VOICE for the DEFENSE

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Texas
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Lawyers
Association

MAY 1978

Editor's Corner

A couple of weeks ago I had an experience which I believe merits sharing. Most of us, in our practice, have had clients who required our assistance *after* final conviction and affirmance. [And, if your track record is anything like mine, lately, *most* are in that category.] At one time or the other we've had occasion to represent parolees in revocation matters. I, and, I suspect, most of you, have viewed these endeavors as extralegal duties, and have not attached the importance to them they deserve. My awakening came when, after I had presented a retained case to the commissioners, Bill LaRowe, of the State Bar Indigent Parolee program, asked that I assist indigent parolees whose hearings were scheduled. I agreed, and proceeded to interview inmates who were challenging their parole revocations. To the man, these citizens had been deserted by their trial counsel. The basis of their revocations ranged from being in beer joints to serious felony infractions. Some were challenging revocations of two-year parole terms in the face of recent habitual convictions. But *all* were floundering in a system which they neither understood nor trusted. All were facing loss of liberty, and were doing it without the effective assistance of counsel.

Bill, and the counsel for Indigent Parolees Program, have done much to alleviate the injustices that permeate the revocation process. Short-notice counsel has got to be better than no counsel at all. But, I believe the Criminal Bar has a duty in this area to provide some continuity of representation to clients who, in spite of our best efforts, take the trip and end up parties to a contract of adhesion called a "parole agreement." If the criminal justice system is to function with any degree of success, the penal/rehabilitative arm must have a higher degree of success. Recidivism is high—too high. My experience with the Parolees has led me to suspect that a great many of the repeat customers at TDC are there because they found no support in the free world. . . and, just as many because the revocation process was brought to bear on them with chilled bureaucratic efficiency, unbuffered by competent counsel.

While serious violations of penal law by a parolee must lead, inevitably, to revocation, many of the revocation proceedings involve nothing more than failure to abide by specific terms of the "parole agreement." In those instances counsel can perform a service. Most of these infractions are explainable, and, when properly explained, excusable. I would urge you to maintain contact with your clients who do become parolees, and be available to assist them when their status is challenged.

Bill LaRowe has another program aimed at assisting parolees, which I would urge you to participate in. It involves no legal assistance, only moral and social support. The Parole Volunteer program simply gets lawyers involved with parolees in a counseling and supportive role, to be available to advise the parolee on his everyday problems, to assist him in his adjustment process, and to be a stabilizing influence for him.

I've asked Bill to write a short article on his programs for inclusion in the *Voice*. I hope it makes this issue. Read it and get involved.

News & Notes

NEW REPRESENTATIVE

Hector Uribe of Brownsville has been elected to the Texas House of Representatives to replace Ruben M. Torres who has resigned.

MOVE FOR MEMBER

Austin attorney and long-time TCDLA member Cameron Cunningham has moved from Austin and is now practicing law at 724 Willow Road, Menlo Park, California 94025.

CORRECTION OF PRIOR ARTICLE

In the March 1978 issue of the *VOICE for the Defense* at page 27 an article appeared concerning Sam Houston Clinton, Marvin O. Teague, Richard Thornton, Pat Priest, and Maurice Campbell, all of whom are running for office. Contrary to what was stated in that article Mr. Campbell of Waco is not a charter member of TCDLA and on the Board. Mr. Campbell is a member of TCDLA; it is his partner, W. V. Dunnam, who is on the TCDLA Board and a charter member.

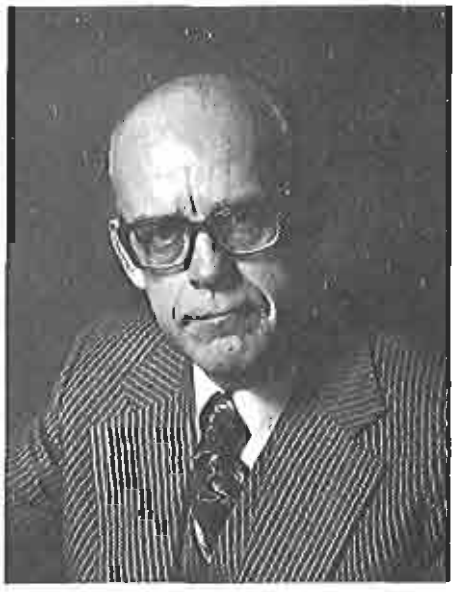
TCDLA BOARD RESOLUTION ON RECENT BAR REFERENDUM

Immediately prior to the recent bar referendum all the regular members of TCDLA received a copy of a resolution passed by TCDLA's Board of Directors. This resolution in support of the Board of Directors of the State Bar of Texas was passed by the TCDLA Board in a telephone poll during the week preceding the bar referendum.

The envelope you received and the resolution itself carried the admonition "not printed or mailed at State Bar expense" and this has led to confusion and the false assumption that TCDLA paid for the mailing you received.

The printing of the resolution and envelopes for the mailing and the postage itself were *not* paid for by TCDLA. All the expenses were paid by a special fund created by the James Watson Inn of Former Officers and Directors.

President's Report



I have often said that there is at least a little bit of whore in all of us and I am no exception. It has always been upsetting to me that an association of lawyers would rely npon public funds for the association to progress. And yet, like the whore, I found myself in the posture of making an application for Criminal Justice funds for TCDLA, and in the alternative, in joining in an application with the Texas Bar Association as President of our Association. The former was denied and the latter will undoubtedly be granted. In this instance, we had our hand out directly. Sometimes the indirect approach amounts to the same. In completing the State Bar building, we, in the Texas Bar Association, were relying on contributions in large measure by some of our bigger corporations. We normally don't stop to think of this as public funding but when the public is deprived of such funds because of these tax deductions—the result is the same—a handout. People over the Nation are frustrated with their utter inability to cope with the excessive taxation and extravagant spending. Frustrated people become selfish, taking the attitude, "Damn the government, I want the benefits and to hell with anyone else." What we are really saying here is "To hell with our children and our children's children."

I am proud to be a lawyer because of the relative independence our profession should reflect. We should be among the last persons to have a hand out. We project the concept of freedom—we fight for human rights and freedom. There can be, however, no freedom without responsibility. We criticize the hippie and his utter lack of responsibility but when we go begging for public funds the only distinguishing difference is our vested suit.

What I am really saying is that we are losing our moral fiber and we are not alone. The number of tax protesters increases each year along with others cheating on their taxes. It is difficult to arrive at the extent of the loss each year, since the estimates vary from at least 13 billion to 150 billion annually. Even the high estimate may be too low according to some private economists. As our public servants have learned a long time ago, it is very easy to spend the money of others. In fact, they seem to look upon us as a bottomless well of funds. The well is going dry, revealing a potential collapse of our Nation.

From a selfish and pragmatic viewpoint we, as criminal lawyers, may benefit from this trend. When people are successful in cheating the government, they should have no hesitancy in cheating lesser victims in our own communities. How can they be successful? Ask IRS! Our tax system depends largely on voluntary compliance and the honesty of the taxpayer. Out of this inbreeding of lawlessness, we, along with the IRS investigators, will get more business. There will, however, come a time when these clients will have cheated on our fees or will have no money left and IRS will have no more agents. Then we will both run to the public trough only to find the money has run out.

Emmett Colvin, President
Texas Criminal Defense
Lawyers Association

65th LEGISLATURE

INTERIM CHARGE
to the
SELECT COMMITTEE ON DRUGS AND ALCOHOL ABUSE AND CONTROL

Pursuant to Rule 1, Section 8 of the Rules of the House, there is hereby appointed a Select Committee on Drugs and Alcohol Abuse and Control.

This Select Committee is directed to conduct in-depth studies, to take and receive testimony, and to pursue all possible research avenues in an effort to develop proposed legislation and other recommendations for the 66th Legislature designed to curb the spread of the use of illegal drugs and the abuse of alcohol. The committee will work on the premise that detection and cure of alcoholism and drug addiction at its early stages may lower the costs of later related illnesses and reduce the number of long-term abusers. The committee should deal with possible legislative measures designed to curtail the supply of illicit drugs into the Texas marketplace as well as revisions to the Texas Penal Code which would inhibit the distribution of such contraband. The committee should consider requirement of alcohol or drug-related coverage in health insurance plans; and of diagnostic and referral services and the state's proper role in providing assistance. Additionally, the committee should seek out innovative ways to handle abusers and how to best see to their treatment.

The following individuals are hereby appointed to serve on this Select Committee:

Rep. Robert Maloney, Dallas, Chairman
Rep. Robert Bush, Sherman,
Vice Chairman
Rep. Dave Allred, Wichita Falls
Rep. Roy Blake, Nacogdoches
Rep. Bill Caraway, Houston
Rep. Melchor Chavez, Harlingen
Rep. Wilhelmina Delco, Austin
Rep. W. S. "Bill" Heatly, Paducah
Rep. Chris Miller, Fort Worth
Rep. Danny Hill, Amarillo
Mrs. Beverly Heinrich, Houston
Mrs. Lynn Stafford, Lubbock
Mayor Sherrill Burba, Olney
Mayor R. D. Youker, Harlingen
Mr. Charles Worth Ward, Wichita Falls
Mr. B. F. McDonald, Austin*
Mr. M. C. Sullender*

*Ex-officio member

The Select Committee on Drugs and Alcohol Abuse and Control shall meet as necessary to pursue its activities of seeking answers to providing treatment of a decriminalized nature for public drunkenness and drug-related intoxication. I am hereby asking all State and local government entities to provide assistance, information and cooperation to this Select Committee in determining its recommendations.

PROSECUTORIAL COMPULSION OF DEFENSE-HIRED EXPERT TESTIMONY AND REPORTS*

*David L. Botsford***

CONCLUSION

(Please refer to the April issue of VOICE for the first part of this article.)

III. COMPULSION OF DEFENSE-HIRED EXPERT TESTIMONY AND PROSECUTORIAL DISCOVERY OF THEIR REPORTS

D. Effective Assistance of Counsel

Three arguments can be advanced for the proposition that prosecutorial attempts to obtain the testimony and reports of defense-hired experts, not called by the defense at trial, violate defendants' right to effective assistance of counsel: 1) the compulsion of defense-hired expert testimony interferes with the attorney-client privilege and therefore violates the Sixth and Fourteenth Amendments; 2) the compulsion of defense-hired expert testimony and discovery of reports prepared thereby violates the work product doctrine and therefore violates the Sixth and Fourteenth Amendments; and 3) the compulsion of defense-hired expert testimony and discovery of reports prepared thereby infringes on the right of mutual discovery and therefore violates the Sixth and Fourteenth Amendments.

As a general proposition, the Sixth Amendment right to counsel, which is applicable to the states through the Fourteenth Amendment, means the right to "effective assistance of counsel."[64] This right encompasses the right to adequate trial preparation by counsel which may necessitate the assistance of experts.[65] The protection of the right to effective assistance of counsel is the underlying basis for the arguments advanced below.

The first argument, that compulsory discovery in this context interferes with the attorney-client relationship, is supported by some federal cases which involved the use of psychiatric experts. Since it was noted above in section III (A) that the attorney-client privilege could only protect *testimony* of experts, if at all, this argument can only pertain to the expert's testimony.

In *United States v. Alvarez*,[66] a defense-hired expert, not called upon to testify at trial by defense counsel, was called to testify by and for the prosecution. The Third Circuit held that the expert's testimony was within the attorney-client privilege and therefore could not be compelled. Moreover, the Court rejected the government's argument that the defense had waived the privilege with regard to the non-testifying expert by raising, through the testimony of other experts, the defense to which the non-testifying expert would have testified for the defense [and to which the expert did in fact testify for the prosecution]. The court stated that:

> The effect of such a [waiver] rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosure made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.[67]

The court also noted that the defense counsel could properly assume that defensive expert testimony could not be compelled and cited Rule 28 (a) of the Federal Rules of Criminal Procedure [now Rule 706, Federal Rules of Evidence]. Rule 706, which provides for the appointment of experts by the court, states that such experts ". . .may be called to testify by the court or any party." Rule 706 (d), however, provides that nothing in this rule limits the parties in calling their own retained expert witnesses.[68] Moreover, the Advisory Committee's note to the rule states that:

> The ever present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The existence of Rule 706 and its ramifications demonstrates the absence of governmental necessity to call defense-hired experts and discover reports prepared thereby, since the prosecution can call both court appointed experts and their own retained experts to testify at trial.

On the other hand, a different conclusion was reached in *United States Ex. Rel. Edney v. Smith*.[69] There, a defense psychiatrist testified that the defendant was insane at the time of the commission of the alleged offense. The prosecution called in rebuttal a defense-retained psychiatrist who had not been called by the defense. The court initiated its inquiry by stating that:

> The extent to which the [attorney-client] privilege includes communications to a non-lawyer by the lawyer's client is determined by balancing two competing factors: 1) The need of the attorney for the assistance of the

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* The author would like to express his appreciation to Ms. Leslie Benitez, Briefing Attorney for Judge Brown and Judge Davis, Texas Court of Criminal Appeals, for her assistance in the preparation of this article.

**David L. Botsford, J.D., Southern Methodist University School of Law, 1977. Member, State Bar of Texas. Briefing Attorney for Judge Truman Roberts, Texas Court of Criminal Appeals, 1977-78. This article should not be construed to reflect the official or unofficial views of any of the Judges of the Court of Criminal Appeals. The author encourages readers to submit constructive criticism of this article to him.

non-lawyer in effectively representing the client, and 2) The increased potential for inaccuracy in the truth-finding process as the trier of fact is deprived of valuable witnesses.[70]

The court then discounted the *Alvarez* opinion by stating that it need not have been decided on constitutional grounds. Thus, the *Edney* court declined the opportunity to address the constitutional issue directly, but implied that such a procedure had not violated the defendant's right to effective assistance of counsel. The court was not willing to conclude that any possible prejudice outweighed "the strong counterbalancing interest of the State in accurate fact-finding by its courts.[71]

Of further significance is the Supreme Court's opinion in *Weatherford v. Bursey.*[72] *Weatherford*, which involved an intrusion by an undercover agent into conversations between an attorney and his client, contained the suggestion that when conversations between a defendant and his attorney are overheard and related to the prosecution, and/or these overheard conversations produce, directly or indirectly, any of the evidence at trial, the Sixth and Fourteenth Amendments are violated.[73] The analogy between *Weatherford* and prosecutorial attempts to compel defense-hired expert testimony is apparent: there is little distinction between conversations that are overheard and the fruits thereof used at trial and situations where the contents of conversations are compelled through the testimony of defense-hired experts.

Still, in *United States v. Nobles*, Mr. Justice White, addressing the work product doctrine, stated:

> Of course, a party should not be able to discover his opponent's legal memoranda or statements of witnesses not called whether his request is at trial or before trial.[74]

While this does not directly concern the testimony of an expert, this language lends credence to the proposition that intrusions into the attorney-client privilege are violative of the right to effective assistance of counsel. However, it appears that this issue has not yet been authoritatively decided.

The second argument, that compulsory discovery of defense-retained expert testimony and reports interferes with the work product doctrine, relies upon the above quoted statement in *United States v. Nobles*, that

> [o]f course, a party should not be able to discover his opponent's legal memoranda or statements of witnesses not called whether his request is at trial or before trial.[75]

Based upon this statement, a defendant may be able to raise a claim of ineffective assistance of counsel, where his experts have been subjected to compulsory discovery, on the ground that this compulsory discovery created a chilling effect upon defense counsel's trial preparation. He may assert that his counsel's efforts to explore all avenues of defense were hindered by the fact that the prosecution would have access to all information prepared by his own experts.

However, the *Nobles* Court, in dicta, rejected this claim by the defendant, and rejected the argument that the disclosure of defense investigator's notes would compromise the defense attorney's ability to investigate and prepare the case. The Court stated that

> [t]he short answer is that the disclosure order resulted from respondent's [*i.e.*, defendant's] voluntary election to make testimonial use of his investigator's report. Moreover, apart from this waiver, we think that the concern voiced by the respondent fails to recognize the limited and conditional nature of the court's order.[76]

Therefore, it is unlikely that this argument will win acceptance by state courts. However, such an argument should still be advanced since it is possible for a state court to give a defendant broader protection than the Supreme Court, based upon state constitutional law.

The third argument, that compulsory discovery in this context violates a defendant's right to due process, focuses upon the absence of reciprocal discovery rights. It may be asserted that the absence of statutory protection for a defense attorney's work product has a chilling effect upon the trial preparation of defense counsel. Therefore, the absence of this protection, which is afforded the prosecution, violates a defendant's right to effective assistance of counsel.

It was demonstrated in section III (c) that reciprocal discovery rights between the defense and the prosecution are necessary to avoid a violation of due process. The logical extension of that principle is that in the absence of such reciprocal discovery, defense counsel cannot be assured of confidentiality in their factual investigations, and that this lack of assurance of confidentiality will exert a chilling effect upon the trial preparation of the defense. While it is not contended that defense attorneys would fail to prepare for trial, completely, were prosecutors able to discover their work product, it is asserted that defense attorneys may forego the exploration of possible defenses which require expert assistance if they are aware that such experts can be compelled to testify for the prosecution and that reports prepared by such experts are subject to prosecutorial discovery.[77] This, in turn, may deprive a defendant of a complete investigation by his attorney of all possible legal and/or factual grounds of defense while simultaneously increasing the burden on the attorney to interview witnesses personally and explore highly technical areas in which he has little or no expertise.[78] Since prosecutors are already protected by Article 39.14, C.C.P., the State's inherent advantage in information-gathering would be dramatically increased were this to occur.[79] When the balance between the prosecution and the defense is unequal and the accused cannot fully prepare a defense without possibly contributing damaging information to his prosecution, can it be said that the Sixth Amendment right to counsel is not violated? While there is no authority for this approach to the issue, it should nevertheless be asserted.

IV. CONCLUSION

This article has attempted to describe four theories that can be advanced to attempt to block prosecutorial attempts at compelling the testimony of defense-hired experts and discovering reports prepared thereby, unless such experts testify at trial or their reports are utilized during trial. One of these theories may be successful for a defense attorney confronted with this problem, although there undoubtedly would be resistance to at least some of them by the courts of Texas. However, it is the position of this author that prosecutorial attempts to obtain testimony or discover reports prepared by defense-hired experts may seriously infringe upon the rights of a defendant. The practice of compelling the testimony and reports of defense-hired experts should not be permitted by the courts of this State.

FOOTNOTES

64 *McMann v. Richardson*, 397 U.S.759, 771 n.14 (1970).

65 *See United States v. Wright*, 489 F.2d 1181, 1188 n.6 (1973); *Shepard v. Hunter*, 163 F.2d 872 (10th Cir. 1967).

66 519 F.2d 1036 (3rd Cir. 1975).

67 *Id.* at 1046-47.

68 (A rule similar to this federal rule exists in Texas.) *See generally* Articles 46.01-46.03, C.C.P., and compare Article 46.02, Section 3 and Article 46.03, Section 3 with Rule 706, Federal Rules of Evidence.

69 425 F. Supp. 1038 (E.D.N.Y. 1976).

70 *Id.* at 1046.

71 *Id.* at 1054.

(Continued on page 23)

ATTORNEY GENERAL'S OPINION ON DEFERRED PROCEEDINGS UNDER CONTROLLED SUBSTANCES ACT

The following is the full text of a recent Attorney General Opinion dealing with deferred proceedings under the Controlled Substances Act:

March 14, 1978

Honorable Bill Stubblefield
County Attorney
Williamson County
Georgetown, Texas 78626

Opinion No. H-1135
Re: Payment of fees in cases of deferred proceedings under art. 4476-15, sec. 4.12, the Controlled Substances Act.

The text of the letter follows:

You have requested our opinion concerning the collection of certain fees in cases where a court has deferred proceedings and placed a defendant upon probation pursuant to the Controlled Substances Act, article 4476-15, section 4.12, V.T.C.S., which provides that probation may be granted "without entering a judgment of guilt," and that discharge and dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law for conviction of a crime." *See Ritchie v. State,* 542 S.W.2d 422 (Tex. Crim. App. 1976).

You ask whether a defendant who has been discharged and against whom proceedings are eventually dismissed pursuant to section 4.12 may be assessed the following court costs: county attorney's fee (Code Crim. Proc. art. 1061), trial fee (Code Crim. Proc. art. 53.06), sheriff's fees (Code Crim. Proc. art. 53.01), and county clerk's fees (Code Crim. Proc. art. 1064).

The county attorney's fee, the trial fee and the sheriff's fees are expressly authorized in cases where there is a "conviction." Liability for the clerk's fee is not expressly made referable to conviction by the language of article 1064, Code Crim. Proc., but the statute is a 1925 codification of an 1876 act which also embraced the county attorney's fee, and the trial fee, as well as the sheriff's fees, and which provided:

> In all cases where any person shall be presented or indicted by the grand jury, and shall be discharged from such presentment or indictment, neither the Clerks nor the Sheriffs shall charge fees for the same, but if the party or parties so presented or indicted shall be convicted, the Clerk or Sheriff shall charge him, her or them, with all the fees accruing thereon.

Acts 1876, 15th Leg., ch. 164, § 24, at 284, 294. The 1925 codification merely reenacted the previous laws on the subject which appeared in the 1911, 1895 and 1879 codifications of the 1876 legislation. We think this provision remains applicable and that fees are not collectible under article 1064, Code Crim. Proc., if the defendant is acquitted. Attorney General Opinion O-6093 (1944) so held. *See Adams v. State,* 92 Tex. Crim. 26, 241 S.W. 164 (Tex. Crim. App. 1922); 53 Tex. Jur.2d, Statutes § 189 at 288.

It has been held by both the Supreme Court of Texas and the Texas Court of Criminal Appeals that courts may grant probation only "after conviction," in accordance with article 4, section 11A of the Texas Constitution. *State v. Thurmond,* 516 S.W.2d 119 (Tex. 1974); *Burson v. State,* 511 S.W.2d 948 (Tex. Crim. App. 1974); *Ex parte Giles,* 502 S.W.2d 774 (Tex. Crim. App. 1973). *See also Lee v. State,* 516 S.W.2d 151 (Tex. Crim. App. 1974); *Hill v. State,* 92 Tex. Crim. 312, 243 S.W. 982 (Tex. Crim. App. 1922). However, the Court of Criminal Appeals very recently held in *George v. State,* cause # 56,169 (Tex. Crim. App., filed Nov. 16, 1977), that a person placed on probation after the entry of an order granting a conditional discharge under section 4.12 of the Controlled Substances Act has been neither convicted nor found guilty. *See State v. Blackwell,* 500 S.W.2d 97 (Tex. Crim. App. 1973); *Ex parte Muncy,* 72 Tex. Crim. 541, 163 S.W.29 (Tex. Crim. App. 1914); *Baker v. State,* 70 Tex. Crim. 618, 158 S.W. 998 (Tex. Crim. App. 1913).

In light of the *George* decision, we advise that a defendant placed on probation after the deferral of proceedings pursuant to section 4.12 of article 4476-15, V.T.C.S., the Controlled Substances Act, is not "convicted" for the purpose of the fee statutes, and is not liable for the fees assessed by articles 53.01, 53.06, 1061, and 1064, Code Crim. Proc.

SUMMARY

> A defendant placed on probation after the deferral of proceedings pursuant to section 4.12 of article 4476-15, V.T.C.S., the Controlled Substances Act, is not "convicted" for purposes of the fee statutes, and is not liable for the fees assessed by articles 53.01, 53.06, 1061, and 1064, Code Crim. Proc.

ATTORNEY GENERAL'S OPINIONS

NOTE: Copies of the full opinions may be obtained from the Association office.

H-1153
RQ-1732

As described, a coin game known as the "Treasure Chest" is a "gambling device," the possession of which is prohibited by article 47.06 of the Texas Penal Code.

4/12/78

H-1155
RQ-1771

A trial court clerk cannot refuse to file pleadings which appear to him inadequately certified pursuant to Rule 72, Texas Rules of Civil Procedure.

4/18/78

H-1156
RQ-1841

The violation of regulations promulgated by the Board of Polygraph Examiners, which regulations prohibit conduct not proscribed by any statute, is not a penal offense under section 26 of article 4413(29cc), V.T.C.S.

4/19/78

OPEN RECORDS DECISIONS—ATTORNEY GENERAL

ORD-188
RQ-1802

Documents revealing names of individuals who have applied for appointment to the post of municipal judge are subject to disclosure under the Open Records Act.

4/13/78

SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

APRIL 1978
VOLUME IV, NO. 7

DIAZEPAM CASES STILL COMING IN. EX PARTE PAGE, #58, 162, 4/5/78, J. Douglas, Panel #2, 1st Quarter, GETS WRIT GRANTED ON BASIS OF HENDERSON, 560 (2) 645; LUMBERAS, 560 (2) 644; AND RIDDLE, 560 (2) 642; I.E., THERE IS NO PENALTY AT THIS TIME PROVIDED FOR POSSESSION OF THIS DRUG. (Dallas County).

CCA REVERSES TREVINO, #54,148, 4/5/78, J. Dally, Panel #1, 1st Quarter, BECAUSE TJ REFUSED TO ALLOW D'S ATTY, AT VOIR DIRE, TO ASK THE FOLLOWING Q OF PROSPECTIVE JURORS: "WHETHER THEY WOULD GIVE WEIGHT AND CREDIT TO THE TESTIMONY OF LAW ENFORCEMENT OFFICERS, MERELY BECAUSE THEY WERE LAW ENFORCEMENT OFFICERS, THAN TO THE TESTIMONY OF OTHER WITNESSES.

Held, "In the instant case, four police officers were wits and their testimony was an important part of the State's case." Offense was burglary. "Under the circumstances, knowing whether or not each of the prospective jurors would give greater weight to the testimony of police officers, merely because they were police officers, than to the testimony of non-officers would have enabled appellant's counsel to exercise more intelligently his peremptory challenges." "The question propounded by D's counsel did not exceed the proper scope of voir dire and because this restriction of D's voir dire examination extended to the entire jury panel, injury to D is clearly shown." Reversed. (Bexar County).

PROSECUTOR, IN JONES, #54,176, 4/5/78, P. J. Onion, Panel #2, 1st Quarter, GETS REVERSED FOR TRYING TO CIRCUMVENT PAROLE LAW INSTRUCTION IN HIS JURY ARGUMENT.

COMMENT: Here, prosecutor argued in part: "And, if you don't assess a punishment for both of these characters, as bored as they might look right now, if you don't assess a punishment for both of these characters for a term of years in the T.D.C. between 7 and 10 years it won't mean anything." D got maximum of 10 years.

Held: "The argument was an attempt to get around the TCt's jury instruction not to discuss the matter of parole, and improperly urged the jury to consider it in assessing punishment."

Previous to the above statement, the prosecutor had argued: "And you should, in deliberating as to punishment, discuss how long the Ds would be required to serve in order to satisfy the sentence imposed."

The State argued that a clerical or typographical error of omission had occurred as word "not" should have gone after the word "should".

Held, "We are bound by the record before us, to which the State never

filed an objection before it was approved by the TCt. "And we have not found any supplemental transcript correcting the statement of facts and showing the word "not" was omitted by error."

But, State didn't quit. Also argued that statement made was inadvertently made. Held, "if it was a matter of inadvertence, the harm was nevertheless done." State also argued that objection made to argument didn't cover this part of argument. Held, "Both arguments immediately followed each other in separate sentences, and in examining the entire context of the objection, we cannot construe the objection to be so limited." Reversed. (Bexar County).

P. J. ONION SAYS IN BRADLEY, #56,475, 4/5/78, EN BANC, J. Odom, with J. Vollers not participating, with P.J. Onion dissenting with opinion, and with J. Douglas dissenting to not affirming case, and with J. Phillips dissenting with opinion and with J. Dally concurring with opinion, THAT "THE CHICKENS HATCHED BY BARRIENTEZ, 500 (2) 474, ARE COMING HOME TO ROOST." APPEAL ABATED. (Dallas County).

Barrientez, supra, held that in proceeding to revoke probation, trial judge, who had presided at D's trial for murder, which was basis for revocation, could take judicial notice of evidence introduced in murder trial at revocation hearing.

Here, prosecutor asked TJ to take judicial notice and knowledge of the testimony heard in a murder case where D was tried but jury hung. Defense counsel objected to this, but objection overruled and TJ made following findings: "I want the record to further show that the D was present at the time that the testimony was given, that he was represented by counsel at the time the testimony was given, and further that his right to confrontation and cross-examination of wits was reserved during that trial." "For those reasons, I will take judicial notice of the proceedings in this court."

Held, "The court at the revocation of probation hearing took judicial notice of the events that would be reflected in those notes, yet the actual notes were not introduced as evidence at the hearing." "D has presented a complete record; the State did not meet its burden to present the material relied on to meet its burden of proof in a manner capable of reflection in the trial record, so that a meaningful review could be had on the appellate record in this Court."

Held, "We abate this appeal with directions that the State have reduced to writing, and then present to the TCt for approval as a supplemental appellate record, the court reporter's notes of the testimony judicially noticed at the revocation hearing."

COMMENT: Among other things, P.J. Onion took the majority of the CCA to task, dissected the Barrientez decision, and concluded: "Why doesn't this court face up to the problem, and recognize that the Barrientez rule as to 'judicial notice' was ill-conceived and should be overruled." "It creates more problems than it solves." "Barrientez and its progeny should be overruled."

J. Douglas said that the burden was on D to get the statement of facts from the prior trial filed and, as there was no S/F in the record, the case should be affirmed; not abated.

J. Phillips, in his dissenting opinion, in my opinion, simply could not square the Barrientez' holding with due process of law.

J. Dally said that in light of past decisions of the Court it would be unfair to do other than what was done in this case. However, "In the future I would follow the reasoning in Presiding Judge Onion's dissenting opinion because I do not believe that testimony in other proceeding is the proper subject of judicial

knowledge." He suggested that the State or the TJ consolidate the motion to revoke with the offense being tried and then, at the same time, consider the evidence of the primary offense with the ground for revocation in the motion to revoke.

Excluding the various views, regarding the applicability of judicial notice to an item, this is a good case to read concerning the law of judicial notice and for cases construing this law.

COMMENT: It has been suggested that, to get around Barrientez, you should never have the same attorney for both the primary offense and the motion to revoke probation where a violation of the law is alleged. The attorney who made this suggestion, who works for the State, believes the important point in the case is the fact the same attorney that handled both cases. I agree and think this suggestion is a sound one.

IF YOU WANT TO SEE HOW LITTLE IT TAKES TO MAKE A RAPE CASE, READ GARCIA, #54,179, 4/5/78, J. Dally, Panel #1, 1st Quarter.

No bruises, scratches or other evidence of trauma, nor any damage to clothing found. Also, no evidence of recurrent intercourse, no sperm, no objective scientific evidence that the C/W had been raped and, originally, C/W could not identify the D from gallery of photographs. Also, when C/W originally complained, she said that her attacker was 5'8" tall and had shoulder-length wavy black hair. D was over 6' tall and his hair was collar length. Affirmed. (Lubbock County).

PROSECUTOR'S CALLING WIT A LAIR, "MRS. SEATON, THAT'S A LIE AND YOU KNOW IT," IS ERROR BUT ERROR CURED BY INSTRUCTION TO DISREGARD GIVEN TO JURY, IN SEATON, #54,195, 4/5/78, J. W. Davis, Panel #1, 1st Quarter.

CCA DISMISSES BEAN, #55,629, 4/5/78, J. Odom, Panel #2, 1st Quarter, AND SENDS CASE BACK TO HARRIS COUNTY FOR SOME TJ TO TRY AGAIN.

Here, it just seems that somebody just would never read what the CCA said in its original opinion regarding the case when it first dismissed the appeal as punishment was never assessed; i.e., D was continuously sentenced without a formal assessment of punishment.

COMMENT: The D, however, cannot complain that he has not seen any members of our judiciary who are from throughout the State and outside of Harris County. At the original trial, he had a visiting judge from Wichita Falls; then, after presentence investigation report completed, he had a visiting judge from Dallas; then, while case pending in Austin and prior to issuance of mandate, he had another visiting judge from Amarillo; and lastly, he got another visiting judge from Corpus Christi.

It is not known at this time from which part of the State the next visiting judge, who will see the D, may come. DISMISSED. (HARRIS COUNTY).

PANEL OF CCA RULES IN NORTON, #54,081, 4/5/78, J. Odom, Panel #2, 1st Quarter, THAT IT IS PERMISSIBLE FOR TJ TO TELL DEFENSE ATTY, WHEN HE REQUESTS TO MAKE OPENING STATEMENT TO JURY, AFTER STATE RESTED HER CASE, THE FOLLOWING:

"The Court here and now will permit you to make an opening statement outlining to the jury what you expect the testimony from your witnesses to show." "I will now give you an opportunity to check and see if you have any witness to put on and if you do, you make your opening statement, but if you do not, the Court will not permit you to make an opening statement telling the jury what you expect a witness to testify to when you don't expect to put any witness on."

Apparently, after TJ made this statement, either with or without suggestion from prosecutor, he then went and read Crew, 387 (2) 899, not cited in the opinion, and changed his ruling:

"I am here and now going to permit the defense counsel to make an opening statement to the jury regarding any explanations of any testimony that he expects to give through his witnesses."

"I would further advise defense counsel that if he does make such an opening statement, the Court would expect him to be acting in good faith and in the event he did not have any witnesses to testify following his opening statement, the Court would presume that he was not acting in good faith and would take appropriate action."

Held, "D's contention that Art. 36.01, subd. 5, C.C.P., allows defense counsel to make an opening statement to the effect that the D is relying upon the defense of not guilty, and that the D is content in relying on the facts presented by the State, is without merit." AFFIRMED. (Harris County).

COMMENT: It appears that this is a very strict construction of the statute which states in part: "The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by D's counsel." However, the law now is as stated above.

PANEL OF CCA CHASTISES COUNSEL FOR D IN EASON, #57,989, 4/12/78, J. Roberts, Panel #3, 1st Quarter, BUT FINDS REVERSIBLE ERROR PURSUANT TO SEC. 13, ART. 40.09, C.C.P., WHEN TJ CONDUCTED THE VOIR DIRE EXAMINATION OF THE JURY PANEL IN THE ABSENCE OF D'S COUNSEL. (Brazoria County).

D's atty did not show up on time to court. D was present. Case recessed until that afternoon. When court reconvened still no counsel. Case recessed until the next morning, but still no counsel. Probably, out of exasperation, if nothing else, TJ then instructed the jury on general principles of law. D said he wanted his atty. present. "Nevertheless, TJ ordered voir dire to proceed." After selecting a jury, trial then recessed until later that day until 12:30. D's atty finally arrived at 12:45 and made motion to dismiss the jury, which was denied.

Held, "Despite counsel's behavior, however, we hold that, in the present case, the TJ fell into error when he ordered the voir dire examination of the jury panel to proceed and allow it to be conducted over D's objection."

"The voir dire examination of a jury panel is a critical stage of a criminal prosecution at which the right to counsel attached." Reversed.

COMMENT: ONE (1) MONTH LATER, IN ANOTHER CASE AGAINST SAME D, D'S ATTY WAS HELD IN CONTEMPT OF COURT AND FINED $100.00 FOR BEING LATE TO COURT.

J. PHILLIPS, WRITING FOR PANEL OF CCA, DISAGREES WITH APPELLATE ATTY AND CONCLUDES THAT APPEAL WAS NOT FRIVOLOUS IN KELLEY, #58,008, 4/12/78, Panel #3, 1st Quarter, AND ORDERS CASE REVERSED BECAUSE THE TRANSCRIPTION OF THE COURT REPORTER'S NOTES DID NOT REFLECT THE D WAS ADMONISHED AS TO THE RANGE OF PUNISHMENT BEFORE THE TJ ACCEPTED THE NOLO CONTENDERE PLEA. ALSO, TJ FAILED TO ASCERTAIN IF THE PLEA WAS FREELY AND VOLUNTARILY MADE. (Nueces County).

ROBINSON, 553 (2) 371, AND DAVIS, 557 (2) 303, RETURN AND HELP GET JOHNSON, #52,076, 4/12/78, J. Odom, Panel #2, 1st Quarter, A REVERSAL AS TCT'S JURY CHARGE IN AGGRAVATED ROBBERY CASE WAS SUBJECT TO OBJECTION MADE. SEE NOV., 1977, Vol. IV, No. 3, p.2, S.D.R., and Vol. III, No. 11, May, 1977, p.4, S.D.R. (Harris County). Reversed.

Note: CCA held that D's objection was sufficient and it did not need to rely upon fundamental error, as it had done in Robinson and Davis, supra, to reverse.

HOWEVER, IN CLELAND, #54,100, 4/12/78, J. Roberts, Panel #3, 1st Quarter, with J. Vollers dissenting without opinion, CCA HELD THAT A CHARGE AUTHORIZING THE JURY TO CONVICT THE D ON A THEORY NOT ALLEGED IN THE INDICTMENT WAS FUNDAMENTAL ERROR WHERE OFFENSE WAS ROBBERY.

Held, "It is clear that the charge authorized a conviction for robbery if the jury found, among other things, that D intentionally and knowingly caused bodily injury to Stephanie Wolff." "However, it is equally clear that the charge also authorized a conviction for robbery if the jury found, among other things, that D intentionally or knowingly threatened or placed Stephanie Wolff in fear of imminent bodily injury or death."

"Thus, the charge authorized the jury to convict D on two theories when only one was alleged in the indictment." Reversed. (Harris County).

HERNANDEZ, #52,802, 4/12/78, J. Phillips, En Banc, with J. Vollers not participating, GAINS REVERSAL ON SECOND MOTION FOR REHEARING.

FACTS: D contended TCT erred in failing to excuse a venireman and in failing to grant him an additional peremptory challenge. When D ran out of strikes and asked for an additional peremptory challenge he notified the TCt that had he been granted an additional challenge, he would have struck the last venireman who got on the jury.

HOLDING: CCA went off on theory that if D could show that the venireman who was not excused should have been excused then the overruling of such challenge deprived D of a peremptory challenge he would have used to strike the last venireman who got on the jury.

CCA then went to the record and concluded that the first venireman, on whom D used a strike, was disqualified due to her attitude toward police officers as this constituted a bias against D. "Her voir dire examination revealed she believed a police officer would always tell the truth." "A D is entitled to a juror who will impartially judge the credibility of the wits." "Under the circumstances, we hold that D's challenge for cause was improperly overruled." Reversed. (Bexar County).

COMMENT: It appears by the opinion the trial attorney in this case did one heckuva job on the record concerning this issue.

SULLIVAN, SEE VOL. III, NO. 11, MAY, 1977, p. 7, DOESN'T MAKE IT TO THE RUN-OFFS AS STATE'S M.R.H. GRANTED AND CASE AFFIRMED. (Dallas County). P. J. Onion, En Banc, with J. Vollers not participating, and with J. Odom, joined by Judges Roberts and Phillips, dissenting with opinion.

Held, "It does not appear that D had standing to complain of the search under the facts of this case." "Where, as here, the D disclaims ownership of an automobile he forfeits his standing to contest the search thereof." Here, when the D was arrested, he "denied any contact or connection with the brown Cadillac and said that it was not his car." Subsequently, the police went and got keys from the property room which were used to open the door to get inside the automobile.

CCA simply went off on the abandonment theory or, at a minimum, that D made no claim of right to the automobile. Also, when the keys were offered into evidence, no objection was made.

Held, "By denying that the car was his when asked about it by the police, D lost his reasonable expectation of privacy in the car; that the abandonment doctrine came into play; and that he had no 4th amendment protection against the search." See Duncan v. Maryland, 22 Cr.L. Rep. 2160.

"In the instant case although possession of the shotgun was an integral part of the circumstantial evidence against the D, possession of the shotgun was not an essential element of the offense [murder] with which D was charged." "This was not a possession prosecution, but a murder prosecution."

Maldonado, 528 (2) 234, overruled in part. "To hold that a search and seizure is illegal even though the record before this court and the evidence before the TJ shows the D had no standing to challenge the search simply because the prosecutor did not verbalize the issue would be to reach an absurd result."

J. Odom, who wrote the original opinion reversing the case, did not like this holding one bit. "The State should not be allowed to contest the D's standing for the first time on appeal because this deprives the D of the opportunity to present evidence showing standing." "If the State had raised the issue at trial, D in this case would have had an opporunity to present evidence on the issue." "The majority deny him that opporunity and in doing so deprived him of due process of law."

COMMENT: Thus, as the law now stands, it is going to be incumbent upon the D to show he has standing, regarding a search and/or seizure, at the trial court level.

Remember, however, that Simmons v. U.S., 390 U.S. 377, gives the D the right to testify, concerning the hearing on motion to suppress, without same being admissible, over objection, on guilt issue.

Of course, the D is boxed in if he cannot testify favorably on this issue or the TJ chooses not be believe his testimony on this issue.

It seem, therefore, that the converse of what J. Douglas said in Hanna, 546 (2) 318, is applicable here.

> "Thus, the rule allows the [State] to lull the [D] into a false sense of security concerning the status of [his] proof and then on appeal to argue that [the D has no standing]."

NEW RULE? IN CLOPTON, #54,604, 4/12/78, J. Odom, En Banc, with J. Dally dissenting with opinion, joined by Judges Douglas, Roberts and Vollers, CCA RULED THAT EVEN THOUGH MNT WAS NOT HEARD UNTIL OVER 12 MONTHS LATER, "THE TCT'S CONSIDERATION OF THE MOTION WILL BE ACCORDED A PRESUMPTION OF REGULARITY AND THE CCA WILL NOT REQUIRE A SHOWING OF GOOD CAUSE IN THE RECORD ON APPEAL TO SUPPORT AN EXTENSION OF TIME FOR FILING OR AMENDING A MOTION FOR NEW TRIAL UNDER ART. 40.05, C.C. P." Case affirmed however. (Dallas County).

COMMENT: The dissenters thought the appeal should have been dismissed; not affirmed. J. Dally said: "The majority opinion will frustrate and delay justice, allow a back-log of cases to accumulate in the trial courts, and permit interminable delay of appeals, and it fails to fully discuss the pertinent statute to justify the result reached."

J. PHILLIPS GIVES MAJORITY FITS REGARDING TJ TAKING AND ACCEPTING PLEAS OF GUILTY OR NOLO CONTENDERE IN KIDD, #55,015, 4/12/78, J. Douglas, En Banc, with J. Roberts joining in the dissent and with P. J. Onion concurring on the ground that there was no plea bargain.

The majority ruled there was no necessity, by the statute, to admonish the D concerning recommendation of the prosecutor and TJ not being bound by same. "A substantial compliance with the statute has been shown." Affirmed. (Harris County).

EX PARTE MINJARES, #57, 136, 4/12/78, J. Douglas, Panel #2, 1st Quarter, SHOULD HAVE STAYED IN EL PASO.

Here, D filed writ claiming he was entitled to release because he contended that fines assessed him by the Municipal Court were concurrent. Also claimed he was entitled to good time credit.

CCA ruled that "Judgments in misdemeanor convictions imposing pecuniary fines as punishment have been held not concurrent but cumulative." "Further, Art. 5118a, V.A.T.S., providing for commutation of jail time for good conduct, has no application to judgments of municipal courts wherein a pecuniary fine is assessed as punishment." Thus, the 1/3 credit the Sheriff of El Paso County gave D was a nullity and D must come up with another $155.00 or lay it out at $5.00 per day.

PANEL RULES IN VILLELA, #57,158 & 159, 4/12/78, J. Roberts, Panel #3, 1st Quarter, THAT "WHEN THE TJ, AFTER ADMONISHING D, ACCEPTED THE D'S PLEAS OF GUILTY, AND HEARING THE STATE'S EVIDENCE, HELD THE ASSESSMENT OF PUNISHMENT IN ABEYANCE AND ORDERED A PRESENTENCE INVESTIGATION, HE NECESSARILY IMPLIED THAT HE HAD FOUND D GUILTY IN EACH CASE." Thus, TJ need not make an oral pronouncement of finding of guilt. Affirmed. (Harris County).

IF YOU LIKE TO READ ABOUT SPEEDY TRIAL CLAIMS, SEE EASLEY, #56,321, /4/12/78, J. Dally, Panel #1, 1st Quarter, WHERE CCA DISCUSSED THIS ISSUE AT LENGTH.

Held, "While it is true that D has been incarcerated for nearly 8 years, his incarceration has been due to the prolonged nature of his 4 trials and 3 appeals, as well as the delay of which he now complains."

NOTE: It appears that in light of Self, 513 (2) 832, and what the Court said here in reaffirming Self, and the fact the new penal code omitted the requirement that a body be found before a prosecution for murder may be maintained, that under the new penal code Corpus Delecti can now be summed up with one element:

(1) The death of the deceased must be shown to have been caused by the criminal act of another.

Law students, if no one else does, should appreciate this conclusion if it be a correct one.

PANEL OF CCA, IN CRISS, #57,320-323, 4/12/78, J. Odom, Panel #2, 1st Quarter, RULES THAT "JUST AS THE RIGHT TO INDICTMENT MAY BE WAIVED BY AFFIRMATIVE ACT IN CONFORMITY WITH THE TERMS OF ART. 1.141, WE HOLD THE RIGHTS SECURED BY THE EXAMINING TRIAL UNDER SEC. 54.02(h) MAY BE WAIVED BY AFFIRMATIVE ACT IN CONFORMITY WITH THE TERMS OF SEC. 51.09(a)." Affirmed. (Dallas County). Here, sufficient showing of waiver.

J. T. DAVIS, WRITING FOR A PANEL OF THE CCA, HOLDS IN SCOTT, #54,320, 4/19/78, J.T. Davis, Panel #3, 2nd Quarter, THAT D'S STATEMENT, MADE IN RESPONSE TO QUESTION ASKED BY OFFICER, MADE AT A TIME WHILE D WAS UNDER ARREST, WAS NOT ADMISSIBLE AS RES GESTAE OF EITHER THE OFFENSE OR OF THE ARREST AND ITS ADMISSION INTO EVIDENCE WAS REVERSIBLE ERROR. (Harris County). Reversed.

Here, D was stopped, while driving an auto, for a routine driver's license check. D produced his driver's license. Other officer then noticed that passenger in car seemed to be placing a bottle in the arm rest. Passenger ordered from car. Bottle of Robitussin, (a cough syrup that can be purchased over the counter at drug stores), was found in the arm rest. After arresting passenger, police then decided to check for traffic warrants and found D had one open traffic warrant. D then placed under arrest, searched, and put in patrol car. A search of the vehicle then occurred resulting in the finding of a .38 pistol in the glove compartment. One of the officers then asked who the pistol belonged to and, at trial, over objection, Officer Sneed testified that D answered that it was his.

Held, "The record does not show that D was properly advised as to his constitutional rights." "Further, since D's statement did not lead to the discovery of any evidence conducing to establish guilt, it would be inadmissible as an oral confession under Art. 38.22." As to the claim that this was res gestae, CCA said: "There is no showing in the record that D was excited or emotionally stimulated or in the emotional grip of any shocking event so as to render the incriminating statement of D a spontaneous utterance." Reversed.

I and J. DOUGLAS BOO BOOED IN PART IN EX PARTE LONG, #56,264, 12.14,78, J. Douglas, AS CCA AGREES WITH D ON HIS MOTION FOR REHEARING AND WRIT GRANTED AS EVIDENCE PRESENTED WAS SUFFICIENT TO CREATE A BONA FIDE DOUBT AS TO D'S COMPETENCE TO STAND TRIAL. "IT WAS THUS REVERSIBLE ERROR FOR THE TCT NOT TO CONDUCT A SEPARATE HEARING TO DECIDE THE ISSUE." (Bexar County).

The facts showed that D was tried in Bexar County for one of two murders. A mistrial resulted and case transferred to DeWitt County where D tried, convicted and given 99 years. The second murder case was then transferred back to Bexar County where, before same judge, D entered a plea of guilty to a jury and his punishment was assessed at 99 years. No appeal was taken from either conviction.

Originally, CCA held that there was no necessity for a separate competency hearing to be held as no evidence of incompetency introduced when D PG. "Even if there might have been evidence that D was incompetent to stand trial four months earlier, this did not mean that he was incompetent to stand trial at the time he plead guilty."

In light of this holding, I put nothing in the S.D.R. about the case.

On D's Motion for Rehearing, CCA agreed there was no necessity to hold a hearing prior to the D's PG as there was an absence of evidence of incompetency at D's trial.

However, as to the case where D was convicted on plea of not guilty, Writ Granted.

Held, "The holding in Pate v. Robinson required the court to hold a hearing on competency to stand trial whenever "the evidence raises a 'bona fide doubt' as to a D's competence to stand trial." "The evidence before a court to require a competency hearing need only be such as will raise the 'bona fide doubt' referred to in Pate; it need not be conclusive on the issue." As the trial court instructed the jury on the issue of insanity at the time of trial, "It provides strong evidence that the issue of present competency was in fact raised by the evidence presented in that trial." "Where evidence before the court raises a 'bona fide doubt' concerning a D's competency, due process requires the TJ on his own initiative to halt the trial and conduct a hearing."

CCA also held there were other reasons for granting the writ.

Held, "This Court has found it to be a violation of due process any time the issue of present competency is submitted to the same jury that determines the merits [of the case].

Held, The charge given used the M'Naghten standard. Held, "The proper test of legal competence to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him: It is a violation of due process to measure competency to stand trial by any standard besides that set forth in Dusky."

COMMENT: As it appears that the same parties were present in both cases, it would seem that in light of Bradley, see supra, and Barrientez, and the doctrine of judicial notice, that even though no evidence was adduced regarding the issue of D's competency to stand trial when he PG, nevertheless, based upon the past events, the issue was in fact raised. However, State did put on one wit at the PG who testified that in his opinion D was sane.

EXECUTIVE DIRECTOR'S REPORT

For what seems like the hundredth time I would like to discuss membership and money. Our Association lives by membership dues. The Association breaks even on seminars, loses money on publication sales. The free materials we send to you eat up any profit on the others. The Association makes a little money from advertising in this magazine, but that amount does not even cover the printing costs. Of course no money is made on public relations activities.

The Association can really change only two segments of this structure and be able to provide additional services. Actually there are two other alternatives; one, cut staff and two, increase dues. The staff at present consists of the Executive Director, an administrative assistant and a law clerk, with another secretarial position unfilled. Staff cutting would save relatively little and drop the services offered by the Association below the acceptable level. Raising dues would simply price the Association out of the market for most young attorneys and add TCDLA to the increasing inflationary spiral; that might be necessary in the future but two easier and less painful-to-the-individual-pocketbook alternatives are available.

One alternative is to increase advertising in this magazine. We need your input on that, too: whom do you use for investigative services, for publications, for research? If they are good and would benefit other attorneys, tell them about the *Voice*, a monthly communication with 1200 attorneys, judges and other people interested in criminal law around this state. The people who do advertise with us also need your support. They must see some results from their advertisement. If you use their services tell them you are with TCDLA or saw their ad. By increasing the advertising income of TCDLA the relative cost of this magazine goes down. That means a corresponding increase in monies for other TCDLA services.

The easiest and most effective alternative is to obtain new members. We are not, as you are aware, a mandatory organization. You can join TCDLA or you can sit back, reap all the benefits that TCDLA produces, and not contribute to its support. The criminal defense lawyer never had a voice in the Legislature until TCDLA was created. Publications in the criminal law area were few and far between, and in many cases of questionable value. Publications sold by TCDLA or published by them are now the standards in this state and in many others. This magazine we hope is worth the cost of your annual dues. We hope it brings to you both educational and entertaining insights into the area of criminal law. The "Significant Decisions" found in the *Voice* is perhaps by itself worth the price of your dues.

In short, if you practiced criminal defense work prior to 1971, think back to what it was like, what input you had, what help you received from anyone, what voice you had in the Legislature. If you have been licensed recently, talk to one of the "older attorneys," look at his bookshelf—where did his publications come from?

The Texas Criminal Defense Lawyers Association is uniqne even among associations. We try to lobby and we try to educate. Both fields take a great deal of money; each is hard to do as a single project. If you are a member, pay your dues and get another to join. If you see a nonmember, remember he gets almost as much benefit as you do, but he does not pay. Get him to join!

* * * NOTICE * * *

ANNOUNCEMENT OF ANNUAL MEETING

TCDLA's annual meeting will be held at the Ft. Worth Convention Center on Thursday, June 29th, at 10:00 a.m.

"SHOCK PROBATION"— THE LAST HURRAH (A FOLLOW-UP)

In the February 1978 *VOICE for the Defense*, Knox Jones of McAllen wrote a short article and provided the membership with a "Motion for Suspension of Sentence" form. The Editor has received the following letter and forms from D. Brooks Cofer, Jr., of Bryan concerning Mr. Jones's discussion.

March 7, 1978

Hon. Clif Holmes
Attorney at Law
Box 1073
Kilgore, Texas 75662

Dear Mr. Holmes:

I noted with current interest the article in the February issue by Hon. Knox Jones, McAllen, on "Shock Probation," for I am in process of utilizing this new section of Art. 42.12. I believe most Courts are not sure of the procedure, and I have learned just yesterday that TDC is not too familiar with the process. It appears that there are two types of these inmates: Those that come to TDC in the beginning with shock probation being contained in the original sentence (and it is these inmates that have a "P" noted after their assigned number); and the other type, that individual who is receiving an amended sentence after he has been once delivered to TDC. It is this second class of persons that creates an administrative problem.

I received an amended sentence order from the local court and forwarded it to the Warden of the unit for his return and for delivery of the same to my client. We knew that there would be some processing out but did not know the exact steps which would be taken. I have now learned that the order should be forwarded to the records section, TDC, Huntsville, as it will be this unit which will direct the custodial unit to transport the individual back to Huntsville for release. It is my understanding that upon arrival there immediate release will follow on the same day.

I prepared an original order for the Court and have since revised it and as a matter of interest enclose copy herewith to you and *VOICE for the Defense*, as well as copy of this letter and enclosure to Mr. Jones with the hope that it may assist other members of the Association in the future.

Sincerely yours,

COFER and van OVERBEEK
D. Brooks Cofer, Jr.

NO. _____

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS.	)	_____ COUNTY, TEXAS
_____	)	_____ JUDICIAL DISTRICT

SUSPENSION OF SENTENCE

On this _____ day of _____, 19____, came on to be considered the Motion to Suspend Execution filed by the Defendant in this Court on _____, pursuant to the provisions of Art. 42.12, Sec. 3e, Code of Criminal Procedure, and the Court having considered the same along with a copy of the Defendant's record from the Texas Department of Corrections while incarcerated, finds that the said Motion of the Defendant was properly filed not less than 60 days nor more than 120 days after the date the execution of this sentence began, on _____; that the Defendant has served in the Texas Department of Corrections since _____, and would not benefit from further incarceration in a penitentiary; that he is eligible for probation and was eligible for probation at the time he was originally sentenced, as he had never been incarcerated for a felony and was not convicted of homicide, rape or robbery; that this Court has jurisdiction of this matter as 120 days have not expired from the date of his sentence; and that the sentence entered in this cause on _____, 19____, should be amended and suspended;

It is hereby ORDERED, ADJUDGED AND DECREED that the further execution of the sentence of _____, No. _____, Texas Department of Corrections, _____, Texas _____, of _____ years be suspended from the date this Order is entered in the District Court of _____ County, Texas, and the District Clerk is ORDERED to forward two certified copies of this Order to the Warden of the _____ Unit, TDC, for compliance and delivery of a copy to the said Defendant; the Clerk is further directed to forward a certified copy of this amended sentence to Classification and Records, TDC, Box 99, Huntsville, Texas;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said _____ is placed on probation for the balance of his sentence, upon the following terms and conditions, that the probationer shall:

a. Commit no offense against the laws of this State or of any other state or of the United States;
b. Avoid injurious or vicious habits;
c. Avoid persons or places of disreputable or harmful character;
d. Report to the Probation Officer as directed;
e. Permit the Probation Officer to visit him at his home or elsewhere;
f. Work faithfully at suitable employment as far as possible;
g. Remain within the State of Texas;
h. Pay his fine, if one be assessed, and all Court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the Court shall determine;
i. Support his dependents;

and he is ORDERED to report to the Probation Officer of this Court at his office in _____, Texas, immediately upon his return and release from TDC for explanation of these terms and compliance with administrative details of this probationary sentence.

SIGNED AND ENTERED this _____ day of _____, 19____.

_____
Judge Presiding

RETURN BY WARDEN

Came to hand on this _____ day of _____, 19____ and executed by delivering a copy of the same to _____, No. _____ at the _____ Unit, Texas Department of Corrections, _____, Texas _____, whose receipt of said Order is acknowledged below, at _____ o'clock _____ M. this _____ day of _____, 19____.

_____
Warden, _____, TDC
By _____
Deputy

(Continued on page 23)

State Bar of Texas Center for Correctional Services

W. C. LaRowe

In cooperation with the Board of Pardons and Paroles, the State Bar of Texas Center for Correctional Services is operating two projects which give participating lawyers an unparalleled opportunity to gain insight into the parole process.

The Counsel for Indigent Parolees Project, which provides appointed counsel to represent indigent parolees at parole revocation hearings, was initiated in response to Federal Court rulings in *Morrissey v. Brewer* and *Gagan v. Scarpelli.* Each parolee who is accused of violating the conditions of parole is entitled to two hearings before parole is revoked. The first hearing (referred to as an "on-site investigation" by the Board of Pardons and Paroles) must be held at or near the site where the alleged violation occurred. This "on-site investigation" is conducted by an administrative hearing officer. The purpose is to determine whether or not there is probable cause to believe that the alleged parole violations actually occurred. The second hearing is held at the Diagnostic Unit of the Texas Department of Corrections before a panel of three parole commissioners. At this second hearing the panel makes a final decision to revoke or to continue the parole.

Parolees are entitled to be represented by legal counsel at both the on-site and the final hearings. If a parolee who is scheduled for a revocation hearing wants legal representation at the hearing but cannot afford a lawyer, legal counsel is appointed by the Center for Correctional Services.

Appointed attorneys are compensated at the rate of $16.88 per hour for legal services up to a maximum of $50 per day for on-site hearings and up to $135 per day at final hearings. When travel is required, attorneys are reimbursed for travel expenses.

Participation in the program is voluntary and participating attorneys have the option to accept or decline each appointment offered to them.

This voluntary approach is taken to ensure that parolees will be represented by attorneys who are interested and want to participate in revocation hearings and, because of the relatively short notice usually given for parole revocation hearings, to ensure that the appointment is compatible with the attorney's schedule. Of course, once an appointment is accepted it is imperative that the attorney appear as scheduled and be prepared.

The projects have relied heavily on the support from the members of the Texas Criminal Defense Lawyers Association and we look forward to your assistance in the future.

For more information about either Volunteers in Parole or Counsel for Indigent Parolees write W. C. LaRowe, Center for Correctional Services, P.O. Box 12487, Austin, Texas 78711 or dial toll free 1-800-252-9230.

* * * * * NOTICE * * * * *

ANNOUNCEMENT OF
ANNUAL MEETING

TCDLA's annual meeting
will be held at the Fort Worth Convention Center
on Thursday, June 29th, at 10:00 A.M.

* *

TCDLA Annual Trip to Cancun

Cindy Walters
Administrative Assistant, TCDLA

I am sure that many of you, when you hear about a TCDLA trip to some exotic spot, often wonder what it's really like, or even if you would have fun. I believe the pictures on the following pages speak for themselves.

This year TCDLA traveled to Cancun, Mexico, located at the tip of the Yucatan Peninsula. The group, 74 strong, traveled via AeroMexico and stayed at the El Presidente Hotel, about three miles outside the town of Cancun, right on the beach. Those of you fortunate enough ever to have visited Cancun will readily agree that it is a magnificent place. Water the color of a light blue/green tinted crystal goblet, and the sand, a cushion of cool wheat colored fine grain salt. The sunsets and moonlit walks along the beach were—well—indescribable in beauty, but a feeling of peacefulness and contentment would just about sum them up, in my opinion.

TCDLA started the ball rolling with—what else—a cocktail party, so everyone could meet, mix and mingle. The next two days people more or less went their own ways. Many went to Talum (Mayan ruins), the natural aquarium for snorkeling, exploring small off-the-road villages, sailing, scuba diving, ferry rides to Isla de Mujeres, where one could hire a boat and a guide for a trip around the island and a marvelous lunch of fresh civiche (conch caught on the spot), red fish, bread and, of course, drinks. Others went shopping, deep sea fishing, and—I could go on and on, but I think you've got the picture. At night most of the group met in a small outside bar for drinks and to discuss that day's activities before going to dinner. Then of course there was dancing in the disco until the wee hours, and another walk along the beach for star gazing. I wonder if Clif Holmes ever found Orion?

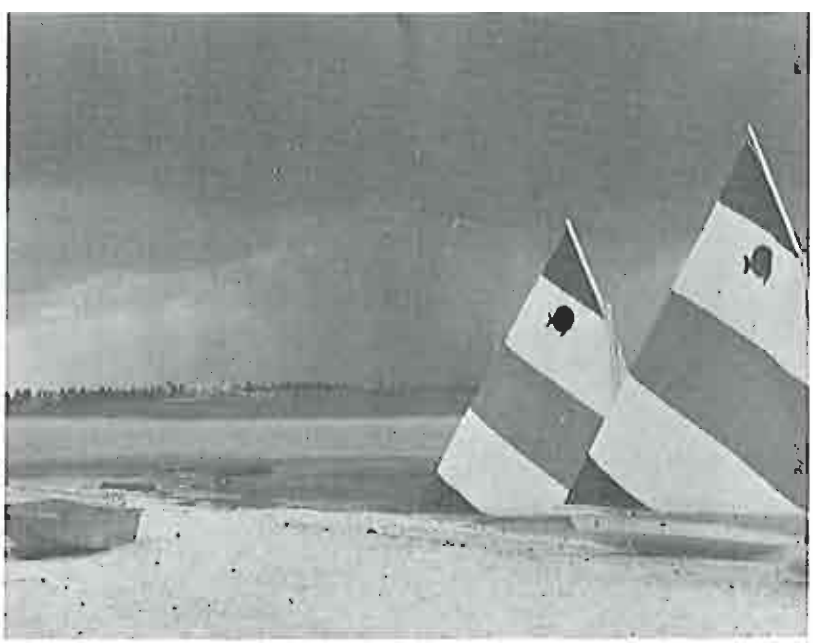
I sincerely believe everyone had a great time. . .I know I did, and, even more importantly, I met some absolutely marvelous people. I look forward to our next trip!

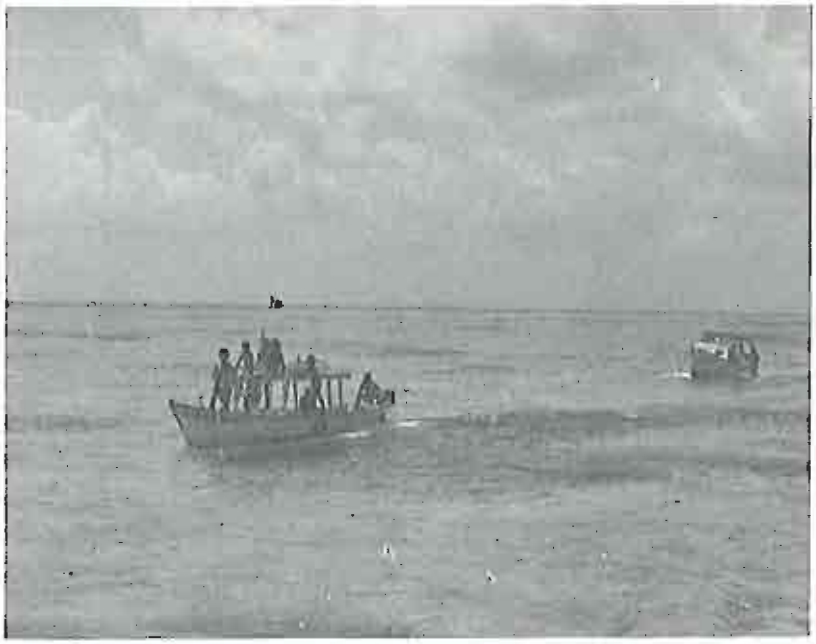
* * * * *

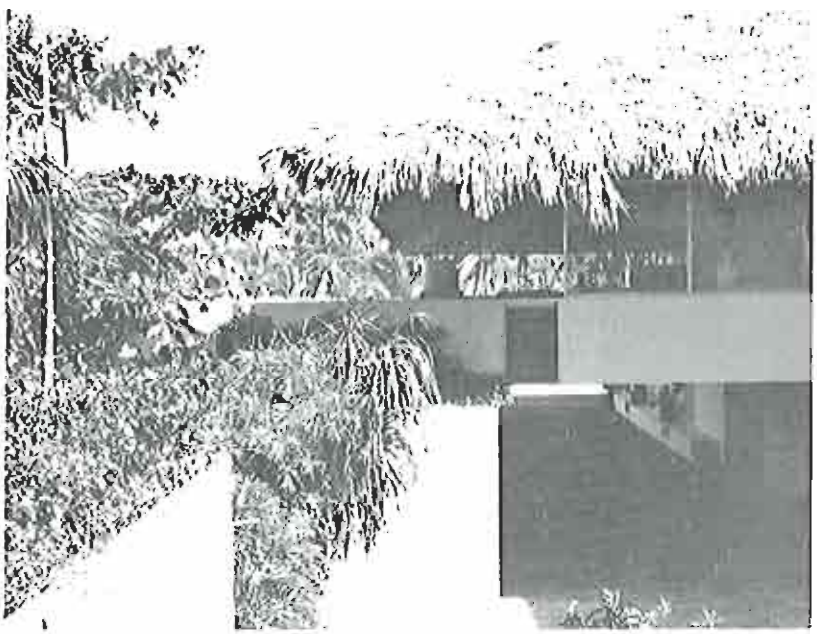
I would like to thank Charles McDonald personally for not missing the plane this year.

CANCUN

Page 20: Clockwise from upper left–Heading to sea; Akumal Resort; they didn't want to look like tourists–Clif Holmes & friends; Charles McDonald & Cheryl, Waco; grounds of the hotel. Page 21: Clockwise from upper left–The boardwalk; Doug Tinker, Corpus Christi, and Edwina Holmes, Kilgore; Talum–the Mayan ruins; how big was that fish? Emmett Colvin, Cindy Walters, & Mr. Robertson; storm coming in; Stan Weinberg, Beth & Lou Dugas. Page 22: Clockwise from upper left–trip around island; at the bar *again*? Bob & Bev Jones, John & Judy Boston, Austin; they claimed to be sober! Clif Holmes, & Doug Tinker; "I did no such thing!" Vee Perini & Stan Weinberg, Dallas; what can we say?–; outside bar–the "meeting place." The scenes on page 24 are self-explanatory!







CANCUN

PROSECUTORIAL COMPULSION
from page 7

[72] _____ U.S. _____, 51 L.Ed.2d 30 (1977).

[73] *Id.* at 51 L.Ed.2d 38, 40.

[74] 422 U.S. 225, 251 n.12.

[75] *Id.*

[76] *Id.* at 240 n.15.

[77] The tactical advantage of having a defense-hired witness testify for the prosecution is painfully obvious. Not only does it bolster the State's case, but it also casts grave doubts as to the credibility of any defensive testimony in conflict with it. It also indirectly attacks the defendant by attacking the defendant's counsel.

[78] This assertion is of particular importance in light of Article 4413 (29bb), Section 28 (a) and the realization that an attorney himself is exempt therefrom.

[79] *Cf.* Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 *YALE L. J.* 1149 (1960).

SHOCK PROBATION
from page 18

I, _____, acknowledge that I have received a copy of Suspension of Sentence dated _____ _____, 1978, in No. _____ in the District Court of _____ County, Texas, which Order of Suspension includes terms and conditions of probation; I also agree to report immediately within 24 hours of my return to _____ _____ County, Texas, to the Probation Officer of the _____ District Court for further instructions.

_____
Defendant

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.

  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