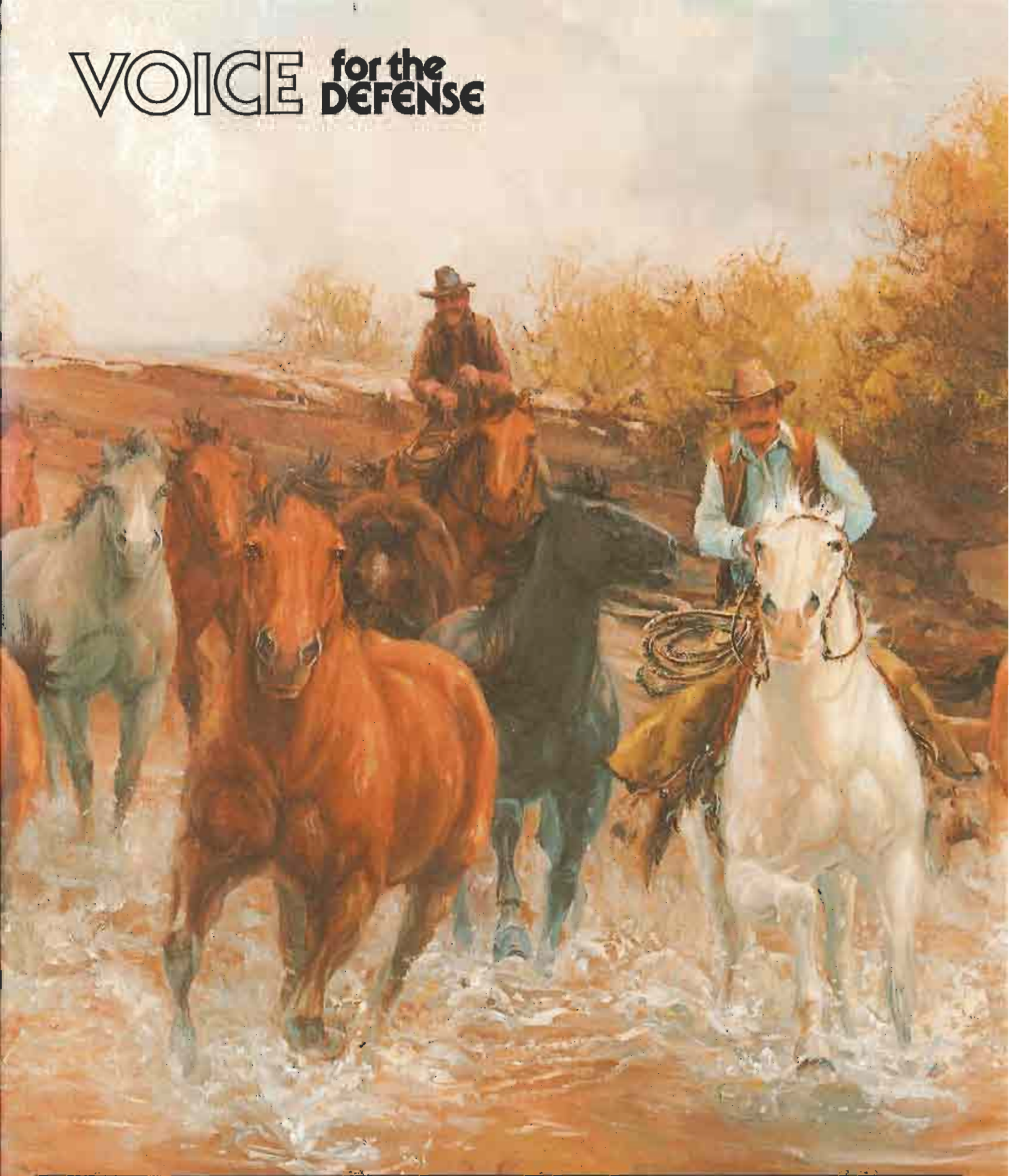
VOICE for the DEFENSE



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VOICE

Articles

Regular Features

NewsVOICE

Cover

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JANUARY 1981

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Editor's Corner

Clif Holmes

New Year's resolutions, it is said, are made to be hroken. That being the case, I won't propose "New Year's" resolutions, as such, but would like to offer several areas where we, as CDLs should resolve, at all times, to improve upon.

1. The legislative process—We are 1200-plus strong, yet fewer than five percent of our membership is visibly active in lobbying for our position in the legislature. Good and bad (from our standpoint) legislation is being proposed for the upcoming legislative session. If only 75 additional members would get active in this process, we could more than double our impact—what the hell would happen if we all did?

2. Court operations improvement—I'm tired of dealing with inane docket procedures devised by unthinking persons. I'm tired of jury impanelment and selection procedures which consume inordinate amounts of time and inure to the benefit of none. We as CDLs should take the lead in proposing and getting established procedures which lead to a more efficient operation of our courts.

3. Intermediate appeals—How and with whom this system is instituted is IMPORTANT to us. We need to give our close and concentrated attention to it.

4. TCDLA—We are it. It is nothing else. TCDLA is the only organized, effective voice for the defense point of view. Pay your dues, recruit new members, and be active.

I could probably extend the list but fulfilling these goals would be a monumental accomplishment. Can't we, like Avis, try a little harder?

Ed.

News VOICE

OOPS! It's Habern, not Haburn. Our apologies to Bill Habern for misspelling his name in the December *VOICE*.

* * *

NEH ANNOUNCES 1981 SEMINARS FOR LAWYERS AND JUDGES

In the summer of 1981, the National Endowment for the Humanities will sponsor eight seminars for lawyers and judges.

The program brings them together for a month of full-time study in seminars directed by distinguished law teachers, philosophers, historians, and other scholars at selected colleges aud universities throughout the country.

Its purpose is to advance public understauding and use of the humanities by giving professional leaders the opportunity to stand back from their work and explore a wide range of issues of national concern under the direction of scholars in the humanities.

Three seminars are open only to lawyers and judges, in all sectors of public and private legal practice. In addition, five Interprofessional Seminars are offered for lawyers, judges, and members of other professions.

Topics include an historical analysis of U.S. race law, theories of adjudication, the relationship between law and political and philosophical theory, and among the Interprofessional Seminars, morality and international relations, taste and U.S. popular culture, conflicts between individual values and professional responsibilities, competing rights claims in contemporary society, and Caribbean societies and relations with the U.S.

From twelve to fifteen persons attend each seminar tuition-free, receiving a stipend of $1,200 plus reimbursement for travel. The application deadline is April 13, 1981.

For applications and further information write: Professions Program, Division of Fellowships & Seminars, MS-101, National Endowment for the Humanities, Washington, D.C. 20506.

* * *

TCDLA AMICUS COMMITTEE REPORT

Paul Chitwood, Dallas attorney, assisted by Richard Anderson, Dallas TCDLA Amicus Committee member and first amendment expert, obtained temporary relief in federal court from imposition of punishment under a misdemeanor conviction for intentionally "annoying" another under the Texas harassment statute, §42.07, T.P.C. The Federal magistrate set bond pending a ruling on the vagueness of the statute which was upheld 5-4 in *State v. Kramer*, Texas Court of Criminal Appeals, No. 57,355, decided on October 1, 1980.

Professor David Dittfurth, St. Mary's University Law School, has agreed to be "of counsel" on the TCDLA Amicus Brief to be authored by Dallas TCDLA Amicus members Richard Anderson and Elizaheth Carlisle. A copy of the brief will be forwarded to the TCDLA brief bank in Austin.

* * *

President's Report

ROBERT D. JONES

THE NEWS IS OUT

Ruiz vs. Estelle is now public and Texas Corrections System is going to be revamped. There are going to be meaningful changes for the benefit of our present and former clients. It is long past due.

It was indeed an act of courage on the part of Judge William Wayne Justice. This Association certainly must acknowledge and commend Judge Justice, which we do with deep gratitude.

HOME OFFICE

There have been approximately 132 members who have assigned their State Bar assessment refunds to TCDLA for the future purchase of a home office. I say, "Thank you." This gives the Association in excess of $2,000 to start our building fund.

MEMBERSHIP

The "dues are out." I request that you mail your check by return mail in order for the staff to process the funds. This will allow for a more meaningful financial planning for 1981-82, and will not require additional time and money to send additional statements.

Our membership is growing; however, many of the officers and directors have not reported the new members they have signed up. I would like a report from each officer/director at the January Board meeting.

LEGISLATIVE REPORT

Ed Mallett and his committee met in Austin at the Law Center and had a strategy session. It was well attended by the members. Ed will make a report of his committee at the January Board meeting on January 31, 1981, at the Sheraton Crest Hotel in Austin. An invitation is extended to all to attend.

It was significant that the Supreme Court permitted the Census Department to release its figures. The result of that act is that the '81 Legislature will expend a good portion of their time on redistricting. I anticipate that this will reduce substantial time allocated for other legislative matters.

I wish to thank each of you for the time, effort, energy, and money that you gave to our Association in 1980. It has been a productive year.

It is my wish that each of you and your family have a prosperous new year. May 1981 be the best year for TCDLA.

EFFECTIVE REPRESENTATION: DEATH OF THE DOUBLE STANDARD

Charles Bubany and Rocky Crocker

Rocky Crocker

Charles Bubany

No longer will the standard for determining effectiveness of representation differentiate between retained and appointed counsel. As noted in the Texas decision of *Ex parte Duffy*[1], the United States Supreme Court clearly stated in *Cuyler v. Sullivan*[2] that effective assistance under the sixth amendment cannot mean one thing for an appointed attorney and another thing for retained counsel.

Before *Cuyler*, a number of courts, including the Texas Court of Criminal Appeals, required a finding of state action before determining that the accused was denied effective assistance of counsel.[3] Writing for the majority in *Cuyler*, Justice Powell declared that the state's conduct of the criminal trial is itself "state action."[4] Accordingly, there is "no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."[5] Where counsel was appointed, the prerequisite state action was found in the state official's action of tying together counsel and client. Where counsel was retained, however, there was a tendency to find state action only if counsel's errors were so egregious as to make the state a party to the denial of effective assistance through failure of the judge or prosecutor to take remedial action. As the Texas court stated in *Ex parte Duffy*, it is now clear that "*Cuyler v. Sullivan* has put an end to the double standard emanating from the retained-appointed dichotomy."[6] What that single standard will be has yet to be answered by the Supreme Court.[7]

Lacking any guidance from the U.S. Supreme Court on the matter of formulating a single test, the Texas Court of Criminal Appeals relied on its own prior decisions. "[U]ntil further experience teaches otherwise," it said, "we will apply here and continue to use the standard of 'reasonably effective assistance of counsel'. . . ."[8] The court specifically rejected anything akin to a willful misconduct or gross negligence standard as "but a throwback to the 'breach of duty' notion"[9] which was scrapped in *Ex parte Ewing*.[10] Fully stated, the test is "counsel reasonably likely to render and rendering reasonably effective assistance."[11] The court views this as a distinguishable standard because it includes both a *competence* (likely to render) and a *performance* (rendering) component. Applying this standard, the court had little difficulty in finding that the accused in a capital murder case had not received effective assistance.

The problem with the "reasonably effective assistance" test adopted by the majority in *Duffy* is that it is really no test at all. Its application rests solely on an almost instinctive, highly subjective judgment by the reviewing court as to the overall quality of the accused's representation. To that extent, it may be practically little different than the old "farce and mockery" test, which was a generalized determination of prejudice based on a view of the whole proceedings.[12]

From the standpoint of the trial judge, this vague standard poses real problems. The trial judge bears the task of making competency judgments during the trial in response to counsel's mal- or misfeasance. He or she does not have the luxury of hindsight, of making judgments on the basis of the proceedings as a whole. Moreover, the vague standard forces the trial judge to guess what the reviewing court would find "reasonable." Because the trial judge can never know what is "reasonable" in the minds of a majority of the court of appeals, he must make a determination based on his personal view of reasonableness.

The court rejected the standard urged by Judge Roberts, "reasonable competence demanded of attorneys in criminal cases," as "lack(ing) appeal at this time."[13] Petitioner's counsel apparently had this standard in mind; the record included offers of proof from eight defense lawyers regarding the minimally

EFFECTIVE REPRESENTATION from page 5

acceptable standard of legal assistance in Bexar County. The court appears to have mischaracterized the test Roberts suggested. Referring to it as an undifferentiated standard, the court apparently objected to its sole emphasis on "competence." Courts applying the "reasonably competent counsel" standard, however, have not perceived it as relating only to the degree of skill or expertise *possessed* by the defense attorney.[14] That standard also includes the degree of competence actually *exercised.*

The court may not be so much concerned with the technical formulation of the test, however, as it is with the practical ramifications. The reasonably competent counsel test urged by Judge Roberts necessarily implied reference to an objective standard. The court acknowledges as much when it recognizes the link between the "reasonably competent counsel" test and evidence of "community standards."[15]

Judge Roberts's approach takes the test a step beyond the weakness of the more subjective test adopted by the court. It takes what is reasonable "out of the minds" of the judge or judges and externalizes the standard of reasonableness. An integral part of the reasonable competence test is the external and objective standard of the reasonably competent attorney or the attorney giving assistance within the range of competence normally expected of attorneys in criminal cases. Under that test, community standards could be used to establish the frame of reference against which a specific attorney's degree of skill and performance is measured. Consideration of generally accepted guidelines for performance such as the ABA Defense Standards also would be relevant in determining the community standard. Exactly which guidelines would be appropriate would depend on the nature of the scrutinized activity. In some instances, case precedent would be germane to determining an attorney's duty in a given situation.

The community standards approach would not hamper counsel's judgment in those matters traditionally left to his discretion. In matters of trial strategy, for example, there may be several "reasonable" choices. Regarding adequacy of investigation, on the other hand, there may be only a single minimally acceptable level. The "range of competence" required would necessarily vary with the activity or decision.

The effect of such an approach would be to adopt a standard not unlike a tort negligence standard, which may explain the court's reluctance to adopt it. Perhaps the court fears that it will invite tort actions for malpractice in criminal cases and in turn discourage inexperienced attorneys from accepting criminal cases. If that is true, those fears seem unfounded.

The reasonably competent counsel standard requires nothing more of attorneys than the typical criminal defense attorney is accustomed to providing. For those attorneys who do not regularly handle criminal cases, on the other hand, it provides a readily ascertainable standard for gauging the quality of performance expected of them. This will have the effect of causing those attorneys to take stock of potential limitations before accepting criminal cases and to take all necessary steps to ensure adequate representation in those cases they do accept.

The single most compelling reason for adoption of the reasonably competent counsel test of effective representation is to provide a uniform standard for both trial courts and the newly reconfigured courts of appeal in Texas.

The meaning of something so fundamental to our legal system as the sixth amendment should not ". . . vary with the sensibilities and judgments of various courts. The law demands objective explanation, so as to insure the even dispensation of justice."[16]

Footnotes

[1] No. 64,863 (Tex.Crim.App., Oct. 1, 1980).

[2] 100 S.Ct. 1708 (1980).

[3] *Ex parte Ewing,* 570 S.W.2d 941 (Tex.Crim. App. 1978); *Fitzgerald v. Estelle,* 505 F.2d 1334 (5th Cir. 1974, *en banc*).

[4] 100 S.Ct. 1708, 1716.

[5] *Id.*

[6] No. 64,863 (Tex.Crim.App., Oct. 1, 1980) at p. 5.

[7] *Maryland v. Marzullo,* 435 U.S. 1011 (1978) (White, Jr., dissenting from denial of certiorari).

[8] No. 64,863 (Tex.Crim.App., Oct 1, 1980) at p. 6.

[9] 570 S.W.2d 941 (Tex.Crim.App. 1978).

[10] No. 64,863 (Tex.Crim.App., Oct. 1, 1980) at p. 6.

[11] *McKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960).

[12] Erickson, "Standards of Competency for Defense Counsel in a Criminal Case," 17 *AMER. CRIM. L. REV.* 233, 240-41 (1979).
This test has the effect of merging the determination of counsel's competence with the question of prejudice to the accused. The test urged herein would make those issues separate, and as a result, decisions applying to it would provide clearer guidance as to standards of competency.

[13] No. 64,863 (Tex.Crim.App., Oct. 1, 1980) at p. 6, note 17.

[14] See, *e.g., State v. Anonymous,* 34 Conn. Supp. 656, 384 A.2d 386 (1978); *Commonwealth v. Adams,* 375 N.E.2d 681 (Mass. 1978).

[15] No. 64,863 (Tex.Crim.App., Oct. 1, 1980) at p. 5.

[16] *Beasley v. United States,* 491 F.2d 687, 692 (6th Cir. 1974).

ORAL SEX AND THE CHARGING OF CULPABILITY IN TEXAS CRIMINAL INDICTMENTS

Martin Underwood

Underwood, (at left, with hat), defending his thesis at a recent meeting of the Comstock Criminal Lawyers Association, stopped long enough to pose for photographers. Martin Underwood practices law in Comstock, Texas, and is president of the Comstock Criminal Lawyers Association.

There is no demonstrable relationship between oral sex and the charging of culpability in Texas criminal indictments. Consequently, this article has nothing whatsoever to do with oral sex. However, having attracted your attention, I hasten to assure you that this article does, in fact, deal with the problem of charging culpability in Texas criminal indictments, as recently exemplified by *Ex Parte Ruben Santellana,* Texas Court of Criminal Appeals No. 63,512, decided en banc on October 15, 1980.

Culpability seems so simple, a logical outgrowth of the civilized notion that a citizen shouldn't be punished for a forbidden act unless he also did it with the prescribed unlawful state of mind. Even in Latin it makes sense: there must be a *mens rea* as well as an *actus reus* to make a crime. This basic idea is clearly laid out in Section 6.02, Texas Penal Code. Doing one of the acts described as a crime is not an offense unless it is done with one of the prescribed culpable mental states, all of which are defined in Section 6.03, T.P.C. A person must act either intentionally, knowingly, recklessly, or with criminal negligence; these terms describe a hierarchy of mental states, with the greater including the lesser. Except in the rare case where the Legislature makes an actor strictly liable, the statutory scheme seems to contemplate that every statute describing a crime will designate a particular mental state, or else at least presume recklessness.

A reading of Section 6.02, T.P.C., indicates that the four listed culpable mental states are an exhaustive listing. Subsection (a) says:

> Except as provided in Subsection (b) of this section, a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

Subsection (b) provides:

> If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

The "culpable mental states" are classified in Subsection (d) and are defined in Sec. 6.03. In both of these the four aforementioned culpable mental states are listed, i.e., intentional, knowing, reckless, and criminal negligence. There is no indication in the statute that other "culpable mental states" exist which would satisfy Sec. 6.02(a).

In spite of the foregoing framework, a curious line of cases has developed which have modified Sec. 6.02. The result could be not only confusion in the law but also real injustice to defendants. The illustrative cases are *Teniente v. State,* 533 SW2d 805 (1976); *Clark v. State,* 558 SW2d 887 (1977); and the previously-cited *Santellana* case.

Teniente involved a conviction or burglary of a habitation. He appealed only as to the sufficiency of the evidence to convict. However, during oral argument appellant's counsel asserted that the indictment did not properly charge culpability. The indictment charged that the defendant "... did then and there, with intent to commit theft, enter a habitation without the effective consent of Carlos Reyna, the owner." Presumably this question was not even briefed by the litigants. However, Commissioner Dally wrote on the question in an opinion approved by the court. The court answered this argument in a single paragraph:

> V.T.C.A. Penal Code, Sec. 6.02, provides that a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires. The conduct that is gist of the offense of burglary in this case is the entry into the habitation with the requisite intent. The indictment alleges the culpable mental state with which the appellant entered the habitation; it alleges he entered the habitation "with the intent to commit theft."

Teniente thus implicitly held that the indictment need not have alleged that the entry was made intentionally, knowingly, or recklessly; it was sufficient to allege that the entry of the habitation was made "with the intent to commit theft." That intent, of course, is also a specific

element of the crime charged. Thus with a few words, the carefully designed requirements of Sec. 6.02, T.P.C., were nullified; instead of alleging one of the four defined mental states, henceforth simply alleging another element which involved some sort of intent would suffice so long as it related to the perceived "gist" of the particular offense under scrutiny. Crimes could now be charged and proven without reference to any of the four mental states prescribed by Sec. 6.02.

Clark was another case written by a commissioner and approved by the court. The conviction was for indecency with a child. The indictment read:

> . . . did then and there unlawfully with intent to arouse the sexual desire of the Defendant have sexual contact by touching the genitals of L—M—M—, a child under the age of seventeen years and not his spouse.

The appellant argued that the indictment was fundamentally defective for not alleging a culpable mental state under Sec. 6.02. The opinion holds that such "contention is without merit," citing *Teniente* as authority. The paragraph explaining the rationale is as follows:

> In the instant case, the gist of the offense is appellant's having sexual contact with the prosecutrix, with the requisite intent. The indictment does allege the culpable mental state with which he had sexual contact. Therefore, under the authority of *Teniente v. State, supra,* appellant's third ground of error is overruled. (Citing also *Johnson v. State,* 537 SW2d 16[1976]).

The noncompliance with Sec. 6.02 was on authority of *Teniente,* which actually provided no adequate rationale for such a decision. The concept of "gist" reappeared.

Such was the state of the culpability law in October, 1980, when the court decided *Santellana. Santellana* provided the opportunity to disavow *Teniente* and *Clark* and return to the concepts of Sec. 6.02. The court could have held that the fact that an offense has an element which mentions "intent" has nothing to do with the *mens rea* requirement, and that Sec. 6.02 is not to be replaced with a subjective "gist" analysis. Instead, the court embraced and endorsed the reasoning of *Teniente* and *Clark,* while creating an exception which fit the *Santellana* situation.

Santellana was convicted of aggravated robbery. By writ of habeas corpus, he claimed the indictment was fundamentally defective for failure to allege the necessary element of a culpable mental state. The indictment against Santellana alleged that he

> . . . did then and there while in the course of committing theft of money owned by Susie Oyervides, hereafter styled the complainant, and with intent to obtain and maintain control of the property threaten and place the complainant in fear of imminent bodily injury and death, by using and exhibiting a deadly weapon, namely, a pistol. . . .

The state did not properly allege the requisite elements of robbery according to Sec. 29.02, T.P.C.; it failed to charge that Santellana *intentionally or knowingly* placed complainant in fear of *imminent* bodily *injury* or *death.*

The state used the *Teniente/Clark* cases to argue that the indictment complied with the culpability requirement in Sec. 6.02 by alleging that the defendant acted "with the intent to obtain or maintain control of property."

The court rejected the state's argument by pointing to the difficulty in applying the "gist" analysis to aggravated robbery. It was readily apparent, the court said, what single act constituted the "gist" of burglary or indecency with a child. Aggravated robbery, on the other hand, consisted of two criminal acts: a theft and an assault. The court also noted that two mental states are specifically made part of the definition of the offense: the offender must intend to obtain control, and he must intentionally or knowingly place the victim in fear. One mental state goes to the element regarding theft of property, the other goes to the assaultive component. The court rejected the state's contention that the "intentionally or knowingly" language was superfluous. Applying its reasoning to the *Santellana* indictment, the court found that the missing culpability element rendered the indictment fundamentally defective.

Although the "gist" theory is not the primary basis for the court's decision, in light of the statutory language, the court did apply the concept to Santellana's indictment. Finding that the essence of aggravated robbery could not be so easily identified as it was with burglary and indecency with a child, the court rejected the application without questioning the validity of the concept. The court specifically reendorsed the "gist" theory as it was applied in *Teniente* and *Clark.*

So what does the *Teniente/Clark/Santellana* trilogy say about alleging culpability? Evidently it would read as follows:

> An indictment is not required to allege any of the four culpable mental states listed in Sec. 6.02 as to any element of conduct charged which is not the "gist" of the offense if there is also a specific intent element in the offense which applies to the "gist" element, unless the statute specifically requires such culpable mental state(s) as to the non-gist element(s).

Obviously there is great potential for subjectivity and confusion about the "gist" of various offenses. Even more serious is the potential, small though it may be, for conviction of defendants who have unintentionally engaged in forbidden conduct. For instance, is it not possible that Mr. Teniente could have unintentionally entered the very house that he in fact intended to commit theft in (but not to unlawfully enter) by virtue of falling through the door, or being chased inside by a dog? If the state does not have to allege intentional entry, presumably they also do not have to prove intentional entry. Likewise, couldn't Mr. Clark have intended to gratify himself sexually but not intended to have sexual contact, only to have sexual contact occur by actions of the child rather than his own? The state wouldn't have to prove that the sexual contact was intentionally made by Mr. Clark, only that it occurred while he was intending to get sexual gratification. I submit that the *Teniente/Clark/Santellana* rationale, by discarding the clear requirements of Sec. 6.02 in favor of the "gist" concept, has made the law in this respect both unclear and unjust.

SIGNIFICANT DECISIONS report on

ON RECENT DECISIONS FROM THE COURT OF CRIMINAL APPEALS AND FEDERAL COURTS.

Editor: Kerry P. FitzGerald
Associate Editors: David L. Botsford and Arch C. McColl III

COURT OF CRIMINAL APPEALS DECISIONS

ACE WHITLOW (No. 59,401, Attempted Escape, Affirmed, 12-17-80)

D claimed Court failed to make an independent determination of D's competency to plead guilty after D gave an equivocal response to the Court's inquiries into the reasons for his plea of guilty. Two days before D pled guilty, a jury had found D competent. C.C.A. held that where there was a jury determination after a well developed competency trial, followed closely by D's plea of guilty, there was no need for any independent determination as to D's competency. Further, it is not necessary that there be an express inquiry as to whether a defendant freely and voluntarily enters his plea of guilty to constitute substantial compliance with Article 26.13, C.C.P.

While D filed a motion in limine to exclude res gestae facts as to the offense and subsequent investigation which was overruled, D failed to properly object to the evidence when offered and thus the error was waived. D again waived any error in the exclusion of evidence pertaining to the administration of sodium amytal (truth serum) to him, purportedly relevant to indicate the basis of the psychiatric diagnosis of D's doctor. D failed to perfect any trial bill of exception.

C.C.A. held that when the jury inquired "Is it necessary to remember about the event to be competent or is it only the present that matters?", the Trial Court properly referred the jury to the second paragraph of the Court's Charge defining incompetency.

FRANCIS BALLEW (No. 59,663, Murder, Affirmed, 12-17-80)

This case holds that the attorney-client privilege (Article 38.10,C.C.P.) encompasses agents whose services are required by the attorney in order to properly prepare client's case and does include the psychiatrist and the accountant. The privilege extends to the testimony of D's psychiatrist and his notes and reports from the examination but it is not absolute and can be waived such as when a defendant calls his psychiatrist to the witness stand as was done in this case. D.A. does have the authority to discover the psychiatrist's medical reports and notes on cross-examination and impeach the doctor with them. C.C.A. reiterated the rule that Article 46.02(3)(g), C.C.P. does not prohibit trial use, relative to the defense of insanity, of D's statement to the psychiatrist during a combined competency/sanity exam. Here the psychiatrist examined D after the competency hearing and his testimony was limited to the sanity issue.

JOHNNY QUIN (No. 66,146, Burglary of a Building, Affirmed, 12-17-80)

For the first time on appeal, D argued that the Court erred in only appointing a psychologist and not also a neurologist, the latter being necessary to perform certain medical tests of organic brain damage not performable by a non-medical person such as a psychologist. D's motions stated D was not claiming incompetency or insanity. No error as the justification for appointing a neurologist was not shown at trial nor was any evidence brought to the Trial Court's attention.

Likewise, D's challenge as to the constitutionality of Article 26.05(1)(d), C.C.P. (investigative and expert witness expenses up to $500.00) failed as D did not show he was denied funds in excess of $500.00.

TURNIPSEED & HOWARD (No. 65,868-9, Delivery of Cocaine, Affirmed,11-26-80)

The 1979 amendment to the Controlled Substances Act (effective 8-27-79) wherein cocaine was specifically named as a controlled substance was constitutional under Article 3, Section 35.

C.C.A. held error, if any, was waived re D's challenge to a prior conviction because he was without counsel, as D did not object to cross-examination when D admitted to the conviction although he stated he was not represented by counsel at the time. Further, evidence did not show D was indigent and did not waive counsel.

EX PARTE RICHARD RUSTIN (No. 61,098, Relief Granted, 11-26-80)

D escaped from jail 5 days after he was convicted for aggravated robbery and was then charged with escape. D pled guilty and was sentenced to 25 years. C.C.A. held that D's plea was not knowingly and voluntarily entered into, as the sentence exceeded that of a second degree felony and as according to D, his counsel told him the range of punishment was that of a first degree felony; further, D pointed to defective admonishments by the Trial Court at the time of the plea of guilty.

DAVID VELASQUEZ (No. 65,005, D.W.I, Affirmed, 11-26-80)

C.C.A. declined to reach the question presented by D - that the Court erred in denying his pre-trial motion to set aside the information for failure to provide him with a speedy trial under Article 32A.02, C.C.P., as there was no evidence in the record that there was a plea bargain so as to even invoke Article 44.02, C.C.P.

ACE WHITLOW (No. 59,401, Attempted Escape, Affirmed, 12-17-80)

The indictment alleged that D unlawfully, with the specific attempt to commit the offense of escape, did attempt to escape from the custody of the Sheriff, etc. D argued that the indictment was fundamentally defective as it did not include each of the elements of the offense of escape under Section 38.07(c), P.C.

C.C.A. noted that the elements necessary to establish an offense under Section 15.01, P.C. (the attempt statute) comprised the following: (1) a person (2) with specific intent to commit an offense (3) does an act amounting to more than mere preparation that (4) tends but fails to effect the commission of the offense intended. Here the indictment was sufficient to show a felony. However, if this were a conviction for a consummated escape, D's contention would have merit. Ex parte McCurdy 571 SW2d 31. Further, D's argument that the use of the word "attempt" rather than "intent" (i.e. "with the specific attempt to commit the offense of escape") fails as the word "attempt" includes the word "intent". Ex parte Pousson 599 SW2d 820.

DONALD VAUGHAN (No. 58,432, Murder, Affirmed, 12-10-80)

D argued that the indictment alleging murder by kicking and stomping the decedent "with his feet" was defective because it did not specifically allege "with shoes on his feet", citing Northern 203 SW2d 206. Overruling all cases to the contrary including Northern, C.C.A. held that the manner, kicking and stomping, and the means, with his feet, are plainly set forth and are sufficient. Benoit 561 SW2d 810.

C.C.A. also approved a charge authorizing conviction if jury found D "stomped or kicked" the deceased to death even though the indictment charged in the conjunctive, particularly as the evidence showed and the jury could have concluded the deceased was both kicked and stomped during the single transaction. Brantley 522 SW2d 519.

To rebut D's testimony that the decedent had been running around on D, State presented testimony of the decedent's attorney to show he had been retained to file a divorce petition against D and on the day before her death to seek a temporary restraining order and that he had done so. The contents of the petition were not in evidence, as they were in Erwin 531 SW2d 337. C.C.A. held the testimony relevant to show something of the feelings and relationship of the parties and was a legitimate attempt to rebut D's evidence that the deceased was unfaithful and generally a bad person.

ROBERT HALL (No. 65,091, Voluntary Manslaughter, Reversed, 12-10-80)

The enhancement allegation alleged that D had been previously convicted "upon an indictment" in a Michigan court, while the proof showed he had been convicted on an Information. C.C.A. held proof of the "repeater" allegation was not sufficient but noted that the double jeopardy clause did not forbid the State to attempt to again prove the prior conviction on re-trial. Porier 591 SW2d 482.

EX PARTE JAMES HOWETH (No. 65,804, Reversed in Opinion on Court's own Motion for Rehearing, 12-10-80)

D won a new trial because the prior conviction alleged in the enhancement paragraph was based on an indictment for possession of a "drug" (methaqualone) which was not listed under the Dangerous Drug Act. This defendant was particularly successful because he elected to have the jury set the punishment.

EX PARTE LUIS HERRERA (No. 66,218, Relief Granted, 12-10-80)

The indictment was fundamentally defective for alleging an impossible date for the commission of the offense ("on or about the 10th day of November, A.D. 19 8").

EX PARTE PATSY PULLIN (No. 64,614, Relief Granted, 12-17-80)

The "tampering with a witness" Information was fundamentally defective for failing to allege the specific culpable mental state, that the act was done "with intent to influence the witness". See Section 36.06, P.C.

EX PARTE JERRY HOLBROOK (No. 64,979, 12-17-80)

C.C.A. withdrew the original Opinion which granted relief based on D's challenge to an indictment alleging criminal attempt under the Controlled Substances Act. The original Opinion overlooked the amendment effective May 2, 1979 which made effective a criminal attempt provision under the Controlled Substances Act. Notwithstanding this error, the result in the case was the same because the controlled substance named in the indictment (Preludin) was not expressly listed in the schedules and penalty groups of the Act nor did the indictment allege what facts must be proved about Preludin that made it a controlled substance. Thus the indictment was fundamentally defective. Ex parte Wilson 588 SW2d 905.

As to D's second conviction he was less fortunate. There was a variance between the allegation in the purport clause that D had unlawfully acquired a controlled substance namely amphetimine, and the tenor clause which showed that the actual forged prescription was for biphetamine. The indictment tracked the statutory language of Section 4.09(a)(3) prior to this reference to the prescription which named a different controlled substance. However, as this Section does not require as an element of its offense such purport and tenor clauses and as once it is alleged that

a named controlled substance was acquired or obtained by misrepresentation, etc. by using a forged prescription, the offense is properly charged, and neither the purport or the tenor of that prescription is of any consequence in alleging the offense. Thus, the variance was immaterial.

JOSEPH THOMAS (No. 59,974, Theft, Reversed, 12-17-80)

The theft indictment alleged that X was the owner of certain hub caps taken without his effective consent. D's motion to quash pointed out that the indictment did not sufficiently allege the nature of the ownership or give D adequate notice on the matter of lack of effective consent. C.C.A. recognized the several ways in which a person may be an owner, and the expansive definition of effective consent. See Section 1.07(a)(24) and Section 31.01(1),(2) and (4), P.C. In view of D's motion to quash, D was entitled to such notice.

COMMENT: Several of these cases clearly emphasize that we should be looking at every single drug named in the indictment, whether in the primary count or in the enhancement count; and we should double check the content of the definitions of the terms of art, such as "owner" and "effective consent". If the Thomas decision remains with us, its implications are obvious and the Thomas case will require the filing of motions to quash on similar bases in the future.

ALVIN CLARK (No. 61,641, Burglary, Reversed, 11-26-80)

C.C.A. held that the Trial Court's arbitrary time limitation on the defendant's voir dire examination deprived the defendant of a valuable right to intelligently exercise his peremptory challenges and was an abuse of discretion. The Court limited D to 30 minutes after the Court's very brief examination and the State's similar 30 minute examination. The record showed here that D was not merely trying to prolong the interrogation but was asking relevant material and necessary questions of the jury panel. D's apparently very carefully drawn bill of exception included these two questions: "Whether or not each of the jurors could give D a fair trial and whether or not they had from hearsay evidence or otherwise such a conclusion as to the guilt or innocence of D that would influence them in finding a verdict". In this situation harm is shown automatically. Mathis 576 SW2d 835.

HULAN WRIGHT (No. 61,944, Unauthorized Use of a Vehicle, Reversed, 12-10-80)

State's evidence showed several suspicious events in an eventual high speed chase, following which D was arrested in his car and several guns found therein. D pled guilty. Of four officers who testified as to D's reputation, one came from Bexar County. D's challenge to his testimony showed that he had always worked in Bexar County and knew only the prosecuting attorneys in Dallas as far as D was concerned. D's motion to strike the testimony of the officer was granted and the jury was in-

structed to disregard his testimony but the motion for mistrial was denied. The prosecutors referred to such bad reputation testimony of this officer which had been stricken during their final jury arguments. C.C.A. held that this bad reputation testimony constituted reversible error, particularly in view of the prejudicial prosecutorial jury arguments(even though D did not object to the jury arguments in question). C.C.A. noted that the arguments were blatantly improper and compounded the harm which occurred when the evidence was presented to the jury.

C.C.A. went on to condemn additional jury arguments such as: "What would you say at the trial of Jack the Ripper or the Boston Strangler, the friendly rapist, they didn't have any prior convictions on them" - this argument served no purpose other than to inflame and prejudice the minds of the jurors. D.A.'s further argued that when just before D's arrest in his car, he was seen at a gas station, he really intended to rob the attendant and that he had the guns in his car in the event that some officer happened to apprehend him so that he could kill the officer. These arguments were not based on any evidence and constituted prosecutorial misconduct. Stein 492 SW2d 548.

The type of prosecutorial misconduct exhibited in this case prompted Judge Roberts in his concurring Opinion to write:

> "A plea of guilty before a jury is as close to a sure thing as one can come in our adversary system. It is almost impossible to commit reversible error in such a proceeding, but this demonstrates that nothing is impossible if it is sought zealously enough".

MARVIN BELL (No. 59,469, Aggravated Robbery, Reversed, 12-17-80)

D testified on direct examination, in response to the question as to whether he had anything in his past of a criminal nature, that he had been convicted of a felony offense of embezzlement and had served time in prison. Arguing that D had opened the door, the State over objection, cross-examined D and established a prior misdemeanor possession of marijuana case wherein D received probation. C.C.A. held that D's testimony was not incorrect and did not present an incomplete version of the truth to the jury which would have allowed the D.A. to adduce ordinarily inadmissible criminal activity to correct that version of the facts. Obviously, impeachment of the witness should have been limited to a final conviction for a felony or a misdemeanor offense involving moral turpitude. Murphy 587 SW2d 718. This evidence was not admissible under Article 38.24, C.C.P. as the basic criterion for admission of any evidentiary fact is that it be relevant to a material issue in the case on trial, which was not the situation here. C.C.A. further noted the State's evidence was not overwhelming in view of three somewhat tentative identifications of D as one of the perpetrators of a robbery and therefore the error was not harmless; also, D and two others testified to a defense.

GILBERT LEAL (No. 59,568, Delivery of Heroin, Affirmed, 12-17-80)

State's evidence showed a purchase by an undercover officer from D at his house at 3:05 p.m. on March 26. D's defense was that he was working 100

miles away from his house and didn't get off until 3:00 p.m. that date. His employment records reflected his presence from 7:00 to 3:00 p.m., through a custodian of the records. The custodian did not make the entry; another person did, whom the custodian labeled as a trusted employee who should have entered accurate information. To impeach the business records of this employee, the State introduced bad reputation testimony for truth and veracity and for being a peaceful, law-abiding citizen. The employee in question who made the entries did not testify in the case. When the witness (custodian of records) does not have personal knowledge of the records admitted under Article 3737e, this statute provides that this may be shown to effect the weight and credibility of the evidence but not its admissibility. In this case it is the employee's extrajudicial testimonial assertion in the form of a business record that is actually offered as evidence and thus his credibility is an issue even though he did not testify at the trial and his credibility is subject to impeachment in the appropriate ways. His bad reputation for truth and veracity was therefore properly admitted. Without discussion, C.C.A. held that on the facts of this case the possibility of prejudice to D by the improper admission of evidence of this employee's bad reputation as a peaceful and law-abiding citizen did not require reversal. The record did show that the employee had several prior felony convictions which the custodian did know about and did acknowledge outside the presence of the jury. Bell 443 SW2d 443 was distinguished because of the clear showing of prejudice in Bell.

ELIZA BRADFORD (No. 59,671, Murder, Affirmed, 12-17-80)

The State introduced the decedent's bloody shirt and trousers over the objection that they did not tend to solve any disputed issue in the case and were admitted solely to inflame the jury. C.C.A. held that if a verbal description was admissible, the clothing worn by the victim of the offense, even if bloodstained, was admissible into evidence. C.C.A. noted that earlier decisions held that it is necessary for bloody clothing to solve some disputed issue before it is admissible. Henceforth, all cases inconsistent with this Opinion are overruled. By footnote, C.C.A. stated that such clothing would not be admissible if it is offered solely to inflame the minds of the jury.

GUY ROY (No. 60,068-70, Burglary of Habitation, Affirmed, 11-26-80)

State's evidence in part consisted of video tapes showing the defendant coming to a warehouse and selling stolen property to the police. C.C.A. overruled D's argument that the video tapes only bolstered unimpeached testimony of the police and held that the video tapes were governed by the predicate set forth in Edwards 551 SW2d 731, 733. As the tapes had the dual aspect of audio as well as visual, they conveyed a greater indicia of reliability than either film or sound tapes standing alone and thus at least some of the Edwards elements may also be inferred from the testimony.

C.C.A. also held that D was not denied his right of confronting witnesses when a portion of the video tape showed admissions made by one of D's confederates. These statements were rendered harmless by the equally damaging statements made by D himself. Quinones 592 SW2d 933.

D argued he was entitled to a change of venue as a matter of law because the State's controverting motion was supported by two affidavits signed only by an Assistant District Attorney and by a deputy District Clerk who should not be considered as "credible persons" under Article 31.03, C.C.P. C.C.A. disagreed. Mansell 364 SW2d 391. Further, as a pre-trial evidentiary hearing was held, any insufficiency or defect in the State's controverting affidavits was not prejudicial; nor was there evidence D was forced to take an objectionable juror, since the voir dire was not included in the appellate record. Freeman 556 SW2d 287.

THEODORE JONES, JR. (No. 58,463, Possession of Heroin, Reversed, 12-23-80)

C.C.A. held that the State failed to lay the proper predicate that the substance (alleged to be heroin) had been analyzed by a qualified chemist or technician. The assistant toxicologist with the Dallas lab testified the substance was delivered to him for analysis, that he did not personally do the analysis or know whether it was performed correctly but that it was performed under his supervision by Miss Wu and that he took the results of two tests performed and compared them against reference curves which were retained on known substances as heroin and reached his own judgment that the substance was heroin. C.C.A. declined to extend the rule so that a qualified expert witness may testify from records as to the results of lab tests run under his supervision on the qualifications of the person performing the test is not shown by any evidence whatsoever. Here, the correctness of the actions of the assistant toxicologist who testified depended upon the correctness of the test performed by Miss Wu and therefore her qualifications were essential in order to lay a proper predicate for the evidence that the substance was in fact heroin.

CHARLES CARLOCK (No. 59,451, Commercial Obscenity, Reversed, 11-26-80)

C.C.A. held that the Trial Court improperly excluded evidence of a public opinion survey regarding community standards compiled by a defense doctor who had, ten months after the date of this offense, conducted a poll of Dallas County regarding the community standards as to explicit sexual material. Thanks to a properly perfected bill of exception as to what his testimony would be, D gained a reversal. Under the obscenity definition of Section 43.21(1), P.C., the issue of what is or is not acceptable according to contemporary community standards is a jury question which must be resolved before determining whether the particular material distributed is in fact obscene. The public opinion survey here was evidence which attempted to define the applicable community standards and was certainly relevant. Berg 599 SW2d 802.

ROBERT SANDEL (No. 65,078, Possession of Marijuana, Reversed, 12-10-80)

An informant told Officer A that a person in a yellow and white pickup with a camper shell would arrive at a specific address to purchase narcotics. Officer A said the informant was a credible person, etc. but that the source of the info was unknown to the officer. At the location, Officer A saw D arrive in a yellow and white Chevrolet pickup with a camper but did not see D leave his truck and did not see any other party approach D; the officer then saw D drive away so he followed and appre-

hended him and found a bag of marijuana in the truck. C.C.A. found no probable cause to justify the arrest, search and seizure. Even if the tip had been the result of the personal knowledge of the informant, the tip indicated D was to buy narcotics at the location, not to carry them there and therefore there was nothing in the record to support the conclusion that D possessed narcotics when he drove away.

RANDALL MC CALLUM (No. 63,339, Opinion on State's Motion for Rehearing: Granted; Affirmed, 12-17-80)

After an officer pulled a speeding motorist, D, to the side of the road for speeding and almost hitting his patrol car, he asked but did not receive D's driver's license. According to D, when the officer first asked to search the car, D asked if he had any choice and the officer said he did not. Again the officer asked if he would mind opening his trunk and D said he didn't and opened it. The officer saw a white sack used for sugar in Mexico but normally used by people transporting marijuana from Mexico and when he looked inside the sack he found 5.25 pounds of marijuana.

On original submission the panel Opinion held the search exceeded the scope of the consent given by D. Re-examination of D's brief showed that D was arguing no probable cause to justify the officer's stopping D's car and D's consent was not freely and voluntarily given. At trial D did not claim the consent he gave was limited in scope.

On reconsideration C.C.A. held that the officer had probable cause to stop the vehicle and that the consent was freely and voluntarily given and justified the search in question.

DAVID MONTEZ, JR (No. 59,179, Opinion on State's Motion for Rehearing: Affirmed, 12-17-80)

Officer was heading for D's residence after having obtained a search warrant based on information from an informant. En route, the same informant gave the officer additional information that D was at a certain garage and he and others were dividing 100 pounds of marijuana. He did not get a search warrant because he did not have time to do so at that time of night and because the informant said they would be at that address for only a short time. The officer arrived at the garage and was directed to D who was in the garage with others. The garage itself was open to the public. The officer obtained the keys to D's trunk from D, opened it and found considerable marijuana. Later more marijuana was found in the attic at D's house and in a truck in his garage.

The reliability of the informant was not questioned. In view of the information given by the informant - the license number of the car, its make and description and that the people were dividing the marijuana at the garage, the officer had sufficient probable cause to believe D possessed marijuana in the automobile. Colorado v. Bannister 101 S.Ct. 42 (October 20,1980) 28 Cr.L.R. 4043.

MITCHELL, et al (No. 59,444-9, Reversed, 12-17-80)

These cases involving 6 different defendants evolved from activity of undercover officers who entered a lounge and were encouraged by waitresses to purchase drinks. Each defendant was charged in a separate Information which did not refer to any other charging instrument and did not allege joint action. The offenses occurred on the same date and at the same address and all alleged a common employer. Each Information alleged that the employee solicited from a different complaining witness. After each defendant and the State announced ready for trial, the State for the first time filed its motion to consolidate the trials, thus catching the defendants by surprise and apparently unable to file a motion to sever although they strenuously objected to the State's motion.

C.C.A. held that the offenses charged did not grow out of the same transaction and it was therefore not within the Trial Court's discretion to order a joint trial over the defendants' objections. C.C.A. also noted that the State could argue the bartender's offense grew out of the same transaction as the offenses of his employees (waitresses). The bartender could be convicted on proof that an employee committed the illegal transaction and that he permitted that transaction to occur. The joinder of the bartender and one of the employees might therefore have been proper but the joinder of the bartender with all of the employees, who were improperly joined among themselves, resulted in an unfair trial for the bartender.

LEROY GREEN (No. 59,380, Capital Murder, Life, Reversed, 11-26-80)

D's written statement confessing to his participation in the robbery-murders was the only connection between the defendant and the murder of X. On the night of the murders, neighbors of the decedents said 3 Negro males had come to their home and that they knew Sanders was one but did not know the others. Sander was finally arrested at his home and shotguns were seized but no fingerprints were lifted. At the Sheriff's office a complaint was sworn at against D alleging he had committed the murder of the decedent and an arrest warrant issued for D. After some searching, the police went to an apartment where D was thought to be and after knocking several times the police broke the door down, rushed into the bedroom and confronted D and his brother who were sleeping. With flashlights and shotguns in his face, the defendant identified himself as "Leroy Green". D was handcuffed and dressed in only a T-shirt and undershorts and then led out the front door into 29° weather where an officer recited his Miranda warnings. D was 18 years old. He was put in a patrol car and shortly thereafter, at D's request, the police apparently got a pair of pants for him but no shoes or shirt. The police drove D around for an hour while D gave them information concerning another individual they were seeking. D was arrested at 2:30 a.m., booked into the jail at 3:30 a.m. and although the Magistrate was in the building until 5:00 a.m. D was not taken before him. At the jail, D was placed in a holdover tank and then taken to an investigative office at about 4:30 a.m. where the police began taking his statement which he signed at 7:45 a.m. During the 3 1/2 hour period that it took to obtain his statement, D's parents attempted to see him but were told he was unavailable.

C.C.A. first held that the arrest warrant which only recited that the

defendant intentionally and knowingly caused the death of the decedent by shooting him with a gun did not contain the basis for the complainants' conclusion and therefore did not adequately state probable cause and was invalid. Knox 586 SW2d 504; Lowery 499 SW2d 160. Further, there is no evidence which would authorize D's arrest in this case without a warrant and his arrest therefore was illegal. Article 14.01, C.C.P.

The remaining question is whether the connection between the defendant's unauthorized arrest and his incriminating statements obtained during his illegal detention was sufficiently attenuated to permit, at trial, the use of that statement. Dunaway vs. New York 442 U.S. 200; Brown vs. Ill. 422 U.S. 59. The State argued that the statement was voluntarily given under the Fifth Amendment concept and in its Opinion, the C.C.A. made that assumption. However, citing Brown, C.C.A. stated that Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be sufficiently an act of free will to purge the primary taint consistent with the policies and interests of the Fourth Amendment. The relevant factors are (1) whether the Miranda warnings were given; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. C.C.A. held the State failed to meet its burden of proof and that the entire course of conduct engaged in by the police was patently investigatory in nature and that under these facts no intervening events broke the connection between D's arrest and his confession. Thus, its introduction into evidence was reversible error.

CHARLES RASMUSSEN (No. 59,398, State's Motion for Rehearing: Denied, 11-26-80)

Two undercover officers arranged to meet D's brother at a parking lot to discuss buying marijuana. At the time in question, D was seen driving a Mustang into the lot; in the car were also D's brother and another man. One officer got in the back seat and was given a baggie which he offered to pay for but was turned down because "We'll give it to you this time since you are going to make another purchase". The other officer chatted with D. When the officer asked re the quality of the marijuana, all 3 in the car said it was good stuff. When an uninvited police car entered the parking lot, D said they were going to get out of there but before leaving D said "We'll get back with you".

D's timely requested instruction to apply the law of parties to the fact should have been granted. D was not shown to be the primary actor in the commission of this offense and the record does not support the State's argument that D's action constituted constructive delivery so as to make him a primary party to the offense. C.C.A. cited State vs. Ellis 239 S.E. 2d 670 (W.Va. 1977) as to the definition of "constructive transfer": "We interpret a 'constructive transfer' to be the transfer of a controlled substance either belonging to an individual or under his control by some other person or agency at the instance or direction of the individual accused of such constructive transfer". C.C.A. also noted that it was not necessary for D to set forth this ground of error in his motion for new trial to preserve the matter for review.

DONNY KUYKENDALL (No. 59,462, Murder, Affirmed, 11-26-80)

The indictment charged that while in the course of committing theft with intent to obtain the property of X, D intentionally and knowingly placed X in fear of imminent bodily injury and while in the furtherance of the commission of said offense D committed an act clearly dangerous to human life, to-wit, D exhibited and used a loaded shotgun against the person of X in his habitation and did thereby cause the death of X. State's theory was that D went to the decedent's house with a shotgun and intended to steal his marijuana and shot him in cold blood. D defended on the basis that he went to collect money owed him by the decedent and that when he confronted the decedent, the decedent grabbed his shotgun and caused it to discharge.

C.C.A. held that criminally negligent homicide is prospective lesser included offense of felony murder when the intended felony is other than an underlying assaultive offense. Garrett 573 SW2d 543. Unfortunately this record did not contain enough evidence to raise the issue and thus the Trial Court did not err in refusing to instruct the jury as requested.

FRANK LARUE (No. 59,970, Commercial Obscenity, Reversed, 12-17-80)

The Court instructed the jury that it was to apply the contemporary community standards of the adult population of Potter County, Texas, over D's objection that the charge improperly limited the geographic area of the community. C.C.A. agreed and held that the proper community scope for determination of the obscenity issue is a statewide standard. Berg 599 SW2d 802.

W.J. MC NEW (No. 56,669, Opinion on Appellant's Motion for Rehearing: Affirmed, 12-23-80)

While, as previously held by C.C.A., that Article 42.12, Section 3d (deferred adjudication) is not the type of probation permitted by Article IV, Section 11A of the Texas Constitution, it was authorized by Article III, Section 1 of the Constitution and was therefore constitutional. D further complained the Court erred in assessing 10 years, TDC after an adjudication of guilt when it had assessed 5 years "probation" under the deferred adjudication statute, in violation of due process under North Carolina vs. Pearce 395 U.S. 711 (1969). C.C.A. held the procedure provided for deferred adjudication was different from the other types of probation and that the legislature intended after adjudication of guilt following deferred adjudication that the assessment of punishment be as if the adjudication of guilt had not been deferred. The increase in punishment was clearly provided for by the statute and any procedural changes are for the legislature to consider, not the C.C.A. While not required, it is the better practice for the Trial Court to admonish D as to the consequences of deferred adjudication (i.e. the punishment may be increased if the Court later proceeds to adjudicate the guilt of the defendant).

RICKEY BRADLEY (No. 57,475, Probation Revocation, Affirmed, 11-26-80)

In the probation revocation hearing, the Court took judicial notice of

testimony at the prior trial which ended in a hung jury. C.C.A. faced the unanswered question in Barrientez (500 SW2d 474) as to whether the Barrientez rule requires the presence of the same attorney in both proceedings (trial on the merits and the probation revocation hearing) and decided that it did not as long as the new attorney had before him the record of the trial in the judicially noticed proceedings.

C.C.A. held that the motion to revoke was sufficient which alleged that D caused the death of the victim by hitting him on the head with a hammer whereas the proof showed the victim died of a knife wound. The thrust of the State's motion was that D committed an offense against the laws of the State of Texas and such a violation of the law was sufficiently alleged to give D fair notice. Further, D admitted assaulting the deceased with a knife and did not deny striking him with the blood stained hammer which was recovered at the scene and admitted into evidence.

"That there was expert testimony that death actually resulted from the application of one and not the other weapon used in the attack is not such a variance between pleading and proof as is fatal under the circumstances of a hearing on a motion to revoke probation at which the defendant admitted using both weapons."

TEDDY MC DONALD (No. 61,189, Opinion on State's Motion for Rehearing: Affirmed, 11-26-80)

At a probation revocation hearing, a prior hung jury has no effect on the Trial Court's findings. No specific findings by the Trial Court are required with respect to the credibility of any witness. Former panel Opinion assumed that the jury deadlocked over the credibility of the principal witness presented by the State and that therefore the Trial Court must enter findings concerning the weight in effect given the testimony of said witness. The failure of the Court to include unsolicited findings as to who or what it disbelieved and why does not render the evidence insufficient. Reversal is limited to an abuse of discretion. C.C.A. examined the evidence and found it sufficient to support the order revoking D's probation.

MARCUS GUTIERREZ (No. 58,125, Possession of Heroin, Affirmed, 12-17-80)

Officers A and B were told by an informant that a white and Mexican couple from Austin were going to buy heroin at Jack's Ice House and would be driving a maroon 1967 Pontiac LeMans. Surveillance was set up in separate cars at the location in question which was a known drug connection. A car fitting the description stopped at a nearby Pizza Hut. The occupants fit the description and the car was registered in Austin to one of the females. D was the driver. All four entered the Pizza Hut and 15 minutes later the two males left only to return 20 minutes later; 15 minutes later all four went to Jim's Hamburgers where the driver got out and paced in front and on one occasion using a telephone booth. About 30 minutes later one Lopez, a known dope dealer, drove up and D got into the passenger side of his car, remained briefly and then returned to the LeMans. Nothing was seen exchanged between Lopez and D. Both vehicles departed. Officer A followed Lopez and later saw him counting a large sum of money; Officer A was also informed by an informant that a drug transaction had been completed.

Officer B followed the defendant and stopped his car. As the police rushed the vehicle, a small package of heroin was dropped out the window by the passenger sitting in the right rear seat. No other contraband was found in the car or on the passengers. When called by the State, Lopez denied selling heroin to D and when confronted with his testimony on the motion to suppress evidence where he admitted selling heroin to D, Lopez stated his earlier version was told because he was in withdrawal and afraid of the police.

C.C.A. held the necessary affirmative link was established between D and the heroin, in view of the facts set forth above and the defendant's course of action through the entire episode which was unusual and suspicious. The jury could reasonably infer D knew of the drug's existence and its whereabouts. Norman 588 SW2d 340; Long 532 SW2d 591.

BILLY GIBBS (No. 59,316, Theft, Reversed and Prosecution Ordered Dismissed, 12-17-80)

Security investigators at Montgomery Ward saw D take an item from a rack and hide it in his pants. The State showed the value of the item and that D was not given permission to take it without paying for it but there was absolutely no testimony as to the ownership of the item, as alleged in Montgomery Ward, Inc. and thus the evidence was insufficient under the rules of Burks and Greene.

JAMES GAWLIK (No. 62,485, Theft of Services, Affirmed, 11-26-80)

C.C.A. held evidence sufficient to prove D's intent to avoid payment where D was indicted for securing performance of services by deception, threat and false token. D hired X to paint a house and agreed to pay him every two weeks. At the end of two weeks, D gave X a check which was dishonored on two occasions for insufficient funds. X sent a registered letter demanding payment within ten days to D. The home owner who hired D said he had the day before given D a check sufficient to cover the painting work done and that the check was cashed. D testified that he did not intend to avoid paying X but that he was having severe financial problems. C.C.A. also held Section 31.04, P.C. to be constitutional.

MARVIN MORRISON (No. 59,662, Aggravated Robbery, Reversed/Judgment of Acquittal Entered, 12-10-80)

Clement robbed a bank teller at 2:00 p.m.; D was not seen near the robbery scene and the only evidence tending to prove him guilty as a party was that D and Clement came to Lubbock together the morning of the crime and they both arrived at a small club between 12:30 to 2:30 p.m. the date of offense and stayed until about midnight. Clement left a gun at the club but it was somehow lost. Six days after the robbery, the police searched D's house and found a newspaper clipping concerning the robbery in Clement's bedroom and Clement's sunglasses which were used during the robbery in the bathroom. A gun was found in D's car and D was carrying $1000.00 including one mutilated $100 bill identified as having been taken in the robbery. At this time both D and Clement were arrested.

The circumstances must prove some culpable act before or during the robbery. Further, as D was not the primary actor, the presumption that one in unexplained possession of recently stolen property was the thief did not apply. As a State's witness testified that Clement's car had been stolen shortly before the crime, it could not be speculated that D provided the car for Clement. Thus, every reasonable hypothesis except D's guilt was not excluded. Suff 531 SW2d 814; Wygal 555 SW2d 465

ROBERT MUSGRAVE (No. 57,175, Opinion on State's Motion for Rehearing: Granted and Affirmed, 12-23-80)

The State's evidence was sufficient to prove unauthorized use of a motor propelled vehicle, which showed that D was stopped by police while driving a 1966 Chevrolet which had been stolen two days earlier; that the owner had not given his consent to D to use his auto and that at the time of his arrest D was in possession of 5 Chevrolet master ignition keys. D testified he had joined others at an apartment and when they ran out of cigarettes Cliff lent him his car as well as the keys. D had only driven several blocks before he was arrested. D said he did not know the car was stolen. However, D refused to give Cliff's last name or lead the police to his apartment and in general was very uncooperative.

HANS WELLS (No. 57,566, Opinion on State's Motion for Rehearing: Granted and Affirmed, 12-23-80)

In this theft from a corporation case, at the time of the thefts D was the secretary-treasurer and managed the business and X was the president and was inactive. D issued 3 checks for a Cadillac, a go-cart and various remodelling merchandise for his own personal use, without the consent of X, the president, who had supplied most if not all of the money for the company's financing.

A corporation can be an owner of property under Section 1.07(24), P.C. which provides that "owner" means a person and that "person" means a corporation. A corporation cannot testify or give direct testimony of lack of consent but same can be proved by circumstantial evidence which was sufficiently done in this case. Middleton 476 SW2d 14.

EX PARTE DAVID JOHNSON (No. 65,933, Relief Denied, 12-23-80)

Defendant sought discharge from an order to return him to Illinois, which was entered by a Tarrant County district court. D was convicted in Illinois of a felony offense and entered into a parole agreement which provided that he would serve his parole in Virginia only and that if he was charged with a violation of his Illinois parole and be in another state at the time he would waive extradition and would not resist being returned to Illinois. D was arrested in Tarrant County for being drunk and the Illinois authorities put a hold on him. After a hearing on his application for writ of habeas corpus, the court ordered him delivered to Illinois authorities. D argued this was error as he had never been transferred to Texas for parole supervision under the provisions of the uniform act of out of state parole supervision.

Formal extradition proceedings are not necessary to the return of absconding parolees or probationers who have signed a prior waiver of extradition as a condition to their release. Texas can apprehend and remand through its own authorities an absconding parolee who has signed a pre-release waiver of extradition, to the state granting parole, under either the authority of the Uniform Compact or the Uniform Criminal Extradition Act. A parolee is not deprived of any constitutional right by enforcement of his prior waiver of extradition as a condition of parole.

FEDERAL CASES

U.S. v. Feinburg, No. 79-3571, Per Curiam, Panel Opinion, 11-24-80, Affirmed [Direct Appeal]. Defendant, on probation in the Southern District of Texas for possession of marihuana with intent to distribute, pled guilty in the Western District of Texas to federal crime of possession of a firearm by a convicted felon. Defendant again received a probated sentence. Defendant then cooperated with Assistant U.S. Attorney pursuant to agreement that the Assistant U.S. Attorney would not file motion to revoke probation for possession of marihuana. Motion to revoke filed and probation was revoked.

REVOCATION OF PROBATION-JURISDICTION OF DISTRICT COURT-PLEA BARGAINS: Defendant asks for specific performance of promise not to file motion to revoke his probation. In other words, Defendant is attacking jurisdiction of District Court to entertain motion to revoke. Court notes that although government should have kept their promise, the District Court had the jurisdiction to revoke the Defendant's probation after it acquired knowledge of the violation, had a hearing on the motion, and the violation was sufficiently proven. The decision is based, in part, on 18 U.S.C. §3651 et. seq., which gives the District Court continuing jurisdiction over a defendant until the expiration of the probationary term. Too, since the District Court can, on its own volition, inquire into violations of probation, it cannot be bound by an agreement by the United States Attorney.

NOTE: The Court, in an exercise of their supervisory powers, orders United States Attorneys and their agents to refrain from entering into agreements regarding probation revocations unless such agreements are submitted to the District Court for its approval. A defendant must be notified that any such agreement is subject to the Court's approval, and where so approved, the Fifth Circuit will henceforth enforce such agreements.

NOTE: It is important to realize that the Defendant pled guilty in the Western District to possession of a firearm before the agreement was made with the U.S. Attorney in the Southern District. This illustrates the necessity of obtaining a firm, written committment before a Defendant irrevocably embarks on a course of conduct. Defense Counsel has an obligation, in my opinion, to coordinate his plea bargaining efforts [whenever possible], whether it be between two different federal courts, two different state courts, or a federal and state court [See U.S. v. Sandate, No. 79-3952, delivered 11-12-80]. If defense counsel had done so in this case [a matter not revealed by the opinion], and if the agreement had been stated in the record before the Defendant pled guilty to possession of a firearam, the Defendant may have been able to enforce specific performance or otherwise withdraw or move to vacate his plea to the firearms charge.

U.S. v. Smith, No. 80-7063, Judge Johnson, Panel Opinion, 11-24-80, Reversed [Direct Appeal].

SUFFICIENCY OF EVIDENCE: Defendant was charged with possession of a government check stolen from the mails and with uttering that same check. There was no proof that the Defendant himself actually possessed the check or uttered it. Too, under the theory of aiding and abbetting [18 U.S.C. §2], there was no evidence that Smith associated with and participated in the possession or uttering of the check.

U.S. v. Quigley, No. 80-1008, Judge Tate, Panel Opinion, 11-26-80, Affirmed [Direct Appeal].

PLEA BARGAINS: Defendant escaped from federal prison in Kansas and was arrested in Texas while in possession of a firearm. Defendant pled guilty to a plea bargain in Federal Court in Kansas to the escape charge. Shortly after that plea, Defendant was charged in the Northern District of Texas with possession of a firearm by a felon. Before trial on the firearms charge, Defendant asserted that his plea in Kansas to the escape charge was intended to preclude prosecution on the firearm charge. Defendant's attorney testified that since the firearm charge had not been filed as of the date of the Kansas plea bargain, he assumed non-prosecution on that charge was encompassed in the bargain. However, Defendant's attorney also testified that he had not discussed the firearms matter with the Kansas prosecutor. The Kansas prosecutor testified that he had not discussed the firearms matter with the Defendant and that he was not aware of it since the arrest information forwarded to him was silent as to the Defendant's possession of a firearm at the time of his arrest. The Court held that the Kansas plea bargain did not include non-prosecution of the firearm charge and stated:

> "[i]n the absence of inquiry by defense counsel, or of knowledge by the prosecutor that an additional charge might be filed in the other district, the latter was not obliged to clarify that the plea bargain concerned only the escape charge pending in his own district and did not concern non-prosecution on charges pending or to be filed in another district."

NOTE: Again, the danger of incomplete, imprecise and/or oral plea bargaining is demonstrated. Defendant's attorney should have explored the firearms matter. This apparent lack of diligence may account for the Court's failure to rely [or even mention] the doctrine of constructive knowledge [e.g., in discovery areas, one agent of the government is imparted with constructive knowledge of other agents (See U.S. v. Auten, discussed infra)]. The Court's use of the word "knowledge", without any modifiers, leads me to believe that the Court is saying "actual knowledge", and that the prosecutor has no duty to inquire as to other potential offenses. The message, although not artfully worded, is clear: always ensure [if possible] that the plea bargain covers all crimes prior to the date of the plea, whether those crimes are known or unknown. Language to this effect should be inserted into your written plea bargain and orally stated to the Court at the entry of the plea.

Here, unlike Feinburg above, the Defendant may be able to vacate (as unknowingly made) his guilty plea to escape charge [See Rule 35 (a), Fed. R. Crim. Proc.].

SEARCH AND SEIZURE: Defendant was arrested in a motel room with a female. After Defendant was placed under arrest and handcuffed, the police searched the motel room and found the firearm under the mattress. At that time, the female had not been arrested or handcuffed. Defendant contended that the search was beyond the scope of a search incident to the arrest. The Court overrules this contention by holding

that the attempt to locate the firearm was a reasonable and cursory check to protect the officers, not a post-arrest search under Chimel v. California, 395 U.S. 752 (1969). This conclusion was buttressed on the fact that the Defendant was reasonably believed to be armed and with an accomplice [who was not handcuffed at the time of the search].

U.S. v. Taylor, No. 80-1750, Per Curiam, Panel Opinion, 11-26-80, Affirmed [Direct Appeal].

APPELLATE RECORD: On remand, Court determined that oral charge read to the jury by the Court was identical to the Court's written charge.

NOTE: The significance of this case lies in the Court Reporter Act, 28 U.S.C. 753(b). That section requires that all portions of proceedings held in open court during a criminal case must be transcribed verbatim. Two standards have been established for review of non-conpliance with the requirement: (1) where Defendant is represented by the same attorney at trial and on appeal, reversal is dictated only if the Defendant can "show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal" [U.S. v. Selva, 559 F. 2d 1303, 1305 (5th Cir. 1977)]; and (2) where Defendant is represented by new counsel on appeal, reversal is dictated when a substantial and significant omission in the transcript is demonstrated [U.S. v. Selva, supra]. On original submission, the Court elected not to announce a standard when a Defendant prosecutes his appeal pro se. 607 F. 2d 153, 154 (5th Cir. 1979).

Stephens v. Zant, No. 79-2407, Judge Roney, Panel Opinion, 11-26-80, Reversed [i.e., relief granted][Habeas Corpus].

RECORD ON APPEAL: Petitioner was convicted of murder in Georgia and assessed the death sentence. The transcript of the trial did not contain the closing and sentencing arguments of counsel or the voir dire of the jury. In his direct appeal to the Georgia state courts, state habeas corpus, and federal habeas corpus, the Petitioner alleged, relying on Gardner v. Florida, 430 U.S. 349 (1976), that a death sentence cannot constitutionally be affirmed when the transcript is incomplete.

In Gardner, supra, the Supreme Court held that the Due Process Clause prohibited a trial judge's reliance on a confidential presentence report, not included in the record on appeal, to assess a sentence of death. The Court stated that Gardner does not create a per se rule, but that the test to be employed is whether the procedure on appeal permitted the Georgia Supreme Court to perform its function as required by Gregg v. Georgia, 428 U.S. 153, 198 (1976), to-wit:

> "...to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases."

After reviewing the record and comparing the deficiencies herein with

the deficiency in Gardner, the Court held that the record was adequate to "ensure that there was no substantial risk that the death penalty was arbitrarily imposed."

NOTE: In this case, it was agreed that the arguments and voir dire would not be transcribed and that if there was an objection, the objectionable portion would be transcribed. Or course, sucn an agreement in Texas would not be sufficient to preserve error in some situations. See Hernandez, 563 S.W. 2d 947; Wolfe, 178 S.W. 2d 274. Furthermore, it is difficult to imagine why, in any case, defense counsel would waive the transcription of voir dire and/or final arguments. In light of Adams v. Texas, ___U.S. ___ (1980), failure to have the voir dire transcribed might result in a substantial risk that the death penalty was arbitrarily imposed.

DEATH SENTENCE: During Petitioner's trial in state court for murder, the jury was permitted to consider four statutory aggravating circumstances. The jury found three factors to be present. After the trial, but before Petitioner's direct appeal to the Georgia Supreme Court, one of those three aggravating factors - commission by one having a substantial history of serious assaultive criminal convictions - was held to be unconstitutionally vague. Arnold v. State, 224 S.E. 2d 386 (1976). The Court, therefore, was confronted with the issue of whether the sentence of death was invalid because it was imposed when one of the aggravating factors was subsequently declared unconstitutional even though there were two other aggravating factors, either of which by itself would be legally sufficient to support the sentence of death. The Court, relying on Stromberg v. California, 283 U.S. 359 (1931), held that it was impossible to ascertain whether the jury's consideration of one unconstitutional aggravating factor affected its sentence. Accordingly, the sentence of death could not stand.

U.S. V. Georgalis, No. 79-5183, Judge Hatchett, Panel Opinion, 12-3-80, Affirmed in Part, Reversed in Part [Direct Appeal].

CROSS-EXAMINATION-HARMLESS ERROR: Near conclusion of three week mail fraud trial, prosecutor attempted to impeach Defendant with a Florida hot check conviction. The Defendant denied the conviction and objected to the question. During the next day of trial, the prosecutor, in open court, stipulated that the Defendant 's answer denying that he had been convicted of a hot check in Florida was true. The Court then instructed the jury to disregard the original question. Under Florida law, the check case was similar to Texas "deferred ajudication" [i.e., no judgment was entered]. This was improper impeachment under Rule 609, Fed. R. Evid. However, the Court held that due to the instruction to disregard, the prosecutor's stipulation, and the strength of the government's case, the error was harmless.

NOTE: The Court admonished the government that the proper procedure for impeaching a witness pursuant to Rule 609 is to obtain a certified copy of the conviction.

SUFFICIENCY OF EVIDENCE: The jury convicted the Defendant on seven counts of mail fraud. Court holds evidence insufficient to support conviction on two of those counts as the "count letters" [the letters alleged in each particular count of the indictment] were written by the "count victims" [the person (victim) allegedly defrauded in each particular count in the indictment] and not in furtherance of the

scheme to defraud.

U.S. v. Tapia, No. 79-5642, Judge Garza, Panel Opinion, 12-3-80, Remanded [Direct Appeal].

INTERPRETERS: The Defendant contended that the Interpreters Act of 1978, 28 U.S.C. §1827, was not complied with as no interpreter sat with him at counsel table during the trial. Thus, the defendant argued that he was unable to assist his attorney [who was bi-lingual]. The Court holds that certain factual findings are required to be made by the District Court in any case where the Defendant speaks only or primarily a language other than the English language (or has a hearing deficiency) so as to impair that Defendant's ability to comprehend the proceedings or communicate with his attorney. Court remands for factual findings.

NOTE: This is a case of first impression dealing with the Court Interpreters Act of 1978. It and the statute should be read.

Branch v. Estelle, No. 80-1515, Judge Garza, Panel Opinion, 12-4-80, Affirmed [i.e., relief denied][Habeas Corpus].

IDENTIFICATION: Complaining witness identified the Defendant's photograph in a photographic array. The police failed to preserve the photographic array for trial purposes. Court holds that where police fail to preserve a photographic array, there "shall exist a presumption that the array was impermissibly suggestive" [emphasis added], thereby satisfying the first prong of Simmons v. U.S., 390 U.S. 377 (1968) [i.e., the two prong test for exclusion of in-court identification].

NOTE: This is an extremely significant presumption. A key question, however, is whether this presumption will be given retroactive effect. I would be surprised if the case was not reviewed en banc since it creates a presumption without any citation of authority and without extended analysis. The Court simply creates the presumption to prevent the police from undermining the due process and confrontation rights the Courts have established regarding identification procedures.

U.S. v. Caldera, No. 80-1299, Per Curiam, Panel Opinion, 12-4-80, Vacated and Remanded [Direct Appeal].

CROSS-EXAMINATION: At parole revocation hearing in District Court, police officer was allowed to testify that a laboratory test revealed that the substance seized from the Defendant was cocaine. However, the officer had not participated in the laboratory test or prepared the laboratory report from which he testified. Furthermore, a police officer also testified that the results of a field test on the substance seized from the Defendant was positive for cocaine. However, that officer did not conduct the field test. Court vacated the order revoking the Defendant's parole and remanded for another evidentiary hearing so that the Defendant's rights to confront and cross-examine witnesses will be protected.

Jones v. Estelle, No. 80-1574, Judge Politz, Panel Opinion, 12-8-80, Affirmed (i.e., relief denied) [Habeas Corpus].

EFFECTIVE COUNSEL: Petitioner, via habeas corpus, alleged that his trial attorney was ineffective due to his conduct at trial and his inadequate pretrial investigation. The Court holds that Petitioner did not sustain his burden of proof [Swain v. Alabama, 380 U.S. 202 (1965)] as to actions "within the amorphous zone known as 'trial strategy' or 'judgment calls.'" Furthermore, the brevity of time spent by attorney with petitioner, prior to trial is not sufficient by itself to show ineffective assistance of counsel. The failure to subpeona witnesses was not substantial as the witnesses who were available and could testify favorably to Petitioner were called at trial.

JURY: Petitioner also contended that the jury verdict was improper as the verdict at the punishment stage of the trial was signed by a foreman other than the one who signed the verdict at the guilt stage of the trial. The Court holds that in Texas, there is no statutory requirement to support Petitioner's contention. See Article 36.26, C.C.P. ["Each jury shall appoint one of its members foreman"]. Furthermore, "a state court's failure to follow its own procedural rules does not of itself raise a federal constitutional question cognizable in habeas corpus." Van Poyck v. Wainwright, 595 F. 2d 1083, 1086 (5th Cir. 1979).

NOTE: The Court distinguished Elizaldi v. State, 519 S.W. 2d 881 on the ground that Elizaldi was premised on Article 36.27, C.C.P. [i.e., communications between jury and the court].

U.S. v. Auten, No. 80-1269, Judge Politz, Panel Opinion, 12-8-80, Reversed and remanded for evidentiary hearing [Habeas Corpus].

PROSECUTORIAL MISCONDUCT: Petition asserted that prosecutor suppressed the criminal record of one of its witnesses. Prosecutor did not obtain a background report by the FBI or request any background from the National Crime Information Center. Thus, since the prosecutor was not aware, at the time of trial, that the witness did in fact have a criminal record, the government argued it could not suppress evidence which was unknown to it.

The Court rejected the government's position relying, in essence, on the doctrine of constructive knowledge, and stated:

> "If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government."

The Court reversed for an evidentiary hearing since the record was not clear how many convictions the witness had.

NOTE: The imposition of a duty on the government to produce evidence within the possession of any agency of the "prosecution team", is extremely valuable. It is wise, however, to direct your requests for "Brady" material to any and all governmental agencies, whether local, state or federal. This type of request for exculpatory material may ease your burden under United States v. Agurs. 427 U.S. 97 (1976), by

notifying the Assistant United States Attorney of the full import of his duty.

Clark v. Blackburn, No. 80-3093, Judge Gee, Panel Opinion, 12-10-80, Remanded [i.e., relief granted][Habeas Corpus].

PROSECUTORIAL MISCONDUCT: Two informants, both of which were material witnesses to the alleged crime [distribution of heroin], were subpeoaned by the Petitioner at his state trial. However, at the suggestion of a state police officer, the witnesses were sent out of state through the combined efforts of state and federal officials.

The Court, relying on Lockett v. Blackburn, 571 F. 2d 309 (5th Cir. 1978)[a case involving state and federal concealment of the same two witnesses], holds that this action constitutes a prima facie deprivation of due process and remands for a new trial.

Holloway v. McElroy, No. 79-3325, Judge Randall, Panel Opinion, 12-11-80, Affirmed [i.e., relief granted][Habeas Corpus].

COURT'S CHARGE - BURDEN OF PROOF: Georgia's statutory scheme for murder, voluntary manslaughter and self-defense is intensively examined. The Court concludes that the jury charge given in the case shifted the burden of proof to the Petitioner, in violation of the due process clause.

NOTE: The significance of the above mentioned aspect of the case is two-fold. First, Judge Randall has expertly explored and explained the inter-relationship of In Re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); and Patterson v. New York, 432 U.S. 197 (1977). This, in and of itself, is worthwhile reading. Second, and perhaps more important, is the applicability of the analysis to Texas law. That is, the Georgia statutory scheme for murder, voluntary manslaughter and self-defense is deceptively similar to the Texas Penal Code. This opinion should be read and compared to the Court of Criminal Appeals' opinion in Ayers v. State, No. 58,832 (delivered March 26, 1980). The opinion casts grave doubt over the constitutionality of Section 2.04(d) of the penal code [i.e., defendant must prove affirmative defense by preponderance of evidence] when the affirmative defense tends to negate an element of the offense.

HABEAS CORPUS - SUFFICIENCY OF EVIDENCE: The Court noted that the standard of review [in federal habeas corpus actions] in evaluating the sufficiency of evidence of state convictions is that set forth in Jackson v. Virginia, 443 U.S. 307 (1979); to-wit:

> "...the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."

The Court applies that standard retroactively. Applying the Jackson standard, and viewing all of the evidence in the light most favorable to the prosecution, the evidence was insufficient .

NOTE: Retroactive application of Jackson is extrmely important to your

practice since it represents such an extreme departure from the previous "no evidence" rule of Thompson v. City of Louisville, 362 U.S. 199 (1960). As a practical matter, this decision should generate a tremendous amount of federal habeas corpus litigation if it survives en banc (which I anticipate) review.

Furthermore, it should be noted that the Court mentioned the potential profound practical implications for state-court standards of direct review:

> "...can it make sense to apply on direct appeal some standard less strict than that announced in Jackson, with the inevitable result that the losing defendant - appellant will immediatley seek the benefits of the Jackson standard on habeas?"

U.S. v. Conway, No. 79-5483, Judge Johnson, Panel Opinion, 12-11-80, Reversed [Direct Appeal].

EFFECTIVE COUNSEL: During the trial, the cross-examination of Defendant was interrupted by a lunch break. The trial court ordered the Defendant not to discuss the case with his attorney during that lunch break.

Relying on Geders v. United States, 425 U.S. 80 (1976), the Court held that any court ordered deprivation of a defendant's right to consult with his attorney, regardless of how brief (in time) that deprivation might be, violates the Sixth Amendment right to effective assistance of counsel.

U.S. v. Whitney, No. 80-7254, Per Curiam, Panel Opinion, 12-12-80, Affirmed [Direct Appeal].

DOUBLE JEOPARDY; In 1975, the Defendant was convicted of three separate counts. The trial judge imposed a five year sentence on counts one and two and ordered them to be served concurrently. The trial judge then placed the Defendant on probation for five years on count three, the probation to commence upon the Defendant's release from confinement on counts one and two.

In 1976, the Defendant was released on parole. In 1979, a petition to revoke the Defendant's parole was filed. That petition relied on three specific acts of misconduct. After a parole revocation hearing, the Defendant's parole was revoked. However, since the term of her parole had expired, she was released from custody.

Then, the Defendant's probation officer filed a petition to revoke her probation. That petition relied on some of the same acts of misconduct which had been utilized in the petition to revoke her parole. The Defendant claimed that her probation revocation was barred by the double jeopardy clause.

The Court held that since the double jeopardy clause applies only to criminal prosecutions and probation revocations , like parole revocations, are not a stage of a criminal prosecution, double jeopardy was not offended.

TEXAS CRIMINAL TRIAL MANUAL

by

Garland Wier

(Published and Distributed by TCDLA)
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ABOUT THE AUTHOR:

Garland Wier, author of the *Texas Criminal Trial Manual,* graduated from Somerville Law School in Dallas (now defunct) in 1937, and passed the Texas Bar the same year. After teaching for this school for two years, he entered full-time general practice in Gregg County, Texas, which continued until 1942 when he entered military service in WW II. During the war years and while overseas he served in numerous duty assignments, receiving a General's Commendation for trial work as defense counsel during this period. The commendation together with a somewhat more than modest track record as defense counsel produced the nickname of "Loophole." Later, Mr. Wier returned to private practice via the office of the Criminal District Attorney of Bexar County. Following a tour of duty as grand jury assistant in the D.A.'s office, Mr. Wier returned to private practice, specializing in criminal law. He is a charter member and former board member of TCDLA as well as being certified as a specialist in criminal law by the Texas Board of Legal Specialization.

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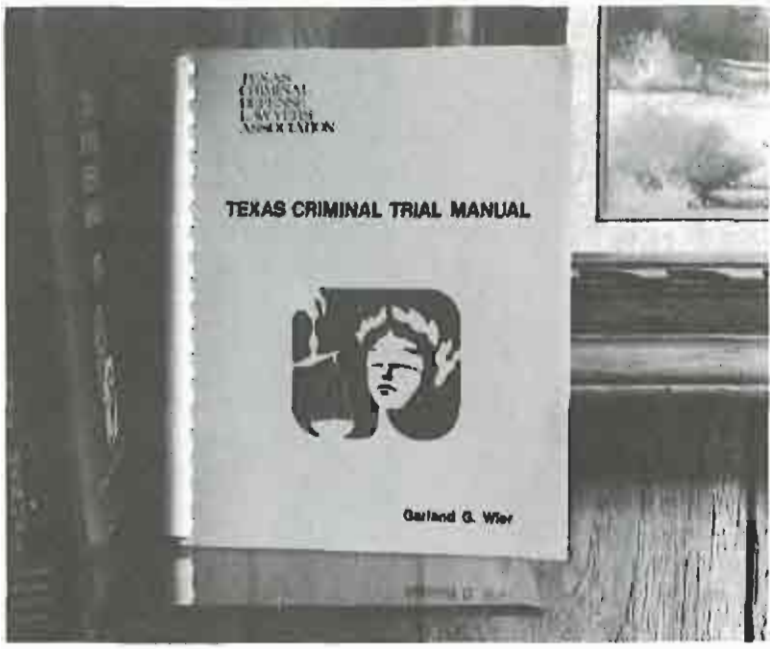

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GUIDELINES FOR CONDUCTING PRESS INTERVIEWS

Lawyers should be able to benefit from these guidelines even though they are written for business people. Permission to reprint this article was granted by the Lobsenz-Stevens Public Relations firm in New York.

As a company attains greater visibility in the media through its activities and the positions that it takes on various matters of public interest, exposure to journalists becomes inevitable. Too often we tend to view such face to face meetings with anxiety where they should be regarded as opportunities to project a positive impression of the company, its products, services, and contributions.

To give you a better grasp of how to handle yourself, your subject matter and the journalist in question, we have developed the following guidelines for the press interviews. Please bear in mind that these guidelines are of necessity general in nature. Your specific situation should be handled on an individual basis, as suggested below.

OBTAINING THE INTERVIEW

Basically, there are two circumstances in which officers of a company would be exposed to press interview: the interview is requested by the reporter or editor, or the interview is arranged by a public relations representative of the company.

In the first instance, the request for an interview may be prompted by a breaking news story involving the company or its industry. The request for an interview can also be made if the writer is working on a feature story about your industry, your area of expertise, or the company itself.

If the interview is requested by the publication, follow these steps:

1. Get the name of the reporter and his publication.
2. Ask for the specific reason the interview is being requested and how much time he will need.
3. Ask the reporter how he plans to use the interview—strictly as background, as part of a general article on the subject in which other firms will also be quoted, or as the basis for an entire article.
4. Do not respond to questions asked over the telephone, but instead refer the reporter to the public relations department of the company or the company's public relations firm. Advise them of the request for an interview and the areas which the reporter wishes to cover.

Except in the case of a breaking news story, there is usually sufficient time between the request and the actual interview for proper preparation. In those instances where the interview is arranged by a public relations representative, there is almost always enough time for adequate preparation.

PREPARING FOR THE INTERVIEW

Regardless of how an interview originates, it should be regarded as a very serious undertaking. You should enter an interview situation with the assumption that what you say will be seen by thousands of readers. Therefore, you should know in advance not only what you want to say, but how you should express it.

Unless the interview is held over lunch, try to have it conducted on your own home ground, in your office or conference room. In any case, try to avoid distractions. Hold your telephone calls. Close the office door, and make sure that persons not involved in the interview do not come into the office during that period.

Though you are familiar with the subjects being considered, do not go into an interview situation without thorough preparation. Many reporters today are extremely knowledgeable about business and financial matters, and will recognize the difference between a top-of-the-head response to a question and a response that has been carefully researched.

Conversely, you may occasionally encounter a reporter who is totally without knowledge or understanding of the subject. This can happen when the business reporter is unavailable and someone from another department is thrown into the breach. In that case, be patient and as clear and simple as possible. At the conclusion of the interview, ask if it would be possible to review the article from a technical viewpoint. In extremely rare instances, if it appears that the reporter's lack of understanding of the subject would result in a grossly inaccurate story, it may be necessary to terminate the interview. In that case, it should be done as gracefully as possible.

Review the subject with others in the company, keeping in mind that the press is looking for something that is new and/or different. If you have questions, or reservations, do not hesitate to express them. However, try to raise these questions far enough in advance so that answers can be obtained prior to the interview.

Determine the major points you would like to see published in the resulting article and outline them on a sheet of paper. Do not hesitate to have the outline with you at the interview. There is a good chance that you can provide the reporter with some supplementary material that will provide greater insights into or understanding of the subject. Prepare such materials in advance, refer to it during the interview, and offer it to the interviewer.

In advance of the interview obtain several recent back issues of the publication and read them carefully to determine how they have handled similar stories, if any; and the type of reader they seem to have been written for. If you are un-

familiar with the publication, your public relations department or agency can obtain a readership profile.

In addition, familiarize yourself with the type of stories the interviewer has written by making a special effort to obtain those issues in which he has stories. Besides giving you a clue as to how he will approach your subject, the fact that you are familiar with his work will flatter him.

Be prepared to spend at least an hour in advance of the interview with your public relations department or agency for in-depth review of the interview either directly or by phone.

This is one of the most important exercises you can undertake prior to the interview. Properly conducted, the reveiw will uncover gaps in information, missing documents, and uncertainties as to the approach to take. On the positive side, it will reinforce your familiarity with the subject matter, give you direction on how to express yourself best, and alert you to potential trouble areas to be avoided.

THE INTERVIEW ITSELF

The following guidelines generally apply in every interview situation:

1. If you don't want to see it in print, or hear it on the radio or television, *do not say it.* Speaking "off the record" will not insure that the statement will not be used. If the reporter goes to the trouble of getting the same information from another source, after you have provided the lead by being off the record, he will ethically be able to use it.
2. Try to be responsive to the question by getting to the point quickly. It may be sound practice in presentations and written reports to build to your conclusion point by point, but the key to a good interview is in providing direct answers to the questions. If you do otherwise you risk boring the reporter so that he misses the point when it is finally made. Furthermore, stating your conclusion early helps to direct the interview your way and can lead to the inclusiou of significant details into the story.
3. In some cases, you might encounter a reporter whose questions appear to be antagonistic. You should remain calm and dispassionate. Do not be critical of the reporter or discourteous. Remember that the reporter has a job to do and that in any exchange, he has the last word.
4. Be open and forthright. Make your responses pertinent and do not evade. If you cannot answer the question for any reason, say so and tell the reporter why. If you don't know the answer say that you will get it if possible and that it will be relayed to him.
5. Generally, try to keep your answers short, unless you are replying to a technical question from a technically oriented reporter.
6. Use examples whenever you can to illustrate your point. They not only liven the story, but will often influence an editor to give a story much more prominence than he otherwise would.
7. Don't let a reporter put words into your mouth unless you agree with the question. Do not repeat the reporter's terminology, because what you are doing is making his quote your quote.
8. Do not feel that you have to accept a reporter's facts or figures. If you disagree, tell him so gracefully, and why. If you are not sure, you might say, "That doesn't seem right to me," and ask for time to check the data for yourself. And then, make sure either you or your public relations representative gets back to the reporter with the answer.
9. If you consider a question to be inappropriate, you do not have to answer it. Further, the reporter may try to generate controversy by drawing you into evaluations of competitors. Do not be critical of competitors. You should be interested in projecting your own expertise, not in denigrating others.

Analyze the interview by asking yourself these follow-up questions:

1. Did we convey all of the major points we had planned to?
2. Were we effective in our responses?
3. Do we owe the interviewer any promised answers to questions or written materials?

Dialogue

December 9, 1980

Honorable Robert D. Jones
President, TCDLA

Re: My resignation.

Dear President Jones:

It is with deep regret that I submit to you my resignation as a member of the Board of Directors of TCDLA.

However, this I must do due to the fact I will be sworn in as a judge on the Court of Criminal Appeals on January 1, 1981. Thus, to keep matters in perspective, my resignation will be effective December 31, 1980.

Without being too repetitive, I once again thank all of the members of the Association, both past and present, for giving me the opportunity to be a part of this Association. I hope I have helped make the Association a better one and have also, at the same time, made a small contribution to our criminal justice system.

I know the Association is in good hands with you at the helm and hope in the days to come there will be a little closer relationship, in the respective capacities, of the Association and the Court.

Please convey my best to the members of the Association, the members of the Board, and the officers of the Association and, should the occasion ever arise where I can be of service to the Association, please let me know.

Very truly yours,
Marvin O. Teague

" NOW FIRST OF ALL, DID YOU PROVOKE THIS OFFICER IN ANY WAY? "

MARVIN TEAGUE BECOMES A JUDGE IN THE COURT OF CRIMINAL APPEALS

On January 1, 1981, Marvin Teague was sworn in as a judge in the Court of Criminal Appeals. Shown at left is Judge Teague taking his oath of office as his mother looks on. She is holding his robe which he donned upon completion of the oath.

But Yeroner!

Great moments in courtroom history should be shared. The VOICE will publish excerpts from courtroom transcripts whose outrageousness demand presentation. Submissions should be sent to Pamela Lancaster, Managing Editor, VOICE for the Defense, 314 W. 11th, Suite 211, Austin, TX 78701.

PROFESSIONAL COURTESY

submitted by Judge Gordon Gray
Fort Worth, Texas

MR. STRICKLAND: Your Honor, we have a matter to take up outside the presence of the Jury.

THE COURT: Okay. We'll take a recess and take this up out of your presence.

[The Jury retires to the Jury room and the following proceedings are had.]

THE COURT: What have you got?

MR. STRICKLAND: Your Honor, we would like to be apprised, if we may, of who this witness is and what her relevant testimony is.

Her name has not before surfaced.

I notice Mr. Burleson is going to handle her direct examination, so I don't know that it's a crucial witness, but nonetheless –

MR. BURLESON: F-—k you. [Laughter]

THE REPORTER: What did you say, Mr. Burleson?

MR. BURLESON: How about a punch in the nose for it and see how crucial that is.

MR. HAYNES: I, I think that I ought to be permitted to respond for Mr. Burleson.

MR. STRICKLAND: Well, all we got is the fact –

MR. HAYNES: It's a 4:30 p.m. remark and should not be made shortly after 10:00 . . .

NERVOUS TITTERS

submitted by Judge Jack Blackmon
Corpus Christi, Texas

(On trial was the City's injunction suit against a night club featuring female nude dancing, alleged by the city to simulate sexual intercouse. Under examination by plaintiff's attorney was one of the dancers, an employee of the defendant.)

Q. Have you been doing this same basic act ever since you started working there?

A. No. When I first started, I was very clumsy and I was very scared.

Q. Did you take off all your clothes when you first started?

A. Yes.

Q. You were scared of what? Just self-conscious of having your clothes off?

A. Well, I've got funny-looking tits. One looks this way (witness points to the left with her left arm fully extended left) and one looks that way (pointing to the right with her right arm fully extended right). And that makes someone . . .

Q. And that embarrassed you?

A. Well, yeah, at first, because I figured—what would you feel like if you had them? And I was afraid that someone was going to start laughing and say "Ha, ha! Look at that!" So I was scared and when I took off my clothes.

ON THE NEED FOR EXPERT TESTIMONY

reprinted from the Forum, California Attorneys for Criminal Justice

DEFENSE ATTORNEY: And if somebody was stabbed in rapid succession six times, such as these wounds indicate, would that person, how would that person react to that? Would that cause any physical changes immediately in their body? How would they react to that?

PROSECUTOR: Your Honor, there are three questions right there and I am trying to sort out which one he wants answered.

DEFENSE ATTORNEY: Well—I am basically just asking one question. I think I was asking it a couple of different ways.

THE COURT: Why don't you rephrase it one way so we know where we are going?

A At one point as he is being stabbed he is going to hurt.

Q And would that be debilitating in any way, limit somebody's ability to move around or to fucntion in any way?

A It might slow him down a little.

DEFENSE ATTORNEY: Fine. How would you expect somebody to react being stabbed six times in this fashion?

PIGEON VENTRILOQUISM

reprinted from the Forum, California Attorneys for Criminal Justice

Defendant contends that the evidence is insufficient to support a finding that the officers had reasonable cause to enter the apartment. The officers were informed that the man who was living in the apartment with Mrs. Higgins had not worked lately and that he was sickly. After they knocked on the door they heard moaning sounds as if a person inside the apartment was in distress. Unless the testimony of the officers is rejected, the evidence is clearly sufficient.

Defendant argues, however, that their testimony is too improbable to be believed. He calls attention to the fact that no one was found in the room and points out that one of the officers when asked on cross-examination to give his present opinion as to where the sounds might have come from said, "Well, it could be pigeons in that area."

Defendant asserts that a competent police officer could not honestly confuse the sound of a moaning pigeon with that of a person in distress. The witness, however, was only giving his opinion as to a possible source of the sounds the officers heard, and moreover, we cannot say that it is impossible in any circumstances to confuse the moan of a pigeon with that of a human being. The trial court was not required to reject the testimony of the officers as being unworthy of belief.

TEXAS CRIMINAL D[illegible]th, Suite 211, Austin, TX 78701

Some of the best legal minds

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

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

(Please print or type)

MEMBERSHIP APPLICATION

Application of: _____
(Name, please print or type)

Please letter certificate: as above
other _____

Street or Box No.: _____

City and Zip Code: _____

Firm Name: _____

Business Telephone: _____

Date Admitted to State Bar of Texas _____

Admitted to Practice in: _____

Law School (Name, degree, date) _____

_____

College (Name, degree, date) _____

_____

(If student, expected date of graduation) _____

Professional Organizations in which applicant is member in good standing:

_____

_____

_____

_____

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

_____ _____
(Date) (Signature of Applicant)

ENDORSEMENT

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

_____
(Signature of Member)

Mail to:

TCDLA, Suite 211, 314 West 11th Street, Austin, TX 78701

ADVANTAGES FOR YOU

- TCDLA Membership Directory—referrals to and from criminal defense lawyers in over 100 Texas cities.
- Outstanding Educational Programs—featuring recognized experts on practical aspects of defense cases. TCDLA and the State Bar annually present many seminars and courses in all parts of the state.
- TCDLA Brief Bank service.
- Publications, including the monthly *VOICE for the Defense* with its "Significant Decisions Report" of important cases decided by the court of criminal appeals and federal courts.
- Attorney General's Crime Prevention Newsletter. Summaries of latest court of criminal appeals cases available to private practitioners only through TCDLA's group subscription, included in dues.
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TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION