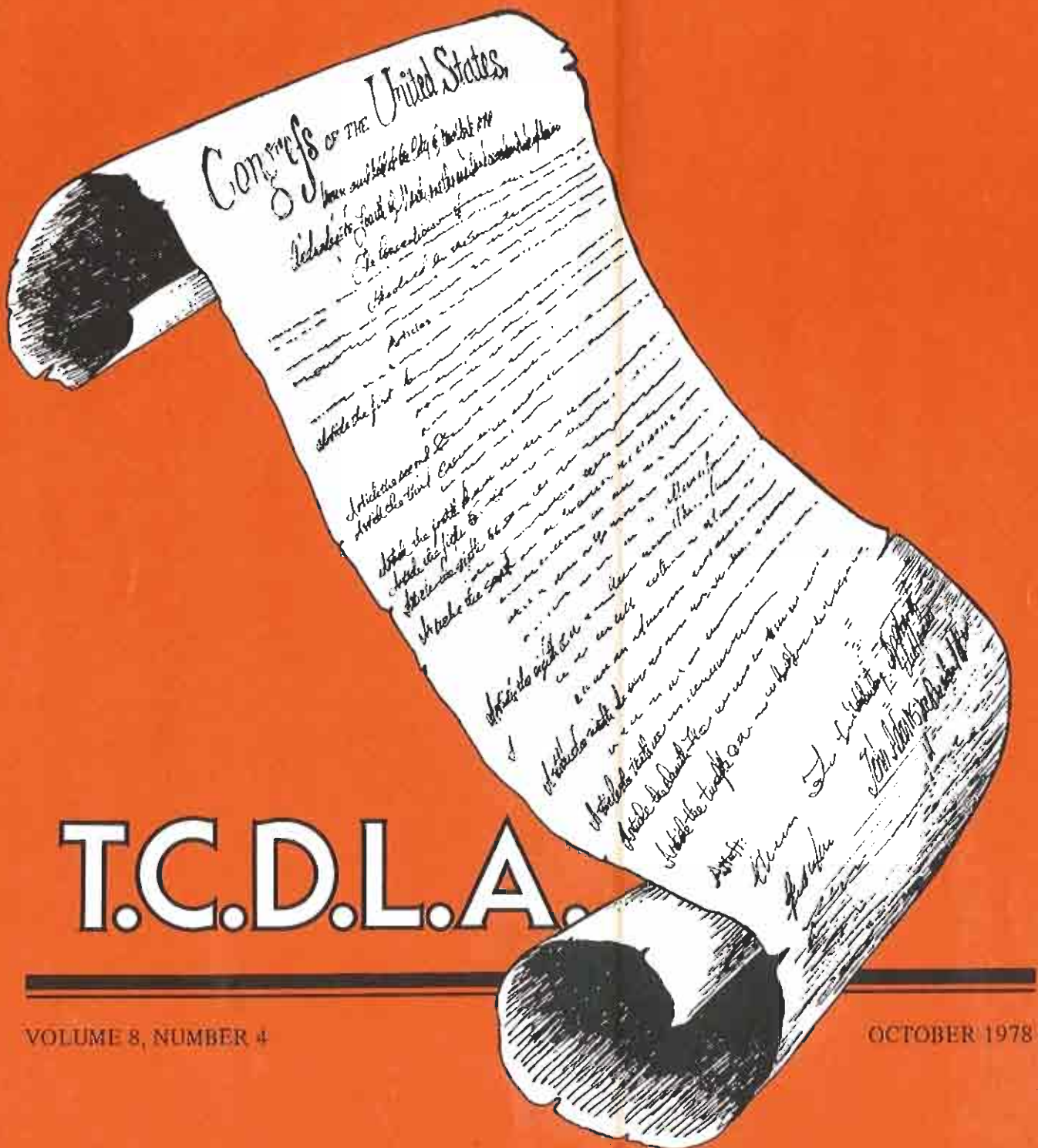
VOICE for the DEFENSE



T.C.D.L.A.

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Texas
Criminal Defense Lawyers
Association

OCTOBER 1978

MINUTES OF BOARD OF DIRECTORS MEETING

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
BOARD OF DIRECTORS MEETING
SAN ANTONIO
AUGUST 12, 1978

10:10 a.m. President Luquette called the meeting to order. The roll was called. It was established that a quorum was present.

MEMBERS PRESENT George Luquette, Harry Nass, Charles McDonald, Gerald Goldstein, Jack Beech, David Bires, Charles Butts, Anthony Constant, Gene DeBullet, Louis Dugas, Buck Files, Michael Gibson, Grant Hardeway, Oliver Heard, Jan Hemphill, Clif Holmes, Boots Krueger, Edward Mallett, Thomas Sharpe, Richard Thornton, Doug Tinker, Stanley Topek, Stanley Weinberg, Rodger Zimmerman, Ronald Zipp, Bennie House, Richard Anderson, Larry Sauer, James Bobo, Michael Thomas, C. David Evans, Weldon Holcomb, Pat Priest.

EXCUSED ABSENCES Vincent Perini, Robert Jones, Clifford Brown, Russell Busby, Tony Cantu, David Carlock, Waggoner Carr, Allen Cazier, Kerry FitzGerald, Stuart Kinard, Robert Salinas, Pete Torres, Francis Williams, Keith Alaniz, Robbin Pearcy, Emmett Colvin, Richard Harrison.

UNEXCUSED ABSENCES Raymond Caballero, W.V. Dunnam, Charles Rittenberry, Willis Taylor, Charles Burton, R.L. Whitehead, Frank Maloney, C.Anthony Friloux, Phil Burleson, George Gilkerson.

BUSINESS The minutes of the July 15, 1978, board meeting were approved with a minor change after discussion from the floor. President Luquette discussed at length the past actions of the Executive Committee. Minutes of the July 29, 1978, Executive Committee meeting were distributed to the board. Much discussion followed, regarding past problems of the Association; and the solutions to these that have resulted from the meeting. The budget was discussed in a general fashion, with no action being taken at this time; because the monthly operating expense had previously been set.

The San Antonio membership drives, headed by David Evans had been very successful. The Drive ending on July 26 had acquired approximately $2,000.00, and the membership drive before this board meeting on August 11th., had produced approximately $850.00. All directors working on these drives were to be commended for their hard work for the Association. Discussion continued concerning the Dallas membership drive to be led under the direction of Jan Hemphill. It was planned to be held on August 22nd before the next board meeting, with a cocktail party that night organized by Michael Gibson.

Committee reports followed; with Clif Holmes, Editor of the *VOICE* again stating his need for more advertising. He also requested that the directors send to him articles that could be reprinted in the *VOICE*.

President Luquette reported that the Amicus Curiae Committee had received its first case. It concerns whether or not a District Judge, before indictment, could increase a bond before a Justice of the Peace. The Letter requesting filing of an Amicus Curiae brief in the Association's behalf will be given to David Ziegler of Houston.

The next CDLP skills course to be held in Houston, September 7th & 8th, was discussed regarding a possible Houston membership drive.

(Continued on page 35)

LAWYER CLAIMS POOR CAN'T GET EFFECTIVE COUNSEL

Austin (UPI) 9/29/78

Many poor people accused of crimes in Texas are not receiving effective legal representation because the attorneys appointed for them are young and inexperienced, the president of the Texas Criminal Defense Lawyers Association said Thursday.

George Luquette of Houston told the House Criminal Jurisprudence Committee attorneys lose money by accepting appointments to represent indigent defendants under the present system of fees for court-appointed attorneys.

"The fee schedule is way too low," Luquette said. "I do not believe across the state they are getting effective counsel.

"Not every criminal is Cullen Davis, and Racehorse Haynes or Percy Foreman are not there to represent them. Consequently, criminals with appointed counsel are getting young and inexperienced lawyers."

Under the present fee system, court-appointed attorneys receive a maximum of $50 per courthouse appearance, and can be paid for only one appearance per day on behalf of indigent clients.

"I cannot go to the courthouse and represent any criminal for $50." Luquette said.

Judge Chuck Miller of a Dallas County criminal court at law presented the committee a proposed revision of state law dealing with fees and activities of court-appointed attorneys, and said the plan has the backing of the State Bar's Criminal Law Section.

The proposal would double the fees in some instances, provide for payment for appeals handled by the court-appointed attorneys and require marginally indigent defendants to pay part of the attorneys' fees.

Miller told the House committee the Bar panel also preferred that discretion to choose the attorneys appointed to handle cases for indigent defendants be taken out of the hands of trial judges, but said such provisions were omitted from the proposed legislation because judges oppose it.

Richard Anderson, a Dallas attorney who worked with a Bar committee drafting the bill, said much of the current system of choosing court-appointed attorneys involves political patronage.

"Some judges will appoint what we consider heavyweight attorneys, and some judges will not appoint the so-called heavyweight attorneys because they don't want to be hassled in their courtroom," Anderson said.

(Continued on page 35)

Clif Holmes

Sunset, hell. What I saw appeared closer to midnight. We've broached the subject of the Bar's current situation on several occasions in this column. We've yet to receive the first response from our membership concerning the subject. The hearings in September at which the Sunset Commission sought "input" from the public at large demonstrated graphically the "esteem" in which we're held by many segments of the population. I was more than surprised that little or no testimony was offered by members of the Bar at large. While many ex-Bar officials offered their reasoning, few "just lawyers" appeared. Our always stellar performer, Director Waggoner Carr, offered well-reasoned support for the continuance of the right to a jury trial in grievance matters. Travis Shelton, another TCDLA member and former President of the State Bar, presented pertinent testimony. But, in my opinion, the salvation of a viable Bar organization will come from the membership at large, if at all. We should not fool ourselves that well-known attorneys can carry our legislative football, unassisted. If we are to preserve a Bar organization which can serve the needs of our profession while also protecting and upholding the rights and interest of the general public, *we* have to get involved in the process. The legislature is no longer "lawyer dominated"—a majority are non-lawyers. Both presiding officers in the legislature are non-lawyers. When presented, proposed legislation affecting the Bar will be viewed not primarily by lawyers, but by a real cross section of public opinion. God forbid, our CLIENTS? How do we communicate to them that no purpose can be served by throwing the baby out with the bath water? What proposals can we make which would assure a bar organization dedicated to professional competence, sure, efficient justice, and the public good? I don't have the answers. But, brethern, we don't have long to find them.

The organized Bar has been under much criticism of late from almost every direction—50% incompetent (Burger, C.J.), minimum fee schedules = price fixing (Virginia Bar Case); advertising by lawyers is O.K. (or is it?) (U.S. Sup. Ct.). As professions go, I suppose these past few years have marked "our turn in the barrel." We're smart enough—and competent enough—to formulate and institute answers for these problems. I don't believe we need a superimposed bureaucracy to handle that chore. I don't believe you do, either. Let us know.

Ed.

TO INC. OR NOT TO INC.

Louis Dugas, Jr., Orange

Texas Law, as do the laws of a number of other states, provides for the formation of professional corporations. Since I practice law in Texas, I am vaguely familiar with the Texas Statute and have no acquaintance, speaking or otherwise, with the laws of other states dealing with professional corporations.

I became interested in the subject of lawyers forming corporations when I looked around my community and discovered most of the firms in my town had incorporated. I figured there must be some advantage to being incorporated and started asking questions. The first lawyer I asked said it enabled him to own a car through the corporation. The next lawyer said his accountant suggested he do so. A third said it enabled him to lease his building to the corporation. So far I had received only isolated responses, none of which had me panting to incorporate my office. Next I asked my accountant if he knew of any good reason for me to incorporate—"any good reason" being one which would put more money in my pocket. The accountant said it would enable me to invest more in IRA. I asked him if he had any inside information that the Irish Republican Army would win out in the dispute in Northern Ireland. Sarcasm dripping on my desk, he informed me that IRA was a pension plan formulated by the Federal Government for self-employeds. He furthered my education by telling me there was another pension plan for richer-self-employeds titled "KEOGH"; and, if incorporated, I could contribute more to a retirement plan. All of which sounded great, but would it stop my Social Security payments, I asked. "Negatory" was his answer. I thought about his retirement pitch for all of a second. Did Inc. put more money in my hands now? He never told me, so I did some reading of the IRS Code. This is like a first grader reading a text in Greek. However, I discovered a couple of jewels. One of which is that if you, as an individual, make at least 50 grand, you are taxed at the same rate as a corporation.

Some lawyers kept saying you could set your salary, leave the rest of the money in the corporation and borrow it against next year. I discovered two areas of problems. One, you could have your salary reset by IRS if they decided you were drawing too much. Second, if you let the money accumulate in the corporation beyond the reasonable needs of the business, then you become subject to another tax as a penalty. I decided then and there as far as taxes went, I would remain unincorporated.

My thoughts then turned to the corporate statutes or statutes governing corporations. The professional corporation statute is silent but the business corporation act requires resolutions granting authority to perform certain acts. As a professional corporation, did I need to pass a resolution authorizing me to file a lawsuit? What about the members of the corporation? Must there be a resolution authorizing them to represent a client in Court? What about Motions? Are they covered by the resolution? Further, how would the pleadings be signed? Does the president sign the pleadings as Joe Jukes, President; the Vice-president as R. Rich, Vice-president, and so on? How do you distinguish between the officers? The statute in Texas provides for the issuance of shares which

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SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

SEPTEMBER, 1978
VOLUME V, NO. 1

WELL, SPORTS FANS, HERE IT IS, THAT TIME OF THE YEAR AGAIN. FOOTBALL HAS NOW OFFICIALLY ARRIVED AS HAS THE BEGINNING OF THE NEW YEAR FOR THE COURT OF CRIMINAL APPEALS. BY THE FIRST WEEK'S DECISIONS, DEFENDANTS RESEMBLE THE BOOKIES AS, FROM THE OPINIONS, THE DS AREN'T OFF TO A GOOD START (22 REVERSALS OR GRANTS OF RELIEF VERSUS 256 AFFIRMANCES OR DENIALS OF RELIEF, ALMOST 8%), AND, FROM MY CONFIDENTIAL INFORMANTS, THE BOOKIES ARE DOING ABOUT THE SAME AND JUST GETTING BY AND, BUT FOR THE "JUICE" THEY, TOO, WOULD BE BATTING ABOUT THE SAME. HOWEVER, FORTUNATELY FOR MOST OF US, WE DON'T HAVE THE "TEAMS" TO FACE, AS DOES RICE, BUT WE MUST SIMPLY STRIVE TO DO BETTER EVEN IF MANY TIMES OUR "FACTS" RESEMBLE A LACK OF DEPTH ON OUR TEAM'S PART.

AS YOU KNOW, WE HAVE EN BANC, (THE ENTIRE COURT), OPINIONS, AND PANEL DECISIONS. THE NUMBER OF THE PANEL DECISIONS WHICH FOLLOW WERE COMPOSED OF THE FOLLOWING JUDGES:

Panel #1, 3rd Quarter:	Judges Odom, Vollers and W. C. Davis.
Panel #2, 2nd Quarter:	Judges Onion, Dally and Vollers.
Panel #2, 3rd Quarter:	Judges Onion, Phillips and T. Davis.
Panel #3, 1st Quarter:	Judges Roberts, Phillips and Vollers.
Panel #3, 2nd Quarter:	Judges Roberts, Odom and T. Davis.
Panel #3, 3rd Quarter,	Judges Douglas, Roberts and Dally, with J. Keith substituting for J. Douglas on occasion.

THESE ARE THE FIRST SUMMARIES SINCE JULY 19, 1978. IF YOU HAVE BEEN WONDERING WHERE THE S.D.R. HAS BEEN, I HAVE JUST BEEN DRINKING MY HADACOL TO STRENGTHEN MY BODY FOR THE COMING YEAR. (YOU KNOW HOW WE HEALTH FANATICS, SUCH AS GEORGE GILKERSON, ARE ABOUT SUCH THINGS).

FIRST THE WRIT OPINIONS.

EX PARTE CANTRELL, #58,869, 9/20/78, Panel #2, 3rd Quarter, J. T. Davis, GETS ONE 25 YEAR SENTENCE REMOVED FROM HIS T.D.C. RECORD DUE TO THE DOCTRINE OF CARVING. (Writ Granted). (Tarrant County).

COMMENT: D convicted, on pleas of guilty, for murder (life), robbery (life) and assault to murder (25 years). D did not attack the murder conviction, which involved a different person from the other 2 cases.

Held, "Petitioner's conviction for assault with intent to murder with malice in Cause #83,403 should have been barred under the carving doctrine." The robbery conviction occurred prior to this conviction. Thus, this conviction was void.

LIKEWISE, EX PARTE ISREAL WILLIAMS, #58,644, 9/20/78, P.J. Onion, Panel #2, 3rd Quarter, GETS PARTIAL RELIEF AS D PLEAD OUT TO A MURDER AND A ROBBERY WHICH AROSE OUT OF THE SAME TRANSACTION AND BOTH WERE THE RESULT OF A CONTINUOUS AND UNINTERRUPTED ASSAULTIVE TRANSACTION DIRECTED AT A SINGLE VICTUM. THUS, THE ROBBERY CONVICTION WAS VOID AS VIOLATIVE OF THE DOCTRINE OF CARVINC. (Writ Granted). (Dallas County). Held, "The robbery conviction is set aside."

COMMENT: However, the other 60 year conviction, for murder, remains in effect.

INFORMATION FOR BURGLARY CONVICTION HELD VOID IN EX PARTE JOHN WAYNE NIXON, #58,868, 9/20/78, J. Phillips, Panel #2, 3rd Quarter, FOR FAILURE OF SAME TO ALLEGE THAT THE ENTRY WAS WITH THE INTENT TO COMMIT THEFT OR A NAMED FELONY OR THAT IT ALLEGE INSTEAD THE ELEMENTS OF THE FELONY OR THEFT IN THE INDICTMENT. (Writ Granted). (Polk County).

ALSO, SEE EX PARTE MARVIN L. DOBBINS, #58,866,9/20/78, J. W.C. Davis, Panel #1, 3rd Quarter, where Panel ruled that Information for Criminal Mischief was void and should be dismissed because it failed to allege that the property was destroyed without the effective consent of the owner, an essential element of the offense. Thus, TDC officials were to be sent a copy of the opinion and, by implication, to cut Mr. Dobbins loose from whatever he was doing unless, of course, he had been put on the payroll as a result of all of their lawsuits filed since the writ was filed. (Writ Cranted). (Gaines County).

RULE THAT THE SAME PRIOR CONVICTION CANNOT BE USED TWICE TO ENHANCE PUNISHMENT, AND FACT THAT THIS APPLIES WHEN TWO CASES ARE TRIED TOGETHER, SEE EX PARTE ROBERT EARL WILLIAMS, #58,645, 9/20/78, J. Phillips, Panel #3, 3rd Quarter, IS GOOD LAW BUT DOESN'T HELP WILLIAMS GET OUT OF THOSE COTTON FIELDS. (Writ partially granted in one case, but denied in other case). (Dallas County).

COMMENT: Here, D plead out on two (2) burglary of motor vehicle cases. The same prior conviction was alleged in both cases. D's punishment was thus enhanced although he only got 15 years on each case. Held, "The prior conviction was properly used to enhance punishment in the first conviction but the same conviction should not have been used to enhance punishment in the second conviction." "The latter cause must be remanded for proper assessment of punishment."

At least, however, by the opinion, the D will get to go back to Dallas for at least a day and enjoy the sights of the Dallas skyline and see how it has changed since he was there last.

CAN YOU BELIEVE THAT SOME OF THOSE OLD FELONY CONVICTIONS WHERE THE D DID NOT HAVE COUNSEL, WAS INDIGENT, DIDN'T WAIVE COUNSEL, ETC., ARE STILL COMING IN? D DEVERE JOHN STANFORD, #58,696, 9/20/78, J. Dally, Panel #3, 3rd Quarter, GETS WRIT GRANTED ON A 1950 CONVICTION WHERE THE RECORD SO REFLECTED THIS FACT. (Writ Granted). (Guadalupe County).

COMMENT: I wish the Court would put in the opinion whether the D, in this type situation, had previously made parole as, otherwise, it appears the D has been continuously locked up for over 28 years and this can, without more, destroy the confidence the public has in the news media as they have convinced the general public that nobody stays that long.

Note: Both the TJ and the DA in this case were dead.

THIS IS AN INTERESTING ONE. EX PARTE McCURDY, #58,867, 9/20/78, Panel #1, 3rd Quarter, ALSO WILL GET TO MISS THE RODEO THIS YEAR AS CCA FOUND THAT INDICTMENT FOR ESCAPE WAS FUNDAMENTALLY DEFECTIVE. (Writ Granted). (Dallas County). See Sec. 38.07, P.C.

COMMENT: Here, D was indicted for escape in that he did "knowingly and intentionally escape from his confinement in Woodlawn Detention Center where he was in custody of F. N. Gilbert, at the said penal institution."

Held, "Here, the Indictment alleged the punishment element under subsec. (c)(2)." "It failed, however, to allege the third element of the underlying offense as those elements are listed in Garcia, 537 (2) 930." "The Indictment is therefore fatally defective and petitioner is entitled to relief." Missing element was "under arrest for, charged with, or convicted of a felony".

COMMENT: As everyone knows, there is always a raging controversy between Dallasites and Houstonites as to which City is the most progressive. In Houston, however, when one mentions Woodlawn, he immediately thinks of a well known cemetery in that City. Perhaps, Mr. McCurdy was from Houston and that caused him to escape from that institution when he learned that was where he was going to be kept.

EX PARTE BEN CANNADY, #56,907, 9/20/78, Panel #3, 1st Quarter, J. Roberts, MAKES IT WITH HIS WRIT WHEN CCA RULES THAT INDICTMENT FOR ROBBERY BY ASSAULT WAS FUNDAMENTALLY DEFECTIVE WHEN IT MERELY ALLEGED "CORPOREAL PERSONAL PROPERTY" WITHOUT ALLEGING A DESCRIPTION OF THE PROPERTY TAKEN. HELD,"A DESCRIPTION OF THE PROPERTY TAKEN WAS ESSENTIAL TO THE VALIDITY OF THE INDICTMENT." "THE FAILURE TO GIVE ANY DESCRIPTION OF THE CORPOREAL PERSONAL PROPERTY WAS A FATAL DEFECT, WHICH CAN BE RAISED FOR THE FIRST TIME ON APPEAL" [and by way of Habeas Corpus]." (Writ Granted). (Hunt County). J. Vollers dissented for the reasons he stated in Ex parte Canady, 563 (2) 266.

BUT, NOT ALL WRITS WERE GRANTED.

EX PARTE JAMES SMITH, #58,179, 9/20/78, J. Dally, Panel #2, 2nd Quarter, DIDN'T MAKE IT IN HIS CLAIM THAT SEXUAL INTERCOURSE WAS NOT OR COULD NOT BE CONSIDERED A CRIMINAL EPISODE; I.E., THE REPEATED COMMISSION OF ANY ONE OFFENSE DEFINED IN TITLE 7 OF THE PENAL CODE. (Writ Denied). (Taylor County).

COMMENT: The first part of this Indictment alleged the D unlawfully engaged in sexual intercourse with a female, whom he claimed to be his daughter. The second part alleged that the D "knowingly and intentionally during the course of the same criminal episode caused serious bodily injury to the female."

Held, "The criminal episode referred to is the act of sexual intercourse with the complaining witness." "We hold that the emphasized phrase constitutes a sufficient allegation that D knowingly and intentionally engaged in sexual intercourse."

NOTE: Sec. 21.03(1) provides that aggravated rape results if D "causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode."

COMMENT: The reasoning and rationale given to reach the desired result is difficult, if not impossible, to understand as this Indictment specifically attempted to allege three (3) possible criminal offenses:

1) Rape

2) Causing Serious Bodily Injury to another or

3) Aggravated Rape.

If, "In order to establish criminal responsibility for the offense of rape, the State must allege and prove that the D acted intentionally, knowingly or recklessly," See Childs v. State, 547 (2) 613, and if the word "Unlawfully," is insufficient to cover the requisite mental state, see Reynolds, 547 (2) 590, it is difficult to understand this bootstrapping operation.

In sum, I honestly believe the prosecutor was trying to plead the offense of aggravated rape, See Sec. 21.03, P.C., but was drawing, at the same time, an indictment involving a Title 7 offense, offenses against property, and just got the two screwed up. So, it may be some poor slob got indicted that same day for having repeatedly had sexual intercourse with an insufficient check. However, the Panel did hold its nose on this indictment as it did say, "We do not commend its use [in the future]"

EX PARTE EWING, #58,268, 9/20/78, J. Odom, Panel #3, 2nd Quarter, See also 549 (2) 392, ALSO DIDN'T MAKE IT ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. (Writ denied). (Harris County).

COMMENT: Regardless of what you call it or how you call it, it still seems to me, at least, that if one can read a record on appeal, and, regardless of how badly the accused was defended, if, from a totality of the circumstances, the D got a "fair trial," whatever that may be, then counsel will not, in State Court, at least, be held ineffective or incompetent. However, keep in mind our Federal Judiciary and the Fifth Circuit are, at times, not quite so kind toward such counsel.

TCT BOO BOOS IN SMITH, #59,033, 9/20/78, J. T. Davis, Panel #2, 3rd Quarter, AND GIVES FUNDAMENTALLY DEFECTIVE CHARGE IN AGGRAVATED ROBBERY CASE. (Reversed). (Angelina County).

Here, D indicted for aggravated robbery, it being alleged, in part, that D "intentionally and knowingly" placed Warren Garrison in fear of imminent bodily injury. However, TCt charged the jury that it could convict the D if they found he "intentionally, knowingly or recklessly caused bodily injury to Warren Garrison."

Held, "Consequently, the TCt allowed the jury to convict D . . . in a manner of committing robbery which was not alleged in the indictment." "This charge, then, was fundamentally erroneous and requires reversal of D's conviction."

P. J. ONION WRITES OPINION FOR PANEL #2, 3RD QUARTER, IN McWHERTER, #58,769, 9/20/78, REVERSING CONVICTION WHERE D FIRST ENTERED A PG AND THEN, DURING TRIAL, AFTER STATE RESTED HER CASE AND PRIOR TO CHARGE BEING READ TO THE JURY, MADE MOTION TO TCT, WHICH WAS DENIED, TO PERMIT HIM TO CHANGE HIS PLEA FROM GUILTY TO NOT GUILTY. (Reversed). (Harris County).

COMMENT: I think, in reading between the lines, the TCt may have been trying to jack with the D's atty. but, in the end, as seen by the reversal, the D's atty. got to jack with the TJ.

Held, "A liberal practice prevails in this state concerning the withdrawal of a guilty plea." "Where a guilty plea is before a jury the accused at any time before the retirement of the jury may withdraw his plea and thus put upon the State the burden of proving his guilt beyond a reasonable doubt." "Thus, the accused may as a matter of right withdraw his guilty plea without assigning reason therefor at any time before the retirement of the jury, but thereafter, however, the withdrawal of the plea would be within the discretion of the court."

Also, CCA's panel ruled that harmless error doctrine not applicable as urged by the State.

J. ROBERTS RULES IN BATTLE, #57,806, 807 & 808, 9/20/78, Panel #3, 2nd Quarter, THAT SIMPLY BECAUSE THE D LIKED TO GO INSIDE LADIES' RESTROOMS THAT THIS, IN ITSELF, WHATEVER ELSE IT MIGHT MAKE THE D, DOES NOT MAKE HIM A THIEF. (Reversed). (Dallas County).

COMMENT: Here, State was trying to revoke D's probation claiming he committed the offense of theft of a purse. Evidence showed that D met two (2) women and a male, who was with the women,in a Dallas nightclub. The two ladies went to the restroom and the D also went to the same restroom where several other women were located doing their thing. D apparently just stood near the sink and door to the restroom. One of the women went inside one of the stalls with the other woman holding the door closed as the door was broken. (Apparently, in Dallas at least, liberal thinking does have its limits). The one who went inside the stall left her purse on the sink thinking the door holder was watcbing same. Needless to say, when the one came from the stall, the D was in the process of leaving, with the C/W then discovering her purse to be missing. D was pursued and accused of stealing the purse but he denied doing this dastardly deed; probably, also denying he would do such a dastardly thing in such a high class place as this was. To convince the C/W he was not the thief, he then partially undressed. Nobody saw the purse in the D's possession. Now you see it, now you don't.

Held, "There is no direct evidence supporting the State's allegations in its motion to revoke probation." "The chief incriminating circumstance relied upon by the State is D's presence in the restroom near Skelton's purse shortly before it was discovered missing." "Mere presence at the scene of the crime is not sufficient alone to show guilt." "Under the present circumstances the State's evidence created only a surmise or a suspicion that D had violated the condition of probation as alleged and that reasonable minds could arrive at conclusions other than D's guilt." Reversed.

COMMENT: It will not be surprising to see, in the future, in Dallas at least, a condition of probation for male probationers that they must not go inside ladies'

GUADALUPE COUNTY'S METHOD OF HANDLING APPEALS IS NOT ACCEPTABLE TO CCA AND PANEL #3, 1ST QUARTER, IN HOGAN, #57,547, 9/20/78, J. Phillips, ABATES APPEAL. (Guadalupe County).

COMMENT: Here, Panel could not, from the Record on Appeal, without difficulty, figure out when the D plead guilty. D had retained counsel but such counsel later was allowed to withdraw while case on appeal. Two (2) days later, D filed affidavit of indigency but this was apparently not brought to the TCt's attention. However, as the D had not properly designated any materials to be included in the Record on Appeal, the TCt ruled that this constituted an abandonment of his appeal.

Held, "The trial court has no authority to unilaterally abandon D's appeal and waive D's appeal even though the statutory provisions for the preparation of the record and filing of D's brief had not been properly pursued." Case remanded for a hearing to determine if D indigent and/or whether he wished to further pursue his appeal. (Abated). See also Thompson, #59,357, 9/20/78, J. Phillips, Panel #2, 3rd Quarter. Abated. Hopkins County.

P.J. ONION, IN MONTGOMERY, #57,246, 9/20/78, Panel #2, 3RD QUARTER, RULES THERE IS NO FELONY CRIME IN TEXAS FOR MAKING A FALSE STATEMENT TO OBTAIN A FIREARM. (Remanded). (Travis County).

COMMENT: Here, State alleged a prior Federal Firearms Conviction, for enhancement of punishment purposes.

Held, "A prior federal conviction used for enhancement of punishment, although clearly a felony under federal law, must also be an offense which is denounced by the laws of Texas as a felony." "There is no specific offense set out in the firearms portion of the Texas Penal Code to prohibit such conduct." Also, this would not constitute a "governmental record," see Sec. 37.10, P.C., as "The definition of "government" does not include the federal government, but only the state, counties, municipalities, or political subdivisions of the state." "It is thus apparent that D could not have been successfully prosecuted in the courts of this state under Sec. 37.10 for making a false entry in a federal governmental record required to be kept by federal law."

Thus, with this holding, one of the prior convictions alleged for punishment fell, thus causing a remand to the TCt for another punishment hearing for which the maximum punishment will be 2 to 20 and a possible fine up to $10,000.00. Undoubtedly, the TCt will probably give the D the max of 20 as by this decision he did escape a life sentence.

NOTE: Again, and as mentioned several times before, if you are dealing with a habitual criminal indictment case, always elect to have the jury assess the punishment as if the TCt follows his oath of office, he is going to give your man or woman life imprisonment. If, on the appeal, you succeed in getting a new trial on the issue of punishment, then you get a new trial on the whole shooting match. Here, if the trial attorney had done this, the D would have gotten a new trial on the entire case rather than a remand on the issue of punishment.

TJ ADMITTING EXTRANEOUS OFFENSES IN TRIAL OF JONES, #55,823, 9/20/78, J. Dally, Panel #3 3RD QUARTER, with J. Douglas dissenting without opinion, GETS D JONES A NEW TRIAL. (Reversed). (Dallas County).

COMMENT: Here, D on trial for burglary of a habitation with the intent to commit theft. State was allowed to also show that 3 days before this offense the D broke into another apartment and raped a woman who testified to this extraneous offense. Prosecutor argued and TJ agreed that this latter offense showed his intent to take property through an attack of a woman.

Held, "The State having alleged that D entered the habitation with the intent to commit theft, evidence of an unrelated offense of rape was of no probative value in establishing that intent." "Moreover, it has been held that where intent can be inferred from the act itself, evidence of extraneous offenses is not admissible." Reversed.

Also, not harmless error as D got maximum of life imprisonment.

NOTE: Although betting on the admissibility of extraneous offenses is not a safe thing to do as often-times it is heads it is admissible and tails it isn't, (and, I personally think a lot of TJs do flip coins on this type issue), many of the cases where the CCA has reversed are cited in the opinion.

BURKS V. U.S., 98 S.Ct. 2141, AND GREENE V. MASSEY, 98 S.Ct. 2151, ARRIVE IN AUSTIN AND MANY DS NOT ONLY GET A REVERSAL BUT DISMISSAL OF THEIR CASES AS WELL. Art. 44.25, C.C.P., is, in part, unconstitutional.

UNDERWOOD, #55,368, AND AYERS, #55,365, 9/20/78, P.J. Onion, Panel #2, 3rd Quarter, GET REVERSALS WHERE THEY WERE CHARGED AND CONVICTED FOR POSSESSING GRASS OF MORE THAN 4 OUNCES BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENT OF POSSESSION. (Reversed and Dismissed). (Travis County).

COMMENT: These are companion cases, although by separate opinions, where each D was charged with possession.

In Underwood, supra, the facts showed only the following resulting in the following holding:

"Appellant was found in the living room of the house at the time of the search. There was no showing that he had leased or rented the house, had the utilities in his name, or shared joint possession of the house. None of his personal clothing or possessions were shown to be in the house. No cash or contraband was shown to have been found on his person. The personal papers and mail which were seized bearing a different address were not shown to reflect his name. There was no evidence of furtive gestures toward the contraband when the officers entered the premises, no attempt to escape, and no evidence of any marihuana smoke, no evidence of appellant being under the influence of marihuana or other drugs, and no incriminating statements at the time of arrest. The record does not establish appellant's position in the living room-dining room so as to show close proximity or plain view. Further, the mere presence of an accused near where the prohibited items are found, standing alone, is not sufficient to show possession.

In Burks v. U.S., 98 S.Ct. 2141, 57 L.ed2d 1, the U.S. Supreme Court by opinion on June 14, 1978, held that the "Double Jeopardy Clause precluded a second trial once the reviewing court has found the evidence legally insufficient...." In Greene v. Massey, 98 S.Ct. 2151, 57 L.3d2d 15, handed down the same day as the Burks decision, the Supreme Court held, "Since the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings, Benton v. Md. [395 U.S. 784, 89 S.Ct. 2056, 23 L.3d2d 707], we are bound to apply the standard announced in Burks to the case now under review.

Having found that reversal must result in the instant case since we concluded that the evidence is insufficient to support the conviction, the Supreme Court's decision in Burks v. U.S. and Greene v. Massey dictate that no further prosecution be had in this cause."

Likewise, in Ayers, supra, the facts showed only the following resulting in an identical holding:

Appellant was found in the bathroom of the house at the time of the search warrant. There was no showing that he had leased or rented the house, had the utilities in his name, or shared joint possession of the house. None of his personal clothing or possessions were shown to be in the house. No cash or contraband was shown to have been found on his person. The personal papers and mail which were seized bearing a different address were not shown to reflect his name. There was no evidence of furtive gestures toward the contraband when the officers entered the premises, and no evidence of any marihuana smoke, no evidence of appellant being under the influence of marihuana or other drugs, and no incriminating statements at the time of the arrest. However, the fact that appellant was found in the bathroom with a weapon in his hand seems to be relied upon by the State as an inference of an attempt to escape. We conclude that appellant's presence in the bathroom with a weapon, which he surrendered without resistance, is insufficient, standing alone, to affirmatively link him to the contraband which was seized in other parts of the house.

ALSO, IN ANOTHER POSSESSION CASE, DAMRON, #56,031, 9/20/78, P.J. Onion, Panel #2, 3rd Quarter, CASE REVERSED AND ORDERED DISMISSED BECAUSE EVIDENCE INSUFF. (Reversed). (Hall County).

COMMENT: The facts showed the following and the Panel answered the question posed in the negative:

"In the instant case the appellant was (1) not at the place searched at the time of the search, and (2) there were other persons present at the time of the search and shown to be living there so appellant was not in exclusive possession, (3) the marihuana was found in a closet in a bedroon without any showing it was appellant's bedroom or only bedroom in the house and no showing of appellant's personal belongings in the closet or bedroom or even the observation of any men's clothing etc., and (4) appellant was not found in possession of any contraband at the time or arrest nor (5) was he under the influence of any narcotic and (6) he did not make any incriminating statements at the time of arrest."

It is true that it was stipulated that the premises were the community property of the appellant and his wife and there were references to the fact that the house was his residence, and that his wife and child were present at the time of the search. There was no evidence, one way or the other, whether other persons lived or frequently stayed there. The question thus presented is whether the State has established an affirmative link from the appellant to the marihuana found when he was not present under the particular circumstances of this case.. Stated another way, is the evidence sufficient to sustain a conviction of an accused, who is not present at the time of the search, where contraband is found in his residence under the above described conditions?" NO.

LIKEWISE, IN ROBINSON, #54,915, 9/20/78, J. T. Davis, Panel #3, 2nd Quarter, THE PANEL REVERSED A CIRCUMSTANTIAL EVIDENCE BURGLARY OF A HABITATION CONVICTION AND, BECAUSE OF BURKS AND GREENE, SUPRA, THE CASE WAS ORDERED DISMISSED. (Reversed and Dismissed). (Wichita County).

COMMENT: The facts, rather detailed, are set out in the opinion. However, Judge T. Davis, feeling sorry for newsletter editors, set out a good summary of the facts which are as follows with the Court's holding:

"By way of summation, the incriminating facts show that three black males were at the scene of the burglary around 8 a.m. on the day in question. Appellant was identified by the witness Davenport as being at a location less than a mile from the burglarized house that morning. Appellant was arrested in the company of George Nixon, Jr. and William Robinson about 11 a.m. the same morning. Nixon was identified as one of the three persons at the scene of the crime. William Robinson's footprint matched a print found at the Mitchell residence.

Presence in the vicinity of a crime is not sufficient to sustain a conviction. Ysasaga v. St., 444 S.W.2d 305. We find that this factor, along with all of the other circumstantances in this cause, amounts to nothing more than strong suspicion or a probability that appellant committed the crime charged. We conclude that the evidence does not exclude all other reasonable hypotheses except appellant's guilt and find the evidence is insufficient to support the conviction."

ALSO, JOHNSON, #54,642, 9/20/78, J. Odom, Panel #3, 2nd Quarter, GETS A LIKE RESULT IN A CREDIT CARD ABUSE CASE. (Reversed and Dismissed). (El Paso County).

COMMENT: This is an interesting case and involved a credit card, which had been stolen, being used at the Montana Mining Co. It seems, by the facts, either it was late in the day or the prosecutor had his mind on something else as the waitress who testified was unable to testify to the name that was on the credit card and was not asked by the D.A. to identify it. The cashier could not identify the D as the person who presented the card. The State thus failed to show that the D presented a credit card belonging to another to the waitress who in turn gave it to the cashier who in turn called the police. The cashier testified he got the card from someone who was not identified or called as a witness.

Held, "There is no evidence identifying the card presented to Thomas (the waitress) as the Griffin (name of real owner) card, nor is there any evidence connecting D with the Griffin card introduced by the State." However, the defense almost saved the day for the State as a defense witness testified that 3 days before, in New Orleans, she saw a person who identified himself as Griffin give the D a like credit card. "There is no evidence, however, that this card was the one presented in El Paso, nor did this witness identify St.'s Exh. 1 as the card she saw."

COMMENT: All I can say is that if this D was the culprit, I'll bet his participation in our judicial system cost him a lot more than the amount on the Montana Mining Co. check.

CCA IN HAMMETT, #58,453, 9/20/78, J. Odom, En Banc, BREAKS NEW GROUND IN DEATH PENALTY CASE AND D GETS NEW TRIAL BECAUSE, THOUGH D ASKED THE TCT TO APPOINT A PSYCHOLOGIST OF THE D'S CHOICE TO TESTIFY AS TO THE PROBABILITY THAT HE WOULD COMMIT FUTURE ACTS OF VIOLENCE, THE TJ REFUSED. (Reversed and Remanded for a new trial). (Brazoria County).

COMMENT: The D's motion and his ground of error are set out in the opinion.

Held, "The issue in this case is not the exclusion of evidence, as it was in Robinson, 548 (2) 63, but rather, the denial of a motion sought to permit D to secure such evidence in the first place."

> "If the scales of justice are to weigh equal regardless of wealth; if the hand of justice is to extend as far to those who cannot afford to hire an expert as to those who can; if the State is not to have exclusive access to experts, if the jury is to hear "all possible relevant information about the individual defendant whose fate it must determine," Jurek, and not hear only those experts of the prosecutorial persuasion; if fairness and open inquiry are to characterize the judicial exploration of the accused's mental condition and possible future conduct, then the indigent capital murder defendant must have equal access to expert opinion psychological or psychiatric testimony from some expert of his reasonable choosing, but not necessarily his first choice."
>
> "We hold denial of appellant's motion for appointment of a psychologist was reversible error."

COMMENT: This is truly one time one cannot call the CCA a hypertechnical Court as the majority did not require the D to show that if the TCt had granted the motion he could have gotten someone, the name of that person and what that person would have testified to if he had examined the D. In fact, this just didn't sound like the CCA as to what a D usually has to show to perfect his error. Maybe it was the fact the case was a death penalty case.

J. Vollers, writing a lone dissenting opinion, said, in my words:

1. The Ground of Error was not any good;
2. The Ground of Error submitted and the Ground of Error the Court wrote on are not the same and, of course, grounds of error, like objections made at trial and on appeal, must be the same.
3. Another Doctor, who was appointed, examined the D.

However, though scary, he perhaps hit the nail on the head,as to a valid objection to the death penalty; i.e., can we afford it if that kind of accused is entitled to a "millionaire's defense," when he said:

> "It is utter foolishness to suggest that our system of justice can afford the indigent defendant with expert testimony to same extent that a millionaire who is accused of crime can afford for himself. It is sheer fallacy to suggest that we can afford to allow an indigent defendant to seek examinations until he finds a psychiatrist who will testify favorably for him. It is an utter disregard of our statutory process and our prior cases to suggest that when a trial judge appoints a disinterested expert the accused is denied the opportunity to present an expert other than those "of prosecutorial persuasion."

NOTE: By this rationale, Cullen Davis must now declare bankruptcy.

BUT, ROBERTS, #55,662, 9/20/78, P. J. Onion, Panel #2, 3rd Quarter, A D.W.I. CASE, ONLY GETS A REVERSAL BUT NO DISMISSAL. (Reversed and remanded for a new trial). (Bell County).

COMMENT: Here, D charged with D.W.I. State did not, by the opinion, call any witnesses but simply offered and had admitted into evidence a "Texas Peace Officer's Accident Report," which indicated that D was the operator of a vehicle. Attached to the report was an affidavit of the arresting officer, who had since left Bell County and joined the Marine Corps, who stated that he observed D behind the wheel of the vehicle immediately after the accident and that D appeared to be intoxicated.

Held, "The court erred in admitting the report into evidence" and, without the report, this made the evidence insufficient.

Why was the report inadmissible? Hearsay? No. Sec. 47 of Art. 6701d, V.A.C.S., provides that accident reports are made without prejudice and are privileged and confidential.

COMMENT: From a close reading of this opinion, as to the facts, it simply appears that the TJ had just finished reading something that some prosecutor had prepared for the next Legislature that I would call, "The Elimination of the Witness Act," and thought this was something the last Legislature had passed. Otherwise, nothing else makes sense about this case. Why, however, wasn't the case ordered dismissed?

CCA TELLS LOUIE WAINWRIGHT, IN CORTEZ, #58,630, 9/20/78, J.T. Davis, En Banc, With Judges Douglas, Dally and W. Davis dissenting without opinion, THAT FLORIDA'S AUTHENTICATION AND CERTIFICATION OF PEN PAPERS CERTIFICATE IS NOT ANY GOOD IN TEXAS AND REVERSES A DEATH PENALTY CONVICTION. (Reversed). (Nueces County).

COMMENT: Louie Wainwright, in case you don't know, is the equivalent of W. J. Estelle, and is the Director of the Florida prisons which are still operating in that State.

At the punishment stage, the State offered and had admitted into evidence, over objections, several prior convictions from the State of Florida via a "pen packet".

Held,"In the instant case, there is no certificate by a judge of a court of record in which the record is kept certifying the attesting officer has legal custody of the asserted writings. Nor is there a certificate from the Secretary of State of Florida or any other appropriate of-

ficial certifying as to Louie Wainwright's position and to the fact that he has custody of the documents as asserted in his certificate. It is clear, therefore, that the trial court erred in admitting St.'s Exh. #45 into evidence." Reversed.

CCA also held this not to be harmless error.

PANEL OF CCA, Panel #2, 3rd Quarter, IN DECKER, #58,587, 9/20/78, J. T. Davis, RULES THAT UNLESS D PERSONALLY AGREES TO RECOMMENDATION OF D.A., PER ART. 44.02, C.C.P., TJ CANNOT DENY HIM AN APPEAL. (Affirmed). (Ector County).

COMMENT: Art. 44.02, C.C.P., provides ,in general, that if there is a plea bargain agreement and the D and his attorney agree to the recommendation of the D.A. and the plea bargain is approved by the TJ and followed, then, except with permission of TJ, D cannot appeal his case.

Here, TJ denied D his right to appeal because there was a plea bargain agreement which was followed and approved by TJ. However, record did not reflect D personally joined therein. Held, "We construe Art. 44.02 to require the D to personally agree to the recommended punishment." Needless to say, D received no relief regarding his claim that admonishments of TJ, regarding rights one gives up in the Stipulation form, must affirmatively appear in the Record. Thus, very little is still needed for a TJ to comply with Art. 26.13, C.C.P.

J. PHILLIPS DISCUSSES RAMIFICATION OF BREATHALYZER TEST RESULTS AND ADMISSIBILITY THEREOF IN SLAGLE, #54,947, 9/20/78, J. Phillips, Panel #2, 3rd Quarter. (Affirmed). (Travis County).

COMMENT: The long and short of this opinion is that 1) the administration of the breathalyzer is okay, 2) it is admissible and 3) the usual presumption instruction doesn't have anything wrong with it.

The problem with this type case is that it got to Austin too late. If it had been the first case to be decided involving the breathalyzer, it makes one wonder what the law would be today. However, it isn't and wasn't so we are now stuck with breathalyzer results.

NOTE: If you are handling an appeal and as far as you can tell it is a case of first impression, try to get Amicus briefs filed, backing you up, as we should never forget that the law the Court makes today in your case may very well decide what law we must follow 10 or 20 years from now and, as we all know so well, rarely is a law favorable to those accused of crime passed by the Legislature. And once the CCA has written on an issue and continued to write similar opinions on that issue, it is very difficult to get a change or to get past cases overruled.

FOR AN INTERESTING CASE, INVOLVING D'S COMPETENCY TO STAND TRIAL, WHICH I DON'T BELIEVE WILL STAND MUSTER DOWN THE ROAD, READ DINN, #54,939, 9/20/78, P. J. Onion, Panel #2, 3rd Quarter. (Affirmed). (Nueces County).

COMMENT: Whether it was tactics or just what is not shown by the opinion. However, in this Aggravated Assault case, the evidence adduced during trial appeared rather overwhelming, to me at least, to raise an issue as to the D's competency. However, no issue was made of this pre-trial. During trial, the evidence reflected bizzare behavior on the part of the D at the time of the commission of the offense. After stabbing two persons the D then fled to his mother-in-law's house where he asked her to kill him. The defense during trial was insanity. Other witnesses testified D's conduct was "weird or hard to believe," "acted like an insane man," "acted like a crazy person," "out of his mind," "he lost his mind." However, jury chose not to believe this defense.

During trial, as a result of this evidence, TJ,sua sponte, 3 times, inquired of D's atty. as to the D's competency to stand trial. (If a TJ acts sua sponte, you have got to believe he thinks something is wrong).

Arresting officer testified D wasn't crazy; he was just mean.

TJ, apparently, after hearing this testimony then decided he had better work on the appeal record and entered a finding that he found the D competent to stand trial.

D's trial atty. then asked for appointment of a psychiatrist, which was denied.

Panel of CCA ruled, speaking through P. J. Onion:

> "We are not here confronted with a situation where the TJ failed to halt the proceedings on his own motion or the question of the sufficiency of the evidence to cause the judge to halt the proceedings to make inquiry." Thus, no error found.

COMMENT: With the evidence that is set out in the opinion, it is difficult to understand how Sec. 2(b) of Art. 46.02, C.C.P., was not invoked: "If during the trial evidence of the D's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial." If a finding of incompetency to stand trial occurs, then a new jury panel shall be impaneled to determine the issue of competency to stand trial. Compare Hassler v. State, 473 (2) 513, not cited in the opinion.

I think the Courts are not through with Mr. Dinn and we will probably see this case in Federal Court at a later date. During argument, trial counsel for the D made the argument that the reason the defense did not bring a psychiatrist was because "that would cost at least $250 and that's not available."

REMEMBER: If your client enters a plea of "true" to enhancement allegations, he cannot be heard to complain that the evidence, on this issue, is insufficient on appeal.

J. DALLY, IN NORRIS, #54,686, 9/10/78, Panel #2, 2nd Quarter, WRITES OPINION UPHOLDING CITY OF HURST'S SPEEDING ORDIANCE. (Affirmed). (Tarrant County).

COMMENT: This had to do with a "school zone" type ordinance. D claimed this ordinance conflicted with State law and State regulations. CCA said it didn't. See Ex parte Devereaux, 389 (2) 672, discussed in the opinion.

D'S NOVEL CONTENTION IN FERGUSON, #54,001 & 002, 9/20/78, J. Phillips, Panel #3, 1st Quarter, THAT BECAUSE THE TJ DID NOT INCLUDE IN THE CT'S CHARGE AN ENGLISH INTERPRETATION OF THE SECURITY INSTRUMENT INVOLVED IN THE CASE WHICH WAS IN SPANISH, THAT THE TRIAL WAS NOT CONDUCTED IN THE ENGLISH LANGUAGE REJECTED. (Affirmed). (Dallas County). J. Roberts wrote a concurring opinion.

COMMENT: I think what really sank the D's boat in this case was that he made a judicial confession that he violated the securities law and it was also shown he had training in and could read the Spanish language. Thus, I think his contentions, regarding the above, as well as his complaints about the Indictment, etc., probably did not get the warm reception he had expected because of this.

IN ANOTHER INVESTMENT CASE, SEE WATKINS, #51,551 & 552, 9/20/78, J. Keith, substituting for J. Douglas, Panel #3, 3rd Quarter, PANEL DISCUSSED PRESIDENTIAL PARDONS (NOT QUITE LIKE THE ONE NIXON GOT) AND RULES THAT A FEDERAL CONVICTION WAS ADMISSIBLE FOR IMPEACHMENT PURPOSES EVEN THOUGH THE D GOT A PRESIDENTIAL PARDON. SEE EX PARTE SMITH, 548 (2) 410, CITED IN THE OPINION. (Affirmed). (Dallas County).

COMMENT: However, as to remoteness of a prior conviction used for impeachment, the "ten year" rule is not absolute. Held, "There being evidence showing a lack of reformation and the subsequent conviction of another felony, the 1961 conviction is not deemed subject to the objection of remoteness."

CLEAR ACRYLIC PLASTIC AEROSOL SPRAY PAINT SNIFFS OUT D. HOLDER, #58, 811, 9/20/78, J. Phillips, Panel #2, 3rd Quarter, AS REVOCATION ORDER AFFIRMED. (Palo Pinto County). See Sec. 42.08, Public Intoxication.

COMMENT: This is one of those cases where the D, when arrested, had been driving all over the road. Police Officer testified that "he had experience with over a thousand individuals who were intoxicated by alcohol or drugs," and, in his opinion, the D was intoxicated. (In looking in the latest Texas Legal Directory, Palo Pinto County has 28,505 people. Does this mean that 1/29 of the population is on drugs or alcohol?).

Held, "The State's proof that D 'smelled like airplane glue or paint thinner' and the close proximity of the can of acrylic lacquer and the baggie with the acrylic substance within it to the driver's position in the automobile driven by D is sufficient to establish that the acrylic lacquer paint was the cause of D's public intoxication." (Affirmed).

CCA RULES IN FERGUSON, #58,706, 9/20/78, J. Dally, En Banc, Death Penalty Case, No dissents, THAT "WE ARE RELUCTANT TO SAY THAT THE STATE AFFIRMATIVELY ESTABLISHED THAT D FREELY AND VOLUNTARILY CONSENTED TO THE SEARCH OF HIS BODY AND SEIZURE OF HIS BLOOD," BUT RULES THIS WAS, IF ERROR, HARMLESS ERROR. (Affirmed). (Bell County).

COMMENT: Apparently, the following established the probability question, See Art. 37.071, C.C.P.

"The death penalty is a harsh penalty; it is especially harsh when assessed against a person who is 17 years of age as was the D when he committed the offense." "However, in view of the savage, ruthless murder for which D was convicted and in view of the entire record, we cannot say that the death penalty assessed is unjust."

CCA SPLITS OVER RIGHT TO COUNSEL IN MISDEMEANOR CASES WHERE MAXIMUM POSSIBLE PUNISHMENT CARRIED TIME AND FINE BUT D RECEIVED ONLY FINE. EMPY, #55,957, 9/20/78, J. Dally. (Affirmed). (Dallas County).

COMMENT: D was charged with theft of over $20.00 but less than $200.00. See Sec. 31.03(d). Maximum punishment provided for this Class A misdemeanor offense is fine up to $2,000 and/or time up to 1 year in county jail.

Held, where the TJ merely assesses a fine, even though he could have assessed time, the court was not required to appoint an attorney to represent the D even though the D was indigent, not represented by counsel and convicted under a statute which included imprisonment as a possible punishment. Ex parte Herrin, 537 (2) 33, overruled.

Held, "It has been the law in this State for 100 years that such admonishment [as to the consequences of a plea of guilty] need not precede the acceptance of a plea of guilty to a misdemeanor."

J. T. Davis, joined by Judges Onion and Roberts, dissented with opinion. J. Phillips also dissented with opinion.

COMMENT: This case more clearly resembles a plea for State's Rights but, as any student of Constitutional Law knows, State's Rights haven't existed in this country for many years. However, we should never forget that but for the State of Texas where would we be concerning the Constitutional rights of individuals? Perhaps this case will be the predicate for a further and additional Constitutional right that many of us had taken for granted.

CCA RULES IN MOLANDES, #53,814, 9/20/78, J. Odom, En Banc, Death Penalty, No Dissents, THAT "THE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT IN FELONY CASES EXTENDS ONLY TO THE RETURN OF A VERDICT ADVERSE TO THE ACCUSED, AND THAT THE LEGISLATURE MAY PROVIDE FOR THE RETURN OF A VERDICT FAVORABLE TO THE ACCUSED ON LESS THAN UNANIMOUS AGREEMENT." THUS, NOTHING WRONG WITH 10 MAN VERDICT IN DEATH PENALTY CASES. (Affirmed). (Nacogdoches County).

PANEL OF CCA RULES IN BRYANT, #54,948, 9/20/78, P.J. Onion, Panel #2, 3rd Quarter, THAT INDICTMENT FOR AGGRAVATED ROBBERY, WHICH LEFT OUT WORD "WITH," WAS NOT FUNDAMENTALLY DEFECTIVE. (Affirmed). (Matagorda County). Although the CCA's Panel ruled for the State, it rejected her argument that because Hart Graphics of Austin printed this form that this should not make the Indictment defective.

COMMENT: Here, Indictment alleged as follows:

"....Defendant, on or about the 4th day of Sept., A.D. 1975, and before the presentment of this indictment, in said County and State, did then and there while in the course of committing theft and with intent to obtain property of Paul Lewis, the owner of the following described property, to-wit: lawful money of the United States of America in the amount of $485.75 without the effective consent of said owner and [with] intent to deprive the said owner of said property, did then and there exhibit a deadly weapon, to-wit: shotgun, and did then and there intentionally and knowingly threaten and place the said Paul Lewis, the owner of said property, in fear of imminent bodily injury and death...." (emph. supp.).

Note: The word "with" in brackets is the "with" that was left out of the Indictment.

PANEL OF CCA, IN BROWN, #55,060, 9/20/78, J. Keith, Panel #3, 3rd Quarter, with J. Douglas not participating, DISCUSSES LAW OF CONSPIRACY AND AFFIRMS CONSPIRACY TO COMMIT CAPITAL MURDER FOR THE PROMISE OF REMUNERATION CONVICTION. (Affirmed). (El Paso County).

NOTE: Merely because the police use a subterfuge to arrest a D, that does not nullify a subsequent confession.

D SALMONS, #58,850 & 851, 9/20/78, J. Dally, Panel #3, 3rd Quarter, SAYS THAT CENIKOR FOUNDATION IS WORSE THAN PENITENTIARY. PROBATION REVOKED BECAUSE D LEFT CENIKOR FOUNDATION WITHOUT AUTHORIZATION AND PROBATION REVOKED. AFFIRMED. (Tarrant County).

COMMENT: CCA said that this condition of probation, attend the Cenikor Foundation, was poco weino and did not constitute an unauthorized delegation of judicial authority.

D was given an option; i.e., go back to Cenikor or go to the penitentiary. D chose the latter.

COMMENT: I think many times, in trying to represent our clients, and attempting to get them the best deal possible, we oftentimes overlook the fact that some of these drug programs aren't what the brochures crack them up to be. How many of your trial judges have gone to these places and seen how they are run and what they actually accomplish?

I DON'T KNOW ABOUT THIS ONE. D CASTILLO, #55,207, 9/20/78, J. Dally, Panel #3, 3rd Quarter, WAS REPRESENTED AT TRIAL BY COURT APPOINTED COUNSEL. AFTER SENTENCING, HE HAD RETAINED COUNSEL AND ALSO MADE AN APPEAL BOND. ATTY. HAS NOT SEEN D SINCE HE WAS RELEASED FROM JAIL AND BELIEVED HE HAD GONE TO MICHIGAN. HELD, "D HAS NOT EXERCISED DUE DILLIGENCE IN PURSUING THE APPEAL." (Affirmed). (Harris County).

COMMENT: The problem I have with this one is the fact the opinion does not state if the attorney on appeal was hired and paid or just hired. (As so many of us know, there is a difference). The appeal attorney apparently never did anythink except to give notice of appeal as no brief was filed, etc. There is no showing what sum of money, if anything, was paid for the appeal bond.

Thus, if and when Mr. Castillo comes back into our judicial system, I suspect a writ will be forthcoming from several different directions; i.e., 1) he was actually indigent or 2) his retained attorney did nothing on the appeal.

NOTE FOR YOUNG LAWYERS. If you are going to represent a D on an appeal, always make sure you have been paid or arrangements for the fee have been made before making an appearance in court. Once your name gets on the books as attorney of record, then it is there until removed by the trial court. I suspect, in this case, much valuable time of our courts, attorneys, etc., will be taken up at some time in the future and the evidence will probably show the attorney was not paid anything for his being in the case. However, he will probably get to waste two (2) or three (3) days in court on a writ hearing.

REMEMBER. "BEFORE THE DOCTRINE OF CARVING CAN BE APPLIED TO REVERSE A SUBSEQUENT CONVICTION FOR AN OFFENSE ARISING OUT OF THE SAME CRIMINAL TRANSACTION AGAINST THE SAME VICTUM WHICH FORMED THE BASIS FOR A PRIOR CONVICTION, THERE MUST BE A PRIOR CONVICTION." THUS, MERE FACT THAT D TRIED AND CONVICTED BUT GOT NEW TRIAL IS NO BAR TO SUBSEQUENT PROSECUTION. BOWERS, #55,683, 9/20/78, J. Phillips, Panel #2, 3rd Quarter. (Affirmed). (Harris County).

PANEL IN GONZALES, #55,686, 9/20/78, J. Phillips, Panel #2, 3rd Quarter, SAYS THAT "BY NO STRETCH OF THE IMAGINATION CAN IT BE CONTENDED THAT THE EVIDENCE IN THAT CAUSE RAISED THE ISSUE OF ENTRAPMENT. " THUS, CASE AFFIRMED. (Harris County).

I. T. DAVIS, IN MARES, #55,778, 9/20/78, Panel #2, 3rd Quarter, DISCUSSES BENCH CONFERENCES AND FACT THAT THIS DID NOT CONSTITUTE CONDUCTING THE TRIAL IN THE D'S ABSENCE. (Affirmed). (Hidalgo County).

Held, "The presence of D at such conferences did not bear "a reasonable substantial relationship to the opportunity to defend." "We find no violation of Art. 33.03 nor do we find that D was deprived of any right guaranteed by the 6th Amendment." "No error is shown."

COMMENT: Books could be written about Bench Conferences. The tragedy of them is there is usually no record of what happened at the Bench. A possible solution to this problem is the Sony. Ask the trial judge to let you leave your Sony on his Bench and then when there are Bench Conferences punch the button. Then, at the end of the trial, mark it as an exhibit marked "Bench Conferences" and make it part of the record.

ON
WOULD YOU BELIEVE? THERE IS SUCH A THING, IN DALLAS, AT LEAST, AS AN EXPERT/"BOOSTER GIRDLES." REGINA JACKSON, #55,924, 9/20/78, Panel #1, 3rd Quarter, LEARNS THAT THIS IS SO AND MUST NOW GO AND DO LIFE FOR STEALING. (Affirmed). (Dallas County).

PANEL IN GREEN, #55,942, 9/20/78, J. W. David, Panel #1, 3rd Quarter, RULES THAT INDICTMENT FOR INDECENCY WITH A CHILD NOT FUNDAMENTALLY DEFECTIVE AND THAT "THE ALLEGATION THAT HE KNOWINGLY EXPOSED HIS GENITALS TO THE C/W" IS SUFFICIENT TO ALLEGE" THAT HE DID SO KNOWING THAT SHE WAS PRESENT." "THAT HE COMMITTED THE ACT TO HER IS SUFFICIENT TO ALLEGE THAT HE COMMITTED THE ACT WITH KNOWLEDGE OF HER PRESENCE." (Affirmed). (Dallas County).

WANT TO KNOW HOW TOUGH DALLAS JURIES ARE? ASK BRINSON, #57,071, 9/20/78, J. Roberts, Panel #3, 1st Quarter, WHO PLEAD GUILTY TO A D.W.I. TO A JURY AND GOT THE MAXIMUM OF 2 YEARS AND A $500.00 FINE. (Affirmed). (Dallas County).

COMMENT: It appears that the D is also eligible for a perjury conviction, See Article 42.13, C.C.P., as he swore to an application for misdemeanor probation and only had 5 prior felony convictions.

J. ROBERTS DISCUSSES IN FLOYD, #57, 623 & 624, 9/20/78, Panel #3, 2nd Quarter, OFFENSE OF AGGRAVATED PROMOTION OF PROSTITUTION. (Affirmed). (Dallas County).

Held, Secs. 43.02(a)(1) AND 43.04 ARE CONSTITUTIONAL. Panel also ruled, concerning a hypothetical, that if a man supports and finances two mistresses [unquestionably that is not a defense lawyer] whom he knows to engage in prostitution in his absence that this "passive knowledge of surrounding circumstances alone does not constitute an enterprise or business."

J. Roberts also, in discussing sexual dysfunction clinics (those places where by screwing you get it out of your system), said that this issue should properly be addressed to the Legislature as a matter which is wholly within their province.

J. ODOM DISCUSSES "SAFE PLACE" IN WRIGHT, #58,504, 9/20/78, Panel #1, 3rd Quarter, SEE SEC. 20.04, AGGRAVATED KIDNAPPING STATUTE, AND RULES THAT THIS PHRASE IS COMMONLY UNDERSTOOD AND NEED NOT BE DEFINED FOR THE JURY. (Affirmed). (Dallas County).

WHAT DOES A PLEA WITHOUT A RECOMMENDATION FROM THE PROSECUTION MEAN? J. T. DAVIS, IN McKELVEY, #58,608, 9/20/78, Panel #2, 3rd Quarter, DISCUSSES THIS QUESTION, IN PART. (Affirmed). (Harris County).

COMMENT: The plea bargain here was the State would make no recommendation as to punishment and would not oppose granting of probation.

Held, "A recommendation to 'not oppose probation' cannot be unilaterally converted by the D into an agreement to affirmatively recommend probation for him." Thus, nothing wrong with prosecutor taking an adversarial approach in cross examining D's wife and his father.

NOTE: It has come to my attention that a lack of mutual understanding may exist regarding a plea without a recommendation. In Harris County, Texas, for example,where this is usually predicated upon a presentence investigation, some prosecutors have been known to come into court at the punishment stage and actually make recommendations regarding punishment; the D.A. taking the position that a plea without recommendation concerns only the probation department and not the D.A. So, in handling this kind of situation, make sure what you think it means, it also means what the trial judge and the prosecutor thinks it means.

J. ONION DISCUSSES, IN ULLOA, #58,638, 9/20/78, Panel #2, 3rd Quarter, OFFENSE OF ROBBERY. (Affirmed). (Comal County).

COMMENT: "Sec. 29.02 IS BROADER IN SCOPE THAN THE PRIOR ROBBERY OFFENSE, HOWEVER, BECAUSE IT APPLIES TO VIOLENCE USED OR THREATENED 'IN THE COURSE OF COMMITTING THEFT,' WHICH IS DEFINED IN SEC. 29.01 TO INCLUDE NOT ONLY VIOLENT CONDUCT ANTECEDENT TO A COMPLETED THEFT, BUT ALSO VIOLENCE ACCOMPANYING AN ESCAPE IMMEDIATELY SUBSEQUENT TO A COMPLETED OR ATTEMPTED THEFT," IS INCLUDED.EVID. HERE WAS SUFFICIENT WHERE D, AFTER LEAVING STORE, AFTER SHOPLIFTING, GOT IT ON WITH THE OWNER, "THUS, THE VIOLENCE OCCURRED IN FLIGHT FROM THE SCENE OF THE THEFT." "THE EVID. CLEARLY REFLECTS THAT D INTENDED TO APPROPRIATE OR OBTAIN CONTROL OF THE SHIRTS AND IN FACT DID SO AND ONLY DISCARDED SAME IN FEAR OF APPREHENSION."

PANELS ARE AS FOLLOWS FOR THE WEEK OF 9/27/78.

Panel #1, 1st Quarter: Judges T. Davis, W. C. Davis and Dally.
Panel #1, 2nd Quarter: Judges Phillips, Douglas and W. C. Davis.
Panel #1, 3rd Quarter: Judges Odom, Vollers and W. C. Davis.
Panel #3, 1st Quarter: Judges Phillips, Roberts and Vollers.
Panel #3, 2nd Quarter: Judges T. Davis, Roberts and Odom.

WOW. LANGFORD, #56,977, 9/27/78, J. Phillips, Panel #3, 1st Quarter, with J. Roberts concurring without opinion, and with J. Vollers dissenting with opinion, a revocation of probation, HOLDS THAT ENTRAPMENT CAN BE ESTABLISHED AS A MATTER OF LAW. (Reversed). (Galveston County).

COMMENT: Here, police wanted to catch a couple of burglars whom the D knew quite well. Police Officer instructed D to work with these people but he wanted to be contacted about the time and place of the burglaries before they occurred. This agreement enabled the D to get probation.

Apparently, the other burglars became suspicious of the D inducing him to take narcotics to show he was one of them. The parties then decided to go into neighboring Brazoria County and commit the burglary made the basis of the State's motion to revoke. However, the D was not able to contact his cop buddy by telephone until after the burglary had occurred.

Police Officer admitted that if he had received a telephone call from the D. before the burglary, the D would not be in the dock.

HELD: There are two general tests for entrapment recognized throughout the United States; the "subjective" and the "objective."

"SUBJECTIVE": Whether there was inducement on the part of the State and Whether the D showed any predisposition to commit the offense.

"OBJECTIVE": The Court considers only the nature of the police activity involved without regard to the criminal tendencies of the D.

HELD: Our Legislature, See Sec. 8.06, P.C., has adopted the "Objective" test.

TEST: Was there police inducement?

If so, what was the nature of the police activity involved, without reference to the predisposition of the particular defendant?

After reviewing the facts of the case, J. Phillips then concluded: "Having failed to rebut or contradict the defensive evidence of entrapment, we hold the facts of this case establish a prima facie case of entrapment." Reversed.

NOTE: J. Vollers dissented on the basis, in my opinion, that as the TJ revoked the D's probation, he didn't believe the D's testimony; therefore, the D cannot complain that his defense of entrapment was rejected.

BUT, NOT ALL OFFENSES ARE SUBJECT TO THE "AS A MATTER OF LAW" DEFENSE. IN JOHNSON, #55,041, 9/27/78, J. Phillips, Panel #1, 2nd Quarter, THE EVIDENCE WAS HELD SUFFICIENT TO SUSTAIN AN UNLAWFULLY CARRYING A PISTOL CONVICTION EVEN THOUGH THE EVIDENCE WAS, BY THE OPINION, TOTALLY UNDISPUTED WHY THE D WAS CARRYING THE PISTOL. (Affirmed). (Dallas County).

COMMENT: All of the evidence showed that the reason the D had the pistol was because he was moving from one location to another location. His vehicle was stopped because it matched the description of a suspect vehicle in a burglary. However, no evidence to show D was in way, form or fashion connected to a burglary.

HELD: "The State established a prima facie case when it demonstrated D was found carrying a handgun."

The New Penal Code has not changed: "We therefore hold that a person carrying a handgun from an old residence will constitute a defense to prosecution under Sec. 46.02; but such person will not be entitled to carry such weapon idly, or for the sake of carrying it, or habitually, or for some unlawful purpose."

SO, DID THE D WIN?

NOT SO, SAYS THIS PANEL. The jury or the TJ is the sole judge of the credibility of the witnesses and of the evidence. "Having been properly charged in the instant case, the jury could properly disbelieve D's defensive evidence." "The State was not required to introduce affirmative controverting evidence to rebut the defensive theory."

NOTE: By this holding, every person who carries a handgun, regardless of his status; i.e., a peace officer, member of the armed forces, national guard, security guard, on his own premises, traveler, hunter, fisherman, etc., he is in violation of the law. He, however, has a defense, but if the jury or TJ does not believe that person's defense, even if it is uncontroverted, he can be found guilty and the conviction will be sustained on appeal.

Cf. Allen v. State, 422 (2) 738, not cited or discussed in the opinion.

Although I do not recommend it, due to Art. 14.01, C.C.P., any John Doe Citizen now has the right to arrest any police officer as it would seem that person carrying a pistol is a prima facie offense against the public peace. Of course, the police officer has a defense if a jury or TJ believes him. But, who knows? Just because he is in uniform, says he is a cop, has a badge and a card that says he is a cop, if he is not believable, he is not a cop.

AND THE BEAT GOES ON FOR POSSESSION CASES. WIERSING, #57,154, 9/27/78, J. W. C. Davis, Panel #1, 1st Quarter, GETS REVERSAL IN REVOCATION OF PROBATION CASE AS EVID. RULED INSUFF. TO SUSTAIN POSSESSION OF MARIJUANA CHARGE. (Reversed). (Harris County).

COMMENT: Here, D was a passenger in the backseat of an automobile stopped for having a loud muffler. While one officer was checking the driver out, the other officer walked to car, leaned his head inside and smelled a faint odor of marihuana. He could not pinpoint the "freshness" of the odor as to whether it was a day old or a week old, etc. He apparently then had everyone get out of the automobile and "as D got out of the car Morrison saw about 1 inch of plastic on the floor sticking out from under the seat in the back."

The woman who had been sitting next to the D in the backseat said it was hers. The TJ said he didn't believe this witness. The D, of course, testified it was not his. Needless to say, the TJ didn't believe him either.

Held, "The State has failed to prove by a preponderance of the evidence that D was in possession of the marihuana." As to the TJ's disbelief of wit' testimony, panel said: "However, his disbelief of her testimony cannot be taken as evidence that the marihuana belonged to D, in light of the fact that two other persons were in the car and did not disclaim ownership of the contraband at trial." Reversed.

NOTE: A more detailed summary of the facts, to sustain the holding, shows the following. See Ayers and Underwood, supra, and Damron, supra.

"The record reflects that appellant did not own the car nor was he in exclusive possession of the car in which the marihuana was found. Neither was he the driver of the car. There is no evidence that appellant made any furtive gesture when the officer approached the car, or that appellant appeared to be nervous during this time. The record does not reflect that appellant or any of the passengers gave any conflicting stories, or that anyone made any suspicious or incriminating statements. There was no attempt by appellant or the other passengers to flee the scene. Off. Morrison testified that he did not smell the odor of marihuana on appellant's clothing, nor did he find any contraband on appellant when he searched him. There was no evidence that appellant appeared to be under the influence of any drug. The record does not reflect that the baggie of marihuana was in plain view of appellant, since it was under the seat and only an inch of plastic protruded. After a full search of the car, no more marihuana was found. The marihuana was not found in appellant's actual possession. The State did not attempt to disprove the ownership of the contraband by the driver or the third passenger."

ANOTHER CREDIT CARD INDICTMENT BITES THE DUST IN EX PARTE MATHIS, #57,073, 9/27/78, J. Vollers, Panel #3, 1st Quarter. (Writ Granted). (Dallas County).

COMMENT: Indictment here alleged, in pertinent part:

"D . . . did unlawfully, then and there present to Charles Epley, an A & A Credit Card Number 28576, with intent to obtain property and service, without the effective consent of the cardholder, R. Saba."

HELD, INDICTMENT "fails to allege that the D had the intent to obtain the property fraudulently and it fails to allege that he acted with knowledge that the credit card had not been issued to him or that it was not used with the effective consent of the cardholder." "The Indictment omits elements of the offense, (See Sec. 32.31(b)(1)(A), P.C.), and is fundamentally defective." Writ Granted.

HABITUAL CRIMINAL CASES, TO ME AT LEAST, HAVE ALWAYS BEEN INTERESTING. MAYBE BECAUSE I HAVE SEEN TOO MANY OF THEM. HOWEVER, IF YOU HAVE ONE, READ EX PARTE MONTGOMERY, #56,718, 9/27/78, J. Phillips, Panel #3, 1st Quarter. (Writ Granted). (Travis County). This is a pro se writ case.

COMMENT: D was tried in Travis County and got life as a habitual criminal. That case is still on appeal.

He thereafter plead guilty on this case which apparently contained a Williamson County prior conviction, which was also used in the habitual case where D got life. See supra.

He claimed that his sentence of 16 years in this cause was excessive as the prior conviction used in this cause was the same prior conviction used in the habitual case.

HELD: "The record supports D's contention that a 1969 burglary conviction from Williamson County in Cause No. 13,598 was twice used for enhancement purposes, initially for enhancing D's punishment as a habitual criminal in Travis County, Cause No. 49,806, and then subsequently enhancing D's punishment as a second offender in Travis County Cause No. 49,807."

"The law is clear that in prosecutions under Sec. 12.42 the same prior conviction cannot be used to enhance a D's punishment to life as a habitual criminal in two separate cases." However, "The use of a prior conviction to enhance the punishment as a second offender does not preclude the State from again using that conviction to affix the status as a habitual criminal."

HELD: "The State is not permitted to use a prior conviction for enhancement under Sec. 12.42, (a), P.C., after the State has successfully invoked the same prior conviction as part of its effort to enhance the D's sentence under Sec. 12.42(d)." "Once a prior conviction is utilized to obtain the maximum automatic sentence available under sentence available under our P.C., it should be put to rest." "We hold the State is estopped from using a prior conviction for enhancement under the habitual criminal provisions of the Penal Code."

Thus, case remanded to TCt to assess D's punishment as a third degree felony and not a second degree felony.

NOTE: The rules of the game, I don't think, have been greatly changed. The State is entitled to enhance punishment with a prior conviction; i.e., if the D is charged with a 3rd degree felony but he has a prior conviction, he can be graduated to a 2nd degree. In other words, with only one prior, he can only be graduated one degree, except for a first degree, when the punishment is life, or for not less than 15 nor more than 99 years. However, it appears, by the opinion, that that prior can be used only once to graduate the punishment.

But, if the D has a prior, later gets convicted, and then subsequently gets convicted again, with the two (2) priors alleged for enhancement of punishment, he can get life imprisonment per Sec. 12.42(d). However, once this is accomplished, the priors used to get life cannot be used again.

IN SUM, I think this decision simply holds that once a prior conviction is used to accomplish the maximum permissible punishment allowed by law, then it cannot thereafter be used again. In other words, if a prior is used to enhance as a second offender, it cannot again be used in a second offender situation but can be used later in a habitual offender situation. It cannot then be used thereafter.

WOW. WOW. IF YOU DON'T HAVE A COPY OF BRITTON, #56,680, 9/27/78, J. Phillips, Panel #3, 1st Quarter, with J. Vollers dissenting with opinion, RUN, DON'T WALK, AND GET A COPY OF THIS ONE. (Reversed). (Dallas County).

COMMENT: The facts showed the following:

Appellant was a passenger in a vehicle observed by two Dallas police officers to be blocking the two west-bound lanes of a Dallas street [violation of City Ordinance] at 1:50 a.m. The car did not move until after the police pulled up and turned their lights on. Appellant was observed as bobbing, weaving, or swaying his head. Upon one officer's inquiry, appellant mumbled incoherent responses. Appellant was further observed to have "glassy" and bloodshot eyes. The officer asked appellant to exit the vehicle at which time the officer arrested appellant for public intoxication. The officer then frisked appellant, finding a syringe containing fresh, milky white residue in his front pocket. Appellant denied being a diabetic to the officer. Upon

resuming the pat-down, appellant reached for his pocket. The officer removed appellant's hand and withdrew a matchbox from appellant's pants pocket in which 12 pink capsules, later found to contain heroin, were found.

DID THE STATE WIN?

HELD: "It is clear from the officer's testimony that given the facts observed by him, he lacked probable cause to arrest D for the offense of public intoxication." "No facts or information was provided by the police officer to indicate any basis for a reasonable inference that D's suspected intoxication was a degree that would endanger himself or others." See Sec. 42.08, P.C. "There being no probable cause to lawfully arrest D without a warrant, the search of D's person cannot be justified as a search incident to a lawful arrest."

"The police officer's conclusory statement that the frisk was for the sake of his and his partner's safety fails to satisfy the mandate of Terry v. Ohio." "The officer provided no facts upon which a reasonably prudent man could conclude that D was armed or posed a danger to the police officers."

HELD: "The search of D which resulted in the discovery of a matchbox containing heroin capsules was not justified under the facts and circumstances in this record." Reversed.

HINES, #56,554, 9/27/78, J. T. Davis, Panel #3, 2nd Quarter, GETS REVERSAL DUE TO PROSECUTOR BEING ALLOWED, OVER OBJECTION, TO ASK D ON CROSS EXAMINATION ABOUT EXTRANEOUS OFFENSES WHICH OCCURRED SUBSEQUENT TO THIS OFFENSE. (Reversed). (Orange County).

COMMENT: The facts were rather interesting in this delivery case. Cops testified that D went inside a residence and got the dope. A 67 year old woman said she had lived there for approximately 24 years, did not know the D and testified he had never been in her home. D also so testified.

On cross examination, over objection, prosecutor was allowed to ask D if he had used heroin subsequent to this offense and he said he had.

Held, Objections made, though weak, sufficient.

Held, "Although the testimony of the D clearly raised a defensive theory of alibi, in order to prove an extraneous offense the State must also prove sufficient common distinguishing characteristics between the extraneous offense and the primary offense to enable its probative value to outweigh its prejudicial effect." "The fact that D used heroin three months after he is alleged to have delivered it to Payne adds little, if anything, in the way of probative evidence to rebut his defensive theory of alibi." See also Okra, 507 (2) 220, cited and discussed in the opinion. Reversed.

D STEPHENSON, #55,443, 9/27/78, J. Odom, Panel #1, 3rd Quarter, SHOWS JURY MISCONDUCT AND GETS NEW TRIAL. (Reversed). (Dallam County).

COMMENT: This case shows the beauty of being in a small county as, contrary to the big cities, everybody usually knows everybody. In this aggravated rape case, the affidavit of the jury foreman reflected that several women jurors stated they knew two of the defense witnesses and in their opinion they did not have a good reputation for being truthful. Others on the jury also said they personally knew all or some of the facts of the case and they knew the D was guilty beyond a reasonable doubt.

HELD: "We conclude from the character of the other evidence received by the jury during deliberations that such evidence was adverse to D and requires a new trial." Reversed.

COMMENT: The opinion does not reflect if the prospective jurors were asked during voir dire if they had any personal knowledge about the facts or the parties to the case or the witnesses who might testify. It is inconceivable that somebody did not ask this question and got negative replies from these persons. It is also probable, if this did occur, that these good citizens will go unpunished. Hopefully, Mr. Stephenson will receive, on the retrial, the fair and impartial jury he, unquestionably, did not receive this time.

PANEL OF CCA, IN DOESCHER, #54,865, 9/27/78, J. Phillips, Panel #1, 2nd Quarter, RULES THAT SEARCH WARRANT AFFIDAVIT IS NOT ANY GOOD AND THAT CONSENT OF D'S WIFE NOT ANY GOOD BUT HARMLESS ERROR RULE GETS D. (Affirmed). (Dallas County).

HELD: "It is clear from a review of the affidavit that, aside from the D's wife, none of the informants upon whom the affiant relied are named or in any other way characterized as credible or reliable by the affiant." "Thus, the magistrate was not apprised of any fact, information, or "underlying circumstances" to permit him to conclude that the "yellow money bag and blue steel revolver pistol" were connected with the aggravated robbery or at the location identified for search in the affidavit."

HELD: As to the wife's consent to search, the Panel ruled: "We therefore hold, as a matter of law, that there can be no voluntary consent to search if the officers securing the "consent" assert that they presently possess a search warrant to search the premises for which "consent is sought." Also, "the prosecution has failed to carry its burden of proving that, under the totality of the surrounding circumstances, Mrs. Doescher's consent was voluntary, as a matter of fact."

BUT, HARMLESS ERROR BECAUSE OF THE FOLLOWING:

"First, none of the items seized in the course of the search of 2038 Fort Worth Street on Jan. 9, 1975, were admitted into evidence. Rather, their seizure and identification were testified to. Second, approximately $10,800 was stolen in the alleged robbery at gunpoint; some of the currency being new bills, some old. Mrs. Doescher voluntarily surrendered approximately $6,478 to the police from the premises two days after the search. This currency was identified as being bound similarly to some of that taken in the instant robbery. Third, two eyewitnesses positively and unequivocally identified appellant as the perpetrator."

GET READY. I ANTICIPATE, AFTER GORDON, #57,414 & 415, 9/27/78, J. Roberts, Panel #3, 1st Quarter, THAT WE WILL COMMENCE SEEING MANY TRIAL JUDGES, WHERE THE D IS PLACED ON PROBATION FOR MULTIPLE OFFENSES AT THE SAME TIME,USING CUMULATION ORDERS TO BE EFFECTIVE IF THE D VIOLATES HIS PROBATIONARY TERMS AND/OR CONDITIONS. (Reformed and affirmed). (Tarrant County).

COMMENT: Here, D placed on probation at the same time in two (2) cases. The State subsequently filed and had granted its motion to revoke probation. D's original punishment was 4 years on each case but same was probated. The TJ, after revoking the probation, then "stacked" or made the two cumulative to one another.

HELD: "A trial judge does not have the power to order a cumulation of sentences when he revokes felony probation if neither the original judgment suspending the imposition of sentence and placing the D on probation provides for a cumulation of the sentences."

"However, this does not mean that the TJ could not have properly placed the cumulation order into the judgment granting probation and the order granting probation." See EX PARTE DAVIS, 542 (2) 117, Vol. II, No. 6, Feb. 1976, S.D.R., p. 4.

HELD: "The proper time for a TJ to order cumulation in a case where he grants felony probation is when probation is granted and that unless the cumulation order is reflected in at least the judgment granting probation, the cumulation order is ineffective." Here, ineffective and sentences reformed.

NOTE: J. Vollers dissented saying that Spencer, 503 (2) 557, controls and case should have been affirmed rather than reformed.

COMMENT: This case points out the importance, if you are representing a D and a deal is cut for probation and he has several cases, to get the prosecutor to let him plead to only one case and get the others dismissed if you can. Otherwise, you may be getting your client a whole bunch of time in the future at the present time. If you cannot get the other cases dismissed, make it part of the plea bargain that the probations are to be served concurrently and not to be cumulated.

TWO PANELS ORDER APPEALS DISMISSED IN WALKER, #54,163, 9/27/78, J. Roberts, Panel #3, 1st Quarter, with J. Vollers dissenting with opinion, AND LOVETT, #58,565, 9/27/78, J. Odom, Panel #1, 3rd Quarter, with J. Vollers dissenting with opinion. (Gregg County and Harris County).

COMMENT: In Walker, supra, the jury assessed the D's punishment on June 18, 1976. On June 28, 1976, the D was sentenced.

Held, "The record does not reveal that D affirmatively waived his right to file a MNT or motion in arrest of judgment during the remaining portion of June 28, 1976." "Therefore, the imposition of sentence on June 28, 1976, was one day premature and we are without jurisdiction to entertain this appeal." APPEAL DISMISSED.

In Lovett, supra, a real screw-up occurred. Apparently, in reading between the lines, the TJ ordered a presentence report on the D after he was found guilty by a jury. A hearing on the MNT occurred, which was overruled, and then the D had his punishment assessed and he was then sentenced.

Held, "Because the sentence was pronounced too soon, the appeal must be dismissed." "After proper time for MNT has passed and any such motion disposed of, timely sentence should be pronounced and notice of appeal may be given." APPEAL DISMISSED.

COMMENT: It is elementary but often-times forgotten that the proper steps to be followed are as follows:

1. Punishment first assessed by TJ or the jury;

2. After punishment assessed, D has ten (10) days in which to file MNT unless he affirmatively waives same.

3. After ten (10) days or waiver, he or she can then be sentenced.

4. Notice of Appeal then, if permitted, must be given within ten (10) days from date of sentencing or, if no sentence required, then, See Art. 44.08, C.C.P., if no motion for new trial filed, ten (10) days from date of entry of judgment. If MNT filed, then within ten (10) days from date it was overruled or could have been overruled, if no sentence required.

The important of this is really seen if your client is incarcerated and not out on bail as you simply lose additional time before your case is properly decided by the CCA.

PANEL OF CCA, IN JONES, #58,445, J. W. Davis, Panel #1, 2nd Quarter, RULES AGAIN THAT THERE IS NOTHING WRONG WITH TJ FORCING A D TO ENTER INTO ONE OF THE DRUG PROGRAMS. (Affirmed). (Bexar County). See Supra. Here, it was the Patrician Movement. Order of revocation was upheld for failure to report and failure to comply with the rules and regulations of that group.

WATCH OUT. THOUGH PEN PAPERS CAN BE THE DOWNFALL OF THE STATE, SEE CORTEZ, SUPRA, IN STEARN, #55,791, 9/27/78, J. Odom, Panel #1, 2nd Quarter, THE CERTIFICATION WAS HELD SUFFICIENT WHEN THE PEN PACKET WAS APPARENTLY ACCOMPANED BY OR A LETTER WAS LATER SENT TO SHOW WHO THE CUSTODIAN WAS. (Affirmed). (Dallas County).

COMMENT: It seems that a proper objection, if it had been made, would have been sufficient to exclude this evidence. However, the opinion is not clear on whether proper objections were made to the admissibility of this document.

J. ODOM SAYS, IN HOLLOWELL, #55,940, 9/27/78, Panel #1, 3rd Quarter, with J. Vollers concurring in the result, THAT STATE'S CONTENTION THAT IT WAS UNAWARE OF THE EXISTENCE OF A PALMPRINT UNTIL THE TRIAL WAS IN PROGRESS IS UNTENABLE. "THE PROSECUTOR HAS A DUTY TO KNOW WHAT EVIDENCE IS AT HIS DISPOSAL" BEFORE HE GOES TO TRIAL. HOWEVER, HARMLESS ERROR RULE GETS D. (Affirmed). (Dallas County).

COMMENT: Here, D's attorney filed Motion for Discovery and TJ granted motion as to any real evidence in possession of the prosecution. The State, however, laid behind the log and then, needless to say, "surprised" D with a palmprint. Held, "The palmprint clearly was within the motion." See Art. 39.14, C.C.P. Held, "Although evidence willfully withheld from disclosure under a discovery order should be excluded from evidence, we hold its admission here was harmless."

PANEL OF CCA, IN POTTS, #56,676 & 677, 9/27/78, J. Phillips; Panel #3, 1st Quarter, BOOTSTRAPS D OUT OF COURT. (Affirmed). (Dallas County).

COMMENT: Here, D PG to two (2) cases. State introduced into evidence D's judicial confessions which did not include the magic phrase, in these theft cases, "without the owner's consent." D affirmatively waived the reading of the Indictment, but stated that the judicial confessions were substantially true and correct.

Thus, in my words, as the D knew what she was charged with and as the Indictment did contain the magic phrase and as the D then affirmed the confessions of guilt which were introduced into evidence without objection, this constituted an affirmation or judicial confession that she committed the offenses as alleged in the indictment. Affirmed.

GOOD POLICE GUESS WORK AND BOTTLE OF COLOGNE IS D BREM'S DOWNFALL AND HIS CASE, #55,467, 9/27/78 J. W. Davis, Panel #1, 2nd Quarter, AFFIRMED. (Dallas County).

COMMENT: D was a prime suspect in a series of rapes which occurred in Dallas County. However, police could not put those rapes on him.

On this occasion, a woman was raped and officer, who was familiar with the other rapes, made a beeline to the D's residence where, upon D's arrival, he arrested the D. "He stated that D was wearing no underwear and had a strong odor of cologne." A search resulted in finding a knife which this C/W said was similar to the one used in her rape. Another officer, who had gone to C/W's apartment and smelled the odor of cologne, also went to where the D was and smelled the same odor of cologne. A search of the D's car revealed a bottle of cologne.

Held, 1) Indictment for aggravated rape O.K.

2) Police had the right to temporarily detain the D.

3) The knife seized was O.K. and admissible. As the officer had the right to temporarily detain the D, he had the right to "frisk" him for his safety.

4) The consent to search of the D's auto was poco weino and the bottle of cologne was admissible.

5) Though the D was told by his attorney not to sign any statements, he did not tell him not to sign any consent to search forms. Thus, his consent to search his residence was O.K.

6) The In Court Identification was O.K. as not tainted.

7) The prosecutor has no duty to investigate other cases in order to supply the defense with information concerning them.

8) Merely asking police officer the Q: "Now, was his arrest the result of an accident or a mistake, or a guess, or the result of intense police work?" not sufficient to get reversible error. Instruction to jury rule got the D, in part, on this.

NOTE: The opinion does not state if this was Brut Cologne. I suspect that whatever brand it was, that the D no longer uses it, or, if Brut, he no longer watches the Joe Namath show if he previously did.

PANEL OF CCA, IN SMITH, #54,727, 9/27/78, J. Phillips, Panel #1, 2nd Quarter, REJECTS D'S CONTENTION THAT ATTEMPTED BURGLARY INDICTMENT SHOULD HAVE ALLEGED THE SPECIFIC INTENT TO COMMIT BURGLARY. (Affirmed). (Harris County).

COMMENT: Panel also held that TJ need not, per se, hold a hearing, regarding admissibility of prior convictions, prior to their admissibility.

NOTE: About the only thing you can do here, if you have a good objection, is if the TJ refuses you a hearing, just commence talking and objecting, for whatever reasons, and hope that on appeal one of your objections strikes gold. Do this again whenever the State makes her offer. If nothing else, it makes the client feel good.

PANEL OF CCA RULES IN BONEY, #54,891, 9/27/78, J. Phillips, Panel #1, 2nd Quarter, THAT FOLLOWING INDICTMENT FOR AGGRAVATED ASSAULT WAS NOT FUNDAMENTALLY DEFECTIVE:

". . . on or about April 4, 1975, did then and there unlawfully commit an offense hereafter styled the primary offense, in that he did intentionally and knowingly cause serious bodily injury to Berry Jane Outlaw . . . "

Evid. also ruled sufficient even though no one person testified that the injuries sustained constituted serious bodily injury. (Affirmed). (Harris County).

FOR AN INTERESTING CASE, BY WHAT WAS NOT SAID, SEE PARR, #54,736, 9/27/78, J. Phillips, Panel #1, 2nd Quarter, REGARDING TAKING A BLOOD TEST. (Affirmed). (Wise County).

COMMENT: This was an involuntary manslaughter (murder by auto) charge. D refused three (3) times but then consented to the taking of the blood test by a nurse.

1) Panel ruled that definition of intoxication per Sec. 19.05(b), P.C., was O.K.

2) Indictment, which tracked statute, also ruled O.K. and not fundamentally defective.

3) Prosecutor's jury argument, to which objection made and sustained, that: "I've dismissed plenty of cases when I don't think there's enough evidence to go to trial on them." "There is no point in trying them." O.K. as TJ's instruction to jury cured error.

NOTE: I'm not sure what a good reply to this would be but I think the Defense Attorney made the wrong statement in retaliation as he said: "I've pled a lot of people guilty, too, but I don't think that has anything to do with the facts in this case."

President's Report

The other day I found myself sneaking out of the backdoor of my office dodging bill collectors while cursing another client who had just beaten me out of a large portion of my fee. Upon reaching the elevator I noticed a beautiful creature standing patiently thereby. Still frustrated over the immediate series of events, and still being human too, my approach was one of a small commentary on the status of my profession. She listened attentively to my verbose, if not elegant, comments, as to what was wrong and if things didn't get better I was faced with two alternatives–slitting my writsts or getting out in the world and attempting to find honest work.

Smiling sweetly and revealing without a doubt the prettiest face I have seen in years, she handed me a piece of paper, obviously xeroxed and stated, "maybe *this will help.*" The next instant she was on the elevator going up, as all "angels" should, while I naturally stood and waited for one going down.

I mention this story only so the writer may give literary credit to the person responsible for the president's message-to this beautiful creature, name yet unknown, whose message I now pass on to you for maybe a different look at what we call work. (Herein follows the message received.)

"More and more lately I had come to suspect that the law was the great catch-all of the professions. It was the alluring beacon that beckoned those bewildered and uncertain individuals who didn't know precisely what to do. In these days, I reflected, a young man of good family could not choose to become an artist or poet. People would simply laugh at him, and moreover who was there to teach him these arts, where was he to learn these subtle crafts? Where were these young men to go, what were they to do? Almost naturally, it seemed, many of them turned in desperation to the law. More and more I was becoming convinced that the law attracted and harbored more dissatisfied dreamers, yearning malcontents and outright misfits in its ranks than any other trade or profession under the sun.

"Part of the reluctant attraction of the law to these rootless wanderers, I sensed, was that not only did it offer a shelter of kinds, but perhaps more than any other calling it more easily allowed its votaries to escape gracefully into business or politics or diplomacy or somewhere. . . .Had not the great brooding Abraham Lincoln himself been a prime example of all this? And, to be fair, was not the law, of all the professions, the one that most appeased and comforted its reluctant pilgrims even as it frustrated them? The law, I saw, was the last of the romantic professions.

"Whatever doubts I had about my own place in the legal profession, there was one thing on which my mind remained clear: I still nourished a profound respect for the law as an institution. That respect had if anything increased since I had got out of law school. Mr. Bumble had once called the law an ass, true, but for my part it was not the law that was an ass, but rather some of its practitioners for what they made of the law. Whatever imbecilities they might have foisted on their profession, it was the law–and only the law–that kept society from coming apart at the seams, the world from reverting to a jungle.

"No other system than the law had yet been found for governing men than raw violence; it was society's safety valve, the most painless way for men to resolve their differences and achieve some sort of peaceful social catharsis; any other way lay anarchy and chaos. My doubts, then, were not about the worth of my profession; rather what Willy Poe was ever doing in it. It was bad enough for a young man to find himself adrift in a profession he hated; it was far worse to find himself miscast in a profession he revered.

"In my doubt and soul-searching the farewell lecture of frail old Dean Lattimore came crowding back to me. 'Always remember, young men,' he had told our law school graduating class, 'that the law is the busy fireman that puts out society's brush fires; that gives people a nonphysical way to discharge their hostile feelings and settle their violent differences; that spells the difference between a barroom brawl and a debate; that substitutes order and predictable ritual for the rule of tooth and claw. Never forget, young people, that the very slowness of the law, its massive impersonality, its neutrality, its calm insistence upon proceeding according to settled procedures and ancient rules, its tendency to adjust and to compromise, its very delays if you will–that all of these act to bank and cool the fires of violence and passion and replace them with order and reason. Ponder well, if you will, that this is a tremendous civilizing accomplishment in itself, whatever the outcome of a particular case. The law not only saves anarchy; it also saves face.'" *LAUGHING WHITEFISH,* Robert Traver (John D. Voelker), 1965, pp.23-24.

George Luquette

TO INC. OR NOT from p. 4

are "freely transferable" to other professionals. Ordinary lay-persons cannot invest in a law firm. This turned me off, since like most lawyers, I think "I's the greatest" and I could really have a super law firm if I could sell stock to the general public. Since I can't do it my way, I thought about a law firm with each member of the firm being a shareholder. What fertile ground for a minority stockholder's derivative suit! What about annual meetings? Would you have proxy and cumulative voting? I visualized a junior member of the firm and a minority stockholder obtaining the proxies of all of the junior members and minority stockholders and getting himself elected to the presidency of the corporation. There are many more problems inherent to a professional corporation, not the least of which is the large firms buying up your stock, and you become a local member of the largest firms, and their employee.

My most serious objection is that as a corporation, you lose your Fifth Amendment privileges. As a lawyer, unincorporated, you can claim attorney-client privilege if summoned before a grand jury. If you practice criminal law, then incorporation should not be for you. Prosecutors and grand juries keep attempting to erode the attorney-client privilege so why help them by incorporation. If you incorporate, you can be called before the grand jury and you cannot claim the privilege, as corporations cannot claim the privilege. This is well-settled law.

I've always thought that the title "LAWYER" was the most impressive I've ever heard. President of a corporation is a rather mundane title requiring so much paperwork to keep IRS off your back. My position: I do not want to retire, so incorporation for me is out. I want to die in Court objecting to a Judge's ruling. ■

CROSS-EXAMINATION

Sam Houston Clinton Austin*

**Mr. Clinton is a former director of TCDLA, a noted criminal law practitioner, and Judge-elect of the Texas Court of Criminal Appeals.*

CONSTITUTIONS AND STATUTES

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .
Sixth Amendment, U.S. Constitution

In all criminal prosecutions the accused . . . shall be confronted by the witnesses against him . . .
Article 1, Section 10, Texas Constitution

In all criminal prosecutions the accused . . . shall be confronted with the witnesses against him . . .
TEX. CODE CRIM. PRO. Article 1.05

The defendant, upon a trial, shall be confronted with the witnesses, except in certain cases provided for in this Code where depositions have been taken.
TEX. CODE CRIM. PRO. Article 1.25

CROSS-EXAMINATION

I. INTRODUCTION

Cross-examination finds "expression in the Sixth Amendment, which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' " *Greene v. McElroy*, 360 U.S. 474, at 496-497 (1959); *Coulter v. State*, 494 S.W.2d 876 (Tex.Crim.App. 1973). Texas has long recognized that cross-examination was embodied in the confrontation clause contained in Article 1 Sec.10 of its constitution. *Kemper v. State*, 138 S.W. 1025 (Tex.Crim.App. 1911).

Anglo-American jurisprudence has long considered confrontation to be "[o]ne of the fundamental guaranties of life and liberty" which is "so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most, if not of all, the states composing the Union." *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899). This concern with confrontation of one's accusers led Texas to adopt a confrontation clause in its earliest constitutions that traced its federal counterpart. However, state and federal development of "confrontation law" was independent until the landmark case of *Pointer v. Texas*, 380 U.S. 400 (1965), which incorporated the Sixth Amendment confrontation clause into the Fourteenth Amendment. The Court held the confrontation clause "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id* at 406.

Cross-examination is the most important aspect of confrontation. Its importance is best described by Wigmore:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." *5 Wigmore on Evidence* (3rd ed. 1940) 1367.

"[T]he mission of the confrontation clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials." *Dutton v. Evans*, 400 U.S. 74 at 220 (1970). This quest for accuracy in the determination of truth is expressed by the constitutional stature given cross-examination, yet it is the same quest that also results in limited exceptions to the right of cross-examination. Cross-examination "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, at 295 (1973).

II. SCOPE OF CROSS-EXAMINATION

The scope of cross-examination is within the trial court's sound discretion, *Toler v. State*, 546 S.W.2d 290 (Tex.Crim. App., 1977); *Richardson v. State*, 508 S.W.2d 380 (Tex.Crim.App. 1974). This discretion must, however, be exercised within the parameters of the confrontation clauses of the United States and Texas constitutions and the rules of evidence. See *Evans v. State*, 519 S.W.2d 868 (Tex.Crim.App. 1975), *Jackson v. State*, 482 S.W.2d 864 (Tex.Crim.App. 1972). The right to cross-examination is no longer seriously challenged, the issue is the right to "effective" cross-examination. Denial of the right of effective cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Evans v. State, supra* at 873, citing *Davis v. Alaska*, 415 U.S. 308 (1974) and *Brookhart v. Janis*, 384 U.S. 1 (1966). Commonly, such a denial occurs when the defense is trying to attack the credibility of a State's witness. According to the Court of Criminal Appeals, the general principle is "great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive and animus of any witness testifying against him." *Evans v. State, supra* at 871. Caution should be exercised in regard to the words "any witness," as the Court of Criminal Appeals has refused to find a denial of effective cross-examination when it determined that the witness was not a "material" witness. *Mutscher v. State*, 514 S.W.2d 905, 920 (Tex.Crim.App. 1974). The test of relevancy for the credibility attack is whether:

> ". . . Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances which, when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only." *Jackson v. State, supra,* quoting *Aetna Insurance Company v. Paddock*, 301 F.2d 807, 812 (5th Cir. 1962).

A. EXAMPLES -- 1. Defendant wanted to cross-examine State's witness concerning prior arrests for purpose of showing bias towards the State. At pre-trial it had become known that the complainant/witness had three charges dismissed. The trial court denied the request, but on appeal the conviction was reversed because the refusal was a denial of the

right to effective cross-examination. *Simmons v. State*, 548 S.W.2d 386 (Tex.Crim.App. 1977). The Court of Criminal Appeals rejected the State's argument that the dismissed charges were distinguishable from pending charges on the issue of potential bias. *Id* at 388.

2. State's expert witness testified that his opinion concerning defendant's sanity was also the opinion of a board of psychiatric experts. The Court of Criminal Appeals reversed the conviction on the ground that while witness' opinion was admissible, the testimony of the witness concerning the opinion of others was inadmissible because the defendant would be denied his Sixth Amendment right to effective cross-examination. *Hostetter v. State*, 527 S.W.2d 544 (Tex.Crim.App. 1975).

3. Defendant was tried under a circumstantial evidence theory for a murder occurring during a robbery. State's witness testified that he had given defendant a set of gloves similar to ones found in defendant's car, that defendant was friend of co-defendant who had been positively identified, and that he had gone with defendant the day after robbery to shoot a gun similar to one used in robbery. On cross-examination it was shown that witness was friend of co-defendant, had access to defendant's car, had a pair of gloves similar to ones found in defendant's car, and fit the third witness' description of the robber. Defendant wanted to cross-examine witness concerning pending felony indictment for sodomy. The trial court refused the request. On appeal, defendant argued that this refusal denied his constitutional right to effective cross-examination. The Court of Criminal Appeals reversed rejecting the State's contention that Article 38.29 of the Texas Code of Criminal Procedure (evidence of a charge is inadmissible for impeachment) controlled the situation. In doing so the Court found the requested cross-examination went to bias, motive and prejudice, and was *not* to general impeachment. *Evans v. State*, 519 S.W. 2d 868 (Tex.Crim.App. 1975).

4. Confession of co-defendant which implicated defendant was admitted at joint trial. Co-defendant did not testify. Although trial court gave limiting instructions as to its use only against the co-defendant the Supreme Court reversed conviction on ground that no limiting instruction could be a substitute for the defendant's constitutional right of cross-examination. *Bruton v. United States*, 391 U.S. 123 (1968).

5. Defendants wanted to offer evidence and elicit testimony of officers showing police brutality after heroin arrest. After hearing outside presence of jury in which officer testified that defendants had been taken to hospital after arrest, trial court refused to allow jury to hear any evidence concerning matter. Court of Criminal Appeals reversed, reasoning that "great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive and animus upon the part of any witness testifying against him." *Hooper v. State*, 494 S.W. 846 (Tex.Crim.App. 1973).

III. HELPFUL HINTS IN CROSS-EXAMINATION

1. Cross-examine only when it's necessary. Some of the State's witnesses' testimony may not be harmful to your position after direct, but your cross-examination could elicit harmful testimony.

2. If you are going to cross-examine make sure you know what the answer should be. If you are not sure don't ask the question.

3. Outline where you want to take the witness with your cross-examination. Then prepare your questions carefully so as to reach your goal. If earlier State's witnesses have testified to facts which you know will be inconsistent with the witness' answers on cross, then attempt to ask questions that will show this inconsistency. Don't help the State's case by asking the same questions the State asked.

4. Use leading questions; you have the right to on cross.

5. Remember!! Stop while you are ahead. Going further may put you behind.

■

NEWSPAPER REPRINT from p. 3

Miller said the cost of the higher attorney fees could be paid from an increase in court costs of $25 in misdemeanor cases and $50 in criminal cases. The proposed legislation also would require persons given probation in felony cases to repay the county for the cost of their court-appointed attorney.

"If a fellow is indigent to start with, how in the world would you expect that individual to pay back the court costs?," asked Rep. Cullen Looney, D-Edinburg.

BOARD MINUTES from p. 3

Concerning the general financial situation, Thomas Sharpe made the suggestion that we reproduce the Deputy Opinions, for sale to our members. President Luquette stated we should consider whether or not we would want to be in competition with her on them. It was decided that we should consider this further, before reaching a decision.

There being no further business, the motion was made by President Luquette that the meeting be adjourned. After being duly seconded from the floor, the motion carried. The meeting was adjourned at 11:25 a.m.

Respectfully submitted,
Judy Bolander
Executive Assistant to the President

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

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