VOICE for the DEFENSE

MEMORIAL ISSUE
Judge Fred Erisman

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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JUNE 1978

IN MEMORIAM

Judge Fred Erisman

FROM PRESIDENT COLVIN

There is always a sense of sadness when we know that a truly great lawyer has left the courtroom for the last time. Many called him a workaholic, for until he entered the hospital, he came to his office early and left late. That the man, in truth, was in love—a deep and abiding love of the law, many of us can understand. There is a difference in him, however, for through his relationship with the law he effectively touched thousands of people in his lifetime. Through him there is a better world--a better law. Others may enumerate his specific deeds. I cannot, for to merely enumerate diminishes his greatness. To cite his work "Erisman's Manual of Reversible Errors in Texas Criminal Cases" tends to ignore his advice in the quiet of his Longview office to a little old lady in need.

I began with a sense of sadness, but for those of us who knew Fred Erisman, a man who has left his rich imprint on the law for generations to come, we are also glad in a sense. We are glad we knew him. Thank God, we knew him.

Goodbye, my dear friend.

—Emmett Colvin

The Longview Daily News
April 28, 1978

Fred R. Erisman, Jr., attorney, jurist, and author, is dead.

Judge Erisman, in nearly a half century of practice, established a wide reputation as a prosecuting attorney, a district judge and as a trial attorney. He was active as a layman in the Christian Church, in several Masonic orders, and in the Knights of Pythias lodge.

Judge Erisman was born in Fort Worth, and was graduated from Paschal High School in Fort Worth. He entered Texas Christian University and was graduated with honors in 1929. He later did graduate work at Brown University in Providence, R. I., Where he served as a graduate assistant in economics.

He also was given a post-graduate scholarship to Duke University, but an injury prevented his using it. After recovering, he studied law and was admitted to practice on April 14, 1931. He later was admitted to practice before the U.S. Supreme Court on motion of then Sen. Tom Connally of Texas.

He served as city attorney for Longview from 1935 to 1939, and in 1938 was elected criminal district attorney of Gregg County. He was reelected twice unopposed, and during his final term he served as president of the District and County Attorneys Association of Texas.

In 1945 he retired from public office and entered private practice here, but in 1950 Gov. Allan Shivers appointed him to fill a vacancy in the judgeship of the 124th District. He was elected to a full term, during which time he served in several offices in the State Bar of Texas'

Judicial Section, including the chairmanship.

When the veterans' land scandals surfaced, Judge Erisman was named a special assistant to the attorney general of Texas to assist in the trial of individuals involved.

His contributions to his profession were numerous. He wrote several books including "Erisman's Manual of Reversible Errors in Texas Criminal Cases," and others on laws governing arrests, bond settings, and forfeiture and on wills and estates.

On May 16, 1971, Judge Erisman was awarded an honorary Doctor of Laws degree from Texas Christian in ceremonies in which his son, Dr. Fred Erisman III, who then was acting dean of the school's College of Arts and Sciences, performed the hooding ceremony for his father. The judge served as a member of TCU's board of trustees from 1956 until his death. At the time of his death he was a vice-chairman of the board.

He served in various offices of several professional societies and organizations, including the American Bar Association, the American Judicature Society, the International Academy of Trial Lawyers (to which he was elected a fellow in 1959), the Texas Trial Lawyers Association, which he served as president, and the international honorary legal fraternity Phi Delta Phi.

He also held memberships and offices in several fraternal orders. He was past grand orator of the Masonic Grand Lodge of Texas, which he also served as deputy district grand master in 1956 and 1966. He held the 33d degree in the Scottish Rite, Valley of Dallas, and was past commander of Longview Commandery 886. He served as aide to the potentate of the Sharon Temple of the Shrine and was a past chancellor commander of the Longview Knights of Pythias lodge.

In addition to his service as a longtime member of TCU's board of trustees, Judge Erisman also has long been active in the First Christian Church of Longview. He held every lay office in the church, including the chairmanship of the Official Board, and at the time of his death was a member of its board of elders. He also has served as teacher of the Loyal Men's Bible Class of the church continuously since 1943.

Judge Erisman also was a member of the Board of Visitors of the University of Texas' M. D. Anderson Hospital and Tumor Institute in Houston, where he was taken when he became ill. He also served on the Longview Hospital Authority and was on the board of directors of East Texas Bank & Trust in Longview.

He served as president of the Longview Lions Club in 1948-49 and as president of the Greggton Rotary Club in 1971-72. He served as chairman of both Red Cross and United Fund drives, and was a former YMCA director and member of the Longview Chamber of Commerce. He was a patron of the Junior Service League, the Civic Music Association, the Community Theater, the League of Women Voters, and in many of the activities of Longview High School. He also was a member of the board of directors of Longview Cable Television, Inc. and of the executive committee of LeTourneau College Associates.

Surviving him are his wife, the former Dorothy Barnhart, who also is a graduate of TCU; one daughter, Mrs. Emily Felsenthal of Longview, who is a Spanish teacher in Spring Hill High school; the son, Dr. Fred Erisman III of Fort Worth, a professor of English; one brother, A. D. Erisman, attorney, of Fort Worth; and three grandchildren.

FRIENDS AND ASSOCIATES REMEMBER HIM. . . .

Dr. Erisman (he'd tell me "Don't call me Doctor"). . .but he was a Doctor, a signal and distinguished honor from his beloved alma mater, Texas Christian University. He was also "Judge". . .he was also a scholar.

We never thought of Fred Erisman as getting old. He was ageless to all of us, the young, the middle aged and the old folks alike. . .because he related in his own unique way to all of us. His zest for, interest in, and enjoyment of life in all its facets made him young and kept him young all these many years.

If one word could describe Fred Erisman it would have to be "perfection." Everything this gentleman, and friend, did had to be perfect. If it wasn't, he constantly worked to make it that way.

He was the recognized authority on Criminal Law in Texas. He often said that the greatest asset a criminal lawyer could have is a friend on the jury or an error on the Court. . .but the next best thing was a copy of Erisman's Manual of Reversible Errors.

Judge Erisman was a kind and thoughtful man who will be remembered as a giant among his peers.

—R. E. "Peppy" Blount, Longview

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FRED ERISMAN was one of the truly outstanding jurists and lawyers that I have known.

His dedication to "near perfection" in everything that he did was one of his greatest virtues. He never tolerated mediocrity, yet he never failed to help others in their efforts to rise above it.

Judge Erisman's efforts to improve the standards of his beloved profession were known by all. I practiced before him and with him, and learned so very much from him.

He was the kind of lawyer every lawyer aspired to emulate.

—Sam B. Hall, Jr.
House of Representatives
Congress of the United States

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The death of Judge Fred Erisman is a great loss to the criminal law practitioner.

I first met Judge Erisman while I was an Assistant District Attorney in Dallas and Fred represented the defendants in the famous "slant hole" cases in East Texas. Fred beat the hell out of me and the State's case in the examining trial and no indictments were returned against his clients. Right after the J.P.'s verdict, Fred sent me his "Manual of Reversible Errors" book and inscribed it as follows:

July 4, 1962

To my esteemed friend, Phil Burleson, in grateful appreciation for many courtesies in the recent trial of a "six and one-half million Dollar *Civil* suit" in the Justice Court—Sincerely, Fred Erisman.

Over the years I had the privilege to work with Fred on several cases and always found him to be imaginative, hard working, diligent and having the zeal of a young lawyer.

About two months ago I spent part of an evening with Fred in Longview and we discussed current problems facing the criminal law practitioner.

All of Fred's friends will miss him, but his work in the criminal law field will live forever.

—Phil Burleson, Dallas

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EULOGY TO A FRIEND

There are those giants of men amongst us whose passing from this life seems, if only temporarily, to dim the sun, pale the moon, and cause Mother Nature to catch her breath. So it is with the passing from this Earth of Judge Fred Erisman.

Judge Erisman's life-long quest for excellence in every aspect of endeavor set him apart from the common man.

Even so, he was an uncommon man who walked among the "common," a friend to the "friendless," a companion to the "great." His deepest personal friendship, that quality of friendship that transcended brotherly and fatherly love and compassion, was not freely given. It had to be earned, but those who by their efforts for others had earned this deepest friendship and respect know whereof I speak—John Petty, Noble Crawford, Jack Dempsey, Phil Brin, among others too numerous to mention, not only shared the

pleasure of his friendship but reveled in the privilege of being a friend to him.

Judge Erisman achieved excellence in scholarship. His keen mind and disciplined regimen established him at the pinnacle of the priesthood of his professional peers. His excellence in scholarship as an author established him as the Dean of Criminal Law in this free state of Texas for a quarter of a century. The accomplishments and ability of Judge Erisman and his comrade on the battlefield of justice, Judge Brin, have caused them to be recognized far and wide as the Best and the Brightest in their chosen profession.

Judge Marcus Vascocu and Judge David Moore, his loyal and trusted friends, could tell you that Judge Erisman was, in short, the kind of lawyer that made his professional brothers proud to admit that they, too, were lawyers.

His excellence in scholarship is reflected in his church work—a preeminent Biblical scholar, he has touched untold numbers of lives through his efforts in teaching the Sunday School lesson for the Men's Bible Class of the First Christian Church, a ministry so excellent that it has been broadcast over the radio for so many years.

His excellence in scholarship is reflected in his civic work. Whether we speak of Judge Erisman's efforts on behalf of the Masons, the Knights of Pythias, the Rotary Club or the Lions Club, we speak in hushed tones of the great leadership ability he achieved through excellence in scholarship.

This same quality of excellence in leadership led Judge Erisman to the forefront of this city's pioneer growth. His excellence in leadership was one of the cornerstones on which this city was built. His efforts on behalf of Longview covered half a century—as City Attorney, District Attorney, District Judge, and City Father. His death marks the passing of an era—that era in which this community was transformed from a town into a city, strong and vibrant, ever growing.

Judge Erisman's quest for excellence is reflected in his family life—his scholarship ability so clearly reflected in his son, Fred; his charm and charisma so ebulliently embodied in his daughter, Emily; his excellence as a man and husband so vividly reflected in the love and devotion he shared with his wife, Dorothy.

Judge Erisman was, for so many of us, in so many varied aspects of our lives, the final word. And because Judge possessed the propensity and proclivity to postulate with his sardonic wit, his final word was usually the last word.

I cannot help but recount examples of his humor—the glint in Judge's eyes he used to get when he said the reason he became a lawyer was because a horse kicked him. . .and kicked the sense out of him. I can recall the enthusiasm with which he recounted that on his Sunday radio broadcast, the broadcaster oftentimes referred to him as Dr. Erisman—thus misleading to his office door a woman in her final stages of pregnancy who protested on the way out after excited conversation with Judge, ". . .but they called you 'doctor'."

On the last occasion that I visited with Judge, he joked with me about a recent jury argument, saying, "You must have really run out of anything to say when you came up with that Honeysuckle Mountain." I replied, "Judge, you know how it is when you can't argue the evidence." He laughed and responded, "When I get to feeling a little better, come see me and tell me all about Honeysuckle Mountain." And with a wave of his hand, we bade each other farewell.

Honeysuckle Mountain is a place where little children gambol through fields of daffodils and tulips. . .where honey is the milk of life and runs over sugar-coated rocks into lush, verdant valleys of peace and tranquility. . .where there is no pain and there is no anguish and where a doctor's only function is to administer the golden nectar of life and a lawyer's only function is to draw up contracts of happiness.

Judge Erisman is no doubt, by now, the High Priest of Justice on Honeysuckle Mountain. I am sure he is with pluperfect precision perfecting those contracts of happiness.

—G. Brockett Irwin, Longview

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Judge Fred Erisman was a credit to the Trial Lawyers of Texas. I was fortunate enough to be in the area of Texas where he lived and tried a great number of his well known civil and criminal trials. While I was District Attorney, Judge Erisman taught me many valuable lessons in the trial of criminal cases. His investigation of his clients and their cases was outstanding. He was always prepared on the law involved in his cases. In all cases of substantial involvement he had a trial folder in loose leaf form, prepared Objections and Orders, proposed Requested Charges, synopses of pertinent cases as well as a virtual handbook on each prospective juror. Just to be in the Courtroom with Judge Erisman was a fascinating experience. Above all other considerations, Judge Erisman was always the epitome of decorum, courtesy and respect, to both the Court and opposing Counsel. He was a relentless cross-examiner, and in jury argument he could either be the suave and sophisticated logical Counsel with a flair for the grand vocabulary or, if the circumstances required, he could be a "tent revival" chest-thumping, knee-slapping, red-faced evangelist. Regardless of the circumstances, his side of the case was always well represented. As an individual, I am extremely thankful that I had the opportunity to be "educated, chastised, and complimented" by Judge Fred Erisman.

—Weldon Holcomb, Tyler

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I do not have adequate words to express my respect and admiration for Judge Fred Erisman as a man, lawyer, and judge. He was unique as a man: kind, compassionate, and considerate; highly qualified, skilled and effective as a lawyer and judge.

He will be remembered by all who knew him in person with esteem and affection.

—Joe J. Fisher, Chief Judge
United States District Court
Eastern District of Texas
Beaumont, Texas

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Judge Fred Erisman always "kept his powder dry." His desk was always clean; his files were always in order and complete to the moment. His trial notebooks were always posted; his car was always topped off with gas. He had a large leather wallet in which he kept a current passport and all the papers and credit cards he would need to go anywhere in the world. Each of his briefcases was supplied with pens, pencils, throat lozenges and all the paraphernalia that he would need for a contested trial away from home. Therefore I was *not* surprised to hear him tell his secretary one day, "Mrs. Fowler, I am going to Chicago. . .30 minutes." I *was* surprised when he did not emerge from his office. I waited five minutes past the thirty, noticed Mrs. Fowler was away from her desk, and pounded frantically on the door to his office, officiously concerned that he would miss a plane. The door swung open and there was Judge in his stocking feet with his tie loosened, glaring at me owlishly, rudely awakened! He had forgotten to tell this guest in his library that "going to Chicago" was the office code for taking a nap and not wanting to be disturbed.

—William C. Martin III
Judge, 307th District Court
Gregg County

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

Marvin O. Teague: Editor

MAY 1978
VOLUME IV, NO. 8

WHEN THE QUESTION ARISES WHETHER A TJ NEEDS TO CONDUCT A HEARING OUT OF THE PRESENCE OF THE JURY TO DETERMINE WHETHER OR NOT THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF INCOMPETENCY TO STAND TRIAL, IT IS SIMPLY NECESSARY FOR TJS TO READ THE DECISIONS FROM THE CCRAPP WEEKLY AS WHAT HAPPENED LAST WEEK DOES NOT NECESSARILY GOVERN WHAT IS GOING TO HAPPEN THIS WEEK ON THIS ISSUE. OTHERWISE, I AM CONVINCED THEY WILL GO CRAZY. Cf. Infra.

THUS, JOHNSON'S, SEE SEPT., 1977, Vol. IV, No. 1, S.D.R., REVERSAL FOR FAILURE OF TJ TO CONDUCT SUCH A HEARING DOES NOT STAND ON MRH. 4/26/78, J. Douglas, with J. Odom, joined by Judges Roberts and Phillips, dissenting with opinion. En Banc. Affirmed. (Jefferson County).

Held, "We now conclude that the evidence was insufficient to create reasonable grounds to doubt the present competency of the D." It is only where evidence of incompetency becomes so manifest as to raise a bona fide doubt that a hearing is required. "The Legislature intended to preserve bona fide doubt in the mind of the TJ as the standard of proof to be met before a separate, mid-trial determination of the accused's competency will be required." "The fact that psychiatric examinations are ordered by a court does not constitute a determination that an issue as to the D's competency exists." "The fact of previous institutionalization does not require a finding of present incompetence."

J. Odom said for the dissenters: "If only well-founded claims trigger Sec. 2(b), Art. 46.02, C.C.P., then a Sec. 4(a) hearing will always follow, and the Sec. 2(b) inquiry would be a wasteful formality." "The majority again reveal their confusion of Sec. 2(b) with Sec. 4(a), and the result is a wholly unconvincing effort at statutory construction."

J. ROBERTS IN FERNANDEZ, #54,598, 4/26/78, Panel #3, 2nd Quarter, J. T. Davis, VOICES A PLEA IN HIS DISSENTING AND CONCURRING OPINION THAT EVIDENCE OF POLYGRAPH RESULTS SHOULD BE ADMISSIBLE IN THE COURTS OF THIS STATE. HOWEVER, HERE, HE FELT THE HARMLESS ERROR RULE SHOULD APPLY BUT WOULD HAVE HELD THE RESULTS SHOULD HAVE BEEN ADMITTED. AFFIRMED.

COMMENT: Here, the D was on trial for two (2) hijackings. State's prosecutor agreed that the D could take a polygraph test if he was first interviewed by a psychiatrist, which was done. D then took the test and passed it. Operator testified, out of jury's presence, that in his opinion "the subject did not commit either of the two alleged robberies on the date in question."

J. Roberts, in his opinion, said, in my words, that if we are going to allow the high priests of witch-craft magic (psychiatrists) to testify in our courts when such testimony is inherently unreliable, there is no reason why we should not allow those prognosticators who use machines to testify in our courts. (El Paso County).

IF YOU WANT TO READ ABOUT MR. PEEPER'S BOOK STORE IN AUSTIN AND SOME OF BILLY RAY GREEN'S PROBLEMS, READ GREEN, #56,572, 4/26/78, J. Douglas, En Banc, with J. Vollers not participating, with J. Roberts, joined by J. Phillips, dissenting with opinion. Affirmed. (Travis County).

This is the case where D, by the State's evidence, then a D.A. in Anderson County, was arrested inside Mr. Peeper's Store in Austin, Texas, in one of the booth's therein, after fondling and masturbating and then going down on another person, for public lewdness.

CCA ruled, in shooting down the D's contentions:

1. "Knowingly, as used in the statute applies only to the act of deviate sexual intercourse and not the placewhere such act was committed."

2. Mr. Peeper's was a public place and open for business on the night in question.

3. As to the testimony of Officers Miller and Ray relating to what they had seen through the crack between the curtain and the edge of the booth and the D's contention this was an unconstitutional search and seizure, CCA said: "There is quite a difference in one's expectation of privacy when he goes into a stall in a restroom with a door closed from the expectation of privacy in a peep show stall with the curtain open." Held, "The Officer's conduct did not constitute a search" and "D, under the facts of this case, waived any expectation of the right to privacy."

What split the majority and dissenters, in part, was over the exclusion of certain defensive type evidence involving an alleged conspiracy between certain persons in Palestine and the police in Austin and the D. The majority concluded: "If the evidence were held to be proper in this case, imagine a D who has had many bitter political campaigns." "All of the testimony about people out to get him in those campaigns could be aired before the jury." "Such evidence would seldom be relevant." "It would prolong trials for no purpose at all." J. Roberts, however, pointed out some of the strange facts in this strange case to show that the excluded testimony did support the defensive theory of a conspiracy against the D. I like the following statement: "None of the 5 Austin Police Department officers or ABC Agent Bacak had been assigned to enforce sexual offenses, and Mr. Peeper's did not serve or sell alcoholic beverages so as to justify and explain Bacak's presence there." J. Roberts concluded that the evidence would have, in whole or in part, been admissible to support the conspiracy theory or should have been admitted as impeachment evidence at a mimimum.

J. Roberts and J. Phillips also believed the TJ failed to properly charge the jury regarding the issue of whether Booth #18 was a "public" or "private" place.

CCA RULES IN EX PARTE HENDERSON, #57,115, 4/26/78, J. Odom, En Banc, THAT $40,000 APPEAL BAIL WAS NOT EXCESSIVE WHERE D RECEIVED 10 YEARS FOR 3 ROBBERIES AND 1 AGGRAVATED ASSAULT ON THE ARRESTING POLICE OFFICER WITH SENTENCES TO RUN CONCURRENT. Writ Denied. (Dallas County).

IF YOU HAVE A DIAZEPAM OR PHENTERMINE CASE, DON'T GET YOUR HOPES ALL BUILT UP IN LIGHT OF EX PARTE ASHCRAFT, #57,857, 4/26/78, J. Dally, Panel #2.

Read, however, EX PARTE PAGE, #58,162, 4/5/78; HENDERSON, 560 (2) 645; LUMBERAS, 560 (2) 644; AND RIDDLE, 560 (2) 642, and this case.

Held, "Although PHENTERMINE EO NOMINE has not been placed in a penalty group of the Controlled Substances Act, a prosecution for the possession of that substance may be maintained if it is alleged and the proof shows that phentermine is an isomer of methamphetamine, since the possession of methamphetamine including its salts, isomers, and salts of isomers, is a first degree felony."

Here, D indicted for possessing phentermine, an isomer of methamphetamine. "Whether phentermine is an isomer of methamphetamine is a question of the sufficiency of the evidence, which may not be collaterally attacked." Affirmed. (Harris County).

CCA RULES IN FELDER, #58,049, 4/26/78, J. Dally, En Banc, that three (3) prior burglary convictions, D being armed with a pistol when he committed the murder by stabbing the deceased, a quadraplegic, resulting in his death, and, when arrested, D was armed with a pistol, THAT THIS IS ENOUGH TO GET YOU ONE OF THOSE LETHAL COLD SHOTS at T.D.C. Affirmed. (Harris County).

WILLIAMS, #54,416, 5/3/78, J. Dally, Panel #2, GAINS RELIEF WHEN CCA RULES THAT EVIDENCE ADMITTED FOR THE LIMITED PURPOSE OF SHOWING A FRAUDULENT SCHEME WILL NOT SUPPORT A JUDGMENT OF CONVICTION.

Here, D indicted for committing theft on or about July 19, 1970, in connection with the sale of a parcel of land. Complainant's alleged theft occurred on February 13, 1973. During the course of the trial, the State offered evidence of 11 similar offenses for the stated purpose of showing D's intent to defraud the C/W. "Curiously enough, however, the court in the same charge instructed the jury that the State had elected to rely on the February 13, 1973, transaction and authorized the jury to convict the D for that offense which was admitted for the limited purpose [to show system, scheme, plan, intent or knowledge]."

Held, "The judgment is not supported by any evidence since the jury was erroneously instructed that it could find the D guilty of an uncharged offense when evidence of that offense had been admitted for the limited purpose of showing scheme and system." "There is no evidence that the offense alleged in the indictment occurred on a different day than alleged." Reversed. (San Jacinto County).

Panel also ruled that: "When evidence is admitted for impeachment purposes in a criminal case, it may not be considered as substantive evidence which will support a judgment." "Evidence admitted for a limited purpose may not be used for another purpose or to support a judgment in a civil [criminal] case."

Reversible error was also committed when TJ overruled D's challenge for cause of a prospective juror who had previously had unsatisfactory dealings with D causing him to be prejudiced against the D. However, prospective juror also testified that he could disregard his past association with D and base his decision on the evidence and the court's charge.

Held, "While a TCT may hold a juror qualified who states that he can lay aside any opinion which he may have formed, no such discretion rests in the court with reference to a juror with bias or prejudice toward an accused." "When it appears that the feeling had by the proposed juror is really one of prejudice, and that it is directed toward the accused, it is not ordinarily deemed possible for such a juror to be qualified by stating that he can lay aside such prejudice."

PANEL OF CCA, #1, 2nd Quarter, IN HUMPHREYS, #54,324, 5/3/78, J. Phillips, RULES THAT NEITHER DOUBLE JEOPARDY NOR CARVING APPLIES WHERE D WAS CONVICTED FOR FAILURE TO IDENTIFY HIMSELF AS A WITNESS AND THEN IN THIS CAUSE CONVICTED FOR RESISTING ARREST.

Held, "Resisting arrest requires proof of the use of force which is not required to prove failure to identify as witness." "The offense of failure to identify as witness requires proof that a D failed to report his name and residence to a police officer when lawfully requested to do so which is not required for resisting arrest." "We therefore hold D was not placed in double jeopardy by virtue of his former conviction for failure to identify as a witness."

As to the doctrine of carving, J. Phillips said: "Further, the acts which formed the basis for D's arrest for failure to identify as a witness were complete prior to the acts which constituted resisting arrest." "We hold the doctrine of carving does not bar D's present prosecution for resisting arrest." Affirmed. (Dallas County).

WHEN IS A HOUSE A HOUSE? IN MOSS, #54,392, 5/3/78, J. Dally, Panel #2, 2nd Quarter, CCA RULED THAT FOLLOWING WAS INSUFFICIENT TO SUSTAIN CONVICTION FOR BURGLARY OF A HABITATION.

House had been rented in the past. No light bulbs on in the house. Water turned off. Only furniture was an old dresser across the front door, mattress and box springs, a bed, dining room set, and stove and gas heaters which had been placed there on the day in question. Stove and gas heaters not connected. To rent house, it would have been necessary to move out personal belongings and install other furniture and appliances.

However, did the D win?

Not so, says this Panel. Reformed and Affirmed. (Dallas County).

Held, "While this conviction cannot be as a burglary of a habitation, a first degree felony, the evidence is sufficient to sustain conviction for burglary of a building, second degree felony, which is a lesser included offense of the offense of burglary of a habitation."

"Since the penalty assessed, imprisonment for 5 years, is within the range of punishment for both a first degree felony and a second degree felony the conviction can be affirmed as one for burglary of a building."

COMMENT: The final holding is difficult to appreciate as the opinion does not say whether the jury was given a charge on the lesser offense of burglary of a building; i.e., were they given a choice as to which offense the D committed? If that be the case, that would be one thing. However, if the case were tried as a straight burglary of a habitation, when, as the opinion says, the D was guilty only of burglary of a building, who can say that the jury might not have given him the minimum punishment of 2 years or probation if he were eligible? A panel of the CCA; that's who.

CCA RULES IN HARRIS, #54,827, 828, & 829, 5/3/78, J. Roberts, En Banc, THAT INDICTMENTS DID NOT ALLEGE THE QUANTITY OF MARIJUANA DELIVERED NOR WHETHER THE DELIVERY WAS FOR REMUNERATION; THUS, NEITHER INDICTMENT ALLEGED A FELONY OFFENSE BUT ONLY ALLEGED CLASS B MISDEMEANOR TYPE OFFENSES. THUS, D GOT TWO REVERSALS.

However, a third conviction for delivery of L.S.D. was affirmed. (Jefferson County).

It now appears that the objection "I'm going to object. . . because the proper predicate has not been laid," is another thing of the past and is insufficient for a proper objection. Held, "In the present case, the D did not inform the TJ of which of the seven requirements the prosecution had not satisfied [for the admissibility of a tape recording]." "The prosecutor was not put on notice of which of the seven requirements he had failed to satisfy." "We hold that the objection was too general to preserve error."

COMMENT: As there should be no question the CCA is once again tightening up on making objections with specificity, it seems that our organization is going to have prepare a pamphlet of some sort to cover this event; i.e., to preserve error, if you have not spent at least fifteen (15) minutes objecting properly, your objection is probably going to be deficient or insufficient on appeal.

NOT ONLY IN THE BIG CITIES DO TJS AND PROSECUTORS SOMETIMES GET EMBARRASSED, SEE DURROUGH, March, 1978, Vol. IV, No. 6, p. 3, S.D.R., where the CCA reversed for failure to grant D's uncontroverted motion for change of venue, BUT IN SOME OF OUR NOT SO BIG CITIES THE SAME THING CAN HAPPENED. THUS, STAPLETON, #54,499, 5/10/78, J. Douglas, Panel #1, 2nd Quarter, GETS REVERSAL FOR FAILURE OF TJ TO GRANT D'S APPLICATION FOR CHANGE OF VENUE WHERE SAME WAS UNCONTROVERTED. Reversed. (Hill County).

PANEL OF CCA IN PELEGING, #53,186, 5/10/78, J.T. Davis, Panel #3, 2nd Quarter, DISCUSSES LAW OF FORGERY AND RULES THAT "THE INCLUSION IN SEC. 32.21, N.P.C., OF DEFRAUD OR HARM," PRECLUDES AN INTERPRETATION THAT THE PRESENTATION OR PASSING OF A FORGED INSTRUMENT IS A PER SE VIOLATION. Thus, case reversed for insufficient evidence as to this element of the offense. (Dallas County).

COMMENT: Here, facts showed that lawful owner of page of checks, who resided in Bastrop, discovered them to be missing. D went to a bank in Dallas and tried to cash a check. However, due to the bank's investigation, because of the amount of the check, $3,500.00, no money changed hands and no one ever saw the D make any writing, either on the face or the back of the check.

HELD: "It is clear that intent to defraud or harm is a necessary element of the offense of forgery and the burden is on the State to prove every element of the offense charged." "We fail to perceive how such culpable mental state can be shown absent proof of knowledge that the instrument is forged."

Although such a case could be proved by circumstantial evidence, Panel ruled: "In the instant case, the State proved that the instrument was in fact forged, but there is no evidence, circumstantial or otherwise, to show D's knowledge that the instrument was forged or the instrument was passed with intent "to defraud or harm another."

Thus, if all the State has is a D who is attempting to pass a forged instrument, that will not be enough by this case to sustain a conviction.

TELFAIR, SEE NOV., 1977, Vol. No. 3, p. 1, DOESN'T SURVIVE STATE'S MOTION FOR REHEARING AS CASE AFFIRMED. (Shelby County). 5/10/78, J. Douglas, En Banc, with Judges Onion, Roberts and Phillips dissenting for reasons stated in Dovalina, #53,797, 2/22/78, with J. Vollers not participating due to being disqualified, and with J. Reavley, sitting as a special judge for J. Vollers, concurring without opinion.

Originally, the CCA reversed because the following indictment was held to be void as it failed to allege a particular intent.

"D did then and there intentionally and knowingly attempt to cause the death of Marvin McClelland, Mattie C. Handy, Mary Louise Williams and Jerry Preston, by shooting them with a gun."

Held, "The case of Lucero, 502 (2) 750, answers the question." "Even though it concerned an indictment under the former code, it construed the word "attempt" as sufficient to include the word "intent." "In the present case, "attempt" was used instead of "intent." "The word "attempt" is a word of more comprehensive meaning then the word "intent" and includes the latter." Affirmed. (Shelby County).

PANEL OF CCA RULES IN CLOUD, #54,036, 5/10/78, J. Dally, Panel #1, 1st Quarter, THAT TCT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW D TO SHOW THAT SUBSEQUENT TO THE DATE OF THE ALLEGED OFFENSE THE POLICE OFFICER WHO MADE THIS CASE, PUBLIC LEWDNESS, HAD FILED A FALSE REPORT ABOUT ANOTHER OFFICER IN ANOTHER VICE SQUAD OPERATION. Affirmed. (Dallas County).

COMMENT: In this area, you must brush up on Trippel, 535 (2) 178, See April, 1976, Vol. II, No. 8, S.D.R., p.1, and try to get the witness to testify that he has never in his life lied under oath. You should also guard this information very carefully, if you plan to "manipulate" the witness into a trap, as, by informing the prosecutor of this fact, what will generally happen is that he will file a motion in limine on you and you will never get to "manipulate" the witness into the trap you desire to put him.

FOR AN INTERESTING CASE, WHERE THE D USED RADIOACTIVE ISOTOPES THAT CAUSED HIS SON TO LOSE HIS TESTICLES, READ CROCKER, #54,261, 5/10/78, J. Douglas, Panel #2, 1st Quarter, with J. Odom concurring in the result. Affirmed. (Harris County).

COMMENT: To accomplish his evil deed, for whatever reason it was that motivated him, the D would place small metal cylinders on, near or about the child's body, with the cylinders containing a radioactive substance, over a period of time. This, together with giving son "spiced" orange juice, would result in the child becoming drowsy, nauseous and causing him to vomit and caused his thighs and other parts of his body to break out and eventually caused him to be deprived of the function of both of his testes. Ugh.

However, after getting past the gruesomeness of the facts of the case, some interesting discussions regarding the following occurred:

1. Causation.
2. Requiring the State to elect when the State alleges one offense in one count.
3. Bolstering of witnesses.
4. Patient's statement to doctor and admissibility thereof.
5. Diligence used by Grand Jury re allegation "in a quantity to the Grand Jury unknown."
6. No evidence heard by Grand Jury.
7. Hypothetical Questions to expert witnesses.
8. Special and General Statutes.

IF YOU LIKE TO READ ABOUT THE LAW OF PARTIES AND HOW LITTLE IT TAKES TO MAKE A CASE ON A D WHO, WITH ANOTHER, WENT TO A MOTEL ROOM WITH OTHER PERSON WHO USED A STOLEN CREDIT CARD TO RENT A MOTEL ROOM, READ TARPLEY, #54,343, 5/10/78, J. Douglas, Panel #1, 1st Quarter. Affirmed. (Taylor County).

COMMENT: There is also a great deal in the opinion about making an arrest based upon the co-proprietor of the motel calling Bank-Americard's security in Ft. Worth and being informed the credit card used was stolen with Bank-Americard then notifying Abilene police who went to the motel room, arrested the D and the other person and then commenced a search and seizure mission of the motel room.

PANEL OF CCA, IN WYATT, #54,462, 5/10/78, J. Phillips, Panel #1, 2nd Quarter, RULES, AMONG OTHER THINGS, THAT "INFORMING A D OF THE ACCUSATION AGAINST HIM DOES NOT CONSTITUTE THE INITIATION OF ADVERSARY CRIMINAL PROCEEDING." Affirmed. (Tarrant County).

COMMENT: Here, D was arrested and next day taken before a Magistrate where he was warned. He signed a printed form acknowledging same. Later that day he was put in a lineup and identified. Then, the next day, formal charges were filed.

By the above ruling, the D's right to counsel was not inritiated when he appeared before the magistrate. No error was committed by admitting into evidence this evidence.

Furthermore, "The record reflects that Andrews' in-court identification of D was of independent origin based on her observations of D at the Quik Sak convenience store and not tainted by the lineup."

An interesting part of the opinion had to do with plea bargaining. D was originally charged with offense of robbery. He PG and got a 10 year probated sentence. Thereafter, indicted for forgery and the present aggravated robbery case. It was agreed between State and D that in exchange for PG to forgery case and plea of true to the motion to revoke, State would recommend 10 years on those cases. The Aggravated robbery case would be held in abeyance conditioned that the D would file frivolous appeal briefs in the above cases and after they were affirmed this case would be dismissed.

However, cases got to Austin and CCA ordered them rebriefed and abated the appeals. Then, when cases got back to TCT, that court granted D new trials.

Held, "Appellant contends that his filing of frivolous appeal briefs performed his entire contract." "This is true as to his performance of acts or omissions imposed on him personally by the agreement; but an affirmance of the case was required as a condition precedent to any of contractual duty of the State to dismiss the present aggravated robbery case." "Since the condition did not occur, the State had the right to proceed on said case absent some new agreement otherwise." "Since D has never before been tried or sentenced on the instant offense, N. Carolina v. Pearce does not apply."

COMMENT: I don't know about this holding as it appears the D tried to do everything within his power to carry out the plea bargain agreement and it was only through the acts of the CCA in abating the appeal and the TCT in granting new trials that prevented the contract from being consummated. Thus, in equity, if not law, the D should have gotten some relief on this issue. However, by law, neither of these Courts are courts of equity.

WATCH OUT. IF YOU ARE GOING TO ENTER A PLEA WITHOUT A RECOMMENDATION AND THEN THERE IS GOING TO BE A PRE-SENTENCE INVESTIGATION REPORT, YOU SHOULD HAVE IT SHOWN BY THE RECORD THAT NOBODY, AND I MEAN NOBODY, INCLUDING THE PROBATION DEPARTMENT, IS GOING TO MAKE A RECOMMENDATION. IN NUNEZ, #55,394, 5/10/78, J. Roberts, En Banc, with P.J. Onion concurring with opinion, THE CASE INVOLVED JUST THOSE FACTS WITH THE PROBATION OFFICER RECOMMENDING THE MAXIMUM SENTENCE ALLOWED UNDER THE LAW. Affirmed. (Harris County).

COMMENT: The D tried to withdraw his plea because he claimed there was a breach of the plea bargain agreement re no recommendation.

HELD: "The prosecutor did not violate any plea bargaining agreement made with D's counsel, since the agreement apparently was that the district attorney's office would make no recommendation and no recommendation as to what punishment should be assessed was made." "The assumption made by D that a probation officer is an agent of the prosecution is invalid." "Probation officers are assigned or designated by the courts." "The district attorney's office does not employ a probation officer nor do they have any authority over the probation officers."

CCA DISCUSSES IN GRAHAM, #53,462, 5/10/78, J. Odom writing a unanimous En Banc opinion, ISSUES CONCERNING DEFENSE OF INSANITY IN THIS AGGRAVATED RAPE CASE.

The interesting thing about this case was the fact that the defense witnesses were the only witnesses to give expert testimony.

Held, "The issue of insanity is not strictly medical, and expert witnesses, although capable of giving testimony that may aid the jury in its determination of the ultimate issue, are not capable of dictating determination of that issue." "Only the jury can join the non-medical components that must also be considered in deciding the ultimate issue." "That ultimate issue of criminal responsibility is beyond the province of expert witnesses." "Were it otherwise, the issue would be tried in hospitals rather than the courts."

As to the evidence, the CCA ruled:

"It is not necessary for the State to present expert medical testimony that a D is sane in order to counter the defense experts."

1. The mental condition of D at the time of the commission of the offense is relevant under the terms of the statutory defense.

   Here, "The last time either of D's expert witnesses saw him before the crime was 6 months before that event, and at that time his condition was in remission." He was next examined 18 days after the offense. "It cannot be said as a matter of law that the diagnosis in late Sept. and Oct. may be projected back to the offense and held conclusive as to that date."

2. The circumstances of the crime itself are always important in determing the mental state of the accused at the time of the commission of the offense.

   Here, though the C/W's testimony showed that during the attack D went "crazy" and that after the attack he got his senses back or came back to his senses this need not be taken as evidence of insanity. "Such expressions are often used in everyday speech to describe behavior that is unexpected, inappropriate, or bizarre, without implying the sense of insanity that excuses criminal responsibility." "The context of the wit' testimony shows she was using "crazy" in the everyday sense."

And, in conclusion: "Ultimately the issue of insanity at the time of the offense excusing criminal responsibility lies in the province of the jury, not only as to the credibility of the witnesses and weight of the evidence, but also as to the limits of the defense itself." Affirmed. (Lubbock County).

COMMENT: At least by this opinion, unless the D can bat 100% on the issue of insanity, we now know that a jury verdict finding against the D will always be sustained.

Also, "An adjudication that a person does not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," or that he does not have "a rational as well as factual understanding of the proceeding against him," does not alter the otherwise existing presumption that at the time of the offense the accused was sane under the standards of Sec. 8.01."

IT WOULD SEEM THAT IN A MAJOR NOTORIOUS TYPE CASE WHERE THE D HAS RECEIVED A GREAT DEAL OF PUBLICITY THAT SOME SORT OF MOTION IN LIMINE, WHERE THE STATE INTENDS TO PUT ON A CHARACTER WIT AND THE WIT IS ASSIGNED TO A PARTICULAR SECTION OF AN OFFICE, TO LIMINE OUT TO WHAT SECTION THAT PERSON HAS BEEN ASSIGNED SHOULD BE GRANTED. HOWEVER, SEE O. P. CARILLO, #57,329, 5/10/78, J. Onion, Panel #1, 1st Quarter, WHERE THE CCA HELD THAT IT WAS PERMISSIBLE FOR AN INVESTIGATOR FOR THE ORGANIZED CRIME DIVISION OF THE ATTORNEY'S GENERAL'S OFFICE TO SO TESTIFY AS A CHARACTER WIT FOR THE STATE.

Held, "We overrule this contention and find that the information was received by the court as the result of proper preliminary inquiry into the background of the wit so as to allow the jury to assess the weight to be given his testimony and to evaluate his credibility. Affirmed. (Hidalgo County).

PANEL ALSO RULED THAT WHERE THE STATE HAS A WIT TESTIFYING FOR HER IN EXCHANGE FOR A "DEAL" THAT D CANNOT EXACT A JUDICIAL CONFESSION OF GUILT FROM THE WIT.

J. PHILLIPS, IN RANDLE, #54,341, 5/10/78, Panel #1, 2nd Quarter, RULES THAT FOLLOWING EVIDENCE WAS SUFFICIENT TO GET A CHARGE ON LAW OF SELF-DEFENSE:

"D's brother testified that prior to the shooting, deceased had pulled a gun on D at the Tip Top Cafe." "D confronted deceased in the recreation hall in order to demand an explanation of certain statements made concerning D's wife." "At that time, deceased threatened D, stating, "Nigger, you better leave, before I kill you." "Deceased repeated this statement and started towards D." "Deceased was a man weighing over 200 pounds and standing approximately 6'5" while D was suffering from a back injury and was wearing a back brace." "There was also testimony concerning several prior incidents between D and deceased." "D stated that he was afraid of serious bodily injury as deceased approached, and he backed away from deceased 4 or 5 feet." "As deceased advanced, D saw a gun in deceased's right front pocket." "D pulled his gun and, when deceased turned, D fired rapidly."

Held, "The jury should have been instructed to decide these facts under the law of self-defense." Reversed. (Potter County).

Reversible error was also committed when D was denied the right to impeach State's rebuttal witness by showing that he was under indictment for a different offense.

Held, "In the instant case, the defense was entitled to demonstrate to the jury the bias or motive of the State's rebuttal witness Walser." "The fact that Walser was under indictment was admissible to afford a basis for an inference of undue pressure due to his status as an indictee." "As in Castro, supra, while the jury may have rejected such an inference, D was nonetheless entitled to bring these facts before the jury." "Consequently, D was thus denied his right to effectively cross examine witness Walser "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Also, Not harmless error.

IF YOU ARE GOING TO DICTATE OBJECTIONS TO THE COURT'S FINAL CHARGE, YOU MUST COMPLY TOTALLY AND WHOLLY WITH ART. 36.14, C.C.P., AS AMENDED.

IN DIRCK, #54,370, 5/17/78, J. Odom, Panel #3, 2nd Quarter, THE D GOT SHOT DOWN WHEN HE FAILED TO HAVE, AFTER THE REPORTER'S NOTES TRANSCRIBED, THEM ENDORSED WITH THE COURT'S RULING AND OFFICIAL SIGNATURE THEREON.

Held, "It is not sufficient just to secure permission of the court and to dictate to the court reporter objections to the charge." "The subsequent steps under the quoted provision [of Art. 36.14] must also be followed." "That was not done here." "The objections present nothing for review." Affirmed. (Harris County).

PROSECUTOR IN IRVING, #54,675, 5/17/78, J.T. Davis, Panel #3, 1st Quarter, GETS REVERSED FOR MAKING THE FOLLOWING JURY ARGUMENT:

"THE PROPER PUNISHMENT IN THIS CASE, I ASK YOU TO RELY UPON MY EXPERTISE IN THESE MATTERS, RELY UPON THE TEXAS DEPARTMENT OF CORRECTIONS, ON WHAT THE PROPER THING TO DO WITH THIS MAN IS--"

Held, "It is the duty of counsel to confine their arguments to the record; reference to facts that are neither in evidence nor inferable from the evidence is therefore improper." "There was no evidence of the prosecutor's expertise in the record." "Such evidence would not have been admissible had it been offered." Objection to above argument overruled. Due to the facts involving the range of punishment and the issue of probation being in the case, this argument was also held not to be harmless error. Reversed. (Dallas County).

STATE GOOFS IN MISDEMEANOR OFFENSE OF FRAUDULENTLY SUBSTITUTING PRICE TAGS CASE AS SHE ALLEGED WRONG COMPLAINANT AND COMMONS, #54,485, 5/17/78, P. J. Onion. Panel #2, 2nd Quarter, GAINS REVERSAL. Reversed. (Dallas County).

COMMENT: Here, Dallas Police Officer Murray Jackson, while supplementing his police officer's salary by working off-duty as security officer for a Skaggs-Albertson store in Dallas, saw the D commit the dastardly deed. Thereafter, he was named as the complainant in the complaint and information filed against the D.

Held, "It is apparent that when price tags were switched on merchandise, as was the case here, it is the owner of the merchandise who is injured, defrauded and harmed because it is the owner who stands to receive less for his goods as a result of the fraudulent act." But, here, "There is no evidence that Murray was the owner of the merchandise or the person who exercised care, control and custody thereof." Reversed.

SO YOU THINK THAT YOU KNOW WHAT THE LAW IS GOVERNING EVIDENCE ENVELOPE CASES? SEE MARCH, 1978, Vol. IV, No. 6, S.D.R., p.2, WHERE CARRIER, #54,089, March 8, 1978, RECEIVED REVERSAL WHERE ENVELOPE WHICH CONTAINED A CONDENSED VERSION OF THE STATE'S CASE WAS ADMITTED INTO EVIDENCE OVER OBJECTION.

However, before you bet any money on your expert knowledge, read WILKES, #54,425, 5/17/78, J. Odom, Panel #3, 2nd Quarter, with J. Roberts dissenting without opinion, WHICH WAS AFFIRMED AS HERE NEITHER THE NAME OF THE CHARGED OFFENSE NOR IDENTIFICATION OF THE SUBSTANCE APPEARED ON THE EXHIBIT. Affirmed. (Orange County).

Held, "Although the exhibit here bears no greater indicia of reliability than was held insufficient in Coulter, supra, and should have been excluded under the rule applied there, it was not so harmful here."

COMMENT: If you read Wilkes before your good buddy in the D.A.'s office does, you can probably collect a bundle off him. However, pass the word on this holding as we defense lawyers need to win all the bets we can.

HOWEVER, IF YOU CAN'T GET YOUR GOOD BUDDY IN THE D.A.'S OFFICE TO BITE ON WILKES, THEN TRY BOUIE, #54,711, 5/17/78, J. Odom, En Banc, with J. Phillips dissenting and concurring with opinion, and with P.J. Onion, joined by Judges T. Davis and Dally, concurring with opinion, and with J. Roberts dissenting to opinion.

FACTS: D entered a PG to charge of robbery by assault, old code case, and received 10 years T.D.C. As part of the plea bargain agreement, an enhancement allegation was dismissed. See Art. 62, Old P.C.

D then appealed his conviction and it was reversed and ordered dismissed by CCA, see 528 (2) 587, as the Indictment was held to be void. After reversal, he was then reindicted for same offense but the new indictment alleged two prior convictions for enhancement. He then plead guilty to the primary and not true to the enhancement allegations. In a bench trial, the trial court, upon finding the enhancement allegations "true," assessed D's punishment at life imprisonment.

HELD: "The judgment of conviction is affirmed, the punishment is set aside, and the cause is remanded for dismissal of the enhancement allegations in the indictment and for assessment of punishment within the principles of North Carolina v. Pearce, supra." (Harris County). Remanded.

"Prosecutorial vindictiveness is retaliation and distinguishable from trial strategy that is a matter of the D's free choice with full knowledge of the consequences." "If a D withdraws on retrial from a plea bargain obtained at the first trial; an increased punishment would be a legitimate response of the State to the D's rejection of that agreement." "On the other hand, if the D enters the same plea on retrial as on the first trial, the use of the enhanced statute cannot be said to be the legitimate response approved in Bordenkircher v. Hayes, supra." "The possibility of prosecutorial vindictiveness in retaliation for the exercise of the right to appeal again arises, and the burden shifts, as in this case, to the State to show "objective information concerning identifiable conduct on the part of the D occurring after the time of the original sentencing proceeding." "The record before us is devoid of any such objective information." "We hold that due process was violated by use of the enhancement paragraphs of the indictment, and that the TCT erred in denying D's motion to dismiss the enhancement paragraphs."

COMMENT: J. Roberts simply would have reversed the case due to the failure of the TCt to comply with Art. 26.13, C.C.P.

"When a trial judge fails to follow a mandatory statute, the failure should be called to his attention." "As an appellate court, our only way of calling attention is by reversing the case." "To do so is neither nonsense nor an absurdity; it is nothing less than our duty." J. Phillips joined in J. Roberts' dissent and also concurred to the majority's reasoning on the issue of prosecutorial vindictiveness.

P.J. Onion said, in part: "However, insofar as Alvarezholds that where there is potential prosecutorial vindictiveness the case may turn upon whether the plea was different at the two trials and whether trial strategy was involved, it should be overruled." "A D should not lose the due process protection afforded by Pearce and Perrymerely because at his second or subsequent trial he changes his plea or his trial strategy."

MY ADMONITION THAT IT IS INCUMBENT THAT DEFENSE COUNSEL COUNSEL WITH A D WHO IS GOING TO BE PLACED ON PROBATION AS TO WHAT HE MAY BE ASKED BY THE PROBATION OFFICER IS WELL SEEN BY SIMMONS, #57,366, 4/19/78, J. T. Davis.

Comment: Here, the D was put on probation. He was subsequently tried for aggravated robbery. His defense was alibi. The D denied any dependency on narcotics or any use of narcotics as did his wife. During the course of the robbery, the C/W testified the D stated to a Co-D that "I have a monkey on my back, $100 a day."

The State then put on the unit supervisor of the probation department and he testified, from his records, that the D stated to his probation officer the following: "He admitted using drugs several times and also the use of heroin."

HELD: "The proper predicate was laid whereby Pierce could testify from probation records that D had admitted narcotics use to the probation department." "D's statement made while he was not under arrest or in custody to the probation department inconsistent with his testimony in court was admissible for the purpose of impeachment." Affirmed. (Dallas County).

BAD ROBBERY INDICTMENT CASES STILL COMING IN; THIS TIME, VIA POST CONVICTION HABEAS CORPUS. SEE EX PARTE PARKER, #58,331, 4/19/78, J. Phillips; and EX PARTE SHANNON, #58,332, 4/19/78, J. Phillips. Writs granted. (Harris County and Brazos County). Panel #1, 2nd Quarter.

EX PARTE GORTON, #57,608, 4/19/78, J. Odom, Panel #3, 2nd Quarter, GETS WRIT GRANTED AS HE PROVED HE WAS INDIGENT AT HIS 1954 TRIAL AND THAT HE WAS NOT REPRESENTED BY COUNSEL AT SENTENCING. CONSEQUENTLY, HE WAS DENIED APPELLATE REVIEW OF HIS CONVICTION. AS IT WAS IMPOSSIBLE TO GIVE D AN OUT OF TIME APPEAL, HE GETS A NEW TRIAL. Writ Granted. (Jefferson County).

KEEP IN MIND THAT MUNICIPAL OR JUSTICE COURT CONVICTIONS, EVEN IF NOT FROM COURT OF RECORD, MAY BE ADMISSIBLE AT THE PUNISHMENT STAGE OF THE TRIAL, SEE ART. 37.07, C.C.P., IF THEY ARE MATERIAL TO THE OFFENSE CHARGED. THUS, FIST FIGHTING IS MATERIAL TO AGGRAVATED ROBBERY. CHESTNUT, #54,590, 5/24/78, J. Odom, Panel #3, 2nd Quarter. Affirmed. (Bell County). Thus, you should be on guard to challenge the validity of these type convictions on some legal basis.

IT IS NOT NECESSARY FOR A TJ TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW, REGARDING A CONFESSION, IF THE D DOES NOT CHALLENGE THE VOLUNTARINESS AND ADMISSIBILITY OF THE CONFESSION ON APPEAL. THUS, APPEAL WILL NOT BE ABATED IN THIS EVENT. BROOKS, #54,322, 5/24/78, J. Odom, Panel #3, 2nd Quarter. Affirmed. (Smith County). Also, evidence presented by the State in anticipation of an attack on the voluntariness of a confession does not put voluntariness in issue. Only when some evidence is presented that a confession is not voluntary is the issue before the jury.

PANEL OF CCA, PANEL #2, 2ND QUARTER, IN EX PARTE HOMER AND LINDA CAMPBELL, #57,251 & 252, 5/24/78, P.J. Onion, DECLINES TO CONSIDER WRIT OF HABEAS CORPUS CASE WHERE D, CHARGED WITH 3 CASES IN TRAVIS COUNTY AND 9 OTHER CASES IN WILLIAMSON, TAYLOR, LUBBOCK, GREGG, TARRANT AND BEXAR COUNTIES, Writ Denied, (Travis County).

Ds, apparently in jail in Travis County, filed application for writ of habeas corpus to have $500,000.00 (total of all cases) bail reduced. After a hearing, Travis County judge reduced bail on the Travis County cases but declined to act on the other out of county cases.

Held, because of Art. 11.07, C.C.P., the writ must be returnable to the judge of the county where the offense covered by the indictment was committed.

Held, "Thus, we conclude the trial court was correct in refusing to act on the out of county cases, but it should have acted to make the writ returnable to the various counties where the indictments alleged the offenses occurred." "Upon remand, the writ should be made returnable to the various counties unless the applications for writs of habeas corpus are withdrawn by appellants." (Travis County).

FOR A CASE WHERE C/W WAS ROBBED BY 5 PERSONS, WHO ALL GOT AWAY BUT 3 OF THE 5 WERE ARRESTED SHORTLY THEREAFTER, WITH ONE OF THE 3 COPPING OUT ON D, WITH THE POLICE THEREAFTER, WITHOUT WARRANT, GOING TO WHERE D WAS AND ARRESTING HIM AND CONDUCTING A SEARCH AND SEIZURE MISSION, READ JONES, #55,598, 5/24/78, P.J. Onion, Panel #2, 2nd Quarter. Affirmed. (Dallas County). Everything done by the police was poco weino said CCA.

PANEL OF CCA, IN WARREN, #54,689, 5/24/78, J.T. Davis, Panel #3, 2nd Quarter, REJECTS STATE'S ARGUMENT THAT A D IN A MURDER CASE MAY NOT URGE INCONSISTENT DEFENSES: I.E., SELF-DEFENSE AND INSANITY AND REVERSES CASE FOR FAILURE OF TJ TO GIVE CHARGE ON USE OF DEADLY FORCE. Reversed. (Harrison County).

Here, D introduced evidence from psychologist and a psychiatrist, which testimony raised the defense of insanity.

Additionally, the D also raised the issue of self-defense. "The evidence is uncontradicted that D shot deceased with a pistol." "D testified that deceased had threatened to kill him on the day of the shooting, that he believed she had a weapon when she entered his apartment, that he had no place to retreat, and that he shot her to protect his life."

Held, "D's rendition of the facts raised an issue that entitled him to an instruction on his justification in using deadly force against the victum."

"The fact the TCT did charge on self-defense under Sec. 9.31 was not sufficient as it should have also charged on the use of deadly force in defense of a person pursuant to Sec. 9.32."

The State's analogy of the defense of insanity to the defense of entrapment was simply unacceptable to the Panel.

PAYNE, #55,601, 5/24/78, J. Dally, Panel #2, 2nd Quarter, GETS REVERSAL WHEN PANEL RULES THAT EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTION FOR PASSING A FORGED CHECK. Reversed. (Taylor County).

Held, "To sustain the conviction for passing a forged check there must be proof that the check was forged." "To prove that a check is forged it is necessary to prove that the purported maker did not authorize the D or another to make the check."

COMMENT: Here, the D, apparently from the evidence, got her mother's check book and wrote a check for $65.10 on her mother's account and cashed same at "Aunt Betty's Rags," a store in Abiline. When the check was returned it appears Mamma went down and filed forgery charges against her daughter. The mother testified that while taking medication she could have given D permission to write the check but did not remember doing so. Other evidence showed that mother, when asked by D for permission to write the check, said: "I don't care how many checks you write." Held, "The evidence is insufficient to support a finding that D was not authorized to make and pass the check.

J. ODOM, WRITING FOR PANEL #3, 2ND QUARTER, IN WHITE, #55,608, 5/24/78, PUTS A CRIMP IN POLICE STOPPING AUTOMOBILES, BECAUSE OFFICERS BECAME SUSPICIOUS OF D AS D AND ANOTHER APPEARED TO BE RIDING AROUND SHOPPING CENTER, WHICH HAD BEEN PLAGUED BY PURSE SNATCHERS, WITH NO PURPOSE IN MIND, AND RULE THAT STOPPING CAR FOR A DRIVER'S LICENSE CHECK WILL NOT BE PERMITTED TO SUSTAIN A SEARCH OF CAR WHEN IT IS A "SUBTERFUGE TO COVER UP AN UNLAWFUL STOP BASED ON MERE SUSPICION UNSUPPORTED BY ARTICULABLE FACTS NECESSARY FOR AN INVESTIGATIVE DETENTION," IS HANDED DOWN." Reversed. (Harris County).

Held, "The behavior observed by the officers was as consistent with innocent activity as with criminal activity, and in fact was no ground for suspicion whatsoever." "A mere hunch will not support a traffic stop." "We hold the automobile stop was unauthorized and a violation of D's constitutional rights." "The contraband discovered and seized in the course of events flowing from the initial stop should have been suppressed."

J. DALLY BELIEVES THAT THE CCA IN TREVINO, #56,424, 5/24/78, En Banc, J. Odom, with J. Douglas dissenting without opinion, and with J. Dally dissenting with opinion, USED RED HERRINGS AND MUSCLE TO GRANT THE STATE A MOTION FOR A NEW TRIAL AND FAILED TO ABIDE BY THE HISTORICAL PRINCIPLE OF LAW OF LETTING THE CHIPS FALL WHERE THEY MAY. Remanded. (McLennan County).

COMMENT: The D filed a motion for new trial alleging error in the separation of the jury without his consent after the court gave its charge to the jury. For whatever reason, the D's attorney did not show up for the hearing set on the motion for new trial but the hearing was held anyway with the TCt overruling the motion, sentencing the D with him then giving notice of appeal.

After discussing the fact that this hearing constituted a critical stage of the proceedings, the majority held: "Thus, in this case when the motion for new trial came on for hearing and D's counsel was not present, the hearing could have been continued or recessed in the interest of justice to some date after the 20 day limit (the hearing was apparently held on the 19th day) at which time D's right to counsel would have been protected." "We hold D was denied his right to counsel at a critical stage of the proceedings against him" CCA then remanded the case back to the TCt to commence proceedings at the motion for new trial stage of the game.

J. Dally said, in his dissent, in part, that this excuse to remand the case was nothing more than a red herring. "Without being granted rule-making power, the majority on its own muscle is now promulgating historically unprecedented new rules of criminal procedure granting the State the right to a motion for new trial." "This appeal should be decided on the record now before this Court, and let the chips fall where they may."

COMMENT: Actually what happened here is the State got caught with her britches down as she didn't refute the presumption of harm arising from the separation of the jury without the consent of the D, see Skillern v. State, #55,337, 12/21/77, at the hearing on the motion for new trial. Apparently, recognizing the error, the State then claimed on appeal that the D was denied counsel, which the majority bought, thus resulting in a remand of the case back to the trial court where the State can now put on evidence to rebut the presumption of harm.

It seems the fair thing to have done in this matter was to remand the case back to the trial court with counsel for the D being allowed to stand on the record as it now exists or be permitted to add to the record if he chooses. However, the majority did not so rule.

I think this is one of those cases, where someone argues that "manipulation of the law and technicalities in the law are allowing criminals to walk the streets when they should be in prison," that one can reply that the converse is also true; i.e., it can also cause convictions to be affirmed and Ds being locked up. Another interesting facet of the case was that on a plea of guilty, this McLennan County jury gave this D maximum possible punishment under the law for the offense of possession of grass.

EX PARTE TABOR, SEE VOL. III, NO. 13, JULY, 1977, S.D.R., P. 4, DOESN'T GET TO GO BACK TO BROWN COUNTY, 5/24/78, P. J. Onion, En Banc, with Judges Roberts and Phillips dissenting without opinion and with J. Vollers not participating, AS MAJORITY OF CCA RULES THAT D MADE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO APPEAL; THUS, AS D GETS NO APPEAL, HE GETS NO APPEAL BOND. THUS, MUST GO DIRECTLY TO PEN.

Held, "No attack on the waiver of the right to appeal will be entertained in the abscence of factual allegations supporting the claim that the waiver was coerced or involuntary." State's Motion for Rehearing Granted. Writ Denied. (Brown County).

BEFORE YOU READ THE NEXT THREE (3) OPINIONS, AND BELIEVE ME YOU SHOULD,GET SOME OF THAT STUFF THAT SAMMIE DAVIS, JR. ADVERTISES AS YOU WILL NEED SOMETHING TO SOOTHE YOUR STOMACH AFTER DOING SO.

FRANKLIN, #57,348, 5/24/78, J. Dally, En Banc, with J.W.C.Davis concurring in the result, with J. Odom dissenting without opinion, with J. Phillips, joined by P. J. Onion and J. Roberts, dissenting with opinion, Affirmed. (Nueces County on change of venue from Bexar County).

Here, some of the highlights of the opinion were as follows:

1. In a capital murder case, under no circumstances can you get a charge on the law of circumstantial evidence, regarding the questions to be asked, at the punishment phase of the trial.

2. Where the D impeaches or attempts to impeach the testimony of an identifying witness' identification the testimony of a third party as to the wit' extra-judicial identification is admissible. Compare Williams #55,599, 5/24/78, J. Dally, Panel #2, 2nd Quarter. Affirmed. (Dallas County).

******3. A D WHO TESTIFIES AT A PRE-TRIAL HEARING CAN BE IMPEACHED AT TRIAL AS TO WHY HE HAD NOT RELATED HIS EXCULPATORY VERSION OF THE FACTS IN THE PRETRIAL HEARINGS.

"When D testified for limited purposes at the pretrial hearings the State was properly restricted in its interrogation and cross examination of D, but D in those hearings was free to testify to, and had the opportunity to testify to, the same exculpatory version of the facts as he later did before the jury."

"WE HOLD THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO CROSS EXAMINE D BEFORE THE JURY AS TO WHY HE HAD NOT RELATED HIS EXCULPATORY VERSION OF THE FACTS IN THE PRETRIAL HEARINGS."

4. In a capital murder case, testimony of a sociologist that the death penalty does not, in his opinion, deter crime is not admissible. Likewise, as to his testmony regarding the death penalty in Texas, the opposition of several religious groups to the death penalty, and what happens at an electrocution is also not admissible.

5. It is permissible to exclude persons under 30 from serving on the Grand Jury. "We hold that an arbitrarily defined age group does not constitute a recognizable class for the purpose of determining the lawfulness of a grand jury selection system."

6. Not necessary to have evidence before Grand Jury votes to return an indictment.

7. It is okay for a D.A. to decide who does and who does not get selected for a capital murder trial.

8. Capital Murder prospective jurors may be disqualified under either Witherspoon or Sec. 12.31(b) or both.

9. Specificity regarding making objections is the rule; not the exception in Texas law.

As to #3, supra, J. Phillips said, probably after taking some of that flop, flop, fizz, fizz stuff:

> "The majority's disposition once again places a criminal defendant upon the horns of a dilemma when evaluating whether to pursue his 4th Amendment rights at the pretrial stages." "This Hobson's choice was erased from criminal jurisprudence in Simmons v. U.S., but the majority would resurrect it once again to haunt the courtrooms of this State."

WILLIAMS, #53,528, 5/24/78, J. Dally, En Banc, with J. Roberts dissenting with opinion, and with J. Phillips, joined by P.J. Onion and Judges Roberts and W. C. Davis, dissenting with opinion, Affirmed. (Galveston County).

The highlight is as follows:

1. Where A D is wanted by the police, goes and hires an attorney, who surrenders the D to Sheriff's officers, with the admonition that he represents the D and did not want the D, whom the lawyer claimed was ill and on medication, interrogated unless he was present to represent him, and, after the attorney leaves, the D is then turned over to another police agency, it is permissible for the latter to interrogate the D and get a confession from the D if they can.

   Apparently, after obtaining the confession, the attorney had a conversation with the interrogating officer:

   Q: Do you recall me asking you why in the world you were taking a statement from a person you knew I was representing?

   A: Yes, sir.

Q: Wasn't your answer to the effect that you had a job to do and you were going to do it regardless?

A: I think I said something like I was obligated to make the best possible case and I am obligated to use every illegal means available to do it.

Q: Regardless of whether he had an attorney or anything else, is that correct?

A: I could care less if he had two lawyers.

Q: That's right, you could care less?

A: That's exactly right.

Held, "We conclude that under the totality of the circumstances the State has proven "an intentional relinquishment or abandonment of a known right and that D waived his right to remain silent and his right to have counsel present during questioning."

J. Roberts would have reversed on failure of the trial judge to give a charge on circumstantial evidence.

J. Phillips, joined P. J. Onion and J. Roberts and J. W. C. Davis, would have reversed on the issue involving the confession.

"Are we to allow law enforcement officials to circumvent an accused's 6th Amendment right to counsel by shuffling him back and forth until he is in the hands of an officer who is unaware of a prior commitment made to the accused's attorney?"

CHAMBERS, #54, 676, 5/24/78, J. Douglas, En Banc, with J. Roberts joined by J. Phillips, dissenting with opinion, Affirmed. (Dallas County).

The highlights:

1. Although it was held the trial judge abused his discretion in excusing a prospective juror, in this capital murder case, "However, because there is no showing that D did not receive a fair and impartial jury, and because the State exercised only 13 of its 15 peremptory challenges, one of which could have been used to remove prospective juror Minicks, no reversible error is shown."

2. The excusing of a statistician was not error as he testified that whether an act will probably occur in the future cannot be proven beyond a reasonable doubt.

"Whether or not the concept of determining the probability of future conduct is mathematically viable, it is clear that the concept is viable in law."

J. Roberts, in part, said in his dissenting opinion:

> "In determining whether a D's due process rights have been violated by the conduct of the voir dire examination, we should look to the entire voir dire and not to portions in isolation--except of course where those portions standing alone constitute reversible error."
>
> "Every citizen, when placed upon trial for his life, is entitled to a trial according to the due course of the law of the land." These rules of law may be termed by some technicalities, but they accord with a fair and an impartial trial, and are founded in the wisdom of experience; and, moreover, some of these constitute the safeguards and bulwarks of human rights, and, whenever and wherever they have been disregarded or ignored, that era has marked the decadence of human freedom."

COMMENT: Chambers, supra, may give lawyers, who defend persons charged with capital murder, some food for thought. If a psychiatrist is qualified, after visiting with a defendant for a relatively short period of time, to make a prediction as to future probability, it would seem that you could also qualify a statistician, such as Mr. Delgadillo, who could testify that whether an act will probably occur in the future cannot be proven beyond a reasonable doubt to show acts of violence in the future. This could possibly be developed by the use of those inmates whose death sentences were commuted as a result of Witherspoon and Furman and Branch, to life sentences.

J. ROBERTS, WRITING FOR PANEL #3, 1st Quarter, 5/31/78, with J. Vollers dissenting without opinion, IN EXPARTE CASPER WALTERS, HOLDS THE FOLLOWING INDICTMENT TO BE FUNDAMENTALLY DEFECTIVE AS IT FAILED TO ALLEGE THAT THE D PRESENTED A CREDIT CARD WITH KNOWLEDGE THAT IT HAD NOT BEEN ISSUED TO HIM AND WITH KNOWLEDGE THAT HE USED THE CREDIT CARD WITHOUT THE EFFECTIVE CONSENT OF THE CARD HOLDER. Writ Granted. (Dallas County).

> "D. . . did unlawfully, then and there present to Linda Moore, a Sears Credit Card Number 0 95742 5 6500 5, with intent to obtain property and service, without the effective consent of the cardholder William R. Opry."
>
> Held, The culpable mental state was not alleged. "Also, the Indictment fails to properly allege the requirements that the act be performed with the "intent to obtain property or service fraudulently since it omits the word fraudlently."

COMMENT: Here, the prosecution simply forgot to put into the Indictment the elements set out in Sec. 32.31, P.C. Compare, however, Sec. 32.31, the forgery statute.

AS PREVIOUSLY MENTIONED, IF YOU ARE DEALING WITH A HABITUAL CRIMINAL SITUATION; I.E., THE STATE HAS ALLEGED A PRIMARY OFFENSE AND TWO (2) PRIOR CONVICTIONS, ALWAYS ELECT TO GO TO THE JURY FOR IF THE EVIDENCE IS INSUFFICIENT TO SHOW THAT D'S SECOND PREVIOUS CONVICTION WAS FOR AN OFFENSE COMMITTED AFTER THE FIRST PREVIOUS CONVICTION BECAME FINAL THEN THE D GETS A NEW TRIAL. SEE PORTER, #56,957, 5/31/78, J. Roberts, Panel #3, 1st Quarter. Reversed. (Dallas County).

Held, "The record failed to show when the offense in the 1st prior conviction was committed." "Therefore, there is no evidence in the record to show that the conviction was final when D committed the offense in the second alleged prior conviction." "The State has thus failed to meet its required burden under Sec. 12.42(d)."

Compare, however, this case with Childress, 472 (2) 133, 1335.

CCA RULES IN ALVAREZ, #54,149, 5/31/78, J. Roberts, Panel #3, 1st Quarter, THAT EVIDENCE REGARDING THE MANNER OF USE OR INTENDED USE OF KNIFE WAS INSUFFICIENT TO SHOW THAT A LINOLEUM KNIFE WAS CAPABLE OF CAUSING DEATH OR SERIOUS BODILY INJURY. HELD, THE EVIDENCE IS INSUFFICIENT TO SHOW THAT D USED A DEADLY WEAPON. "THE STATE'S EVIDENCE, AT BEST, REVEALED ONLY THE COMMISSION OF AN ASSAULT." Reversed. (Bexar County).

Here, the D was charged with making an aggravated assault with a deadly weapon on a police officer by making a swing at officer with a linoleum knife with officer thereafter aiming for and shooting D in the leg with the D still advancing toward the officer. However, when the officer politely told the D he was going to kill him, the D backed off and dropped the knife.

EDMOND, #54,143 & 114, 5/31/78, J. Roberts, Panel #3, 1st Quarter, with J. Vollers dissenting without opinion, GETS ONE REVERSAL AS JURY WAS AUTHORIZED TO CONVICT D FOR AGGRAVATED ROBBERY IF THEY FOUND THAT D EITHER CAUSED SERIOUS BODILY INJURY TO LIBBIE JANSKY OR IF D USED OR EXHIBITED A DEADLY WEAPON AS THIS ALLOWED JURY TO CONVICT D ON A THEORY NOT ALLEGED IN THE INDICTMENT; I.E., IT WAS ONLY ALLEGED THAT D THREATENED AND PLACED LIBBIE IN FEAR OF IMMINENT BODILY INJURY AND DEATH. Reversed. (Bell County). THIS WAS FUNDAMENTAL ERROR.

However, D's conviction for attempted murder was affirmed.

IN LIGHT OF KOMURKE, 562 (2) 230, ART. 38.07, C.C.P., AND NOW VICKERY, #54,859, 5/31/78, P. J. Onion, Panel #2, 2nd Quarter, DIRTY OLD OR YOUNG MEN BETTER LOOK OUT. Affirmed. (Tarrant County).

In Komurke, CCA ruled that 12 year old was too young to be criminally responsible and was not an accomplice witness as a matter of law or fact and no corroboration of his testimony was required.

Here, Panel of CCA discussed Art. 38.07, C.C.P., which provides that a conviction under Chapter 21, Sexual Offenses, can be supported on the uncorroborated testimony of the victum of the sexual offense if the victum informed any person, other than the D, of the alleged offense within six months after the date on which the offense is alleged to have occurred.

Here, C/W, 15 years old, did not report the incident of being masturbated and having D's finger stuck up you know where to his parent until three (3) months after the alleged offense.

Held, "We conclude that Arts. 38.07 and 38.14 are in pari materia and when construed together can be harmonized." "The general rule of Art. 38.14 applies except where the accomplice witness is a victum of a sexual offense in which the testimony of the witness need not be corroborated in order to support a conviction."

SEE YOU AT THE BAR CONVENTION IN FORT WORTH

Clif Holmes

Editor's Corner

Well, old TCDLA has made another year. How (and maybe, why) is a matter of conjecture. I, for one, think it's due primarily to the dedication and sacrifice of the officers and directors, who spend their time and money to "keep the ball rolling." Were I the "award giver" I'd give each of them an embossed, 8x10, suitable for framing, "THANK YOU." But, dammit, TCDLA cannot continue to exist as nothing more than a striving Board of Directors. Directors must have something to direct. We have to have a concerned, active membership who are interested in improving our criminal justice system. Our annual meeting is announced in this issue. I challenge each of you to be there. It is *your* organization and you ought to be telling the Board how you want it run. The annual meeting gives you that opportunity. If you want something on the agenda, call Steve. If you want the opportunity to be heard, you'll have it. If you want TCDLA to be an effective voice for the criminal defense bar, you will be there. If you don't, or just don't care, you won't. It's just that simple.

This issue is dedicated to the memory of a great man and great lawyer, Judge Fred Erisman. It was my good fortune to have been from the Judge's neck o' the woods, and to have known him for many years. Fred Erisman was *concerned* about his profession, especially his favorite facet thereof, the criminal law. He was a charter member, director, and staunch supporter of TCDLA. All of us can't be Fred Erismans. Our contributions will be smaller and of less renown. We owe it to ourselves and the bar, though, to make the contributions we can. Let's start contributing by showing up in Fort Worth.

Law Office of Martha McCabe
Room 210A Commercial
National Bank Building
Post Office Box 13
Nacogdoches, Texas 75961
May 2, 1978

Clif Holmes
Editor, *Voice for the Defense*
Texas Criminal Defense Lawyers
Association
Box 1073
Kilgore, TX 75662

Dear Editor Holmes:

This month, as I have every other month for the past several years, I was leafing through my copy of the *Voice for the Defense* as soon as I received it in the mail. As a lawyer who practices a small but steady amount of criminal law in the state courts, I frequently find the articles and features practical and helpful in my work.

This month however when I got to Page 19 I ran across the Bancroft-Whitney ad which prompted me to write this letter. TCDLA, it is true, is an organization made up overwhelmingly of men, probably a pretty fair reflection of the fact that the rest of the lawyers practicing criminal law in this state are men. Not only are the members of the TCDLA, however, lawyers, and therefore presumably owing some particular attention to the constitution and laws of Texas; they belong, additionally, to an organization which has taken positions—for example, in its work regarding the death penalty—that set it apart from the vast bulk of lawyers in Texas who concern themselves very little with the quality of justice in the Courts. Mr. Holmes, I am not at all pleased with the quality of justice purveyed by Bancroft-Whitney in the ad appearing on Page 19. There are a number of reasons why the scenario portrayed in the advertisement is reprehensible to anyone who takes seriously, or even professes to take seriously, the guarantees of equality for women and men that our system of law provides. It seems to me, that after six or eight years of public debate on the subject of sexism in the media, a person in your position does not need to be instructed by a person like me about the various ways in which the advertisement referred to perpetuates notions about the respective roles of women and men that are strikingly inappropriate in a publication like *Voice for the Defense.*

I know that it is often said, and it would be a convenient response for you to say, that in the interests of commercial free speech and other such high-falutin' concepts, an editor such as yourself has no business "censoring" copy of its advertisers. Other publications, perhaps in just as much need of advertising revenue as yourself, have grappled with this issue and have come down on the side of informing their advertisers that they will not accept copy that affronts the dignity of human beings in any way. It seems to me that the subject of sex has so little relation to the subject of criminal evidence that the advertiser's intent to titillate rather than educate is obvious and needs no further discussion on my part. I have sent a copy of this letter, as well as another, direct to Bancroft-Whitney with my strong protest over this type of advertising. I am not interested, in short, in seeing this type of advertising appear any longer in the pages of *Voice for the Defense.* I am, to the contrary, interested in hearing from you about your response to my letter on this question.

In conclusion I strenuously urge *Voice for the Defense* to work with Bancroft-Whitney and any other like-minded advertisers to be sure that their advertising copy is not patently offensive to women, minorities, or other groups in whose interest we as advocates so often find ourselves arguing in the courts.

Yours sincerely,

Martha McCabe

CRIMINAL DISCOVERY DURING TRIAL

DAVID CARLOCK, DALLAS

NOTE: The assistance of Messrs. Ron Chapman, Tom Mills, Jr., and Vincent W. Perini in the preparation of this outline is acknowledged with appreciation.

I. THE GASKIN RULE

A. *Gaskin v. State*, 353 S.W.2d 467: Upon timely request, the Defendant is entitled to inspect a statement or report made by a State witness subsequent to the testimony of the State's witness on direct examination. It is not necessary that the witness have used the statement or report to refresh his recollection or memory.

1. *Lewis v. State*, 481 S.W.2d 804; Requirements for Gaskin:
   a. Witness must be for the State;
   b. Witness must have made a report or must have given a statement prior to testifying;
   c. Timely motion by Defendant.
2. *Zanders v. State*, 480 S.W.2d 708: Defendant not required:
   a. To show that witness used instrument to refresh his memory;
   b. To show that witness has even seen statement since giving it.

B. *White v. State*, 496 S.W.2d 642: It is error to fail to require production of a prior available report or statement of the State's witness if the *Gaskin* rule is effectively invoked at trial, but such error may be harmless.

1. Harmfulness of error is dependant upon whether an examination of the report or statement by the court on appeal demonstrates that the accused should have been allowed the statement for the purposes of cross-examination and possible impeachment;
2. *Zanders v. State* (supra) error *per se* will result if the accused is denied the opportunity to have made available such statement for the appellate record for the purpose of showing injury, if any.
   a. *Leal v. State*, 442 S.W.2d 736: *Lewis v. State*, (supra): CAVEAT! It is incumbent upon the accused to preserve error when the statement or report is denied by having same placed in a sealed envelope and forwarded to the appellate court for examination on appeal.

C. *Artrell v. State*, 372 S.W.2d 944: A report made by someone other than the witness himself cannot be obtained, even if the witness refreshed his memory by reading just before testifying (criticized by Judge Onion in his occurring opinion in *Lewis*.)

II. USE BEFORE THE JURY RULE

A. *Sewell v. State*, 367 S.W.2d 349: A Defendant is entitled to inspect, upon his timely request, any document, instrument or statement which has been used by the State before the jury in such a way that its contents become an issue.

1. *White v. State*, 478 S.W.2d 506: Failure to permit or compel such inspection is reversible error, and showing of harm flowing from the error is not required;
2. *Rose v. State*, 427 S.W.2d 612: It is clear that if used before the jury, the document, statement, instrument, etc. is obtainable regardless of whether it has been made by the witness or not;
3. *Baldwin v. State*, 490 S.W.2d 583: The cross-examiner can obtain documentary reports used by the witness to refresh his memory with respect to his direct examination testimony while the witness is testifying before the trier of fact.

III. THE BRADY DOCTRINE

A. *Brady v. Maryland*, 373 U.S. 83 (1963): The suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

1. *Moore v. Illinois*, 408 U.S. 786 (1972): Brady doctrine further explained.
   a. Suppression by the prosecution must come after a request by the defense;
   b. The evidence suppressed must be of a favorable character for the defense;
   c. The evidence must be material to either guilt or to punishment.
2. *U.S. v. Agurs*, 427 U.S. 97: Goodbye to Brady? Three different situations involving failure to disclose with three different results.
   a. Prosecution uses testimony it knew or should have known was perjured. Reversal will follow if there is any reasonable likelihood the false testimony could have affected the judgment of the jury, regardless of a defense request for exculpatory material;
   b. Pre-trial requests for specific evidence and a failure to disclose will result in reversal if the suppressed evidence might have affected the outcome of the trial (*Brady* situation);
   c. If only a general request for exculpatory material or no request at all, reversal will result only if the omitted evidence creates a reasonable doubt that did not otherwise exist.

IV. JENCKS ACT

A. 18 U.S.C. § 3500 (1970): After a witness called by the United States has testified on direct examination, the court shall, on a motion of the Defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter concerning which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered to the Defendant for his examination and use.

1. "Statement" defined:
   a. A written statement made by said witness and signed or otherwise adopted and approved by him;
   b. A stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
   c. A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to the Grand Jury.

• • •

TCDLA
ANNUAL MEETING
THURSDAY
JUNE 29, 1978
10:00 A.M.
FT. WORTH CONVENTION CENTER
ROOM 122

REPORT ON STATE OF ASSOCIATION

AND

ELECTION OF OFFICERS, DIRECTORS AND ASSOCIATE DIRECTORS

TCDLA - Hospitality Room
Sheraton-Ft. Worth
815 Main Street
(across from Convention Center)
June 27th and June 28th, 1978

TCDLA ANNUAL MEETING

At the Annual Meeting the membership will elect officers and Directors for the coming year. The following have been nominated:

OFFICERS
President: George Luquette
President Elect: Vincent Perini
First Vice-President: Harry Nass
Second Vice-President: Robert Jones
Secretary-Treasurer: Charles McDonald
Assistant Secretary-Treasurer: Gerald Goldstein

DIRECTORS

Clifford Brown	Robert Salinas
Clif Holmes	Thomas Sharpe
Anthony Constant	Stanley Topek
Pat Priest	Charles Rittenberry
Raymond Caballero	Grant Hardeway
Russell Busby	Rodger Zimmerman

ASSOCIATE DIRECTORS

Benny House	Keith Alaniz
Willis Thomas Taylor	C.W.(Robbin) Pearcy
Richard Anderson	Larry Sauer
Charles Burton	R. L. Whitehead
Richard Harrison	James Bobo
Michael Gibson	Michael Thomas

ANNUAL CONVENTION
STATE BAR OF TEXAS
June 27 - July 1, 1978

Criminal Law Institute

June 28, 1978
8:30 A.M. - 5:00 P.M.
FT. WORTH CONVENTION CENTER

Criminal Law Institute & Luncheon: Pre-registration $35.00, after July 19, $40.00
Luncheon Only: Pre-registration $15.00, after July 19, $20.00

SPEAKER	SUBJECT
The Honorable John Onion Presiding Judge Court of Criminal Appeals	*Recent Decisions of the Texas Court of Criminal Appeals*
The Honorable B. J. George, Jr. President Southwestern Legal Foundation	*Recent Decisions of the Supreme Court of the United States*
The Honorable Patrick Higginbotham United States District Judge	*Warrantless Searches*
The Honorable Larry Gist District Judge	*Part Two of the Bifurcated Trial*
LUNCHEON	*Speaker To Be Announced*
Dr. Martin Blinder, M.D. San Anselmo, California	*A Psychiatrist Voir Dires a Jury*
Dr. James Grigson Dallas, Texas Dr. George Dix Austin, Texas Psychiatrists	*Psychiatry and the Death Penalty*
Warren Burnett, Esquire Attorney At Law Odessa, Texas	*Some Aspects of Cross-Examination, Psychological and Otherwise*
Richard Haynes, Esquire Attorney at Law	*Reading the Jury During Final Argument*

Contact: STATE BAR OF TEXAS CONVENTION
P. O. Box 12487
Austin, Texas 78711
(512) 475-1234

ATTORNEY GENERAL'S OPINIONS

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

H-1157
RQ-1790
A juvenile officer whose powers and duties are governed by article 5142, V.T.C.S., has the authority of a peace officer.
4/20/78

H-1158
RQ-1868
A rider to the Texas Department of Corrections appropriation in the Appropriations Act for fiscal years 1978 and 1979 provides the purchase of acreage for a new prison farm is to be made primarily with funds from the sale of the Blue Ridge Farm. Such funds may be used only for the purchase of land in a seventy-five mile radius of Huntsville.
4/25/78

H-1161
RQ-1821
The Texas Commission on Jail Standards lacks authority to promulgate a rule equalizing the salaries of county jail personnel with the salaries of law enforcement officers in the field. The commissioners court has authority to fix the salaries of jail personnel at a level lower than the pay of other county law enforcement officers of equal rank and seniority.
5/3/78

OPEN RECORDS DECISIONS– ATTORNEY GENERAL

ORD-190
RQ-1781
Information concerning the race and gender of inmates before the Board of Pardons and Paroles and the fact that an attorney was involved in a matter before the Board is public information.. The names of the trial officials mentioned in article 42.12, section 16 of the Code of Criminal Procedure are public information, but the contents of their recommendations are made confidential by article 42.12, section 27 of the Code of Criminal Procedure and are thereby excepted from public disclosure by section 3(a)(1) of the Texas Open Records Act.

4/24/78

ORD-191
RQ-1833
An employee of a Community College District is entitled to see those portions of grievance filed by another employee which relate to him.

5/2/78

THE NEW GEORGETOWN LAW JOURNAL

The annual United States Courts of Appeals Issue of the *Georgetown Law Journal*, covering all the decisions in every circuit relating to criminal law and procedure, is now available. Divided topically, the 500-page issue gives you a quick review of what happened across the entire United States. Only $5.00 per copy; write the Association offices.

TCDLA
APPROACHES TO JURY SELECTION: SCIENCE & LUCK
MATERIALS AND TAPES AVAILABLE

TCDLA held a one-day intensive course in jury selection on the 19th of May, 1978, in Dallas. The course materials are now available for $25.00 from the Association office.

Tapes of these lectures are also available* for all the lectures or for an individual lecture. If you want the materials or are interested in the tapes, contact the Association office. A list of speakers and topics follow for your information:

Ray Walker, Dallas: *Jury Selection Through Handwriting Analysis*
Fred Time, Dallas: *Jury Voir Dire, Body Language*
Richard "Racehorse" Haynes, Houston: *Voir Dire*
Dr. Robert Gordon, Dallas: *A Psychological Strategy for Jury Selection*
Doug Tinker, Corpus Christi: *Jury Selection in Capital Murder Cases*
Stuart Kinard, Houston: *Individual & Group Dynamics in Jury Selection*
Warren Burnett, Odessa: *Voir Dire*

*Exact costs for set or individual tapes were not available at time of publication.

News & Notes

STATE BAR COMMITTEE REQUESTS HELP

The State Bar of Texas Effective Assistance of Counsel Committee has requested the help of all criminal practitioners, prosecutorial, defense, and judiciary. You should have received from Co-Chairman Judge Chuck Miller of Dallas a copy of a proposed Effective Assistance of Counsel Act. He is asking all interested parties to comment on the act and send those comments to him. If you have not sent your comments in, or if you desire to comment on the act but did not receive a copy of it, please contact:

Chuck Miller, Judge
County Court at Law No. 7
Dallas, Texas 75202

TCDLA MEMBER PRODUCES BOOK

Professor George E. Dix, of the University of Texas School of Law, has authored, for the Texas Young Lawyers Association and the State Bar of Texas, a book dealing with mental health commitments. The book, entitled *Texas Mental Health Commitments*, is available for $10.00 per copy (plus 5% sales tax in Texas) plus $2.00 per order postage and handling (without regard to the number ordered). Orders may be made by phone (512) 475-3047 or through the Professional Development Program at the State Bar of Texas.

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.

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

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.

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION