VOICE for the DEFENSE

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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IN THIS ISSUE

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Criminal Defense Lawyers

Association

MARCH 1979

GUEST EDITORIAL
(with comment)

The following editorial appeared in the December 22, 1978, issue of the Dallas *Morning News*. For those who missed it, we offer it here, with Brother Holcomb's response. We believe them worth reading, and *pondering*.

Criminal Decisions:

And What of Justice?

BACK IN the 1950s the Texas Court of Criminal Appeals was celebrated far and wide for its prowess at the great indoor sport of nitpicking. If there was a nit in sight, the court would pick it; as, for example, in the famous "tea and coffee case," where their honors reversed a murder conviction on grounds that the indictment had not specified the substance in which the victim had been drowned.

Matters improved for a time thereafter, with the election of judges visibly more committed to the broader considerations of justice than to the picayunish pondering of technicalities.

Even so, there came this week a jarring reminder that every generation breeds its own nitpickers. The criminal appeals court reversed two capital murder convictions on the narrowest of grounds.

The conviction of Elmer Wayne Henley, charged in the homosexual slayings of six Houston youths, was overturned because the judges objected to the lack of consideration given a defense request to move the trial out of San Antonio. Likewise reversed was the conviction of Ignacio Cuevas, sole survivor among the convicts who tried to shoot their way out of Huntsville State Prison in 1974. The court ruled, 5-4, that the defense had used up its last peremptory challenge excluding a prospective juror the judge should have dismissed.

Three dissenting judges in the Henley case argued that the refusal to change venue—after it had been changed already from Houston to San Antonio—was "harmless." The defendant's argument that pretrial publicity damaged his case could not stand: "To demand that a criminal defendant be tried in a community untouched by the news media is to demand that our judicial system function in a fantasy world."

In the Cuevas case, the four dissenters took similar exception. The prospective juror in question had, on the basis of the court record, been no rabid hangman; there was no reason for the judge, rather than the defense, to dismiss him.

In any case, a layman might say to all this, what about justice? The job of the courts is fairly to establish guilt or innocence, not to stage the perfect trial for the delectation of legal connoisseurs. Punishment of the guilty, vindication of the innocent—such are the wider imperatives of justice. What have the Cuevas and Henley decisions to do with these imperatives? They are pieky in the extreme; they are bad law.

Likewise the layman might inquire what can be done about such decisions. There is plenty that can be done. Candidates of proved or presumptive concern for the broader ends of justice can be elected to the criminal appeals court, and candidates of the nitpicking variety can be rejected.

Of course the matter is less easy than it looks, thanks to citizen apathy. For example, one of the court's truly distinguished judges is Jim Vollers, a man who in running last spring for re-election affirmed his belief that nitpicking is out of place; that the rights of society are equal at least to those of the accused. He dissented in both the Henley and Cuevas cases.

In the primary, Vollers was soundly defeated by a candidate whose Christian and middle names are those of a great Texas hero.

That is one reason we have the kind of criminal appeals court we do—because the voters care, but not nearly enough.

Dallas *Morning News*
Dallas, Texas

Re: Dallas *Morning News* Editorial

Dear Sir:

Your Editorial "And What of Justice?" was read with great interest by the undersigned. No one should be surprised at the Editorial. The owner of a newspaper in a free country with the First Amendment to the Federal Constitution standing in its corner may express its opinions on any subject so long as they are deemed "Public Figures" or "Public Institutions" and can be considered within the realm of "reasonable comment."

Naturally the Courts expect to be criticized when they "follow the law" if it does not coincide with the view point of the media, but thankfully, in the State of Texas we have a Supreme Court for Criminal Matters (the Court of Ciminal Appeals of Texas) consisting of nine Judges elected statewide by a free electorate that has been fully informed by all the media, written, vocal and pictorial, including endorsements and non-complimentary Editorials and comments.

So we have been blessed with your Editorial of December 22, 1978. As a matter of information, the Court of Criminal Appeals during the year 1978 affirmed 2,018 cases and reversed 174, an 8% reversal. In 1977 the Court of Criminal Appeals affirmed 1,885 cases and reversed 273, a 13% reversal. In 1976 they affirmed 1,689 and reversed 230, a 12% reversal. In 1975 affirmed 1,378 and reversed 136, a 9% reversal. In 1974 affirmed 1,502 and reversed 142, a 9% reversal. In 1973 affirmed 1,433 and reversed 142, a 9% reversal. In 1972 affirmed 1,065 and reversed 128 or 11% reversal. (These figures are from the reports submitted to the Governor of the State of Texas, Office of Court Administration and Texas Legislative Budget Board as required by law.)

You will note from the above percentages, that beginning with 1972 the percentage of reversals dropped from 11% to 9% for the following three years of 1973, 1974 and 1975 and rose to 12% and 13% in 1976 and 1977 and returned to the downward scale of 8% in 1978. For those who are interested this is rather predictable because in 1965 the Texas Legislature passed a new Code of Criminal Procedure to govern the trial of criminal cases in the State of Texas and the Law became effective on January 1, 1966. Ordinarily under the best conditions it takes a three to five year period to get the "bugs" worked out of the newly passed laws that the Legislature in its wisdom has given to the public and the Bar to utilize. Then in 1973 the Legislature, in its wisdom, passed an entirely new Penal Code defining offenses, abolishing offenses and altering the scope and punishment of other offenses. The new Penal Code became effective January 1, 1974, and the new laws worked their way through the Appeal system and we see this reflected in the increase in reversals during 1976 and 1977 and the subsequent lowering of the trend back to 8% in 1978.

The real tragedy appears to be the misconcept of those who are supposed to be our leaders in the educational field of the media where you find isolated cases taken and utilized to crucify the system of justice that has brought us this far in our State and Nation's history. Comments are often heard that a case was reversed on "a technicality;" "of violation of due process;" or a case is reversed on the "technicality" of "jury misconduct."

Your editorial asked the question "and what is justice." The truth is that "justice" in its noblest sense is not what you and I desire the result to be but that the law as propounded and written is interpreted impartially and enforced impartially. Justice is not what the Defendant wants the result to be nor is justice the result that the Prosecution desires that it be. If the law brings the wrong results,

(Continued on page 35)

Clif Holmes

Editor's Corner

Spring at last. Dogwoods, roses, redbuds, azaleas, and legislation in bloom. We can all enjoy Mother Nature's handiwork along the highways and byways, but to enjoy the blooms which might burst forth from our legislative branches requires some serious gardening, pruning, and fertilizing. *David Spencer*, our resident Austin gardener, is busy with his tools. Thus far he's been able to pull some insidious weeds which have appeared between our legislative rows, and has adeptly pruned a few mutated blossoms. But with the fertilizer now being spread indiscriminately by prosecutorial horticulturists and hard-line husbandmen, we need, desperately need, a corps of field hands to do a little weed-chopping and bug killing. In the last issue of the *VOICE* we called on our members to get active. Our response has been less than gratifying. We're calling once again. *Please* take the time to sharpen your hoe, get between the rows and cut some weeds. Your daddy must have told you, as mine did me, there's no substitute for hard work. Right now, before you turn this page, dictate a letter to your legislator. Take a position and tell him you are concerned. Then, write or call *David Spencer*. Volunteer your services. Your efforts could spell the difference between a successful session and a calamity.

LEGISLATIVE NOTES

David Spencer
TCDLA
Legislative Representative

There is a recent development in the Legislature about which I am sure you will all be concerned. Two bills that would authorize wiretapping by state law enforcement agencies were heard in the Senate subcommittee on March 27. George Luquette, Vince Perini, David Bires, and Ed Mallett came to Austin and testified against the bills. The mood of the subcommittee was decidedly hostile at that time and the bills appeared to be dead; however, after two redraftings, which included many stringent restrictions on the use of wiretaps, Senate Bill 981 by Howard finally received enough affirmative votes to be reported favorably from subcommittee on April 17. It will probably be heard in the full Senate Jurisprudence Committee on April 24. I expect it to be reported favorably from committee as soon as it comes up. It should reach the floor of the Senate sometime the week after that. It is important that as many people as possible express their views to their senators and representatives. This bill is high on the Governor's list of priorities and there will be a big push to get it passed. Obviously a lot of unfavorable public reaction will help those legislators who will be opposing it. Please let your legislators know how you feel.

Bills providing for judicial sentencing, requiring notice of alibi defense, restricting parole eligibility for major crimes, and allowing expanded joinder of offenses also face hostile subcommittees and will probably not get to the floor any time soon. However, the atmosphere of this legislature is somewhat more law-and-order oriented than it has been in the last few years, and the possibility of these and other state-oriented measures passing is somewhat greater this year.

S.B. 168, forfeiture of money derived from drug deals, was amended on the floor of the House to provide that forfeiture proceedings must be brought within ten days after seizure of the property. The Senate concurred in that amendment. The "reasonable doubt" standard of proof was put in the bill in place of the "preponderance of the evidence" test. It was sent to the Governor on April 2nd. I'm pretty sure we can expect him to sign it.

One bill about which we should be concerned is H.J.R. 97. This is a resolution proposing a constitutional amendment to give the State the right to appeal from trial court rulings which (a) hold a statute to be unconstitutional, (b) grant a motion to quash, dismiss or suppress, or (c) grant an instructed verdict prior to submission to the jury. This is obviously a matter of importance to the defense bar. Similar resolutions have failed to pass the legislature in past years (it takes a two-thirds vote for a constitutional amendment), but this year the measure is in a very friendly committee, and has been sent to a very friendly subcommittee (Reps. Bob Close, Ray Keller, and John Sharpe). You should start letting your legislators know your feelings about H.J.R. 97 as soon as possible. It will probably be coming out of subcommittee in short order.

Most of the bills in the Association's legislative package are bottled up in the Senate Subcommittee on Criminal Matters. Because of conflicts in committee meetings, they haven't been able to get enough votes to vote them out for several meetings in a row. However, we're hoping to have them out by the middle of April.

This next month is going to be crucial. Any bill that is not out of committee by the end of April is probably dead. Please be ready to respond to any urgent matters that I bring to your attention.

As I have said before, I'll try to provide any information I can to anyone with a particular concern. However, with the pace of the committee hearings being what it is, my time is becoming more and more limited. However, I will certainly try to let everybody know when important matters, such as oral confessions, come up.

BILLS INTRODUCED

SB 711 By Santiesteban and Longoria, Amending Sec. 3.63, Family Code. Relating to a temporary allowance that may be granted on divorce or annulment—REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 750 By Mauzy. Relating to the right to representation by counsel in criminal proceedings and compensation for appointed counsel. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 970 By Brooks. Amending Title 132, R.C.S. Relating to a criminal offense for the purchase or sale of tickets for admission to entertainment events at a price in excess of the established price. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 981 By Howard. Amending Chap. 18, C.C.P. Relating to the interception and use of wire or oral communications.

(Continued on page 32)

President's Report

The curtains are being drawn on the final acts of this year's legislature, and many feel that it well may be the final curtain for the integrated Bar under the judicial system as we have known it in the state of Texas.

The Sunset Committee will destroy the State Bar if a bill is not obtained before the close of this present legislature. That is to say, the State Bar as an agency would terminate as a matter of law, and all assets would revert back to the state of Texas.

Whereas the Bar could live with the recently adopted Senate Bar Bill, it is my understanding that we face a very hostile House committee and an unfriendly nonlawyer Speaker of the House. Strangely enough, it seems that most of our troubles began with disgruntled members of the Bar who are in the legislature. However, their cry is now being carried by many outside the legal profession who feel it is now beneficial to their political careers to jump upon lawyers.

The Bar has generally been influential enough to stop any bill coming out of the legislature that was harmful. However, today we must get a favorable one out of this legislature or fall victim to the Sunset legislation.

The Speaker of the House is unmovably entrenched in the belief that all funds, from no matter what agency, should go into the general fund, and all agencies should be governed through yearly appropriations by the legislature. The chairman of the Governmental Committee, Charlie Evans, a lawyer and member of the Bar is very hostile towards the State Bar and confidently stated that time is running out on the State Bar of Texas. It is from his committee that we must obtain a workable bill to maintain the State Bar.

Now is the time for all lawyers, whether you have grievances against the Bar or not, to take a stand. We can stand idly by and let the legislature regulate our funds through their Appropriations Committee and use our license fees for revenue so we may then be no better off than the liquor licensee and/or the dance hall licensee, and pay $400-$500 a year to operate a law office.

Our existence is on the line. The only way we can stop such legislation is for each member of the Bar to contact his or her representative and let him/her know how you feel. It would not hurt if you were able to have all your nonlawyer friends and family also contact their state representatives—remember, time is of the essence—so I'll waste no more of your time with telling you about this and hope you go grab your state representative by the ear and let him know that you are interested in special interest legislation—your own—so until then I shall remain—

George Luquette

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
1979 Nominating Committee

Braniff Club—Dallas
April 4, 1979

3:25 p.m.
The meeting was called to order by Chairman, C. David Evans

Members Present:
C. David Evans, Charles McDonald, Doug Tinker, David Bires, Weldon Holcomb, Jack Beech, Clifford Brown.

Appeared before Committee:
Thomas Sharpe, Robert Jones, Vincent Perini

Excused Absence:
Raymond Caballero

The 1979 Nominating Committee, after due considcration, unanimously recommends for nomination as Officers:

President-Elect:	Robert D. Jones, Austin
1st Vice President:	Charles McDonald, Waco
2nd Vice President:	Clifford Brown, Lubbock
Sec'y-Treas.:	Harry Nass, San Antonio
Asst.Sec'y-Treas.	*Doug Tinker*, Corpus Christi

By unanimous approval, the Nominating Committee recommends for *nomination* as Directors:

Jack Beech, Fort Worth—Renominated
David Bires, Houston—Renominated
James Bobo, Odessa—Replacing Clifford Brown, Lubbock
Allen Cazier, San Antonio-Renominated
Louis Dugas, Orange—Renominated
W. V. Dunnam, Waco—Renominated
Richard Anderson, Dallas—Replacing F. R. "Buck" Files
William F. "Bill" Alexander, Dallas—Replacing Kerry Fitz-Gerald
Larry Sauer, Houston—Replacing L. J. "Boots" Krueger
Edward Mallett, Houston—Renominated
Robert G. Turner, Houston—Replacing Richard Thornton
Donald Dailey, Corpus Christi—Replacing Doug Tinker
Gerald Goldstein, San Antonio—Replacing Francis Williams
Ronald Zipp, Edinburg—Renominated

By unanimous approval, the Nominating Committee recommends for nomination as Associate Directors:

Jimmy Don Carter, Fort Worth—Replacing Bennie House
George L. Thompson, Lubbock—Replacing Willis Taylor
Ron Goranson, Dallas—Replacing Richard Anderson
Rusty Duncan, Decatur—Replacing Charles Burton
Richard Harrison, Dallas—Renominated
David Spencer, Austin—Replacing Keith Alaniz
Robert Joseph, Sinton—Replacing Robin Pearcy
James F. Pons, San Antonio—Replacing Larry Sauer
J. C. "Rusty" O'Shea, Lubbock—Replacing R. L. Whitehead
Charles Scarborough, Abilene—Replacing Jim Bobo
Michael Thomas, Fort Worth—Renominated
James H. Kreimeyer, Jr., Belton—New

The meeting was adjourned at 5:50 p.m.

Respectfully submitted,
Judy Bolander
Exec. Asst. to the President

MINUTES OF
BOARD OF DIRECTORS MEETING
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
AUSTIN
February 3, 1979

10:10 — 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, Bob Jones, Charles McDonald, Jack Beech, David Bires, Charles Butts, Ray Caballero, Tony Cantu, Waggoner Carr, Gene de Bullet, Louis Dugas, W.V. Dunnam, Jr., Buck Files, Jr., Grant Hardeway, Jan Hemphill, Clif Holmes, L.J. "Boots" Krueger, Pat Priest, Robert Salinas, Larry Sauer, Thomas Sharpe, Richard Thornton, Stanley Topek, Stanley Weinberg, Francis Williams, Rodger Zimmerman, Ron Zipp, Richard Anderson, Charles Burton, Richard Harrison, Keith Alaniz, C.W. (Robin) Pearcy, Michael Thomas, Frank Maloney, David Evans, Weldon Holcomb.

EXCUSED ABSENCES — Clifford Brown, Russell Busby, Allen Cazier, Anthony Constant, Michael Gibson, Oliver Heard, Ed Mallett, Doug Tinker, Benny House, R.L. Whitehead, James Bobo.

UNEXCUSED ABSENCES — Harry Nass, Gerry Goldstein, David Carlock, Kerry FitzGerald, Stuart Kinard, Charles Rittenberry, Pete Torres, Willis Taylor, Tony Friloux, Phil Burleson, George Gilkerson, Emmett Colvin.

OTHERS PRESENT — John Boston, Criminal Defense Lawyers Project, and David Spencer, Legislative Representative, TCDLA.

BUSINESS — The minutes of the November 11, 1978 board meeting were discussed, and with a motion by George Luquette, were approved.

MOTION — The January 26, 1977 Reception (co-sponsored by TCDLA); for the Court of Criminal Appeals Judges was discussed, and a motion made by George Luquette to reimburse Weldon Holcomb for the nine tickets purchased by him for the clerks of the court. This motion was seconded by Bob Jones, and authorization was given for payment of $90.00. John Boston, Project Director of the CDLP gave a general presentation to the board regarding the seminars held, and the procedures for recruiting speakers for them. He discussed the grant which would begin its new fiscal year on April 1st, and financial control of the budget by the CJD and the State Bar. He stated he has no control of the funds, and works with a financial reporting system maintained by Bar personnel.

Cullen Smith has appointed a Committee to study this grant, and problems, which will report at their April meeting. TCDLA input is necessary to insure proper representation of this Association's stand regarding the grant and administration of it, because the State Bar is seeking total control.

At this time David Spencer gave a status report of pending legislation. The proposed legislation was discussed, with special emphasis regarding the Speedy Trial Act, Oral Confessions, evidentury searches, and wiretapping. A column will be printed monthly, to keep the members updated on current legislative happenings in the *Voice*.

MOTION — A motion was made by C.W. (Robin) Pearcy that the Association oppose S.B. 216 by Longoria. This is a venue bill in regard to marijuana offenses, and would allow prosecution in any adjacent county in the same judicial district. The motion was seconded by Bob Jones. George Luquette gave recognition to Waggoner Carr for his Chairmanship of the Legislative Committee, who adopted our nineteen bill package, and gave thanks to him from the Association and Board for a job well done. Frank Maloney then discussed the Langdon vs. State case that he was filing an Amicus Curiae brief in the Association's behalf.

MOTION — A motion was then presented by George Luquette regarding Robert Jones, and the duties he has been performing as Second Vice President. Since July 15, 1978 the office staff has presented him with the Association's Federal, State, County and City government reporting forms in all aspects required by them. These he has inspected and signed in behalf of the Association, as its appointed officer. This duty, along with all check signing, had earlier been assigned him by President Luquette, as per the guidelines as set in the By-Laws. By formal motion, these actions and duties were approved and supported by a unanimous vote of all present.

The next Board meeting was then announced, as being held in Tyler on March 31, 1979 at 10:00 a.m., at the Sheraton. Arrangements for this meeting have been made by Director, Buck Files. The meeting was adjourned at 12:30.

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

SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

MARCH, 1979
VOLUME V, NO. 7

THE FIRST WEEK IN MARCH WAS NOT TOO EXCITING IN AUSTIN EXCEPT AT ONE OF THE BUS STATIONS.

PANELS FOR THE WEEK WERE COMPOSED OF THE FOLLOWING JUDGES.

Panel #1, 1st Quarter: Judges Odom, Douglas and Roberts.
Panel #2, 1st Quarter: Judges Phillips, Onion, T. Davis and C. Keith.

JUVENILE CASES STILL COMING IN.

EX PARTE GLOSTON, #58,695, 3/7/79, J. Dally, En Banc, Unanimous; EX PARTE YTUARTE, #57,995, 3/7/79, J. Dally, En Banc, Unanimous; EX PARTE JUAREZ, #58,182, 3/7/79, J. Dally, En Banc, Unanimous, ALL GET THEIR WRITS GRANTED BECAUSE OF FAILURE TO AFFORD THEM AN EXAMINING TRIAL AND NOTHING SHOWN TO SHOW WAIVER OF THAT RIGHT. (Writ Granted). (Jefferson County). (Writ Granted). (Jefferson County). (Writ Granted). (Howard County). See also Infra, pp. 5, 16, of this S.D.R.

> "Absent a waiver made pursuant to V.T.C.A., Family Code, Sec. 51.09(a), the failure to afford a juvenile who has been certified as an adult an examining trial before he is indicted renders the indictment void." "A void indictment may be successfully attacked in a collateral proceeding."

FUNDAMENTAL ERROR CASES, REGARDING AGGRAVATED ROBBERY OFFENSES, ALSO STILL COMING DOWN.

LEE, #56,469, 3/7/79, J. Odom, Panel #2, 1st Quarter, and BOLTON, #56,289, 3/7/79, J. Phillips, Panel #1, 1st Quarter, EACH GET REVERSALS DUE TO TJ CHARGING JURY ON ALTERNATIVE THEORY OF CULPABILITY AND ENLARGING UPON WORDING OF INDICTMENTS.

In Lee, supra, Indictment alleged that D placed the C/W in fear of imminent bodily injury and death. The charge, however, authorized a conviction if D either threatened or placed the C/W in fear of imminent bodily injury or death. (Reversed). (Ector County).

In Bolton, supra, Indictment alleged that D intentionally and knowingly threatened and placed the C/W in fear of imminent bodily injury and death. The charge, however, authorized a conviction if the jury found that D caused bodily injury, caused serious bodily injury or found that D threatened or placed the C/W in fear of imminent bodily injury or death. (Reversed). (Harris County).

TJ TELLING JURY THAT IT COULD ASSESS A FINE AND A JAIL TERM AND PROBATE THE JAIL TERM ONLY RESULTS IN POINTER, #56,624, 3/7/79, Commissioner Keith, Panel #1, 1st Quarter, GETTING A NEW TRIAL. (Reversed). (Harris County).

COMMENT: As previously mentioned, see, for example, Franklin, #53,310, 12/20/78, "In authorizing the jury to probate either the fine or the jail time and to exact from the D that portion of the penalty not probated, the court fell into error."

J. DOUGLAS, IN EX PARTE WILSON, #58,646, 3/7/79, Panel #2, 1st Quarter, BASED UPON WAGES, 573 (2) 804, RULES THAT D DID NOT HAVE INEFFECTIVE COUNSEL FOR FAILURE OF TRIAL COUNSEL TO ADVISE THE D OF HIS RIGHT TO SEVERANCE. (Writ Denied). (Bexar County).

HELD, THE AGGREGATION PRINCIPLE ENUNCIATED IN SEC. 31.09, P.C., OPERATES TO CREATE ONE OFFENSE. IT IS AXIOMATIC THAT YOU CANNOT SEVER ONE OFFENSE. THUS, HERE, THE D HAD NO RIGHT TO SEVER THE THEFT CHARGES WHICH WERE AGGREGATED TO MAKE THE OFFENSE A THIRD DEGREE FELONY. He, therefore, did not have ineffective coun-counsel for failure to urge a motion to sever. Compare, however, Waythe, 533 (2) 802, and Overton, 552 (2) 849.

Panels for Week of March 14, 1979.

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

IDEM SONANS IS STILL WELL, LIVE AND VIABLE IN AUSTIN, TEXAS.

IN ESCOBAR, #56,888, 3/14/79, Panel #2, 1st Quarter, J. Odom, PANEL REVERSED AND ACQUITTED THE D WHEN INDICTMENT ALLEGED THE COMPLAINANT TO BE DAN WIEDERHOLD BUT THE WITNESS TESTIFIED AT TRIAL HIS NAME WAS DONALD RAY WIEDERHOLD. HE ALSO TESTIFIED ON CROSS EXAMINATION HE HAD NOT EVER BEEN KNOWN AS DAN WIEDERHOLD.

HELD, "That testimony, we conclude, constitutes evidence that the witness' name, "Donald," and the alleged name, "Dan," are patently incapable of being sounded the same." Record perfected also as D made a motion for instructed verdict on this issue at trial. (Reversed). (Travis County).

BUT: This holding would not bar a prosecution for the residence of Donald Wiederhold, but that to so prosecute this D it would be necessary to re-indict him.

COMMENT: This latter holding is difficult to understand under the doctrine of collateral estoppel. Compare Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971).

EX PARTE LARRY JAMES SANDERS, #60,221, 3/14/79, Panel #2, 1st Quarter, J. Roberts, with J. Douglas dissenting without opinion, GETS WRIT GRANTED WHEN PANEL RULES THAT PRIOR CONVICTION OF D, USED FOR ENHANCEMENT, WAS VOID BECAUSE IT WAS MADE FINAL AT A PROBATION REVOCATION PROCEEDING WHEN D HAD NO COUNSEL. (Writ Granted). (Tarrant County).

COMMENT: The State argued the case of Loud v. Estelle, 556 F.2d 1326, where the Fifth Circuit held in part:

> "We affirm the district court's ruling that petitioner did not enjoy a constitutional right to counsel or to be present at his 1960 probation revocation hearing. Even though Gagnon v. Scarpelli does require that there be a revocation hearing and that probationers be present, its procedural protections, like those of Morrissey v. Brewer, were specifically set forth as prospective guidelines and therefore cannot govern this 1960 proceeding."

Here, however, J. Roberts, writing for a majority of the panel, held:

> "In considering claims of denial of right to counsel at pre-1966 probation revocation hearings, we do not inquire whether it was the imposition or the execution which was suspended. So that there will be no further confusion at the state or federal levels, we hold that probationers had rights to counsel at probation revocation hearings, regardless of whether it was the imposition of sentence or the execution of sentence which had been suspended under the former Texas Code of Criminal Procedure. The applicant having been denied this right, the revocation of his probation was void and it was error to use the conviction for enhancement purposes.

The majority of the Panel also rejected the State's claim the D waived the error for failure to object.

COMMENT: In light of this holding, it would appear if Clennon Loud is still being held in T.D.C., he should return to the Court of Criminal Appeals as it would appear he is entitled to relief by this holding.

ALLEGATA-CHARGATA RULE GOBBLES UP THE STATE IN HAWKINS, #57,662, 3/14/79, J. Phillips, Panel #1, 1st Quarter, AND LOWRY, #56,928, 3/14/79, J. Roberts, Panel #3, 3rd Quarter. (Reversed). (McLennan County). (Reversed). (Harris County).

COMMENT: In Hawkins, supra, an aggravated robbery case, the trial judge expanded upon the indictment and charged the jury on the issue of recklessly.

Held: "§29.02 does not provide for any robbery offense involving the reckless threatening or placing of another in fear of imminent bodily injury or death. Thus, the jury was authorized under this erroneous instruction to convict appellant of a non-existent offense under the laws of this State.

> Error in applying the law to the facts can be avoided by scrupulous attention to the allegations in the indictment and ensuring that the charge in no way expands on those allegations. The application of the law to the facts is controlled by the indictment, not the evidence.
>
> For the foregoing reason, the judgment of conviction is reversed and the cause remanded."

In Lowry, supra, an aggravated rape case, same result reached.

Held: "Although the indictment alleged aggravated rape by "intentionally and knowingly by force and by threatening the imminent infliction of serious bodily injury and death," in its charge to the jury applying the law to the facts the court instructed the jury under all theories of culpability under § 21.03, supra. It is now well established that such an enlargement in the charge upon the allegations in the indictment constitutes fundamental error."

EX PARTE ALFREDO AGUILAR GARCIA, #58,981, 3/14/79, J. Roberts, Panel #3, 3rd Quarter, See 560 (2) 948, takes the ray of hope, See Vol. IV, No. 5, Jan., 1978, S.D.R., p. 3, AND GETS WRIT OF ERROR CORAM NOBIS GRANTED BY U.S.D.C. AND PANEL OF CCA NOW RULES THAT ONE OF D'S TWO PRIORS IS VOID AND GRANTS WRIT. (Writ Granted). (Cameron County).

COMMENT: The interesting part of this decision, I thought, was the fact that the D was convicted in State Court in Brownsville (Southern District) but had his writ granted by a Federal judge in the Western District. The Federal conviction actually occurred in the Southern District.

J. CLINTON, WRITING FOR PANEL #3, 1st Quarter, IN SEWELL, #56,437, 3/14/79, RULES THAT EVIDENCE WAS INSUFFICIENT TO SUSTAIN THIS FELONY MARIJUANA CONVICTION. (Reversed). (Yoakum County).

COMMENT: This is one of those cases where the State simply couldn't put the D at the scene of the arrest nor doing anything anywhere else of an illegal nature. However, in light of the fact that at least seven (7) narcotics officers from the State of New Mexico and Texas all probably got promotions and merit badges for the bust, the prosecution of the D is understandable.

Held: "Since appellant was not identified at the scene where the marijuana was found, we must look with even closer scrutiny at the independent facts from which we are to infer that he knew of and exercised control over the substance. The evidence presented by the State shows that appellant was seen in the company of Otley Smith in El Paso and that he traveled at least as far as Lovington, N.M., in the Trans Am driven by Smith. The positive identification of appellant was made at Lovington. However, since the car was followed from Lovington to Bronco, Texas, without stopping, and two people were observed as passengers in the car, we may reasonably conclude that appellant traveled as far as Bronco. However, the car was lost temporarily south of Bronco, and the passengers in the Trans Am were not viewed during the time the car was parked on the side road north of Bronco. The officers' testimony as to the time the car was parked in that location varied from 20 minutes to one and a half hours. One agent saw three people at the scene of the trailer, and only two were arrested. However, the agent could not identify that third person. The State's case requires a finding that: (1) the evidence circumstantially proves that appellant was in the area where the marijuana was found, and (2) that his presence in the area combined with his association with Smith is sufficient to show knowledge and control over the contraband. We conclude that the evidence does not justify such a finding."

"The only evidence in this case involving appellant was as to events before the offense occurred. The evidence shows that appellant was a passenger in the Trans Am driven by Smith for a prolonged period of time before the commission of the alleged offense. There is no evidence, however, of any aiding in the carrying out of the offense in any way other than riding in the car. We do not believe that the new party statute was intended to extend criminal liability to that extent. Absent other facts and circumstances showing that appellant encouraged or aided the criminal conduct, we hold the evidence to be insufficient." (Reversed).

D TINNEY FAILS IN HIS CLAIM THAT IT WAS REVERSIBLE ERROR FOR THE TJ TO ASSESS HIS PUNISHMENT AT LIFE WHERE HE WAS INDICTED AS A HABITUAL AND PANEL OF CCA, Panel #2, 1st Quarter, J. Odom, 3/14/79, #56,459, RULES THAT "D'S FAILURE TO MAKE THE ELECTION FOR JURY ASSESSMENT OF PUNISHMENT LEFT ALL QUESTIONS TO BE CONSIDERED IN THE PUNISHMENT PHASE UP TO THE TJ AND WAIVED HIS RIGHT FOR A JURY DETERMINATION OF THE ALLEGATIONS OF PRIOR CONVICTIONS." (Affirmed). (Dallas County).

COMMENT: Panel also ruled that merely because some clerk screwed up and put in the Indictment the wrong courts, regarding the prior convictions, that this did not do anything more than shift the burden of proof to the D.

FACT THAT MEMBERS OF THE TOM GREEN SHERIFF'S DEPARTMENT VISITED A JUROR AND HAD A DISCUSSION WITH THE JUROR, APPARENTLY DURING THE TRIAL, ALTHOUGH GOOD FOR A MISTRIAL IS NOT GOOD ENOUGH TO GET DOUBLE JEOPARDY IN CHVOJKA, #56,725, 3/14/79, P. J. Onion, Panel #1, 1st Quarter. (Affirmed). (Tom Green County).

COMMENT: Because of this visit, a mistrial was declared during the first trial. The D then claimed jeopardy had attached. However, Panel ruled against him because "the record is devoid of evidence that the prosecutor was guilty of any conduct which could be characterized as prosecutorial overreaching."

As to the D's claim he was not allowed sufficient latitude with which to cross examine a witness, it appears that how far or how much one can cross examine is subject to the discretion of the TJ. The restriction here, on a collateral matter, did not constitute an abuse of discretion.

NOTE: The opinion does not state whether these public servants were held in contempt of court for visiting this juror and, if so, what their punishment was.

J. ROBERTS, IN GALLOWAY, #59,256, 3/14/79, Panel #3, 3rd Quarter, REJECTS D'S CONTENTIONS IN THIS COLLATERAL ATTACK ON TRANSFERRING A CASE FROM JUVENILE COURT AND THE CERTIFICATION HEARING. (Affirmed). (Dallas County).

COMMENT: Here, D attacked the "transfer" order, concerning a prior conviction which resulted when the D was a juvenile. This case is really the other side of the recent juvenile cases but does not concern the issue of a lack of an examining trial. Here, the Panel ruled that the issues concerning the transfer order were not subject to collateral attack. Thus, by this decision, excluding the issue of an examining trial, a juvenile who is tried as an adult is not going to get any relief by making a collateral attack upon his conviction with the other possible exception of lack of counsel.

PANELS FOR WEEK OF MARCH 21, 1979.

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

J. W. C. DAVIS RULES IN LAND, ADAIR, AND LAND, #55,172, 206, 207, and 208, Panel #1, 4th Quarter, 3/21/79, THAT ANY REGULATIONS AS TO POSSESSION LIMITS OF CHANNEL CATFISH WERE BEYOND THE AUTHORITY DELEGATED TO THE PARKS & WILDLIFE DEPARTMENT, AS THESE CONVICTIONS WERE BASED UPON UNAUTHORIZED PORTIONS OF PROCLAMATION A-3, THEY CANNOT STAND. (Reversed). (Hunt County).

COMMENT: The Ds' argument that Proclamation A-3 of the Parks and Wildlife Commission, which provided that each fish possessed in excess of the legal limit constitutes a separate offense, was unconstitutional was rejected.

HELD: "Appellant's broad assertion that the delegation of rule-making authority is unconstitutional is without merit." "However, we must examine further to determine if the portion of Proclamation A-3 at issue exceeds the delegation of authority given the Parks & Wildlife Department."

"Clearly Proclamation A-3 regulates both taking and possessing. The complaint charges a violation by possession over the limit. Therefore, in order for the judgments to be affirmed, the Legislature must have delegated the authority to regulate possession to the Parks & Wildlife Dept."

"Our review of the Parks & Wildlife Code reveals no delegation of authority to regulate possession of channel catfish. Rather, the authority delegated is in the area of taking."

"We hold therefore that any regulations as to possession limits of channel catfish were beyond the authority delegated to the Parks & Wildlife Department." (Reversed).

NOTE: The regulation of the taking of wildlife resouces shall be by proclamation of the Parks and Wildlife Commission. The Parks and Wildlife Department is under the policy direction of the Parks and Wildlife Commission. See Section 11.011, et.seq., and Section 61.054, et. seq., of the Texas Parks and Wildlife Code.

COMMENT: If you are dealing with a D who was arrested in a City, County or State Park, you should become familiar with the Texas Parks and Wildlife Code as well as the local or County Ordinances regulating these places as you might come up with a possible defense you did not know you had or, at a minimum, a lot of good impeachment material on the arresting officers.

D FORTBERRY, #60,206, 3/21/79, En Banc, J. Odom, with J. Douglas dissenting without opinion, STRIKES GOLD IN HIS 53RD AND 54TH GROUNDS OF ERROR RELATING TO D'S COMPLAINT THAT THE TCT SUBMITTED AN ERRONEOUS CHARGE ON THE LAW REQUIRING CORROBORATION OF AN ACCOMPLICE WITNESS. (Death Penalty Case Reversed). (Hale County).

COMMENT: Here, D on trial for killing the former High Sheriff of Motley County. A Co-Defendant, Stacy Carter, was the only witness who gave direct evidence that D knew the sheriff was a peace officer. When the sheriff was killed, he was out of uniform, did not have any of his regalia on, and the car he was driving was not a marked car.

The TJ gave the usual charge on an accomplice witness as a matter of law.

HELD: "Although it is the general rule that the "usual" charge on Art. 38.14 is sufficient, that is not always the case." In certain cases, as here, it may be necessary for the court to further charge the jury on the corroboration of the accomplice witness on the particular point raised; i.e., on the very points that make this case one of capital murder, i.e., here, the elements from Sec. 19.03(a)(1), P.C.

HELD: "In capital murder under § 19.03(a)(1), the very heart of the offense is that the victim was a peace officer (or fireman) who was acting in the discharge of an official duty, and that the accused knew the victim was a peace office(or fireman). Appellant specifically objected that the accomplice witness instruction failed to direct the jury to the requirements of the law that Stacy Carter's testimony must be corroborated as to the facts that make this a death penalty case. The trial court committed reversible error when it overruled these objections.

For failure of the court to adequately instruct the jury on the statutory requirement that the accomplice witness must be corroborated, the judgment is reversed and the cause remanded."

STATE'S FAILURE TO PRODUCE ANY EVIDENCE THAT LIQUID SILICONE WAS ADMINISTERED IN A GROSSLY IGNORANT MANNER OR THAT THE INJECTION OF THE SILLICONE PRODUCED DEATH OR OTHER GREAT BODILY INJURY, SEE ART. 1200, V.A.T.C.S., RESULTS IN LOCKHART, #60,216, 3/21/79, J. Phillips, Panel #1, 1st Quarter, GETTING A REVERSAL AND AN ACQUITTAL.

COMMENT: Either the husband of the deceased or the deceased wanted big boobies. The husband contacted a social acquaintance, who knew the D, about getting his wife a silicone job from the D so she could have big boobies. From March through April, 1971, D tried to make big boobies out of little boobies through silicone injections. After the fourth injection, things went to hell as in less than one (1) week, rather than a boobie celebration there was a funeral for the deceased wife. The causes of death was listed as pneumonia.

HELD: After discussing the elements of Art. 1200, V.A.T.C.S., J. Phillips pointed out that "The autopsy report was not admitted into evidence, and there was no medical testimony whatsoever linking the silicone injections to the cause of death."

COMMENT: This case is in all things like Batterbee, 537 (2) 12, where the CCA reversed a murder conviction, per J. Douglas, "because the proof in this case does not show that the four secorbarbital pills resulted in, or contributed to, Vernon Batterbee's death." Here, there was simply a lack of evidence to show a connection between the death of the deceased and the silicone injections; i.e., that the liquid silicone was administered in a grossly ignorant manner or that the injection of the silicone produced death or other great bodily injury.

J. ODOM RULES FOR PANEL #2, 1ST QUARTER, 3/21/79, IN RODRIGUEZ, #59,260, THAT "STOPPING A PEDESTRIAN SOLELY BECAUSE HE LOOKS OVER HIS SHOULDER IN THE DIRECTION OF A POLICE CAR IS UNREASONABLE UNDER THE 4TH AMENDMENT TO THE U.S. CONSTITUTION AND UNDER ART. I, SEC. 9 OF THE CONSTITUTION OF TEXAS AND REVERSES CONVICTION FOR EVADING ARREST. (Reversed). (El Paso).

COMMENT: This case is one step removed from Ceniceros, 551 (2) 50, where the CCA reversed a conviction for possession of heroin when the evidence for the detention showed only that the police saw 4 men standing together on the sidewalk at an intersection at 10:30 O'Clock A.M.

See also Brown v. Texas, Supreme Court, Argued 2/21/79, 24 Cr.L.Rep. 4214, where arguments on the constitutionality of Sec. 38.02, P.C., failure to give name and residence address or the giving of a false report, have been held. There, the police merely saw two men walking in opposite directions in an alley around noontime.

Here, the CCA ruled that the action of the D, looking over his shoulder in the direction of the police car, constituted no lawful basis for any investigative action. "Stopping a pedestrian solely because he looks over his shoulder in the direction of a police car is unreasonable." "Any subsequent arrest arising out of the unlawful detention would likewise be unlawful, and, therefore, the evidence is insufficient to prove the lawful arrest element of the evading arrest conviction." (Reversed). Sec. 38.04, P.C., provides that it is an exception if the attempted arrest is unlawful.

Brown v. Texas, supra, by-passed the CCA because the fine assessed was only $35.00 and the case went directly from the County Court to the Supreme Court of the United States.

FOR AN EXCELLENT CASE TO USE TO EXCLUDE EXTRANEOUS MATTER AND EXTRANEOUS OFFENSES FROM A CASE, SEE PHILIP NOLAN WARD, #57,762, 3/21/79, J. Phillips, Panel #1, 1st Quarter. (Reversed). (El Paso County).

COMMENT: The facts showed that while sleeping in their respective motel rooms, each motel room occupant was burglarized, losing their credit cards to the unknown burglar or burglars. Needless to say, the D was arrested when he used the credit cards to buy, among other things, shoes.

The State, over objection, presented evidence of the two (2) burglaries on the basis that this was "res gestae" of the offense of credit card abuse.

The panel rejected this contention for several reasons:

1. It was not shown that the D was the burglar or was involved in the burglaries.

2. The burglaries were capable of being separated from the offense of credit card abuse. "Further, how an individual attains access to credit cards he abuses under the terms of V.T.C.A., P.C., Sec. 32.31(b)(1)(A) is not an element of the offense."

As the D received the maximum of 10 years as punishment the error was not harmless error.

D MARSH, #57,765, 3/21/79, P. J. Onion, Panel #1, 1st Quarter, LOSES ON HIS CONTENTION THAT COMPLAINT FOR RUNNING A STOP SIGN WAS INVALID, BUT GETS REVERSAL AS EVIDENCE IS RULED INSUFFICIENT TO SHOW THE OFFICIAL NATURE OR INSTALLATION OF THE STOP SIGN UNDER ART. 6701D, SEC. 91A, V.A.T.C.S. (Reversed). (Tarrant County).

COMMENT: To get around having to prove this element of the offense, the State argued that Sec. 5.03 of the Arlington Municipal Traffic Ordinance, which provided, in part, that "In any prosecution of any violation of this chapter, it shall not be necessary for the state to prove the installation or authority therefor, of any traffic control device or signal," controlled.

HELD: "Sec. 5.03 by its terms applies only to prosecutions for offenses in violation of the Arlington Muncipal traffic ordinances, and not to prosecutions for offenses under Art. 6701d."

CONCLUSIONS: "The complaint sufficiently alleges an offense under § 5.04 of the Arlington muncipal traffic ordinances, and the evidence is sufficient to sustain a conviction for the same. However, § 5.04 violates the rule of Art. 6701d, § 26 in that it does not provide for the exceptions set forth in Art. 6701d, § 91A. The ordinance, being in conflict with the statute, is void. A conviction under a void ordinance cannot stand."

COMMENT: It is always good to see a D like this one, who is willing to litigate this type offense and carry it as far as he can,as I honestly believe it helps our system a little.

D OROSCO, #56,876, 877, and 878, GAINS ONE REVERSAL BUT TWO CASES OF AGGRAVATED RAPE AND FORGERY ARE AFFIRMED. (1 Reversal, 2 Affirmances). (Harris County).

COMMENT: State's case showed that D, by the use of a knife, gained entry into home of C/W, assaulted her and then raped her. Her checkbook and T.V. were taken from the premises. Thereafter, one of the checks was cashed, with D's name endorsed on the check.

The D's story, which was rejected by the jury, was that everything was hunkey dorey and that he was first picked up by the C/W, went with her to her home, had intercourse, with the C/W inviting him back and giving him the check and the television set before he left. He testified he had permission and consent to sign the check as the C/W did not have a pen at the time she gave him the check.

QUESTION: "Whether the convictions for aggravated rape and aggravated robbery of a single victum arising out of the same facts and occurring in the same transaction are in violation of the double jeopardy clauses of the state and federal constitutions?"

ANSWER: Yes. The conviction for aggravated robbery is reversed as it is the higher numbered cause and it is presumed the lowest number case had judgment entered first.

"Double jeopardy attaches when multiple offenses arise from "an uninterrupted and continuous sequence of events or assaultive acts directed toward a single victum."

HELD: "In the present case, the initial display of the knife, coupled with appellant's continued possession of the knife, must provide the aggravating circumstances in both the rape and the robbery. Appellant's initial assault with the knife continued throughout the episode. His acts were an uninterrupted and continuous assaultive act against a single victim. Conviction for both the rape and the robbery is violative of the double jeopardy clauses of both the state and federal constitutions."

COMMENT: As to the D's contention, regarding the sufficiency of the evidence to sustain the aggravated rape offense, held, "when a gun or knife is used to compel submission, the evidence is sufficient to prove the aggravating circumstances under Sec. 21.03, P.C." "Further, the prosecutrix's testimony is sufficient to support a finding that the sexual intercourse was without her consent and that she submitted because of force and threats."

Likewise as to the question on the forged check. The C/W's testimony that she did not authorize someone to sign the check together with the D's admission he signed the check rendered the evidence sufficient to sustain the verdict.

J. PHILLIPS, IN RICE, #56,698, 3/21/79, Panel #1, 1st Quarter, RULES THAT EVIDENCE, IN THIS AGGRAVATED ROBBERY CASE, WAS INSUFFICIENT TO CORROBORATE THE TESTIMONY OF THE ACCOMPLICE WITNESSES. (Reversed). (Brazoria County).

COMMENT: Excluding the accomplice witnesses' testimony, the State did not have much. The D was not shown to be at the scene of the robbery.

HELD: "Appellant here was not identified as being present at or near the scene of the offense, but rather 15 miles distant at an undetermined time. No non-accomplice evidence indicates possession of or control over any fruits or instrumentalities of the offense. No flight to avoid apprehension or prosecution is shown. The trailer in which the fruits and instrumentalities of the offense were found was leased to another party and there is no record indication of appellant residing therein. Appellant's presence in the vicinity of the trailer and van was not suspicious or incriminatory in nature. The corroborative evidence in Johnson v. State, 88 S.W.2d 108, was far more persuasive than that adduced here, yet this Court reversed that cause.

Finally, neither does the evidence tend to connect the appellant to the charged offense as a party who was criminally responsible for the conduct of the accomplice witnesses. Likewise, the evidence demonstrates mere presence in non-incriminatory or suspicious circumstances. The conduct described cannot be said to even tend to show appellant solicited, encouraged, directed, aided, or attempted to aid the accomplice witnesses in the commission of this offense with the specific intent of promoting its commission. See V.T.C.A., P.C.§ 7.02(a)(2).

We must conclude that on the record before us the State failed to present sufficient, non-accomplice evidence of an incriminatory nature that tends to connect appellant to the offense charged and thereby corroborate the accomplice witness as required by law."

J. T. DAVIS TELLS OUR FELLOW CITIZENS IN TIJERINA, #57,205, 3/21/79, with J. Phillips concurring without opinion with the result, WHO PASS OUT IN THEIR AUTOS THAT A SUBSEQUENT SEARCH OF THE D BY A POLICE OFFICER WILL FALL UNDER THE "EMERGENCY" OR "EXIGENT CIRCUMSTANCES" RULES OF LAW AND SEARCH WILL BE HELD LAWFUL. (Affirmed). (Travis County).

COMMENT: Here, officer, while on patrol, in the early morning hours, observed an auto in a parking lot next to a bar with its door open with a pair of legs hanging out of the driver's door. Further investigation revealed the D sprawled on the front seat with his billfold out in the open.

HELD: "After D was removed from the vehicle the officer determined that he was intoxicated and a danger to himself. D was arrested and the search incident thereto which resulted in the seizure of the gun was legal."

COMMENT: Compare, however, Britton, #56,680, 9/27/78, Vol. V, No. 1, Sept., 1978, S.D.R., p. 22; and Davis, #59,303 & 304, 12/13/78, Vol. V, No. 4, Dec., 1978, S.D.R., p. 11; See also Hazel, 534 (2) 698, and Crestfield, 471 (2) 50. See Infra.

EN BANC CCA'S MAJORITY, PER J. DOUGLAS, WITH JUDGES ROBERTS AND CLINTON DISSENTING WITHOUT OPINION, IN DOESCHER, #54,865, 3/21/79, GRANTS SMRH AND AFFIRMS CASE. (Affirmed). (Dallas County).

COMMENT: Originally, a panel of CCA, per J. Phillips, 9/27/78, affirmed the conviction but, among other things, ruled the search warrant affidavit to obtain a search warrant to search the D's house was defective because the affidavit supporting it failed to present sufficient surrounding circumstances upon which the reviewing magistrate could judge either the reliability and credibility of the unnamed informants or determine that the items in question were where they were alleged to be. However, this error was considered, in light of the facts, harmless error.

However, on DMRH, the affidavit was upheld. "The magistrate was warranted in determining that the named informant was credible and the information given was reliable." (Affirmed).

HELD: "In the case at bar, the affidavit named the wife of appellant as an informant and stated that she had told officers that money obtained in the robbery was in the house to be searched. Two eyewitnesses to the robbery positively identified appellant as the robber. The address of the premises to be searched, 2038 Fort Worth Street, was given by appellant as his address to his parole officer. Appellant was on parole for robbery and he was observed by the affiant entering and leaving the address on several occasions within two weeks prior to making the affidavit. The truck identified as being used by the robber is registered to a man named "Taggert" at 2038 Fort Worth Street, whom the affiant knew to be appellant's friend.

The affiant had talked to an anonymous informant who advised him that appellant had participated in the robbery and that the money bag and gun could be found at 2038 Fort Worth Street. This information, coupled with that set out above, was sufficient to place the gun and money bag at appellant's residence, 2038 Fort Worth Street."

NOTE: The Majority did not discuss the issue of the wife consenting to the search which the panel had previously ruled was involuntary.

This may be the first time that you will see a non-consenting informant involved in a case.

SLOW DOWN AS NOW YOU DON'T HAVE TO RUN TO GET A COPY OF BRITTON, #56,680, 3/21/79, See Vol. V, No. 1, Sept., 1978, S.D.R., AS SMRH GRANTED, per J. T. Davis, with J. Phillips dissenting with opinion, and J. Clinton, joined by Judges Onion and Roberts, also dissenting with opinion. (SMRH granted, Affirmed). (Dallas County).

COMMENT: Previously, a panel of the CCA reversed the conviction as the officer lacked probable cause to arrest D for the offense of public intoxication; thus rendering the search illegal.

HELD: "When an officer is confronted with a person intoxicated in a public place, his determination as to possible danger that may befall the individual is not reviewed under the same standard used in a judicial determination of guilt."

Here, "The officer's observations of D were sufficient to support a conclusion that D was intoxicated." "This, coupled with his view of D's position of peril as a passenger in a vehicle blocking two lanes of traffic on Ross Avenue in Dallas, was sufficient to warrant a prudent man in believing that D was committing an offense." "There was probable cause for the officer to arrest D." "No error is shown in the admission into evidence of the heroin seized in the search of D incident to such arrest."

COMMENT: In his dissenting opinion, J. Phillips expressed alarm that this decision, for this type offense, "effectively resurrects the former vagrancy statutes which have been ruled unconstitutional." "To be frank, this arrest appears to be a pretext to permit a further exploratory patdown or search."

J. Clinton believes that this opinion will cause an "open" season on passengers as well as drivers of motor vehicles and places a burden on the passenger toward the driver that defies common experience.

D TUCKER, #56,090, 3/21/79, J. Roberts, Panel #1, 4th Quarter, GETS GOBBLED UP IN HIS CONTENTION THAT TCT COMMITTED REVERSIBLE ERROR BY FAILING TO ALLOW HIM TO REOPEN HIS CASE. (Affirmed. (Dallas County).

COMMENT: During the trial, at the guilt-innocence stage, the State, without objection, asked two defense wits "have you heard" type questions. After both sides rested and closed, court recessed for the day. The next morning, the D wanted to reopen and put on wits to negate the "have you heard" questions.

HELD: "The propriety of a "have-you-heard" question is one of law, not a material issue of fact. Appellant did not avail himself of legal objections. He did not object to the questions on the ground that they improperly injected an assertion of fact. He did not request an instruction to the jury to disregard the questions. He did not seek to demonstrate to the court that the questions were asked in bad faith.

The State did not offer proof of the acts it inquired about. There was no fact issue before the jury to which the proferred evidence was material. The evidence being immaterial, it was inadmissible, and it was not error to refuse to reopen for such inadmissible evidence."

PANEL OF CCA, PER J. PHILLIPS, IN TARLTON, #57,833-7, 3/21/79, Panel #1, 1st Quarter, RULES THAT FAILURE TO ACCORD A PROBABLE CAUSE HEARING IN THESE D.W.I. CASES, ALL MISDEMEANORS, WILL NOT VITIATE A CONVICTION SUBSEQUENT TO SUCH AN OMISSION AND FACT THAT D WAS RELEASED BEFORE TRIAL FROM CUSTODY WITHOUT SIGNIFICANT RESTRAINTS ON HIS LIBERTY TAKES CASE OUT OF GERSTEIN V. PUGH HOLDING. (Affirmed). (Scurry County).

IF YOU WANT A SHUFFLE OF THE JURY PANEL, IT IS MANDATORY THAT THIS REQUEST BE MADE PRIOR TO VOIR DIRE EXAMINATION OF THE JURY PANEL. IN ROBERSON, #58, 065, 3/21/79, P. J. Onion Panel #1, 1st Quarter, REQUEST MADE AFTER TWO PROSPECTIVE JURORS EXAMINED WAS TOO LATE. (Affirmed). (Harris County).

COMMENT: J. Onion also chastised and criticized the prosecutor in this case when he,after the defense had raised the question of whether the gun involved in this aggravated robbery case, which had been admitted into evidence, was operable to the extent that it would fire, instructed the officer, without obtaining permission from the trial court to do so, to go and test fire the weapon which he did.

However, as nothing presented to show that the weapon had been tampered with or that it was in a different condition than it was prior to the test firing, no error.

NOTE: It would appear, if you are confronted with this type situation, the thing to do would be to move for a continuance in order that you may have an expert of your own choosing make an examination of the weapon.

FOR THOSE WHO HANDLE DEATH PENALTY CASES, REMEMBER THAT IN ORDER TO GET ERROR, CONCERNING VOIR DIRE EXAMINATION, IT IS MANDATORY, UNDER TEXAS LAW, THAT YOU EXHAUST ALL OF YOUR PER-EMPTORIES. SEE BROOKS, #60,521, 3/21/79, J. T. Davis, En Banc, Unanimous. (Death Penalty Affirmed). (Tarrant County).

COMMENT: A frightening part of the opinion is that the State may now conclude a series of questions with the following: "Is your religious view so strong that nothing can talk you out of them, is that not correct?"

CCA also ruled that where the record was replete with evidence that D lived with a heroin addict and a frequent user of heroin in a room containing narcotic paraphernalia at a motel frequented by dope addicts, that it was okay to bring out fact that the D was a heroin user. "The probative value of evidence of heroin outweighed its prejudicial effect."

HELD, "The evidence of D's heroin use was an integral part of his relationship with Loudres and Smith, and thus is inseparable from the events involving all three persons leading up to the death of Gregory." "We note, however, that this is not a case where the D's use of heroin was collateral and peripheral to the offense charged."

J. PHILLIPS, IN COOPER, #55,445, 3/21/79, Panel #2, 4th Quarter, with J. Dally concurring with opinion, RULES THAT ALTHOUGH TCT WAS IN ERROR IN REFUSING TO ALLOW WIT FOR D TO TESTIFY BECAUSE HIS TESTIMONY CONSTITUTED IMPEACHMENT OF AN UNDERCOVER AGENT ON COLLATERAL MATTERS AS THIS TESTIMONY WOULD HAVE BEEN ADMISSIBLE, NEVERTHELESS, "UNDER THE 'PARTICULAR CIRCUMSTANCES' OF THIS CASE THE TCT'S EXERCISE OF DISCRETION IN ENFORCING THE WITNESS SEQUESTRATION RULE DID NOT VIOLATE D'S 6TH AMENDMENT RIGHTS SECURED TO HIM THROUGH THE 14TH AMENDMENT." (Affirmed) (Ector County).

COMMENT: The panel also strongly condemned the argument of the prosecutor when he argued for the jury to give the D 20 years and a fine of $10,000.00, which the jury did. "I submit to you he will be down there for a little while and he will be back out." Instruction to jury rule got the D on this point.

COMMENT: This case also points out the importance of having bench conferences reported as here, with this blank in the page, the D was left with a general objection to an innocuous question. "In order to preserve error, an objection must be timely made and the grounds of the objection must be stated."

COMMENT: J. Dally, in his concurrence, concerning impeachment of a State's witness on a collateral matter, wants Montemayor, 543 (2) 93, and Binnion, 558 (2) 485, overruled.

PANEL, PER J. T. DAVIS, IN MASQUELETTE, #56,034, 3/21/79, RULES THAT FACT D WAS TRIED BEFORE A NON-LAWYER COUNTY JUDGE IN THIS SPEEDING CASE WHICH WAS ORIGINALLY TRIED IN J.P. COURT AND THEN APPEALED TO COUNTY COURT DOES NOT DENY D DUE PROCESS. (Affirmed). (Fayette County).

COMMENT: Panel also rejected the D's contention that Art. 6701d, Sec. 169B, V.A.C.S., which enables the State Highway & Public Transportation Commission to set temporary maximum speed limits, is an unconstitutional delegation of the Legislature's authority.

Panel also ruled that the trial court could take judicial notice that the maximum prima facie speed limit in the State of Texas was 55 M.P.H. at the time of the D's offense.

The interesting part of the opinion, I thought, was what was not said, concerning reasonable and prudent speed. Officer apparently merely testified that the D was not driving at a speed that was reasonable and prudent under the conditions. Sec. 166(a) of 6701d, provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances." It is difficult to understand how going 67 M.P.H. on I-10 near Flatonia, Texas, could ever be unreasonable and imprudent. But, it is now.

PANEL, PER J. W. C. DAVIS, IN ANNIS, #56,086, 3/21/79, Panel #1, 4th Quarter, REJECTS ALL OF D'S CONTENTIONS IN THIS D.W.I. CASE. (Affirmed). (Travis County).

COMMENT: Among the contentions rejected were:

1) The opinion testimony of the arresting officer, standing alone, does not establish intoxication.

2) A breathalyzer test administered one hour and 20 minutes after D's arrest has no meaning.

3) The affidavit to a complaint has to allege the credibility of the affiant.

4) Even if the D rests with the State and does not put on any witnesses, it is permissible for the State to argue, if there are witnesses who could testify. "Who could have testified to you about the rate of consumption of alcohol?" "We don't know if there were 5 drinks consumed, ten drinks consumed, no drinks consumed."

PANEL, PER J. T. DAVIS, IN GREEN, #57,202, 3/21/79, Panel #2, 4th Quarter, sitting only with J. Douglas, OVERRULES ALL PRIOR DECISIONS WHICH HELD THAT INCONSISTENT ALLEGATIONS IN THE SAME COUNT OF AN INDICTMENT RENDERS THAT INDICTMENT DEFECTIVE. (Affirmed). (Palo Pinto County).

COMMENT: If an indictment or information alleges that an offense was committed, any objection would be to form rather than substance, and therefore not a fundamental defect. A motion to quash is necessary in that instance.

Thus, the following indictment was not fundamentally defective:

> "The Grand jurors for the County of Palo Pinto, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the October Term, A.D. 1976, of the 29th Judicial District Court of said County, upon their oaths present in and to said Court, that Robert Wayne Green, on or about the 21st day of August, A.D. 1976, and before the presentment of this indictment, in said County and State, did then and there intentionally damage and destroy tangible property of Christine Rogers, the owner, to wit: one (1) native rock fence located at the residence of Christine Rogers, said residence being seven (7) miles North of Palo Pinto County, Texas, at a place commonly known as Darl Valley Camp, and did thereby cause percuniary loss in the amount of more than $200 but less than $10,000 to the said Christine Rogers, without the effective consent of the owner, Christine Rogers. . . ." (emph. added)."

COMMENT: It was further held that the allegation that the property was "7 miles north of Palo Pinto County" was surplusage; thus, the State did not have to prove this element.

HELD: "Art. 21.09 requires that the State prove the owner and the general locality in the county. The State had alleged that the property was a native stone fence, that the owner was Christine Rogers, and that its general locality was Dark Valley Camp. These allegations were descriptive of what is legally essential to the indictment. The allegations that the property was located at the owner's residence and the location of that residence were not descriptive of what was legally essential under Art. 21.09.

We hold that the allegation was surplusage, and could be disregarded."

THE WEEK OF MARCH 28, 1979, LIKE LIFE, HAD GOOD NEWS AND BAD NEWS.

Panels for Week are as follows:

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

J. W. C. DAVIS, IN EX PARTE HEBERT, #58,449, 3/28/79, Panel #1, 2nd Quarter, TELLS TJS THAT IF THEY WISH TO DENY A D BAIL WHILE CASE ON APPEAL, PER ART. 44.04(C), C.C.P., THAT THEY MUST USE NON-HEARSAY EVIDENCE. (Writ Granted; Case Remanded to TCt). (Harris County).

COMMENT: Here, D was convicted and given 10 years for rape of a child. Without objection, State introduced into evidence a psychiatrist's report who apparently examined the D prior to trial. Using this report, the TCt denied bail on the appeal.

HELD: "Since hearsay evidence, even admitted without objection, constitutes no evidence, we hold that the TCt abused its discretion in denying D bail on this ground." "This case is remanded to the trial court, with an order for the court to either set bail for D or to hold another hearing to determine whether good cause exists to deny bail on another ground."

J. W. C. DAVIS ALSO, IN EX PARTE DAWSON, #60,382, 3/28/79, Panel #3, 1st Quarter, RULES THAT FOLLOWING INDICTMENT WAS FUNDAMENTALLY DEFECTIVE TO CHARGE THE OFFENSE OF CREDIT CARD ABUSE. (Writ Granted). (Harris County).

"The first count of the indictment, in pertinent part, alleged that appellant, on or about December 10, 1977, "did with intent to fraudulently obtain property and services, present to JANICE MANUEL a FOLEY'S credit card owned by ALICE LOUISE PHIPPS, hereafter styled the Complainant, without the effective consent of the Complainant, knowing that the credit card had not been issued to the Defendant."

HELD: "An allegation of culpable mental state (knowledge) regarding the lack of effective consent by the cardholder is omitted in the indictment in this case. This indictment, which fails to allege a necessary element of the offense, is so defective as to require that relief be granted."

SEVERAL DS GET RELIEF AS THE RECORD DID NOT SHOW THEY WERE AFFORDED AN EXAMINING TRIAL OR THAT THEY WAIVED SAME WHEN THEY WERE JUVENILES. See, also, supra, p. 1.

Thus, Ex parte Rodrigues, #60,835 & 836, 3/28/79, P. J. Onion, Panel #1, 1st Quarter; Ex parte Rogers, #60,891, 3/28/79, J. T. Davis, En Banc; and Watson, #54,140, 3/28/79, J. Phillips, En Banc, with J. Douglas dissenting without opinion, (On DMRH), all get relief for this reason. (Bexar County). (Galveston County). (Hill County).

Held: "Absent a waiver made pursuant to Sec. 51.09 the failure to afford a juvenile who has been certified as an adult an examining trial before he is indicted renders the indictment void." "A void indictment may be successfully attacked in a collateral proceeding."

COMMENT: Watson, supra, on original submission discussed and adopted "the inevitable discovery of evidence rule of law." See Nov., 1978, S.D.R., p. 29. In granting the DMRH, the CCA said: "In light of our disposition, we do not address D's challenge to this Court's adoption of the "inevitable discovery" doctrine raised in his motion for rehearing."

J. DALLY REVERSES ANOTHER CONVICTION FOR AGGRAVATED ROBBERY FOR TJ GIVING A FAULTY CHARGE BY ADDING ELEMENTS, RECKLESSLY AND CAUSED SERIOUS BODILY INJURY, TO THE INDICTMENT PART OF THE CHARGE IN JACKSON, #57,682, 3/28/79, Panel #3, 1st Quarter. (Reversed). (Hunt County).

COMMENT: In passing, he said:

"Many cases such as this have recently come before this Court. It is difficult to understand why so many courts are submitting charges to juries which allow the juries to convict defendants for offenses not alleged in the indictment. It would seem much easier when submitting the charge to the jury to correctly charge the jury by following the allegations of the indictment. Also, it would seem that prosecutors would advise trial judges that a charge is incorrect which does not follow the indictment but allows a jury to convict for an offense which has not been alleged in the indictment."

SEE ALSO GONZALES, #56,729, 3/28/79, J. T. Davis, Panel #1, 1st Quarter, WHERE PANEL REVERSED ANOTHER AGGRAVATED ROBBERY CONVICTION BECAUSE THE COURT'S CHARGE AUTHORIZED A CONVICTION ON THE BASIS OF A THEORY NOT CHARGED IN THE INDICTMENT IN THAT THOUGH NOT ALLEGED, JURY CHARGED IT COULD FIND THE D GUILTY IF THEY FOUND HE CAUSED SERIOUS BODILY INJURY. (Reversed). (Nueces County).

LIKEWISE, SEE CADD, #55,259, 3/28/79, J. Roberts, Panel #1, 4th Quarter, WHERE THE D WAS CHARGED WITH POSSESSING A FORGED WRITING WITH INTENT TO PASS IT, BUT THE COURT"S CHARGE INSTRUCTED THE JURY THEY COULD FIND THE D GUILTY IF THEY FOUND THAT THE D POSSESSED A FORGED WRITING WITH INTENT TO ISSUE IT. (Reversed). (Dallas County).

HELD: "In this case, the indictment charged intent to pass; this required proof of intent to deliver and to achieve acceptance and a completed transaction." "The court's charge authorized conviction on proof of intent to achieve acceptance and a completed transaction." "Therefore, the court's charge authorized conviction on a charge which was not contained in the indictment, and which required less proof."

COMMENT: The D's attorneys filed their brief prior to the trial court approving the record. This is a no-no. HELD, "THEREFORE, THE BRIEFS ARE NOT PROPERLY BEFORE THIS COURT." The issue on which the case was reversed was fundamental or Section 13, Art. 40.09, C.C.P., error.

ALTHOUGH THE CASE WAS AFFIRMED, READ CUMBLE, #56,351-354, 3/28/79, J. Roberts, Panel #1, 4th Quarter, WHERE J. ROBERTS DISCUSSED THE DIFFERENT WAYS FUNDAMENTAL ERROR CAN ARISE IN THE TCT'S CHARGE. (Affirmed). (Dallas County).

"An omission from the court's charge of an allegation in the indictment which is required to be proved has long been held to be fundamental error.

A second kind of fundamental error occurs when the charge to the jury substitutes a theory of the offense completely different from the theory alleged in the indictment.

A third kind of fundamental error is committed when the charge to the jury authorizes conviction on the theory alleged in the indictment and on one or more other theories not alleged in the indictment. Such a charge would permit conviction on proof different from (and sometimes less than) that required to prove the allegations in the indictment. Most of the recent cases have involved such charges that enlarge on the indictment.

This third type of error is illustrated by aggravated robbery cases in which the indictment alleged threatening and placing in fear, while the charge also authorized conviction for causing bodily injury.

Another group of cases involved the converse; the indictment alleged aggravated robbery by causing serious bodily injury, while the charge also authorized conviction for threatening and placing in fear.

Other charges allowed conviction on every theory of robbery and aggravated robbery found in Texas Penal Code Secs. 29.02 & 29.03, regardless of the theory (or theories) alleged in the indictment.

This third kind of fundamental error, the charge that enlarges on the indictment, is not limited to robbery cases."

"A fourth kind of fundamental error is committed when the charge authorizes conviction for conduct which is not an offense, as well as for conduct which is an offense."

HELD: "The indictments alleged that appellant threatened and placed the complainant in fear of imminent bodily injury. The court's charge authorized conviction if the jury found that appellant threatened and placed the complainants in fear of imminent bodily injury or death. Appellant argues that the addition of the words "or death" is an enlargement on the indictment which constitutes fundamental error of the third kind discussed above. We cannot agree."

J. PHILLIPS, IN EX PARTE ALANIZ, #57,859, 3/28/79, Panel #1, 2nd Quarter, with J. Douglas dissenting with opinion, WRITES AN INTERESTING OPINION AND GRANTS D RELIEF BECAUSE THE "D'S TRIAL ATTORNEY LABORED UNDER A CONFLICT OF INTEREST WHICH HINDERED HIS DISCHARGE OF LEGAL OBLIGATIONS OWED TO THE PETITIONER AND AS A CONSEQUENCE, D WAS DENIED DUE PROCESS AND COURSE OF LAW." (Writ Granted). (Ward County).

COMMENT: The conflict arose when the Co-D, who was also represented by the same attorney, wrote a letter to the D.A. exculpating this D. Prior to trial, the D's attorney was made aware of this letter. However, he did nothing with it.

Although disclaiming that a conflict of interest resulting from one attorney's dual representation of Ds charged with the same offense mandates reversal of a conviction, it is, nevertheless, hard to read this opinion and not get that result.

As to the admissibility of the letter, J. Phillips said:

> "It should be noted at this point that the admission of the letter into evidence does not necessarily require the physical presence and testimony of the author. The authenticity of the correspondence can be proven by circumstantial or other evidence. See generally: 2 Wharton's Criminal Evidence (11th ed.), § 807, et. seq., pp. 1391-1394; 23 Tex.Jur.2d, Evidence, § 309, et seq.; and 29 Am.Jur.2d, Evidence, § 879. Further, any objections to the letter as hearsay could be overcome by virtue of the declarations against penal interest expressed therein.

COMMENT: I would strongly suggest that before an attorney decides to represent more than one D, with all charged with the same offense, that he carefully read this opinion as, if it holds, in my opinion, it has judicially abolished joint representation.

TJs should, when confronted with dual representation by one attorney, read U.S. v. Garcia, 5th Cir., 517 F.2d 272.

J. W. C. DAVIS, IN RIGGALL, #57,985, 3/28/79, Panel #1, 2nd Quarter, with J. Douglas dissenting without opinion and J. Phillips concurring in the result, ORDERS CASE REVERSED AND REMANDED WHEN IT WAS SHOWN THAT NEITHER THE D NOR COUNSEL WERE PRESENT AT A PRETRIAL PROCEEDING WHEN THE TCT DENIED, EX PARTE, THE D'S MOTION TO DISMISS FOR FAILURE TO GIVE HIM A SPEEDY TRIAL. (Reversed). (Deaf Smith County).

COMMENT: The D was charged with theft out of Deaf Smith County. While in the New Mexico State Penitentiary, D filed numerous motions for a speedy trial and dismissal for denying him a speedy trial. On May 25, 1977, the trial court, ex parte, denied all of the motions except he was given a trial. However, a plea bargain was struck and he pled out for 6 years.

Using Art. 28.01, C.C.P., as the guide, the panel held that the D had an absolute right to be present or to be represented by counsel at the pretrial hearing.

HELD: "The absence of D or his appointed counsel at the pretrial proceedings of May 25 denied D the opportunity to support his motion to dismiss and controvert any facts presented by the state." "We hold that the consideration, ex parte, of D's motion to dismiss violated the provisions of Art. 28.01, C.C.P." (Reversed).

PROSECUTOR'S FAILURE TO DRAW DISTINCTION BETWEEN CHARACTER AND REPUTATION RESULTS IN LIVINGSTON, #57,632, 3/28/79, J. T. Davis, Panel #1, 1st Quarter, GETTING NEW TRIAL. (Reversed). (Potter County).

COMMENT: "In the present case, the witness testified that he referred children to B.I.A., that he received assistance from B.I.A., and that he had worked closely with appellant. This is not the broad assertion of general good character made in Childs. Appellant's character and the effectiveness of the B.I.A. is not one and the same. The B.I.A. could have been viewed as an effective organization regardless of appellant's conduct.

In the present case, the testimony inferentially concerned, at best, specific, narrow character traits of appellant. Instances of conduct inconsistent with the testimony of O'Connor would have been proper impeachment. The instances of misconduct used by the State in the "have you heard" questions were not proper to test the credibility of this witness. These specific instances of misconduct were not inconsistent with any character trait introduced during direct examination. We hold that the State's attempted impeachment of O'Connor was improper."

HELD: "From the cases above we can draw the following conclusions. When a witness testifies to conduct of the defendant that is so broad as to infer that the defendant has good general character, the witness' credibility can be impeached with "have you heard" questions involving specific instances of misconduct inconsistent with generally good character. But when a witness testifies to instances of conduct that go no further than to imply that specific traits of character are good, the witness can be impeached with "have you heard" questions involving only those instances of misconduct inconsistent with the specific character traits placed in issue."

COMMENT: This case was long overdue and, unfortunately, the panel did not see fit to overrule the likes of Childs, 491 (2) 907, upon which the trial court relied in allowing the prosecutor to do what he did here. However, keep in mind the error here resulted at the guilt-innocence stage and not the punishment stage of the trial. See Infra, p. 20, however.

The following rules should he kept in mind:

> "It is important to keep in mind that reputation is but one method to prove character. A reputation witness is a character

witness insofar as his testimony inferentially proves character, but a witness whose testimony proves character by a method other than reputation is not a reputation witness. This distinction is important in determining what means of impeachment are proper to test the credibility of the witness. When specific acts of conduct that inferentially show the accused's character are admitted into evidence, the State is not automatically entitled to impeach the character witness as if his testimony had been reputation testimony.

When a witness testifies to the accused's reputation in the community, the State may ask the witness "have you heard" questions to impeach the witness' testimony. The purpose of a "have you heard" question is not to show the specific instances of bad conduct of the accused, but rather to test the credibility of the witness.

Further, the State cannot place the accused's character into issue by its own cross examination and then justify impeachment by "have you heard" questions based on the testimony elicited on cross-examination."

However, read Jewell, #58,315-58, 321, 3/28/79, En Banc Opinion on SMRH, where a majority of the CCA ruled: "Daniels, 527 (2) 549, and Childs, 491 (2) 907, were well reasoned and sound opinions; we will follow them."

PROSECUTOR'S MISREADING OF PAST CASES ALSO GETS PORTER, #57,553, 3/28/79, J. Dally, En Banc, Unanimous, A DEATH PENALTY CASE, A NEW TRIAL. (Reversed). (Tarrant County).

COMMENT: Here, at the punishment stage of the trial, over objection, the prosecution was allowed to introduce letters, reports, and documents from a federal parole officer's file pertaining to D's supervision and progress while on federal parole.

The decision to do this, I am sure, had to do with some of the recent cases where the CCA implied that under Art. 37.071, C.C.P., the "slop-jar" method was to be used; i.e., any and everything known to mankind, which was detrimental to the D, was admissible as same would be "relevant to sentence."

The reversal came about because:

1. This constituted a denial of the D's right to confront and cross-examine witness.

2. The letters, merely because they were collected in a file in a government office, did not have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross examination.

3. Art. 37.071(a), C.C.P., does not alter the rules of evidence insofar as the manner of proof is concerned. "While the facts contained in the documents in question may have been relevant to punishment, the manner in which the State sought to prove those facts denied D his constitutional rights of confrontation and cross-examination."

THE LATEST LAS VEGAS LINE IS THAT EX PARTE MINJARES, #57,136, 3/28/79, J. Odom, ON DMRH, En Banc, Unanimous, See also Feb., 1979, S.D.R., p. 3, WILL GET BACK TO EL PASO BY THIS SUMMER.

HELD: "We hold petitioner is entitled to such good time credits as he had earned while an inmate of the county jail, and the absence of a formal sentence may not be used to deny him that credit. On the record before us petitioner has credits of $465 toward discharge of his $788 of fines and costs.

On remand the County Court at Law from which this appeal was prosecuted shall (1) determine the cause numbers of the Municipal Court cases, (2) set aside the commitment to custody issued by the Muncipal Court, and (3) remand petitioner to the Municipal Court for execution of the judgments on the fine and costs remaining due by arrangement in the Municipal Court of a schedule of payments or other means legally authorized. See Arts. 42.15, 43.07, 45.06, 45.50, 45.52(b), C.C.P.; see also Sheppard v. State, 548 S.W.2d 414. Petitioner is entitled to credit for $465 against the $788 total assessed in those cases."

D HERNANDEZ, #55,810, 3/28/79, Commissioner Cornelius, Panel #3, 4th Quarter, GETS REVERSAL WHEN PANEL RULES THAT EVIDENCE WAS INSUFFICIENT TO CORROBORATE THE TESTIMONY OF THE ACCOMPLICE WITNESS. (Reversed). (Crane County).

COMMENT: "There was no testimony, save that of the accomplice which placed D at or near the scene of the crime." "None of the money taken in the robbery was found in his possession." "He did not flee from Alpine, but was arrested there some two days after the murder." "No fingerprints or other identifying clues were found at the scene which would connect D with the offense." "There is no evidence tending to connect D with the gun." (Reversed).

J. W. C. DAVIS, IN ELDRED, #54,732, 3/28/79, Panel #1, 2nd Quarter, with J. Phillips dissenting with opinion, DISCUSSES THE LESSER INCLUDED OFFENSE OF THEFT IN AN AGGRAVATED ROBBERY CHARGE AND WHEN D IS ENTITLED TO SUCH A CHARGE, BUT RULES IT IS NOT IN THIS CASE. (Affirmed). (Dallas County).

HELD: "The test, set forth in Campbell, 571 (2) 161, to be used to determine whether a charge on theft is required in a prosecution for aggravated robbery is:

> "...not whether the primary offense is capable of proof on some theory that would not show theft, but whether the State's case as presented to prove the offense charged also included theft."

Under Campbell, two separate steps are necessary to determine if a charge on theft is required in a prosecution for aggravated robbery. First, the lesser included offense must be included within the proof necessary to establish the offense charged. If the offense charged is aggravated assault, then theft must be established by proof of the same or less than all the facts required to establish the commission of aggravated robbery before a charge on theft is required. See Art. 37.09(1), C.C.P.

The focus here is not on the evidence which proved the statutory elements, but rather, we must search for evidence which shows that if appellant is guilty, he is guilty of the lesser offense only. Therefore, our task is an examination of the entire record.

Under our "step two" examination of the record, we are searching for any evidence which would show that if appellant is guilty at all, he is guilty only of the lesser included offense.

In simpler terms, before an instruction on theft as a lesser included offense of aggravated robbery is required, the record must contain evidence which shows that if appellant is guilty, he is guilty of theft only.

The record in appellant's case does not satisfy the second step requirement of Campbell. The record does not show that appellant, if guilty of any offense, is guilty only of theft."

COMMENT: I have to agree with what J. Phillips said in his dissent as if this case stands for an "all or nothing" approach, then how can you ever have lesser included offenses? J. Phillips said:

> "In this case the "taking" was the only undisputed element. Appellant subjectively thought he had complaint's "effective consent" while complainant denied same. The use of a weapon was likewise disputed. If the jury system is to have any meaning, the jury should be given the entire range of potential offenses supported by the charge and evidence. Otherwise, under the majority's interpretion of Campbell, the jury must believe all or none of the testimony of the State's witnesses. Here it is reasonable that the jury would have disbelieved complainant's testimony about the weapon and appellant's testimony about this subjective belief that he acted with complainant's "effective consent." In other words, the evidence is sufficient to sustain a conviction for aggravated robbery or theft! Appellant was entitled to his requested instruction. I dessent."

BY HART, #54,864, 3/28/79, J. W. C. Davis, Panel #1, 2nd Quarter, HAS THE CCA NOW OUTLAWED A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE IF THE D IS CHARGED WITH A GREATER OFFENSE BUT IS CONVICTED OF A LESSER OFFENSE? (Affirmed). (Dallas County).

HELD: "We note the interesting but unpersuasive position taken by appellant. The jury was charged on the lesser included offense of aggravated assault at appellant's insistence that the lesser offense was "raised by the evidence." The jury, properly charged, returned a verdict of guilty of aggravated assault. Now, appellant argues that the evidence was insufficient to support a conviction for aggravated assault. If there exists a distinction between the amount or degree of evidence necessary to charge the jury on a lesser included offense and the sufficiency of the evidence to support a conviction of the lesser included offense on appeal, such a distinction is a very fine one. Fortunately, we are not now required to focus on this issue; however, we do note in Stiles v. State, 520 S.W.2d 901, a requested charge on accidental death was given where not raised by the evidence. Holding that the error was invited by requesting the charge, we found no reversible error. The same reasoning would easily be extended to appellant's argument."

COMMENT: The panel also ruled that the following phrases are synonymous:

1) "Serious bodily injury" equals "Attempt to cause death."

2) "Stabbing with a knife" equals "knife is a deadly weapon."

I think this was a cute answer to one of the contentions;

> "To argue that the physical act of thrusting a knife blade into the C/W's body is mere preparation does not comport with common experience or reasoning." "By alleging that D attempted to cause death by stabbing, the State has alleged an act beyond mer preparation which fell short of the intended offense of murder."

MAJORITY OF PANEL OF CCA, PER J. W. C. DAVIS, IN HALIBURTON, #55,038 & 039, 3/28/79, Panel #1, 2nd Quarter, with J. Phillips dissenting with opinion, RULES THAT IN A JOINT TRIAL OF TWO SEPARATE AGGRAVATED ROBBERY INDICTMENTS ARISING FROM THE SAME CRIMINAL EPISODE THAT IT IS NOW PERMISSIBLE TO TELL THE JURY THAT THE SENTENCES ON BOTH CHARGES WOULD RUN CONCURRENTLY. (Affirmed). (Tarrant County).

COMMENT: J. Phillips dissented with vigor and, in part, said:

> "In conclusion, the jury should not be authorized to negate legislated procedural rules by being adivsed what the effect of the rules will be on their decisions. In return for permitting the State to consolidate offenses against property, the Legislature decided that a quid pro quo of concurrent sentences was in order. The jury still has the evidence of the accused being a multiple offender before it, as well as the other evidence mentioned, and is not wallowing in the darkness of ignorance without an instruction of the law of § 3.03, supra.
>
> Believing the instruction complained of was calculated to injure appellant's rights to fair determination of the appropriate penalty and, in the alternative, that harm is present, the judgment should be reversed."

COMMENT: Unquestionably, with this decision on the books, I would anticipate trial court's charging juries that the sentences imposed or assessed shall run concurrently. Thus, it's back to the drawing board as to whether to invoke the provisions of Sec. 3.04, P.C.

HOWEVER, THE LAW IS AS NOW WRITTEN BY THIS PANEL AND AS WRITTEN BY A MAJORITY OF EN BANC CCA, IN JEWELL, #58,315-58, 321, 3/28/79, J. Douglas, with Judges T. Davis and Dally concurring in the result, and with Judges Onion, Roberts, Phillips and Clinton dissenting for reasons stated in the original opinion. Thus, SMRH granted.

PANEL SPLITS IN SEVERAL DIRECTIONS OVER DECISION IN HAMMEL, #55,462, 3/28/79, J. Douglas, with J. W. C. Davis concurring with opinion, and with J. Phillips dissenting with opinion. (Affirmed). (Galveston County).

COMMENT: The only basis for stopping the D's car was: "We felt something occurred in the store but we didn't know what." "We had a pretty good idea [that they were shoplifting]."

Thereafter, the D signed a consent to search form for his apartment and made an oral statement which was incriminatory to the offense of possession of heroin.

This case almost gives the police the right, if an ex-convict is under suspicion, to arrest that person for whatever and then if they can obtain an oral confession, everything in poco weino.

J. Phillips writing with all of the vigor he could muster said:

> "I would conclude that the consent to search form executed by the appellant in this case was a direct exploitation of his initial lawful arrest and there were no sufficient intervening circumstances or other occurrences, within the totality of circumstances confronting the appellant, which made his consent a sufficient act of free will to purge the primary taint of his unlawful arrest. Thus, the consent form executed by appellant and the evidence seized by the officers pursuant to that consent should have been excluded by the trial court. The failure to exclude such evidence constitutes reversible error, for without it appellant's oral statement to the police officers could not have been corroborated assuming for the moment that that confession was admissible. See Art. 38.22(e), C.C.P. The evidence was unquestionably incriminatory and harmful.
>
> Turning now to the admissibility of appellant's oral statement to the police officers telling them where the "stuff" would be in his residence and that the "stuff" was heroin, I must conclude that that statement was a direct result of the police officers' exploitation of their initial unlawful arrest. Brown v. Illinois, supra, applies with even more force to this issue and mandates my conclusion. I would also hold that that confession was inadmissible as the fruit of the officers' breach of Art. I, § 9 of the Texas Constitution.
>
> The inescapable conclusion is that appellant's conviction should be reversed. For the foregoing reason I strongly dissent."

EN BANC CCA, IN LANGFORD, #56,977, 3/28/79, J. Douglas, with J. Phillips concurring in the result, without opinion, OVERRULES SMRH BUT HOLDS THAT ORIGINAL PANEL OPINION IS OVERRULED. (SMRH Overruled). (Galveston County).

COMMENT: See Sept., 1978, S.D.R., p. 18, where a majority of a panel of the CCA ruled in this case that entrapment could be established as a matter of law. However, with this opinion, all that good stuff J. Phillips said about the law of entrapment is now just good reading material and not the law. Now, the holding is: "The undisputed testimony shows that D was not entrapped as a matter of fact or law in committing the burglary which was used to revoke probation."

The CCA did discuss motions for rehearing. "This Court may grant a rehearing if a motion is filed within 15 days after the opinion has been handed down." "The Court, within its discretion, may grant a rehearing at any time during the term of the original opinion." However, if the motion for leave to file for rehearing is filed, as it was here, after the term of the CCA has expired, then the judgment becomes final and no rehearing can be had.

Thus, here, the D gets the benefit of his reversal but his opinion, except to this D, means nothing.

Crowded Dockets and Excusable Delay under the Texas Speedy Trial Act*

Steve Williams

The Texas Speedy Trial Act (Texas Code Crim. Proc. ch. 32A) became effective on July 1, 1978. This new act provides a specific right to a speedy trial with specific time limits set out therein. Before enactment of the Texas Speedy Trial Act, Texas criminal defendants had only a constitutional right to a "speedy and public trial" which does not involve specific time requirements. U.S. Const. amend VI; Tex. Const. art. I, § 10; Tex. Code Crim. Proc. art. 1.05. Whether there has been a constitutional violation depends on a "balancing" in each case of four factors: (1) length of delay; (2) reasons for delay; (3) defendant's assertion or non-assertion of right; and (4) prejudice to defendant from delay. *Barker v. Wingo,* 407 U.S. 514 (1972); *Moore v. Arizona,* 414 U.S. 25 (1973). The Texas Speedy Trial Act provides the courts a more objective standard. Section 1 of the Act provides that a motion to set aside an indictment, information or complaint shall be granted "if the state is not ready for trial" within certain periods of time after commencement of the criminal action:

(1) 120 days;
(2) 90 days if accused of a misdemeanor punishable by a sentence of imprisonment of more than 180 days;
(3) 60 days if accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or
(4) 30 days if accused of a misdemeanor punishable by fine only.

In computing the time by which the State must be ready for trial, Section 4 of the Act excludes certain periods of time—generally those delays attributable to the defendant. Subsection 10 of section 4 is the catchall exclusion provision designed to exclude a reasonable period of delay that is justified by exceptional circumstances:

> Sec. 4. In computing the time by which the state must be ready for trial, the following periods shall be excluded: ...(10) any other reasonable period of delay that is justified by exceptional circumstances.

However, the Act does not define "exceptional circumstances," thus leaving it for the courts to interpret.

A problem arises when an indictment, information or complaint is filed and the prosecutor announces ready but the court's dockets are too crowded to set the case for trial within the stated time period. The statute does not state the time the defendant "must be brought to trial" but rather the time the "state must be ready." This distinction raises the question whether the term "state" encompasses the prosecutor and the State of Texas, including its court system, or merely describes the prosecutor. If the term "state" includes the court, a defendant may be denied his right to a speedy trial under the Act when the only cause of the delay is calendar congestion and lack of court facilities. This question so far has not been answered by the courts in Texas, but it will surely arise in the near future.

Another unanswered question is whether crowded court dockets is an "exceptional circumstance" under the Act. If calendar congestion and lack of court facilities is deemed an "exceptional circumstance" by the Texas courts, any "reasonable delay" resulting therefrom will be excused and excluded from days counted against the State. Tex. Code Crim. Proc. art. 32A.02, § 4(10).

The only available precedent will be for deciding these questions is from other jurisdictions with similar statutes. Although the Texas Speedy Trial Act purportedly is not derived from any other jurisdiction's statute, it is similar to others including New York's. New York C.P.L. § 30.30 reads:

> "1. Except as otherwise provided in subdivision three, a motion [to dismiss]...must be granted where the people are not ready for trial within:
> (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;
> (b) ninety days...[if] "at least one [of multiple offenses] is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony;
> (c) sixty days...[if] at least one...is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months;
> (d) thirty days...[if] at least one of which is a violation and none of which is a crime."

The New York Act also has a provision which excludes a delay that is caused by an exceptional circumstance. Subsection 4 of C.P.L. § 30.30 reads:

> "In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded:
> (g) other periods of delay occasioned by exceptional circumstances, including but not limited to...and additional time is justified by the exceptional circumstance of the case."

In 1973, the Court of Appeals of New York was called upon to construe the New York Speedy Trial Act in the case of *People ex rel. Franklin v. Warden,* 31 N.Y.2d 498, 294 N.E.2d 199 (1973). In that case, appellants were pretrial detainees who had been detained in custody for more than six months because of inability to make bail. In each case the District Attorney had announced ready. The Appellate Division concluded in effect that failure in each case to afford a prompt trial was attributable to calendar congestion and lack of court facilities. The Court declined to hold that the people were not "ready" under the terms of the statute and hence it did not reach the question whether court congestion was an "exceptional circumstance" that excused the delay. Instead it held that the defendants were entitled to a trial preference and ordered that they be tried within three months unless some valid reason unrelated to lack of public facilities prevented it. Acknowledging that its decision was a compromise, the Court noted that:

> The ultimate remedy must be provision by the appropriate branches of government of the material and personal resources required to handle a court burden increased and increasing because of higher crime rates, enlarged police activity, and, most of all, greater urbanization of our population. Nothing less will avoid eventual implement on the dilemma between a general jail delivery and the violation of constitutionally protected human rights.

Consistently with the *Franklin* holding, the New York cases have refused to hold the State absolutely responsible for delay caused by court congestion and crowded

dockets. Instead the statute has been read as imposing a duty on the State to "move" criminal cases; delays occasioned by inadequate facilities or court personnel are merely one factor in determining whether the State's duty is violated. See People v. Montfort, 91 Misc. 2d 237, 397 N.Y.S.2d 686 (1977).

The distinction between the requirement of the New York statute that "the *people* must be ready" and the Texas statute that "the *state* must be ready" is probably of little consequence. In common parlance, both terms are used to describe the prosecuting attorney and his staff. In some contexts, each form may refer to the state government in general.

Pennsylvania is another jurisdiction that Texas courts may look to when it comes time to decide whether calendar congestion and lack of court facilities constitute an excusable delay.

**This article, an edited version of a paper written by Steve Williams, a third-year law student at Texas Tech University School of Law, and submitted in a Criminal Procedure Seminar (Professor C. P. Bubany, instructor) will be concluded in our May issue.*

Bills Introduced – continued

SB 1064 By Truan. SAME AS HB 30. Amending Art. 42.121, C.C.P. Relating to statewide juvenile services and probation. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 1078 By Jones of Harris. Relating to the repeal of the statutes pertaining to cruelty, adultery and abandonment as grounds for divorce. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 1091 By Brooks, SAME AS HB 1380. Amending Arts. 304, 304a, 305, 306, 308, and 310, R.C.S. Relating to regulation of lawyers by the Supreme Court and the Board of Law Examiners. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 1134 By Price. Amending Art. 6701d, V.C.S. Relating to punishment for the offense of fleeing a police officer. REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 1135 By Price. Amending Sec. 1, Art. 32A.02, C.C.P. Relating to a request for speedy trial by the defendant in a criminal case. REFERRED TO COMMITTEE ON JURISPRUDENCE.

HCR 85 By Hudson. Creating a special joint interim study committee to study capital punishment. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1298 By Valles, Amending Subsec. (a), Sec. 21.02, P.D. Relating to the sexual offenses of rape and sexual abuse. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1305 By Washington. Amending Sec. 3a, Art. 42.12, C.C.P. Relating to attending rehabilitation programs as a condition of probation for persons convicted of driving while intoxicated. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1312 By Rangel and Lalor, Amending Chap. 22, P.C. Relating to establishing offenses of domestic violence and aggravated domestic violence for assaults against a spouse. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1319 By Hernandez. Amending Art. 31.03, C.C.P. Relating to a change of venue granted on motion of defendant. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1347 By Green of Harris. Amending Chap. 18, C.C.P. Relating to the interception and use of wire or oral communications. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1375 By Agnich. Amending Chap. 25, P.C. Relating to establishing a criminal offense of harboring a runaway child. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1392 By Crawford. Amending Art. 67011-1, R.C.S. Relating to the elements of and sanctions for driving while intoxicated. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1393 By Crawford. Amending Art. 67011-5, V.C.S. Relating to chemical tests, including blood, urine, and other bodily substances, for intoxication in cases of arrest while driving on a public highway or beach. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1399 By Washington. SAME AS SB 653. Amending Art. 2.21, C.C.P. Relating to the duties, in criminal cases, of the clerks of the District and County Courts. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1401 By Whitmire. SAME AS SB 72. Amending Art. 37.07, C.C.P. Relating to assessment of sentence by the judge in criminal cases. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1420 By Hendricks. Amending Chap. 19, P.C. Relating to a defense of accident in a criminal homicide case. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1428 By Hendricks. Amending Art. 18.01(c), C.C.P. Relating to the issuance of a search warrant to search for property constituting evidence of an offense. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1430 By McFarland. Amending Subsec. (a), Sec. 42.11, P.C. Relating to the use of animals as a lure or quarry in racing dogs or in training dogs for racing. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1436 By Looney. Amending Art. 19.01, C.C.P. Relating to the selection of grand jurors. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1437 By Jones. Amending Sec. 25.05(a), P.C. Relating to the offense of criminal nonsupport. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1511 By Lyon. Amending Art. 4476-15, V.C.S. Relating to the penalty for the manufacture or sale of certain drugs. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1578 By Nowlin. Amending 19.03(a), P.C. Relating to the offense of capital murder when an officer or employee of government is murdered. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1586 By Gibson of Ector. Amending Art. 1006, C.C.P. Relating to satisfaction of a judgment from proceeds of a bond forfeiture. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1611 By Chavez. Relating to conforming criminal penalties to the punishment structure established by the Penal Code. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1629 By Whitehead. SAME AS SB 786. Amending Art. 4476-15, V.C.S. Relating to local regulation of drug para-

phernalia. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1670 Amending Sec. 25.05(i), P.C. Relating to the offenses of criminal nonsupport and of coercion to avoid payment of child support. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1686 By Green of Harris. Amending Sec. 2.03, 2.04, and 4.05, Controlled Substances Act. Relating to regulation of certain controlled substances that may be therapeutic. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1689 By Hendricks. Amending Art. 36.07, C.C.P. Relating to the order of argument in a criminal case. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1700 By Clark of Smith. Amending Sec. 3f, Art. 42.12, C.C.P. Relating to denial of probation and parole to certain offenders. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1730 By Rudd. Amending Art. 670id, V.C.S. Relating to operation of a motor vehicle while under the influence of drugs. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1741 By Wallace, et al. Amending Sec. 43.21, P.C. Relating to the definition of obscene and to the elements of and penalty for the offense of obscenity. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1743 By Wallace, et al. Amending Sec. 43.24, P.C. Relating to the offense of disseminating harmful material to minors. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1744 By Wallace, et al. Amending Chap. 43, P.C. Relating to prohibiting the display of material harmful to minors in certain places. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1745 By Wallace, et al. Amending Sec. 19.03(a), P.C. Relating to the offense of capital murder. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1746 By Wallace, et al. Relating to sexual offense arrest and final conviction investigations of persons employed to work with children. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1747 By Wallace, et al. Amending Chap. 21, P.C. Relating to the testimony of certain child witnesses in proseeutions for certain sex offenses. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1948 By Wallace, et al. Amending Sec. 71.02(a), P.C. Relating to the offense of organized criminal activity. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1750 By Wallace, et al. Amending Art. 18.02, C.C.P. Relating to search warrants for juveniles under certain circumstances. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1751 By Wallace, et al. Amending Art. 18.18(a), C.C.P. Relating to the scizure and destruction of obscene materials. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1752 By Wallace, et al. Amending Chap. 25, P.C. Relating to the offense of harboring or concealing a runaway child. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1753 By Wallace, et al. Amending Sec. 12.42, P.C. Relating to punishment for repeat offenders of sexual crimes involving children. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1755 By Wallace, et al. Amending Sec. 25.06(c), P.C. Relating to the penalty for the offense of the sale or purchase of a child. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1757 By Wallace, et al. Amending Sec. 34.07, Family Code. Relating to the penalty for the failure to report child abuse. REERRED TO COMMITTEE ON JUDICIAL AFFAIRS.

HB 1765 By Wallace, et al. Relating to allowing a landlord to void a lease if the property is used for obscene purposes. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1798 By Close. Relating to the protection of witnesses in organized crime prosecutions. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1821 By Nabers. Relating to representation of a person accused or suspected of a crime under federal law by a state proseeuting attorney. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1826 By Gibson of Ector. Amending Sec. 22.02(a), P.C. Relating to the offense of aggravated assault. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1827 By Gibson of Ector. Amending Sec. 22.04(a), P.C. Relating to the offense of injury to a child. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1830 By Crawford. Amending Sec. 22.03, P.C. Relating to the definition of what constitutes a deadly assault on a peace officer. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1887 By Hill of Travis. Amending Art. 43.03, C.C.P. Relating to imprisonment for default in payment of fine or costs or both. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1940 By Lyon. Amending Art. 55.01, C.C.P. Relating to expunction of certain criminal records. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1960 By Bird. Amending Arts. 4.01 and 4.03, C.C.P. Relating to creating intermediate courts of criminal appeals to be known as Circuit Courts of Criminal Appeals. REFERRED TO COMMITTEE ON JUDICIAL AFFAIRS.

HB 1993 By Uribe. Amending Sec. 4, Art. 26.05, C.C.P. Relating to the compensation paid to appointed counsel in a criminal case. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1997 By Schlueter. Amending Sec. 19.03(a). P.C. Relating to capital murder when the murder of a child is involved. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 2107 By Ezzell. Amending Art. 42.13, C.C.P. Relating to performance of community service jobs as a condition of probation. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

(Continued on page 35)

ANNOUNCING . . .

NORTHWESTERN UNIVERSITY'S TWENTY-SECOND ANNUAL SHORT COURSE FOR DEFENSE LAWYERS IN CRIMINAL CASES

June 25-29, 1979
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Bills Introduced-- continued

HB 2015 By Berlanga. Amending Arts. 17.02 and 17.03, C.C.P. Relating to the release pending trial of persons accused of criminal offenses. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 2035 By Wright. Amending Arts. 42.12, 42.13, C.C.P. and Art. 6687b, V.C.S. Relating to proof of financial responsibility in certain situations involving driving while intoxicated or suspension of a driver's license. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 2048 By Nabers. Amending Art. 1083, C.C.P. Relating to transfer of funds from the Criminal Justice Planning Fund. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 2125 By Hill of Travis. Amending Subsecs. (a) and (b), Sec. 3, Art. 42.13, C.c.P. Relating to the misdemeanor cases in which probation is authorized. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE. ■

Guest Editorial—continued

then the law should be changed if the public so desires. Remember all "criminal laws" are Statutes which define the conduct or lack of conduct that constitutes the criminal offense which can be punished.

If a survey were made it is certain that some of the Amendments to the Federal Constitution and the Constitution of Texas would fail because the public at the present time does not like some of the results. However, I feel certain that your Institution would be at the forefront of defending the validity of the First Amendment to the Federal Constitution which guarantees your right of "Freedom of the Press and Freedom of Speech" whereas the same Institution would probably be non-committal if not opposed to the effective and valid enforcement of the "Fifth Amendment". Yes, the last two examples are exaggerations but it is believed that they make a point. The hue and cry today is that the Constitution and laws interfere with "law enforcement." This is true. They do, and it is intentional on the part of those who wrote the Constitution and the laws. Whenever they said freedom of speech, freedom of press, freedom of religion, they meant it. When they said the right to keep and bear arms, they meant it. When they said the people should be secure in their houses, persons and papers against unreasonable searches and seizures, they meant it, and when they said a person should not be required to testify against himself, they meant it. Likewise, whenever they stated that there should be due process of law, they meant it.

So in answer to your question "And What of Justice?" it is submitted that justice is that hoped for but never obtained system that will govern the rights of men and women within the framework of their Government equally protecting the poor as well as the rich, the innocent as well as the guilty, the uneducated as well as the educated, regardless of race or station in life, and it must be admitted that our system has not accomplished this high and noble goal but it is the best that the minds of men has yet conceived anywhere on the face of God's green earth. So if you have not had an opportunity to receive some of the "justice" south of the border or some of the "justice" of Castro's Cuba or some of the "justice" of the USSR, let's don't be knocking the system, let's support it and pass the word to the members of the State Bar, the Prosecution and the Judiciary that the Appelate Courts of the State and the Federal system will grade your papers and grade your activities so be prepared and comply with the law, and "justice" can more nearly be obtained.

Very truly yours,
Weldon Holcomb

NEW MEMBERS

(Since February 2, 1979)

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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.

SHORT COURSES FOR DEFENSE LAWYERS IN CRIMINAL CASES AND FOR PROSECUTING ATTORNEYS

(Summer 1979)

Northwestern University School of Law will conduct its 22nd Annual Short Course for Defense Lawyers in Criminal Cases during the five-day period June 25-29, 1979. The Law School will also conduct its 34th Annual Short Course for Prosecuting Attorneys during the five-day period August 6-10. Course directors are Professor James B. Haddad and Assistant Dean, J. William Elwin, Jr.

An important aspect of each course will be demonstrations and panel discussions on "Trial Techniques." Other subjects on the program include "Recent Development in the Law of Arrest, Search and Seizure"; "Confessions"; "Discovery"; "Eye-Witness Identification"; "Scientific Evidence"; and many other subjects of importance to criminal law practitioners. There are also special sessions for military lawyers.

The registration fee for each course is $300. Further information may be obtained by contacting Ms. Jeanne M. Nowell, Director of Continuing Legal Education, Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, IL 60611. The phone number is (312)649-8932. Programs and applications will be available about April 15.

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

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B-2 Erisman's, *MANUAL OF REVERSIBLE ERRORS* $33.50

B-3 *GEORGETOWN LAW JOURNAL* . . . . . $ 5.00

B-4 Tessmer's, *HOW TO BREAK A BREATHALYZER* $15.00

B-5 *TRAFFIC LAWS*, by Jim Lovett . . . . . $ 2.00

B-6 *TABLE OF OFFENSE AND PENALTIES* . . . . . $ 1.00

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