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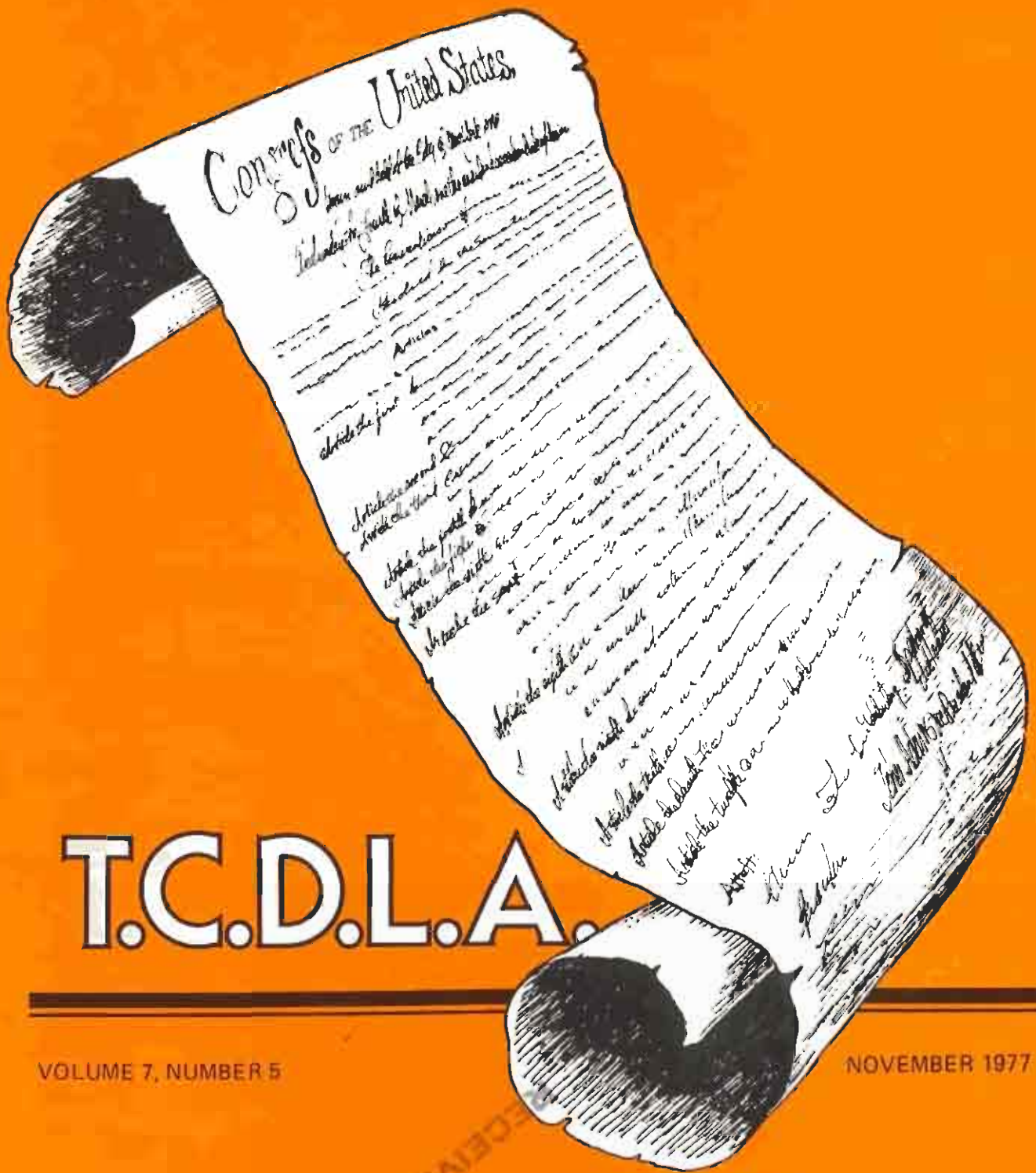

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NOVEMBER 1977

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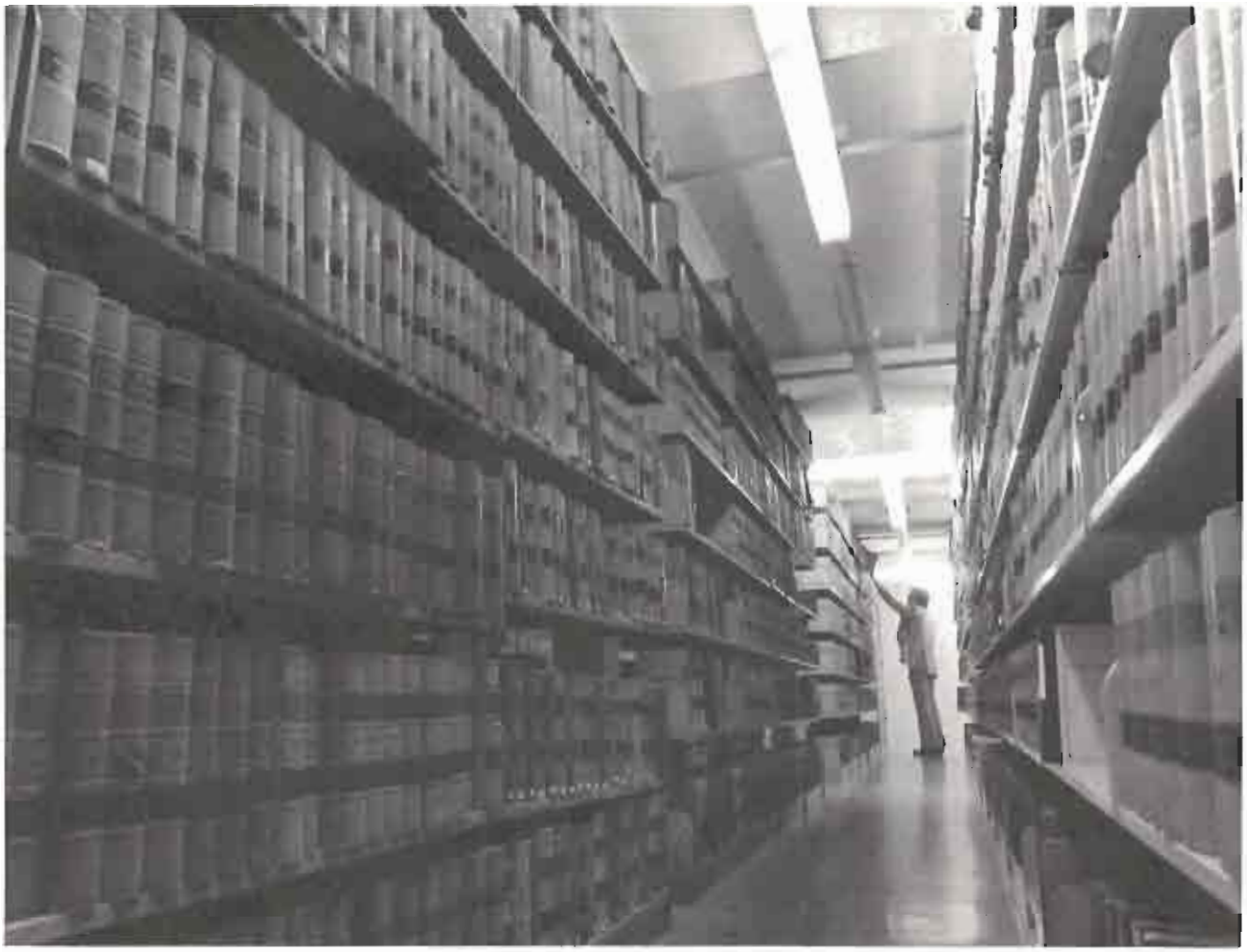

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NOVEMBER 1977

Editor's Corner

Clif Holmes

It seems as though every time I look up Ginny Dromgoole is fussin' at me because I haven't provided her copy for the Editor's Corner. We pushed hard to get a *Voice* which was regular and responsive to the needs of TCDLA members, and have chastised all for not getting behind it with articles, advertising, and support generally. I find that keeping articles flowing, news items current, and the various departments filled requires a great deal--both in time and in effort. But, I also find that much of that required could be done much easier (and, Ginny, more timely) if I did not suffer from the lawyer's nemesis, procrastination. I vow with each issue to overcome that foe, but each time I seem to put off facing him.

I think I'll make a Halloween's resolution (seems just as appropriate as those made at New Year's) to make better efforts. I hope I can persuade you to do the same. That article that you were going to write, write it and get it to us. That advertiser you were going to contact, contact him and get him signed up. The young lawyers you were going to recruit, take a membership application and get them on the rolls with us. TCDLA and the *Voice* must have total membership support to be effective and productive.

That old boy who said something about everything coming to him who stands and waits must have spent his life eatin' chicken wings and cold "taters."

EXECUTIVE DIRECTOR'S REPORT

The new offices of TCDLA are finally completed. We have been in temporary offices since June 1st and we know that there have been delays in receipt of publications and that our other services have been interrupted. Now that the offices are moved and we are organized, we hope you notice the change in the Home Office efficiency. In our old quarters we did not have space to store all of our publications and materials; consequently, when publications were ordered we had to rely on others for their "fast service." With the additional space, which incidentally costs the Association the same rent, we will have closer control over our shipments and mail-outs. This should speed up service to you and, in addition, save the Association money.

We have spent a number of weeks updating our mailing lists and now feel that only "dues-paying" members are receiving our publications. We had difficulty with our mailer's computer, and consequently some people received our mailings even though they were delinquent in payment. If your fellow lawyers complain about not receiving the publication, you can now be safe in assuming that they have not paid their dues. You should encourage their support of this Association and encourage them to renew their memberships.

I would like to solicit your comments concerning the operation of this office and would like to encourage letters from you concerning our services. Too often the staffs of Associations operate in a semi-vacuum. We hear some good things, a few complaints, and eternal silence from the vast majority. This is normal and we expect it, but we hope you are concerned enough about your Association to communicate with the Home Office when you are concerned about our activities or in need of information.

I would also encourage you to send your suggestions concerning the upcoming 66th Legislature. It is fast approaching the hour when any suggestion will be too late to be acted upon. The Legislative Committee is formed, subcommittees have been assigned specific areas of interest, and we are working. Send any suggestions for changes to us *now*; if you wait it will be too late and the 66th Session will approach the 65th in its enlightened approach to law enforcement.

Steve Capelle

Meet Your Directors

L. J. "Boots" Krueger
Liberty

President's Report

Emmett Colvin

At our October Board of Directors meeting in Beaumont, the Board voted unanimously to submit a Federal Grant Application solely in behalf of our organization. Heretofore, as many of you know, our group has submitted such grant applications annually jointly with the Texas Bar Association. It would appear that the time was ripe for such action on the part of the Board. The joint venture has proven highly unsatisfactory from our viewpoint in that in the past, *inter alia*, our people were being used by the State Bar for educational programs, among other things, throughout the State without recognition or benefit to our organization. The prosecutors' association last received a grant of nearly four hundred thousand dollars to serve the prosecutors throughout the State. It is recognized that TCDLA is the most appropriate organization to represent, aid, assist, and educate the criminal defense lawyers throughout the State of Texas. Steps are now being taken to process such a grant. Such financial assistance has been needed for some time and we feel confident that it should be forthcoming.

In our program of commending individual judges throughout the State it is vital that all our members contact as soon as possible our Executive Director, Stephen Capelle, at our Austin office. Keep it in mind: we must be highly selective in designating those judges who truly reflect the independence that should be shown from the bench. Let us hear from each of you soon!

THE SIXTY-SIXTH SESSION HAS BEGUN!

On Friday, October 14, 1977, the 66th Session of the Texas Legislature began work. No, the laws about the Legislature meeting every two years in odd-numbered years have not changed, but the Interim Studies of the Legislature have begun.

On the 14th of October, the Criminal Jurisprudence Committee of the Texas House of Representatives met in Austin. (The Texas Longhorns played in Fayetteville that next day.) The Criminal Jurisprudence Committee was given six specific tasks during the interim; subcommittees will be named at a later date.

1) The committee is to study agency expenditures and related transactions of the following agencies:

- Criminal Justice Planning (Office of the Governor)
- Board of Pardons and Paroles
- Texas Adult Probation Commission
- Court of Criminal Appeals
- State's Prosecuting Attorney before the Court of Criminal Appeals

2) The committee is to study the administration and operation of the Texas Board of Pardons and Paroles with recommendations as to necessary changes, if any.

3) A study of the probationary system and services in the state with particular emphasis on the variations thereof and recommendations as to the extent and desirability of statewide uniformity and a study of the newly created Texas Adult Probation Commission.

4) A study of the statutes in Texas which provide the death penalty for crimes with singular emphasis on any recommendations for changes which may be necessary to avoid successful constitutional challenges to the Texas death penalty.

5) A study of the methodology by which criminal records are compiled, kept, disseminated, and expunged by the various law enforcement agencies of the state and local government.

6) The committee is to review any statutory changes which may be necessary to enact the provisions of House Joint Resolution 18 (the expansion of the Court of Criminal Appeals), should that amendment be adopted by the electorate in November.

In addition to the interim studies by the Criminal Jurisprudence Committee itself, there will also be a "joint committee study" by Criminal Jurisprudence and Judiciary. This "joint committee study" will be on the grand jury system in Texas, including the selection procedures of grand jurors, and procedures and terms of the grand jury itself.

These studies will be made during the interim; a written report will be made by September 31, 1978, and this report will be distributed to the Legislators by December 16, 1978.

TCDLA's Legislative Committee, under the leadership of Waggoner Carr, is organized and is studying the Penal Code and Code of Criminal Procedure for possible changes. If you have any suggestions as to amendments or changes, or if you have any information to communicate to the Interim Study Committees, please contact Waggoner Carr or the Executive Director as soon as possible.

THE LOST ART OF CROSS-EXAMINATION

Louis Dugas, Jr.
Orange

The title of this paper may conjure up visions of a mystical nature. A "lost art" must be something akin to black magic, or, maybe, a tradition handed down from generation to generation until there occurred a real generation gap and the art (e.g., the making of soap) became lost. In spite of the title, I hope that cross-examination is in neither category but, like fly fishing, an art learned by practice and experience. In the practice of criminal law the artist is the lawyer who day after day, year after year enters the courtroom and defends every case diligently, learning something new with each case he tries.

The first lesson he learns is how to win. Not that he will win every time, but he gains confidence which enables him to try each case as though he must win. The competent trial lawyer comes armed with an arsenal of tactics, and a knowledge and understanding of human nature which psychologists must envy. He utilizes them to their utmost–the most important application being in cross-examination of the witnesses for the state.

Cross-examination is defined as the questioning of a witness, usually adverse to your position, in an attempt to arrive at the truth. It is as old as civilization. An example is in Plato's account of Socrates's masterful cross-examination of Miletus, his accuser. But cross-examination is best learned by doing not by reading.

Let us suppose a witness has just testified on direct, and is tendered to us for cross-examination. We must ask ourselves several questions: "Has the witness testified to anything material against us? Has the testimony hurt our side of the case? Has he made an impression with the jury? Is it necessary for us to cross-examine him?

Assuming the answers are "Yes," and the possibility of obtaining new facts exists, then you must determine if the witness has testified truthfully and with candor. If this be the case, ask plain straightforward questions. The hardest witness to cross-examine is the truthful one.

Unfortunately, this is not what is generally seen in a courtroom; and it is with these that cross-examination, properly done, earns you your fee. These are the types this paper will attempt to cover. Getting back to the questions, if the answers are "No," then ask no questions. The rules of cross-examination are almost always phrased in the negative; and therein lies the mystery. Should the answers compel questioning, and it be necessary to break the force of his testimony, you must next determine whether the witness is to be discredited, or should you discredit the testimony. This becomes a matter of instinct and, if you are a student of body language, your observations of the witness may serve you well.

Study him as he testifies on direct, and watch him even closer on cross. Look for a difference in action between cross-examination and direct. For example, a woman witness may cross her legs and swing one back and forth. If your questions score, she may suddenly stop. Train yourself to take as few notes as possible, in order that you may watch the witness. The state may offer a chemist in D.W.I. cases. He may be very cool on direct, but hit him hard on cross and he might tie and untie his shoelaces. Some people swallow hard on a good cross when they are being evasive; others simply open their eyes very wide; yet others are prone to lick their lips. Some women press their clothing, and men tug on their sleeves, when prevaricating. Remember, when cross-examing a witness, you are facing an almost insurmountable foe–self preservation. It not only works in war or catastrophies, but in the courtroom. No one wants to lose face before members of his community. Also, the cross-examiner must be careful in his treatment of the witness, for the sympathies of the jury are with the witness. They will admit his mistakes, but are very reluctant to believe he has perjured himself. Don't let these scare you. Look upon them as challenges to be met and conquered.

There are occasions for you to be dramatic, as the following example will demonstrate:

> "Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell in a low voice. 'I did,' said Sampson. 'Did you understand it?' asked Russell, in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it?' A thrill of excitement ran through the courtroom. Sampson was overwhelmed, and he never pulled himself together again."

A talkative witness should be allowed to talk on, because he's sure to become involved in difficulties from which he can't extricate himself. Ask a critical question only if you are reasonably sure of the answer. Lee Bailey says this rule is made to be broken when you have nothing else left, and your client is in bad shape from the testimony. This is probably a proper view. Also, Bailey suggests that when you have a witness who has seen the incident, and testifies in a most damaging way on direct, you cross by finding out what the witness did *not* see.

Always save the critical question you want answered until the witness is in the right frame of mind. You may even frame your earlier questions in such a way as to get a retort from the witness. If the witness takes the bait, and manages to get a good laugh on you, then repay him by asking the critical question. As is known, if you ask questions in a sequence, the witness will be way ahead of you and waiting for your questions. Keep him off guard as you lead him around the mulberry bush with questions that have no rhyme, reason, or sequence.

Once you have scored your point, drop it and go on to something else. Remember, you are like an artist painting a picture, whose painting leaves something for the viewer to perceive with his own eye. The jury will get the point and you can argue it to them in summation.

Human nature is present in the actions

and words of every witness in a trial. One looks at a running stream on a hot day and sees the delicious coolness which the sense impression of his eye gives him. Another's impression might be that of a polluted body of water. These sense impressions take on all the shadings of motive, past experience, and the character of the individual mind receiving them.

Another facet to consider is that of memory. We tend to think of memory as an exact reproduction of past states of consciousness. Experience reveals that memory is often inexact. Further, if one's feelings are involved, that memory loses its objectivity, and records only that favorable to those feelings. When people testify, they are recalling events recorded by those sense impressions, and the testimony is the result of a convenient memory which is part of the self-preservation. Did you ever ask a child who has cookie crumbs all over his face if he got in the cookies? He is likely to look you in the eye and tell you he has not. He does this, though the evidence is overwhelming against him, out of fear that he will be spanked. The same thing applies to a witness.

One of the basics that is often forgotten is the law applicable to the particular subject matter. Too often lawyers assume they know the law, and fail to refresh their memories. You should know the law applicable to your situation to cross-examine effectively. Many times this is all you may have.

At the punishment hearing you will often hear police officers testify that your client has a bad reputation which they have heard discussed. You might ask when this discussion occurred. Many times the discussion has taken place in the prosecutor's office just prior to the testimony of the officers.

Our livelihood, and our client's life, may depend on words. Probably nothing is as important as the way questions are asked. First, use your own terminology, not the prosecutor's. Remember, you are setting the stage for your summation. If you use your terminology, you may find the prosecutor adopting your language throughout the trial. Instead of asking a witness, "Where were you when the event occurred?", ask, "How far away were you?" Also, be specific, as witnesses will normally answer what you ask. For example, if you ask someone, "How often did he visit you?", the witness will answer that question, and you may be stuck with an answer that says he seldom visited. But, if you ask, "How often did you see him?", you will get a response that will include not only his visits but the visits by the witness.

Where they are beneficial, use action words, such as: "far–near"; or, "fast–slow." They help paint a word picture to the jury, and the jury will latch on to those action words. By proper phrasing of your questions, you may be able to prevent the witness from thinking about his answer. Asking questions beginning, "Isn't it a fact that. . .?", "I suggest to you that. . .?", "Let me ask you this. . .?", "Isn't it true that. . .?", provide the witness with time to think, and are obsolete. They are the product of bad cross-examination habits.

When the witness responds to your question, avoid the use of words such as, "Okay," or, "All right." These are also bad habits, and what they do is set a routine you fall into. Then, when the witness hits you with a "zinger," you fail to say, "Okay," or, "All right," and you have telegraphed to the jurors your feelings.

You can make a partisan out of the witness by your choice of words. Instead of, "You testified on direct. . .," use phrases such as, "You contended. . .," or "It was your view. . .?" On direct, the prosecutor usually projects himself into the examination, and the jury does not listen with all systems. It is a different story on cross. The jury is aware that a battle is going to be starting and they really sit up and listen to the cross-examination.

Finally, there is no short-cut to the art of cross-examination. Experience in the trial of many cases is almost the only route to discovering this art.

TEN CROSS-EXAMINING RULES

DONOVAN on TRIAL PRACTICE, published 1883, states the following eleven cross-examining rules:

1. Never expect to prove your case by the other side's witnesses, but treat what you get with coolness till the closing.

2. Never appear to have too strong a case, or boast of it in advance. The race may not be to the swift but to the valiant.

3. Never get angry, and say rude things to intimidate. A good steady look, long and untiring is instructive.

4. Never sit down and seem sleepy. Throw a bad witness into a habit of a great many yeses to your questions till ready to say it "snowed" in July, if need be.

5. Never trust a case on one question, nor drive a bad man in a corner so hard as to let his honor depend on truth or lies, for *he will lie on oath who lies without it.*

6. Never use a dragnet and repeat bad evidence repeatedly in a jury's hearing. It may intensify it. The jury will commit it to memory.

7. Never be too anxious for an answer. A case often turns on identification, and after a witness is drawn into admission of a possible mistake (first by a possible uncertainty), then he soon admits a reasonable doubt.

8. Never depend on trial day for examination; a thorough inquiry into the motive of witnesses may reveal weak points. Stand while examining, and commit the subject to memory so as to be interesting. Interest even fascinates witnesses, besides a semi-applause at a happy turn is heard by the jury.

9. Never use strange language or harsh tones. Be as persuasive as possible, and wait for the anger of the witness first. But if he be a bully, show his real character fearlessly, and show yourself master.

10. Never ask at the start for something that may make the case stronger for the other side. Such is very unwise.

11. Never hold a bad witness longer than you can get a good laugh on his meanness, or lay a foundation to impeach his assertions. Be brief. Be wary. Be ready. Be at your best. Be full of the subject. Master your witness by adroitness. Be sparing of this branch always. ■

DECEMBER BOARD MEETING

The next meeting of the TCDLA Board of Directors will be in El Paso, Texas, on December 10, 1977. The meeting will be at the Holiday Inn Downtown in conjunction with a Criminal Defense Lawyers Project Seminar to be held on December 8th and 9th. All TCDLA members are invited to attend the seminar and the board meeting.

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

Marvin O. Teague: Editor

October, 1977
Volume IV, No. 2

PROBATIONER WHITEHEAD GETS REVOCATION ORDER REVERSED WHEN EVERYTHING STATE ALLEGED AND PROVED WAS SIMPLY INSUFFICIENT TO SUSTAIN THE ALLEGATIONS OF PROBATION. WHITEHEAD, #55,024, 10-25-77, J. Brown, with J. Douglas, joined by J. Odom, dissenting with opinion. (Harris County).

Here, it appears the State just "slopped" through, commencing with the Motion to Revoke and concluding with the trial Judge's Order of Revocation, hoping I suppose, if they could "slop" through the waters of Buffalo Bayou they could swim "like a champ" in the waters of the Colorado. However, by the opinion, they never got off the banks of the Colorado or, if so, the gators got them.

1. Probationer told to report, by the trial judge, on 9-15-75 and on 15th of each month thereafter. Apparently, after he got probation, probation department changed reporting date and had probationer report on a weekly date. Thus, date alleged, April 22, 1976, was a date "that D was not obligated to report on." Held, "SINCE D WAS NOT OBLIGATED TO REPORT ON THAT DATE, THE FINDING BY THE COURT THAT HE DID NOT REPORT ON THAT DATE CANNOT SUSTAIN A FINDING OF A VIOLATION OF PROBATION CONDITIONS BY D."

2. As to failure to make restitution payments, Held, "IT IS WELL SETTLED THAT ABSENT A SHOWING OF A PROBATIONER'S ABILITY TO MAKE THE RESTITUTION PAYMENTS, AND THAT HIS FAILURE WAS INTENTIONAL, IT IS AN ABUSE OF DISCRETION FOR A COURT TO REVOKE PROBATION ON HIS FAILURE TO MAKE PAYMENTS." Here, no showing by State that D was able to make payments. Cf., however, S.B. 61, effective 8-29-77, as B/P now on D.

3. As to changing residence without the permission of probation officer, D given permission to live with his mother on Harley Street. However, he moved in with a cousin so he could try and get a job in his cousin's business but after this occurred, his mother and father apparently were having marital problems, so he didn't move back in with his parents. Mother blew the whistle by telling probation office he no longer lived there. D testified that he still considered his mother's address his permanent address.

Held, using Whitney, 472 (2) 524, CCA held that there was insufficient evidence to show that D actually changed his residence.

State tried to save this one when her prosecutor, during cross examination, questioned D with "its," i.e., "The fact is you can't make it on probation; can you?"

Held, "Residence" is a legal conclusion, a matter of law, to be determined from facts." "An admission of a legal conclusion is not necessarily an admission of underlying facts."

4. As to "commit no offense against the laws," allegation that D "took without permission from his mother checks from her personal checking account and wrote two checks for $50

and one check for $45" this allegation was subject to motion to quash, which was filed.

"We conclude that the court erred in overruling the D's exception to the motion to revoke." "These allegations should give the probationer fair notice of the charges against him upon which he is called to defend or he is denied the rudiments of due process of law." However, that did not happen here. Thus, another reason given for reversal.

J. PHILLIPS GET RULES OF CIVIL PROCEDURE OUT, TOGETHER WITH THE CONSTITUTION, AND RULES THAT SURETY INSURANCE COMPANY OF CALIFORNIA, #53,437, 10-5-77, with Judges Roberts and Odom concurring with the result, WAS NOT AFFORDED DUE PROCESS OF LAW. Reversed. (Val Verde County). (Bail Bond Forfeiture Case).

This case had to do with Rule 166-A. It appears that the Assistant D.A., who handled this matter, never had the fortune of either being the moving party on a motion for summary judgment, and losing, or being the opposing party, and reading the rule and the cases very carefully, and winning.

In short, unless you have been in both situations, it is hard to appreciate this case. "In view of D's absence from the May 21 hearing and the trial court's refusal to consider D's answer to the motion for summary judgment, D has not been given an opportunity to be heard, to defend and assert his interest, and to present his objections to the summary judgment proceeding." "Under these circumstances, we conclude that D has not been afforded due process of law." "The want of due process renders the summary judgment proceeding a nullity and the order granting the motion for summary judgment invalid."

COMMENT: And to think. The professor that Appellant's attorney and I had in law school worried if he ever read the Rules of Civil Procedure.

IF YOU ARE WORRIED ABOUT PROCLAMATION #E-18 OF THE PARKS & WILDLIFE COMMISSION, YOU MIGHT READ GARNER, #54,184, 10-5-77, J. Roberts. However, CCA ruled that the Complaint in this case, which alleged only "that D did then and there unlawfully hunted in a closed season, to-wit: the Nueces" failed to allege what the D was hunting. "The absence of what and where the D was illegally hunting renders the complaint fatally defective." (Bexar County).

Note: As the opinion does not state how many of our judges are going to be hunting in November in Uvalde, Dimmit and Zavala Counties or on, near or about the Nueces and Frio Rivers, and, as Proclamation #E-18 has not been declared unconstitutional, if you are planning to be in this area, I recommend you read Proclamation #E-18 carefully.

WHAT WAS THE BASIS OF D'S COMPLAINT THAT UNAUTHORIZED PERSONS WERE IN GRAND JURY ROOM DURING DELIBERATIONS? In RAY, #51,567, 10-5-77, J. Roberts, Affirmed, D filed motion to quash Indictment on ground that unauthorized persons representing the State were present during deliberations of the grand jury, but TCt refused to hold hearing thereon. When case got to CCA, the Court ordered a hearing held on the Motion. Hearing held. CCA simply held that "D failed to meet his burden of showing that the sanctity of the grand jury was violated." (Tarrant County).

FROM WHAT THE CCA SAID IN ALEJOS, SEE VOL. IV, NO. 1, SEPT., 1977, S.D.R., THE CASES OF COLLECTION CONSULTANTS, INC., AND THORNTON, SEE VOL. III, NO. 11, MAY, 1977, S.D.R., WOULD NOT SURVIVE MRH AND THEY DIDN'T. On October 5, 1977, J. Green, ruled in these telephone harassment cases that "The State was authorized to carve as large an offense from the transaction as it could, provided it cut only once." "We conclude that the State properly exercised its opinion as to which offense it sought to prosecute." Thus, prosecution under Sec. 42.07(a)(2) permissible and not governed by Art. 5069-11.03, V.A.C.S.

CCA also ruled, again, it is permissible to make D speak before jury.

DID THE "BUTTER KNIFE" GET HERNANDEZ, #55,121, 10-5-77, P.J. Onion? Here, as to a condition of probation, D apparently told "to remain within the limits of Hidalgo County, Texas, but was then told "to return to the Republic of Mexico." Held, "While D was to remain in Hidalgo County unless given permission to leave, the second sentence directing his return to Mexico constituted that permission." "Here, the condition did not say that the D must not reenter the United States or any other county." (Hidalgo County).

Held, "D was not deported by the State as a result of the probationary condition but was formally deported by federal authorities on January 30, 1975, after conviction in the U.S. Magistrate's , Court on Jan. 22, 1975." "D's probation was not revoked because he refused to return to Mexico, but because he reentered the United States illegally."

IF YOU GET A D WITH AN ENHANCEMENT ALLEGATION AND HE HAS RECEIVED A PARDON REGARDING THAT CONVICTION, READ RUNO, #55,138, 10-5-77, J. Green, See also Smith, 548 (2) 410, AS, TO DO ANY GOOD, YOU MUST SHOW THAT D'S PARDON WAS BASED ON THE GOVERNOR'S FINDING THAT D WAS INNOCENT OF THE OFFENSE FOR WHICH HE WAS PARDONED. (Walker County).

CCA DECLINES TO DECIDE CONSTITUTIONALITY OF CITY OF BURLESON'S NEGLIGENT COLLISION ORDINANCE, BUT DOES RULE IN COLE, #55,339, 10-5-77, J. Dally, THAT COMPLAINT IS INSUFFICIENT BECAUSE IT FAILS TO ALLEGE THE ACT OR ACTS RELIED UPON TO CONSTITUTE NEGLIGENCE. (Johnson County).

BUT, IMPORTANT: CCA MAY HAVE VOIDED MANY MUNICIPAL COURT COMPLAINTS. "IT WOULD NOW APPEAR THAT NOT SIMPLE NEGLIGENCE BUT CRIMINAL NEGLIGENCE IS THE LOWEST DEGREE OF CONDUCT FOR IMPOSING CRIMINAL RESPONSIBILITY."

Complaint here merely alleged: "D, on or about July 24, 1975, did then and there unlawfully and wilfully while operating a motor vehicle in said City and County, said motor vehicle being then and there under the exclusive direction and control of the said D, with negligence, to-wit: did then and there fail to exercise such care and caution as a person of ordinary prudence would have used under like or similar circumstances in that he permitted or suffered a motor vehicle under his control to collide and be in collision with another motor vehicle that was proceeding on State Highway #174, in violation of Art. 4, Section 1 of Burleson City Ordinance B-17."

Thus, for those of you who go to the "Supreme Courts" of our cities, get out your motion to quash forms and use this case.

D LOSES HIS APPELLATE ARGUMENTS BUT REALLY GAINS 4 YEARS. IN HOUSTON, #55,375, 10-5-77, J. Green, D INDICTED AND TRIED FOR BURGLARY OF A HABITATION WITH INTENT TO COMMIT RAPE, BUT FOUND GUILTY OF RAPE AND TJ ASSESSED PUNISHMENT AT 12 YEARS. THEN, WHILE CASE ON APPEAL, ON STATE'S MOTION, TJ DISMISSED THE APPEAL. (THIS SOUNDS LIKE AN ERROR AS IT APPEARS THAT TJ GRANTED A NEW TRIAL AND THEN DISMISSED THE INDICTMENT). D THEN REINDICTED FOR RAPE OF THE OWNER OF A HABITATION. FILED PLEA OF FORMER JEOPARDY, OVERRULED, AND THEN ENTERED A PLEA SUBJECT TO DOUBLE JEOPARDY PLEA. PUNISHMENT ASSESSED AT 8 YEARS.

Held, "The offenses of rape and burglary with intent to commit rape are separate and distinct offenses, and a conviction of an accused for rape will not bar a subsequent conviction of the same accused for burglary with intent to commit rape involving the same transaction."

"Since rape is not a lesser included offense of burglary with intent to commit rape, there was no valid indictment before the court in Cause #24,944 charging rape, and the court was without jurisdiction to convict D for rape." Thus, the TJ correctly entered the order of dismissal. Jeopardy did not attach as a result of that trial and judgment. But, compare this case with Johnson, 432 (2) 98, where the CCA ruled the fact that D had been acquitted of the offense of burglary of a private residence at night with intent to commit the offense of rape did not preclude him from being prosecuted for the offense of assault with intent to rape, and Johnson v. Estelle, 506 F.2d 347, where, in granting the D relief, the

Fifth Circuit said: "The exercised double jeopardy is the constitutional eliminator of the might have beens." "Puristic parallelism is not an absolute in the law of double jeopardy." See also Harris v. Okla., 97 S.Ct. 2912, June 29, 1977.

WATCH OUT. IT YOU ARE SEEKING A REDUCTION OF BAIL VIA HABEAS CORPUS, "IN ORDER TO TIMELY PERFECT AN APPEAL IN A HABEAS CORPUS PROCEEDING, NOTICE OF APPEAL MUST BE GIVEN OR FILED WITHIN TEN DAYS AFTER THE RENDITION OF THE JUDGMENT OF THE TRIAL COURT." HERE, NOTICE OF APPEAL NOT TIMELY FILED AND APPEAL DISMISSED. EX PARTE WESTON, #55,654, 10-5-77, J. Douglas. Also, keep in mind the distinction between a motion to reduce bail and an application for writ of habeas corpus regarding bail reduction. There is no appeal in the former unless same is treated as an application for writ of habeas corpus. (El Paso County).

CCA HOLDS THAT FOLLOWING IS HARMLESS ERROR. "I WANT YOU TO THINK ABOUT THE TIME YOU HAVE READ IN THE PAPER OR YOU'VE SEEN ON TELEVISION ABOUT THE CRIMES IN OUR COMMUNITY." "ABOUT PEOPLE GETTING SHOT UP." "ABOUT PEOPLE GETTING ROBBED." BELIEVE IT OR NOT, THESE ARE PROBABLY PLEAS FOR LAW ENFORCEMENT. O'BRIANT, #54,869 & 870, 10-5-77, J. Davis. (Dallas County).

YOU SHOULD PREPARE YOUR RECORD IF THE D IS GOING TO WAIVE HIS RIGHT TO APPEAL. IN LIGHT OF THE DESIRE OF MANY TO ELIMINATE APPEALS, SEE, FOR EXAMPLE, AMENDMENT TO ART. 44.02, C.C.P., WE CAN ANTICIPATE SEEING MORE AND MORE HABEAS CORPUS CASES WHERE A D GOT TIME, WAIVED HIS RIGHT TO APPEAL, AND THEN SUBSEQUENTLY FILES A WRIT OF HABEAS CORPUS CLAIMING HE WAS DENIED HIS RIGHT TO APPEAL, USUALLY CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL. THE D IS NOT GOING TO GET ANY RELIEF IN AUSTIN, SEE EXPARTE HOGAN, #54,307, 10-12-77, J. Odom, with P.J. Onion concurring and dissenting to overruling Ex parte Dickey, 543 (2) 99, SEE VOL.III, NO. 5, p. 2, S.D.R., but you may get to spend some time in Federal Court explaining what you did regarding this. Thus, in addition to everything else, right then and there, write out what you did on the case and either put it in the file or file it with the papers of the cause. See also Johnson, #55,283, 10-19-77, P.J. Onion.

DEATH PENALTY BAIL CASES ARE STILL GIVING STATE A HEADACHE. SHE LOSES ANOTHER ONE IN EX PARTE MAXWELL, #54,896, 10-12-77, J. Phillips, AS BAIL SET IN AMOUNT OF $55,000.00, AS EVIDENCE IS INSUFFICIENT TO SHOW THAT PROOF IS EVIDENT THAT A JURY WOULD ANSWER THE REQUIRED QUESTIONS SUBMITTED UNDER ART. 37.071, C.C.P., IN THE AFFIRMATIVE.

ONE OF OUR MEMBERS MAKES IT. GETS WRIT GRANTED. EX PARTE SUPERCINSKI, #55,496, 10-12-77, J. Davis. "It is well established that no one may be restrained for contempt without a written order of commitment." Here, no written order. Thus, Relator is unlawfully restrained of his liberty. Writ granted.

CCA REVERSES GILL, #55,580, 10-21-77, J. Dally, WHEN IT HOLDS THAT TESTIMONY OF SHERIFF OF WOOD COUNTY, WHO TOLD D, DAY BEFORE HIS ARREST WITH DANNY RAY ORSBOURN, THAT "DANNY RAY HAD ESCAPED AND THAT HE COULDN'T STAND TO BE CAUGHT WITH HIM, THAT HE WAS ON PROBATION AND TO LEAVE HIM ALONE IF HE SEEN HIM," WAS INSUFFICIENT TO SUSTAIN ALLEGATION THAT D HAD NOT AVOIDED PERSON OF DISREPUTABLE OR HARMFUL CHARACTER, AND HAD ASSOCIATED WITH DANNY RAY OSBOURN. REVERSED. HELD, "ALTHOUGH INFERENCES MAY BE DRAWN FROM THE SHERIFF'S MEAGER TESTIMONY, THESE INFERENCES ARE NOT EVIDENCE AND THEY WILL NOT SUPPORT THE ALLEGATIONS OF THE MOTION TO REVOKE OR THE FINDINGS OF THE TRIAL COURT." (WOOD COUNTY).

CCA SPLITS OVER APPLICABILITY OF ART. 38.22, C.C.P., AS TO EXCULPATORY STATEMENTS, BUT 3 IS BETTER THAN 2, AND MAJORITY REVERSES HARRISON, #53,245, 10-19-77, J. Phillips, with J. Douglas concurring with opinion, and J. Odom, joined by J. Roberts, dissenting with opinion. (Jefferson County).

Here, during trial and while on cross examination, D denied making a statement to police officer, during ride to the police station, that he had been cleaning the gun and it accidentally discharged. Then, on rebuttal, without objection, but after hearing held on D's objection outside jury's presence, police officer testified that D told him and the other officers that while he had been cleaning the gun it had accidentally fired and struck the deceased. D'S DEFENSE WAS ALIBI AS HE TESTIFIED HE DID NOT KNOW ABOUT SHOOTING UNTIL HE RETURNED TO THE APARTMENT AFTER GOING TO GET A PACKAGE OF CIGARETTS.

Held, "Any fact or circumstance contained in an oral statement of an accused may not be used by the State as a criminative or inculpatory fact against him." Reversed. "In the instant case, the oral statement of the D was introduced by the State to negative and destroy his defense of alibi and is therefore incriminating evidence in the nature of a confession." "The D's statement clearly falls within the purpose and spirit of the statute if not within the very letter of Art. 38.22." "The Legislature did not draw a distinction in the statute between exculpatory and inculpatory statements, but rather, sought to prohibit all statements which are incriminating."

COMMENT: The dissenters will not have to "weep" too long for, as Judge Douglas pointed out in his concurrence, Article 38.22, C.G.P., has been Amended, effective August 29, 1977. It appears that any statement of an accused person, regardless of the circumstances of how it was taken or from whence it came, will be admissible. This Amendment should see a return to the days of old; i.e., police officers are going to be taught at the police academies how to get around the statute: 1) If the statement was res gestae of the arrest or of the offense; 2) If it is a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness; or 3) any other statement that may be admissible under the law. Thus, if you didn't enjoy the "throw-down" causes, I can assure you that you will not enjoy the "voluntary" statement cases in the future.

J. DOUGLAS, WRITING FOR A UNANIMOUS CCA, RULES IN HARRIS, #55,619 & 620, 10-19-77, THAT WHERE TJ ASKED D, AFTER INDICTMENTS READ, HOW HE WISHED TO PLEAD, AND D REPLIED: "GUILTY", AND NOTHING FURTHER OCCURRED, THAT THIS WAS INSUFFICIENT TO SATISFY ART. 26.13, C.C.P. "Substantial compliance, however, is not achieved where, as in this case, there has been no compliance at all." Reversed. (Harris County).

CGA RULES IN RIOS, #53,328, 10-19-77, J. Roberts, THAT DOUBLE JEOPARDY CLAUSES WILL NOT BAR RETRIAL WHERE A MOTION FOR MISTRIAL HAS BEEN REQUESTED BY DEFENSE COUNSEL BUT THE TRIAL JUDGE HAS NOT ASKED THE D WHETHER HE PERSONALLY WANTS A MISTRIAL. (BEXAR COUNTY).

CCA SPLITS OVER TRIAL JUDGE'S COMMENTS AND JURY ARGUMENT OF PROSECUTOR IN WILDER, #53,474, 10-19-77, J. Douglas, AND ANDREW, #52,674, 10-19-77, J. Douglas, WITH J. ROBERTS, JOINED BY J. PHILLIPS, DISSENTING IN BOTH CASES. AFFIRMED. (Dallas County).

It seems, in reading the comments that occurred at the trial, that one can only conclude that what was forgotten by all is that the animosity generated by the trial judge, the defense lawyer and the prosecutor in this case; i.e., at the trial level, it appears there was a running gun battle between the lawyers vs. the lawyers and the judge vs. the lawyers, that everyone got so wrapped up in their own little vendettas that the rights of the D to a fair trial totally went out the window. It would have been more enjoyable reading if, Cf. Rios, supra, the trial judge had asked the D, during the heated discussion that took place, what he thought about what was going on. He probably would have said: "M...F..., let me out of here." "Ya'll are crazy."

REMEMBER. YOU ARE NOW, AS OF 4-5-77, ENTITLED TO SEE A COPY OF THE PRE-SENTENCE PROBATION REPORT IF YOU REQUEST SAME. CCA IN LOPEZ, #55,493 & 494, 10-19-77, J. Green, RULED, HOWEVER, THAT GARDNER V. FLA., 97 S.Ct. 1197, APPLIED ONLY TO DEATH PENALTY CASES. (Hidalgo County).

CCA CONSTRUES SEC. 31.09, N.P.C., RE ADDING UP AMOUNTS IN DETERMINING THE GRADE OF THE OFFENSE, IN TUCKER, #55,549, 10-19-77, J. Green, (Collin County), and affirms.

DAY RETURNS, SEE VOL. II, NO. 6, FEB., 1976, S.D.R., p. 2, 532 (2) 302, WHERE THE CCA'S MAJORITY HELD THAT IN A BURGLARY PROSECUTION THE D WAS ENTITLED TO A CHARGE ON THE LESSER OFFENSE OF TRESPASS AFTER HE TESTIFIED THAT HE ENTERED THE BUILDING WITHOUT THE CONSENT OF THE OWNER BUT FOR AN INNOCENT PURPOSE, IN MC GARDELL, #53,627, 10-19-77, J. Douglas, with J. Roberts, joined by J. Phillips, dissenting with opinion, BUT THE LATTER GETS NO RELIEF AS CCA'S MAJORITY HOLDS THAT EVID. WAS INSUFF. FOR D TO GET A CHARGE ON TRESPASS. CF. DISSENT.

LANDMARK CASE. EX PARTE MENEFEE, #54,780, 10-19-77, P.J. Onion.

Q. IS AN INDICTMENT RETURNED AGAINST A JUVENILE AFTER A DISCRETIONARY TRANSFER FROM JUVENILE COURT VOID FOR THE FAILURE OF THE DISTRICT COURT, TO WHICH THE TRANSFER WAS MADE, TO CONDUCT AN EXAMINING TRIAL PRIOR TO THE RETURN OF THE INDICTMENT?

Q: WHETHER AN EXAMINING TRIAL IS ABSOLUTELY ESSENTIAL TO SUCH PROCEDURE?

HELD, "WE CONCLUDE THAT THE INDICTMENT, HAVING BEEN RETURNED PRIOR TO AN EXAMINING TRIAL, IS VOID, THAT THE INDICTMENT SHOULD BE SET ASIDE, AND THE D ACCORDED AN EXAMINING TRIAL." (Jefferson County).

CCA GETS ALL UPSET WITH DEFENSE ATTORNEYS AND COURT REPORTERS IN YATES, #56,316 & 317, 10-26-77, J. Douglas, and GUILLORY, #56,318, 10-26-77, J. Roberts, AND ABATES APPEALS.

The problems here arose, in part, due to the fact that Art. 40.09, C.C.P., was amended whereby, as you know, the CCA controls the appeal of a criminal case regarding the filing of an appeal brief, after 30 days, and the filing of the statement of facts after 90 days. In Yates, CCA put the responsibility on the TJ to see that an indigent's attorney filed an appeal brief. "If this is not done, the trial court has authority to punish for contempt under Art. 1911a, V.A.C.S." In Guillory, the court appointed counsel objected to the Record for failure to have a statement of facts. The CCA went one step beyond Yates and ordered "that the court reporter, Mary Jane Pontzler, shall prepare, complete and file with the clerk of the trial court a transcription of her notes within 15 days after the delivery of this opinion." "Failure to comply with this order is grounds for contempt proceedings in this Court under Art. 1911a, V.A.C.S."

STATE'S INGENIOUS ARGUMENT, MADE IN WAGONER, #56,258, 10-26-77, J. Dally, THAT CONDUCT OF D, WHEN ARRESTED, SHOWED A CONSCIOUSNESS OF GUILT AND A PROBABILITY, BEYOND A REASONABLE DOUBT, THAT THE BOTTLES CONTAINED THE DRUG FOR WHICH THEY WERE LABELED, NOT ACCEPTED.

CASE REVERSED BECAUSE "THERE IS NO EVIDENCE THAT THE TABLETS IN THE BOTTLES FOUND IN THE D'S POSSESSION WERE AMPHETAMINE, AND THERE IS NO EVIDENCE TO SUPPORT THE ALLEGATION THAT D HAD A PRIOR CONVICTION FOR A LIKE OFFENSE." "WITHOUT PROOF OF THE PRIOR CONVICTION, THE PUNISHMENT FOR THE FELONY OFFENSE WHICH WAS ASSESSED WAS UNAUTHORIZED."

NEW PENAL CODE MESSES UP TJ IN SANTELLANO, #55,878, 10-26-77, J. Green.

D indicted for attempted burglary of a home under old code. PG and had punishment assessed at 5 years. Maximum punishment under old code was 4 years. Found guilty of attempted burglary of a habitation. Held, "The indictment will not support a conviction for the offense of attempted burglary of a habitation under Secs. 31.02 and 15.01 of the new Code." Reversed. (Harris County). D did not file election re punishment under new code.

D COMO, #53,637, 10-26-77, P.J. Onion, GETS NEW TRIAL WHEN TJ DID NOT GRANT D'S MOTION TO SHUFFLE THE JURY PANEL. SEE ALSO WOERNER, 523 (2) 717, and ALEXANDER, 523 (2) 720. (Jefferson County).

DEATH PENALTY CASE OF RILES, #54,101, 10-26-77, P.J. Onion, GETS REVERSED WHEN TJ ADMITTED INTO EVIDENCE EXTRANEOUS OFFENSES WHICH OCCURRED ABOUT 40 MINUTES AFTER THE ALLEGED OFFENSE. (Harris County). See also Ford, 484 (2) 727, not cited in the opinion.

State argued "flight". However, "THE CIRCUMSTANCES MUST INDICATE THAT THE 'FLIGHT' IS SO CONNECTED WITH THE OFFENSE ON TRIAL AS TO RENDER IT RELEVANT AS A CIRCUMSTANCE BEARING UPON HIS GUILT." NOT HERE. FURTHER, "THERE IS NO ISSUE AS TO INTENT, IDENTITY, OR MOTIVE RAISED BY THE EVIDENCE WHICH WOULD PERMIT THE INTRODUCTION OF THE EXTRANEOUS OFFENSES." "NO DEFENSE THEORY WAS RAISED BY THE EVIDENCE." "THE ADMISSION OF THE EXTRANEOUS OFFENSES WAS REVERSIBLE ERROR."

CCA CONSTRUES ART. 38.24, C.C.P., IN PARR, #55,287, 10-26-77, J. Davis, AND RULES THAT TJ COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW D, ON REDIRECT EXAMINATION, TO TESTIFY AS TO WHY HE ENTERED A PLEA OF GUILTY.

Held, "WITH THE PROSECUTOR HAVING GONE INTO THE SUBJECT OF D SELLING DOPE IN THE COUNTY, WHY D ENTERED A PLEA OF GUILTY, AND THE PLEA BARGAINING RESULTING IN THE PLEAS, IT WAS ERROR FOR THE COURT TO REFUSE TO ALLOW D ON REDIRECT TO TESTIFY AS TO WHY HE ENTERED A PLEA OF GUILTY."

COMMENT: THIS CASE PROBABLY BELONGS UNDER THE "OVER/KILL SECTION," AS, FROM THE FACTS, IT WOULD BE DIFFICULT FOR A JURY IN ECTOR COUNTY, See Flores,493(2)785, NOT GIVING A D 99 YEARS.

HOOPER, #56,518, 10-26-77, J. Dally, GAINS REVERSAL WHERE RECORD ON APPEAL DOES NOT REFLECT HE HAD COUNSEL OR WAIVED HIS RIGHT TO COUNSEL. HELD, "IN THE INSTANT CASE, THERE IS NOTHING IN THE RECORD BEFORE US TO SHOW A KNOWING AND INTELLIGENT WAIVER BY D OF HIS RIGHT TO BE REPRESENTED BY COUNSEL AT TRIAL; WE CANNOT PRESUME SUCH WAIVER FROM A SILENT RECORD." REVERSED. (Lubbock County).

EX PARTE WRIGHT, #55,397, 10-26-77, J. Green, GETS APPEAL BAIL REDUCED FROM $50,000 to $20,000. (Bell County).

And who says that being a criminal doesn't pay in some regards. D, who had many convictions for felonies, never defaulted on any of his bonds. This seems to be the thing that turned the case.

CCA DISCUSSES SCOPE OF SEARCH WARRANT AND "CURTILAGE" IN CANTU, #55,701, 10-26-77, J. Davis, BUT EVID. SUFF. TO CONNECT THE D WITH THE OFFENSE. THUS, REVOCATION ORDER AFFIRMED. (Brazoria County).

ALWAYS REMEMBER. IF YOU HAVE A NEW PENAL CODE OFFENSE AND THE CCA HAS NOT RULED ON THE VALIDITY OF AN INDICTMENT OR INFORMATION FOR THAT OFFENSE, ALWAYS FILE A MOTION TO QUASH THE INDICTMENT OR INFORMATION FOR THAT OFFENSE,

USING THOSE CASES WHERE THE CCA HAS GRANTED RELIEF. THIS APPLIES TO THE PRIMARY ALLEGATION AS WELL AS ANY ENHANCEMENT ALLEGATION. WHO KNOWS? YOU MIGHT GET A WINNER IN AUSTIN. TEAMER, #55,839, 10-26-77, P.J. Onion, DIDN'T MAKE IT AS NO MOTIONS TO QUASH FILED.

FOR AN UP TO DATE INTERPRETATION OF MORRISSEY V. BREWER, 408 U.S. 471, AND GAGNON V. SCARPELLI, 411 U.S. 778, AND REVOCATION OF PROBATION CASES, SEE WHISENANT, #55,319, 10-26-77, J. Dally, HOWEVER, THE LAW HAS NOT REALLY CHANGED FROM EARLIER CASES DECIDED BY THE CCA SINCE THOSE DECISIONS. THUS, MR. WHISENANT DOESN'T GET ANY RELIEF.

NOTE: We are having trouble with the mail service in getting out the newsletter sooner than it has been coming to you. Bear with us as through hail, sleet, floods or snow, it will eventually get there. Adversity we can overcome. However, the postal service is something else.

COMMENT: It looked like T.C.U. was going to set the pace for the criminal law field this fall as they got hot and won two (2) in a row; like some defendants and lawyers I know. However, like most defendants and lawyers I know, it will be necessary that a new winning streak take place as they must commence anew. Rice, like so many of us, is appealing to a higher court for relief.

ARE YOU INTERESTED? As you all know, most defendants who receive the death penalty are indigents and have appointed counsel. These attorneys, at great sacrifice to their practices and their families, do the best they can. Once the case is disposed of by the Court of Criminal Appeals, the legal obligation to represent that person ends. Also, there is no provision for payment to further represent that person to the Supreme Court. Even when the case gets into the U.S. District Court, the sum of money available for appointed counsel is extremely nominal. Due to the present system; i.e., more and more lawyers are going to be called upon to represent persons charged and/or convicted with capital murder and given the death penalty, it is going to be necessary that the defense bar be in a position, when requested, to aid these defendants and the attorneys, possibly going to the extent of asking our association for a volunteer replacement in the appellate process. NO DEFENDANT IN THE STATE OF TEXAS, WHO HAS BEEN CONVICTED OF CAPITAL MURDER, AND ASSESSED THE DEATH PENALTY, SHOULD EVER BE WITHOUT COUNSEL AT ANY STAGE OF THE PROCEEDINGS.

THUS, IF YOU WANT TO GET ON OUR VOLUNTEER ATTORNEY LIST, PLEASE WRITE STEVE CAPELLE AND TELL HIM SO THAT IF THE OCCASION ARISES HE CAN NOTIFY YOU.

1R refers to index reference pages of *Significant Decisions*.

EXTRANEOUS OFFENSES

Ron Goranson
Dallas

I. GUILT OR INNOCENCE STAGE:

A. General Rule:

The general rule in all English-speaking jurisdictions is that the accused is entitled to be tried on the accusation made in the state's pleadings, and not on some collateral crime, or for being a criminal generally. The rule is now deemed axiomatic and is followed in all jurisdictions. *Young v. State*, 261 S.W.2d 836 (Tex.Crim.App. 1953); see also *Butler v. State*, 509 S.W.2d 873 (Tex.Crim.App. 1974); *Powers v. State*, 508 S.W.2d 377 (Tex.Crim. App. 1974).

1. Reasons for Rule:

a. Inherently prejudicial;

b. Confuses the issues;

c. Forces the defendant to defend himself against charges of which he had not been notified;

d. See 1 Charton, *Criminal Evidence*, (12th ed.), Sec. 232; 22A C.J.S. *Criminal Law*, Sec. 682; *Crass v. State*, 30 Tex.App. 480, 17 S.W. 1096 (Tex.Crim.App. 1891).

2. See Judge Odom's excellent opinion in *Albrecht v. State*, 486 S.W. 2d 97 (Tex.Crim.App. 1972) for a treatment of the rule and its exceptions.

B. Exceptions to the Rule:

1. Relevance:

Extraneous offenses committed by the accused are admissible where such evidence is material and relevant to a contested issue in the case. *Howard v. State*, 36 S.W. 475 Crim.App. 1896); *Jones v. State*, 481 S.W.2d 900 (Tex.Crim.App. 1972).

2. Relationship:

A relationship between the extraneous offense and the evidence necessary to prove the accused committed the crime charged must be shown. *Spillman v. State*, 44 S.W. 149 (Tex.Crim.App. 1898); *Powell v. State*, 478 S.W.2d 95 (Tex.Crim. App. 1972).

3. Connection:

An accused's connection with an extraneous offense must be shown with some degree of certainty before evidence of that offense can come in, assuming it is relevant. *Fentis v. State*, 534 S.W.2d 676 (Tex.Crim.App. 1975).

4. Examples:

a. To show context in which the criminal act occurred ("res gestae"):

(1) *Hernandez v. State*, 484 S.W. 2d 754 (Tex.Crim.App. 1972): Defendant charged with possession of heroin. Evidence showed quantities of heroin and paraphernalia seized at time of arrest. Admissible to prove circumstances surrounding arrest.

(2) *Jones v. State*, 471 S.W.2d 413 (Tex.Crim.App. 1971): Defendant charged with robbery by assault. Three months after assault, defendant was arrested while driving without a license in a stolen car. Admissible to prove circumstances surrounding arrest.

(3) 4 Branch's Ann. P.C., 2nd Ed., Sec. 2255, p. 618: Where the offense is one continuous transaction, or another offense is a part of the case, or blended or closely interwoven therewith, proof of all facts is proper.

b. To circumstantially prove identity where the state lacks direct evidence on this issue:

(1) *Wyatt v. State*, 114 S.W. 812 (Tex.Crim.App.1908): Where the prosecution lacks *direct* evidence on the issue of identity, extraneous similar offenses committed by the accused are admissible if the evidence conclusively shows that whoever attempted the previous similar offenses did commit the offense under consideration.

(2) Exception to the Exception —Similarity:

(a) *Cameron v. State*, 530 S.W.2d 841 (Tex.Crim.App. 1975): An extraneous offense is admissible when offered on the issue of identity only: (1) if identity is a controverted issue; and, (2) if there are distinguishing characteristics common to both the extraneous offense and the offense for which the defendant is on trial.

(b) *Ford v. State*, 484 S.W. 2d 727 (Tex.Crim.App. 1972): An extraneous offense is admissible only if there are some distinguishing characteristics common to both. These include proximity in time and place, mode of commission, and mode of dress. Something that sets it apart from its *class or type* of crime in general and marks it distinctively in the same manner as the principal crime is necessary.

(c) Examples:

i. *Robinson v. State*, 508 S.W.2d 631 App.1974): Both offenses occurred in the early part of the night in stores in San Antonio where there was only one employee; the robbers were two black men, one of whom had a .38 revolver, and the appellant was the leader in both instances.

ii. *Poage v. State*, 507 S.W. 2d 789 (Tex.Crim.App. 1974): The methods of arranging the sales of marijuana were similar, as were the prices and parties involved.

iii. *Mitchell v. State*, 503 W. 2d 562 (Tex.Crim. App. 1974): A pistol was used in each offense; each was committed on a person entering a car; the victim was first told to get into the car, then put into the trunk; and, the assaults were committed by two men with Afro haircuts and occurred within a short time period.

iv. *Devonish v. State*, 500 S.W.2d 800 (Tex.Crim. App. 1973): The offense sought to be used

and the one for which defendant was on trial were committed at approximately the same time of day, by a black man upon white women *alone in their apartments*, in the same neighborhood, within a week of each other, and were assaults showing motives of rape and robbery.

c. To prove scienter, where intent or guilty knowledge is an essential element of the state's case and cannot be inferred from the act itself:
   (1) *Barnes v. State*, 503 S.W.2d 267 (Tex.Crim.App. 1974): Theft and sale of other automobiles were properly admitted to prove knowledge and intent of the accused who was charged with felony theft and sale of a stolen automobile.
   (2) *Arnott v. State*, 498 S.W.2d 166 (Tex.Crim.App. 1973): Since knowledge is an element in possession of narcotic cases, evidence that the accused has sold the drug in the past is admissible, but only in cases where the evidence is such that knowledge cannot be readily inferred.
   (3) *O'Brien v. State*, 376 S.W.2d 833 (Tex.Crim.App. 1964): Commissions of other crimes or transactions may be shown only when the intent accompanying the act is equivocal, or where intent otherwise becomes an issue in the trial.

d. To prove malice or state of mind when malice is an essential element and cannot be inferred from the act:
   (1) *McArthur v. State*, 105 S.W. 2d 227 (Tex.Crim.App.1937): Defendant beat, stomped and choked a person to death. Evidence of extraneous offenses prior to conduct causing death which indicated the defendant was drunk, quarrelsome, and in a threatening mood was admissible to show motive, intent or state of mind.
   (2) *Albrecht v. State*, 486 S.W.2d 97 (Tex.Crim.App. 1972): Fingerprints of the accused on forged checks other than the one being prosecuted were admissible to prove scienter. Collateral offenses which form a part of the same continuing criminal design as the offense in question are admissible as a part of the state's main case.

e. To show the accused's motive, particularly where the commission of the offense at bar is either conditioned upon the commission of the extraneous offense or such extraneous offense is a part of a continuing plan or scheme of which the crime on trial is also a part:
   (1) *Jones v. State*, 376 S.W.2d 842 (Tex.Crim.App. 1964): Extraneous transactions of pickpocket were admitted to show the common scheme and intent of defendant in making physical contact with the complaining witness.
   (2) *Hammonds v. State*, 500 2d 831 (Tex.Crim.App.1973): State's theory was that accused and another were principals in a scheme whereby one distracted the cashier while the other slipped money from the open cash register. State was allowed to show similar offenses within a space of a few hours to demonstrate the common scheme of appellant's operation, and unlawful intent shared with codefendant.
   (3) *Eldridge v. State*, 537 S.W.2d 257 (Tex.Crim.App. 1976): A rape case similar to one being tried was not admissible to show motive, intent, scheme or design where there was no defense testimony and the prosecutrix was unimpeached.

f. To refute defensive theory raised by the accused:
   (1) Identity:
   (a) *Ferrell v. State*, 429 S.W. 2d 901 (Tex.Crim.App.1968): Permissible where alibi defense offered.
   (b) *Parks v. State*, 437 S.W.2d 554 (Tex.Crim.App.1969): Witness who identified defendant at trial gave a prior sworn statement that she was unable to identify the assailant (prior inconsistent statement).
   (c) *Hernandez v. State*, 532 S.W.2d 612 (Tex.Crim.App. 1976): Defendant denied committing the sexual abuse alleged in the indictment. On cross-examination, the prosecution was permitted to ask about a similar incident. Prosecutor did not have to prove up extraneous offense. Burden was on defense to show bad faith.
   (d) *Sanchez v. State*, 492 S.W. 2d 530 (Tex.Crim.App.1973): issue of the identity of the person who possessed and threw the narcotics toward the commode and flushed the toilet, fact that defendant had previously possessed heroin was admissible.
   (2) Intent:
   (a) *Allen v. State*, 533 S.W. 2d 352 (Tex.Crim.App.1976): In aggravated assault against a peace officer case, the accused testified he never struck *any* peace officer. The prosecution was permitted to prove the accused intended to strike the officer.
   (b) *Grayson v. State*, 481 S. W.2d 859 (Tex.Crim.App. 1972): Murder case. Defendant offered defense of lack of intent to rob or murder anyone. State then proved extraneous similar robbery. Admissible to refute defensive theory.
   (c) *Perbetsky v. State*, 429 S. W.2d 471 (Tex.Crim.App. 1968): Appellant denied rape, but also stated that he was too drunk to know what was happening. Testimony relative to an extraneous offense committed shortly before charged offense admissible.
   (d) *Parnell v. State*, 312 S.W. 2d 506 (Tex.Crim.App.1958): Abortion case, the defensive theory being that defendant only performed proper medical acts. State was allowed to offer proof of other abortions.
   (3) Self Defense:
   (a) *Halliburton v. State*, 528 S.W.2d 216 (Tex.Crim.App. 1975): Murder case. Defendant testified that she acted in self-defense. Prosecution permitted to prove that on another occasion the defendant shot another man under circumstances which clearly showed that she had not acted in self-defense. The presence or absence of similarity was not entirely determinative of the admissibility of the extraneous offense.
   (b) *Lolamaugh v. State*, 514

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S.W.2d 758 (Tex.Crim.App. 1974): Defense of self-defense was rebutted by proof that the accused had a tendency to shoot his wife's lovers.

(4) Condition of Mind:
(a) *Fite v. State*, 290 S.W. 2d 897 (Tex.Crim.App.1956): Testimony was elicited that accused smoked several marijuana cigarettes just prior to charged rape. Admissible to explain condition of mind (inability to recall incidents).

C. **Other Exceptions:**

1. **Confessions:**
   a. State may introduce the whole confession, even though it embraces an extraneous offense, if the offense tends to connect the accused with the crime for which he is on trial. *Coomer v. State*, 260 S.W.568(Tex.Crim. App. 1924).
   b. Evidence in a confession tending to show that the appellant committed another offense, wholly unconnected with that for which he is on trial, should not be admitted. *Martinez v. State*, 134 S.W.2d 276 (Tex. Crim.App. 1939); *Alvarez v. State*, 511 S.W.2d 493 (Tex. Crim.App. 1973).
2. **Ineest and Rape Cases:**
   a. In matters of incest and rape under the age of consent, it is admissible to show relationship between victim and accused, including other extraneous offenses. *Williams v. State*, 490 S.W.2d 604 (Tex.Crim. App. 1973); *Johns v. State*, 236 S.W.2d 820 (Tex.Crim. App. 1950); *Gephart v. State*, 249 S.W.2d 612 (Tex.Crim. App. 1952).
3. **Flight:**
   a. Extraneous offenses which show flight are admissible. *Woods v. State*, 480 S.W.2d 664 (Tex.Crim.App. 1972); *Israel v. State*, 258 S.W.2d 82 (Tex.Crim.App. 1953).
   b. Where flight is motivated by extraneous offense, the evidence is not admissible. But where the flight and the extraneous offense were related to each other and motivated by consciousness of guilt for primary offense, it is admissible. *Fentis II v. State*, ___ S.W. 2d ___ (Tex.Crim.App.1976).
   c. The evidence should show some act or instance of running away. The mere fact that the accused is found somewhere else is insufficient. There must be some circumstances to show accused is moving out or running. *Jones v. State*, 481 S.W.2d 900 (Tex. Crim.App. 1972).
4. **Nonresponsive Answer:**
   a. If state's witness "inadvertently" relates an extraneous offense in a nonresponsive answer, instruction to disregard can cure. *Cazares v. State*, 488 S.W.2d 110 (Tex.Crim.App. 1972); *Fisher v. State*, 493 S.W. 2d 841 (Tex.Crim.App. 1973).
   b. But see J. Douglas' dissent in *Allen v. State*, 513 S.W.2d 556 (Tex.Crim.App. 1974): ". . .When a sergeant in a police department with 11 years experience is asked a question, his answer should be responsive. . ."
5. **"In Trouble":**
   a. Where a witness leaves a false impression of his trouble with the police, the prosecution may impeach with real "trouble" including mere arrests. *Reese v. State*, 531 S.W.2d 638 (Tex.Crim.App. 1976).
   b. Describing defendant as being real good-natured does not open up character. *Odum v. State*, 533 S.W.2d 1 (Tex. Crim.App. 1975).

D. **Other Rules:**

1. **Relevant to Issue:**
   a. *Hernandez v. State*, 484 S.W. 2d 754 (Tex.Crim.App. 1972): In heroin possession case, trial court properly excluded evidence of possession of stolen property at time of arrest.
   b. *Powell v. State*, 478 S.W.2d 95 (Tex.Crim.App. 1972): In felony theft case, it was error to allow state to prove defendant had "needle tracks" on his arm at time of arrest (in absence of some affirmative link between theft and alleged addiction).
2. **Remoteness:**
   a. *Robledo v. State*, 480 S.W.2d 401 (Tex.Crim.App. 1972): In forgery case, it was error to introduce evidence of forgery 4 years prior to present case, since it was too remote in time to show intent.
   b. *Voekel v. State*, 501 S.W.2d 313 (Tex.Crim.App. 1973): Where state showed a continuous series of transactions, the extraneous offense committed 8 years prior to present offense was admissible.
   c. *McDonald v. State*, 513 S.W.2d 44 (Tex.Crim.App. 1974): Prior offense one year before charged offense, plus others near date of primary offense, is sufficient to show a continuing course of conduct.
   d. *Ex Parte Flores*, 537 S.W.2d 458 (Tex.Crim.App. 1976): Conviction in 1957 for murder and release from prison in 1962. Two CPW convictions and one DWI conviction occurred before charged case. The 1957 conviction was held too remote to be used for impeachment.
   e. *James v. State*, ___ S.W.2d ___ (#52,861; 6-29-77): Under all the circumstances of the case, the remoteness of the extraneous offense, with no evidence of intervening similar offenses sufficient to show a continuing course of conduct, caused the extraneous offense to be inadmissible (2 years-and-9 months).
3. **Rape:**
   a. *Jackel v. State*, 506 S.W.2d 229 (Tex.Crim.App. 1974): In a rape case where consent defense offered, the fact that defendant had raped another woman had no tendency to prove that another woman did not consent. See also *Caldwell v. State*, 477 S.W.2d 677 (Tex. Crim.App. 1972).
4. **Identity:**
   Where state seeks to admit extraneous offense, the state must be prepared to prove the accused committed the same. *Tomlinson v. State*, 422 S.W.2d 474 (Tex.Crim. App. 1968).
5. **Pending Indictment:**
   Tex. Code Crim. Proc. Ann. Art. 38.29 (1965) expressly prohibits the use of pending indictments for impeachment purposes. *Fentis v. State*, 528 S.W.2d 590 (Tex. Crim.App. 1975).
6. **Coconspirator:**
   Extraneous offense committed by coconspirator after termination of conspiracy was erroneously admitted. *Delgado v. State*, ___S.W.2d ___(Tex.Crim.App. 1977).
7. **Cross-Examination:**
   a. Evidence of extraneous offenses may become admissible where the effectiveness of the state's evidence, though uncon-

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tradicted by other evidence, is completely undermined by defense cross-examination. *Caldwell v. State,* 477 S.W.2d 877 (Tex.Crim.App. 1972). It is not asking of questions, but the responses of the witness which are determinative.

8. **Some/Not All Rule:**
   a. The fact that some extraneous offenses are admissible does not mean all are admissible. *Thrush v. State,* 515 S.W.2d 122 (Tex.Crim.App. 1974).
9. **Opening Up:**
   If state opens up, then defendant can contradict without waiving error. *Alvarez v. State,* 511 S.W.2d 493 (Tex.Crim.App. 1974).
10. **Relevancy/Prejudice:**
   a. In a circumstantial evidence case a prior somewhat similar act was too prejudicial to be admitted, even though it was slightly relevant. *Mallicote v. State,* 548 S.W.2d 42 (Tex. Crim.App. 1977).
   b. *Redd v. State,* 522 S.W.2d 890 (Tex.Crim.App. 1975): Four state witnesses positively identified accused. A fifth stated during cross that she was not sure, and had not identified him at a line-up. State then introduced two extraneous offenses. No defense testimony. Reversed, noting that cross-examination of one of the witnesses was not sufficient to raise the issue of identification since four witnesses positively identified the defendant.
11. **Statutes:**
   a. Tex. Penal Code Ann., Sec. 31.03(c)(1):
      (1) Evidence that the actor has *previously* participated in recent transactions other than, but similar to, that upon which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge and intent are raised by actor's plea of not guilty.
      (2) Applicable only in receiving and concealing type cases.
   b. Tex. Code Crim. Proc. Ann., Art. 38.29 (1965):
      The fact that an accused (or witness) bas been charged with an offense shall not be admissible for impeachment purposes. There must be a final conviction.

II. PUNISHMENT STAGE:

A. Statute:

1. Tex. Code Crim. Proc. Ann., Art. 37.03(3) (1965):
   "(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record or a probated or suspended sentence that has occurred prior to trial or any final conviction material to the offense.

   * * * * *

   "(c) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence."

B. Cases:

1. *Sherman v. State,* 537 S.W.2d 262 (Tex.Crim.App. 1976); *Mullins v. State,* 492 S.W.2d 277 (Tex.Crim. App. 1973): Statute does not permit state to show offenses not resulting in final convictions. *Morgan v. State,* 515 S.W.2d 278 (Tex.Crim.App. 1974): Conviction must be technically final—formal judgment and sentence are required.
2. *Valerio v. State,* 494 S.W.2d 892 (Tex.Crim.App. 1973): While the general rule is that specific acts of misconduct which have not resulted in final convictions cannot be admitted, evidence relevant to a fair determination of the application for probation is admissible. Possession of a large amount of heroin and denial of knowing possession, permitted "biggest narcotic dealer in Houston" question.
3. Prior convictions used at the punishment hearing are not subject to the remoteness rule. *Mendoza v. State,* 552 S.W.2d 444 (Tex. Crim.App. 1977).

III. "HAVE YOU HEARDS":

A. It is error for the prosecution when asking "have you heard" questions to imply or assert as a fact that the accused has committed another offense. *Lovilotte v. State,* 550 S.W.2d 74 (Tex.Crim.App. 1977); *Odum v. State,* 533 S.W.2d 1 (Tex.Crim.App. 1975); *Pitcock v. State,* 324 S.W.2d 855 (Tex.Crim.App. 1959).

B. If the "have you heard" question, through its structure and excessiveness of detail, implies that a criminal act occurred, the question is improper. *Moffett v. State,* ___S.W.2d ___ (#51,841; 9-14-77) (State's Motion for Rehearing).

IV. TRIAL AIDS:

A. Motion for Discovery:

1. **Request:**
   "The nature of the alleged extraneous offenses purportedly committed by this defendant, including date, time, place and complainant, which could become admissible to show the context in which the alleged criminal act occurred, to show circumstantially the necessary elements of the charged offense, to prove scienter, to prove motive, or to refute the defensive theory of not guilty."
   a. If the state already knows your defense, go ahead and notify the state in the motion for discovery.
2. **Grounds:**
   The grounds for the motion are that the defendant has the right to defend against the extraneous offenses, it would cause undue delay in the trial if he must wait until the middle of the trial to prepare his defense, and it denies him the right to counsel.
   a. If motion denied, when extraneous offenses offered, move for 48-72 hour adjournment to prepare defense.
      (1) Form motion for continuance.
   b. If motion for continuance denied, present evidence at motion for new trial as to what additional witness would say (can do by affidavit). Make sure you offer your affidavit and defendant's affidavit as to the reason why evidence not presented at trial.

B. Motion to Disclose Existence of Extraneous Offense:

1. **Constitutional Grounds:**
   a. Texas:
      (1) Art. 1, Sec. 10;
      (2) Art. 1, Sec. 19.
   b. United States:
      (1) Sixth Amendment;
      (2) Fourteenth Amendment.
2. **Request:**
   Request state to furnish the accused a statement of other offenses with same detail as required of an indictment.
   a. See *Hoagland v. State,* 494 S. W.2d 186 (Tex.Crim.App. 1973), J. Odom's concurring opinion:
      ". . .Witnesses should be dis-

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EXTRANEOUS OFFENSES

closed if there is a likelihood they will be used at any stage of the trial. . ."

b. *State v. Spreigl*, 139 N.W.2d 167 (Minn.S.Ct. 1965); *State v. Prieur*, ___ S.2d ___ (La.S.Ct. (1973), 12 Cr.L. 2512.

C. Motion in Limine:

1. Prior convictions and extraneous offenses.
2. Request state not to mention, refer to or allude to in any way before the jury or jury panel until a hearing is held outside the presence of the jury to determine materiality and prejudice.
3. This motion will not be sufficient alone. You must still object if state ignores if you wish to preserve error. If violated, it is used to show prosecutorial misconduct and defense counsel's effort to prevent error. If offense admissible, probably not error.

D. Trial Objection:

1. Questions clearly designed to impeach the defendant with clearly inadmissible arrests, none of which were shown to result in extraneous offenses would have been error had the defendant's attorney objected. *Stutes v. State*, 530 S.W.2d 309 (Tex.Crim.App. 1976).
2. "Objection, Your Honor, the testimony is in violation of the extraneous offense rule."
3. Make sure you "except" to an adverse ruling.
4. If you know it's coming, prepare a "Trial Objection" in which you state in writing the basis of your objection and a request that you be permitted to refer to it as "Trial Objection" instead of restating it in detail before the jury.

E. Jury Instruction:

1. "You are instructed that if there is any testimony before you in this case regarding the defendant's having committed (an) offense(s) other than the offense alleged against him in the indictment (or information) you cannot consider said testimony for any purpose unless you find and believe from the evidence beyond a reasonable doubt that the defendant committed such other offense(s), if any were committed, and even then you may only consider the same in determining the [intent, identity, motive, etc.], of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment (information) herein, and for no other purpose."
   a. If part of res gestae, not required. *Sanchez v. State*, 492 S.W.2d 530 (Tex.Crim.App. 1973).
   b. If an element of the offense charged, not required. *Lacy v. State*, 424 S.W.2d 929 (Tex. Crim.App. 1967). See *Kirkpatrick v. State*, 515 S.W.2d 289 (Tex.Crim.App. 1974) where 275 extraneous offenses which constituted a chain of events to show ultimate conversion did not require limiting charge.
   c. Where the evidence could only be used to show intent, motive, etc., the failure to limit is not error. *McCaleb v. State*, 537 S.W.2d 728 (Tex.Crim.App. 1976). ■

FEDERAL LEGISLATION

JUDICIAL TENURE ACT

No federal judge has been impeached by the House of Representatives in the last 40 years; only nine federal judges have ever been impeached in the 200-year history of this country. Hearings have begun in Washington on **S 1423**, which would provide a mechanism, except for Justices of the Supreme Court, for the removal or censure of judges and for the involuntary retirement of federal judges. Under present law, the federal judiciary serves "during good behavior"; under the proposed bill, the mechanisms for removal are triggered by "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

BROADER MAGISTRATES' POWERS

Hearings have begun in the House of Representatives on the **S 1613**, which passed in the Senate last July. **S 1613** would remove the $1,000.00 fine limitation on the criminal jurisdiction of magistrates and would permit magistrates to try misdemeanor jury trials. Consent of a defendant to have the magistrate try the case would be required only where the possible penalty of imprisonment exceeds six months. On the civil side, the bill would permit magistrates, with consent of the parties, to try any jury or non-jury case regardless of the issue or the amount of money or property involved. Appeal from the judgment of the magistrate could be taken to a district court judge and then to the court of appeals. However, by agreement of the parties, an appeal from the judgment of the magistrate could be taken directly to the court of appeals.

ADDITIONAL FEDERAL JUDGESHIPS

In May the Senate passed **S11**, which created 111 new district court judgeships and 35 new appellate seats and provided for a new 11th Circuit consisting of Texas and Louisiana. The House committee began work on the bill in September with hearings, and markup took place in mid-October, but the bill is in a revised form, with only 81 new district court judgeships and 34 new appellate seats, and the split of the present 5th Circuit may be deleted. At the time of this writing, controversy still continues on the split and it may be eliminated from **S11** in the House and introduced as a separate measure. In any case, House action is not expected until early next year. ■

News & Notes

NEW MEMBERS

The *VOICE* of TCDLA is pleased to say "welcome" to the new members joining since the last issue of the journal:

Curtis A. McDaniel, Jr.	Hurst
Jerrold R. Davidson	Brownsville
Kenneth A. Black	Amarillo
Carson Smith	Amarillo
James L. Poland	Dallas
Miles H. Brown	Dallas
William E. Trantham	Denton
Joseph S. Chagra	El Paso
Andres Perez-Chaumont	Houston
William Baumann	Amarillo

There was a total of three student members in the same period.

TEXAS CONTROLLED SUBSTANCES SCHEDULES AS THEY REALLY ARE

The Texas Controlled Substances Act was created in 1975. Since that time the Schedules in that Act have been amended and changed, but the Legislature has not seen fit to pass the necessary legislation; if they did, this is the way the Schedules would look:

PURSUANT TO SECTION 2.16 OF ARTICLE 4476-15, V.C.S. THE TEXAS CONTROLLED SUBSTANCES ACT SCHEDULES ARE HEREBY RE-PUBLISHED BY FILING WITH THE SECRETARY OF STATE AUGUST 31, 1977

Sec. 2.03. SCHEDULE I. (a) Schedule I shall consist of the controlled substances listed in this section.

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Allylprodine;
(2) Benzethidine;
(3) Betaprodine;
(4) Clonitazene;
(5) Diampromide;
(6) Diethylthiambutene;
(7) Difenoxin;
(8) Dimenoxadol;
(9) Dimethylthiambutene;
(10) Dioxaphetyl butyrate;
(11) Dipipanone;
(12) Ethylmethylthiambutene;
(13) Etonitazene;
(14) Etoxeridine;
(15) Furethidine;
(16) Hydroxypethidine;
(17) Ketobemidone;
(18) Levophenacylmorphan;
(19) Meprodine;
(20) Methadol;
(21) Moramide;
(22) Morpheridine;
(23) Noracymethadol;
(24) Norlevorphanol;
(25) Normethadone;
(26) Norpipanone;
(27) Phenadoxone;
(28) Phenampromide;
(29) Phenomorphan;
(30) Phenoperidine;
(31) Piritramide;
(32) Proheptazine;
(33) Properidine;
(34) Propiram;
(35) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;
(2) Acetyldihydrocodeine;
(3) Benzylmorphine;
(4) Codeine methylbromide;
(5) Codeine-N-Oxide;
(6) Cyprenorphine;
(7) Desomorphine;
(8) Dihydromorphine;
(9) Drotebanol;
(10) Etorphine (except hydrochloride salt);
(11) Heroin;
(12) Hydromorphinol;
(13) Methyldesorphine;
(14) Methyldihydromorphine;
(15) Morphine methylbromide;
(16) Morphine methylsulfonate;
(17) Morphine-N-Oxide;
(18) Myrophine;
(19) Nicocodeine;
(20) Nicomorphine;
(21) Normorphine;
(22) Pholcodine;
(23) Thebacon.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxyamphetamine (Some trade or other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA.);

(2) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA.);

(3) 4-methoxyamphetamine (Some trade or other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine; PMA.);

(4) 5-methoxy-3,4-methylenedioxy amphetamine;

(5) 4-methyl-2,5-dimethyoxyamphetamine (Some trade and other names: 4-methyl-2,5-dimethoxy-alpha-methylphenethylamine; "DOM" and "STP".);

(6) 3,4-methylenedioxy amphetamine;

(7) 3,4,5-trimethoxy amphetamine;

(8) Bufotenine (Some trade and other names: 3-(beta-Dimethylaminoethyl-5-hydroxyindole;3-(2-dimethylaminoethyl)-5-indolol; N,N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine.);

(9) Diethyltryptamine (Some trade and other names: N,N-Diethyltryptamine, DET.);

(10) Dimethyltryptamine (Some trade and other names: DMT.);

(11) Ibogaine (Some trade or other names: 7-Ethyl-6,6,beta,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2': 1,2] azepino [5,4b] indole; tabernanthe iboga.);

(12) Lysergic acid diethylamide;

(13) Marihuana;

(14) Mescaline;

(15) Peyote

Meaning all parts of the plant presently classified botanically as *Lophophora Williamsii Lemaire*, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or extracts.

(16) N-ethyl-3-piperidyl benzilate;

(17) N-methyl-3-piperidyl benzilate;

(18) Psilocybin;

(19) Psilocyn;

(20) Tetrahydrocannabinols

Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

delta-1 cis or trans tetrahydrocannabinol, and their optical isomers.
delta-6 cis or trans tetrahydrocannabinol, and their optical isomers.
delta-3,4 cis or trans tetrahydrocannabinol, and its optical isomers.

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions are covered.)

(21) Thiophene Analog of Phencyclidine (Some trade or other names: 1-[1-(2-thienyl) cyclohexyl] piperidine; 2-Thienyl Analog of Phencyclidine; TPCP.).

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation.

(1) Mecloqualone.

TEXAS CONTROLLED SUBSTANCES SCHEDULES

Sec. 2.04. SCHEDULE II. (a) Schedule II shall consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding naloxone and its salts, and excluding naltrexone and its salts, but including the following:

(A) Raw opium;
(B) Opium extracts;
(C) Opium fluid extracts;
(D) Powdered opium;
(E) Granulated opium;
(F) Tincture of opium;
(G) Codeine;
(H) Ethylmorphine;
(I) Etorphine hydrochloride;
(J) Hydrocodone;
(K) Hydromorphone;
(L) Metopon;
(M) Morphine;
(N) Oxycodone;
(O) Oxymorphone;
(P) Thebaine.

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) of this subsection, but not including the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine;

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(c) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine;
(2) Anileridine;
(3) Bezitramide;
(4) Dihydrocodeine;
(5) Diphenoxylate;
(6) Fentanyl;
(7) Isomethadone;
(8) Levomethorphan;
(9) Levorphanol;
(10) Metazocine;
(11) Methadone;
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid;
(14) Pethidine;
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
(18) Phenazocine;
(19) Piminodine;
(20) Racemethorphan;
(21) Racemorphan.

(d) Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, including its salts, isomers, and salts of isomers;

(3) Methylphenidate and its salts; and

(4) phenmetrazine and its salts.

(e) Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) methaqualone;
(2) amobarbital;
(3) secobarbital;
(4) pentobarbital.

Sec. 2.05. SCHEDULE III. (a) Schedule III shall consist of the controlled substances listed in this section.

(b) Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital or any salt thereof and one or more active medicinal ingredients which are not listed in any schedule;

(2) Any suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository. ■

(The balance of Schedule III and Schedules IV and V will be published in the December issue of the *VOICE*.)

NADER STRIKES THE BAR

"Bringing the Bar to Justice: A Comparative Analysis of Six Bar Associations" is based on a two-year study written for Ralph Nader by Mark Green, Director of Public Citizens' Congress Watch, and two 1977 Harvard Law grads. It focuses on six Eastern Associations, the Massachusetts State Bar, the Boston, New York, Philadelphia, and Washington, D.C. City Bar Associations.

The thrust of the report is an attack on the internal procedures of the six state and city bar associations. They are primarily criticized for their inbred approaches to issues affecting the livelihood of their memberships—prepaid legal plans, lawyer competence and discipline, pro bono programs, and judicial selection and evaluation. ■

NEWS & NOTES from p. 21

ATTORNEY GENERAL OPINIONS

H-1058
RQ-1670

Although the circulation of a list of "known shoplifters" by a retail merchants association would appear to violate no provision of Texas penal law, it might give rise to a civil action for damages on the basis of either libel or invasion of privacy if it can be shown that the characterization was false. 9/21/77

H-1069
RQ-1658

A justice of the peace may move his residence to a different precinct within the county without vacating his office. 10/11/77

H-1070
RQ-1651

A proposed financial disclosure ordinance would not, if enacted by a home rule city, conflict with state law or violate the constitutional rights of city officials and candidates required to file financial statements. Requiring the attachment of portions of an official's or candidate's income tax return to the financial statement would not violate federal law. An attorney or physician may in some instances reveal large fees received from clients or patients without violating ethical or legal obligations. Public access to financial disclosure statements filed with the city secretary would be controlled by the Texas Open Records Act. Whether such an ordinance as has been suggested should be enacted is a question of policy which cannot be addressed in the context of an attorney general opinion. 10/12/77

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, Suite 211, 314 West 11th Street, Austin, Texas 78701

Some of the best legal minds

. . . 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.

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- Use of TCDLA Brief Bank service.
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- 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,
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TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION