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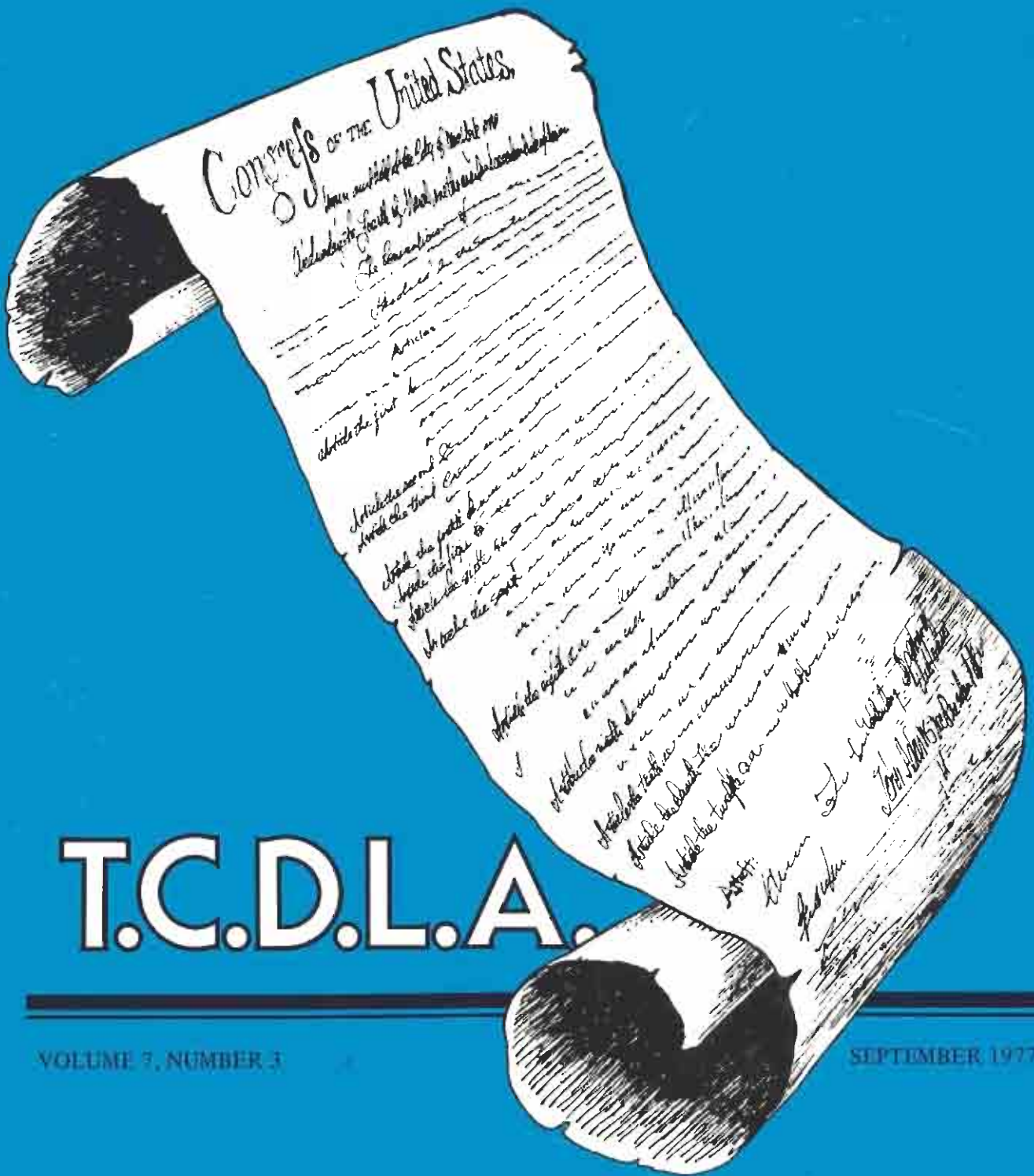

T.C.D.L.A.

VOLUME 7, NUMBER 3 SEPTEMBER 1977

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VOICE for the Defense
is published monthly by the Texas Criminal Defense Lawyers Association,
314 West 11th Street, Suite 211, Austin, Texas 78701.
Phone (512) 478-2514.
All articles and other editorial contributions should be addressed to the Editor, Clif Holmes, Box 1073, Kilgore, Texas 75662.
Business correspondence, advertising, inquiries and contracts: Dick Dromgoole, ARTFORMS AGENCY, Box 2242, Austin, Texas 78768, (512) 451-3588.
Annual subscription rate for members of the association is $5, which is included in dues. Nonmember subscription—$10 per year; single copy—$2.50.
Second class postage paid at Austin, Texas.

Texas
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Defense
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Association

SEPTEMBER 1977

Summer's all but gone. . . kids are back in school. . . and, the courts are back in full swing. Whatever respite you might have enjoyed for the summer must now fade in the glare of your busy dockets. The endless cycle of paper, people and words which comprise the plight of the criminal law practitioner too often take the form of blinders, obscuring his view of duties, responsibilities and commitments which are of equal or greater importance.

I've never tried to categorize and rank those duties, etc., but having gone this far with this thought, seem compelled to.

We all, of course, would rank the well-being of our families pretty well first. Our own personal well-being should run a close second. Past that. . . well, I guess it would depend on where you're coming from. I'd like to think that blindfolded lady with the big knife and the thing-a-ma-bob in her hand would get at least supporting-role billing from most of us.

But, conceding (for the sake of the point I'm laboring to make) Justice does enjoy that exalted position on our lists of priorities, how do we fulfill the responsibilities thus assumed?

Sure, Law Day speeches, *pro-bono* service, and membership in various associations and organizations dedicated to her promotion help. . . but, let me suggest, that "ain't enuff."

While I won't *(couldn't)* profess to be a legal philosopher, cognizant of the intricacies of all the various relationships making up our system of jurisprudence, I think I'm aware of the basic parts of our criminal justice system—The State (represented by the prosecution), The Decision-Maker (judge and jury), and the Accused (represented by the criminal bar). I'm not all that sharp when it comes to 'rithmetic, but that seems to make us one-third of whatever's there.

If that assumption isn't too far wrong, it would appear that something approaching one-third of all official effort designated for improvement of the criminal justice system should be directed toward improving the defense function. I don't want to knock your hat in the creek with an unexpected revelation, but, boys, we "ain't gittin' close to it." Only an infinitesimal part of the public funds being expended in attempts to unprove the criminal justice system finds its way to programs designed to improve the defense function. If our importance is to be measured by the level of assistance dedicated to our function, . . . folks, they don't need us!! Why, they've spent more money on mace cans and Batman crime-fightin' devices than on the defense function.

But, wait a minute. Why? Because they just don't like us? Naw. They like us all right—they just don't think we need them, maybe. I don't know about y'all, but I do. Adequate representation of a person accused of crime requres more than desire. It requires ability—knowledge—know-how—technique. The circumstances which control the adequacy of criminal defense are changing rapidly, as society changes. If it speeds up any more, West will be publishing the Constitution in loose-leaf.

I think we need the help. We ought to make it known that we need it, and that we *want* it.

The Criminal Defense Lawyer's Project, of which we are a sponsoring partner (albeit silent at times), is an example of the kind of service available to us and the good to which such help can be put. We need more. We have demonstrated our ability to use the help, and to produce quality results.

Emmett Colvin is dedicated to this proposition (just as Abe was dedicated to his). Let me urge you to get behind him in seeking—demanding—a proper level of attention to the defense function. Give him your thoughts, ideas, and proposals for improving the quality of our work.

We've got nothing to lose but the system as we now know it (. . . and, that blindfolded lady with the big knife, etc.).

Clif Holmes

PATINO FELLOWSHIP AT HASTINGS COLLEGE

We are indebted to Harry Tatelman of Universal Studios, Inc./MCA for information about a most unusual and welcome fellowship trust recently established at the University of California-Hastings College of the Law.

The half-million-dollar trust, expected to reach a full million within three years, has been donated to Hastings by Mrs. Francesa Turner in memory of her son Anthony Patiño, Jr., who prior to his death in 1973 was a Hastings student and a gifted writer for Universal Studios, a subsidiary of MCA, Inc.

The trust provides for both educational and living expenses; each recipient will be granted $5,000.00 per year; additionally, if the holder requires child care of his or her young children, such can be provided through the Tony Patiño, Jr., Endowment Fund.

Joseph Golant, editor of the Beverly Hills Bar Association *Journal*, says:

> "The purpose of the Fellowship is not only to encourage academic excellence, but more importantly to ingrain in the recipient a sensitivity for the needs of society. Thus, an applicant for the Fellowship must have a record showing active participation in public interest activities, such as organizations or programs that study and contribute to the solution of societal problems. It is hoped that the financial support from this new Fellowship will give the recipient the opportunity to continue engaging in public service activities while pursuing his legal studies; it is expected that the result will be a community-sensitive, community-active lawyer."

A Fellowship Screening Committee has been formed, including three people from the law school as well as a group outside the school headed by former United States Supreme Court Justice Arthur J. Goldberg, California Supreme Court Justice Raymond Sullivan, Los Angeles Superior Court Judge Arthur Alarcon, Mr. Elliott Witt and Mr. Albert Dorskind, executives with MCA, Inc., and Ms. Rosemary Gauthier, a Los Angeles attorney.

Those interested in further information should write to:

Tony Patiño Fellowship (Room 1-M)
Hastings College of the Law
University of California
198 McAlister Street
San Francisco, CA 94102

President's Report

Emmett Colvin

I am going to talk to you in this issue about a matter that may seem quite minor, namely, the size of paper that is used in court proceedings. During a great deal of our legal history we were addicted to scrolls (I presume, by necessity). We finally became so liberal and forward that we began using legal size paper for pleadings, moving papers, and notes, none of which are adaptable to a letter size trial book which most of us use, or should use, in the trial of the case. It occurs to me that if all such papers should be prepared on letter size paper, including indictments and informations, it would be of extreme benefit to the bench and the bar. It would result in well-indexed and tabulated trial and bench books, eliminating the peek-a-boo fumbling search for instruments and papers in the courtroom. I am well aware that special orders can be placed successfully for a legal size trial book. Don't try it. I had one of those and it amounted to a wrestling match with my trial book in the course of every trial. I would like to have your thoughts as to the merits of approaching the trial judges for what I consider a beneficial change in our practice as I have above described. I have discussed this matter with many judges, who favor such change. This idea is certainly not novel with me. It is, as I understand it, the format that has been used in California for some time. I want your thoughts, however, before I move forward for the organization as a whole. I have appointed a special committee to review this matter and present the same to the Board at Beaumont for resolution at that time.

NOTE: President Colvin sent the following letter to Judge Dowlen of Potter County, currently presiding over the Cullen Davis trial:

Dear Judge:

I am impelled in behalf of my association, T.C.D.L.A., to commend you in your handling of the Davis trial at this point. You are faced with fine lawyers on both sides and tremendous problems in what I am certain is a most troublesome case. You have presided in a fashion reflecting an exceedingly even judicial temperament with a magnificent ability toward gracious control—a control sought by many but achieved by few.

Sincerely yours,

NEW MEMBERS

The *Voice* of T.C.D.L.A. is pleased to say "welcome" to the new members joining us since June, 1977.

The listing of names and cities of new members is planned as a regular monthly feature hereafter.

JUNE	
M. Mark Lesher	Texarkana
Robert H. Fisher	Houston
Royce L. Ingersoll	Waco
Mary Sue Black	Richardson
Mark Bamburg	Sherman
John Paul Davis	Beaumont
E. Dale Robertson	Brownsville
Mike Thompson	El Paso
Stephen S. Andrews	Houston
Juan Manuel Ramirez	Edinburg
J. Albert Pruett, Jr.	Houston
David Bruce Lanford	Brownsville
JULY	
Kenneth Zieseheim	Waco
Arch McColl	Dallas
W.C. Kirkendall	Seguin
AUGUST	
George Michael Carnahan	Houston
Katherine M. White	Austin
Ted Dunnam	Galveston
Frank Moore	Dallas

There was a total of 13 student members for the months of June, July, and August.

Meet Your Directors

Peter Torres, Jr., Director
San Antonio

James Bobo, Associate Director
Odessa

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 II

(Editor: Part I was published in the August issue of the *VOICE.)*

COURT OF CRIMINAL APPEALS DECISIONS 1976 TERM

CONFESSIONS

Counsel Once Requested

McKittrick v. State, 541 S.W.2d 177 (1976), held that *Miranda* has never been interpreted to mean that once counsel has been requested or obtained the same forever bars law enforcement officers from interrogating an accused provided the prosecution sustains its heavy burden of showing an affirmative waiver. And this is particularly true where the accused initiates the conversation with the officers. The case was affirmed where facts showed that appellant, though previously represented by counsel, called officers and told them she wanted "to get her business straight," and that counsel no longer represented her. The officers warned her of her rights under *Miranda* and Article 38.22, Vernon's Ann.C.C.P., and she confessed.

Oral Statement in Custody

Creeks v. State, 542 S.W.2d 849 (1976), held that where, at the time the defendant reported to his probation officer, the latter had already filed a motion to revoke probation, had caused arrest warrant to issue and had notified police to come to the probation office to arrest defendant, the oral confession given to the probation officer, without warning as to rights, was inadmissible under Article 38.22 Vernon's Ann.C.C.P., and *Miranda*.

Refusal to Permit Defendant to Testify on Voluntariness

Masters v. State, 545 S.W.2d 180 (1977), held that the refusal of the trial court to permit petitioner to testify solely on the issue of voluntariness of a confession in a *Jackson v. Denno* hearing without subjecting himself to unlimited cross-examination on other issues constituted error requiring reversal.

COUNSEL

Revocation – 10 Days' Preparation Not Required

Detrich v. State, 545 S.W.2d 835 (1977), held that nothing in Article 42.12, Vernon's Ann.C.C.P., or the United States Constitution requires a preparation period of 10 days prior to a revocation hearing in the absence by the defendant of a showing of harm.

Counsel Recommending Plea of Guilty

Bullard v. State, 548 S.W.2d 13 (1977), held that the defendant's claim he was denied effective assistance of counsel since his counsel advised him to plead guilty was without merit as the advice appeared sound under the circumstances and the penalties assessed.

Hybrid Representation

Landers v. State, 550 S.W.2d 272 (1977), held that a defendant has the right to represent himself or to be represented by counsel, but he does not have a constitutional right to hybrid representation or to act as co-counsel.

Self-Representation – Rules of Evidence

Williams v. State, 549 S.W.2d 183 (1977), held that rules of evidence, procedure and substantive law will be applied the same to all parties in a criminal trial whether that party is represented by counsel or acting pro se. A defendant who elects to represent himself cannot thereafter complain that the quality of his own counsel amounted to a denial of "effective assistance" of counsel.

Psychiatric Examination

Livingston v. State, 542 S.W.2d 655 (1976), held that the absence of counsel during the examination of defendant by two psychiatrists who were appointed by the court to determine defendant's mental competency to stand trial did not violate either the Sixth Amendment or the defendant's privilege against self-incrimination protected by the Fifth Amendment.

COURT'S CHARGE

Failure to Charge

Landon v. State, 547 S.W.2d 27 (1977), held that evidence a firearm was accidentally discharged resulting in death of a person at whom it was pointed was sufficient to raise the issue of criminally negligent homicide and, accordingly, trial court erred in refusing to honor defendant's timely objection to trial court's charge for failure to instruct on that lesser included offense.

Williams v. State, 547 S.W.2d 18 (1977), held in a murder case that where the charge to the jury utterly failed to apply the law to the facts such was fundamental error. See also *Harris v. State*, 522 S.W.2d 199; *Perez v. State*, 537 S.W.2d 455.

Gonzales v. State, 546 S.W.2d 617 (1977), held in a murder case that where there was evidence that defendant acted under immediate influence of sudden passion which arose when he found his wife and victim lying on a bed in victim's motel room, issue of voluntary manslaughter was raised and thus defendant's timely presented requested charge on voluntary manslaughter should have been given. The case was reversed.

Billy Ray Rogers v. State, 549 S.W.2d 726 (1977), involved an aggravated robbery case which was reversed because the evidence before the jury was sufficient to raise a fact issue of whether the defendant had the mental capacity to understand his constitutional rights and thus make a knowing and intelligent waiver of those rights when he made and signed the confession and the court overruled a timely objection to the charge for failing to charge on the voluntariness of the confession.

EVIDENCE

Rape – Voice Identification

McInturf v. State, 544 S.W.2d 417 (1976), held that voice identification of the prosecutrix constituted direct evidence, rendering a charge on circumstantial evidence unnecessary. Further, the compelling of the appellant to speak in the presence of the prosecutrix was not a violation

of the Fifth Amendment to the constitutional privilege against self-incrimination.

Not a Deadly Weapon

Mosley v. State, 545 S.W.2d 144 (1976), held that in an aggravated assault case under V.T.C.A., Penal Code, §22.02(a)(3), a spring-activated air pistol (a BB pistol) was not a deadly weapon as defined by V.T.C.A., Penal Code, §1.07 (a)(11), and thus not a weapon calculated to produce death or serious bodily injury under the circumstances of the case. The case was reversed for insufficient evidence to show the assault was aggravated by the use of a deadly weapon.

Refusal to Take Breath Test Still Inadmissible

Dudley v. State, 548 S.W.2d 706 (1977), again held that the verbal refusal of a defendant to take a breath test was inadmissible. The State sought reconsideration of the older cases on the ground that *Olson v. State*, 484 S.W.2d 756 (1972), overruling *Trammell v. State* 287 S.W.2d 487 (1956), had removed the basis for the earlier decisions. The majority did not agree, citing the earlier cases, and noted they were based on the confession statute (Article 38.22, Vernon's Ann. C.C.P.), and also observed that a verbal refusal is testimonial communication protected by the Fifth and Fourteenth Amendments to the United States Constitution.

Party to Crime

Cross v. State, 550 S.W.2d 61 (1977), presented question of whether criminal liability of defendant who planned robbery with others but apparently abandoned the effort. One witness overheard defendant and three others plan robbery. One co-defendant testified defendant was the lookout, but he did not see defendant during or after robbery. Defendant testified he was present during planning but was too scared to participate and left, telling the others he did not want to get involved; that he went home and did not receive any proceeds from the robbery. The defendant was convicted of aggravated robbery. The judgment was affirmed. Defendant's testimony that he did not participate, if taken as true, would not relieve him of criminal liability because there was sufficient evidence that he acted with intent to promote or assist in commission of robbery as denounced by V.T.C.A., Penal Code, §7.02(a)(2). Under former Code, defendant would have been an accomplice, not a principal, but classification under the 1925 Penal Code no longer exists.

EXTRADITION

Bail Pending Appeal

Ex parte Quinn, 549 S.W.2d 198 (1977), held that under the provisions of Article 44.35, Vernon's Ann. C.C.P., a petitioner is entitled to bail pending appeal in any habeas corpus proceeding excepting capital murder cases where the proof is evident, and thus, this provision controls over Article 51.13, Vernon's Ann. C.C.P., which incorporates the Uniform Criminal Extradition Act and bail pending appeal is available in an extradition case.

Ex parte Elliott, 542 S.W.2d 863 (1976), held that the complainant's affidavit to which was attached a photograph of a man complainant identified as the man who committed rape, together with defendant's admission that the photograph was of him, was sufficient to overcome defendant's denial that he was the person named in the Governor's Warrant charging him with commission of rape. The affidavit made by complainant before the magistrate and warrant issued pursuant to that affidavit were sufficient to support extradition even if defendant had not been charged by either indictment or information.

GUILTY PLEAS

Evidence Insufficient

Barrett v. State, 547 S.W.2d 604 (1977), involved an aggravated kidnapping of a peace officer. The defendant pled guilty. To sustain the guilty plea, the State offered affidavit of the victim. The affidavit detailed his abduction by three men and one woman. Nowhere in the affidavit did the victim identify the defendant as one of his abductors or use his name. No other evidence offered. Case was reversed.

Withdrawing Plea

Malone v. State, 548 S.W.2d 908 (1977), involved an aggravated robbery case where defendant pled guilty to a jury, but during trial his testimony reasonably and fairly raised an issue as to the fact of innocence. The court erred proceeding with the case. Such evidence should be withdrawn by the defendant or a plea of not guilty should be entered. Under any circumstances, the case should not have to go to jury with instructions to find the defendant guilty. Two other recent cases on same point are *Gates v. State*, 543 S.W.2d 360 (1976), and *Woodberry v. State*, 547 S.W.2d 629 (1977).

HABEAS CORPUS

Mapula v. State, 538 S.W.2d 795 (1976). In absence of showing that indictment had been returned, justice of the peace court still had jurisdiction over cause wherein J.P. had set bail at $50,000 in capital murder case and, though filing of habeas corpus petition invoked habeas corpus jurisdiction of district court, that court did not have power to order bail to be denied or increased on motion of State, but only to remand to custody if restraint found legal or reduce bail if found excessive.

Garcia v. State, 547 S.W.2d 271 (1977), presented question whether the introduction alone of a complaint, information and a capias at a habeas corpus hearing is sufficient to detain an individual accused of a misdemeanor who challenges his detention by application for habeas corpus. The majority concluded that such exhibits were not sufficient. The concurring opinion expressed the thought that exhibits might be enough if the complaint stated adequate probable cause, but the instant complaint did not.

When an Owner Is Not an Owner

Ex parte Davis, 542 S.W.2d 192 (1976), held that where defendant and his brother had title interest to property which was allegedly burglarized but defendant's wife had exclusive right of possession in such property pursuant to court order in pending divorce action, all rights to enter the house held by defendant were negated by order of court. Owner is defined by V.T.C.A., Penal Code, §1.07(a)(24), as "a person who has title to the property, possession of the property, whether lawful or not or a greater right to possession of the property than the actor." Court held that proof was evident that murder was committed in the course of burglary and attempted burglary in habeas corpus proceeding.

Abuse of Writ

Ex parte Dora, 548 S.W.2d 392 (1977), held that there is an abuse of the writ when a petitioner makes no effort to allege that allegations were not ones that had been raised or could have been raised in earlier proceeding. Where a petitioner has been cited for "an abuse of writ" by the appellate court, the trial court should not thereafter consider the merits of any application for writ of habeas corpus filed by that petitioner and he should enter findings that that petitioner has abused the writ in the past. The transcript should be forwarded to this court and if petitioner has "stated facts, which if true, would entitle him to relief," then this court will order the petition filed and considered on the merits. If factual issues are raised on issue of "good cause" for allowing refiling and such requires an evidentiary hearing, then it will be remanded to the trial court for such hearing. If the petition does not state "good cause" for refiling, the petition shall not be filed or considered by the Court of Criminal Appeals.

(Continued on p. 13)

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CIVIL STATUTES — A Tool in Criminal Cases

Louis Dugas, Jr., Orange

Most of us in preparing a criminal case often neglect to refer to the Civil Statutes. The Civil Statutes can provide valuable assistance in several areas. The references cited in this paper are only a few of the laws available to the Criminal Law Practitioner with imagination and a willingness to delve into the mysteries of the Revised Civil Statutes of Texas.

Assumptions form the basis of many of our everyday activities, and this is as it should be. When applied to the practice of Criminal Law, to assume is to err and there is no forgiveness. To begin, the Judges are required by law to draw juries. If you assume that this is always done correctly, then you have been misled. *Article 2096 V.A.C.S.* applies to the *drawing* of names of jurors. This Statute is very specific in outlining the procedure for drawing the names from a jury wheel. Required to be present at the drawing for a District Court Jury are:

1. The District Clerk or a Deputy;
2. The Sheriff or his Deputy; and
3. The District Judge in whose presence and under whose direction the drawing must take place.

This Statute further sets the time for the drawing, which must be "not less than ten days prior to the first day of the term of Court." Should the Court in selecting a jury fail to follow these requirements, a Motion to Quash the Panel is required. This matter is so subject to waiver that in the case of *Waller v. Summers*, 299 S.W. 2d 752, (Tex. Civ. App., ref. n.r.e.), the Court stated that no Motion to Quash the Jury Panel had been filed before their announcement of ready for trial. The same effect is *Heflin v Wilson*, 297 S.W.2d 864, (Tex. Civ. App., ref. n.r.e.). See also *Texas Electric Service Co. v. Yates*, 494 S.W.2d 274.

Realizing that Article 35.07 of the Code of Criminal Procedure provides for challenge to the array in but one instance where the officer summoning the jury has done so to secure either a conviction or an acquittal, it becomes necessary to educate the Judge that you can also challenge the array because of a violation of Article 2069 V.A.C.S. In all probability, the State will argue 35.08, Code of Criminal Procedure, arguing that you have only the grounds in 35.07, Code of Criminal Procedure. You can in turn argue the reasoning in *White v. State*, 78 S.W. 1066, where an objection was leveled at the selection of the jury. The State argued the then existing Statute which read very much the same as 35.07. The Court demolished that argument with the following:

> "We do not believe that, because the statute fails to designate the mode by which he can invoke the right, this should deprive him of his privilege to question the jury, although our Code of Criminal Procedure provides in a number of instances how rights can be exercised; yet we do not understand that, because no special mode is provided, the Court cannot adopt some rule for the exercise of a right where it is guaranteed by law. For instance, we entertain a Motion to Quash the grand or petit juries where there has been race discrimination in the formation of such juries. And again, although the statute does not point out a mode by which special venires, where not drawn or summoned according to law, can be set aside, yet we have adopted a rule of practice by which this right can be exercised. So we hold, if appellant has a right to be tried by a jury drawn by commissioners, and this right is denied him by the trial court, we will adopt a rule that will safeguard him in the exercise of the right."

You realize, of course, that in most cases this is a one-shot operation because you may educate the Judge; but it sure is good psyching not only your opponent but the Court. If your case is in County Court, the same Civil Statutes apply, the only change being the Clerks.

Terms of Court: In the County Courts and many County Courts at Law, the Commissioners' Court of the County is required to set the terms of Court. Sometimes they forget to do this and the courts go merrily on their way holding court when they are not authorized. Constitution Article 5, Sections 17 and 29, set out the number of terms, and 1961 V.A.C.S. spells out when court terms may be held if commissioners have not provided for same by resolution. If the commissioners have not provided the term of the court to be held and there is an attempt to hold court at a time not authorized by the Constitution and the Civil Statutes, then the proceeding is an illegal proceeding.

Canons of Ethics: Most lawyers look upon the Canons of Ethics in the same way many people look upon the Ten Commandments, as a bunch of "Thou shall not" rather than what they are—a guideline for the lawyer and the court. For example, should you and your client decide that you agree with each other and you wish to go your separate ways but the Court says you must continue going together, then look at Disciplinary Rule 2, 110 V.A.C.S., which deals with withdrawal from employment. This Canon has two categories of withdrawal, mandatory and permissive, plus the compliance with court rules regarding withdrawal, if any.

If you have a discovery problem with a prosecutor, cite to the Court Disciplinary Rule 7, 103(B):

> "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Should the Court overrule you and the prosecutor have violated Disciplinary Rule 7-103, then under Disciplinary Rule 1-102(A):

> "A lawyer shall not:
>
> 1) Violate a Disciplinary Rule,"

this constitutes misconduct and a grievance should be filed against the prosecutor. Further, if the prosecutor files a case where it is obvious that the charges are not supported by probable cause, you also can file a grievance under Disciplinary Rule 7-103(A):

> "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

There are other Civil Statutes which are useful to Criminal Trial Lawyers, and proper representation of his clients requires the criminal trial lawyer to become familiar with them. ■


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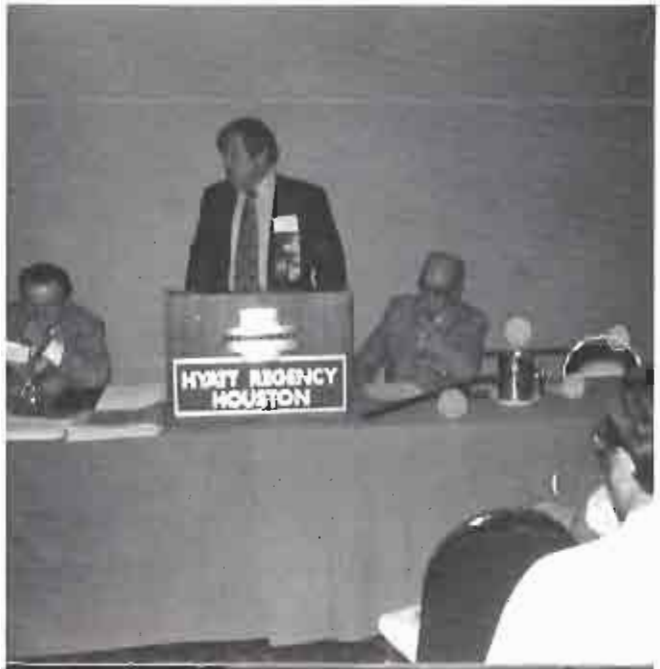


T.C.D.L.A. ANNUAL MEETING

(Why these pictures were not run last issue and the difficulty in running them this issue make an interesting story, but you wouldn't believe a word of it!)

Left to right, top row: (1) "Thank you. . .I totally deserved it." Charles Butts, San Antonio, receiving his award. (2) & (3) ATTENTION: If you ever plan to be president of the association, start practicing to hold your mouth like this.—Emmett Colvin, President 1977-78, and Weldon Holcomb, President 1976-77. (4) "Really, guys, I honestly didn't do it," Bob Jones, Austin. Also shown: Weldon Holcomb, Tyler, and Emmett Colvin, Dallas. Second row: (1) Weldon Holcomb receiving his plaque for dedicated service during his term. (2) David Carlock, Dallas, receiving award for unprecedented membership work across the state. (3) Steve Capelle and Bob Jones, Austin—showing effects of the party the night before. (4) "Did I hear a motion for me to sing?" Emmett Colvin.

Bottom row: "Would you defend a group like this?"

EXECUTIVE DIRECTOR'S REPORT

The Association's office has moved to the Stokes Building in Austin, but we are not in our permanent quarters. The space that was to be remodeled for us by the first of July will, we hope, be available by the first of September. Needless to say, we are still somewhat disorganized and are working out of boxes in our temporary quarters.

Our address since we moved to the Stokes Building has been 314 West 11th Street, Suite 211; when our permanent space is completed, the address will remain the same. I must apologize for the inconvenience that our move has caused. Contrary to what the Post Office has told some of you on the mail that was returned to you, we did leave a forwarding address when we moved. Two separate change of address notices were sent to the Post Office prior to our move, and a third after our move and your calls about the mail. We have discussed the matter with the Post Office, and I hope that any problems you have had are cleared up by now.

Moving to another matter altogether, I would like to discuss the Board of Directors. Last month I attempted to explain the budget of the Association and our membership procedure. The Board of Directors is a group of thirty-six members elected, at annual meetings, for three-year terms. The Board members are listed in the front of this magazine. The requirements for membership on the Board are found in the Association By-laws located in the *Membership Directory*, and in the amendments to the By-laws contained in the July issue of the *Voice*. The Directors may succeed themselves for a second three-year term and then are ineligible for election for one year.

The Associate Directors serve one-year terms and are also elected at the TCDLA Annual Meeting. Both the Directors and Associate Directors are nominated, each year, by a nominating committee named by the President and containing at least one individual from each "Membership Area"—see the front of the *Membership Directory*.

The Board of Directors and the Associate Directors meet at least four times a year, usually every other month, in different cities around the state. The Directors and Associate Directors receive no pay or travel allowance for attending the meetings. If a Director or Associate Director misses more than two consecutive meetings, with an unexcused absence, he is dropped from the Board.

Your Board makes decisions on financial questions and makes policy decisions on matters of concern to the Association. The meetings of the Board are open to the membership, if any of you desire to attend. If you have a complaint or suggestion for the Board, contact your closest Board Member or the Home Office and we will put you on the agenda for the next meeting.

Publications are easy to produce and seminars are easy to put on; good publications are hard to find and good seminars are extremely hard work. We need your suggestions on publications you would like to see and subjects for seminars you would like to attend. Please contact us.

Steve Capelle

News & Notes

NEW JUDGES

With the resignation of Supreme Court Justice Tom Reavley, Gov. Briscoe acted with exceeding dispatch and appointed the Honorable T.C. Chadick of Texarkana to replace him. The Court of Civil Appeals for the Seventh Judicial District has changed in makeup: the Honorable Mary Lou Robinson has become Chief Justice and Carolton B. Dodson of Lubbock has been appointed to the Court.

Under S.B. 368 passed during the Regular Session, new district courts were created in every part of the state; the Governor has begun to appoint the judges with a definite preference shown for prosecutors. The following judges have been appointed:

Hon. Henry G. Schuble, III; 245th; Harris
Hon. John W. Perry; 246th; Harris
Hon. Bruce W. Wettman; 247th; Harris
Hon. Jimmy James; 248th; Harris
Hon. Sam S. Emison, Jr.; 257th; Harris
Hon. Samuel Robertson; 262nd; Harris
(Sam is the former First Assistant D.A. for Harris County)
Hon. W.G. (Dub) Woods, Jr.; 253rd; Liberty
Hon. Monte Dan Lawlis; 1-A; Jasper, Tyler
Hon. Clarence N. Stevenson; 24th; Victoria (replacing Joe E. Kelly)
Hon. Woodrow W. Bean, II; 243rd; El Paso
Hon. Naomi Harney; 251st; Potter, Randall
Hon. Leonard J. Giblin, Jr.; 252nd; Jefferson

BRIEF BANK

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

H-1027:

Commissioned law enforcement officers of the Department of Public Safety are "appointed officers" required to take the oath of office prescribed by Article 16, Section 1 of the Texas Constitution. Whether a fee paid by a prospective appointee to a private employment agency constitutes a reward paid to secure the appointment depends upon whether the employment agency plays any role in the Department's process of selecting new officers.

H-1029:

A Texas peace officer may make a warrantless arrest of an alien upon probable cause to believe that an illegal entry has occurred in the officer's presence, or, if the requirements of Article 14.03 or 14.04 of the Code of Criminal Procedure are satisfied, that the suspect has committed a felony offense under the immigration laws. Aliens may be arrested for violation of State criminal laws on the same basis as other persons, and State officers may notify Federal officials when such a person is suspected of being illegally in the United States and turn the suspect over to Federal officials after disposition of State criminal charges. A Texas peace officer may not arrest without warrant an alien solely upon the suspicion that he has entered the country illegally.

H-1031:

The assessment of subpoena fees in misdemeanor cases is governed by the provisions of Article 53.01 of the Code of Criminal Procedure.

H-1034:

Article 67011-5, V.T.C.S., authorizes the administration of breath tests to minors as well as adults. Records of such a test, when administered to a person under 17 years of age, must be maintained in conformance with the requirements of Sections 51.14 and 51.16 of the Family Code.

H-1038:

A Sheriff may not work county prisoners on private operations under any circumstances. *(Continued on p. 19)*

IMPACT DECISIONS from p. 7

INDICTMENT

Forgery

Jones v. State,, 545 S.W.2d 771 (1977), held on original submission that a forgery indictment which did not allege that the defendant passed the check with knowledge that it was forged rendered it fatally defective. On rehearing it was held that the absence of such language was not such a defect as could be raised on appeal for the first time and the indictment was not fundamentally defective. On rehearing the decision was 3 to 2. The majority opinion on rehearing wrote:

> "Therefore, we hold that an indictment or information for forgery which fails to allege knowledge as an essential element is not fundamentally defective.
>
> "However, because knowledge that the instrument is forged is an element which is strongly implied in the statutory definition of forgery, we hold its absence in an indictment is a matter which may be raised by a motion to quash, but may not be raised for the first time after trial has commenced."

Ex parte Harrell, 542 S.W.2d 169 (1976), held that indictment charging appellant with possessing forged prescription with intent to use it to obtain possession of controlled substance be ordered dismissed where he should have been charged under special statute prohibiting general possession of forged writing with intent to utter it, and not under general statute prohibiting possession of criminal instrument with intent to use it in commission of offense.

Pistol in Bar

Ex parte Garcia, 544 S.W.2d 432 (1976), held that indictment for the offense of carrying a handgun on premises licensed to sell alcoholic beverages which failed to allege any culpable mental state was fundamentally defective. The statute, V.T.C.A., Penal Code, §46.02, provided for the culpable mental states of intentionally, knowingly, or recklessly carrying on the person a handgun.

Controlled Substances

Moore v. State, 545 S.W.2d 140 (1976), it was held that criminal attempt provisions set forth in V.T.C.A., Penal Code, §15.01, do not apply to the Controlled Substances Act (Artiele 4476-15, Vernon's Ann.C.S.), and that an indictment attempting to apply those provisions of the Penal Code to the Controlled Substances Act does not allege an offense. See also *Ex parte Burnes*, 547 S.W.2d 631 (1977); *Baker v. State*, 547 S.W.2d 627 (1977); *Ex parte Lopez*, ___ S.W.2d ___ (#54,414, 4/13/77).

Rape

Watson v. State, 548 S.W.2d 676 (1977), involved a rape conviction and held that the use of the general terms "force" and "threats" to describe why consent to sexual intercourse was lacking embrace the special terms or definitions in the statute giving adequate notice to the defendant of the elements of the force charge. There the court stated:

> "The only type of force which will support a rape conviction is that which 'overcomes such earnest resistance as might reasonably be expected under the circumstances.' The only type of 'threat' which will support a rape conviction is that which 'would prevent resistance by a woman of ordinary resolution.'"

Aggravated Robbery

Childs v. State, 547 S.W.2d 613 (1977), held that an indictment for aggravated rape was not *fundamentally defective* for failure to allege to whom threat of imminent infliction of death was directed or in failing to specially allege lack of consent since the allegation of "force" and "threats" and allegation that victim was compelled to submit to sexual intercourse because of appellant's threat to inflict death also implies that there was no consent to the sexual intercourse. The opinion pointed out, however, that if a motion to quash had been filed a different question would have been presented.

Indecency with a Child

Victory v. State, 547 S.W.2d 1 (1976), held that the court erred in overruling motion to quash indictment charging indecency with a child where the indictment failed to allege an element of the offense, namely, "intent to arouse or gratify the sexual desire of any person." See also *Polk v. State*, 547 S.W.2d 605 (1977); *Slavin v. State*, 548 S.W.2d 30 (1977).

Burglary

Ex parte Cannon, 546 S.W.2d 266 (1976), held that indictment purporting to allege offense of burglary of a habitation was fundamentally defective in that it failed to allege that entry was made with the intent to commit a felony or theft. The use of the general term "unlawfully" in the indictment was insufficient to overcome the deficiency as it failed to allege either that the appellant obtained the property from another or that he exercised control over the property, other than real property, obtained by another.

Theft

Reynolds v. State, 547 S.W.2d 590 (1977), held that an indictment for theft which alleged that defendant unlawfully exercised control over property but failed to allege that such control was "without the owner's consent" was fundamentally defective and did not state an offense.

Causing Prostitution

Ailey v. State, 547 S.W.2d 610 (1977), held an indictment which charged that defendant caused a person under the age of 17 years to commit prostitution under V.T.C.A., Penal Code, §43.05, but which failed to allege culpable mental state of "knowingly" was fundamentally defective. It must be remembered that a culpable mental state must be alleged and proved unless the statute clearly dispenses with the requirement of the same in the definition of offense.

INFORMATION

Tave v. State, 546 S.W.2d 317 (1977), it was held that information charging the offense of driving while license suspended was fatally defective for failing to allege whether the driving license was suspended under the provisions of Article 6701h (Safety Responsibility Act) or under Article 6687b, §22(b), providing for suspension of an operator's license for numerous reasons. These statutes carry different penalties making it essential that the proper statute be pled.

PROBATION

Ex parte Roberts, 547 S.W.2d 632 (1977), held that where a defendant is placed on probation for ten years and following revocation the court reduces the penalty to two years and an appeal is taken resulting in a reversal the original ten year probationary term is reinstated. The defendant, upon remand, had sought discharge after reversal because the two year period had expired.

Pittman v. State, 546 S.W.2d 623 (1977), held that notice of appeal was untimely given and reviewing court did not have jurisdiction. The court noted the judgment below expressed the opinion that the best interest of society and the defendant would be served by granting probation, but it did not contain statement that defendant was granted probation and the conditions were not set forth therein as is the better practice or in a separate order.

Prior Acquittal of Offense–Made Basis of Revocation

Russell v. State, 551 S.W.2d 710 (1977), held that a prior acquittal at trial of the offense for which the revocation is had will not defeat the revocation upon a claim of double jeopardy. This is reasoned upon basis that different burdens of proofs are required and that a finding that he has not abided by probation conditions results only in commencement of an imprisonment term for an offense for which he was previously convicted.

(Continued on p. 14)

IMPACT DECISIONS from p. 13

Revocation of Probation Within 20 Days of Motion

Ex parte Trillo, 540 S.W.2d 728 (1976), held that the 20 day requirement of Article 42.12, §8(a), Vernon's Ann. C.C.P., providing that if probationer, following arrest, has not been released on bail, the court, on motion by probationer, shall cause him to be brought before it for hearing within 20 days of filing of motion is mandatory and non-compliance with its terms requires dismissal of motion to revoke.

SEARCH & SEIZURE

Avery v. State, 545 S.W.2d 803 (1977), held that affidavit for search warrant for search of an apartment which pitched credibility of an unnamed informant solely on fact that he had given affiant infomation in the past was insufficient to establish credibility and reliability of informant, since affidavit did not recite whether prior information given "in reference to violations of the gambling laws of the state" turned out to be true or false.

Auto–Probable Cause

Hinson v. State, 547 S.W.2d 277 (1977), held that an officer in making the stop of a citizen must in the light of his experience and general knowledge have specific articulable facts that would justify the stop and reasonably warrant intrusion upon a citizen's freedom for further investigation. A mere suspicion or hunch will not do. This case was reversed where the officer stopped a u-haul van type truck leaving airport without any articulable reason. There was no probable cause, and no traffic offense was involved. The officer could not point to any articulable fact to justify even an investigative stop.

McDougald v. State, 547 S.W.2d 40 (1977), held that investigatory stop of defendant in his auto without showing of traffic violation, knowledge that defendant had committed crime, and on inarticulable hunch or suspicion of officer did not constitute probable cause for arrest, search or detention and that subsequent search and discovery of pistol in plain view was inadmissible.

Search Warrant– Search of People on Premises

Rice v. State, 548 S.W.2d 725 (1977), held that officers upon execution of warrant upon premises may arrest or search any unnamed person on the premises at the time of the execution of the warrant. Further, no meaningful distinction exists between persons found on the premises by the officer when they initiate the search and persons who enter the premises after the search has begun.

Prevention of Destruction of Contraband

Hernandez v. State, 548 S.W.2d 904 (1977), held that where two officers acting on tip that defendant was in possession of heroin approached the defendant and "saw his hand come to his mouth and try to put something in his mouth," the fact the officers wrestled him to the ground, held him and choked him until he spit out four balloons containing heroin was not improper. Article 14.04, Vernon's Ann.C.C.P., authorized the officer to take reasonable measures to insure that the incriminating evidence is not destroyed and reasonable physical contact is one such measure.

TRIAL

No Jury Trial Upon Remand for Punishment by Court

Bullard v. State, 548 S.W.2d 13 (1977), held that where a case is remanded for a new penalty hearing because of error by court at first trial the defendant is not entitled to a jury trial upon remand. Originally defendant was found guilty by a jury and the court assessed punishment, but cause was reversed because a prior conviction was utilized that was not properly proven. Upon remand defendant demanded a jury, withdrew his earlier election to have the judge assess punishment. The question presented involved the meaning of the right to trial by jury as encompassed in the State Constitution, our bifurcated trial system, and whether earlier waiver of jury at penalty stage of trial was binding upon remand for a new penalty stage.

Handcuffing and Removing Defendant from Courtroom

Kimithi v. State, 546 S.W.2d 323 (1977), held that the trial court did not abuse its discretion under the circumstances when it directed bailiff and other deputies to handcuff and gag the defendant in the presence of the jury. Later defendant, because of his conduct, was removed from the courtroom resulting in denial of the personal confrontation of witnesses against him, but such were the consequences of his own disruptive acts and he waived his rights by his own conduct.

VENUE

Bell v. State, 546 S.W.2d 614 (1977), held that where alleged rape took place in Rockwall County, which was not a single county judicial district, under venue statute in effect at the time of the 1973 indictment, venue for prosecution was not proper in adjoining Dallas County, which was not in the same judicial district as Rockwall County.

Artiele 13.22, Vernon's Ann.C.C.P., in effect at the time of the 1973 indictment provided:

> "Rape may be prosecuted in the county in which it is committed, or in any county of the judicial district in which it is committed, or in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed. *When the judicial district comprises only one county, prosecutions may be commenced and carried on in that county, if the offense be committed there, or in any adjoining county. . . .*" (Emphasis added.)

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)

IMPACT DECISIONS from p. 14

Connally v. Georgia, ___U.S. ___, 97 S.Ct. 546, 50 L.Ed.2d 444 (1/10/77)

State:

Appeal
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, [illegible] S.W.2d 604 (1977)
Malone v. State, 548 S.W.2d 908 (1977)

Habeas Corpus
Mapula v. State, 538 S.W.2d 795 (1976)
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)
Reynolds v. State, 547 S.W.2d 590 (1977)
Ailey v. State, 547 S.W.2d 610 (1977)

Information
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
Avery v. State, 545 S.W.2d 803 (1977)
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)

Misconduct Not Charged: A Commentary in Rhyme

Chuck Bubany, Professor
Texas Tech University School of Law

A problem of evidence, in rhyme, I'll address
Is the law of extraneous offenses, a mell of a hess.

A fundamental principle all courts will agree—
Don't try one for what he is generally.
To know the reason takes no Con Law whiz;
What should count is what he's done, not what he is.

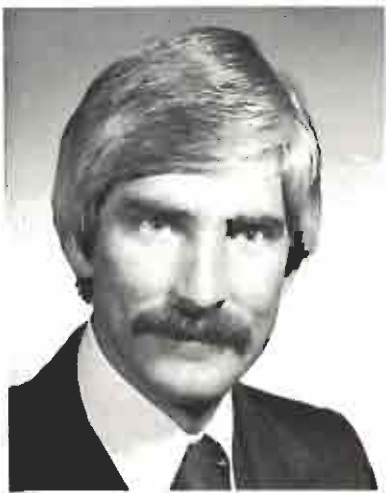
But the criminal defense lawyer knows that oft' times
Defendants are convicted because of prior uncharged crimes.
The typical prosecutor tain't no damned fool
He knows that the exceptions are now definitely the rule.
The court-made restrictions designed to prevent abuse
Are interpreted liberally to allow "limited" use.

If to the main crime other misconduct is near
It's the "res gestae" exception the accused needs to fear.
Or, if mental state is at issue he likely will find
An extraneous offense helping to prove state of mind.
He may plan by a theory his guilt to dispute
But open the door for uncharged crimes which refute.

The latter exception's given the Texas court a fit
And in a number of cases caused its members to split,
Especially on the amount of similarity needed
Between the rebutting misconduct and the crime pleaded.

But the ultimate test of admissibility
Is a case-by-case prejudice versus probity.
Such an ad hoc approach is for defendants no deal
In light of the pressure to affirm on appeal.
The attitude above is like that below, I fear:
"The bastard's bound to be guilty or he wouldn't be here."

EXAMINATION OF WITNESSES



Gene Douglass
Wichita Falls

A. Theory of the Case

1. Unless it is your hope that your "style" of examining witnesses will be discovered by some talent scout who will whisk you off to Hollywood, all examinations should be done with a thought to "where am I going?" No question should be asked for the purpose of hearing your head ring or out of curiosity about what the answer or response might be. Before an examination is begun, you should already know what you hope to achieve by the witness and how you believe the finder of the fact will react to the examination and evidence you present.

2. The theory of the case must not be complicated and must not be inconsistent. In other words, while you feel there may be some evidence to support such a theory, it is fundamentally unwise to put on consent and identification defenses in the same rape case, although I have done so and somehow escaped. A jury will not understand the niceties of alternative pleadings or theories. Find a theory of defense, stick with it, and work in an uncomplicated fashion within the framework of that defense.

3. It is often said that the threshhold to the development of a theory of defense is an understanding of the facts in your case. If you cannot write down your theory of defense it does not exist.

4. The theory of defense must flow from beginning to end and must be consistent in all of its parts. It must be a persuasive theme that finds support in the evidence. Since everyone knows that most of the people charged with criminal offenses are guilty, the theory of defense must establish that there is "something different"about this particular case, this particular defendant, and these particular defense witnesses. Generally, you will not win your case unless the jury likes you and believes that you are sold on your own theory of defense. You will win because the jury wants to believe you and your client. Accordingly, the touchstone of your theory of defense is how you gain control of the case at the earliest time possible and work toward the jury's identification with you and your view of the facts (theory of defense) throughout the trial. There has to be a reason that a jury will believe a theory of defense. Unless your client appears to them as a human being and not one of the "cast of characters" there will be no reason for the jury to identify with the client or the theory.

The trial notebook is the best organizational device known. You would be surprised to know that the best of experienced trial lawyers religiously use the trial notebook. If you do not already use one, you must develop such a habit. Construction begins with the initial client interview and concludes with final agreement memos. The notebook should include: Exhibit index (State and Defense); Witness outlines (important areas of examination); Legal authorities; things to do; Motions; Voir Dire; Argument; and Errors. The theory of the case should flow from Voir Dire to Argument through your trial notebook.

B. Direct Examination—Theory

1. The presentation of direct evidence is the painting of a picture. The jurors are the observers. They know nothing about the picture you seek to paint. Accordingly, in the process of your direct examination, your witnesses must put paint on all of the canvas, from corner to corner, from top to bottom. If a portion of the canvas is left unpainted, the jury will never understand the story.

2. Choosing the order of your witnesses is generally a judgment call, but "first impressions are often lasting." *Strong-Slack v. Crescendo.*

3. A witness should frankly admit when asked that he has discussed the case with the defense lawyer. The defense lawyer should have told him to "tell the truth."

4. The lawyer who does not adequately prepare his witness to testify is the lawyer who believes trial is a discovery tool. This cannot be left to partners, associates, or investigators. Depending on the facts, it may be done with all witnesses present. Your biggest job is to put the witness at ease and to make him understand the prosecutor's objective during cross-examination.

5. Preparation hints: appearance, anticipate questions v. leading, what is hearsay, interrogation not for your consumption, responsiveness, listen to objections, relate to jury and win their friendship.

6. Transmitter theory.

C. Direct Examination—Defendant

1. The first question to ask yourself is why you want to put the defendant on the witness stand. You should not do so without a reason. If you are fortunate enough to have one of those few clients who make a wonderful appearance, handle themselves perfectly, and are unimpeachable, then you definitely want to give the jury an opportunity to see and hear your client. Otherwise, you should consider the question of defendant's testimony very carefully. Generally, there is more to lose than to gain. Of course, if you are dealing with prior convictions or defenses such as circumstantial evidence, all bets may be off. If you decide to place the defendant on the witness stand, then you owe him as complete a preparation as possible. You should not only go over the usual "do's" and "don'ts" but should cross-examine him with the same effectiveness that you can expect from the prosecution. The purpose in this procedure is twofold: it enables your client to understand what cross-examination will be like and to be emotionally prepared for it, and it will give you an opportunity to look at your client and his theory of defense from the devil's advocate position.

2. Even if the defendant will not testify, you can be sure that his presence in the courtroom will not go unnoticed. Therefore, his appearance is of extreme importance. Make sure that his appearance is consistent with your theory of defense. The general idea is that if all of the jury got up and went outside during a recess, a visitor in the courthouse would not be able to tell the defendant from the jurors. Some basic rules: no use of tobacco or chewing gum at the courthouse; no alcohol during the entire trial; cleanshaven, bathed, and hair closely trimmed; clothes consistent with those worn by the jury—not fancy and no gaudy jewelry. The defendant should understand that the jury will be watching his reactions. Therefore, no whispering at the counsel

table, no voluminous note writing, no reactions on his face.

3. Bring out the bad news yourself. If there is a fact of prior conviction or other unpleasant information, be sure that the jury learns of this first from you. If at all possible, the blow of this bad information should be first softened on voir dire.

4. The order in which a defendant may testify depends upon the individual case and the strength of the individual witnesses. There are certain advantages to the defendant's hearing what other witnesses have to say before he takes the witness stand. You thereby avoid harmful conflicts in the defense presentation.

5. Generally, if the jury does not like your client, they will separate him from themselves. He should know about body english.

D. Direct Examination—Character Witnesses

1. The "Have you heard?" question. Since an accused is presumed to be innocent, his good character and reputation is also presumed. However, he may bolster this presumption by offering proof of his good repuation for a particular character trait (peaceful and law abiding, truth and veracity, chastity, etc.) relevant to the offense, in the hope that the jury may: a) conclude that it would be improbable that such a man with such a reputation would commit the crime involved; or b) consider such evidence in mitigation of punishment. In such event, the State is then permitted to offer rebutting character proof or to test the credibility of the character witness. Unless a defendant first puts his general character in issue, by character witnesses, the State has no opportunity to challenge the character. This is different from credibility, which is an issue due to testimony and automatically allows proof of relevant priors. In the case of assaultive offenses, the State will not be permitted to bolster the character of the deceased or victim unless it is first attacked. The defendant may, as a peaceful and law-abiding person, want to prove the deceased's bad character in order to show who the likely aggressor was. This involves a twofold purpose—who the likely aggressor was versus communicated threats. In the former case it is not necessary that the defendant, individually, have been aware of the reputation.

2. After the defendant has bolstered his own reputation for good character, the State is entitled to test the credibility of his character witness. This may not be done by showing specific acts of misconduct. The knowledge of the character witness may be tested by asking if the witness "had heard" that the defendant has done one thing or another inconsistent with that character trait. The witness may not be asked if he has personal knowledge of such facts. See *Brown v. State*, 477 S.W.2d 617. The approved form in this State is "have you heard" and not "do you know." The "have you heard" question may not be asked in such a manner as to imply that the conduct in question actually occurred. This often happens when the prosecutor fleshes the "have you heard" question too much. *Billingsly*, 473 S.W. 2d 501; *Pace*, 398 S.W.2d 123; and *Wharton*, 248 S.W. 2d 739. This is because he then implies an assertion of the truth of the question rather than a good-faith testing of the character witness' general knowledge about the defendant. An example of such a question is found in *Lucas*, 378 S.W. 2d 341: "Hadn't you heard when you so testified as to his being honest, on January 21st of 1936 that he was charged in Corpus Christi for the possession of marijuana?" The prosecutor may not ask whether the character witness "knew" of the specific act of misconduct. Therefore, "didn't you know" or "did you know" or "isn't it true" are all objectionable.

3. Since a character witness may be attacked only by asking "have you heard" questions in the area of the particular character trait put in issue, it is wise to be careful which character trait you put in issue. That is, the jury is interested in seeing people who are concerned about the defendant—exactly what they have to say may not be that important. If you are unable to establish his good character for "peaceful and law abiding" you may accomplish the same thing by establishing "truth and veracity." Character witness testimony is, by definition, hearsay testimony. The witness is disqualified if he is stating his personal opinion or personal observation about the individual. He is testifying to rumor. For that reason, a character witness may testify that a defendant's reputation within the community in which he lived is good for being a peaceful and law-abiding person if he had heard no reputation discussed, on the theory that if it were bad you surely would have heard of it.

4. The "have you heard" material must be asked in good faith by the prosecutor, and the character trait inquired about must be neither too remote in time nor can it have been acquired after the date of the alleged offense. It cannot be the offense with which the defendant was charged.

E. Direct Examination—Exhibits

1. All exhibits must be "talked into the evidence." That is to say, your examination should be done with an eye to seeing how it would read in the statement of facts. What you are referring to must be apparent. No "here or there" or "this or that." The predicate must be clearly laid for the particular type of evidence. Documentary evidence may greatly influence a factfinder through enlargements. With a very small investment, an ordinary exhibit becomes an extraordinary exhibit. Documents blown up to five times their size make the point. Can the jury see what you are doing with the exhibit? Consider approaching the jury with the witness and exhibit and explaining the relevancy of the exhibit to the jury in groups of four. This will not only get the point across but will emphasize the point by repetition.

2. The successful trial lawyer is a successful teacher. Attention span for hearing alone is seven minutes. Retention span is worse. Therefore, mix and blend with showing and telling:

	3 hours	3 days
1. Telling alone	70%	10%
2. Showing alone	72%	20%
3. Blend	85%	65%

3. When it will be necessary to have the predicate laid by a witness, show the witness the exhibits and familiarize him with them before trial.

F. Direct Examination—Experts

1. Show that he is a disinterested expert—qualifications. Never stipulate.

2. It should not be assumed that an expert is knowledgeable about testifying. You will gain the expert's appreciation and confidence by helping him to understand what to expect.

3. You should consider that the witness will ordinarily be unaccustomed to testifying. Accordingly, his language and form of presentation will be alien to the jury. Preparation is the key to enable this expert to communicate with a lay jury in lay terms.

4. The expert witness will have a tendency to testify in boring narrative. A device for aiding the jury and breaking up the otherwise monotonous testimony is the use of phrases such as "Doctor, will you please explain to us what you meant by...."

5. Use teaching aids. The expert witness is at the same time the most important of witnesses and the most sleep-conducing of witnesses. This probably depends on personality more than anything else. Get him up—move him around; use diagrams.

G. Direct Examination—Leading

1. The Hornbook Rule is that you cannot lead your own witness. However,

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every lawyer who effectively prepares his witnesses to testify has prepared them to be led. That is to say, if the preparation is sufficiently thorough, the witness will understand where you are going with your questions. Confusion occurs when the witness does not know where you are going and you attempt to lead him there by the form of the question. Sometimes a witness can be aided by your response to the objection which will surely follow. There are some catch phrases that can be used and which will go a long way toward helping you lead your own witness: a) "Directing your attention"—this is used for the purpose of moving from a general discussion to a specific discussion; b) "Now with respect to"—this can be used to point out a specific portion of the testimony or to emphasize an aspect of the testimony; c) "What about"—these questions lead the witness' attention to particular facts; d) "Tell the jury"—this is a preamble to inquiry about specific facts, *i.e.*, "Tell the jury exactly what Mr. Jones was wearing on the night in question."

2. Explain to the witness beforehand that your questions must be non-suggestive of an answer. He must know that he needs to give a full explanation without mentioning hearsay. Explain what hearsay is. He must not overlook anything in answering the non-leading questions. The easiest way to do this is to answer chronologically. You can key the witness by asking "what did you see, hear, do, and feel?" questions first. Tell the witness that if he has not fully answered the "see, hear, do, and feel" questions you will next ask him, "Anything else?" If he has fully answered the "see, hear, do, and feel" questions, tell him you will next ask, "What, if anything, happened next?" He must be responsive.

H. Direct Examination—Waiver

1. Trial and appellant courts are quick to find waiver in all that we do. Be careful and remember that unreasoned questioning can and will lead to your waiver of certain of your client's rights. The list is endless, but as a few examples, by having the defendant testify that he has "never done anything wrong before," you have invited the prosecution to prove that he runs around on his wife, that he has had a traffic ticket, and that he does not keep his church pledge. These are needless questions and accomplish nothing but exposing your client to risk. By offering part of an act or action, you permit the prosecution to prove the balance of the act or transaction, but only as it tends to explain that portion offered by you. This rule applies most often to writings. While it may be true that the police officer did not tell your client that he could have a blood test in a DWI case, proof of such fact then permits the officer to prove that your client refused the breath test.

2. Waiver is only avoided by a strong knowledge of the rules of evidence.

I. Cross-Examination—Theory

1. Don't cross-examine unless you have a reason. If the witness has not hurt you or if you cannot think of a way of getting out of how he has already hurt you, don't be afraid to say, "We have no questions, your Honor." This is far preferable to the time-consuming and very harmful reiteration and regurgitation of the witness' direct testimony which is so often heard. Surely everyone knows that cross-examination is no place for questions of "how," "why," "when," or "who." These questions serve only to give your opponent witness the dagger. Try to use nothing but leading questions. State the proposition you wish to establish in terms most favorable to you and then ask the witness to affirm or deny it. If you get a favorable answer on cross-examination, move on to something else. The lawyer who hopes to dig the witness into a deeper hole by giving him an opportunity to repeat the damaging/helpful testimony will only find that the witness has found a way to get out of the hole. Never ask a question without knowing the answer. Cross-examination was not designed for discovery.

2. Your general rule should be to approach all witnesses with courtesy and consideration. Do not jump on a witness unless you have reason to believe that the jury would expect you to do so. You want them to identify with you and not with a witness for whom they would feel sympathy. That makes you the enemy. Since you are examining a witness for the benefit of the jury, don't show off. Even if you think you know more than the witness does, you will impress no one but yourself in establishing the fact that you are a fingerprint expert, if nothing is to be gained from it, and the jury will be aggravated at the loss of time.

3. The Gaskin Rule, 353 S.W. 2d 467, is simply stated: "If a witness, prior to testifying, has personally written or prepared a statement or made a statement that was recorded or reduced to writing, the defendant is entitled to inspect, upon timely request, such writing for cross-examination and for impeachment purposes." The rule becomes applicable after the witness has testified and applies to all such writing, including police reports, grand jury testimony, etc. Failure to grant Gaskin material requires a showing of harm, so it is necessary that the material be sealed and sent up as a part of the record, *Moore v. State*, 509 S.W. 2d 349. But whenever a writing of any kind is used before the jury in any manner that causes its contents to come into issue, whether by a witness or a prosecutor, the defendant is entitled to inspect the writing before beginning cross-examination, and no showing of harm is required to create harmful error. There is no requirement that the witness be shown to have refreshed his memory from the writings before the defendant is entitled to see it under the Gaskin Rule.

4. Control is the ultimate objective. Control can best be accomplished by the leading question. Once control is accomplished, consider that you are the speaker, the witness is the transmitter, and the jury is the receiver. Avoid distortion by the transmitter through control. Direct eye contact must be maintained. Do not let the witness volunteer anything. Begin with unimportant questions and ask the judge to direct the witness to be responsive at his first attempt to volunteer anything. If he looks at the prosecutor—"Sir, is there some reason you need to talk to the prosecutor while I'm questioning you?" After having established control and eliminated support from outside forces, follow a system of punishment and reward. Vary your questions from the penetrating to the irrelevant. Do not let the witness go until you get a correct answer. Then back off. Keep in mind the concept that when you approach the witness he becomes more agitated and ill at ease, and when you walk away from him he regains composure. This can be accomplished with the crutch of an exhibit or through the use of unpeaching material. Timing is important. First get everything out of the witness that you can by being friendly, and then turn on him. If the witness knows that he has hurt you by his response he will do it again.

5. Lead and trap. Anticipate how the witness will try to get out of the trap that you hope to put him in. Shut the door first. That is to say, anticipate the out he is likely to take and eliminate it. Don't be obvious in working toward the trap.

6. Jury attention span is about seven minutes. Do not proceed in the chronological order of direct testimony. Do not jump around so much that the jury is confused along with the witness. You can expose the untruthful witness by jumping around in his testimony, in an order unlike that of his direct examination. If you are certain you can hurt the witness, do so early in the hopes of upsetting him.

(Continued on p. 19)

EXAMINATION OF WITNESSES

Use the court reporter by asking him to mark relevant parts of the testimony. Explore areas of bias with the witness. Does the witness associate with the victim during recesses? Always terminate your cross-examination with the strongest point you possibly have.

7. There are five means by which lack of credibility of the witness may be demonstrated: 1) Prior inconsistent statements, *Hernandez*, 334 S.W. 2d 299; 2) General reputation for truth and veracity; 3) Convictions of crimes, *Sipanek*, 272 S.W. 142, *Holt v. State*, 487 S.W. 2d 725; 4) Mental and physical incapacity of a witness, *McCarthy*, 298 S.W. 575, *Possett*, 55 S.W. 497; 5) Interest, bias, prejudice, and corrupt conduct in the case, *Hughes*, 294 S.W. 2d 846, *Blake v. State*, 180 S.W. 2d 351.

8. In order to attack the witness' credibility on the basis of inconsistent statements, you must direct his attention to when, where, and to whom the statement was made. If the witness admits that he made an inconsistent statement you cannot go any further. If he denies making a prior statement or states that he does not remember, then you can offer the testimony of the person to whom the statement was made or offer the documentary evidence.

9. Proof of character for truth and veracity is applicable equally to State witnesses. When any witness takes the witness stand, that witness puts his individual character for truth and veracity into issue. If you attack that character remember that it can certainly be bolstered.

10. Prior convictions are also available for use against State witnesses. They go to the credibility of the witness. Therefore, the same remoteness rules apply. The rule is that prior convictions are generally too remote if there have been nine (9) or ten (10) years between the time of the trial and the date the witness was released from the penitentiary. Of course, you can also use misdemeanors involving moral turpitude. Some are as follows: 1) Conducting a bawdy house, 62 Tex. Jur. 2d 243, 271; 2) Vagrancy charge when related to prostitution; 3) Whipping one's wife, 266 S.W. 2d 875; 4) Misdemeanor theft, including embezzlement and passing worthless checks; 5) Swindling; 6) Adultery; 7) Abducting a child; 8) Procuring, 453 S.W. 2d 828.

11. Be yourself, don't imitate.

12. When you hit oil, stop drilling; if you keep on you'll hit saltwater.

13. Techniques of cross: 1) Have purpose; 2) Don't badger; 3) Don't rehash; 4) Don't elicit omitted damaging testimony; 5) Break up chronology; 6) Don't bore the jury; 7) Avoid what, how, and why questions; 8) End on a high note.

J. Cross-Examination—Expert Witnesses

1. Some would counsel that if you get an expert witness outside of his narrow area of expertise he then becomes uncomfortable. Don't believe it—he will snow you and the jury and you probably will have no way of knowing that it is happening. The better expert—don't be afraid of his qualifications. It may be that the lab technician really is no more qualified than any other high school graduate, and he does his work because he was shown how to do it by his predecessor. What if he was wrong? Did he attend the National Conference on Narcotic Drug Identification and Classification by the Federal Bureau of Investigation in Washington, D.C. this spring? But why are you doing all of this if your client says it wasn't his drugs? The specialty witness—it may be that the expert can be turned into your witness in areas the prosecution did not expect him to testify about—the opinions of a pathologist when no autopsy was performed, for example. But remember that all of this is for the jury's consumption and not your own benefit. Establishing that you know more than everyone else in the room about, for instance, pathology will not help anyone.

2. Unless you know where you are going in cross-examination, you are likely to cause the expert merely to testify for the second time to his direct examination.

3. If the expert witness recognizes a book or treatise as authority, then you may offer those relevant portions of the treatise as direct evidence. If the expert witness refuses to recognize the book or treatise as an authority, then you may proceed with the examination by asking the witness, "Do you agree or disagree with the following statement. . .?"

4. Show that the witness is a professional testifier. Establish the number of hours he has testified.

5. If you are going to use the expert as a single-purpose expert, you may want to bolster his qualifications by showing him to be a disinterested "scientific man."

BIBLIOGRAPHY

H. Spellman, *Direct Examination of Witnesses* (Prentice-Hall, 1968).

F. Wellman, *The Art of Cross-Examination*, Ninth Edition (Collier's, 1974). ■

NEWS & NOTES from page 12

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

ORD-169:

With certain exceptions the home addresses of public employees are open to the public.

REPRESENTATIVE ELECTED

After the resignation of Kenneth Vaughan as State Representative in District 33-D, a special election was held. Mr. Vaughan's former Administrative Assistant, Mrs. Harris (Anita) Hill, won election to his seat in a close runoff.

NEW DISTRICT ATTORNEYS

The Honorable Albert (Neal) Pfeiffer has been appointed by Governor Briscoe to the newly created post of Criminal District Attorney of Bastrop County. Mr. Pfeiffer will serve until the next General Election.

In addition, Governor Briscoe has appointed the Honorable Carroll E. Wilborn, Jr., to fill the shoes of W.G. Woods, Jr., as District Attorney for the 75th Judicial District. Mr. Wilborn will also serve until the next General Election.

NABE REQUESTS ADS

The National Association of Bar Executives will be holding its annual PR Workshop in Kansas City in October, where one of the main topics will be lawyer advertising. In preparation, the NABE requests that copies of lawyer ads appearing in local newspapers, and call letters of television and radio stations broadcasting such ads, along with the dates of broadcast, be sent to:

Richard S. Collins, Staff Director, Public Relations and Information Division, American Bar Association, 77 South Wacker Drive, Chicago, Illinois 60606.

Your cooperation will be appreciated.

TEXAS CR Suite 211, 314 West 11th Street, Austin, Texas 78701

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. . . in this state already belong to the Texas Criminal Defense Lawyers Association. We believe we have now the best Criminal Defense Bar in the United States. The way we maintain that level of excellence is continuously to seek out new minds, new energies. Therefore we want YOU . . . if your legal and personal philosophies are compatible with our *purposes and objectives:*

- To provide an appropriate state organization representing those lawyers who are actively engaged in the defense of criminal cases.
- To protect and insure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases.
- To resist proposed legislation or rules which would curtail such rights and to promote sound alternatives.
- To promote educational activities to improve the skills and knowledge of lawyers engaged in the defense of criminal cases.
- To improve the judicial system and to urge the selection and appointment to the bench of well-qualified and experienced lawyers.
- To improve the correctional system and to seek more effective rehabilitation opportunities for those convicted of crimes.
- To promote constant improvement in the administration of criminal justice.

ADVANTAGES FOR YOU

- Referrals to and from recommended criminal defense lawyers in over 100 Texas cities through the TCDLA membership directory.
- Summaries of latest Court of Criminal Appeals cases through the Attorney General's Crime Prevention Newsletter. Available to private practioners only through TCDLA's group subscription, included in dues.
- Access to many publications dealing with the practice of criminal law through TCDLA discounts & free offerings.
- TCDLA's publications, including the monthly *VOICE for the Defense*, with its "News & Notes" on current activities, legislative summaries and other legal news.
  A monthly *SIGNIFICANT DECISIONS REPORT* of important cases decided by the Court of Criminal Appeals. . .now included as a pre-punched, centerfold snapout for your library.
- Use of TCDLA Brief Bank service.
- Outstanding educational programs featuring recognized experts on practical aspects of defense cases. TCDLA and the State Bar annually present many seminars and courses in all parts of the state.
- An organization through which criminal defense lawyers can formulate and express their position on legislation, court reform, important cases affecting rights of defendants through amicus curiae activity and other matters affecting the administration of criminal justice in Texas.

MEMBERSHIP APPLICATION

Application of: _____
(Name, please print or type)

Please letter certificate: as above
other _____

Street or Box No.: _____
City and Zip Code: _____
Firm Name: _____
Business Telephone: _____

Date Admitted to State Bar of Texas _____
Admitted to Practice in: _____
Law School (Name, degree, date) _____
_____
College (Name, degree, date) _____
_____
(If student, expected date of graduation) _____
Professional Organizations in which applicant is member in good standing:
_____
_____
_____
_____

Have you ever been disbarred or disciplined by any bar association, or are you the subject of disciplinary action now pending _____

_____ _____
(Date) (Signature of Applicant)

ENDORSEMENT

I, a member of TCDLA, believe this applicant to be a person of professional competency, integrity, and good moral character. The applicant is actively engaged in the defense of criminal cases.

_____
(Signature of Member)

Mail to:
TCDLA, Suite 211, 314 West 11th Street,
Austin, TX 78701

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION