUNTY).

IN EXPARTE GREEN, #54,906, 7-13-77, J. Phillips, with J. Douglas dissenting without opinion, CCA HELD THAT IN A CAPITAL MURDER CASE THE PROOF WAS NOT EVIDENT THAT THE JURY WOULD ANSWER THE REQUIRED QUESTIONS IN THE AFFIRMATIVE AS REQUIRED BY ART. 37.071, C.C.P., AND BAIL ORDERED SET AT $25,000.00. (MONTGOMERY COUNTY).

IN EXPARTE TABOR, #54,415, 7-13-77, P.J. Onion, with J. Odom concurring in part and dissenting in part, with opinion, and with J. Douglas concurring to part of J. Odom's concurring opinion, D filed writ to have bail set. TJ denied request contending that D had waived his right to appeal his case. CCA's majority ruled that sentence was prematurely imposed and remanded case back to TJ for new sentence, after which D can then give N/A and he will then "be entitled to bail pending appeal." (Brown County).

CLERK'S ERROR AND NO NEW JURORS NETS D POGUE, #53,585, 7-13-77, J. Davis, A NEW TRIAL. (HARRIS COUNTY).

Here, Clerk mistakenly thought that D had not struck one of the prospective jurors when in fact D had used a peremptory on that person. That person was then called to be one of the chosen 12. TJ then declared a recess prior to arraignment or any evidence being adduced. During the recess, D's Atty brought this to the TJ's attention who was sympathetic but due to the fact that the non-12 had been excused and were already gone and also due to the fact that no more prospective jurors were available until the next day, he declined to grant D's motion for mistrial.

HELD, "We conclude that the court's failure to allow D's peremptory challenge to the juror in question was error and requires reversal of this cause." Reversed. CF. ACOSTA, 522 (2) 528, where atty. did not make timely objection.

TJ, WHEN HE WAS ASSISTANT D.A., BY WRITING LETTER TO D'S THEN ATTORNEY, GETS D LEE, #53,397, 7-13-77, J. Green, A NEW TRIAL. (JEFFERSON COUNTY).

Held, "The letter written by the judge, (which stated that the best he could recommend was life), when he was in charge of the trial division of the D.A.'s office, shows that he did actually investigate the State's file and advise and participate in decisions made in that office relative to this case." "We conclude that the record reflects that Judge Gist had been of counsel for the State and had participated as such in the case while serving in his official capacity on the D.A.'s staff, and that he was disqualified from presiding as Judge in the instant trial." Reversed.

But, C.F., ZIMA, #54,771, 7-13-77, J. Douglas, where D called the TJ's coordinator and told that person she was not coming to Judge Ragan's court and Judge Ragan picked up the phone, talked to the D, formed the opinion she was intoxicated, and "might have told her that if she called me again while she was intoxicated I would put her ten feet under the jail." CCA held that TJ was not disqualified. Held, "IF A D CAN CALL UP A JUDGE AND CURSE HIM OUT AND HAVE THE JUDGE DISQUALIFIED BECAUSE THE JUDGE THREATENS HER WITH CONTEMPT CHARGES, THEN A D COULD DELAY AND GET OTHER JUDGES AT WILL." Affirmed. (HARRIS COUNTY).

ROBINSON, #53,679, 7-13-77, P.J. Onion, with J. Douglas dissenting because no objections made to court's final charge, GETS NEW TRIAL WHEN MAJORITY OF CCA RULES THAT TJ'S CHARGE TO JURY ON AGGRAVATED ROBBERY WAS FUNDAMENTALLY ERRONEOUS. Held, "The charge authorized a conviction under every conceivable theory under Sections 29.02 and 29.03, P.C., rather than limiting it to the theory alleged in the indictment. (Harris County).

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timony as to the manner in which the selection process was implemented, the proof offered by respondent was sufficient to demonstrate a prima facie case of intentional discrimination in grand jury selection, and the State failed to rebut such presumption by competent evidence.

The court observed that none of the evidence reubtted the prima facie case made out by respondent. The State offered only the District Judge, who selected the Commissioners who testified as to the selection method and his instructions to them. The Commissioners were not called, so there was no evidence about methods Commissioners used in determining qualifications for grand jurors. Without such evidence no inference explaining the disparities established by respondent by reference to literary sound mind, moral character and criminal record qualifications (statutory qualifications for grand jurors) can be drawn from the statistics about the population as a whole.

The court also concluded that federal district judges' "governing majority" theory did not dispel the presumption of intentional discrimination because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group, and further if the relevance of a "governing majority" of elected officials to the grand jury selection process is questionable and even if it did have application, the record in the case is not adequately developed to permit such approach.

The case was described as "unique" and the opinion repeatedly noted the State's failure to produce adequate evidence.

**PAROLE REVOCATION**

In *Moody v. Daggett*, ___ U.S. ___, 97 S.Ct. 274, 50 L.Ed.2d 236 (11/15/76), petitioner had been convicted of rape and received a ten-year sentence, then placed on parole with six years remaining to be served. While on parole, he killed two persons, subsequently being convicted for manslaughter and second degree murder, receiving ten-year concurrent sentences. After incarceration, the U. S. Board of Paroles issued but did not execute a violator warrant based on those crimes. Petitioner sought habeas corpus to compel immediate execution of the warrant so that any imprisonment could be served concurrently with his homicide convictions. Following dismissal of the petition by the District Court and affirmance by the 10th Circuit, the Supreme Court affirmed on certiorari, holding that a federal parolee imprisoned for a crime committed while on parole was not constitutionally entitled to a prompt parole revocation hearing where a parole violator warrant was issued and lodged as a "detainer" at the institution of confinement but never served.

**SEARCH & SEIZURE**

*G. M. Leasing Corp. v. United States*, ___ U.S. ___, ___ S.Ct. ___, 50 L.Ed.2d 530, 20 Cr.L.Rptr. 1057 (1/12/77), held that an I.R.S. agent's warrantless entry of a corporation's office to seize its books and records violated the Fourth Amendment where no exigent circumstances existed, reaffirming that corporations and places of business are entitled to Fourth Amendment protections.

However, the court did uphold agent's warrantless seizures of several automobiles owned by the corporation, which appeared to be the alter ego of an individual with severe tax problems.

*Search Warrants – For a Fee*

*Connally v. Georgia*, ___ U.S. ___, 97 S. Ct. 546, 50 L.Ed.2d 444 (1/10/77), held that the issuance of a search warrant for a fee by a Georgia Justice of the Peace violates the Fourth and Fourteenth Amendments protections afforded a defendant. Georgia law provided $5.00 for the issuance of a search warrant and nothing if the Justice of the Peace refused to issue a warrant. The court noted that the case was not precisely the same as *Tumey v. Ohio*, 273 U.S. 510 (1927), or *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), but then stated, "It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who 'has a direct, personal, substantial, pecuniary interest' in his conclusion to issue or to deny the warrant."

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## COURT OF CRIMINAL APPEALS DECISIONS 1976 TERM

**APPEAL**

*Appellate Review of Competency Hearing*

*Jackson v. State*, 548 S.W.2d 685 (1977), held that the Court of Criminal Appeals would henceforth review claimed errors in a pre-trial hearing on competency to stand trial when such error is raised on appeal from a conviction on a trial on the merits and the record of the competency hearing is found in the appellate record. This decision overrules many decisions dating back to the mid-1950s holding that such matters were not reviewable, a significant departure from past rulings.

*Waiver of Appeal Before Sentencing*

*Ex parte Thomas*, 545 S.W.2d 469 (1977), held that a defendant is not bound by his agreement to waive appeal which is made after judgment of conviction but before the pronouncement of sentence. See also *Bailey v. State*, 543 S.W.2d 653 (1976).

*Prohibition of State from Appealing*

*White v. State*, 543 S.W.2d 366 (1976), a forgery conviction, was affirmed after the original reversal, 521 S.W.2d 255, was set aside by the United States Supreme Court in *White v. Texas*, 423 U.S.67, upon application for certiorari by the district attorney. The Court of Criminal Appeals found the higher court's decision binding because White's sole reliance that search and seizure was invalid was not based on the Fourth Amendment and not on Texas constitutional grounds (Art. I, §9). However, a plurality of the court would hold that the State may not in any manner appeal a criminal case to the United States Supreme Court because of constitutional prohibition against the right of the State to appeal (Art. V, §26, Tex. Const.).

*No Penalty for Exercising Right of Appeal*

*McFadden v. State*, 544 S.W.2d 159 (1976), presented a situation where the defendant pled guilty to an indictment alleging possession of heroin and pled true to the motion to revoke probation based upon such possession of heroin. Both pleas were the fruit of a plea bargaining agreement that had been made known to the trial court, including the fact that the sentences were to run concurrently. The defendant was sentenced to seven years in the probation revocation and waited the statutory period before sentencing on the possession charge. He filed a notice of appeal in both cases, and the State then filed a written motion to cumulate both seven year sentences. A hearing was conducted, and the defendant's sentences were ordered cumulated. The court held that the defendant was penalized for exercising his statutory right of appeal by the prosecutor's failure to live up to the State's part of the plea bargaining agreement in which the right of appeal was not involved. The sentence on the possession conviction was reformed to run concurrently with the sentence in the revocation of probation case.

**BOND FORFEITURE**

*Judgment Nisi*

*Ilokr v. State*, 545 S.W.2d 463 (1977), held that a judgment nisi in bond forfeiture proceedings may be judicially noticed by the trial court, thereby eliminating the former requirement that it be introduced into evidence. The case further held that a peace officer may set the amount of bail in a misdemeanor case under Article 17.20, Vernon's Ann.C.C.P. The court held that this should be limited to situations in which no magistrate is available, or in arrests pursuant to a warrant in which the proper magistrate is unavailable.

*Liability Discharged*

*McConathy v. State*, 544 S.W.2d 666 (1976), held that the appellant-surety's

*(Continued on p. 19)*

# Criminal Bills of the 65th Legislature

*Stephen H. Capelle*
*Executive Director*

In this article I will try to summarize the bills passed by the 65th Legislature and the First Called Session that deal with criminal law. I would direct you to the article "Summary of the 65th Legislature," in volume 7, number 1, of the *VOICE for the Defense*, which reviewed all the criminal law bills that passed and had immediate effect. This article will review the criminal law bills that will be effective on the 29th of August 1977, or on another subsequent date if indicated.

**HB 39** (amends Sections 4 and 5, Article 42.09, Code of Criminal Procedure) changes only two words; if the defendant is convicted and sentenced to T.D.C. for a term of more than "ten" years he shall be transferred to T.D.C. If the defendant receives less than "ten" he may request to spend his time awaiting appeal in T.D.C.

**HB 293** (amends Section 42.01, Penal Code, Subsections a and d) changes the disorderly conduct statute. Subsection a (10) now creates an offense if one "discharges a firearm on or across a public road." Old Subsection a(10) becomes Subsection a(11); and old Subsection a(8) is changed so that "public road" is excluded as a public place under that subsection. The bill also amends the punishment portion of 42.01, Penal Code by making a violation of the new Subsection a(10) a "misdemeanor punishable by *fine only*"; first conviction $25-$200, second conviction $200-$500 and third or subsequent conviction a fine of $500.

**HB 905** (adds Article 47.01a, Code of Criminal Procedure) allows a magistrate to hold a hearing to determine ownership of seized property, on the motion of any interested party, *if* no criminal action is pending. The magistrate may order the property delivered to the party with the "superior right to possession" or may remand the property to the peace officer. The only condition being that the property must be made available to the prosecuting attorney if needed in the future.

**HB 945** (amends 43.14 and 43.18, Code of Criminal Procedure) provides that upon sentence of death, a lethal quantity of a substance sufficient to cause death shall be given the prisoner by intravenous injection. The Director of T.D.C. is given the power to designate an executioner to carry out the penalty.

**HB 1089** (amends Section 22.04, Penal Code) redrafts the statute for the offense of injury to a child. A person may commit the offense in any of the four culpable *mental states* "by act or omission" if the act or omission causes: ". . .(1) serious bodily injury; (2) serious physical or mental deficiency or impairment; or (3) disfigurement or deformity." The penalty for the offense remains the same, except if the conduct is "engaged in recklessly or negligently," in which case, it is a third degree felony.

**HB 1124** (amends Sections 47.04,47.06 and 47.07, Penal Code) provides for extensive changes in the sections of the Penal Code dealing with keeping a gambling place, possession of gambling equipment and possession of gambling paraphernalia. The bill adds to each of the sections an affirmative defense to the prosecution of the offenses. The affirmative defense is available if the gambling place and equipment are on an ocean-going vessel that only enters the territorial waters of Texas in the course of a bona fide voyage to or from a foreign port. The vessel must notify the prosecuting attorney for the county of the port, in writing prior to arrival, as to the fact that the equipment is present, and the time they will be in port; and the equipment must be locked up at all times while in port. In addition, 47.07, Penal Code, was provided with an amendment that states that the prosecuting attorney does not need a search warrant or subpoena to enter the vessel to inspect the gambling paraphernalia.

**HB 1214** (adds Article 17.39, Code of Criminal Procedure) states in full:

> "Article 17.39. Records of Bail
>
> "A magistrate or other officer who sets the amount of bail or who takes bail shall record in a well-bound book the name of the person whose appearance the bail secures, the amount of bail, the date bail is set, the magistrate or officer who sets bail, the offense or other cause for which the appearance is secured, the magistrate or other officer who takes bail, the date the person is released, and the name of the bondsman, if any."

**HB 1322** (amends Section 5, Article 42.03, Penal Code) requires that in order for a trial judge to sentence the defendant to serve his jail time on weekends or off duty hours it *must* be upon written motion of the defendant. The judge may require the defendant to request his employer to deduct a specified amount from his pay to be sent to the clerk of the court. The money shall be expended by the court to support the defendant's dependents, for the defendant's personal expenses, for the maintenance of the defendant in jail and to pay the defendant's restitution and fine. The request for deduction is *not* binding on the employer and is only done on a voluntary basis.

**HB 1271** (amends Section 5, Article 42.03, Code of Criminal Procedure) allows the court to sentence the defendant to serve jail time on weekends or off-duty hours if the defendant is sentenced to confinement as punishment for criminal nonsupport, under Section 25.05, Penal Code. The court may require the defendant to execute a letter to his employer directing them to set aside a certain amount of the defendant's pay and have it sent to the court to pay any arrears in child support payments. This letter is *not* binding on the employer and employer's "compliance shall be on a voluntary basis."

**HB 1936** (amends Article 49.03, Code of Criminal Procedure) allows the county to pay a physician a "reasonable" fee for performing an autopsy and does not specify a maximum amount.

**HB 2007** (amends Subdivision (2), Subsection (a), Section 1.07, Penal Code) the term "actor" is changed to "suspect"; and furthermore, "whenever the term 'actor' is used in this code, it means 'suspect.'"

**SB 9**—from the first called session—(adds Section 22.09, Penal Code) creates a whole new offense called "injury to a person under the care of a nursing or convalescent home, "which is a third degree felony. The bill provides that:

> "An owner or employee of a nursing or convalescent home or a person providing medical or psychiatric care at a nursing or convalescent home commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct that causes serious bodily injury, serious physical or mental deficiency or impairment, or deformity to a person who is under the care of the nursing or convalescent home."

**SB 32** (amends Sections 6a and 8 of Article 42.12, Code of Criminal Procedure) provides that the maximum fee that a probationer may be charged is $15. It also provides that the inability of a probationer to pay restitution, court costs, and probation fees is an affirmative defense to revocation, ". . .which the probationer must prove by a preponderance of evidence."

**SB 52** (recodification of Article 44.04, Code of Criminal Procedure) rewrites the existing Article 44.04 with no changes except where the defendant is sentenced to 15 years or less. In this case the trial court, if there appears to be good cause to believe the defendant will commit another offense or not appear when his conviction becomes final, may deny the defendant bail. The court may also keep the defendant on his existing bail and the court may impose "reasonable conditions" on releasing the defendant on bail. The

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court may revoke the bail on a finding of a violation of the conditions, on a preponderance of the evidence. Appeal to the Court of Criminal Appeals is given to the defendant for any ruling or order of the trial court and the appeal shall "be given preference by the Court of Criminal Appeals."

**SB 61** (amends Section 6, Article 42.12 and Subsection (b) of Section 5, Article 42.13, Code of Criminal Procedure) amends both the felony and misdemeanor probation law by adding a new condition "J" to 42.12, Code of Criminal Procedure and the same condition to 42.13 as the last paragraph of Section 5. The condition allows the court to require the probationer to reimburse the county for any compensation they paid to the defendant's appointed counsel.

**SB 109** (amends Section 32, Article 6687b, V.T.C.S.) by adding a Subsection (b) to Number 6. This allows the D.P.S., after written approval of the director, to issue to a law enforcement officer an alias driver's license ". . .to be used in supervised activities involving criminal investigations." Possession, application for or use of the license is not a violation of the statutes.

**SB 146** (amends Article 2.12, Code of Criminal Procedure) drops the "and" found at the end of the clause in Subsection (12) of Article 2.12 and adds a new paragraph after Subsection (13). The new paragraph states that the certain individuals are *not* peace officers, but *do* have the powers of arrest, search and seizure as to felony offenses only under the laws of the State of Texas. The paragraph goes on to list all special agents of the: Federal Bureau of Investigation; Secret Service; Alcohol, Tobacco and Firearms; Federal Drug Enforcement Agency; and the United States Customs, excluding border patrolmen and customs inspectors.

**SB 150** (amends Article 42.12, Code of Criminal Procedure and adds Article 6184n to V.T.C.S.) is effective on the 1st of September 1977. The bill adds a new Section 36 to 42.12, Code of Criminal Procedure, which simply states that the provisions of 42.12 do *not* apply to temporary furloughs granted to an inmate by T.D.C. under Article 6184n, V.T.C.S. The new Article 6184n, V.T.C.S., allows T.D.C. to grant medical furloughs and emergency furloughs to attend funerals or to visit critically ill relatives. These furloughs are for a five-day period with the possibility for an extension for ten additional days; T.D.C. may only grant two furloughs to a prisoner during a calendar year, then permission must be obtained from the Board of Pardons and Paroles and the Governor.

**SB 209** (amends Article 49.05, Code of Criminal Procedure) amends Article 49.05 so that a "parent" may give permission for the autopsy of an unmarried deceased, it drops the words "father, mother."

**SB 210** (amends Article 47.06, Penal Code) adds that it is a defense to possession of gambling equipment if the equipment is not used for gambling and was manufactured prior to 1940. The party possessing the equipment must notify the sheriff of the county where it is possessed and give the sheriff a description of the equipment. The sheriff must also be informed of any sale or transfer of the equipment.

**SB 310** (amends Subsection (c), Section 31.03, Penal Code) provides that an individual who is in the business of buying or selling used or secondhand property or lending money on property deposited with him is presumed to know that the property is stolen if he pays or loans more than $25 and if he does *not* perform all the statutorily listed activities. To not fall under the statutory presumption the individual must obtain identification from the seller, record a complete description of the property and must obtain a signed warranty from the seller or pledgor that the seller or pledgor has the right to possess the property.

**SB 334** (amends Article 44.02, Code of Criminal Procedure) provides that when a defendant has plead guilty or nolo contendere before the court, and the court has found the defendant guilty, and the court assesses punishment, and in assessing punishment, the court does not *exceed* the recommendation of the prosecuting attorney, then the defendant may *not* appeal his conviction without permission of the trial court. An exception is made for those matters ". . .raised by written motion filed prior to trial." The new amendment does not affect appeals under Article 44.17, Code of Criminal Procedure, which are the provisions for trial de novo from justice of the peace and corporation courts.

**SB 471** (adds Chapter 55 to the Code of Criminal Procedure) sets up procedures for the expunction of arrest records on the motion of a person who has been arrested. The person is not eligible to make a motion for expunction unless: (1) an indictment or information has not been presented against him for an offense arising out of the transaction, (2) he has been released and the charges dismissed, and (3) he has not been convicted of a felony in the preceding five years. In the petition the person must list all agencies, state and federal, and all political entities that may have records or files concerning him; and if the record is expunged those agencies and entities listed will be the only ones notified of the expunction. The district court shall hold a hearing and any agency listed in the petition may be represented by an attorney. The court may order the records destroyed or returned to the court; the state may return the files if they can show the petitioner is still subject to prosecution and that the state "may proceed against him for the offense." The agency holding the records must destroy them or obliterate the petitioner's name and delete all index references to the petitioner. The court records concerning the expunction are closed for inspection by anyone except the petitioner, and ". . .the petitioner may deny the occurrence of the arrest and the existence of the expunction order." The only exception to the denial is if the petitioner is questioned, under oath in a criminal proceeding, where he may state only that the matter in question was expunged. It is a class "B" misdemeanor not to expunge the records if so ordered. Upon release or discharge of an arrested person he "shall" be given written explanation of his expunction rights and a copy of Chapter 55, Code of Criminal Procedure.

**SB 481** (adds 38.14, Penal Code) creates the offense of preventing execution of civil process. The class "C" misdemeanor offense is committed if an individual intentionally or knowingly prevents the execution of any process in a civil case. It is an exception to the statute if ". . .the suspect evaded service of process by avoiding detection."

**SB 489** (amends 31.04, Penal Code) enlarges the manner in which "theft of services" may be committed. A person may now commit the offense if he holds personal property he has obtained under a written rental agreement beyond the rental period without the effective consent of the owner. Intent to avoid payment is presumed if the suspect failed to return the property within ten days after receiving notice demanding return. Notice demanding return shall be in writing, sent by registered or certified mail, return receipt requested.

**SB 695** (amends Section 6, Article 42.12, Code of Criminal Procedure, adds new Section 3a, Article 42.12, Code of Criminal Procedure, and adds new Section 3c to Article 42.13, Code of Criminal Procedure) provides that if the defendant is sentenced to confinement in C. for any offense other than, ". . .criminal homicide, rape, or robbery," the sentencing court retains jurisdiction for 120 days from the date the execution of the sentence actually began. After 60 days and before 120 days the judge that imposed the sentence may on his own motion or written motion of the defendant suspend further execution of the sentence and place the defendant on probation, if the defendant is otherwise eligible for probation, and the defendant has never

*Continued*

before served time in a penitentiary for a felony. The same provisions have been added to the misdemeanor probation law; the time periods are 10 days to 90 days, and the defendant must never have served time in jail or the penitentiary for any misdemeanor or felony. The bill also adds new conditions "J, K, L, and M" to (6), Code of Criminal Procedure; these new conditions deal with community-based programs. The defendant may be required to participate in a community-based program, to pay a percentage of his income to the facility for room and board, to pay a percentage of his income for the support of his dependents and to pay a percentage of his income to the victim for compensation for any medical expenses and any property damage.

**SB 937** (amends Article 26.13(a)(2), Code of Criminal Procedure) changes the plea of guilty procedure. The court must now inquire as to the existence of any plea bargaining agreements, and if one exists, the court shall inform the defendant whether the bargain will be followed or rejected, in open court and before there is any finding on the plea. If the court rejects the agreement, the defendant will be allowed to withdraw his plea and no statement or other evidence made during the hearing may be admitted against the defendant on the issue of guilt or punishment in any subsequent criminal proceeding.

**SB 1070** (amends Section 2, Article 11.07, Code of Criminal Procedure) changes the procedure for post-conviction writs of habeas corpus. All the language after the first sentence in Section 2(a) of 11.07, Code of Criminal Procedure, has been eliminated. Sections 2(b) and (c) have been totally rewritten, and a new Section 2(d) has been added. These sections change the district court's procedures for handling petitions for writs. When a convicting court receives a petition, a writ of habeas corpus returnable to the Court of Criminal Appeals shall be issued by operation of law. The clerk shall file it, number it, send a copy to the attorney representing the state, who shall have 15 days to answer the petition. Matters alleged in the petition that are not admitted by the state are deemed denied. Within 20 days of the expiration of the time for the state to answer, the convicting court must decide if there are controverted, unresolved material facts in issue. If the convicting court decides there are no such issues, the record is transmitted to the Court of Criminal Appeals; if the convicting court does not act within the 20 days, it shall be deemed that he made such a finding. If the convicting court decides there are controverted, unresolved material facts in issue, an order designating those facts shall be issued within the 20-day period. To resolve the issues, the convicting court, or a magistrate or attorney appointed by the convicting court, may hold a hearing, order affidavits, depositions, or interrogatories, and must make findings of fact. The court reporter must transmit to the Court of Criminal Appeals the entire record within 15 days of the conclusion of the hearing.

**SB 152** (amends 42.12, Code of Criminal Procedure and various articles in V.R.C.S.) creates an entity called "mandatory supervision," deals with probation and parole, and provides for no probation in certain instances. Many of the amendments are grammatical changes to accommodate the new mandatory supervision program. The definition of "mandatory supervision" appears as a new Section 2d of 42.12, Code of Criminal Procedure, with all the subsequent subsections being relettered. Mandatory supervision is the release of a prisoner from T.D.C. but is not parole or any form of commutation or clemency. The release is for "rehabilitation" and is under the supervision of the Board of Pardons and Paroles. Under 42.12, Section 12, the Board shall determine the degree and intensity of supervision of those individuals on parole or mandatory supervision. The eligibility requirements for parole have not been changed, but are now found in the new Subsection (b) of Section 15. If a prisoner is not paroled, he "shall be released to mandatory supervision" when the calendar time he has served plus any accrued good time equal the maximum time to which he was sentenced. The period of "mandatory supervision" shall be for a period equivalent to the maximum term for which he was sentenced less the calendar time actually served. The time served on mandatory supervision shall be considered calendar time. The old Subsection (d) of Section 15 has been amended and relettered as (g). The amended portion of (g) allows the Board to make restitution to the victim of the crime a condition of parole or mandatory supervision, the amount having been determined by the trial court and entered in the judgment of the court. The old Subsection (e) of Section 15 is now the new amended (f); the amended version allows the Board to consider the fact that restitution or partial restitution has been made when an individual is considered for parole. Section 22 of 42.12, Code of Criminal Procedure, allows the Board or its designee to hold a hearing which "shall be public" and "shall be within ninety days" of the date of arrest on a violation of parole or mandatory supervision. Amendments to Section 24 of 42.12, Code of Criminal Procedure, eliminate the requirement that the Board make a recommendation to the Governor as to the restoration of citizenship. Article 48.05, Code of Criminal Procedure is repealed. With regard to sentencing a defendant to probation, Article 42.12 has been amended by adding a new Section "3f." This section provides that Sections 3 and 3c of Article 42.12 (probation from a judge) do not apply if you are adjudged guilty of one of the following offenses: capital murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, or aggravated robbery. Sections 3 and 3c of Article 42.12 do *not* apply if it is shown that during the commission of any felony offense, or in the immediate flight therefrom, the defendant used or exhibited a deadly weapon as defined in Section 1.07(a)(11), Penal Code. The affirmative finding that the defendant used or exhibited a deadly weapon will be noted on the judgment of the court and if the weapon used is a firearm, this will also be noted. If the defendant is convicted of any felony of the second degree or higher and there is an affirmative finding that a firearm was used and if the defendant receives probation from a jury, then the court "may order the defendant confined in the T.D.C. for "not less than 60 and not more than 120 days." At any time during that period or within 120 days, the court, on his own motion or on the defendant's motion, may order him released to probation. Article 42.12, Section 15 is amended to provide that if the defendant is serving time for any listed offense or for an offense with an affirmative finding of deadly weapon or firearm, he is *not* eligible for parole until his "ac-

*Continued*

# EXECUTIVE DIRECTOR'S REPORT

If you have been reading your monthly *VOICE*, since its beginning in May, you will have read comments from your President, your Editor, and your Executive Director concerning membership. You have perhaps been bored and tired of our redundant pleas concerning membership. Along with those questions about our continued request for more members is your interest with the question of money; primarily, I assume, you have been concerned about where it comes from and where it goes. The Board of Directors, through the Home Office, would be happy to furnish to any member a copy of our annual budget. In the interest of time, so that you will not need to read the entire budget, I will try to summarize what the Association spends each year.

In 1976-1977—our fiscal year ends on the 30th of June--it was projected that the Association would have an income of $158,925.00. The projected income would come from a number of sources, but 82% would come from membership dues. In keeping with the projected income, the budget was geared to spend $155,450.00; whereas, income was only $109,822.00. Not being totally fiscally unsound, expenses were cut back and the total for 1976-1977 was $118,308.00.

In the 1977-1978 budget things were changed. The Budget Committee, made up of the Executive Committee, started from zero on both the projected income and the expenses. The projected income is $115,000.00, with membership dues representing 80% of this total. The remainder will come from publication sales, advertising, and seminars. The expenses have *all* been cut in the budget and the total is some $113,000.00.

The largest expense is "projected maximum salaries," making up 43% of the total budget, with printing and mailing, office rental, complimentary publications, and postage as the next greatest expenses.

In last year's expense column, salaries made up 45% of the total expenses, with the same categories making up the rest of the largest expenses.

Leaving the area of money only slightly, you can readily tell that membership is our lifeblood. In the last week 40 members have been dropped from our rolls because of delinquent dues. Another 87 members are delinquent, but only 60-120 days. As you are aware, with anniversary billing, we have dues coming in everyday, and I think along with the short explanation of our budget, you should receive an outline of our billing procedure. If your dues are to be paid in September, the notice to you goes out around the 15th of the prior month, in this case August. If you do not pay by the 15th of September, you will be sent a second notice. If you do not pay by the 15th of October, you receive a third notice and your name goes on a list that is sent to all the directors. You will not receive any more notices from our Home Office, and the directors have sixty days to contact you; it is now December 15th, and you receive a letter from me dropping you from our rolls.

All organizations have attrition problems (our percentage of loss is less than most); but we prefer to lose members because they are appointed to the bench. . . rather than for nonpayment of dues. The most successful associations look, as we do, to members to secure other members. So, how about *you* sitting down right now and thinking about each and every criminal defense lawyer you know: Is he, everyone of them, a member? If not, why not?

Think about the seminars, this magazine, and the "Significant Decisions"; if they are not worth $100.00 per year to you, maybe you should drop out, too. But if they are worth that much to you, they are to your fellow lawyer. The nonmember who can use our services is in your town. Look for him. . .the law schools "burp-out" six times the number we drop each year; they need our services.

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tual calendar time served, without consideration of good conduct time, equals one-third of the maximum sentence or 20 calendar years, whichever is less. . . ." It also provides that in no event shall the defendant convicted of a listed crime or one involving a deadly weapon or firearm be released in less than two years.

**SB 157** (amends Article 38.21 and 38.22, Code of Criminal Procedure) is the oral confession bill. The only amendment to Article 38.21 is that the word "confession" is changed to "statement," and it must appear that it was freely and "voluntarily" made. Article 38.22, except for Sections 2 and 3, which become Sections 6 and 7 of the new article, has been entirely rewritten. Even though it has been rewritten, the law remains the same with regard to written statements and to oral statements which contain assertions of facts or circumstances that are found to be true, such as finding of stolen property or the instrument with which the offense was committed. Any other oral statement of the accused "made as a result of custodial interrogation is admissible against the accused in a criminal proceeding for the purpose of impeachment only," and when certain requirements are met. These requirements are: (1) an electronic recording is made of the statement, (2) prior to the statement but during the recording the accused is told that a recording is being made, (3) prior to the statement but during the recording the accused is given the warning set out in the statute and the accused "knowingly, intelligently, and voluntarily waives" the rights set out in the warning, (4) the recording device is accurate, the operator competent, and the recording has not been altered, (5) the statement is witnessed by at least two persons, and (6) all voices are identified. The statute also provides that every electronic recording made by an accused during custodial interrogation must be preserved until its destruction is ordered by a district court of this state. Any person who falsely swears to facts and circumstances that would make a statement admissible is presumed to act with the intent to deceive and is guilty of aggravated perjury is not eligible for probation. Nothing in this section affects the admission of a statement made in open court, before a grand jury, at an examining trial, as part of the res gestae of an arrest or an offense, or "whether or not the result of custodial interrogation, (a statement) that has bearing upon the credibility of the accused as a witness. . . ." ■

# Putting the Driver behind the Wheel—the State's Burden

**Peter Torres, Jr.**
San Antonio

It is not uncommon to hear prosecutors cite to trial courts with some misguided authority that the fact that a defendant was behind the wheel of an automobile at the scene of an accident is sufficient to prove that he or she was the driver of the automobile at the time of the accident. Defense counsel should not take for granted that the other participants in the accident can, in fact, identify the defendant as the driver of the automobile at the time that it was being operated on a public road; and if the accident is with a fixed object, the fact that the testifying police officer, or any other witness, says that the defendant was sitting behind the wheel does not establish him or her as the driver of the automobile at the time of the accident.

In *Duran v. State*, 171 Tex. Crim. 535, 352 S.W.2d 739 (1962), the Appellant stipulated to the intoxication, but contended on appeal that the evidence was insufficient to support the judgment. The testimony in that case showed that the defendant's automobile apparently ran into the back of another automobile, the driver of which testified that he could not positively identify Defendant Duran as the driver. Apparently, this witness had remained in his car until the police arrived and only testified that the driver of the car that had struck him was a man with a white shirt. The defendant was not in the car when the officer arrived; however, the officer inquired whether he was the driver and the defendant stated "it was his car and that he had been the driver." A surprisingly inquisitive trial judge inquired of the officer if Duran had admitted at what time he had been driving the car, and whether he had admitted being in the accident, to which the officer replied, "No." The Court of Criminal Appeals reversed, holding that "we find that although it was established that the appellant has been driving the car, it was not established when he drove it." Thus the evidence was insufficient to sustain the conviction. Whether a jury's finding that appellant drove a motor vehicle on the occasion in question could be upheld also arose in *Hollingsworth v. State*, 419 S.W.2d 854 (Tex. Crim. App. 1967), in which the only eyewitness to the accident testified that before regaining consciousness in the hospital he saw a white Chevrolet coming toward him. The police officer related that he arrived at the scene of the collision some time after its occurrence and the appellant was seated inside the Chevrolet on the left half of the automobile, but not exactly under the wheel. No evidence was offered relating to vehicle registration or ownership of the Chevrolet, and the court concluded that the evidence was not sufficient to show that appellant drove the white Chevrolet in question at the time of the accident, thus reversing the conviction.

Similarly, in *Avants v. State*, 170 Tex. Crim. 307, 340 S.W.2d 817 (1960), a conviction was reversed, the court noting that one of the constituent elements of the offense of driving while intoxicated is to show that the appellant drove the automobile, and that the testimony of a police officer to the effect that when he first saw the defendant, "she was slumped in the front seat of the automobile which had been involved in an automobile accident, and that she was alone in the automobile with both doors closed," is insufficient to show that the defendant drove the automobile.

A case involving the striking of a fixed object is *Spinks v. State*, 156 Tex. Crim. 418, 243 S.W.2d 173 (1951), where the only witness for the state was a constable who testified that he heard a crash, immediately went to the crash scene, and saw Defendant Spinks, "coming out of the driver's side of the car." This case was reversed for insufficiency as was *Hudson v. State*, 510 S.W.2d 583 (Tex. Crim. App. 1974), where the defendant was found sitting in the front seat of the automobile with his feet on the ground, the automobile had a flat tire and a warped front wheel, and as the officer approached the motor vehicle, he saw the defendant throw a number of empty beer cans. Since he appeared intoxicated, he was arrested and subsequently convicted.

In *Johnson v. State*, 517 S.W.2d 536 (Tex. Crim. App. 1975), the highway patrol went to the scene of an accident and found a pickup rolled in the ditch beside the road, but no one was in the vehicle. The officer asked the appellant whether he was the driver, and the appellant answered, "I was driving." The officer went further and testified that the vehicle had been traveling due west or coming from the east prior to the accident, but the officer said he could not testify as to what time the accident occurred. He was permitted to testify that his investigation showed that the appellant owned the vehicle. In reversing the case, the court stated that to sustain a conviction for driving a motor vehicle while intoxicated, the evidence must show that the appellant drove the vehicle; that he drove while he was intoxicated, and that he drove on a public road or highway or a street or alley. The court went on to say that in this case there was no evidence that the ditch where the pickup was found was in the street right-of-way, that there was no evidence that the tracks made by the pickup truck came from the direction of the street, and no evidence showing *when* the appellant drove the pickup truck.

The most recent decision touching on this subject is *Young v. State*, 544 S.W.2d 421 (Tex. Crim. App. 1976), in which the appellant was convicted of murder without malice arising out of an automobile accident. The evidence showed that the appellant had been given the keys to a car one hour before the accident. In the accident, the car turned over and the appellant and another person were found lying in the upside down car by the officer who testified that he found the appellant "in the vicinity there of the wheel." In reversing this case as in the other cases cited herein, the court repeatedly cites the rule of circumstantial evidence, that a conviction cannot be sustained if the circumstances proved do not exclude every other reasonable hypothesis, except that of the guilt of the accused.

Counsel, in arguing these cases in similar situations before trial courts, would do well to note the distinction made in *Young v. State (supra)*, between that holding and the court's ruling in *Sandoval v. State*, 422 S.W.2d 458 (Tex. Crim. App. 1968), and in *Perez v. State*, 432 S.W.2d 954 (Tex. Crim. App. 1968). In both of the latter cases the defendants were alone in the car and made incriminating res

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liability to insure the principal's appearance at a subsequent proceeding was discharged upon the date the motion for new trial was overruled by law as his misdemeanor probation had commenced and there could he no subsequent proceeding had relative to the charge absent the giving of notice of appeal.

## CAPITAL MURDER

*Witherspoon Voir Dire Waiver*

*Boulware v. State*, 542 S.W.2d 677 (1976), held that the failure to object to the improper exclusion of a venire member under the standards of *Witherspoon* waives that right and it cannot be considered on appeal.

*Juror Disqualified Under V.T.C.A., Penal Code, §12.31(b)*

*Moore v. State*, 542 S.W.2d 664 (1976), considered the application of V.T.C.A., Penal Code, §12.31(b), stating, "A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." The court held three prospective jurors were properly excused under this statutory provision without the necessity of consideration of whether their answers also disqualified them under the *Witherspoon* doctrine. See also *Boulware v. State*, 542 S.W.2d 677 (1976).

*Opinions of Expert*

*Livingston v. State*, 542 S.W.2d 655 (1976), held that doctor's opinion that defendant would be a continuing threat to society during punishment stage of capital murder trial was properly admissible though he based his opinion in part on statements made by the defendant during the psychiatric examination that he conducted though statements were not related.

*Robinson v. State*, 548 S.W.2d 63 (1977), held that the refusal of the trial court to permit the defendant to elicit testimony from psychiatrist at punishment stage relating to one of three issues submitted to jury under Article 37.071, Vernon's Ann.C.C.P., "whether a probability exists that a defendant would commit criminal acts of violence which would constitute a continuing threat to society," was reversible error.

*Punishment Charge on Circumstantial Evidence*

*Shippy v. State*, ___S.W.2d ___(Tex.Cr. App. #53,831, 4/27/77), held that issue No. 2 of Article 37.071, Vernon's Ann. C.C.P., at the punishment stage of a capital murder case relating to the probability of defendant committing future acts of violence constituting a continuing threat to society does not "fall within rule that dictates use of the circumstantial evidence charge."

*Denial of Bail–Proof Evident*

*Ex parte Derese*, 540 S.W.2d 332 (1976), held that the trial court erred in finding that proof was evident that defendant was guilty of capital murder and that the jury would return death penalty and in denying bail to the defendant under Article 1.07, Vernon's Ann.C.C.P., and Article I, §11 of the State Constitution, where there was an absence of any evidence that there was probability that accused would commit acts of violence that would constitute continuing threat to society and in view of absence of any criminal record of defendant and his non-violent nature. See also *Ex parte Hammond*, 540 S.W.2d 328 (1976). ■

### LIST OF CASES

**Federal:**

*Capital Punishment*
Davis v. Georgia, ___U.S. ___, 97 S.Ct. 399, 50 L.Ed.2d 339 (12/6/76)
Gardner v. Florida, ___U.S. ___, 97 S.Ct. 1197, 51 L.Ed.2d 393 (3/22/77)

*Confessions*
Hutto v. Ross, ___U.S. ___, 97 S.Ct. 202, 50 L. Ed.2d 194 (11/1/76)
Brewer, Warden v. Williams, ___U.S. ___, 97 S. Ct. 1232, 51 L.Ed.2d 424 (3/23/77)
Oregon v. Mathiason, 429 U.S. ___, 97 S.Ct. 711, 50 L.Ed.2d 714 (1/25/77)

*Double Jeopardy*
United States v. Sanford, ___U.S. ___, 97 S.Ct. 20, 50 L.Ed.2d 17 (10/12/76)
United States v. Morrison, ___U.S.___, 97 S.Ct. 24, 50 L.Ed.2d 1 (10/12/76)

*Grand Jury*
Castaneda, Sheriff v. Partida, ___U.S. ___, ___S.Ct. ___, 51 L.Ed.2d 498 (3/23/77)
United States v. Kopp, ___U.S. ___, 97 S.Ct. 400, 50 L.Ed.2d 336 (12/6/76)

*Parole Revocation*
Moody v. Daggett, ___U.S. ___, 97 S.Ct. 274, 50 L.Ed.2d 236 (11/15/76)

*Search & Seizure*
G. M. Leasing Corp. v. United States, ___U.S. ___, ___S.Ct. ___, 50 L.Ed.2d 530, 20 Cr.L. Rptr. 1057 (1/12/77)
Connally v. Georgia, ___U.S. ___, 97 S.Ct. 546, 50 L.Ed.2d 444 (1/10/77)

**State:**

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Jackson v. State, 548 S.W.2d 685 (1977)
Ex parte Thomas, 545 S.W.2d 469 (1977)
White v. State, 543 S.W.2d 366 (1976)
McFadden v. State, 544 S.W.2d 159 (1976)

*Bond Forfeiture*
Hokr v. State, 545 S.W.2d 463 (1977)
McConathy v. State, 544 S.W.2d 666 (1976)

*Capital Murder*
Boulware v. State, 542 S.W.2d 677 (1976)
Moore v. State, 542 S.W.2d 664 (1976)
Livingston v. State, 542 S.W.2d 655 (1976)
Robinson v. State, 548 S.W.2d 63 (1977)
Shippy v. State, ___S.W.2d ___(No. 53,831, 4/27/77)
Ex parte Derese, 540 S.W.2d 332 (1976)

*Confessions*
McKittrick v. State, 541 S.W.2d 177 (1976)
Creeks v. State, 542 S.W.2d 849 (1976)
Masters v. State, 545 S.W.2d 180 (1977)

*Counsel*
Detrich v. State, 545 S.W.2d 835 (1977)
Bullard v. State, 548 S.W.2d 13 (1977)
Landers v. State, 550 S.W.2d 272 (1977)
Williams v. State, 549 S.W.2d 183 (1977)
Livingston v. State, 542 S.W.2d 655 (1976)

*Court's Charge*
Landon v. State, 547 S.W.2d 27 (1977)
Williams v. State, 547 S.W.2d 18 (1977)
Gonzales v. State, 546 S.W.2d 617 (1977)
Billy Ray Rogers v. State, 549 S.W.2d 726 (1977)

*Evidence*
McInturf v. State, 544 S.W.2d 417 (1976)
Mosley v. State, 545 S.W.2d 144 (1976)
Dudley v. State, 548 S.W.2d 706 (1977)
Cross v. State, 550 S.W.2d 61 (1977)

*Extradition*
Ex parte Quinn, 549 S.W.2d 198 (1977)
Ex parte Elliott, 542 S.W.2d 863 (1976)

*Guilty Pleas*
Barrett v. State, 547 S.W.2d 604 (1977)
Malone v. State, 548 S.W.2d 908 (1977)

*Habeas Corpus*
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Garcia v. State, 547 S.W.2d 271 (1977)
Ex parte Davis, 542 S.W.2d 192 (1976)
Ex parte Dora, 548 S.W.2d 392 (1977)

*Indictment*
Jones v. State, 545 S.W.2d 771 (1977)
Ex parte Harrell, 542 S.W.2d 169 (1976)
Ex parte Garcia, 544 S.W.2d 432 (1976)
Moore v. State, 545 S.W.2d 140 (1976)
Watson v. State, 548 S.W.2d 676 (1977)
Childs v. State, 547 S.W.2d 613 (1977)
Victory v. State, 547 S.W.2d 1 (1976)
Ex parte Cannon, 546 S.W.2d 266 (1976)
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Ailey v. State, 547 S.W.2d 610 (1977)

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Tave v. State, 546 S.W.2d 317 (1977)

*Probation*
Ex parte Roberts, 547 S.W.2d 632 (1977)
Pittman v. State, 546 S.W.2d 623 (1977)
Russell v. State, 551 S.W.2d 710 (1977)
Ex parte Trillo, 540 S.W.2d 728 (1976)

*Search & Seizure*
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Hinson v. State, 547 S.W.2d 277 (1977)
McDougald v. State, 547 S.W.2d 40 (1977)
Rice v. State, 548 S.W.2d 725 (1977)
Hernandez v. State, 548 S.W.2d 904 (1977)

*Trial*
Bullard v. State, 548 S.W.2d 13 (1977)
Kimithi v. State, 546 S.W.2d 323 (1977)

*Venue*
Bell v. State, 546 S.W.2d 614 (1977)

Part II of Judge Onion's article will appear in the September issue of *VOICE*. Above is the listing of all cases included in the series.

DRIVER BEHIND THE WHEEL from p. 18

gestae statements that they were the drivers *in the accidents*, and these made the basis of the prosecution. It would, on the surface, appear that there is a contradiction between the *Sandoval* and *Perez* cases and *Duran v. State (supra)*. However, the incriminating statements made by Sandoval and Perez were such that there was no question but that they were the drivers of the automobiles involved in the specific accidents, and this made the basis of the prosecution. ■

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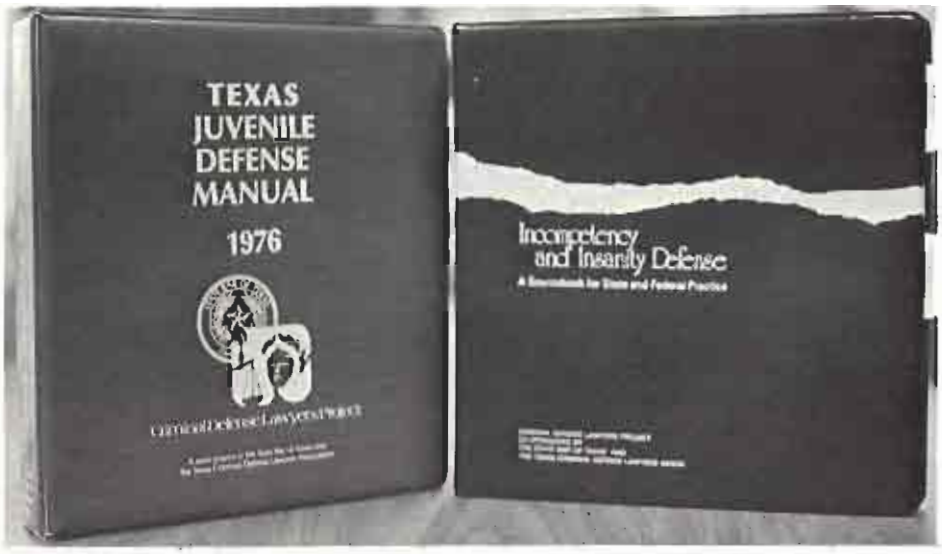


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