VOICE for the DEFENSE

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOLUME 8, NUMBER 5 NOVEMBER 1978

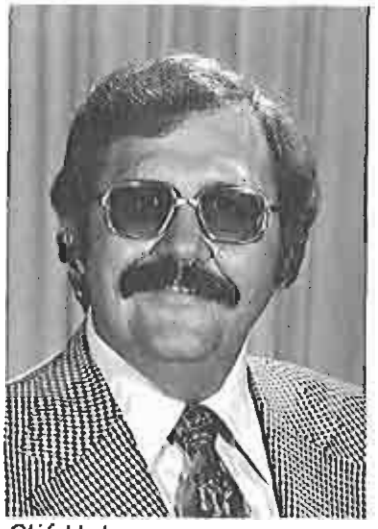
IN THIS ISSUE

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

Texas
Criminal Defense Lawyers
Association

NOVEMBER 1978

Editor's Corner



Clif Holmes

Once, in the Age of Reason, on the barren Desert of Ballot, a lost and suffering barrister crawled thirstily toward a sure date with the condor. As he struggled from disheartening mirage to disheartening mirage, he mused on his promising, though now threatened, career as pleader for the people—on his status among his fellowmen as champion of the commonweal—the ultimate Whig spokesman. As these side-trips through his ego continued, his dragging limbs unearthed a strange vessel, bearing uuusual inscriptions. As he dusted the object in order to see more clearly the hieroglyphics carved thereon, a rumbling from within it rose to a crescendo, a billowing cloud of smoke rushed from its spout, and there appeared before our withering Whig a most impressive Genie. The Genie gently lifted the thirsting soul and spoke: "Master, you have, by your good fortune, discovered the place of my long confinement, and loosed me from ages of incarceration. As your reward I will grant you three wishes of your choice."

The sunburned barrister, though astonished at the spectacle and wary of the circumstance, ventured to test the validity of the offer. "I thirst greatly, and hunger, too," he plead. "I wish an Oasis, filled with cool water, palatable cuisine, and a comfortable lounge upon which I might rest my worn and suffering body." Immediately our wayfaring Whig found himself reposing on a velvet lounge, before a sumptuous spread of delicious foodstuffs and frosty iced drinks. When he had drunk and eaten his fill, the Genie appeared once more: "Master, you have yet to express your remaining two wishes. You have only to ask, and they are yours." Being, as we've said, a true prophet of populism, and one who enjoyed the intellectual company of his fellow Whigs, our now rested Whig had little hesitancy in stating his second wish: "I want to be surrounded with numbers of my fellow Whigs, with opportunity for stimulating conversation and discourse on subjects dear to our Whig hearts." Just as fast as the desire was spoken, the circumstances wished for materialized, and our bolstered barrister was in the midst of hordes of tongue-wagging Whigs, all remonstrating on the sure Utopia promised by their popular platform. As our twice-wished Whig reveled in the company of his stimulating intellectual fellow-travelers, the Genie once again appeared and sought his master's third and final wish. Beleaguered by so many like-thinkers, and bolstered by the conversation which so closely paralleled his subjective belief, our wishing Whig sought to strike a lasting blow for all Whigdom: "For my final wish, oh Genie, I ask that you place a pox on all our ideological opponents—may all Torries be smitten suddenly with terminal laryngitis!"

Of a sudden our once bolstered barrister, our thrice-wished Whig, found himself once again in the burning sand, thirsting and surely doomed. His wished-for comforts gone, with only despair and loneliness on his horizon. . .

As do all such tales, this one has a MORAL, and 'tis:

WATCH WHAT YOU SPEAK, FOR YOU KNOW NOT WHEN YOU MIGHT MEET A TORY GENIE!

News & Notes

Thomas F. Lee of Del Rio has been appointed as the District Attorney of the 63rd Judicial District replacing Tully Shahan.

Charles Bleil of Texarkana has been appointed as Judge of the 5th Judicial District replacing Judge Hutchison.

The Board of Directors of the Sheriff's Association of Texas has voted to endorse and actively support the following proposals during the 66th Session of the Texas Legislature:

- Amending the Texas Controlled Substance Act (Article 4476-15 of the Texas Civil Statutes) by adding certain categories of drugs thereto and incorporating them into a penalty group.
- Amending the State gambling laws pertaining to gambling devices and equipment.
- Amending the Family Code by providing two additional grounds for detention of a juvenile; namely, when a juvenile is accused of committing a felony offense and may be dangerous to himself or others if released; and when a juvenile has previously been found to be a delinquent child.
- Amending the Family Code to provide that photographs of a juvenile, 15 years of age or older, may be taken without court permission and filed by the law enforcement agency taking such photograph.
- Legislation establishing as a Class A Misdemeanor the harboring of a runaway child from the police, parent or guardian, by a person who is not a member of the child's family.
- Amending the Family Code to provide that offenses by a juvenile involving the commission of a first degree felony in which firearms are displayed would automatically place such cases under criminal court jurisdiction.
- Amending the Family Code to provide that a statement or other testimony of an accomplice is insufficient to support a finding of delinquent conduct, or conduct indicating a need for supervision, unless corroborated by other evidence tending agencies which are maintained for internal use in matters relating to law enforcement.
- Amendment of Article 38.22 of the Texas Code of Criminal Procedure to delete the requirement that confessions taken from persons under arrest be in writing and signed by the accused and to permit the admission of all properly-warned oral confessions. Providing that such oral confessions be reduced to writing and sworn to before a magistrate at the latter's next office hours.
- Legislation empowering State District Judges to authorize wiretapping and electronic surveillance in cases of murder, kidnapping, extortion, theft, robbery, gambling, to connect the child with the offense committed, and such corroboration evidence would not be sufficient if it merely allowed the commission of the offense.

THE CRIMINAL DEFENSE LAWYERS PROJECT

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DEATH

PENALTY DEFENSE

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REGISTRATION

To register, complete the COURSE REGISTRATION FORM, detach and mail with your check for $50 payable to the Criminal Defense Lawyers Project. The registration fee includes articles and handouts related to the defense of death penalty cases.

SCHOLARSHIPS

Ten scholarships will be available for those deserving lawyers who are recommended by a member of the Texas or Federal Judiciary. For further information contact the CDLP Office, P.O. Box 12487, Austin 78711, (512) 475-5498.

COURSE REGISTRATION FORM

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CAPITAL MURDER DEFENSE COURSE
Charles I. Francis Auditorium
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December 7-9, 1978

• • •

HOTEL REGISTRATION FORM Mail Form to hotel checked

Check hotel name and type of accommodation
Return to ONE of the following:

	Single	Double
___ Hilton Inn 6000 Middle Fiskville Rd. Austin, Texas 78752	___$27-$40	___$37-$50
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Address _____

City _____ State _____ Zip _____

I plan to arrive (date) _____ at (time) _____

I expect to stay _____ nights (checking out on _____)

(Please advise the hotel if you plan to arrive late; reservation not guaranteed will be held until 6:00 p.m.

President's Report

George Luquette

In lieu of the President's message, for your consideration and action herewith the relevant prefiled bills of the upcoming 66th Legislative Session.

The House will be in session beginning 12:00 noon, January 9, 1979.

COUNTY AFFAIRS

HB 10 By Smith, Amending Art. 5115.1, V.C.S. Relating to minimum standards for county jails.

HB 31 By Grant. Relating to compensation from the state for district attorneys and their staffs and to equipment and expenses supplied by the counties.

COURTS & CIVIL MATTERS

HB 28 By Chavez. Amending Sec. 54.633. Water Code. Relating to recovery of attorney's fees in delinquent tax suits of municipal utility districts.

HB 30 By Grant, Amending Art. 1995, R.C.S. Relating to venue in certain tort actions.

HB 32 By Grant. Amending Arts. 4.03 and 4.14, C.C.P. Relating to the establishment, jurisdiction, and operation of municipal courts of record in the incorporated cities, towns, and villages.

HB 33 By Grant. Amending Art. 200a, V.C.S. Relating to the appointment, duties, and staff of presiding judges of the administrative judicial districts, and the duties of the chief justice of the supreme court.

HB 34 By Grant. Relating to the office of bailiff of each district court and statutory county court.

HB 37 By Coleman. Amending Sec. 11.22, Education Code. Relating to the election, salary, and expenses of members of the State Board of Education.

HB 47 By Criss. Amending Art. 2100a, V.C.S. Relating to the selection and qualifications of jurors.

HB 51 By Bird. Amending Art. 8307, R.C.S. Relating to a preference on court dockets for certain workers' compensation cases.

HB 52 By Bird. Amending Art. 2135, R.C.S. Relating to exemptions from jury service.

SB 2 By Andujar. Amending Chap. 35, CCP. Relating to challenges for cause in criminal cases.

FAMILY, JUVENILES & DOMESTIC AFFAIRS

HB 21 By Green of Harris. Amending Secs. 270-277, 279-280, 282-88, 290-293, Probate Code. Relating to family allowance, homestead, and property exempt from estate debts under the Texas Probate Code.

HB 29 By Grant. Amending Subsec. (c), Sec. 14.08, Family Code. Relating to modification of court orders appointing a managing conservator in a suit affecting the parent-child relationship.

HB 39 By Chavez. Amending Art. 42.121, C.C.P. Relating to statewide juvenile services and probation and making certain changes in the Texas Adult Probation Commission.

HB 40 By Chavez. Relating to the powers and duties of juvenile boards and the establishment of a juvenile board in counties where none exists and to standards for juvenile probation officers and personnel.

PENAL CODE AND CRIMINAL PROCEDURE

HB 6 By Smith. Amending Sec. 28.01, P.C. Relating to the offense of arson, criminal mischief, and reckless damage or destruction of property.

HB 43 By Bird. Amending Sec. 21.01(2) and Sec. 43.01(3), P.C. Relating to sexual contact with the breast of a female.

You have now all received several notices of your annual dues statement. We hope you pause for a few moments and think about TCDLA; then write us a dues check, immediately.

We think you will realize that dues to the Association is what makes it run. TCDLA receives income from the sale of publications, from seminars, and from the Brief Bank,* but it is a very small percentage when compared to the dues figure which rents the home office, provides for free publications, and gives us money to publish this magazine. The Association does not receive any Federal monies or aid from the State of Texas; it receives no grants from foundations or individuals. TCDLA exists because you choose voluntarily to pay the dues. We cannot censor you or take away your "little-gold-card" if you do not pay, but we can cease to exist. We need your support and that of all the other practicing attorneys in your area.

When you take that moment out to think about why you pay your dues to TCDLA, we hope you think about what the practice of criminal law was like in Texas prior to TCDLA. How many educational seminars on the defense of an individual took place each year? How many publications to aid you in your work existed or were available to you? Could you keep up with recent opinions of the Court of Criminal Appeals before "Significant Decisions" of the *VOICE* was published? We think that the answers are obvious.

TCDLA has not been in existence for very long, but we think it has done much to improve the status and the abilities of the criminal defense lawyer. TCDLA had years of astonishing growth, and it can keep growing if you, the members, help. How?–Pay your dues and obtain more members. We cannot find everyone who needs us–we need your help.

**Please read elsewhere in this issue for more on the Brief Bank.*

REVOCATION OF PROBATION

Judge Richard Mays, Dallas

I. FUNDAMENTALS

A. A revocation of probation hearing is not a criminal trial.

Tate v. State, 365 S.W.2d 789 (Tex.Crim.App.1963)
Hulsey v. State, 447 S.W.2d 165 (Tex.Crim.App. 1969)
Munoz v. State, 485 S.W.2d 782 (Tex.Crim.App. 1972)

1. NOTE: The Court of Criminal Appeals has said "A probation revocation hearing is not an adversarial proceeding, a civil action, or a criminal prosecution, but is *administrative* in nature and is a means of protecting society and rehabilitating lawbreakers." *Hill v. State*, 480 S.W.2d 200 (Tex.Crim.App.1972).
2. Probationer is not entitled to a jury trial.
Munoz v. State, supra, and cases cited therein See also *Wickware v. State*, 486 S.W.2d 801, 803 (Tex.Crim.App.1972)
a. It has been consistently held that the provisions of Art. 42.12 §8 C.C.P. preclude a jury trial at a revocation hearing. *Wickware v. State, supra,* and cases cited therein.

B. The allegations in a motion to revoke probation need not strictly comply with the requirements of an indictment.

Gonzales v. State, 456 S.W.2d 53, 55 (Tex.Crim.App. 1970)
Dempsey v. State 496 S.W.2d 49, 50 (Tex.Crim.App. 1973)
See also *Wilcox v. State*, 477 S.W.2d 900, 901 (Tex. Crim.App.1972)

1. However, the allegations in the motion to revoke probation should fully inform the probationer so that he and his counsel will know what he will be called upon to defend against. *Wilcox v. State, supra; Dempsey v. State, supra.*
2. Moreover, due process requires that the probationer be given adequate and prior notice so as to enable him to prepare his defense.
Campbell v. State, 456 S.W.2d 918 (Tex.Crim. App.1970)
Kuenstler v. State, 486 S.W.2d 367 (Tex.Crim. App.1972)

C. The standard of proof in a probation revocation hearing is not as stringent as the standard of proof in a criminal prosecution; i.e., proof need *not* be beyond a reasonable doubt.

Kelley v. State, 483 S.W.2d 467 (Tex.Crim.App. 1972)
Scamardo v. State, 517 S.W.2d 293, 297 (Tex. Crim.App.1974)
Reed v. State, 533 S.W.2d 35, 37 (Tex.Crim.App. 1976)
Keel v. State, 544 S.W.2d 151, 152 (Tex.Crim.App. 1976)
Russell v. State, 551 S.W.2d 710, 714 (Tex.Crim. App. 1977)
See also *Duran v. State*, 485 S.W.2d 923, 924 (Tex. Crim.App.1972)
Guillory v. State, 487 S.W.2d 327, 330 (Tex.Crim. App.1972)

1. The standard of proof that the state must meet in proving offenses upon which the State relies in a probation revocation hearing is by a *preponderance of the evidence. Scamardo v. State, supra; Reed v. State, supra.*
2. NOTE: Chief Justice Onion has remained consistently convinced that the proper burden of proof in a revocation of probation proceeding is "beyond a reasonable doubt." See dissenting opinions in the following cases:
Kelley v. State, supra
Sizemore v. State, 496 S.W.2d 80, 83 (Tex. Crim.App.1973)
Scamardo v. State, supra
Woods v. State, 533 S.W.2d 16, 20 (Tex.Crim. App.1976)
Keel v. State, supra

D. Sufficiency of the Evidence; In General

1. The uncorroborated testimony of an accomplice may be sufficient to support a revocation of probation.
Gonzales v. State, 456 S.W.2d 53 (Tex.Crim. App.1970)
Barnes v. State, 467 S.W.2d 437, 440 (Tex.Crim. App.1971)
Moreno v. State, 476 S.W.2d 684, 685 (Tex.Crim. App.1972)
Kelley v. State, supra
Richardson v. State, 487 S.W.2d 719, 721 (Tex. Crim.App. 1972)
Mann v. State, 490 S.W.2d 545, 546 (Tex.Crim. App.1973)
Regaldo v. State, 494 S.W.2d 185 (Tex.Crim. App.1973)
2. A voluntary confession to the subsequent offense, even though uncorroborated, constitutes sufficient evidence for a court to revoke probation.
DeLeon v. State, 466 S.W.2d 573 (Tex.Crim.App. 1971)
Hicks v. State, 476 S.W.2d 670, 671 (Tex.Crim. App.1972)
Bush v. State, 506 S.W.2d 603 (Tex.Crim.App. 1974)
a. NOTE: When a confession is relied upon by the state it is error for the court to deny probationer the privilege of testifying solely on the issue of voluntariness of the confession, without subjecting himself to unlimited cross-examination by the prosecution on other issues.
Masters v. State, 545 S.W.2d 180 (Tex.Crim. App.1977)
3. Where the commission of the subsequent offense is alleged and proved, no final conviction is necessary for the revocation of probation.
Mason v. State, 473 S.W.2d 15 (Tex.Crim.App. 1971)

Day v. State, 474 S.W.2d 246 (Tex.Crim.App. 1971)
Carr v. State, 476 S.W.2d 329 (Tex.Crim.App. 1972)
Oliver v. State, 482 S.W.2d 874, 875 (Tex.Crim. App.1972)
Guillory v. State, 487 S.W.2d 327, 330 (Tex.Crim. App.1972)
Beck v. State, 492 S.W.2d 536, 537 (Tex.Crim. App.1973)
Martinez v. State, 493 S.W.2d 954, 955 (Tex. Crim.App.1973)

E. Remember:
A probationer is on probation until the moment of revocation.
DeLeon v. State, 466 S.W.2d 573 (Tex.CrimApp. 1971)
Wilson v. State, 471 S.W.2d 416 (Tex.Crim.App. 1971)
Nicols v. State, 501 S.W.2d 333 (Tex.Crim.App. 1973)

II. REQUIREMENTS FOR REVOCATION OF PROBATION

A. Once granted, probation should not be arbitrarily withdrawn by the court; rather, probation can be withdrawn only by the process of revocation of probation.
Barnes v. State, 467 S.W.2d 437 (Tex.Crim.App. 1971)

B. A court, once having granted probation, must find that the probationer has violated a condition of probation in order to revoke, after a hearing in accordance with Art. 42.12 § 8 C.C.P.
Wozencraft v. State, 388 S.W.2d 426 (Tex.Crim. App.1965)
Campbell v. State, 456 S.W.2d 918, 922 (Tex.Crim. App.1970)
Jackson v. State, 464 S.W.2d 153 (Tex.Crim.App. 1971)
Wester v. State, 542 S.W.2d 403, 406 (Tex.Crim. App.1976)
See also, *United States v. Taylor*, 449 F.2d 117 (9th Cir. 1971)

1. The burden of proof is on the State to show a violation of the conditions of probation.
Zane v. State, 420 S.W.2d 953 (Tex.Crim.App. 1967)
Perry v. State, 459 S.W.2d 865 (Tex.Crim.App. 1970)
cf., Campbell v. State, supra

2. Conditions of Probation; Art. 42.12 § 6 C.C.P.
a. The conditions that are spelled out in § 6 are that the probationer shall
1) Commit no offense against the laws of this State, or of any other state, or of the United States;
2) Avoid injurious or vicious habits;
3) Avoid persons or places of disreputable or harmful character;
4) Report to the probation officer as directed;
5) Permit the probation officer to visit him at his home or elsewhere;
6) Work faithfully at suitable employment as far as possible;
7) Remain within a specified place;
8) Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums and make restitution or reparation in any sum that the court shall determine; and
9) Support his dependents.
b. Additionally, the court granting probation may fix a fee not exceeding $15 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing probation. See 42.12 § 6a (a)
1. Additionally, probationer shall reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case. Art. 42.12 § 6 (j)
c. The court may also require that the probationer participate in any community-based program. Art. 42.12 § 6

C. Where the basis of a revocation of probation is a violation of a penal law, i.e., an alleged violation of the condition that the probationer not violate the law, the allegations contained in the motion to revoke must give fair notice, and should allege a violation of the law, but need not be as precise as are the allegations for an indictment.
Jansson v. State, 473 S.W.2d 40 (Tex.Crim.App. 1971)
Gamble v. State, 484 S.W.2d 713, 714 (Tex.Crim. App.1972)
Vance v. State, 485 S.W.2d 580 (Tex.Crim.App. 1972)
Rhodes v. State, 491 S.W.2d 895, 896 (Tex.Crim. App.1973)
Fowler v. State, 509 S.W.2d 871, 873 (Tex.Crim. App.1974)
Diaz v. State, 516 S.W.2d 154, 156 (Tex.Crim.App. 1974)

1. When the motion to revoke probation fails to fully inform the probationer, he is denied the rudiments of due process.
Kuenstler v. State, 486 S.W.2d 367 (Tex.Crim. App.1972)
Graham v. State, 502 S.W.2d 809, 811 (Tex.Crim. App.1973)
Garner v. State, 545 S.W.2d 178, 179 (Tex.Crim. App.1977)
a. When the allegations in the motion to revoke fail to fully inform the probationer, and the trial court has refused to sustain an exception timely filed, the probationer is denied the rudiments of due process; the accused is entitled to have the motion to revoke set forth in clear language the violation relied upon. *Garner v. State, supra.* In *Garner*, it was held that reference to the indictment was not sufficient notice of the offense relied on for the revocation.

2. NOTE: The Court of Criminal Appeals has consistently held that the Due Process Clause of the 14th Amendment does apply to revocation of probation hearings.

3. Further, the allegations in the motion to revoke probation must specifically point out what the new offense is and in what way it is a violation of the conditions of probation.

D. Quantum of Proof Required to Revoke Probation: The Court of Criminal Appeals has never speci-

fically held what degree of proof is necessary.
See *Scamardo v. State*, 517 S.W.2d 293 (Tex.Crim. App.1974)
United States v. Garza, 484 F.2d 88 (5th Cir. 1973)

1. The majority of the Court of Criminal Appeals has held that a *preponderance of the evidence* must support the motion to revoke probation.
Scamardo, supra
Johnson v. State, 537 S.W.2d 16, 18 (Tex.Crim. App.1976)
   a. NOTE: Chief Justice Onion consistently holds that the proper standard of proof is *beyond a reasonable doubt. Kelley v. State, supra,* and other cases cited *supra.*
2. While the trial court is the finder of fact and the sole judge of the weight and credibility to be given to the witnesses, the judge does not have absolute discretion in the decision to revoke probation. Probation may not be terminated without an affirmative finding of a violation of the conditions of probation.
Wozencraft v. State, supra
Campbell v. State, supra
   a. That finding must undoubtedly be supported by some degree of sufficient evidence.
   See *Kubat v. State*, 503 S.W.2d 258 (Tex. Crim.App.1974)
   Whitney v. State, 472 S.W.2d 524 (Tex.Crim. App.1971)
   Padillo v. State, 420 S.W.2d 712 (Tex.Crim. App.1967)
3. Standard employed by the 5th Circuit Court of Appeals
   "A revocation of probation does not require proof sufficient to sustain a criminal conviction. All that is required is enough evidence, within the sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of the probation."
   U.S. v. Garza, 485 F.2d at 89
   See also *United States v. Evers*, 534 F.2d 1186 (5th Cir. 1976)
4. NOTE: Probation revocation is a matter entrusted to the sound judicial discretion of the district court, and only upon a clear showing of abuse of that discretion will the district court's decision be disturbed.
Pickens v. Texas, 497 F.2d 981 (5th Cir. 1974)
Burns v. United States, 287 U.S. 216, 221, 53 S.Ct. 154, 156, 77 L.Ed 266, 269 (1932)

E. Other Grounds for Revocation
1. Revocation based upon failure to pay restitution, supervisory fees or costs, failure to support dependents or failure to obtain employment will be invalid unless the evidence shows that the failure was willful and intentional.
Pool v. State, 471 S.W.2d 863 (Tex.Crim.App. 1971)
Butler v. State, 486 S.W.2d 331 (Tex.Crim.App. 1972)
Denton v. State, 511 S.W.2d 311 (Tex.Crim.App. 1974)
Ivy v. State, 545 S.W.2d 827 (Tex.Crim.App. 1977)
2. Revocations based upon associations with bad persons are invalid unless the evidence shows that the defendant had knowledge of the bad character of his companions.
Jackson v. State, 464 S.W.2d 153 (Tex.Crim.App. 1971)
Prince v. State, 477 S.W.2d 542 (Tex.Crim.App. 1972)
3. Where revocation is based on a failure to avoid injurious or vicious habits, the state must allege and prove that there was a habit and that the habit was injurious or vicious.
Campbell v. State, supra
4. Where revocation is based on failure to report to the probation officer as directed the state must introduce evidence of when and how often the probationer was directed to report to the probation officer; lack of such evidence will defeat the state's motion to revoke.
Campbell v. State, 420 S.W.2d 715 (Tex.Crim. App.1967)
5. Where revocation is based on the failure by the defendant to remain within the boundaries of the state or a specified county, the state must show that the probationer went outside the limits, generally for a substantial length of time, and that he did so without the permission of the probation officer.
McDonald v. State, 442 S.W.2d 386 (Tex.Crim. App.1969)

III. CONSTITUTIONAL RIGHTS OF PROBATIONER IN A REVOCATION PROCEEDING

A. Right of Counsel: 6th Amendment
1. It is clear from case law that a probationer has a right to counsel at a probation revocation hearing.
   a. An order of revocation has been rendered void by a showing that the probationer was denied the right to counsel at a revocation proceeding.
   Ex parte Guzman, 551 S.W.2d 387 (Tex.Crim. App.1977)
   Ex parte Flores, 537 S.W.2d 458 (Tex.Crim. App.1976)
   b. A probationer may request counsel in accordance with Art. 42.12 § 3 (b) C.C.P.
   c. Indigents - The United States Supreme Court has held that as a matter of constitutional law an attorney must be afforded an indigent accused at a proceeding for revocation of probation.
   Mempa V. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967)
   d. As is the case with most other constitutional rights, the right to counsel may be waived.

B. Right to a Speedy Trial: 6th Amendment
1. NOTE: Although a revocation of probation proceeding is not a criminal trial, the probationer does have a right to a speedy trial.
Fariss v. Tipps, 463 S.W.2d 176 (Tex.Crim.App. 1971)
   a. In *Hilts v. State*, 476 S.W.2d 283 (Tex.Crim. App.1972) it was held that a delay of over one year in the filing of a motion to revoke probation for leaving the county without permission did not violate the right to a speedy trial where a hearing was conducted within 13 days after the filing of a motion to revoke *and* the probationer made no motion for a

(Continued on page 29)

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

Marvin O. Teague: Editor

OCTOBER, 1978
VOLUME V, NO. 2

PANELS FOR WEEK OF OCTOBER 4, 1978, ARE AS FOLLOWS:

NONE. ALL OF THE PUBLISHED OPINIONS HANDED DOWN ARE EN BANC DECISIONS.

J. ODOM, IN PAYTON, #54,167, 10/4/78, En Banc, No Dissents, DISCUSSES WHAT YOU NEED ON APPEAL RE VOIR DIRE EXAMINATION IF YOU ARE MAKING AN OBJECTION TO TJ EXCUSING A PROSPECTIVE JUROR. (D's MRH Granted, Reversed). (Denton County).

COMMENT: Here, TJ ruled that a prospective juror was disqualified from serving, as a matter of law, as he had been found guilty of a felony but was placed on probation and had successfully served out the probation.

HELD, "IT WAS ERROR TO RULE THAT BECK WAS ABSOLUTELY DISQUALIFIED UNDER THE LAW." "HE HAD BEEN "RELEASED FROM ALL PENALITIES AND DISABILITIES" RESULTING FROM HIS EARLIER CONVICTION, INCLUDING THE DISABILITY TO SERVE ON A JURY." SEE ART. 42.12, C.C.P.

Originally, a Panel of the CCA ruled that the D could not complain as D did not have all of the voir dire transcribed and in the Record on Appeal.

However, on the MRH, the CCA discussed the possible problems:

1. TJ allowing a prospective juror to remain on the panel when that person should have been struck and the D then is forced to use a peremptory to get rid of that person;

2. TJ excluding a prospective juror from panel when that person should not have been excluded.

3. Conduct of voir dire examination in general.

Held, "We summarize the rules. While inclusion in the record of the entire voir dire is necessary to decide issues regarding denial of questions sought to be posed to prospective jurors, when the issue concerns denial of a challenge for cause or exclusion of a qualified venireman, only the examination of the individual

venireman need be in the record. The harm may be shown in the denial of a challenge for cause by showing exhaustion of the defendant's peremptory challenges, denial of a request for additional peremptory challenges, and the seating of a juror upon whom the defendant would have exercised a peremptory challenge. Harm may be shown in the erroneous exclusion of a qualified juror by showing the State exhausted its peremptory challenges. Pearce and Culley, supra. These rules allow correction of the error, in the former by giving the defendant an extra peremptory challenge to compensate for the one used against the venireman who was subject to challenge for cause, and in the latter by the State's reserving unused one of its peremptory challenges for constructive use against the erroneously excluded vireman."

"In the instant case the record shows not only the erroneous exclusion of venireman Beck; it also shows that the State used all of its peremptory challenges against other veniremen." Reversible error is shown. (Reversed).

J. ROBERTS, IN MORGAN, #54,482, 10/4/78, En Banc, with J. Vollers, joined by J. Douglas, dissenting with opinion, with J. W. C. Davis not participating, STRIKES DOWN ANOTHER FELONY THEFT INDICTMENT. (Reversed). (Brazos County). See Sec. 31.03, P.C.

Indictment here alleged in pertinent part:

D ". . . did then and there unlawfully exercise control over property, other than real property, to wit: One (1) Whirlpool Dishwasher of the value of in excess of $200 knowing said property to be stolen and with intent to deprive the owner, Frank Hurta, of said property . . ."

Held, in quoting from Ex parte Cannon, 546 (2) 266, which set out the four methods in which a person could commit theft:

"The indictment fails to set forth all of the elements of one of the 4 methods." "It does not satisfy the first and third methods because it fails to allege that the obtaining or exercising of control was without the owner's effective consent." "It also fails to satisfy the second method because instead of alleging that D obtained the property, it alleged that D exercised control over the property." "Moreover, the indictment fails to satisfy the 2nd and 4th methods because it does not state that the property is stolen property or that it was obtained by or from another person."

Thus, it is clear that the Indictment is fundamentally defective." As the probation was predicated upon this void indictment, the order revoking D's probation was void. (Reversed).

CCA DECLINES INVITATION TO WRITE ON EXPUNCTION LAW, SEE ART. 55.01, C.C.P., IN EX PARTE PAPRSKAR, #57,049, 10/4/78, J. Vollers. Appeal dismissed for want of jurisdiction. (Tarrant County).

COMMENT: Here, TJ dismissed the petition because it found the statute was unconstitutional as statute was too vague. Petitioner then appealed that decision to CCA.

CCA first ruled that the action could not be considered as an application for writ of habeas corpus as "petitioner is neither confined nor restrained pursuant to any State action which is made the subject of this petition." "Nor would the disposition of petitioner's claim affect the fact or duration of his confinement."

Held, "We find neither constitutional nor statutory authority which would confer jurisdiction on this Court to entertain a direct appeal from an order entered pursuant to a motion for expunction of arrests under Chapter 55, C.C.P." (Dismissed).

COMMENT: Thus, it remains to be seen what one of the Courts of Civil Appeals will do if and when confronted with this issue.

DISSENT BECOMES LAW WHEN MOON, #54,342, 10/4/78, J. Dally, En Banc, with P. J. Onion dissenting with opinion, and with Judge Roberts concurring in part and dissenting in part with opinion, and with J. Phillips concurring with opinion, AFFIRMED ON STATE'S MRH. (Harris County). Case originally reversed on 6/29/77. See Vol. III, No. 12, S.D.R., p. 7.

COMMENT: Originally, a five (5) man Court, per P. J. Onion, with J. Odom, joined by J. Douglas, dissenting with opinion, ruled that TJ committed reversible error by not withdrawing D's PG and entering a plea of not guilty due to the evidence raising the issue of self-defense.

Here, Majority, in very brief fashion, ruled the PG was excellent poco weino and affirmed the conviction. The PG proceedings are set out in the opinion and I would imagine that, as this case was affirmed, all smart TJs throughout our State will use same verbatim in taking a PG.

J. Roberts, in his opinion, pointed out, factually, what happened here, that caused the uproar, was the TJ took the plea and then ordered a presentence investigation. When the parties returned to Court, it was then the issue of self defense was raised.

NOTE: If you have a case, involving the issue of withdrawing a PG, this is a good one to read as it has a lot of good dicta in it regarding this issue.

CCA GRANTS ITS OWN MRH IN EX PARTE DANTZLER, #57,612, 10/4/78, J. Roberts, En Banc, with Judges Douglas, Odom and Dally concurring in the result without opinion, and with J. Vollers concurring, with opinion, in the result. (Writ Denied). (Dallas County). See Vol. IV, No. 10, S.D.R., June, 1978, p. 1.

HELD, "Applying the principles of Moffett, Murchison, and Wolfe to the present case, we note that the record before us does not contain a transcription of the court reporter's notes from the D's trials." "Thus, we are unable to verify, from the records before us, that the D's convictions were, in fact, based on welfare fraud." "Therefore, we hold that the D has not advanced a no evidence contention." "Rather, as was the situation in Wolfe, D's contention is merely an impermisible attempt to collaterally attack the sufficiency of the evidence." "It is clear that our opinion on original submission was erroneous and we order it withdrawn." (Writ Denied).

COMMENT: This appears to be a Catch-22 situation as I do not see how the D can ever win in this kind of situation as all of the papers, concerning this conviction, are probably going to show a valid theft conviction and a transcription of the D's trials is not going to help the D. But there is hope, by the opinion, for the D. Therefore, keep on trucking Mr. Dantzler.

CCA REJECTS MELOON V. HELGEMOE AND SAYS THERE IS NOT ANYTHING WRONG WITH OUR RAPE STATUTE IN EX PARTE GROVES, #58,945, 10/4/78, P. J. Onion, with J. Dally, joined by Judges Douglas and Roberts, dissenting in part and concurring in part with opinion, and with J. Phillips concurring with opinion. (Writ Denied). (Tarrant County). MALES MAY NOW BE RAPED.

COMMENT: Here, D attempted to get a quick decision on his rape conviction by going the writ route rather than the appeal route relying on Meloon v. Helgemoe, which held the New Hampshire crime of statutory rape unconstitutional on the ground that it denied equal protection in violation of the 14th amendment to the U.S. Constitution.

Although, as a general rule, CCA refuses to rule on a writ where an appeal is available, here, due to, in my words, "Street Talk," among the Bench, Bar,Law Enforcement Agencies, and mothers of daughters who are willing but not, by law, old enough, the CCA decided to go ahead and consider the question and, after discussion, proceeded to deny the writ.

CCA found there is no violation of equal protection, in my opinion, for two (2) main reasons:

1) "Although the male sex organ must penetrate the female sex organ in order for sexual intercourse to occur, such penetration may be intiated and that result caused by action of the female as well as the male." I'll bet you didn't know that. See Kinsey, Vol. I, p. 398

2) "Sec. 21.09, as construed pursuant to the Code Construction Act, also makes it a second degree felony for any person to have "sexual intercourse with a male not her husband and he is younger than 17 years."

Held, "We believe that the Legislature intended to protect both male and female victums of rape; and, we so hold." (Writ Denied).

CCA RULES IN VAN BUCKNER, #53,676, 10/4/78, J. Vollers, En Banc, with Judge Odom concurring with result without opinion, and with Judges Roberts and Phillips dissenting without opinion, THAT EXTRANEOUS OFFENSE WAS ADMISSIBLE AND D'S MRH OVERRULED. (Affirmed). (Harris County).

See Dec., 1977, S.D.R., Vol. IV, No. 4, p.3. Originally, the CCA's majority ruling, per J. Odom, was that the objection on appeal and at trial differed and, besides, the extraneous offense was admissible anyway.

In this opinion, per J. Vollers, CCA's majority ruled that the objection which was made by D in the TCt was adequate to preserve this question on appeal. "It appears that the objection was timely and that from an examination of the record it was apparent that the TJ and the prosecutor were both well aware of the grounds upon which the objection was voiced." (My emphasis).

As I mentioned in the previous S.D.R., the long and short of the original opinion was that three (3) judges believed that the extraneous offense was admissible and two (2) did not. The long and short of this opinion is that seven (7) believed it was admissible and two (2) did not.

Thus, by this opinion, where the issue of identity is raised, extraneous offenses are admissible. We have, by a stroke of the pen, truly returned to the days of old regarding admissibility of extraneous offenses. However, don't forget the "Flip of the Coin Rule," See Vol. V, No. 1, September, 1978, S.D.R., p. 7, as you can give your TJ enough cases reversing on this issue that, if he is a little gun shy, he might agree with you.

PANELS FOR WEEK OF OCTOBER 11, 1978, ARE AS FOLLOWS:

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

J. ODOM, IN WAFF, #59,215, 10/11/78, Panel #1, 3rd Quarter, RULES FOR PANEL THAT STATE FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT D DID NOT WORK FAITHFULLY AT SUITABLE EMPLOYMENT AND ORDER OF REVOCATION OF PROBATION REVERSED. (Reversed). (McLennan County).

COMMENT: Facts showed that D was granted probation on 11/9/77. Motion to Revoke filed on 1/27/78 and Probation Revoked on 2/10/78. Nothing shown regarding period of time from 11/9/77 to 12/21/77, as to D working, not working, etc. On 12/21, D got job but was fired when he did not show up for work or got fired when he showed up late for work. Next went to work for another company and, by the Record, worked there for 2 1/2 months. State claimed this should have been 2 1/2 weeks but S/F showed 2 1/2 months and this governed. D got fired from this job because he violated company rules for being where he wasn't supposed to be.

Held, "The State has failed to show D did not work faithfully." Reversed.

D BOBBY DEE LUCKY, #59,098, 10/11/78, J. T. Davis, Panel #2, 3rd Quarter, GETS OUTRIGHT RELIEF ON POST CONVICTION WRIT OF HABEAS CORPUS WHEN CCA FINDS THAT A PRIOR MISDEMEANOR CONVICTION, USED TO ENHANCE PUNISHMENT TO A FELONY (THEFT CASE), WAS VOID AS INFORMATION WAS FUNDAMENTALLY DEFECTIVE AS IT FAILED TO ALLEGE "WITHOUT THE OWNER'S EFFECTIVE CONSENT." (Writ Granted). (McLennan County).

COMMENT: Here, State used two (2) prior misdemeanors to elevate this case to a third degree felony, See Sec. 31.03, P.C., but when this prior conviction was thrown out, this caused the dominos to fall and wiped out the trial court's jurisdiction over the matter; thus, case could not be remanded for assessing of a new punishment.

DOCTRINE OF CARVING GETS D MITCHELL, #59,193, 10/11/78, J. Odom, Panel #1, 3rd Quarter, PARTIAL RELIEF. (Writ Granted). (Harris County).

COMMENT: Here, D copped out on 4 cases; 2 of which were for possessing forged instruments. Apparently, however, 3 of the 4 convictions arose out of the same transaction, so said the TJ, but this finding was not sufficiently supported by the Record.

Held, "The State here secured two convictions out of one possession on 8/18/71, of the two forged instruments upon which the prosecutions in cause numbers 167,908 and 167,916 were based." "This violated the carving doctrine and D is entitled to relief" on one of these two convictions."

NOTE: It does not look like the D gained much in the way of relief.

LAW OF LESSER INCLUDED OFFENSES SCREWS UP PROSECUTOR IN GARCIA, #58,046, & 048, 10/11/78, P. J. Onion, Panel #2, 2nd Quarter, AND D GETS REVERSAL AND ORDER THAT MOTION TO REVOKE WAS TO BE DISMISSED. (Reversed). (Travis County).

COMMENT: Here, State filed motion to revoke alleging that the D committed the offense of burglary of a habitation. The prosecutor elected to pursue the matter on the basis of theft, not burglary, even though theft was not alleged nor was motion to revoke amended. D entered a plea of true to the motion and signed a written judicial confession form but this was not introduced into evidence.

P. J. Onion, in discussing the past law, and Sec. 30.02, P.C.,on this subject, ruled that "Theft is not a lesser included offense of the burglary of the first mode." "Thus, D's revocation cannot be sustained upon a finding of theft because it was not charged in the motion to revoke probation."

State did not make it on the other allegations, avoid injurious and vicious habits, as no evidence rule got State.

HELD: "If it had been proved, it should be remembered that proof of a single instance of the use of a drug cannot be characterized as a habit under the decisions of this court." Reversed and Motion to Revoke dismissed.

RIGHT TO COUNSEL IN MISDEMEANOR CASES, SEE VOL. V, NO. 1, SEPT., 1978, S.D.R., p. 15, STILL CAUSING DISAGREEMENT IN CCA. JORDAN, #55,450, 10/11/78, P. J. Onion, Panel #2, 1st Quarter, with J. Dally concurring with opinion, GETS REVERSAL WHEN CCA FOUND THAT D DID NOT WAIVE RIGHT TO COUNSEL IN CAUSING BODILY INJURY CASE AND HIS PUNISHMENT WAS ASSESSED AT 1 YEAR'S PROBATION. (Reversed). (Nueces County).

COMMENT: J. Dally, in his concurrence, totally disassociated himself from P. J. Onion's statement that "it is well established that criminal Ds in misdemeanor cases are entitled to counsel if there exists a possibility that imprisonment may be imposed," but concurred because the D's punishment, although probated, was assessed at imprisonment for 1 year.

P. J. ONION, WRITING FOR PANEL #2, 2ND QUARTER, IN HOLLINS, #55, 433, 10/11/78, WRITES AND WRITES ON TWO QUESTIONS BUT D GETS NO RELIEF. (Affirmed). (Harris County).

The two issues were:

1) Failure of Harris County Indictment, in habitual case, to allege the name of the Court in which D had been convicted, where complaint was made via a motion to quash, and

2) Effect of jurors taking notes during trial.

Held, "We conclude, although not without difficulty, that the enhancement of punishment allegations are sufficient." "The prior convictions were described as felonies, the exact nature of the offenses was given, the cause number in which the convictions were obtained and the dates of such convictions were set forth." "Although the courts were not named, it was alleged that all convictions occurred in Harris County, and that each felony offense was committed after a final conviction in the preceding case." "Since only district courts have jurisdiction of felony cases, the convictions alleged were all in the same

county with the cause numbers stated, and given the particular circumstances of this case, the trial court did not err in overruling the motion to quash the enhancement portion of the indictment."

Held, As to the note taking, by jurors, "In the instant case the taking of notes by three jurors was discontinued upon admonishment by the court." "The notes were not referred to or used in the jury's deliberations." "As soon as the trial was concluded, the TJ permitted interrogation of the jurors concerning the note-taking, and the notes taken were made part of the record and the same have been examined by this court." "We cannot conclude there has been any showing that D was harmed by such note-taking." "The trial court did not err in overruling the mistrial motion." Affirmed.

J. ODOM, WRITING FOR PANEL #1, 3RD QUARTER, IN SCOTT, #55,943, 10/11/78, DISCUSSES EX-CON POSSESSING A FIREARM AWAY FROM THE PREMISES WHERE HE LIVES, SEE SEC. 46.05 (A), P.C., AND RULES THAT "MERE FAILURE OF THE PROOF TO SHOW THE DATE OF MANUFACTURE OF GUN DOES NOT RENDER THE EVIDENCE INSUFFICIENT." (Affirmed). (Dallas County).

Further, "Robbery by Assault is a felony involving violence or threatened violence against a person as a matter of law." Thus, TJ's instruction to jury on this was not comment on evidence.

Also, CCA, at least this panel, is not going to overrule failure of TCt to instruct jury that a finding of true by the jury, re enhancement allegations, will cause the TJ to assess or sentence the D to life imprisonment.

However, there is something good in the opinion. D, while in a parking lot, was seen shooting a pistol. Police summoned and arrived as D fled. When D came out of an alley, with his hands raised, cops asked him where his gun was, and he replied it was behind the box in the alley. Held, "D was under arrest at this time and had not been given his Miranda warning." "The statement was a direct and responsive answer to the officer's question." "The statement should have been excluded from evidence." However, harmless error got the D.

J. VOLLERS, IN EX PARTE HILL, #58,183, 10/11/78, Panel #2, 2nd Quarter, RULES THAT "IT IS CLEAR, IF ONLY BY VIRTUE OF THE FACTS THAT THE 1961 "ENHANCED" CONVICTION WAS OBTAINED IN A SISTER STATE, THAT THE PRIORS OF WHICH D NOW COMPLAINS HAD NEVER BEFORE BEEN UTILIZED TO ENHANCE A PUNISHMENT UNDER ART. 63 OF THE TEXAS PENAL CODE." "THE PROHIBITION AGAINST USE OF A PRIOR CONVICTION MORE THAN ONE TIME FOR THE PURPOSE OF ENHANCING PUNISHMENT APPLIES ONLY WHEN SUCH DOUBLE USE IS ATTEMPTED BY THE STATE UNDER THE SAME STATUTORY PROVISION." (Writ Denied). (Wilbarger County).

COMMENT: See, however, the discussion found in Ex parte Montgomery, 9/27/78, Vol. V, No. 1, September, 1978, S.D.R., p. 21.

WHOA. IF YOU ARE THINKING ABOUT PLEADING THE D GUILTY AND PRESERVING YOUR ERROR ON SUCH THINGS AS MOTION TO SUPPRESS, BETTER THINK TWICE AND READ FERGUSON, #59,985, 10/11/78, J. Odom, Panel #1, 3rd Quarter. (Affirmed). (Tarrant County).

COMMENT: Art. 44.02, C.C.P., provides, in part, that if a D works out a deal and the TJ follows the deal, then the D must have permission of the TCt to appeal, "except on those matters which have been raised by written motion filed prior to trial."

Here, after TJ overruled the motion to suppress, D worked out a deal, but stil wanted to appeal a search question. TJ granted him leave to appeal.

Held, "This new practice, however, does not change the rule in Stigers, 506 (2) 609, relied on here." "If the guilty plea is supported by evidence (see Art. 1.15, supra) independently of the matter contested in the pre-trial motion, then any erroneous ruling on that motion does not vitiate the conviction." "Such is the case here." Affirmed.

Thus, I suspect that many lawyers should check their malpractice insurance to make sure it is in effect as, by this opinion, we are back to square 1 and it is still necessary to go through all of the gyrations and the gobbledegook in order to appeal a search and seizure question.

J. T. DAVIS, IN EX PARTE TIJERINA, #59,081, 10/11/78, Panel #2, 3rd Quarter, SAYS THAT FACT THAT MOTION TO REVOKE PROBATION HEARD 2 DAYS BEYOND THE 20 DAY RULE, SEE ART. 42.12, Sec. 8(a), C.C.P., DOES NOT MEAN THE D WINS. (Affirmed). (Lubbock County).

COMMENT: Here, it appears that everybody involved in the case was either deaf and/or mute, including the D who was charged with raping another deaf mute, who was also blind, in an institution in Austin.

Because of the need for several interpreters, 6, to be used in the case, from throughout the State, the TJ set the date sufficiently in advance so that they could be present at the hearing.

J. T. Davis discussed rights of a deaf mute in our system, See Art. 38.31(a)(c), C.C.P., and held:

> "Where, as in the instant case, the record supports the fact that the trial court proceeded as far as was possible to grant the probationer a hearing within the 20-day period, and where it is shown that a hearing held within such a period would be a sham and would constitute a deprivation of constitutional rights to probationer, we find the dismissal of the revocation motion is not required under our holding in Trillo 540 (2) 728." Affirmed.

PANEL OF CCA, IN VANCE V. ROUTT, DISTRICT JUDGE, #58, 929, 10/11/78, J. T. Davis, Panel #2, 3rd Quarter, TELLS DISTRICT JUDGES, IN THIS MANDAMUS ACTION, THEY CANNOT DECREASE AMOUNT OF BAIL BOND FORFEITURE JUDGMENT UNLESS CASE FALLS WITHIN ONE OF THE EXCEPTIONS, SEE ART. 22.13, C.C.P., AND AS IT DIDN'T HERE, D STILL RUNNING, DISTRICT JUDGE ROUTT TOLD TO VACATE FORMER JUDGMENT AND TO ENTER A JUDGMENT IN AMOUNT OF $10,000.00 RATHER THAN $6,666.66. (Mandamus Issued). (Harris County).

COMMENT: This was apparently a test case and one of our brethern in the defense bar is now $3,333.34 poorer because of this ruling as he was the surety on the D's bond.

Held, "It is thus clear that the respondent had no authority under these statutes to remit or exonerate any portion of the bond in question." "There was only one judgment authorized to be entered." "Under these circumstances, mandamus is available to correct the respondent's failure to follow the dictates of the foregoing statutes." "Respondent had no discretion but to enter judgment against Green and Collins for the full face amount of the bond."

Note: This does not appear to be a compromise settlement type case where there is a disputed issue, concerning exoneration, and the parties settle the judgment on that basis. Here, apparently, the only question was, where it was undisputed about the facts, did the TJ have the power to reduce the amount of the bail bond, with CCA holding he didn't.

PANELS FOR WEEK OF OCTOBER 18, 1978, ARE AS FOLLOWS:

Panel #1, 2nd Quarter: Judges W. C. Davis, Douglas, and Phillips.
Panel #2, 3rd Quarter: Judges T. Davis, Onion, and Phillips.
Panel #2, 4th Quarter: Judges Dally, Odom, and Phillips.
Panel #3, 2nd Quarter: Judges Roberts, Odom, and T. Davis.
Panel #3, 3rd Quarter: Judges Dally, Douglas, and Roberts.

PANEL OF CCA, Panel #3, 3rd Quarter, J. Dally, TELLS LUBBOCK COUNTY TO QUIT TRYING D DICKERSON, #58,859, 10/18/78, (Reversed). (Lubbock County).

COMMENT: Previously, CCA, in Ex parte Dickerson, 549 (2) 202, See Vol. III, No. 10, April 1977, S.D.R., p. 4, ruled that that Indictment, on its face, was barred by S/L. Writ granted and prosecution under that indictment ordered dismissed.

Apparently, the State came right back on this Indictment but it appears to be same case.

Held, "A prosecution commenced after the S/L has run is barred unless facts tolling the S/L are pled and proved by the State."

Held, "The filing of a complaint in justice court does not toll the running of the S/L in a felony case."

Held, "The failure of the indictment to allege that the offense was committed at a time not so remote that the prosecution is barred by limitations is a fundamental defect and may be raised for the first time on appeal." Reversed and Ordered Dismissed.

WHAT IS A TIRE IRON? IN LOYA, #59,082, 10/18/78, J. DALLY, Panel #3, 3rd Quarter, SAID THAT IT IS NOT A HANDGUN OR AN ILLEGAL KNIFE OR A CLUB. "WE CONCLUDE THAT THE COMPLAINT AND INFORMATION DO NOT ALLEGE A VIOLATION OF SEC. 46.02, P.C., WHICH PROHIBITS THE UNLAWFUL CARRYING OF WEAPONS. (Reversed and Dismissed). (El Paso County).

COMMENT: However, Panel of CCA told prosecutors what to do with this one; i.e., merely allege that the D intentionally and knowingly or recklessly did carry on or about his person a tire iron, to-wit: an instrument that is specifically designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument. See Sec. 46.01, P.C.

EX PARTE LEGG, #59,100, 10/18/78, J. Dally, with J. Douglas dissenting w/o opinion, Panel #3, 3rd Quarter, GETS WRIT GRANTED WHERE IT WAS SHOWN THAT INDICTMENT ALLEGED DATE OF JUNE 5, 1970, BUT INDICTMENT WAS RETURNED ON MAY 8, 1970, (Writ Granted). (Taylor County).

HELD, "SINCE THE DATE ALLEGED IS AN IMPOSSIBLE DATE THE INDICTMENT IS FUNDAMENTALLY DEFECTIVE." "THE VALIDITY OF A FUNDAMENTALLY DEFECTIVE INDICTMENT MAY BE CHALLENGED IN A POST CONVICTION WRIT OF HABEAS CORPUS."

COMMENT: Here, D had already served his sentence for this conviction but claimed it was screwing up his prospects for pardon and parole and his classification and treatment in prison. CCA agreed that because of this, this did not make the conviction moot.

WOW. WOW. IF YOU HAVE A TEMPORARY DETENTION CASE, READ CORTINAS, #59,125, 10/18/78, J. Dally, Panel #3, 3rd Quarter, AS IT IS AN EARTH SHAKER. (Reversed). (Travis County).

COMMENT: Here, Police Officer Dunn received radio report of an armed robbery at a grocery store. Description of robber: "Black male, armed with a knife, carrying a quart bottle of beer, and wearing grey shirt and blue jeans."

One block from the store, Officer saw D walking along the curb carrying a paper sack. D was wearing a blue and white striped shirt and blue jeans and was carrying a quart bottle of beer in the paper sack. D was not a Black man. A knife was seized as a result of a search. Manager told officer D was not the robber. D nevertheless charged with possession of a switchblade knife.

Held, "Upon stopping D, Dunn immediately saw that he did not fit the description of the robber; he was not black and was not wearing a grey shirt." "At that point, Dunn did not have specific, articulable facts on which to base the further detention of D." "Indeed, Dunn testified, in effect, that he detained and frisked D on the suspicion that the description of the robber was incorrect." "Such a suspicion is insufficient for a police officer to detain a person for investigative purposes." "Dunn's search of D was unlawful and the knife seized was erroneously received in evidence." (Reversed).

J. ROBERTS, WRITING FOR PANEL IN SMITH, #54,418, 10/18/78, Panel #3, 2nd Quarter, RULES THAT THEFT INDICTMENT FAILED TO CHARGE D WITH AN OFFENSE AGAINST THE LAWS OF THIS STATE AND REVERSED THE CONVICTION. (Reversed). (Dallas County).

COMMENT: See Morgan, supra, p. 2, S.D.R.

Here, what got State into trouble, in part, was this was a multiple count indictment. After State rested her case, D moved for an instructed verdict, which was granted as to one count but denied as to other count which failed to allege that D acted with intent to deprive the owner of the property.

Panel rejected State's bootstrapping theory; i.e., that you could look to other counts and sustain Indictment. Held, "Each count of an indictment must definitely charge the commission of a distinct offense." (Reversed).

J. W. C. DAVIS REVERSES CRUELTY TO ANIMALS CONVICTION WHEN, WRITING FOR PANEL, HE FINDS INFORMATION INSUFFICIENT TO GIVE D ADEQUATE NOTICE IN HAECKER, #54,721, 10/18/78, Panel #1, 2nd Quarter. (Reversed). (Harris County).

COMMENT: Here, Information alleged that D "did then and there unlawfully, intentionally, and knowingly torture an animal, namely, a dog."

Held, The use of the term "torture" was insufficient to adequately notify the D of the crime charged.

NOTE: This is a good case to refer to for the proposition that an Indictment or Information which tracks a statute, here, Sec. 42.11, P.C., is not necessarily sufficient.

"If the language of the statute is not completely descriptive, then merely tracking the statutory language would be insufficient." Here, more was required to be alleged than merely "tortue." (Reversed).

WOW. J. DOUGLAS WRITES OPINION FOR PANEL #1, 2ND QUARTER, IN VON JANUARY, #54,734, 10/18/78, REVERSING CONVICTION WHEN JURY FOREMAN FAILED TO ANSWER THE QUESTION POSED BY DEFENSE COUNSEL ON VOIR DIRE EXAMINATION. (Reversed). (Dallas County).

COMMENT: Here, Defense Counsel asked the jury panel whether any of the prospective jurors knew members of the George Parker family, the relatives of the deceased. Dunn, a prospective juror, did not respond although he knew the family well. He became the jury foreman.

Held: The jury foreman's failure to answer the question deprived the D of his right to peremptorily challenge the prospective juror.

"When a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to him on voir dire not knowing them to be inaccurate, good ground exists for a new trial." (Reversed).

D FORD, #54,916, 10/18/78, J. W. C. Davis, Panel #1, 2nd Quarter, WINS THE WHOLE SHOOTING MATCH IN THIS D.W.I. CASE AS CASE ORDERED REVERSED AND DISMISSED AS EVID. INSUFF. TO SHOW THAT D DROVE A VEHICLE ON A PUBLIC ROAD OR A HIGHWAY. (Reversed). (Harrison County).

Held, "To sustain a conviction for driving a motor vehicle while intoxicated, the evidence must show that D drove the vehicle while intoxicated on a public road, highway, street or alley."

Case involved an accident between two vehicles at or near an intersection of a private and public road. "They found D's truck some 15 or 20 feet completely off the roadway, resting partly in a creek and against a fence, parallel to the highway, but in the quadrant between the highway and the private road." D made the statement, "I was the driver."

COMMENT: Here, it appears by the opinion, the only live testimony consisted of the two D.P.S. troopers. In my opinion, J. W. C. Davis chastised the troopers for their sloppy investigation of the facts and pointed out what they should have done: "There is no evidence of tracks leading from the highway, skid marks from the highway, a trail of water leaking from the radiator leading back to the highway, nor any indication of which way the stop sign was run over." He also chastised the prosecution: "The diagram included in the record provides no assistance."

Due to Supreme Court decision of Burks v. U.S., as the evidence was held to be insufficient, the D cannot be retried. Case ordered dismissed.

SAN ANTONIO MUNICIPAL ORDINANCE STRUCK DOWN. EMPLOYEE-HUSTLERS ARE NOW FREE TO SOLICIT DRINKS. DUBISSON AND ROSENDAHL, #54,981, 10/18/78, J. Roberts, Panel #3, 2nd Quarter. (Bexar County). (Reversed and Dismissed).

COMMENT: One D was convicted because she mingled with a spectator. Other D was convicted for soliciting a drink.

By the facts, this sounds like the usual strip joint which sells champagne. However, "With the meaning of the ordinance's definitions of "strip" and "striptease" could conceivably fall a variety of productions of acclaimed artistic value ranging from modern interpretations of Shakespeare to the contempory musical "Hair."

Held, "The ordinance in its entirety is overbroad and not subject to a limiting construction." "The City of San Antonio exceeded its general delegated police power by enacting Ordinance 46370."

COMMENT: Thus, the City Attorney's Office is sent back to the drawing board to try and draw an ordinance to protect military personnel, tourists and citizens. However, like a good Baptist once told me, during voir dire examination, people who go into those kind of places do assume the risk of what happens to them after they get inside. Moral! Don't go in there.

HERE'S A STRANGE ONE. CURTIS, #55, 158, 10/18/78, J. Douglas, Panel #1, 2nd Quarter, WAS FOUND GUILTY OF VOLUNTARY MANSLAUGHTER; "CAUSED DEATH UNDER THE IMMEDIATE INFLUENCE OF SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE." SEE SEC. 19.04, P.C. PANEL AGREED WITH D THAT THE EVID. DID NOT SHOW THIS OFFENSE WAS COMMITTED, BUT "HIS CONVICTION MUST BE SUSTAINED IF SUFFICIENT EVIDENCE WAS INTRODUCED TO SUPPORT A FINDING OF GUILT ON THE GREATER OFFENSE OF MURDER." HELD, "THERE WAS SUFF. EVID. TO SHOW THAT THE GREATER OFFENSE OF MURDER WAS COMMITTED." (Affirmed). (Travis County). D tried and convicted as a party to commission of offense.

REMEMBER. IF YOUR DEFENSE IN A D.W.I. CASE IS THAT THE D WAS NOT DRUNK FROM ALCOHOL BUT THAT HE WAS ON SOME TYPE MEDICATION, HE OR SHE CANNOT TESTIFY THEY HAD ANYTHING TO DRINK. GRISSETT, #54,728, 10/18/78, J. Douglas, Panel #1, 2nd Quarter. (Affirmed). (Harris County).

COMMENT: Here, D wanted a charge on causation; i.e., that it was either epilepsy or dilantin which caused her actions and not alcohol.

Held, "A D is entitled to a charge on another causation factor only when he denies use of alcohol and can explain his suspect actions." D testified that she had been drinking wine on the evening in question." "She did explain her post-arrest behavior by stating she had a mild seizure." "However, there was no explanation offered for her erratic driving." "Under these conditions, D was not entitled to instructions on either epilepsy or use of dilantin." (Affirmed).

TALK ABOUT CHICKEN. IN UTTER, #59,169, 10/18/78, J. T. Davis, Panel #2, 3rd Quarter, FACTS SHOWED THAT AN AUTOMOBILE ACCIDENT HAD OCCURRED. ONE OF THE DRIVERS ASKED THAT A CERTAIN CAR DEALER TOW HIS VEHICLE AWAY. CALL WAS MADE TO CAR DEALER AND THAT DEALER SAID THAT CORNISH AUTOMOBILE SERVICE DID ITS TOWING. A CALL WAS MADE TO CORNISH AND HE WAS ASKED IF THEY HAD A PERMIT AND HE, THINKING ABOUT THE PERMIT TEXAS RAILROAD COMMISSION ISSUED, SAID THEY DID. D, DRIVER, WAS DISPATCHED TO PICK UP WRECKED AUTO. AFTER ARRIVAL ON SCENE, IT WAS THEN DETERMINED DRIVER DID NOT HAVE A PERMIT FROM NORTH RICHLAND HILLS. THEN, "THE OFFICER ISSUED A CITATION TO THE DRIVER FOR OPERATING A WRECKER WITHOUT A PERMIT." "THE DRIVER WAS THEN ALLOWED TO TOW THE DISABLED VEHICLE AWAY." (Affirmed). (Tarrant County).

Held, North Richland Hills Ordinance regulating wrecker drivers upheld.

As to sufficiency of the evidence, "These facts are sufficient to show that D was engaged "in the business of motor vehicle wrecker service" in North Richland Hills without having obtained a permit from such city." (Affirmed).

CONTRARY TO THE NEWSPAPERS, REGARDING THE SPEEDY TRIAL ACT, ALL THAT WADE, #59,349, 10/18/78, J. Dally, Panel #2, 4th Quarter, HOLDS IS THAT THE SPEEDY TRIAL ACT COMMENCES ON JULY 1, 1978, AND THAT ANY TIME WHICH ELAPSED PRIOR TO JULY 1, 1978, IS NOT TO BE CONSIDERED IN DETERMINING WHETHER THE MOTION TO SET ASIDE THE INDICTMENT SHOULD BE GRANTED. (Affirmed). (Travis County).

COMMENT: Here, D filed a Motion to Dismiss on July 5, 1978, claiming that more than 120 days had elapsed since the criminal action commenced and the State had announced not ready for trial. Held, not good enough.

PANEL RULES IN BATES, #59,096, 10/18/78, J. Dally, Panel #3, 3rd Quarter, THAT IN A SEC. 46.05, P.C., EX-CON CARRYING A PISTOL CASE THAT STATE MAY MERELY ALLEGE AN OFFENSE AND THEN TACK ON "BEING A FELONY INVOLVING AN ACT OF VIOLENCE TO PROPERTY." (Affirmed). (Dallas County).

Held, "The indictment need not allege specific evidential facts to show that the burglary involved an act of violence to property; it is sufficient to allege that the burglary involved an act of violence to property."

COMMENT: Opinion does not state if a motion to quash was filed to this indictment which alleged that D "was duly and legally convicted of the felony offense of burglary, being a felony involving an act of violence to property." Or, if one had been filed, whether this would have made a difference.

PANEL OF CCA, IN ARMES, #58,902, 10/18/78, J. Dally, DISCUSSES ART. 24.08, UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSES FROM WITHOUT STATE, AND HOLDS THAT "THE DISTRICT COURT'S ORDER UNDER SEC. 24.28 [ORDERING D TO GO TO CALIFORNIA TO APPEAR BEFORE A GRAND JURY IN SAN DIEGO COUNTY, CALIFORNIA]," WAS NOT APPEALABLE TO CCA. (Writ Dismissed). (El Paso County).

J. DALLY, IN NEELY, #56,094, 10/18/78, Panel #3, 3rd Quarter, STATES THAT THE ELEMENTS OF THE OFFENSES OF UNAUTHORIZED USE OF A MOTOR VEHICLE AND THEFT ARE THE SAME EXCEPT THAT IN THEFT THERE IS THE ADDITIONAL ELEMENT OF AN INTENT TO DEPRIVE THE OWNER OF PROPERTY. (Affirmed). (Harris County).

HELD, "BECAUSE THE OFFENSE OF UNAUTHORIZED USE OF A MOTOR VEHICLE CAN BE PROVED BY THE SAME OR LESS THAN ALL THE FACTS NECESSARY TO PROVE THEFT, IT IS A LESSER INCLUDED OFFENSE OF THEFT." CF. PRE-NEW PENAL CODE CASES. Here, Evid. suff. to sustain conviction for unauthorized use of a motor vehicle.

FACT THAT MISDEMEANOR D.W.I., WHICH WAS USED FOR ENHANCEMENT PURPOSES, WAS NOT A FINAL CONVICTION DOES NOT AID EX PARTE DUNN, #58,647, 10/18/78, J. Dally, AS "THIS IS NOT A "NO-EVIDENCE CASE"; THUS, THE D MAY NOT NOW BY HABEAS CORPUS PROCEEDINGS COLLATERALLY ATTACK THE SUFFICIENCY OF THE EVIDENCE SUPPORTING HIS CONVICTION." (Writ Denied). (Dallas County).

J. DOUGLAS, SPEAKING FOR PANEL #1, 2ND QUARTER, IN NIXON #55,295, 10/18/78, RULES THAT TJ PROPERLY EXCLUDED OFFERED EVIDENCE FROM WIT, AT PUNISHMENT STAGE, THAT HE TOOK THE TRUCK BECAUSE HE PANICKED AND D DID NOT EXPECT OR ENCOURAGE HIM TO TAKE THE TRUCK. (Affirmed). (Liberty County).

HELD, "EVIDENCE OF AFFIRMATIVE DEFENSES WHICH WOULD EXONERATE THE D IS NOT ADMISSIBLE AT THE PUNISHMENT PHASE OF THE TRIAL." "THIS EVIDENCE WAS PROPERLY EXCLUDED AS NOT BEING RELEVANT AT THE PUNISHMENT PHASE OF THE TRIAL." (Affirmed).

EN BANC CCA, IN BROGGI V. CURRY, #59,289, 10/18/78, A MANDAMUS ACTION, J. Odom, with P. J. Onion not participating and with J. Vollers concurring with opinion, REAFFIRMS DECKER, #58,587, 9/20/78, Vol. V., No. 1, S.D.R., p. 12, AND AGAIN HOLDS THAT UNLESS D PERSONALLY AGREES TO RECOMMENDATION OF D.A., PER ART. 44.02, C.C.P., TJ CANNOT DENY D AN APPEAL.

EN BANC CCA, PER J. PHILLIPS, NO DISSENTS, OVERRULES S.M.R.H. IN PELEGING, #53,186, 10/18/78, See Vol. IV, No. 9, May, 1978, S.D.R., p. 5, AND AGAIN RULES STATE MUST PROVE D'S KNOWLEDGE THAT THE INSTRUMENT WAS FORGED OR THE INSTRUMENT WAS PASSED WITH INTENT TO DEFRAUD OR HARM ANOTHER. SEE ALSO STUEBCEN, 547 (2) 29. (SMRH Overruled). (Dallas County).

EN BANC CCA, PER P. J. ONION, with J. Vollers not participating, ALSO OVERRULES SMRH IN THOMAS, #59,941, 10/18/78, SEE VOL. II NO. 7, MARCH, 1976, S.D.R., P. 2, AND RULES THAT SEARCH OF D'S AUTO WAS WITHOUT PROBABLE CAUSE. (SMRH OVERRULED). (DALLAS COUNTY).

COMMENT: As to D admitting, when testifying, that pills belonged to another person, who also testified, they were in automobile, and that this constituted waiver of objection, in light of Harrison v. U.S., 392 U.S. 219, CCA RULED:

> "We find that Harrison does in fact add a corrollary to the doctrine of curative admissibility, i.e., the harmful effect of improperly admitted evidence which is obtained by illegal police practices is not cured when a D gives testimony on direct examination which establishes the same or similar facts unless the State can show that its illegal action in obtaining and introducing the evidence did not impel the D's testimony." "We did not there consider the issue whethere this corollary should be extended to apply to testimony impelled by mere evidentiary hearsay evidence."

"In applying this rule, or corrollary, to the present facts, we find that D properly objected to the improperly admitted evidence which was obtained by an illegal search and seizure by the police and there is no showing by the State that its illegal action did not impel D's testimony." "In fact, it is apparent that D would not have taken the stand if the illegally obtained evidence had not been admitted because that was the only evidence the State introduced." "D did not, therefore, waive his objection." (SMRH Overruled).

J. Dally, joined by Judges Douglas and T. Davis, vigorously dissented with opinion, stating that the Defendant waived his objection to the admission of the evidence by admitting possession of the drug. As to the problem a D faces as to whether to testify or not to testify: "It is a price that is paid for having a system of justice that generally insists upon full trials before appellate review of points of law." "It is a problem that can be avoided, within our system, only by doing what is done here, namely, reaching the wrong result as between the litigants."

COMMENT: I think the problem here is that the Court has simply put into effect a new rule of law in this State and, sub silentio, overruled all of the prior cases which J. Dally cited to support his position of waiver. However, the frightening part is that those old cases were not expressly overruled by the Majority Opinion.

However, the remarkable thing is that though Harrison v. U.S. has been on the books for over ten (10) years, (1968), and was recognized in Alvarez, 511 (2) 493, 396, in 1973, it did not fully wash upon the shores of the Travis County until this opinion was handed down. However, the Colorado River is not, at times, a tributary of the Potomac. This, of course, is my own opinion and not that of any geographer.

PANELS FOR THE WEEK OF OCTOBER 25, 1978, ARE AS FOLLOWS:

Panel #1, 4th Quarter: Judges Onion, Roberts, and W. C. Davis.
Panel #2, 2nd Quarter: Judges Dally, Douglas and Roberts.
Panel #2, 4th Quarter: Judges Odom, Phillips, and Dally.
Panel #3, 1st Quarter: Judges Vollers, Roberts and Phillips.
Panel #3, 2nd Quarter: Judges T. Davis, Roberts and Odom.
Panel #3, 3rd Quarter: Judges Dally, Douglas and Roberts.
Panel #3, 4th Quarter: Judges Vollers, Douglas and T. Davis.

DID PROSECUTOR BLOW IT IN WILKES, #55,179, 10/25/78, J. Onion, Panel #1, 4th Quarter? (Reversed). (Bell County).

COMMENT: Dallas D.P.S. office telephoned Aycock of D.P.S. Opinion does not say who called or why the call was made. Thereafter, Aycock and several other officers set up two surveillances for two (2) vehicles, a pickup with a camper and a 1975 Blazer, allegedly traveling together. One surveillance set up close to Waco and the other between Waco and Temple. Approximately, an hour later, Aycock saw the vehicles traveling on I-35 toward Temple, followed them to a restaurant in Temple, and then to the Temple Airport.

The Blazer parked in front of the terminal of the airport and the pickup drove to where airplanes were tied down and backed up to the side of an airplane. Cops were so strategically located that all they could see was: "They were moving something is all I could tell, back and forth from the pickup to the plane." Shortly after this, pickup drove to the terminal and then both vehicles drove through the main gate of the airport where they were stopped and the occupants were arrested. 572 pounds of marijuana was found in the pick-up.

Held, "The record reflects that the appellant was seen driving the 1975 Blazer to the Temple airport. Agent Tucker testified that the Blazer parked in front of the terminal of the airport and did not proceed with the pickup camper to where the airplanes were parked. Nowhere does the record indicate that appellant came into contact with the airplane in question or that he was present when the pickup truck parked next to the airplane. In fact, the record reflects that he was inside the Blazer, which was parked some distance away. Although he was seen driving the Blazer, the record shows that the owner of the Blazer was Walden. Moreover, no contraband was shown to have been found on appellant's person or in the Blazer. There was no showing that airplane seats were placed in the Blazer on the night in question, no evidence of furtive gestures toward the contraband, no attempt to escape no evidence of marihuana smoke, no evidence of the appellant being under the influence of marihuana or other drugs, and no incriminating statements at the time of the arrest. While not above suspicion when viewed in the light most favorable to the jury's verdict, we cannot conclude the evidence is sufficient to affirmatively link the appellant to the contraband seized in the other vehicle."

Due to Burks v. U.S. and Green v. Massey, D cannot be tried again because of double jeopardy clause.

COMMENT: Although not mentioned, Colston, 511 (2) 10. appears to be a white horse case on the fact that the gendarmes had no probable cause to stop the vehicles in the first place. So, either lack of legal possession or lack of probable cause sank the good ship "Texas."

J. ROBERTS SAYS IN BENTON, #54,594, 10/25/78, Panel #3, 2nd Quarter, with J. T. Davis dissenting with opinion, THAT MERELY BECAUSE D WAS DRIVING IN A NEIGHBORHOOD WHERE APPROXIMATELY 3 RECENT BURGLARIES HAD OCCURRED, AT APPROXIMATELY 4:45 O'CLOCK A.M. AND LITTLE OTHER TRAFFIC INVOLVED, THAT THE STOP BY POLICE OFFICER WAS THE PRODUCT OF AN INARTICULATE HUNCH WHICH LED TO AN UNCONSTITUTIONAL SEARCH. (Reversed). (Randall County).

COMMENT: See also Tunnell, 554 (2) 697, and Scott, 549 (2) 170, cited and discussed in the opinion.

Here, probably what also sank the good ship "Texas" was the cop's honesty as he testified that to him probable cause is where "a vehicle is being driven in a part of town that I know shouldn't be there on my beat." "I may stop him just to see what he's doing." Here, it appears that another patrol unit had been following the D's car, but all they could get on the D was the fact that he would go to an intersection, turn right, then go a distance and turn right, etc. Just circling the blocks.

J. T. Davis, in his dissent, felt that just because the officer screwed up on his knowledge of probable cause law that this was not good enough to nullify the stop as this officer was told by the other officers that the D was trying to elude them. "The officer's action in stopping the vehicle D was driving to determine his identity or to maintain the status quo momentarily while obtaining more information was reasonable."

J. ODOM FINDS FUNDAMENTAL ERROR IN JACKSON, #59,716, 10/25/78, Panel #2, 4th Quarter, WHERE D CHARGED WITH POSSESSING A DANGEROUS DRUG, TETRACYCLINE, BUT STATUTE DID NOT SPECIFICALLY DESIGNATE TETRACYCLINE AS A DANGEROUS DRUG. (Reversed and Dismissed). (Dallas County).

COMMENT: See Crockett, 511 (2) 519, the Talwin drug case, cited and discussed in the opinion.

J. T. DAVIS FINDS SECTION 13 ERROR IN ARDEN, #55,248, 10/25/78, Panel #3, 4th Quarter, with J. Vollers, joined by J. Douglas, concurring in the result. (Reversed and Dismissed). (Harris County).

COMMENT: This was an Indictment for aggravated promotion of prostitution and, based upon Chance, 563 (2) 812, because the Indictment failed to allege an essential element of the offense, the culpable mental state "knowingly," it was fundamentally defective.

D MATTE HAS A SMART ATTORNEY. HE FILED A MOTION TO QUASH MOTION TO REVOKE PROBATION, WHICH CCA SAID SHOULD HAVE BEEN GRANTED. MATTE, #57,438, 10/25/78, J. Vollers, Panel #3, 1st Quarter. (Reversed). (Jefferson County).

COMMENT: Here, D charged with violating probation by knowingly making a false written statement to a licensed firearms dealer. D's motion to quash went to fact that motion did not say what type of false statement D made nor did it identify the person to whom the statement was made.

Here, due to 18 U.S.C. Sec. 922(a)(b) which provides for many different kinds of false statements, which can result in a violation of Federal law, CCA held, "The conclusory allegation that D made a "false written statement to a licensed firearm dealer" was not sufficient, in the face of his timely exception, to give D sufficient notice for which he could prepare for the hearing on such motion." "It did not inform him of the nature of the statement made so that he could properly prepare to prove that it was not false or to prove that it was not material." "D was denied due process of law." (Reversed).

PANEL OF CCA, IN NELSON, #55,252, 10/25/78, J. T. Davis, SAYS THAT A RIFLE IS JUST AS GOOD AS A GUN AND ALLEGING IN MURDER CASE SHOOTING EDGAR EARL HUME WITH A RIFLE, RATHER THAN A GUN, IS O.K. (Affirmed). (Dallary County). Held, "The State was pleading more specifically than it was required to do."

COMMENT: By the opinion, it does not appear that one may have self-defense as a matter of law in a murder case. The evidence, by the opinion, was undisputed that the deceased pulled a pocket knife on the D, advanced toward the D, who went and got his rifle and returned, whereupon the deceased lunged at him and D fired once, killing the deceased. "Although raised by the evidence in this case, self-defense and defense of another are to be determined by the trier of fact." (Affirmed).

J. ODOM, WRITING FOR PANEL #3, 4TH QUARTER, IN ROOKS, #56,284, 10/25/78, TELLS US DEFENSE LAWYERS TO THROW AWAY THOSE OLD COMMON LAW PLEADING BOOKS AS "THE TREND IN THE LAW REGARDING ALLEGATIONS OF PRIOR CONVICTIONS HAS GENERALLY BEEN TOWARD RELAXATION OF THE RIGID RULES OF THE PAST." (Affirmed). (Harris County). See Holliins, supra, p. 6.

COMMENT: Thus, it is now permissible for the State, regarding prior convictions, to allege the wrong court but the right county and cause number; alleging no court but the right cause number and county; and alleging wrong court but right cause number and right county.

This rule of law is to deter "tricky" defense lawyers. "To hold otherwise would produce pointless and unjustificable distinctions in the law to befuddle the attentive and trap the unwary." Does this mean that we are smarter than our trial judges? Or, does it mean that the inattentive can trap the wary. Or, does it mean the unwary are trapped by the attentive? No, it appears to mean that the State can now allege that a D was previously convicted and the burden is on the D to show to the contrary.

WATCH OUT IF YOU HAPPEN TO BE IN BELL COUNTY. IN MORANO, #58,968, 10.25.78, J. Dally, Panel #3, 3rd Quarter, IT WAS POINTED OUT THAT IN MOST CASES THE JUDGES THERE DO NOT ALLOW PLEA BARGAINING AND USE SOME KIND OF GUIDELINE IN ASSESSING PUNISHMENT. (Bell County). (Affirmed).

COMMENT: Here, D entered a PC and apparently made it on the guideline but the TJ, nevertheless, thought he should go to the pen. Held, No error in refusing D to withdraw his PG.

There is a lot of dicta about guidelines in the opinion, without setting out just what those guidelines might be. "The use of guidelines properly formulated will return to TJs their discretion in assessing punishment and sentencing Ds, which they have lost because of plea bargaining." "We should encourage those seeking to eliminate disparity in assessment of punishment and in returning the proper discretion to trial judges." "Sentencing guidelines may help accomplish these laudable goals."

COMMENT: This appears to be a plea for judge sentencing in our state courts, which many trial judges and most prosecutors, for whatever reason, want, and which, most, if not all defense lawyers, have nightmares over.

DID THE D'S GOOD INTENTIONS CAUSE HIM TO BE DENIED COUNSEL IN HARRIEL, #54,845, 10/25/78, J. Dally, Panel #2, 2nd Quarter? (Affirmed). (Jefferson County).

COMMENT: The D, while in custody, was indicted and bail set at $5,000.00. D thought bail was $15,000.00 and wrote TJ on this, with TJ telling him his bond was $5,000.00, but that when he had counsel his request for reduction of bail could be presented again. TJ also told him that if he signed the affidavit of indigency forms, counsel would be appointed for him.

D finally made the $5,000.00 bond and when he made appearance in court, he told TJ that although he had filed a motion for a speedy trial, that he no longer needed a speedy trial but now needed a job so he could hire an attorney. The case was reset, but on the next court date, D still had no attorney and the case was set for trial.

On the day the case was set for trial, the D still had no attorney. The TJ, to protect his record, entered conclusory finds: D out on private surety bond. D told court he was capable and intended to employ private counsel. TJ found, without any facts stated, that D had the present ability to secure funds in order to obtain private representation.

The TJ, however, appointed an amicus curiae attorney, who was to sit, but not take an active part in the trial of the case, but was to be available for consultation should D so desire to consult with him.

After the D was convicted and his case was put on appeal, he was appointed counsel, but later retained private counsel.

Held, "We hold that the TCT did not err in failing to find the D indigent, or in failing to appoint counsel when the D refused to execute an affidavit of indigency." (Affirmed).

COMMENT: This, of course, is a recurring problem in our courts. In many instances, some TJs think that where a D can pay a private bondsman his fee that this makes the individual able to afford counsel. When the individual shows up in court without counsel, this causes all sorts of problems. The TJ is upset because the D is without counsel but is out on bond. The prosecutor is put in an unethical position as for him to talk to the D he is then wearing two hats. So, what to do? Some TJs, as here, put the D to trial without counsel. Others, however, put the D in jail by revoking or raising his bond and then appointing him an attorney. I don't know what the solution is but if we all don't get together and come up with some joint solution between the TJs, the prosecutors and the defense bar, we can all bet our bottom dollar that the Federals are going to step in and tell us how to solve the problem and then we can bitch about the Federals taking over the State courts.

CCA'S PANEL, IN ANTWINE, #55,203, 10/25/78, J. Vollers, Panel #4, 4th Quarter, REJECTS D'S CONTENTION THAT BECAUSE THE JURY TOLD THE TJ IT WAS HOPELESSLY DEADLOCKED AND WANTED THE EVIDENCE REOPENED BECAUSE THE EVIDENCE PRESENTED WAS INSUFFICIANT AND INCONCLUSIVE, AND A MISTRIAL WAS THEREAFTER DECLARED, THAT THIS CONSTITUTED A FINDING OF NOT GUILTY. (Affirmed). (Dallas County).

Held, This did not constitute an informal verdict under the provisions of Art. 37.10, C.C.P.

IF YOU FILE A MOTION FOR SEVERANCE, PER ART. 36.09, C.C.P., RE PREVIOUS ADMISSIBLE CONVICTION AGAIN ONE D, YOU MUST PROVE THIS UP. IN SAUNDERS & SPENCER, #55,244 & 245, 10/25/78, J. T. Davis, Panel #3, 4th Quarter, D FAILED TO PROVE THAT PRIOR CONVICTION WAS ADMISSIBLE. (Affirmed). (Harris County). THUS, NO ERROR IN OVERRULING MOTION TO SEVER.

COMMENT: CCA's panel also ruled that D was not entitled to know location of witness; i.e., his present address. Cf. Alford v. U.S., 282 U.S.687; and Smith v. Illinois, 390 U.S. 129.

Panel also ruled that it is O.K. to tape record conversations between D and police witness, and use these against D at his trial.

Panel declined to write on distinction between use of tape as best evidence or a witness' testimony of what was on the tapes as bolstering or best evidence

Panel also held that when Ds themselves corroborated the officer's testimony, no instruction as to the corroboration of the officers' testimony was required in this criminal solicitation of capital murder case.

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speedy trial at any time or moved to set aside the motion to revoke in view of the delay.

IV. RIGHT TO BAIL

A. Misdemeanor Revocation

1. A probationer, convicted of a misdemeanor, is entitled to bail, as the reasons for holding the probationer in jail are not so compelling as are those in a felony case.
   Ex parte Smith, 493 S.W.2d 958 (Tex.Crim. App.1973)

B. Felony Revocation

1. The Court of Criminal Appeals has held that Art. I § 11 of the Texas Constitution, protecting the right of bail, does not apply to a probationer who has been arrested for a probation violation. *Ex parte Jones*, 460 S.W.2d 428 (Tex.Crim.App. 1970)
   As the Court said
   "The petitioner (probationer) is thus not entitled to bail as a matter of right pending a hearing on the State's motion to revoke probation." 460 S.W.2d at 431
   See also *Valdez v. State*, 508 S.W.2d 842 (Tex. Crim.App.1973)
2. Effective June 19, 1975, Art. 42.12 § 8 (a) of the Code of Criminal Procedure was amended to read as follows:
   "*If the defendant has not been released on bail,* on motion by the defendant the court shall cause the defendant to be brought before it on a hearing within 20 days of filing of said motion."
   a. In construing this amendment, the Court of Criminal Appeals noted that while a legislative amendment may not alter the scope of constitutional protection (Art. I § 11, Texas Constitution), the amendment raised the question of whether Art. 42.12 § 8 (a) now created a statutory right of bail. The Court held that while a probationer is still not entitled to bail as a matter of right pending a hearing on the State's motion to revoke probation, a probationer may be granted bail by the trial court in the exercise of that court's sound discretion. *Ex parte Ainsworth*, 532 S.W.2d 640, 641 (Tex.Crim.App.1976)
   b. In construing the "within 20 days" requirement, the Court of Criminal Appeals has held that the failure of the trial court to grant a hearing after the motion for probation revocation within 20 days after a request, as required by Art. 42.12 § 8 (a) C.C.P., entitled the defendant to a dismissal of the motion.
      Ex parte Trillo, 540 S.W.2d 728 (Tex.Crim. App.1976)
      1) Habeas corpus was the proper remedy whereby the court released the defendant on bond and denied his request that the motion to revoke be dismissed.
         Trillo, supra
      2) Author's note: The Court of Criminal Appeals in *Trillo* seems to be saying that the 20 day requirement of Art. 42.12 § 8 (a) is mandatory, and that non-compliance with its terms requires a dismissal of the motion to revoke.

V. ROLE OF THE TRIAL JUDGE IN REVOCATION OF PROBATION PROCEEDINGS

A. Jurisdiction
   The court which granted probation is the court which has the jurisdiction to revoke probation.

B. Role of the Judge at Hearing
   Since the probationer is not entitled to a jury, the trial judge is the sole trier of facts in a revocation proceeding; he alone determines the credibility of the witnesses and the weight to be given to their testimony. The judge may accept or reject any part of the evidence offered.
   Vance v. State, 478 S.W.2d 535 (Tex.Crim.App. 1972)

C. Judicial Notice

1. The trial judge in a revocation proceeding may take judicial notice of the indictment, the judgment, the order placing the defendant on probation, the probation officer's motion to revoke, the warrant, and the show cause notice. No proof of such exhibits is required.
   Cannon v. State, 479 S.W.2d 317 (Tex.Crim. App.1972)
   a. See *Cleland v. State*, No. 54,099, May 31, 1978, in which it was held that testimony on which the court took judicial notice is not generally included in the record on appeal.
2. Where the alleged violation is a new offense, and the probationer has been tried on the new offense, the judge may take judicial notice of those facts shown at trial *if* he presided over the trial.
   Barrientez v. State, 500 S.W.2d 474 (Tex.Crim. App.1973)
   Stephenson v. State, 500 S.W.2d 855 (Tex.Crim. App.1973)
   But, see also *Bradley v. State*, 564 S.W.2d 727 (Tex.Crim.App.1978)

D. If probation is revoked, the court should proceed with the case as if there had been no grant of probation. See Art. 42.12 § 8 C.C.P.

1. Reduction of Sentence
   Art. 42.12 § 8 provides that where probation is revoked and the court determines that the best interests of society and of the probationer will be served by a shorter term of imprisonment, the court may reduce the term of imprisonment originally assessed to any term *not less than* the minimum prescribed for the offense of which probationer was convicted.

E. In revoking probation, the trial court should make findings of fact and conclusions of law and have them set out in the order; the order should then be entered into the minutes.

1. NOTE: A written order revoking probation will control over an oral pronouncement of the trial judge.
   Albon v. State, 537 S.W.2d 267 (Tex.Crim.App. 1976)
   Jimenez v. State, 552 S.W.2d 469 (Tex.Crim. App.1977)
   a. In *Clapper v. State*, 562 S.W.2d 250 (Tex. Crim.App.1978), the written order revoking probation contained the finding:

"[O]n the 5th day of May, S.D., 1976(appellant did) commit the offense of auto theft. . . ."

There was no request for more specific findings. The Court of Criminal Appeals held that, absent such a request, the failure of the trial court to make specific findings in the order did not constitute reversible error.

cf., Mason v. State, 495 S.W.2d 248 (Tex.Civ. App.1973)

VI. RECURRING ERRORS

A. Fundamental Defects in the Primary Conviction

1. Defects in Indictment

a. *General Rule*

An indictment which fails to allege an offense was committed by the accused is insufficient to support a conviction. A conviction which is based on an indictment which fails to state an offense against the law is void.

American Plant Food Corp v. State, 508 (2) 598 (Tex.Crim.App.1974)

b. If the indictment is insufficient to support a conviction, the prosecution should be dismissed.

c. *Examples*

1) *Pickett v. State*, 542 S.W.2d 868 (Tex.Crim. App.1976)

Probation granted after a conviction of assault with intent to rob, under the former penal code, was not a valid conviction where the indictment on which it was based failed to "aver ownership of the property taken."

2) *Timms v. State*, 542 S.W.2d 424 (Tex.Crim. App.1976)

Probation granted after a conviction for Criminal Mischief was based upon a fundamentally defective indictment when it failed to allege "that the offense was committed without the effective consent of the owner."

3) *Standley v. State*, 517 S.W.2d 538 (Tex. Crim.App.1975)

Probation granted after a conviction of conversion by bailee was based upon a fundamentally defective indictment which failed to allege the "value of the property."

a. Without such value alleged, there is no way to determine if the District Court had jurisdiction and no way that punishment could be properly determined.

b. Indictment is void *ab initio* (fails to state an offense), and would be subject to attack by a habeas corpus proceeding.

4) *Kasper v. State*, 547 S.W.2d 633 (Tex.Crim. App.1977)

Probation granted after a conviction for "burglary"; indictment charged "burglary of a private residence at night." The indictment was held insufficient to support the conviction, as a burglary conviction cannot be supported by an indictment charging burglary of a private residence at night.

5) *Baker v. State*, 547 S.W.2d 627 (Tex.Crim. App.1977)

Probation granted following a conviction of conspiracy to sell marijuana. The Court of Criminal Appeals held that since the criminal conspiracy provisions as set forth in § 15.02 of the Penal Code do not apply to the Controlled Substances Act, the conviction is based on an indictment which does not allege an offense against the laws of the State and hence is void.

2. Because of the Judgment entered

a. Examples

1) *Thomas v. State*, 525 S.W.2d 172 (Tex.Crim. App.1975)

Probation was granted after defendant entered a plea of guilty to burglary of a private residence at night with the intent to commit a felony; the court held that, as the judgment (burglary) did not reflect a conviction for the crime charged in the indictment, the conviction in the primary offense was void.

2) *Gonzales v. State*, 527 S.W.2d 540 (Tex. Crim.App.1975)

Probation for *5* years was granted following a conviction for assault to murder without malice. As the maximum punishment by statute at the time of the offense was *3* years, the punishment was set aside.

3) *Lechuga v. State*, 532 S.W.2d 581 (Tex. Crim.App.1975)

Probation for 3 years was granted following a plea of guilty to the offense of defrauding with a worthless check. The court thereafter granted a new trial and later, again on a plea of guilty, assessed a 5 year term of probation. The judgment was reversed by the Court of Criminal Appeals. As the Court said:

"Because the record contains neither reasons for the increase in punishment, nor factual data upon which such an increase could have been based, the judgment of the court assessing punishment must be vacated." 532 S.W.2d 581, 582; *cf., Ex parte Bowman*, 523 S.W.2d 677 (Tex. Crim.App.1975); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969)

4) In *Pedraza v. State*, 562 S.W.2d 259 (Tex. Crim.App.1978), probation was granted for 2 years following a conviction of the misdemeanor offense of assault. The Court of Criminal Appeals held that while it was improper to place appellant on probation for a 2 year term, since the maximum term for the offense of which he was convicted was 1 year, the order was void only to the extent it purported to subject appellant to probationary supervision beyond the time authorized by law.

3. Defects when primary conviction was under a general statute, when a special statute on the same matter governed the general statute.

a. If a special statute provides a misdemeanor punishment, the district court is without jurisdiction.

b. See *Sarratt v. State*, 543 S.W.2d 391 (Tex. Crim.App.1976) in which a 2 year probation was assessed for "unlawful possession of a criminal instrument, to wit: a forged prescription." There were 2 statutes dealing with the possession of a forged prescription; pro-

bationer had been indicted under the general statute rather than the special statute. The Court of Criminal Appeals held that the defendant should have been charged under the special statute prohibiting possession of a forged instrument.
See also *Ex parte Harrell*, 542 S.W.2d 169 (Tex. Crim.App.1976)

4. Evidence obtained as a result of an illegal search
   a. It is error to assume that revocation of probation proceedings operate under a relaxed set of evidentiary rules regarding search and seizure and the admission of the fruits thereof.
   b. Examples
      1) *French v. State*, 546 S.W.2d 612 (Tex. Crim.App.1977)
      Probation was improperly revoked when marijuana was found pursuant to a void search warrant.
         a) Here, warrant was not issued by a magistrate, but by an additional (temporary) municipal judge appointed under an invalid ordinance.
      2) *McDougald v. State*, 547 S.W.2d 40 (Tex. Crim.App.1977)
      Where the defendant violated no traffic law while driving his vehicle on highway, and committed no offense in the officer's presence, and the officer had no knowledge that defendant had committed a crime, the officer was not authorized to make an investigatory stop, and any evidence obtained by a search of defendant's vehicle following such a stop could not be considered by a court in a revocation proceeding.
      See also *Luera v. State*, 561 S.W.2d 497 (Tex.Crim.App.1978)
      3) *Moore v. State*, 562 S.W.2d 484 (Tex. Crim.App.1978)
      Where probable cause to justify the search of the probationer's van without a warrant was not shown, the seizure of marijuana found in the van was illegal. Since the seized marijuana should have been suppressed, there was insufficient evidence before the court to support its finding that appellant violated condition (1) of the conditions of his probation by possessing more than 4 ounces of marijuana.
      See also *Beckworth v. State*, 551 S.W.2d 414 (Tex.Crim.App.1977)

VII. APPEALS

A. Art. 42.12 § 8 provides that when a probationer is notified that his probation is revoked for violations of the conditions of that probation, and he is called on to serve a sentence in jail or the penitentiary, the probationer may appeal the revocation.
   1. Art. 44.04 allows bond pending appeal under certain conditions.
   2. NOTE: The sole issue on appeal of a revocation of probation hearing is whether the trial judge abused his discretion in revoking probation.
   Gonzales v. State, 456 S.W.2d 53 (Tex.Crim.App. 1970) and cases cited therein.
   3. NOTE: An appeal from an order revoking probation does not include a review of the original conviction except in cases of fundamental error such as a fatally defective indictment.
   Traylor v. State, 561 S.W.2d 492 (Tex.Crim. App.1978) and cases cited therein.

B. Habeas Corpus
To successfully use the writ of habeas corpus to challenge the authority of the trial court to revoke probation, the probationer must show that the sentence was void and subject to collateral attack for want of authority to pronounce it.

C. Collateral Attack
The Court of Criminal Appeals, in *Ex parte Moffet*, 542 S.W.2d 184 (Tex.Civ.App.1976) created an exception to the rule prohibiting collateral attack on the sufficiency of the evidence by holding that a collateral attack of an order revoking the defendant's probation is permissible where the revocation order was based on *no* evidence.
cf., Wolfe v. State, 560 S.W.2d 686 (Tex.Crim. App.1978)

TCDLA BRIEF BANK SERVICE

The term "Brief Bank" is misleading insofar as it implies the existence of a bank of reference materials located in the TCDLA office available for checkout. The Brief Bank is actually a service available to TCDLA members. Its purpose is twofold: 1) to provide accurate and inexpensive research and 2) to perform tasks in Austin which, because of inconvenience or expense, an active attorney in or out of Austin cannot do.

When a member wants a case briefed, he should send the fact situation to the Brief Bank and specify the points of law he needs researched. Austin is a depository for many legal references and documents. The sources of these are the U.T. Law Library, the Supreme Court Library, the Legislative Reference Library and the State Library. The U.T. Law Library is a brief depository for many of the Texas Courts of Appeals, the Texas Supreme Court, the Fifth Circuit Court of Appeals, and the U.S. Supreme Court. Information may also be obtained from the records of cases that have been appealed to the Court of Criminal Appeals and the Supreme Court.

Using these sources, the law clerk researches the facts and the law and prepares a short original memorandum of law or locates a recent appellant brief on a similar point and xeroxes it for the member. The appellant brief will usually provide the citations to other pertinent cases as well as rationale used by other lawyers in a like case. In some cases a good law review article can be located on the point in question.

The other facet of the Brief Bank is a service designed to perform various odd jobs in Austin which may benefit TCDLA members, such as obtaining documents and various other information from state agencies or the courts.

The Brief Bank can obtain virtually any information or material found in the various agencies and departments in Austin. A common request is for copies of very recent opinions which may be obtained from either the Supreme Court or Courts of Criminal Appeals.

We have spent a number of weeks updating our billing files and mailing lists, and now feel that only current paid members are receiving our publications.

If your fellow lawyers complain about not having received the *VOICE*, and the Attorney General's Crime Prevention newsletters, you can now be safe in assuming they have not paid their dues. You should encourage their support of this Association, and urge them to renew their memberships.

nuts, bolts and a screwdriver

Marvin Teague

COMMENT: *AS WE ARE ALWAYS LOOKING FOR THINGS MEMBERS OF THE ASSOCIATION ARE DOING, AS TO MATTERS THAT MAY BE OF INTEREST TO OTHER MEMBERS OF THE ASSOCIATION, I PLAN, FOR THE COMING YEAR, TO INCLUDE A PAGE OR TWO IN THE REPORT ON THIS; SO, LET ME HEAR FROM YOU.*

J.P. DARROUZET, OF AUSTIN, HAS BEEN WORKING DILIGENTLY IN A CAPITAL MURDER CASE ON THE APPLICABILITY OF THE ADMINISTRATIVE PROCEDURES ACT TO THE METHOD OF KILLING SOME OF OUR FELLOW CITIZENS BY THE STATE OF TEXAS. LIKE SO MANY OF US EXPERIENCE REGARDING SOMETHING NEW, HE HASN'T FOUND, TO DATE, ANYONE IN THE JUDICIAL SYSTEM WHO WILL ADOPT HIS ARGUMENT. HOWEVER, IF INTERESTED IN THIS ASPECT OF THE CAPITAL MURDER LAW OF TEXAS, WRITE J.P. IN AUSTIN FOR A COPY OF WHAT HE HAS FILED IN *EX PARTE POWELL*.

IN REFERENCE TO THE DEATH PENALTY, MEL BRUDER AND HIS "YOUNG TURKS" OF DALLAS, WHO ARE ALWAYS TRYING TO HELP TRIAL JUDGES *NOT* COMMIT REVERSIBLE ERROR, HAVE COME UP WITH THE THEORY OF "DESERT." "THE CONCEPT OF DESERT IS ONE WHICH IS EMBODIED IN THE CONSTITUTION, AND ANY SYSTEM OR SCHEME OF PUNISHMENT–ESPECIALLY CAPITAL PUNISHMENT–WHICH EFFECTIVELY REMOVES THIS CONCEPT IN ITS APPLICATION IS UNCONSTITUTIONAL." YOU MIGHT CONTACT MEL ON THIS AS I HONESTLY BELIEVE, IF NOTHING ELSE, IT WILL GET YOUR CLIENT ANOTHER COUPLE OF WEEKS AS IT WILL REALLY MAKE YOU SCRATCH YOUR HEAD TO UNDERSTAND HIS THEORY. HOPEFULLY, IT MIGHT ALSO MAKE SOME JUDGE SCRATCH HIS HEAD. IF NOT, MAYBE SOME OTHER PART OF THE ANATOMY.

I AM HOPING WHEN "RACEHORSE" GETS THROUGH WITH THE CULLEN DAVIS TRIAL, (THE PRESENT ONE), HE WILL SIT DOWN AND WRITE A PAPER ON HOW TO BEST ATTACK BODY MIKES THAT ARE NOW SO PREVALENT IN THE ACCUSATORIAL PROCESS. I DO NOT KNOW ABOUT OTHER PLACES, BUT HERE IN HOUSTON MANY OF OUR POLICE OFFICERS ARE CARRYING TAPE RECORDERS WITH THEM AND, WHEN THEY STOP A SUSPECTED D.W.I. DRIVER, THEY FLIP IT ON. AS ONE DEFENSE ATTORNEY, WHO REPRESENTED ANOTHER LAWYER ON A D.W.I., RECENTLY TOLD ME: "I COULDN'T BELIEVE HE SAID ALL OF THAT, AS HE TOLD ME HE WAS A DEACON IN THE CHURCH AS WELL AS A LAWYER."

IT IS WITH DEEP REGRET THAT I INFORM YOU, IN CASE YOU ARE NOT AWARE, OF THE RECENT UNTIMELY DEATH OF HONORABLE GERALD APPLEWHITE OF HOUSTON. GERALD WAS ONE OF THOSE GEMS IN OUR LEGAL PROFESSION AND WAS A CREDIT TO THE DEFENSE BAR OF THIS STATE. HE WILL BE SORELY MISSED BY THOSE OF US WHO KNEW HIM.

DON'T SEND YOUR KID TO VET SCHOOL. BY 1990, IT IS ANTICIPATED THERE WILL BE 8,000 TOO MANY VETS IN EXISTENCE.

A CIVIL CASE WHICH COULD POSSIBLY HAVE FAR-REACHING EFFECTS OCCURRED IN HOUSTON ON SEPTEMBER 1, 1978. ONE OF OUR COUNTY COMMISSIONERS SUED ANOTHER PERSON OVER A PERSONAL DEBT. AFTER A TRIAL, AS BEST AS I CAN FIGURE OUT, THE OTHER PERSON WON. THE COMMISSIONER THEN FILED A SLANDER SUIT. THE OPPOSING COUNSEL, WHEN CONTACTED BY THE PRESS, MADE CERTAIN COMMENTS, AMONG WHICH WERE: "DOES HE INTEND TO SUE THE JURY AS WELL?" A TRIAL COURT JUDGE GRANTED THE COMMISSIONER A NEW TRIAL. THE LAWYERS ON THIS CASE WERE BRUCE JAMISON AND L. GILES RUSK OF HOUSTON.

A NEW FACE IN TOWN, SEE ART. 332D, V.A.T.C.S., IS THE PROSECUTORS COORDINATING COUNSEL. AMONG OTHER THINGS, THEY HAVE THE JOB TO "ACCEPT AND INVESTIGATE COMPLAINTS OF PROSECUTING ATTORNEY INCOMPETENCY AND MISCONDUCT." I AM NOT REALLY SURE JUST WHAT THESE PEOPLE WILL DO, OTHER THAN I SAW WHERE OSCAR McINNIS WILL NOT BE PROSECUTING CASES ANY LONGER DUE TO A LAWSUIT THESE PEOPLE FILED IN EDINBURG, BUT IT SEEMS THAT BY THE TERMS OF THE ACT, IF A PROSECUTOR IS TOTALLY AND WHOLLY AN UNPROFESSIONAL TYPE INDIVIDUAL, THEY CAN TAKE ACTION AGAINST THAT PERSON. THE PROBLEM I HAVE IS WHETHER THE ACT ONLY AFFECTS THE "MAN" HIMSELF OR DOES IT ALSO INCLUDE HIS UNDERLINGS. IF IT IS LIMITED ONLY TO THE FORMER, THEN IT SEEMS TO ME THE LEGISLATURE JUST WASTED THE TAXPAYERS' MONEY IN PASSING THIS LEGISLATION. IF IT INCLUDED THE LATTER, THEN IT HAS MERIT, FOR MANY TIMES A LOCAL GRIEVANCE COMMITTEE WILL NOT TOUCH THIS TYPE COMPLAINT WITH A TEN FOOT POLE. HOWEVER, THIS GROUP, IF IT HAS THE POWER, COULD DO WONDERFUL THINGS IN THE PROSECUTION AREA OF THE CRIMINAL JUSTICE SYSTEM CONCERNING THOSE FEW UNETHICAL AND UNSCRUPULOUS PROSECUTORS IN OUR SYSTEM WHO GIVE MANY OF THOSE WHO PROSECUTE CRIMINAL CASES A BAD NAME.

IN HANDLING ROBBERY CASES, HAVE YOU EVER HAD THAT GUT FEELING THAT THE PERSON ROBBED REALLY DID NOT GET ROBBED? IN DALLAS, A CASHIER OF A STORE WAS ARRESTED FOR AGGRAVATED PERJURY COMMITTED ON A D WHO WAS CHARGED WITH ROBBING THE STORE IN WHICH SHE WORKED. THE NEWSPAPER ARTICLE DID NOT SAY WHAT BROUGHT THIS ABOUT, WHICH OCCURRENCE WAS DISCOVERED *AFTER THE TRIAL*. IF ANYONE HAS THE DETAILS OF THIS, LET ME KNOW AND WE WILL DO A FOLLOW-UP. THE ARTICLE SAID IT WAS THE FIRST TIME AGGRAVATED PERJURY CHARGES HAD BEEN FILED IN DALLAS COUNTY. THIS HAS GOT TO MAKE DALLAS COUNTY THE MOST TRUTHFUL METROPOLITAN COUNTY IN THE STATE, IF NOT THE COUNTRY, IF THAT IS TRUE. ■

A PRIMER ON TEXAS PAROLE

Robert Udashen*

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Parole is the release of an inmate from the Texas Department of Corrections after he has served a portion of his sentence. While on parole, the inmate remains in the continued custody of the state and subject to conditions that permit his reincarceration in the event of misbehavior. The basic purpose of parole is to provide for the rehabilitation of the inmate outside of the prison walls.[1]

Article 4, Section 11 of the Texas Constitution authorizes the Governor to grant reprieves, pardons, and commutations of punishment on the written recommendation of the Board of Pardons and Paroles (sometimes referred to herein as the Board).[2] While the Governor is not bound to follow the recommendation of the Board, he may not grant a parole not authorized by the Board.[3] The Governor has the power to grant a lesser included form of parole than is recommended by the Board, but he may not grant a greater form.[4]

The Board of Pardons and Paroles is composed of three full-time members.[5] One is appointed by the Governor, one by the Chief Justice of the Supreme Court, and one by the Presiding Judge of the Court of Criminal Appeals.[6] The Board is assisted in its work by six Parole Commissioners.[7] In matters of parole, parole revocation, and mandatory supervision[8] revocation, the Board members and Commissioners may act in panels comprised of three persons.[9] In these areas, the Commissioners have the same duties and authorities as the Board members.[10]

Parole Eligibility

Article 42.12 of the Code of Criminal Procedure establishes the date of an inmate's minimum legal eligibility for parole.[11] The parole law in effect at the time of the commission of the offense determines how the eligibility date is calculated.[12]

For offenses committed between August 29, 1977, an inmate is eligible for parole after receiving credit for one-third (1/3) of his sentence or twenty (20) years, whichever is less.[13] This is based on credit for calendar time served plus any "good time"[14] earned by the inmate. On August 29, 1977, an amendment to Article 42.12 made it more difficult for some offenders to receive an early parole eligibility date.[15] Today, a person convicted of certain aggravated offenses or whose judgment contains an affirmative finding that a deadly weapon was used in the commission of the offense will be eligible for parole only after his actual calendar time served equals one-third (1/3) of his maximum sentence or twenty (20) calendar years, whichever is less. In no event will these offenders be eligible for parole in less than two (2) calendar years. A person under sentence of death is not eligible for parole. All other offenders are eligible for parole under the same rules that applied between August 28, 1967 and August 29, 1977.[16]

The use of the term eligibility does not mean that the inmate is entitled to or will be granted a parole as a matter of right.[17] It is merely that time when the Board's statutory authority to parole may be employed.[18]

In 1977, the 65th Legislature added a new form of community supervision for offenders released from prison.[19] If an inmate is not paroled, he will be released to mandatory supervision when his calendar time served, plus any accrued "good time," equals the maximum term to which he was sentenced. The period of mandatory supervision will be the maximum term of the sentence minus the calendar time actually served. A prisoner released to mandatory supervision is deemed as if released to parole, with the same provisions made for his supervision and reincarceration.[20] Mandatory supervision applies only to persons whose offenses were committed on or after August 29, 1977.[21]

Factors Affecting the Parole Decision

The decision to release an inmate on parole comes after a close evaluation of his or her readiness to re-enter the free world. A person is not paroled until it is shown that it is in the best interests of the community to have him back.[22]

While many factors enter into the determination to parole an inmate, some of the more important are:

1. The Criminal history of the inmate.
2. The inmate's habitual use of alcohol or narcotics.
3. The inmate's attitude toward the crime committed.
4. The inmate's adjustments and improvements in prison.
5. The inmate's family background.[23]

After studying all the available information, a three member parole panel (composed of various combinations of Board members and commissioners) determines whether to recommend the inmate's parole to the Governor.[24]

Parole Conditions

If parole is recommended by the Board and approved by the Governor, the inmate is offered his release from prison subject to his agreement to abide by certain rules.[25] The inmate is given a Parole Certificate setting forth the conditions of his release. His signature on the Certificate forms a contract between him and the State. In general, the inmate must agree to be supervised by a parole officer, to remain employed, to request permission to travel beyond the boundaries of the counties adjoining the county to which he is paroled, to avoid excessive use of liquor, to obey all laws, etc.[26] The Certificate also states that any violation of the conditions of parole can cause the parole to be revoked.[27]

Revocation of Parole

A violation of the conditions of parole can constitute grounds for the parolee's revocation and return to prison. The Governor has the exclusive power to revoke paroles.[28] The Board of Pardons and Paroles may recommend a revocation to the Governor.[29]

With the approval of the Governor, the Board is authorized to issue two classes of warrants for parole violators: (1) Pre-revocation Warrants which direct the arrest of a paroled prisoner before a parole is revoked by the Governor; and (2) a Revocation Warrant which directs the arrest of a paroled prisoner after the Governor has ordered a revocation of parole.[30]

When a Pre-revocation Warrant is issued, the parolee is entitled to two hearings: an On-Site Hearing at or near the location of the alleged violation[31], and a Parole Violation Hearing before a Parole Panel at the Texas Department of Corrections in Huntsville.[32] These hearings may be waived by the parolee.[33]

The On-Site hearing provides an opportunity for the parolee to be advised of the charges against him and to confront any witnesses against him. The

parolee is entitled to be represented by an attorney at this hearing. The hearing is conducted by a District Parole Officer.[34]

The purpose of the Parole Violation Hearing is to advise the accused parolee of how he is alleged to have violated the terms of his parole. The parolee is entitled to present evidence rebutting the allegations against him or establishing any mitigating circumstances. The Parole Violation Hearing is not of an adversary nature but is merely a fact-finding procedure. Upon review of the evidence presented, the parole panel decides whether to continue the person on parole or to recommend to the Governor that the parole be revoked.[35] If the Governor accepts the recommendation, a Revocation Warrant is issued and the parolee is remanded to the custody of the Texas Department of Corrections.[36] Should the decision be made to continue the person on parole, the Pre-revocation Warrant is withdrawn and the parolee is released.[37]

When a person's parole is revoked, he may be required to serve that portion remaining of the sentence on which he was released, such portion being calculated without credit from the date of his release to the date of revocation.[38]

Conclusion

Parole is an important concern of every felony defendant. It is thus the responsibility of the criminal defense attorney to understand the basics of the parole process so that he can accurately explain to his client the minimum eligibility requirements and the relevant considerations in making an early parole.

FOOTNOTES

[1] See generally TEX. CODE CRIM. PROC. ANN. art. 42.12 (Pamphlet Supp. 1978).
[2] TEX. CONST. art. IV, § 11. Also see TEX. CODE CRIM. PROC. ANN. art. 42.12 (Pamphlet Supp. 1978) and art. 48.01 (1966); *Ex parte Lefors*, 303 S.W.2d 394, 397 (Tex.Crim.App. 1957); *Clifford v. Beto*, 464 F.2d 1191, 1194 (5th Cir. 1972).
[3] *Ex parte Lefors, supra* at 398.
[4] *Id.*
[5] TEX. CONST. art. IV, § 11; TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13 (Pamphlet Supp. 1978).
[6] TEX. CONST. art. IV, § 11.
[7] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 14A (Pamphlet Supp. 1978).
[8] *Id.* at § 15(c).
[9] *Id.* at § 14A(i).
[10] *Id.* at § 14A(e).
[11] *Id.* at § 15(b).
[12] Tex. Laws 1977, ch. 347, § 7 at 934.
[13] TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966).
[14] "Good time" is a special time classification that in general allows an inmate to earn extra credit for every day served flat (calendar time). TEX.REV.CIV. STAT.ANN. art. 6184L (1971).
[15] TEX. CODE CRIM. PROC. ANN. art. 42.12 (Pamphlet Supp. 1978).
[16] *Id.* at § 15(b). (The aggravated offenses referred to are: capital murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, and aggravated robbery.) Cf. *Jackson v. State*, 403 S.W.2d 145 (Tex.Crim.App. 1966), *cert. denied* 385 U.S. 938 [A person assessed a life sentence is eligible for parole.]
[17] TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15 (Pamphlet Supp. 1978); *1978 Handbook On Parole, Mandatory Supervision, And Executive Clemency of the Texas Board Of Pardons And Paroles* at 21 (hereinafter cited as *Handbook*).
[18] *Id.*
[19] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(c) (Pamphlet Supp. 1978).
[20] *Id.*
[21] Tex. Laws 1977, ch. 347, § 7 at 934.
[22] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(f) (Pamphlet Supp. 1978).
[23] *Handbook*, at 23-26.
[24] TEX. CODE CRIM. PROC. ANN. art. 42.12 § 12, 14A, 15 (Pamphlet Supp. 1978); Rule 2.05.03.01.001, Statewide Rules, Texas Board of Pardons and Paroles.
[25] Rules 2.05.03.02.001-.007, Statewide Rules, Texas Board of Pardons and Paroles; *Clifford v. Beto*, 464 F.2d 1191, 1195 (5th Cir. 1972).
[26] Rules 2.05.03.02.001-.007, Statewide Rules, Texas Board of Pardons and Paroles.
[27] *Id.*
[28] *Id.* at § 22.
[29] *Id.*
[30] Rules 2.05.03.03.001-.011, Statewide Rules, Texas Board of Pardons and Paroles.
[31] *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972).
[32] *Id.* at 487-488.
[33] Rule 2.05.03.03.003(d), Statewide Rules, Texas Board of Pardons and Paroles.
[34] *Morrissey v. Brewer, supra* at 485-487; Rule 2.05.03.03.005(c), Statewide Rules, Texas Board of Pardons and Paroles.
[35] Rules 2.05.03.03.001-.011 and 2.05.04.03.001-.003, Statewide Rules, Texas Board of Pardons and Paroles.
[36] Rule 2.05.03.03.010, Statewide Rules, Texas Board of Pardons and Paroles.
[37] Rule 2.05.03.03.007, Statewide Rules, Texas Board of Pardons and Paroles.
[38] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 22 (Pamphlet Supp. 1978); *Ex parte Sellars*, 384 S.W.2d 351, 352 (Tex.Crim.App. 1964); *Betts v. Beto*, 424 F.2d 1299, 1300 (5th Cir. 1970).

The TCDLA membership is comprised of brilliant, innovative and highly inspired men and women who battle daily for the specialty of Criminal Defense Law. We would like to urge you to contribute your thoughts in the form of articles for publication in *YOUR* magazine, the *VOICE for the Defense*. Please send us any and all things you have expressed your ideas in: unique or unusual briefs, motions–any food for thought which would be helpful to all of your fellow criminal defense attorneys. Any contribution will be greatly appreciated.

Your TCDLA office needs to know if you have changed your phone number or address within the last year. We want to have our membership list absolutely correct. Please call or write if you need to report a change.

Thank you.

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I certify that the statements made by me above are correct and complete.
(s) Judy Bolander
Exec. Asst. to the President

MINUTES OF
BOARD OF DIRECTORS MEETING
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
DALLAS
September 23, 1978

10:15 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, Vincent Perini, Robert Jones, Charles McDonald, Jack Beech, David Bires, Russell Busby, Raymond Caballero, Tony Cantu, David Carlock, Allen Cazier, Gene de Bullet, Louis Dugas, W.V. Dunnam, Buck Files, Kerry FitzGerald, Oliver Heard, Jan Hemphill, Clif Holmes, Edward Mallet, Charles Rittenberry, Stanley Weinberg, Rodger Zimmerman, Ronald Zipp, Richard Anderson, Richard Harrison, Robin Pearcy, Larry Sauer, Michael Thomas, David Evans, Weldon Holcomb.

EXCUSED ABSENCES Gerald Goldstein, Clifford Brown, Charles Butts, Waggoner Carr, Anthony Constant, Boots Krueger, Pat Priest, Thomas Sharpe, Richard Thornton, Doug Tinker, Stanley Topek.

UNEXCUSED ABSENCES Harry Nass, Michael Gibson, Grant Hardeway, Stuart Kinard, Robert Salinas, Pete Torres, Francis Williams, Bennie House, Willis Taylor, Charles Burton, Keith Alaniz, R.L. Whitehead, James Bobo, Frank Maloney, C. Anthony Friloux, Phil Burleson, George Gilkerson, Emmett Colvin.

BUSINESS George Luquette gave the floor to Vincent Perini, who introduced Wayne Baker of the Texas Association of Polygraph Examiners. Mr. Baker, a polygraph operator, expressed to the Board his desire for the use of the Association mailing list for the purpose of conducting a survey of our members. He is interested in sending a list of questions regarding the use of polygraph examinations to our members. He would like the members' opinion of how the examinations were done, with questions regarding the examiner, and whether the use of it assisted them in plea bargaining. A general discussion followed. He asked the Board for permission to use the Association's envelopes, letterhead and postage for the survey, which would be compensated for. George Luquette moved to refer the question to the Executive Committee, seconded by Ron Zipp. The motion was passed unanimously. Bob Jones moved to waive the reading of the minutes of the August 12th board meeting with two changes on the attendance record. Committee reports followed, with Charles McDonald asking to delay the Budget report until the September financial statement had been prepared. A report of the Dallas membership drive given with Vincent Perini stating 11 new members were obtained for a total of $900.00. Jan Hemphill thanked all of the out of town Directors who worked the Drive. Those names were: Larry Sauer, Weldon Holcomb, Allen Cazier and George Luquette. George Luquette stated he was in the process of sending over 300 letters to the delinquent and prospective members from Houston. These would be done at his own expense. Clif Holmes showed the board the small *VOICE* for the month of September, adding the importance of Marvin Teague's Significant Decisions Report. Discussion followed on the handling of the mailing list, with the suggestion of updating and maintenance of the list to be done in the office, and not by the computer method now used. This was referred to Executive Committee by George Luquette.

The next Board meeting was set on Saturday, November 11, 1978, to be held in El Paso, with a membership drive on Friday, November 10th.

Bob Jones discussed the need to be made aware of the Sunset Commission Bar Act. President Luquette stated that Waggoner Carr was absent from this meeting because he was attending a Sunset Commission meeting.

MOTION Oliver Heard moved that "this Association support the State Bar Reinactment Act." The motion was seconded by Richard Anderson. Discussion followed that a list of Sunset Advisory Board members be sent to the board for the purpose of expressing our support of the State Bar Reinactment Act.

MOTION George Luquette expressed to the Board a request from Marvin Teague to obtain the slip opinions from the U.S. Court of Appeals, Fifth Circuit, which would be beneficial in writing the Significant Decisions Report. Bob Jones moved that the reports be ordered for Marvin Teague, with payment for them being made by the Association. This was seconded by Russell Busby, and the motion passed.

General discussion from the floor followed on various topics, with the central issue being representation of indigents, and the demand for quality work for low pay.

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 meeting was adjourned at 11:45 a.m.

Respectfully Submitted,
Judy Bolander
Exec. Asst. to the Pres.

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

Some of the best legal minds

. . . in this state already belong to the Texas Criminal Defense Lawyers Association. We believe we have now the best Criminal Defense Bar in the United States. The way we maintain that level of excellence is continuously to seek out new minds, new energies. Therefore we want YOU . . . if your legal and personal philosophies are compatible with our *purposes and objectives:*

- To provide an appropriate state organization representing those lawyers who are actively engaged in the defense of criminal cases.
- To protect and insure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases.
- To resist proposed legislation or rules which would curtail such rights and to promote sound alternatives.
- To promote educational activities to improve the skills and knowledge of lawyers engaged in the defense of criminal cases.
- To improve the judicial system and to urge the selection and appointment to the bench of well-qualified and experienced lawyers.
- To improve the correctional system and to seek more effective rehabilitation opportunities for those convicted of crimes.
- To promote constant improvement in the administration of criminal justice.

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Admitted to Practice in: _____

Law School (Name, degree, date) _____

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Professional Organizations in which applicant is member in good standing:

_____

_____

_____

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

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(Date) (Signature of Applicant)

ENDORSEMENT

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

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(Signature of Member)

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