VOICE for the DEFENSE

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOLUME 8, NUMBER 2

AUGUST 1978

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

Texas
Criminal Defense Lawyers
Association

AUGUST 1978

Editor's Corner

Clif Holmes

Sorry 'bout July. It seems, in spite of all we do, that perennial pest, procrastination, continues to plague production. We hope to compensate for our disposition to dawdle by making 1978-1979 a banner year for TCDLA and the *Voice*.

To kick it off, we'd like to urge you to get involved with us. TCDLA can be among the most influential specialty bars in Texas, *if* its membership will get concerned about what's going on in the Bar, and make itself heard where it counts. I've spoken on several occasions in this column about the crisis the State Bar of Texas is facing. Each of us has read, almost daily, of the attacks that have been launched against our integrated bar system, and of the pending "Sunset Commission" determination. Brethren, this is serious business! No matter which side of the issue you find yourself on, much serious consideration must be given to which direction the Bar must–should–can–will take from here. I'm afraid that another "perennial pest" afflicts our profession, and one much more dangerous than procrastination–apathy. We must get concerned about what's happening in the State Bar, because what happens there not only will determine the direction and viability of TCDLA and the criminal practice, but will largely determine the very content and direction of each of our professional lives. I don't intend to be a doomsday prophet–that's ballyhoo. But I do want to impart the critical nature of what's now going on in Austin. We can't depend any longer on the old standby bulwark of a lawyer-dominated legislature to handle our problems for us. We need to open a forum to discuss these issues, to formulate positions, and to propose solutions. I'd like to start it with the *Voice*. Please comment–we'll put your views before a large segment of the bar.

American Civil Liberties
Foundation of Texas, Inc.
600 West 7th
Austin, Texas 78701
May 4, 1978

Texas Criminal Defense
Lawyers Association
314 West 11th Street
Austin, Texas 78701

To Whom It May Concern:

The enclosed order holding Art. 42.01 (a)(5) of the Texas Penal Code unconstitutional was entered by Bell County Court at Law Judge Bill Bachus. While his holding has no precedential authority beyond the jurisdictional confines of Bell County, Texas, the decision merits publicizing.

Disorderly conduct is an offense which seldom goes beyond the justice court level. When it does make it to the county court level, an adverse ruling often imposes a fine which cuts off appeal to the Texas Court of Criminal Appeals. Thus, as in *Acker v. Texas*, 97 S.Ct. 1639 (1977) reversing a conviction under 42.01(a)(1), (4), appeal then lies only to the U. S. Supreme Court.

Given the importance of the First Amendment concerns and the chilling effect of the enforcement of 42.01 (a)(5) against pure speech (Messrs. Dickinson and Enander were sidewalk Baptist preachers), the enforcement of the statute raised serious doubts as to the viability of a "good faith immunity" defense by a prosecutor or policeman who enforces the statute against pure speech.

The main authority for Judge Bachus' ruling is *University Committee to End the War in Viet Nam v. Gunn*, 289 F.Supp. 469 (W.D. Tex. 1968) three judge court; appeal dismissed for want of jurisdiction, 399 U.S. 383 (1970), holding the predecessor to Art. 42.01 (Art. 474, former Penal Code) unconstitutional.

I would appreciate your considering giving this decision the notice it merits. Please feel free to contact me if you have any questions.

Very truly yours,
John Buckley
Staff Counsel

ENCLOSURE

No. 1171-K
No. 1172-K

STATE OF TEXAS	)	IN THE COUNTY
V.	)	COURT
JERALD ENANDER	)	
AND	)	
STATE OF TEXAS	)	OF BELL COUN-
V.	)	TY, TEXAS
OTIS DICKINSON	)	

ORDER

On the 16th day of February, 1978, came on to be considered the motion of Defendants to quash the complaint. The Court having heard the arguments of counsel, it is the opinion of the Court that Article 42.01 (a)(5) of the Texas Penal Code is unconstitutional as it applies to speech. it is the opinion of the Court that the term "unreasonable" is overbroad and so vague that it fails to place the citizen on notice as to what conduct is prohibited as to free speech.

It is therefore ORDERED that the complaints in this cause be and hereby are quashed.

DONE AND ENTERED this the 13 day of April, 1978.

W. E. Bachus, Jr.
Judge Presiding

President's Report

On June 29, 1978, at our Annual Meeting in Fort Worth, Texas, I became the eighth (8th) President of the Texas Criminal Defense Lawyers Association. I accepted this presidency with certain thoughts in mind. The first objective I have dedicated myself and my administration to is the increase in membership. This has two elements—one is to retrieve our lost brethren and one is to acquire some new members. So in the very near future if a board member asks you to join in a membership drive, please respond by saying "yes." Your help is greatly needed. Members from other parts of the state will donate their time and effort to solicit new members as well as old members in your town if you will simply give them a helping hand. So I ask you to get the spirit, become a member of the team and watch our organization grow.

Secondly, we need to put more emphasis on our budget. Not only do we need to be fiscally sound, but we must spend more money toward services for our membership. Soon you will receive a questionnaire concerning the services that TCDLA provides for you. We need your input so we can more adequately serve you this coming year. Your ideas and suggestions are very important to us. We want to know how we can better serve our members in a manner that is inspirational, educational and rewarding.

Thirdly, we need to become more forceful in the area of political interests. Not only do we have an interest because of our profession but the criminal lawyer and our organization are the last obstruction in the road our governments have taken to render null and void those ten commandments of the Constitution, more commonly known as the Bill of Rights.

I can truly state that with your help all things are possible. I believe that we can do just about anything we set our minds to. When this organization was in its infancy, we told criminal lawyers across this state that this organization was dedicated to its members and that as a member, for the first time in the history of Texas, a criminal lawyer would *not stand alone*. I am still dedicated to that premise. For truly today as possibly never before in the history of our profession, lawyers must stand together or surely they will fall.

George Luquette

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.

...MORE ON SPEEDY TRIAL ACTS

The accompanying letter and motion form were submitted by Joe Conners of McAllen. It adds yet another practice aid to our growing files on the Speedy Trial Act. We appreciate Joe's contribution and commend the suggestion to your use.

JOSEPH A. CONNORS III
Attorney and Counselor at Law
P. O. Box 4136 425 W. Nolana
McAllen, Texas 78501

Re: Statutory Speedy Trial
Right of the Accused

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

Dear Mr. Holmes:

As it may be of interest to the membership of the TCDLA, enclosed is a copy to you and the *Voice for the Defense* of a Motion to Set Aside Case.

I call to your attention the potential malpractice liability of any attorney who waives the rights afforded his client by the Speedy Trial Act. Section 3 of Article 32A.02 of the Texas Code of Criminal Procedure reads:

> "The failure of a defendant to move for discharge under the provisions of this article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article."

Since a discharge under the authority of Articles 28.061 and 32A.02 of the Texas Code of Criminal Procedure is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction, Art. 28.061, T.C.C.P., any attorney who permits his client to be convicted after the statutory time limits have passed certainly is not serving his client to the best of his ability, nor is he serving his malpractice carrier well.

I hope the above thoughts and the enclosed motion may be of help to other members of the association in the future.

Sincerely,

Joseph A. Connors III

NO. _____

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

MOTION TO SET ASIDE CASE

TO THE HONORABLE JUDGE OF SAID COURT

NOW COMES the accused defendant in the above numbered and styled cause in person and by and through his attorney of record and states the following:

I.

The Accused hereby respectfully requests the Court to set aside the *indictment/information/complaint* herein because the State was not ready for trial on the merits herein within the statutory time limits prescribed by Article 32A.02 of the Texas Code of Criminal Procedure.

II.

On or about _____ _____, 197___, the Accused was arrested.

III.

On or about _____ _____, 197___, the Accused was first detained in custody to answer for the same offense charged herein or another offense which arose out of the same transaction.

IV.

On or about _____ _____, 197___, the Accused was released on bail or personal bond to answer for the same offense charged herein or another offense, which arose out of the same transaction.

WHEREFORE, PREMISES CONSIDERED, the accused Defendant hereby moves the Court to discharge him/her and to set the charging instrument herein aside under the authority of the provisions of Article 32A.02 and Article 28.061 of the Texas Code of Criminal Procedure, which became effective on July 1, 1978.

RESPECTFULLY SUBMITTED,

Joseph A. Connors III
P. O. Box 4136
McAllen, Texas 78501

ATTORNEY FOR THE ACCUSED

SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

JULY 1978
VOLUME IV, NO.11

J. VOLLERS WRITES AN INTERESTING OPINION FOR PANEL #3, 1ST QUARTER, IN KNIGHTEN, #57,237, 7/12/78, AND REVERSES ORDER OF REVOCATION OF PROBATION FOR INSUFFICIENCY OF THE EVIDENCE. Reversed. (Lubbock).

Here, State alleged that D violated his probation by intentionally and knowingly operating a motor vehicle without the effective consent of the owner. Evidence showed that D rented a car from Dollar Rent a Car Systems, whereby the agreement provided that he was to return it by 6:00 O'Clock P.M. on the same day. Car found 10 days to 2 weeks later. Rental agent testified that D "did not have permission to use it after 6 P.M. on the evening in question."

Held, "The evidence is insufficient to show that D operated the automobile in question without the permission of the owner." "The record simply will not support the conclusion that D operated the automobile in question after 6 p.m. on the date in question and therefore the trial judge abused his discretion in revoking D's probation."

Thus, even though the D did not return the car, when he was supposed to, there was no evidence to show that he operated the motor vehicle after 6 p.m. on the day in question.

COMMENT: If J. Vollers continues to write opinions like this between now and the first of the year, J. Clinton will have his work cut out for him to maintain the pace.

J. T. DAVIS, WRITING FOR PANEL #3, 2ND QUARTER, IN BROWN, #58, 542, 7/12/78, IN REVERSING AN ORDER OF REVOCATION, AGAIN POINTS OUT THAT "THE CRIMINAL ATTEMPT PROVISIONS SET FORTH IN V. T.C.A. PENAL CODE, SEC. 15.01, DO NOT APPLY TO THE CONTROLLED SUBSTANCES ACT (ART. 4476-15, C.A.C.S.), WHICH CONTAINS NO CRIMINAL ATTEMPT PROVISION. Reversed. (Harris County). See also Moore v. State, 545 (2) 140, and Ex parte Barnes, 547 (2) 531.

Held, "The charge to which D entered a plea of guilty, attempted delivery of a controlled substance, to-wit: morphine, and received a probated sentence is not an offense and the conviction based thereon is void."

ALWAYS, ON VOIR DIRE EXAMINATION, ASK THE FOLLOWING QUESTION FOR TWO (2) REASONS: 1) IT IS A GOOD QUESTION TO ASK THE PANEL AND 2) THE TRIAL JUDGE MIGHT BE NAPPING AND WILL OVERRULE YOUR OBJECTION, THUS GIVING YOUR CLIENT ANOTHER OPPORTUNITY AT THE WELL IF HE IS CONVICTED.

> "NOW, IS THERE ANY MEMBER OF THIS PANEL WHO REGARDLESS OF WHAT THE EVIDENCE SHOWED IN ANY CASE COULD NOT BELIEVE THAT A POLICE OFFICER WAS INTENTIONALLY TELLING A LIE FROM THE WITNESS STAND?"

In FLORIO, #54,084, 7/12/78, J. Odom, with J. Douglas dissenting for reasons stated in Hernandez, 508 (2) 853, the defense attorney did ask this question of the panel as a whole, the trial judge did sustain the State's objection, "I won't even consider the question." "I'll sustain the objection," and the CCA did reverse. Reversed. (Tarrant County). Thus, D can go to the well again.

JURY ARGUMENT GETS FT. BEND COUNTY'S PROSECUTOR IN TROUBLE IN VILLALOBOS, #54,666, 7/12/78, J. Odom, Panel #3, 2nd Quarter, AND D GETS NEW TRIAL. Reversed. (Ft. Bend County).

COMMENT: Prosecutor here argued, among other things, against self defense and then argued: "I am going to ask you to find him guilty." "I believe he is just as guilty as he can possible be." Objection thereto was overruled.

Held, "The state's case in opposition to the claim of self defense was circumstantial." "In view of the issues at trial we are unable to say the improper argument was harmless beyond a reasonable doubt.

COMMENT: One should always be watchful when the prosecutor argues, and defense counsel should always watch for those nice phrases such as "I think," "I believe," "I know," "I would not have filed the charge against the Defendant but for," "I wish you knew the Defendant like I know him," "There sits the man who committed the crime," "I wouldn't ever try to frame an innocent man," "I am here to prosecute the guilty, not the innocent," etc., and, when these words are uttered, make like a Jesse Owens running the 100 yeard dash and come out of your chair objecting and hollering. But, don't forget to get the judge to rule on your objection after making your objection. If sustained, ask for instruction and then move for a mistrial.

LIKEWISE, IF YOU ARE DEALING WITH AN INFORMANT SITUATION, ALWAYS FILE A MOTION IN LIMINE PRE-TRIAL AND BE PREPARED DURING THE TRIAL TO START OBJECTING IF THE POLICE OFFICER COMMENCES TO RELATE THE HEARSAY TESTIMONY OF THE INFORMER BEFORE A JURY WHERE PROBABLE CAUSE IS NOT IN ISSUE BEFORE THE JURY.

IN HAYNES, #55,074,7/12/78, J. T. Davis, Panel #3, 2nd Quarter, PANEL REVERSED TJ BECAUSE HE ALLOWED INTO EVIDENCE THE FOLLOWING:

Q: Without going into what information you received, was the information that you received with regard to a certain residence, or with regard to certain persons?
A: Yes, it was.
A: To the residence and to three people.
Q: Do you know which three people?
A: At the time that the information was obtained, I didn't know the full names. I knew first names of each actor involved in this case.
Q. Did one of the names match this defendant?

A: Yes, sir.
Q: Why were you going to arrest those three people there at that location?
A" They were supposed to have heroin in their possession.

Held, "It is error to admit the hearsay testimony of an informer before a jury where probable cause is not in issue before the jury." "In the instant case no issue of probable cause was before the jury." "Ashwood's testimony as to what the informer told him was clearly hearsay." Reversed. (Harris County, Texas). ALSO, NOT HARMLESS ERROR DUE TO THE CHARGE AND THE EVIDENCE IN THE CASE.

IT APPEARS THAT PRESENTENCE REPORTS ARE HERE TO STAY. SEE ANGELLE, #57,460, 7/12/78. J. Roberts, Panel #3, 1st Quarter, Cf. P.J. Onion's comments in BEAN, #55,629, 4/5/78. Affirmed. (Jefferson County).

COMMENT: Held, "Whenever an issue of the proper punishment is present a presentence investigation and report may be utilized to assist the TJ in the exercise of his discretion." "We hold that the TJ did not abuse his discretion by ordering a presentence investigation and report."

However, if you are trying to build a record for the appeal, concerning what can at times be described as a receptable of garbage type material, it is necessary that you have the record reflect:

1. Object to the report including hearsay statements, mere arrests, etc.

2. Show that the TJ relied on or considered the hearsay statements mere arrests,etc. in the report.

PANEL OF CCA, PANEL #3, 1ST QUARTER, IN BISHOP, #57,512, 7/12/78, J. Vollers, RULES THAT COCAINE IS COCAINE AND IT IS UNLAWFUL TO DELIVER SAME. Affirmed. (Harris County).

COMMENT: Here, D's challenge went to the Indictment which alleged the D did deliver a controlled substance, namely cocaine.

Held, "Where this definition [Art. 4476-15, Sec. 2.04, Sec. 4.02(b)(3)(D)] specifically includes any compound or derivative of coca leaves but excludes decocanized coca leaves or extractions which do not contain cocaine there is a necessary implication in the definition that cocaine is a derivative or preparation from coca leaves."

STATE'S MOTION FOR REHEARING OVERRULED IN WHITMORE, #52,325, 7/12/78, EN BANC, J. Odom, JOINED BY JUDGES ROBERTS, PHILLIPS, DALLY, WITH SPECIAL JUDGE REAVLEY, SITTING FOR J. VOLLERS, CONCURRING WITH OPINION AND WITH JUDGES ONION, T. AND W.C. DAVIS, JOINING J. DOUGLAS IN HIS DISSENTING OPINION. SEE ALSO VOL. III, NO. 10. S.D.R., P. 1.

COMMENT: This is the death penalty case where D tried, convicted and given death penalty. His Co-D was later tried, while D's case on appeal, and acquitted. D then moved for a new trial due to the evidence from the Co-D now being available whereas it was not available at time of trial.

J. Reavley, in his concurring opinion, said:

> "I would not hold that Whitmore has a constitutional right to the testimony of Totty and to a new trial." "I would hold that Whitmore's motion does state grounds for a new trial under the general rules of newly discovered or available evidence." See his opinion and the discussion therein regarding the late filing of a MNT and newly discovered evidence or available evidence.

The dissent, per J. Douglas, was worried that this decision is going to really screw up Texas law.

> "Under the majority's reasoning, an accused tried and convicted of murder may file a MNT (even after his appeal apparently) claiming newly available evidence if the co-defendant has been convicted and if such conviction has become favorable testimony for the accused, then he is entitled to a new trial." "If the accused was then inclined to reciprocate and give favorable testimony for the convicted co-D, the co-D would probably also be entitled to a new trial." "Both Ds would have to be reprosecuted and, thus, the State would be back where it started since neither co-D could be compelled to testify for the other."

My thought is that if this esoteric hypothetical ever came to pass that the State, somehow, would probably file a class action or civil rights suit of some sort to deter this result from being reached.

STATE IS ALLOWED TO SLIDE ON MOTION FOR CHANGE OF VENUE IN VON BYRD, #58,385, 7/21/78, En Banc, J. Roberts, with J. Douglas not participating, AS, THOUGH DEFENDANT FILED A MOTION AND SAME WAS UNCONTROVERTED, THE TJ NEVERTHELESS HELD A HEARING, WITHOUT OBJECTION, ON THE MOTION. HELD, "WE VIEW D'S FAILURE TO OBJECT AT THAT TIME AS A WAIVER OF THE STATE'S FAILURE TO FILE A CONTROVERTING AFFIDAVIT." Death Penalty Conviction Affirmed. (San Augustine County).

COMMENT: I found one part of the opinion rather interesting for personal reasons, if no other. One of the prospective jurors, who had been committed, was challenged for cause by the State. This was sustained. CCA upheld this action of the TJ. However, it pointed out the case of Ex parte Lovelady, 207 (2) 396, where a person who had been adjudicated insane served as foreman of the jury that gave the death penalty to the D. After the trial, he had his sanity restored in a court of law. CCA ruled that this was o.k. as it was not shown that the foreman was of unsound mind when he served as a juror. CCA here ruled there was no abuse of discretion in sustaining the State's challenge.

Best I can get out of all of this is that the prosecutor here did not think this person would have made a good foreman of the jury and he was sustained on appeal. What if he had been adjudicated insane?

D.A. THOMAS A. CURTIS DOESN'T HAVE TO STAY IN JAIL FOR THREE (3) DAYS. CCA FINDS, IN EX PARTE THOMAS A. CURTIS, #59,108, 7/19/78, J. Roberts, En Banc, with Judges Douglas and W.C. Davis not participating, and with P.J. Onion, joined by Judges Odom and T. Davis, concurring with opinion as well as with J. Roberts' opinion, THAT FOLLOWING COMMENTS OF D.A. TO TJ WERE NOT CONTEMPTUOUS. Writ Granted. (Potter County).

"I think you're acting like a biased judge trying to help this Defendant beat a darn good case."

"Merely because I feel that you are acting in favor of this Defendant in derogation of the State's case illegally and improperly, don't be upset . . ."

COMMENT: In reading between the lines, it appears that the D.A. and the T.J., for whatever reason, did not have that usual mutual understanding type relationship so often found in many of our courts.

Here, a hearing was held on D's motions to quash portions of Indictments in two cases. As to the first round, it was a tie. Relator agreed to waive counts 8 and 9. TJ then ruled it would not quash count 1 or paragraph 8 of count 2. Relator then agreed to the dismissal of paragraphs 1, 2, 3, 4 and 5 of count 2. He thought count 14 was good but TJ ruled against him on this. Relator then lost count 13. What got things going was count 15; i.e., TJ made a Freudian type slip of the tongue when he "pointed out to relator that relator had indicted the D after the S/L had run." "Relator replied that the grand jury [not he] had indicted the D." "The court then told relator that he did not want a speech from relator."

However, TJ ruled for Relator on this Count. When Defense counsel made motion for State to elect, which was denied, Relator replied: "The State had been left with very little to elect with."

After the hearing on the motions, things warmed up concerning a matter involving voir dire examination with defense counsel suggesting they do it in chambers. Relator replied: "He did not want to do anything in chambers with this court." "The TJ agreed with Relator's sentiments." Then, during some haggling over a "remark which might contaminate the jury panel," the TJ referred to the D.A. by his last name and D.A.took this to be demeaning replying "this shows disrespect for counsel." TJ then commenced calling D.A. "Mr. Curtis." The first of the comments was then made. See supra. D.A. then told TJ that "The Court itself might contaminate the whole jury panel by some remark he might make." Thereafter, a slip of the tongue again occurred as TJ called D.A. by his first name, "Tom," but he quickly corrected himself. Thereafter, the second comment was made. See supra.

Held, Relying primarily upon In Re Little, 404 U.S. 553, and secondarily upon Holt v. Virginia, 381 U.S. 131, CCA held these remarks were not contemptuous.

P.J. Onion considered the Relator's conduct and statements to be neither ethical nor proper. "Relator's actions were undignified and discourteous conduct which was demeaning to the tribunal before whom he was appearing as an attorney and officer of the court."

COMMENT: CCA appeared to say that as the remarks of the D.A. were not accompanied by disruptive or boisterous behavior, were made in plain English, were inoffensive and appropriate to charge bias [as the TJ had ruled against the D.A.?] and "these remarks were relevant to the issue (of jury contamination) which was being discussed by the relator and the respondent court," and the remarks probably did nothing more than offend the TJ's sensibilities, then they were not contemptuous.

COMMENT: I do not, however, recommend that you use this case as authority in case you have a running gun battle with some trial judge as you might come within the old saying, "You might beat the rap but you ain't going to beat the ride." Especially, in Houston, where some TJs have been known to put lawyers in jail for omissions, not commissions. See Ex parte Butler, 372 (2) 686, where lawyer put in jail for being late to court. Writ later granted by CCA.

IT IS, OF COURSE, ALSO NECESSARY TO ALWAYS WATCH WHAT THE PROSECUTOR SAYS TO THE JURY AT VOIR DIRE, EITHER INDIVIDUALLY OR COLLECTIVELY AND, OF COURSE, AT ANY OTHER STAGE OF THE PROCEEDINGS. THEY USUALLY LIKE TO TELL THE JURORS SOMETHING LIKE THIS: "NOW, IN THE PUNISHMENT STAGE OF THE TRIAL, THERE CAN BE MORE EVIDENCE PRESENTED TO YOU BY EITHER THE STATE OR THE DEFENSE REGARDING SUCH THINGS AS THE DEFENDANT'S CHARACTER IN THE COMMUNITY OR THE DEFENDANT'S PRIOR CRIMINAL RECORD, OR THE DEFENDANT'S REPUTATION IN THE COMMUNITY. SEE WOODS, #58,774, 7/19/78, P.J. Onion, En Banc, Death Penalty Affirmed. (Harris County).

COMMENT: You should immediately object to this type of statement on the ground that it is error for the prosecutor to tell the prospective jurors that the D in the case to be tried had a prior criminal record, get a ruling and instruction and move to quash the entire panel and lastly move for a mistrial.

If the D has no prior criminal record, then you should ask to make a bill on this to show that the prosecutor was not making the statement in good faith. Likewise, do same if the prosecutor has no evidence regarding the character or reputation of the Defendant that he intends to introduce if the D is found guilty. See and compare Keel v. State, 434 S.W.2d 687.

Of course, if the D does have a criminal record or a bad reputation and the prosecutor intends to introduce this at the punishment stage of the trial, all I can say is grab hold and hang on and duck.

ROMO, SEE VOL. III, NO. 11, MAY, 1977, S.D.R., p.6, RETURNS BUT STATE'S MRH GRANTED AND CASE AFFIRMED, 7/19/78, J. Dally, with J. Vollers not participating, with J. Reavley, sitting in his place, concurring without opinion, and with P. J. Onion, joined by Judges Roberts, Odom and Phillips, dissenting with opinion.

This is the case where D on trial as a principal or party to offense. TJ charged jury as though D only party to crime. Originally reversed because of court's charge not applying the law of parties to the facts of the case. Majority of CCA here held: "WE NOW HOLD THAT IN THE ABSENCE OF AN OBJECTION, WHEN THE TJ FAILS TO APPLY THE LAW OF PARTIES TO THE FACTS OF THE CASE, IT IS NOT FUNDAMENTAL ERROR." NO FUNDAMENTAL ERROR. MUST OBJECT. Affirmed. (Webb County). CCA also held that Evid. was Suff. to show D's criminal responsibility for the act of the Co-D who actually shot the deceased.

P. J. Onion, for the dissenters, said that this was fundamental error and was error calculated to injure the rights of the D and SMRH should be overruled.

SEE ALSO PITTS, #53,428, 7/19/78, J. Dally, with the same lineup as in ROMO, supra. CCA also held here: "If the evidence supports a charge on the law of parties, as it does here, the court may charge on the law of parties even though there is no such allegation in the indictment." Affirmed. (Harris County).

WHOSE NAMES ARE IN THE TRICK CARD INDEX SEIZED IN THE CASE OF PANELA LOU WOOD? #54,325, 7/19/78, J. Odom, with J. Roberts dissenting without opinion, Panel #3, 2nd Quarter. Affirmed. (Dallas County).

SOME OF THE SALIENT RULINGS ARE:

1) Here, D on trial for aggravated promotion for prostitution. Panel held that Sec. 43.02 was constitutional.

2) D arrested in Denton County, the base of her operations. Whoring actually occurred in Dallas County. Held, Venue was proper either in Dallas or Denton Counties.

3) Telephones, telephone recording equipment, and trick lists are implements or instruments used in the commission of a crime. See Art. 18.02 (9) C.C.P.

4) D had no standing to challenge Grand Jury subpeona which subpeonaed S.W. Bell records regarding another's records.

5) Search warrant affidavit adequate or sufficient to show probable cause.

Held, the affidavit contains sufficient information to support the magistrate's finding of probable cause to search the residence in question and to seize the telephones.

6) The underlying circumstances from which the affiant concluded that the citizen informant was credible or his information reliable were insufficient. "The affidavit stated that the citizen had not been arrested, charged with or convicted of a violation of the law in Dallas County, and that he owned his own business in Dallas County for several years." This failed "to meet the minimal standard promulgated by this Court in the aforementioned cases discussing Aguilar's prong." "The absence of any averment pertaining to the reputation of the unnamed informant is fatal."

But: "The affidavit, however, does contain other underlying circumstances which can be looked to for corroboration of the information from the citizen informant and which establishes that the telephones were on the premises searched." "This information provided by the affiant and two named informants [father and son] constitutes adequate and independent corroboration to remedy the deficiency of the second prong of Aguilar in regard to the citizen informant." These facts also "independently corroborate the citizen's information regarding the existence of the telephone recording equipment."

As to the "trick lists", Panel held that it had doubts that the information concerning same satisfied Aguilar's first prong. However, after a review of the facts, CCA held that this was harmless error.

COMMENT: The beginning of the downfall of Panela Lou was the fact that she apparently called a good citizen of Dallas County, (Name and occupation not shown), to make a "date" but good citizen was not interested. This went on for about 3 months. Finally, out of desperation and fearing, I suppose, he was going to get raped, he contacted the Dallas police who took it from there resulting in the case being before the CCA.

NOT ONLY DID THE PROSECUTION WIN ONE, REGARDING A TRIAL JUDGE, SEE SUPRA, BUT THE DEFENSE ALSO WON ONE IN EX PARTE CECIL BAIN AND THOMAS M. THURMOND, #58,595, 7/19/78, P.J. Onion, Unanimous. Writ Granted. (Bexar County). Equal Protection Under the law?

COMMENT: Here, D was charged with capital murder of his wife. He plead indigency re counsel. Previously, he had received over $368,000.00 for his children and himself from insurance resulting from his wife's death for whom he was now accused of killing for remuneration. As to the money he received, D testified: "It was spent." He purchased a home and transferred ownership to his children; gave his girlfriend over $8,000.00; and Lawyers on this case, not these two lawyers, received $2,700 - $4,700.00.

Lawyers Bain and Thurmond had received attorney's fees from D but not on this case; their moneys coming from handling other civil and other criminal matters.

Apparently, from the facts, the TJ believed that if a lawyer represents a client on one (1) case and receives a little money for handling same, then you have adopted the client for all future purposes and cannot charge the client anything for future services rendered. Thus, he "designated" Lawyers Bain and Thurmond, due to their having received past sums of money from D, to be the lawyers for the D. When case called for trial, Lawyers announced "Not Ready," whereupon they were held in contempt of court and jailed, but released. See Art. 1911a, V.A.T.C.S. This application for a writ followed.

CCA ruled that TJ was without authority to enter an order "designating" Petitioners to represent D. "The question of indigency when raised is to be determined at that time and not based on some prior period of time."

COMMENT: The rationale of the TJ is difficult to understand. I have deduced two (2) possible things from his thinking from this opinion. 1) Prior to becoming a judge he only represented a client who could pay him one helluva fee which fee covered that case and any and all future cases, civil or criminal, the client may encounter, or 2) Prior to becoming a judge he did a helluva lot of pro bono work which, of course, if that be true, is commendable, but I, personally, never found a banker, landlord, mortgage company, etc., who really understood pro bono legal work. Maybe things are different in San Antonio than in Houston. At least, by implication, the judges of the CCA also have not met any persons in those categories who understood pro bono legal work. Thank goodness. For Bain and Thurmond, if no one else.

EX PARTE BARRON, #58,599, 7/19/78, J. Phillips, Panel #2, 3rd Quarter, ALSO GETS WRIT GRANTED BUT NOT MUCH RELIEF AS ONE CONVICTION, INVOLVING A LIFE SENTENCE, STILL GOOD. Writ Granted. (Dallas County).

COMMENT: This is another robbery-murder, double indictment type case, where CCA held that carving doctrine violated as to robbery conviction. See Ex parte Olson, 560 (2) 688, cited in the opinion.

IDEM SONANS IS WELL, LIVE AND BREATHING IN AUSTIN. IN GRANT, #55,531, 7/19/78, J. Odom, Panel #3, 2nd Quarter, CCA REVERSED WHERE NAMES WERE MARY HARRINGTON AND MARION HARRINGTON. Reversed. (Bell County).

COMMENT: Compare, Martin, 541 (2) 605, Vol. III, No. 3, Oct., 1976, Supplemental S.D.R., p.3. Here, Defense lawyer made a motion for instructed verdict on this issue, which was overruled, with the jury then instructed on this issue re Q of fact.

Held, D wins. "We hold that the names are patently incapable of being sounded the same, and reverse." "Moreover, not only are the names incapable of being sounded the same but the misspelling effectively transforms the name "Mary" into a wholly distinct application, i.e., "MARION." "For these reasons we conclude that the names are not idem sonans and thus the evidence is insufficient to sustain the conviction." Apparently, the wit name was Marion but went under the name of "Mary." Note: Johnny Cash's song about Sue was not mentioned in the opinion. However, "The complainant was not recalled, and there was no evidence Mr. Harrington went by the name of Mary."

MAJORITY OF CCA, IN CAMPBELL, #53,586, 7/19/78, J. Odom, with J. Roberts dissenting with opinion, joined by Judges Phillips and W.C. Davis, with J. Douglas not participating, RULES THAT THEFT IS A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY IN THIS CASE AND D WAS ENTITLED TO A CHARGE THEREON. Reversed. (Harris County).

COMMENT: Here, C/W testified that D pointed a pistol at her, told her to shut up and to give him her purse. D fired a shot at C/W. D then grabbed C/W's purse and began to run away when he was captured. A gun was found on the sidewalk near where D was caught.

D testified and admitted stealing C/W's purse, but he denied he used a gun in the commission of the offense, denied that he had ever seen the gun, and denied that he threatened the C/W.

Held, "The offense charged here, as shown by the State's evidence, did rest on proof of a completed theft." "The State's version of the events and D's version differed on only one material point: whether the theft was accompanied by acts constituting aggravated robbery. The theft was without question proven within the facts relied on by the State to make its case of aggravated robbery." "Theft was a lesser included offense of aggravated robbery on the facts here." "The record shows theft was included in the proof of the State's case, and therefore D was entitled, on the basis of his testimony, to submission of the lesser included offense of theft."

J. Roberts, speaking for the dissenters, simply could not comprehend how this could be so. In his opinion, theft is not a lesser included offense of aggravated robbery.

COMMENT: I think the problem with the dissenters is they overlook the fact the majority was writing on a new and clean slate, regarding this issue. Under the old penal code, See, for example, Van Arsdale, 198 (2) 270, 273, by virtue of the wording of then Arts. 694 and 695, theft could not be a lesser offense of robbery. Thus, the dissenters would be correct if that law had not changed. However, either knowingly or unknowingly, when the Legislature enacted now Art. 37.09, C.C.P., they gave a D, in a particular case, a blank check on lesser included offenses if he could muster facts regarding any possible offense in relation to the main charge as contained in the indictment.

J. PHILLIPS, IN DISSENTING TO DENIAL OF D'S MOTION FOR REHEARING, IN CLOUD, #54,036, 7/19/78, En Banc, See Vol. IV, No. 8, May, 1978, S.D.R., p. 6, BELIEVES OTHER MEMBERS OF COURT, AS HE WOULD DO, "SHOULD HOLD THAT D WAS ENTITLED TO EXPLORE OFF. AKINS' POSSIBLE BIAS OR MOTIVE FOR TESTIFYING AGAINST THE D." "HAVING FAILED TO ALLOW THE D TO DELVE INTO THIS MATTER DEPRIVED HIM OF HIS RIGHT TO REASONABLE CROSS EXAMINATION." MRH DENIED. (Dallas County).

IT WAS BELIEVED BY MANY THAT BY EX PARTE BRIONES, 563 (2) 270, SEE VOL. IV, NO. 6, MARCH, 1978, S.D.R., P. 5, A PANEL OF THE CCA HAD STRAIGHTENED OUT THE LEGISLATIVE MESS CREATED BY ART. 44.04 AND ART. 42.09, C.C.P. HOWEVER, IT IS FELT IF ONE READS CAREFULLY EX PARTE FOWLER AND FOWLER V. HOOEY, #58,639, 7/19/78, J. Vollers, with Judges Onion and Phillips dissenting without opinion, THAT FURTHER CONFUSION NOW EXISTS.

COMMENT: Here, D got 15 years and, after sentencing, gave notice of appeal. He was then carted off to T.D.C. without his consent or permission. He also wanted reasonable bail on his appeal. TJ set bail but made no order re coming in from the cotton fields. D came right back with an application for writ of habeas corpus which was promptly denied. As D gave no notice of appeal, CCA ruled his appeal in that case should be and it was dismissed.

As to his writ of mandamus, against the District Judge, he wanted CCA to get him out of those cotton fields. CCA denied this request holding that because of Art. 42.09, Sec. 4, C.C.P. "It appears that petitioner was properly transferred to the T.D.C."

As to the second part of the application for writ of mandamus, majority of CCA ruled that it would not treat the application as a writ of habeas corpus re requiring TJ to hold hearing regarding reasonable amount of bail. "Whether or not a trial judge issues a writ of habeas corpus is a matter of discretion and not the proper subject for a writ of mandamus." As the TJ saw fit not to issue the writ, D was then relegated to applying to another district judge of Harris County, Texas.

Apparently, the District Judge considered the D's application as a post conviction writ under Art. 11.07, C.C.P. "We are confident that once it is brought to the trial court's attention that this is not a proceeding under Art. 11.07, C.C.P., the trial court will accord the applicant a hearing on his habeas corpus application for reduction of bail pending appeal, to which he is entitled."

COMMENT: Let us assume, for the moment, that the trial judge does hold a hearing and sets bail in an amount the D can make. He posts a bail bond for his release. Can he get out of jail? Probably not as T.D.C. has a hold on him pursuant to the TJ's original order transferring him to T.D.C. I know of no provision whereby T.D.C. officials can accept a bail bond. So, if this happens, the D will resemble one of those little rats in the laboratory running around a maze with no place to go.

COMMENT: It appears that, hopefully, at the next Legislature, in addition to the Constitutional provisions governing habeas corpus, a statute comparable to Art. 11.07, but governing situations such as here as well as a procedure governing applications prior to indictment and after indictment and after the case is put on appeal, but before the conviction becomes final, will be passed. As it is now, if a TJ wants to jack some D around, and put him in the maze, it is very easy to do. This, of course, causes a disrespect for our courts from those who are inside looking out. When this can be averted, it should occur for our courts need respect from both those on the outside looking in and those on the inside looking out. Sort of like President Carter, who wants to be loved but just cannot get it all together as his staff does not appear to understand the difference between rape and consensual intercourse. Of course, as most of them are not attorneys, this is understandable.

Following is a list of citations for cases appearing in S.D.R. Please note that we boo-bood when we did the March, 1978, edition, as it should have been Vol. IV. No. 7; not No. 6. Thus, if you save the S.D.R.s, have your secretary change the numbers on the March, 1978 edition to 7; April, 1978 to 8; May, 1978, to 9; June, 1978, to 10. This one is No. 11.

The remainder of the citations will be included in the next newsletter as most of the cases contained in the May, June and July editions have not, at this time been reported in the S.W. Reporter.

COMMENT: This will probably be the last newsletter until the fall when many football teams, defense lawyers and bookies all try to regroup and overcome the defeats they suffered from this past season. Hopefully, for your team and your client and yonrself, if applicable, the coming season will be a good year. See you then. In the meantime, if you come up with something short and sweet you think might be of interest to the other members, excluding, of course, such things as whose names are in the trick book, see supra, let me know and we'll try to pass it on.

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JAIL TIME: AN IMPORTANT CONSIDERATION AT SENTENCING AND PLEA NEGOTIATIONS

Robert Udashen and Ken Anderson

***Robert Udashen and Ken Anderson are both graduates of the University of Texas School of Law and are currently attorneys with the Texas Department of Corrections, Staff Counsel for Inmates, Huntsville, Texas.*

An important concern of every criminal defendant is the amount of time he will be required to serve on any given sentence. In advising clients on this matter, attorneys often overlook the amount of jail time credit to which a defendant is entitled. For a lawyer to represent his client properly in plea negotiations and at sentencing it is necessary that he understand exactly what credit his client is entitled to receive.

This article will begin with a brief overview of the current law relating to jail time. We will then discuss the various problems that arise in applying the law. These problems can be grouped into three general areas based upon the date of sentencing: (1) sentenced prior to August 27, 1973; (2) sentenced after August 27, 1973; (3) date of sentencing not important.

STATUTORY OVERVIEW

Credit for time spent in jail is governed by Article 42.03 of the Texas Code of Criminal Procedure.[1] This statute was amended effective August 27, 1973, and now provides:

> "In all criminal cases the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, from the time of his arrest and confinement until his sentence by the trial court."[2]

Further, unless the sheriff advises the Texas Department of Corrections (T.C.D.) that the defendant committed a serious act of misconduct while in the county jail, the defendant is eligible for good time credit for the time spent in the county jail.[3] "Good time" is a special classification that in general allows an inmate to earn extra credit for every day served flat (calendar time). As long as a prisoner maintains a clear conduct record, he is eligible to receive this additional credit. Texas law establishes categories that allow an inmate to earn various amounts of good time.[4] In practice, when good time is allowed for time spent in the county jail, T.D.C. awards twenty (20) good days for each thirty (30) served.[5]

SENTENCED PRIOR TO AUGUST 27, 1973

Prior to August 27, 1973, there was generally no *right* to jail time. The trial judge had almost absolute discretion with regard to awarding the defendant time he spent in jail prior to trial. Nonetheless, the federal constitution *entitles* the defendant to jail time credit where he does not receive it because of his indigency or his election to pursue an appeal.

Thus, in *Robinson v. Beto*,[6] the Fifth Circuit held that an inmate is entitled to *flat time* if in jail while on appeal. This decision arose because of the discretion allowed a trial judge to sentence a defendant following the affirming of his appeal in order to give him credit for whatever time he has spent in jail pending appeal.[7] The trial judge was not required by Texas law to allow the defendant this credit. The *Robinson* court held unconstitutional this procedure where "only those who appeal their convictions run the risk of longer imprisonment. Those who choose not to appeal begin to serve their sentence on the day the sentence is pronounced."[8] At that time, when an appeal was taken, the sentence began to run on the date of the issuance of the mandate from the Court of Criminal Appeals.[9]

Robinson was extended to include good time in *Pruett v. Texas*.[10] In dicta, *Pruett* stated it would only apply to convictions affirmed after January 4, 1973. Although at least one district court held *Pruett* should be applied retroactively,[11] the Fifth Circuit recently held that *Pruett* would not be given retroactive application regardless of the existence and adequacy of good conduct records.[12]

Failure to award jail time to an indigent defendant can require him to serve beyond the maximum sentence for the offense. Both state and federal courts have held that such a result would deny equal protection.[13] Therefore, when a defendant is unable to post bond prior to trial and upon conviction receives the maximum sentence, he has a constitutional right to his jail time.[14]

SENTENCED AFTER AUGUST 27, 1973

The amendments to Article 42.03 eliminated the trial judge's discretion in awarding a defendant his jail time. The amendments, therefore, cover the exceptions created by the above decisions and, in addition, expand a defendant's rights to allow him credit for *all* time spent in jail (on said cause).

Two major questions have arisen in construing Article 42.03. First, can anything interrupt a defendant's custody and thereby deny him part of his jail time credit? Second, what exactly is custody?

The Court of Criminal Appeals has consistently held that time served in jail need not be continuous. An interruption in custody cannot deny a defendant time previously served.[15] Thus, when a defendant is held in jail for a short period of time and subsequently makes bond, he is entitled to credit for the time he served.[16] Similarly, where a defendant originally received probation, if that probation is later revoked, he must be allowed his pre-probation jail time[17] together with the time spent in jail pending the motion to revoke.[18] Even serious misconduct such as an escape will probably not serve as an adequate basis to deny a defendant flat time credit.[19]

The Court of Criminal Appeals has also adopted a liberal view toward the definition of custody. A defendant is considered under "constructive custody" when a detainer[20] is placed against him. He receives good and flat time from the day the detainer is lodged.[21] This includes detainers filed by Texas at out of state institutions.[22]

It is necessary in cases where the accused hopes to receive credit on his sentence for time spent in jail on each of several charges that the records reflect that he is in jail on each of those causes. If he makes bond on one cause and is

then arrested on another, credit for jail time does not apply to the offense for which he is out on bond.[23] In order to obtain credit, an effort should be made to have the bondsman go off the initial bond.

DATE OF SENTENCE NOT IMPORTANT

Special jail time situations have arisen which are not governed by the date of sentence. Again, the Texas courts have liberally held in favor of granting the defendant his jail time.

One area of concern has been time credit earned out of state while serving a concurrent Texas sentence. The Court of Criminal Appeals has held that a defendant in this situation should receive both flat and good time.[24]

The Court of Criminal Appeals has also dealt with the problem of the defendant who is erroneously released from custody due to no fault of his own. In *Ex Parte Downey,*[25] the petitioner was released from T.D.C. when he discharged the first of two sentences he was serving. Petitioner's release was clearly due to an error on the part of T.D.C., and was not brought about by any actions of the prisoner. The Court of Criminal Appeals held that he was entitled to credit toward discharge of the second sentence for the time he was at liberty. Similarly, in *Ex Parte Esquivel,*[26] the defendant was given flat time credit for time spent on the streets due to a clerical error on the part of a county district clerk's office.

CONCLUSION

Many factors coalesce to determine the amount of time a defendant must spend in custody. The first step, however, toward discharging a sentence is taken before a defendant is ever placed in the custody of T.D.C. It is the responsibility of the criminal defense attorney to insure that the sentencing judge properly credits a defendant with all time "spent in jail in said cause."[27]

FOOTNOTES

[1]*Tex. Code Crim. Proc. Ann.* art. 42.03 (Pamphlet Supp. 1978); *Harrelson v. State*, 511 S.W.2d 957 (Tex. Crim. App. 1974).
[2]Id. § 2.
[3]Id. § 4. If the sheriff reports an act of misconduct, he must accord the defendant a disciplinary hearing comporting with minimal standards of due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
[4]*Tex. Rev. Civ. Stat. Ann.* art. 6184L (1971). A similar statute provides for good time credit to be awarded misdemeanants serving county jail time. *Tex. Rev. Civ. Stat. Ann.* art. 5118a (1971).
[5]It should be remembered that while good time on a felony sentence can be *earned* while in the county jail, it can only be *credited* by T.D.C. *Gardner v. State*, 542 S.W.2d 127 (Tex. Crim. App. 1976).
[6]426 F.2d 797 (5th Cir. 1970). *Accord, Ex parte Griffith*; 457 S.W.2d 60 (Tex. Crim. App. 1970).
[7]*Tex. Code Crim. Proc.* art 42.03 (1966).
[8]*Robinson v. Beto*, 426 F.2d 797, 798 (5th Cir. 1970).
[9]*Tex. Code Crim. Proc.* art. 42.09 (1966).
[10]470 F.2d 1182 (5th Cir. 1975) (en banc).
[11]*Kane v. Texas*, 388 F. Supp. 1188 (S.D. Tex. 1975).
[12]*Corpus v. Estelle*, ___ F.2d. ___ (5th Cir. 1978). The Court of Criminal Appeals had earlier held that *Pruett* was not retroactive. *Ex parte Johnson*, 529 S.W.2d 78 (Tex. Crim. App. 1975).
[13]*Caraway v. State*, 550 S.W.2d 699 (Tex. Crim. App. 1977); *Hart v. Henderson*, 449 F.2d 183 (5th Cir. 1971).
[14]Id.
[15]E.g. *Ex parte Bates*, 538 S.W.2d 790 (Tex. Crim. App. 1976).
[16]Id.
[17]*Ex parte Rhoades*, Writ No. 6321 (Tex. Crim. App. - delivered September 20, 1977) (per curiam). (While there is no published opinion on this point, enough unpublished opinions have held there is a right to this time that the point seems settled.)
[18]*Guerra v. State*, 518 S.W.2d 815, 817 n.4 (Tex. Crim. App. 1975).
[19]*Ex parte Johnson*, 529 S.W.2d 78 (Tex. Crim. App. 1975). *Johnson* involved constitutional time. However, since misconduct can be punished by loss of good time, there is no reason to suspect that *Johnson* would be decided differently if it involved statutory jail time. Further, while there is no case, statutory pre-escape flat time is routinely credited.
[20]Detainer is a broad term used to denote a request placed with a jail or prison by officials of another jurisdiction asking that the agency placing the detainer be notified before the referenced inmate is released. A detainer is generally placed because of charges pending against the inmate in the other jurisdiction.
[21]*Ex parte Spates*, 521 S.W.2d 265 (Tex. Crim. App. 1975).
[22]*Ex parte Jasper*, 538 S.W.2d 782 (Tex. Crim. App. 1976).
[23]*Ex parte Alvarez*, 519 S.W.2d 440 (Tex. Crim. App. 1975).
[24]*Ex parte Williams*, 551 S.W.2d 416 (Tex. Crim. App. 1977).
[25]471 S.W.2d 576 (Tex. Crim. App. 1971).
[26]531 S.W.2d 339 (Tex. Crim. App. 1976).
[27]*Tex. Code Crim. Proc. Ann.* art 42.03 (Pamphlet Supp. 1978).

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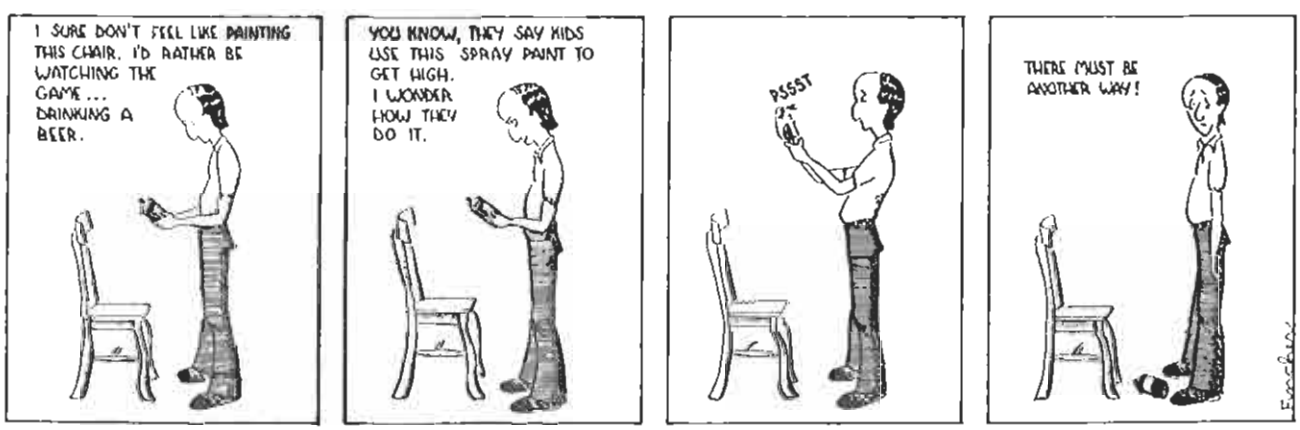

MINUTES OF BOARD OF DIRECTORS MEETING

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
BOARD OF DIRECTORS MEETING
MAY 20, 1978

10:45 a.m. — President Colvin called the meeting to order. Cindy Walters called the roll. It was established that a quorum was present.

MEMBERS PRESENT: Emmett Colvin, George Luquette, Vincent Perini, Harry Nass, Robert Jones, Charles McDonald, Jack Beech, Clifford Brown, David Carlock, Waggoner Carr, Gene DeBullet, Buck Files, Kerry FitzGerald, Gerry Goldstein, Jan Hemphill, Clif Holmes, Stuart Kinard, Charles Rittenberry, Richard Thornton, Stanley Topek, Stanley Weinberg, Rodger Zimmerman, Ronald Zipp, Jim Bobo, Russell Busby, Anthony Constant, Michael Gibson, Michael Thomas, Frank Maloney and Weldon Holcomb.

EXCUSED ABSENCES: David Bires, Antonio Cantu, Abel Toscano, Robert Salinas, Pete Torres, Ed Mallett, Oliver Heard and Thomas Sharpe.

UNEXCUSED ABSENCES: Charles Butts, Allen Cazier, Dick DeGuerin, Louis Dugas, Bill Dunnam, Boots Krueger, Art Lapham, Pat Priest, Garland Wier, Elmo Willard, Francis Williams, Raymond Caballero, Grant Hardeway, Kelly Ireland, Albert Pena, James Wedding.

OTHERS PRESENT: Ted Reddington, Dallas; Robin Pearcy, San Marcos; Richard Anderson, Dallas; Steve Capelle, Executive Director, TCDLA.

READING OF MINUTES — The motion was made by Charles McDonald that the reading of the minutes be waived and that same be approved as previously submitted to the board. Seconded by Gerry Goldstein. The motion carried. The minutes stand approved.

VOIR DIRE INSTITUTE — Steve Capelle reported that the Voir Dire Institute held on May 19 was a great success. Expenses ran approximately $4,000 - $5,000 and the income was $10,350, thus making TCDLA's profit approximately $5,000 - $6,000. Steve also stated that this income would be enough to sponsor another Voir Dire Seminar in another city. Steve further stated that the materials handed out at the seminar would be compiled into a two-part package and sold to other interested individuals for $25.00 per package.

AMICUS CURIAE — Steve Capelle reported that the home office is still receiving requests, forwarding them to Marvin Teague's office, which in turn forwards them to appropriate members of Marvin's committee.

MINUTES IN *VOICE* — Steve took this opportunity to report that the minutes of board meetings are now appearing in the *Voice*, as previously instructed by the board.

CLE — Gerry Goldstein reported that 74 people participated in the Annual Trip to Cancun and that the trip, in his opinion, was a great success. Gerry thanked Cindy for formulating the trip and getting the group there and back home again with so few problems.

On another subject, Gerry thanked Steve Capelle, Cindy Walters Emmett Colvin and Ron Goranson for their diligent work in organizing and putting on the Voir Dire Seminar in Dallas May 19.

Gerry stated that he had plans to put on a Jury Argument Seminar as soon as possible and would be contacting board members for

ATTORNEY GENERAL'S OPINIONS

Note: Copies of the full opinion may be obtained from the Association office.

H-1166
RQ-1727
Article 695a-3, V.T.C.S., the Child Care Licensing Act, authorizes the Department of Human Resources to certify juvenile detention facilities operated by the Texas Youth Council and to license the Dallas County Boys' Home operated pursuant to article 5138a and 5138b, V.T.C.S. It does not authorize the Department to license county detention facilities certified by juvenile courts under section 51.12 of the Family Code.

5/12/78

H-1168
RQ-1764
The Department of Corrections may use part of its Building Program appropriation to provide security for an inmate labor force, where the expenditure is reasonably necessary to the completion of the project using inmate labor.

5/30/78

H-1172
RQ-1847
The administrator of the Interstate Compact on Juveniles may not use the appropriation to the Texas Youth Council for nonresidential services to pay the cost of returning a nonadjudicated juvenile runaway to Texas.

6/5/78

H-1185
RQ-1862
All money held by a county officer in an official capacity, whether or not such money belongs to the county, is subject to audit by the county auditor under article 1651, V.T.C.S. All funds held by a county officer in an official capacity, including trust funds, must be deposited in the county depository.

6/16/78

H-1190
RQ-1830
Authority to supervise, direct or control the actual daily operation of a county jail is vested in the office of the sheriff although the commissioners court does have general responsibilities in connection with the operation of the jail.

6/21/78

H-1196
RQ-1865
Article 15.26 of the Code of Criminal Procedure authorizes law enforcement

May 20, 1978 MINUTES (Continued)

assistance. Gerry further stated that TCDLA should become much more active in the CLE area in the near future.

MEMBERSHIP

David Carlock reported that during the Criminal Trial Advocacy Institute in Huntsville, March 12-17, there were 47 participants, 35 potential new TCDLA members and that Vince Perini, Cindy Walters and Richard Anderson obtained 26 new members during their drive. David stated that his committee would be holding future seminars in San Antonio on June 15 and in Corpus Christi on June 16. David requested the Board of Directors to approve a system for handling new members on these drives based on the new Annual Billing System. Much discussion followed: Steve Capelle was asked to explain why the billing process was so far behind. Steve stated that until very recently the TCDLA staff consisted of only himself and Cindy and that Cindy was also handling the business for the Criminal Defense Lawyers Project due to the resignation of Gary DeShazo and Katheryn Wagster. Steve announced the hiring of a new membership secretary, Judy Bolander, and stated that the billings would be brought up to date within the next week. Further discussion. President Colvin appointed Charles McDonald, George Luquette and Bob Jones to visit the home office to:

(1) Go into the office expenses and cut where necessary and look over office procedures.

(2) Come up with a reporting system and report back to the board with recommendations on June 29.

The home office was instructed to furnish the board with a current list of directors delinquent in their dues within 30 days. The home office was further instructed to contact directors personally rather than by correspondence regarding the status of their dues.

NEXT BOARD MEETING

At this point President Colvin formally announced a special meeting of the Board of Directors, June 29 at 9:00 a.m. prior to the Annual Meeting at 10:00 a.m. that same day.

LEGISLATIVE

Waggoner Carr announced that his committee had worked diligently during the past few months and had arrived at 20 bills to present to the Legislature as TCDLA's legislative package.

HANDLING OF NEW MEMBERS

Discussion followed concerning the handling of new members. Vince Perini moved that the following plan be adopted. New members obtained during the month of February through the Annual Meeting in June pay $75.00. New members joining during July through February of the next year are given those months free, but dues for that next year would be collected in advance. Seconded by David Carlock. Discussion followed due to much opposition. A substitute motion was made that the president of the association appoint a committee comprised of board members or officers to formulate and clarify a policy regarding dues. Seconded by Gene DeBullet. Vincent Perini opposed to substitute motion. The substitute motion was withdrawn due to being out of order. The substitute motion was then restated including the president's committee plus David Carlock's committee. Much further discussion. The substitute motion was accepted, duly seconded and passed.

CONVENTION

Steve Capelle announced that the TCDLA headquarters in Fort Worth would be located at the Sheraton-Fort Worth on Main Street with the following schedule of events:

June 27	Hospitality Suite Cindy's Room - No. 122 5:00 p.m. - until

ATTORNEY GENERAL'S OPINIONS

from p. 29

officers to make arrests under warrant without having possession of it. If the arresting officer learns of an outstanding warrant through a teletype message from a law enforcement agency, he may make an arrest under its authority.

6/21/78

H-1198
RQ-1863

A governmental body may not take action or enter into an agreement in a closed meeting.

6/29/78

H-1199
RQ-1851

Under present law, the Board of Nurse Examiners may not probate a revocation or suspension of a nurse's license.

6/29/78

H-1201
RQ-1844

A magistrate in an administrative hearing under article 6701 l-5, V.T.C.S., may probate the suspension of a driver's license.

7/3/78

H-1203
RQ-1861

A justice of the peace may not proceed to trial on misdemeanor charges in defendant's absence, where defendant has not pled guilty or nolo contendere in accordance with article 27.14(b) of the Code of Criminal Procedure or paid a fine in accordance with article 27.14(c). A cash bond which defendant has not signed is invalid.

7/6/78

OPEN RECORDS DECISIONS—ATTORNEY GENERAL

ORD-193
RQ-1721

A report of accident insurance claims paid to identifiable students is not public information.

6/14/78

STATUS OF FEDERAL CODE UNCERTAIN

The House of Representatives is expected to strike from the criminal code reform legislation the provision adopted by the Senate creating a United States Sentencing Commission. Under S 1437 a Committee whose majority would be appointed by the President would set narrow sentencing ranges

May 20, 1978 MINUTES (Continued)

June 28	Criminal Law Institute Convention Center 8:00 a.m. - 5:00 p.m.
	Hospitality Suite 5:00 p.m. - until
June 29	TCDLA Board of Directors Convention Center 9:00 a.m.
	TCDLA Annual Meeting Convention Center 10:00 a.m.

There being no further business, President Colvin adjourned the meeting.

Respectfully submitted,
Cindy Walters
Administrative Assistant

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
BOARD OF DIRECTORS MEETING
JUNE 29, 1978

9:15 a.m.	President Colvin called the meeting to order. The roll was called. A quorum was present.
MEMBERS PRESENT:	Emmett Colvin, George Luquette, Vincent Perini, Harry Nass, Robert Jones, Charles McDonald, Jack Beech, Charles Butts, David Carlock, Allen Cazier, Eugene DeBullet, Louis Dugas, W. V. Dunnam, Gerald Goldstein, Jan Hemphill, Clif Holmes, Ed Mallett, Stanley Topek, Richard Thornton, Stanley Weinberg, Rodger Zimmerman, Ronald Zipp, James Bobo, Russell Busby, Raymond Caballero, Antonio Cantu, Michael Gibson, Grant Hardeway, Weldon Holcomb.
EXCUSED ABSENCES:	David Bires, Waggoner Carr, Dick DeGuerin, Buck Files, Oliver Heard, Stuart Kinard, Boots Krueger, John Montford, Charles Orsburn, Pat Priest, Thomas Sharpe, Douglas Tinker, Peter Torres, Garland Wier, Elmo Willard, Francis Williams, Kelly Ireland, Albert Pena, Robert Salinas, Michael Thomas, James Wedding.
READING OF MINUTES	The motion was made by Charles McDonald to waive the reading of the minutes of the last board meeting and that the same be approved as previously submitted to the board. Seconded by Gerry Goldstein. Motion carried, minutes stand approved.
BUSINESS	The board discussed the problems of the past year in a general fashion, with no action being taken.
	After discussion, Vincent Perini moved that all new members be charged $100.00 no matter what month they joined and the association office then bill them on February 1 for the next year. Holcomb seconded. Motion carried.

There being no new business to come before the board, the meeting was adjourned at 9:45 a.m.

Respectfully submitted,
Stephen Capelle
Executive Director

STATUS OF FEDERAL CODE from p.30

within the maximums and minimums established in the bill. The leaders of the opposition to S 1437 are the Chairman of the House Judiciary Subcommittee on Criminal Justice, Rep. Mann (D-S.C.), and Rep. Hall (D-Tex.), both of whom prefer a more flexible approach to sentencing with greater discretion left to the trial judge.

EXECUTIVE APPOINTMENTS

The Honorable Roland D. Sawl of Hereford was appointed to replace Andy Shuval as Criminal District Attorney for Deaf Smith County.

The Honorable James S. McGrath of Beaumont has been appointed as the new Criminal District Attorney for Jefferson County replacing Tom Hanna.

The Honorable Charles J. Hearn of Humble has been appointed to serve as Judge of the 263rd Judicial District in Harris County.

The Honorable W. T. McDonald, Jr., has replaced Wilbur Davis as Judge of the 85th Judicial District in Brazos County.

The Honorable Raul A. Gonzalez of Brownsville was appointed to replace William Scanlon as Judge of the 103rd Judicial District serving Cameron and Willacy Counties.

The Honorable Ned C. Butler of Gilmer has been appointed as the new Criminal District Attorney for Upshur County replacing Harry Heard.

ABA SURVEY UNSETTLING

A survey conducted by the American Bar Association in collaboration with the American Bar Foundation indicates that the higher a person's income and education level, the more cynical he or she is likely to be about the fairness of the legal system. However, people in the high-income, well-educated group tended to believe that their needs would be met adequately by the present judicial system. Those questioned who were classified in lower-income groups tended to have a higher respect for the competency of the legal profession while having lower expectations about the ability of the system to serve their needs.

The survey also showed some other interesting public attitudes:

(1) Eighty-eight percent surveyed believed they would get a fair criminal trial while 57% believed juries based their decisions more on emotion than evidence.

(2) Sixty-two percent believed lawyers charge more for their services than they are worth.

(3) Fifty-seven percent believed the legal system favors the rich and powerful.

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
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Street or Box No.: _____

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Date Admitted to State Bar of Texas _____

Admitted to Practice in: _____

Law School (Name, degree, date) _____

_____

College (Name, degree, date) _____

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(If student, expected date of graduation) _____

Professional Organizations in which applicant is member in good standing:

_____

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_____

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

_____ _____
(Date) (Signature of Applicant)

ENDORSEMENT

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

_____
(Signature of Member)

Mail to:

TCDLA, Suite 211, 314 West 11th Street,
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ADVANTAGES FOR YOU

- Referrals to and from recommended criminal defense lawyers in over 100 Texas cities through the TCDLA membership directory.
- Summaries of latest Court of Criminal Appeals cases through the Attorney General's Crime Prevention Newsletter. Available to private practioners only through TCDLA's group subscription, included in dues.
- Access to many publications dealing with the practice of criminal law through TCDLA discounts & free offerings.
- TCDLA's publications, including the monthly *VOICE for the Defense*, with its "News & Notes" on current activities, legislative summaries and other legal news.

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- Use of TCDLA Brief Bank service.
- 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