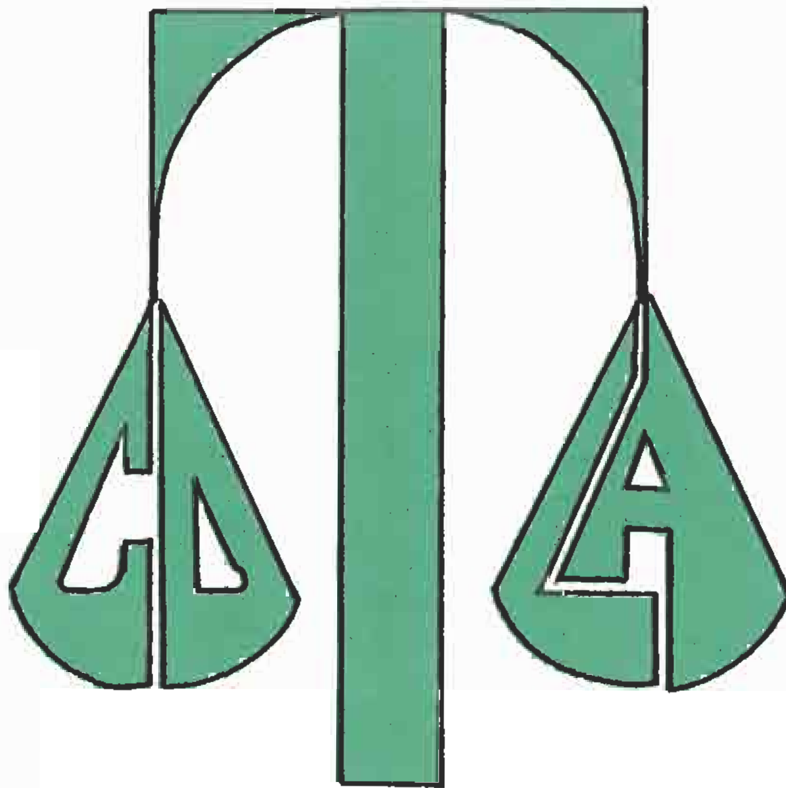
VOICE for the DEFENSE



AUGUST 1981
VOLUME 11, NUMBER 2

JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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VOICE for the DEFENSE

JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

AUGUST 1981/VOLUME 11, NUMBER 2

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Editor: Stanley Weinberg

"Significant Decisions Report"
Editor: Kerry P. FitzGerald
Contributing Editor: Arch McColl III

Executive Assistant to the President:
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POSTMASTER: Please send address changes to Texas Criminal Defense Lawyers Association, 314 West 11th Street, Suite 315, Austin, TX 78701. Phone (512) 478-2514.

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Regular Features

Editor's Corner 4
President's Report 5
Significant Decisions Report . . . . SD-13—SD-23

NewsVOICE

Executive Committee Meeting 4
New Appellate Rules 9-12, 24-28

Articles

Punishment Alternatives
Arch McColl III 6
Plea Negotiations
Charles L. Caperton 29
Supplying Lawful Goods or Services to a Conspiracy
Jim Finstrom 33

CALENDAR OF EVENTS

AUG 24-27 — **Advanced Criminal Law Course**—San Antonio—La Mansion del Norte—deals with Texas and federal substantive and procedural criminal law matters—Contact State Bar of Texas

AUG 28-30 — **Advanced Cross-Examination**—National College for Criminal Defense—Anchorage, Alaska—contact Program Coordinator, NCCD, College of Law, University of Houston.

SEP 25-27 — **Courtroom Psycho Drama** National College for Criminal Defense—Jackson, Wyoming—contact Program Coordinator, NCCD, College of Law, University of Houston.

STANLEY WEINBERG

Out with the old! In with the new! Rules, that is.

Our venerable high 9—the Texas Court of Criminal Appeals—closed up shop in July for vacation. When the judges return, it will be to a new ball game.

The Texas Criminal Appeals program will list a large lineup of new players on the Courts of Appeal throughout the state, including the new judges to be named by the governor. And, the rules of the game will be changed.

In the "Legislative Review" presented in the July issue of the *VOICE for the Defense,* if you did not know before then, a summary of the new legislation establishing the criminal jurisdiction of the Courts of Appeal was presented.

Effective September 1, 1981, only death penalty cases and post-conviction returns of habeas corpus will stay in the Court of Criminal Appeals. The Courts of Appeal will begin hearing all the other cases, including those transferred to the various Appeal Courts by the Court of Criminal Appeals.

In addition to the legislative provisions amending Chapters 40 through 44 of the Texas Code of Criminal Procedure, you will find in this issue of the *VOICE for the Defense* all the new rules promulgated by the Texas Court of Criminal Appeals to implement the handling of those cases, despite all our efforts, that wind up being appealed. The text of these new rules was provided to TCDLA by the Hon. Tom Lowe, Clerk, Texas Court of Criminal Appeals, after the judges adopted the rules on July 17, 1981.

The new rules have been placed in this issue of the *VOICE* in such a way that you will be able to pull them out of your copy, along with the "Significant Decisions Report," for inclusion in your trial and work books.

Along with the rules, you will also find a list of the clerks of all the fourteen Courts of Appeal who will from now on be handling the bulk of the criminal trial records, transcripts, briefs, and motions after September first.

It seems that there is going to be a high state of confusion for a time as the new appeal system rolls into operation. There will be the problems involved in those cases tried and notice of appeal given, under the old rules, that come under the new rules, at every possible stage of appellate procedure. There will be the grand *grab bag* process of trying to determine just what the state of criminal law is in Texas on any given day, depending upon which city and judicial district in which you happen to be.

Then, of course, there is the *wonderful* prospect of the state having the right, along with the defendant, of petitioning the Court of Criminal Appeals to review a decision from a Court of Appeal. Didn't the voters of Texas defeat a proposed constitutional amendment to allow the state to appeal?

The *VOICE for the Defense* and TCDLA can become a potent voice in helping to see that the new criminal appeals system will operate fairly and uniformly by starting a continuing roundtable column devoted to views, news, experiences, interpretations and suggestions about the new system. All readers of the *VOICE* are invited to become contributing editors to this round-table for the benefit of the bench and bar.

————Library materials usually do not create much noise. However, the TCDLA "Law Library Committee Report," published in the June issue of the *VOICE* has created somewhat of a clamor. Unfortunately, the din was caused by listing publications that TCDLA has published in the past.

We are greatly flattered by the response. Unfortunately, except for Garland Wier's *TEXAS CRIMINAL TRIAL MANUAL*, the bulk of the publications listed under TCDLA publications were popular enough to be run out of print by all of you. Our Publications Committee will be exploring the possibility of publishing some of the material, updating others, and publishing new ones. In the meantime, please take it easy on Rosalind Brinkley, the new executive assistant to the president of TCDLA. She is trying to work out your requests, demands and payments for the material that is out of print.

————Speaking of publications. The governor's office has prepared a handy, one-volume compilation of all of the new criminal laws and changes in the old ones passed during the regular session of the legislature. Free copies were sent out to judges throughout the state. You can call the governor's office and ask about obtaining a copy. There is now a long waiting list for the book, but it doesn't hurt to ask.

————And, since it doesn't hurt to ask, I will once again request that you "keep those cards and letters coming, folks." Plans for a columu devoted to news about, and activities of, our members in and out of court, suggested in the July issue of the *VOICE*, will depend on your contributions.

EXECUTIVE COMMITTEE MEETING

SATURDAY, JULY 11, 1981
Austin

The first executive committee meeting under the presidency of Charles M. McDonald was held on Saturday, July 11 at 10:30 a.m. in the office of Bob Jones in Austin. Officers present included:

Charles M. McDonald	President
Clifford Brown	President-Elect
Clif Holmes	2nd Vice President
Louis Dugas	Secretary-Treasurer
Steve Capelle	Asst. Secy-Treas.

Past presidents included Bob Jones, immediate past president, and Frank Maloney. Attending as special appointments to the committee were Charles Butts and Knox Jones. Honorary appointment members present included Richard Harrison of Dallas. Guests included Stan Weinberg.

Members absent from the meeting were Thomas Sharpe, first vice president; Robert Turner, special appointment, and honorary members Weldon Holcomb, Tim Evans and Gerald Goldstein. Past

(Continued on page 8)

President's Report

CHARLES M. McDONALD

As TCDLA begins its tenth year, its impact in the field of criminal law is something almost unbelievable, especially for members who have been with the Association since its inception in 1971. Certainly members who have joined the Association since 1971, and continue daily to join, also realize and appreciate this phenomenon. The founders envisioned a total membership of approximately 600 members. Long ago the Association surpassed this figure. Presently we have approximately 1,247 charter, sustaining, regular, and associate members. This figure does not include honorary or student membership. The student membership has continued to increase, and it has been very helpful in furthering the goals of our Association. At this writing, some of the Association's student members at Baylor University School of Law in Waco are working directly with TCDLA in the planning of a criminal law symposium to be held probably at the Law School in Waco on December 11, 1981. TCDLA will in all probability have a Board of Directors meeting in Waco the day following this planned symposium. These student members and others are actively planning on devoting a complete issue of the *Baylor Law Review* exclusively to criminal law subjects. Commitments for contributions to this law review issue have been made by Judge Wendell Odom, Judge Sam Houston Clinton, both of the Texas Court of Criminal Appeals, Frank Maloney of Austin, Texas, the first president of this organization, Kerry P. FitzGerald, who is responsible for the "Significant Decisions Report" in the *VOICE,* and Professor H.D. Wendorf, Professor of Criminal Law at Baylor University School of Law. Professor Wendorf has been very active in increasing student membership from the Baylor School of Law into our Association. In fact, Professor Wendorf, for the year 1979-80, tied our director, Jan Hemphill of Dallas, in obtaining new members for the Association for that year. Specific details as to the date, time, and place for the symposium and Directors' meeting will be published in later issues of the *VOICE.*

For the benefit of our newer members, a few comments about the general makeup and goals of our organization would seem to be in order. The Association is governed by a Board of Directors elected for three (3) year terms by the voting members present at the annual meetings. The board was initially comprised of twenty-four (24) members; in 1975 the membership was increased to thirty-six (36) to broaden the geographic base of the representation.

TCDLA officers and directors have since its inception paid their own way to every board meeting, executive meeting, and other functions. This expense to the individual officer and director over the period of a term in office amounts to a substantial sum. I have yet to hear one officer or director complain about his/her expenses, even for extended distances and periods of time. All have been dedicated to the goals of the Association and generous with their time, money, and expertise in their all-out efforts to make the Association a success. TCDLA members are now and have always been welcome to attend every directors' meeting. This year, TCDLA members are encouraged to attend, especially those members who live in the area where the board meetings are to be held; members are invited to be present and bring whatever business they may have to the attention of the full board. It is hoped that this procedure will serve to include more members in the affairs and policy making of TCDLA.

Every attorney who has any interest in the field of criminal law who is eligible for memberhsip should join this Association. The rewards are undeniable. Each member receives at no additional cost a monthly issue of the *VOICE,* with its excellent articles and decision reports. There are many other services offered free of charge or for a minimal fee through the staff at our home office in Austin, including various complimentary publications such as the "Attorney General's Crime Prevention Newsletter." Plans are presently in the making for each member to receive at no extra cost a copy of the *Judge's Criminal Law Outline* prepared by the National College of the State Judiciary in Reno, Nevada. This is an outstanding publication citing all the major cases in criminal law and is undoubtedly the best publication of its kind available. Each year benefits received by the membership have increased although the dues have remained the same since the inception of the Association in 1971. As trite as it may seem in these days of political skepticism, I sincerely believe the charter members of this great Association in 1971 were not thinking about what the Association could do for them when they each paid their $200.00, but what they could do for the Association and the furtherance of the interests of criminal jurisprudence and its practitioners. A casual look through the membership directory of the charter and sustaining members will quickly reveal the caliber of attorneys throughout the State of Texas who believe in this Association. I strongly solicit each person who reads this issue of *VOICE* who may not be a member of our Association and who is eligible to please become a member NOW. To members of this Association who are not sustaining members, I encourage them to become sustaining. The lifeblood of this Association is in an ever-increasing membership and its critical and financial backing.

I take this opportunity to welcome Shirley Butts, wife of charter member and director Charles D. Butts of San Antonio, on her becoming a sustaining member. I believe that this is our only husband-wife sustaining membership team. Along with an increased membership and financial strength has come an increased defense influence in the administration of criminal justice.

On July 11, an Executive Committee meeting was held in Austin. At the meeting, appointments were made for the key committees, and plans were made for implementation of the goals that I trust will be accomplished by the Association during the 1981-82 year as set out in the President's Report in the July issue. A summary of the action of the Executive Committee is published in this issue for a more detailed look at what was accomplished.

By letting the membership and others who read the *VOICE* know what is happening in this Association, we trust that it will increase our membership services and encourage greater participation by the general membership. I welcome your comments and suggestions.

PUNISHMENT ALTERNATIVES

Arch McColl III
Dallas

PROBATION

There are three kinds of probation (not including pretrial diversion) in both felonies and misdemeanors.

A. Deferred Adjudication
   1. Authority—Tex. Crim. Pro. Ann. art. 42.12 §3d(a) (felony) and 42.13 §3d(a) (misdemeanor);
   2. Definition—not a final conviction (no finding of guilty; no judgment; no sentence). Probation by the court in deferred adjudication "is a breed other than regular probation," *McDougal v. State*, 610 S.W.2d 509 (Tex. Crim.App. 1981).
   3. Eligibility—in the best interest of society and the accused and *only* on a plea of guilty or *nolo contendre*. (usually for first offenders only.)
   4. Period—
      a. Grant—not to exceed the maximum term of possible imprisonment;
      b. Adjudicate ("revoke")—may *exceed* the period of probation up to the maximum term;
      c. Removal—in the best interest of society and the defendant (probably the same guidelines as regular probation, Tex. Code Crim. Pro. Ann. art. 42.12 §7; the lesser of one-third or two years).
   5. Appeal—
      a. Of the decision to place on deferred adjudication—no appeal, *Hardy v. State*, 610 S.W.2d 511 (Tex.Crim. App. 1981) (felony); *McDougal v. State*, 610 S.W.2d 509 (Tex.Crim.App. 1981) (misdemeanor); Remedy—written motion within 30 days requesting final adjudication Tex. Code Crim. Pro. Ann. art. 42.12 §3d(a).
      b. Of decision to adjudicate and assess punishment ("revoke")—no appeal. May appeal only on basis of *original* proceedings but not on the basis of sufficiency of the evidence supporting the decision to proceed to final adjudication. *Williams v. State*, 592 S.W.2d 931 (Tex.Crim.App. 1979); *Shields v. State*, 608 S.W.2d 924 (Tex.Crim.App. 1980).
      c. Bail—entitled to bail pending final adjudication hearing, *Ex Parte Laday*, 594 S.W.2d 102 (Tex Crim.App. 1980).
   6. Future use—admissible as evidence only *after* conviction in penalty phase of a criminal trial. Tex. Code Crim. Pro. Ann. art. 42.12 §3d(c); *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979).

B. Conditional Discharge
   1. Authority—Tex. Rev. Civ. Stat. Ann. art. 4476-15 §4.12 (1976);
   2. Definition—"conceptually similar" to deferred adjudication under Tex. Code Crim. Pro. Ann. art. 42.12 §3d(a); *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979);
   3. Eligibility—
      a. No prior convictions under federal or Texas law relating to a substance that is defined as a controlled substance;
      b. May be imposed after trial *or* on plea of guilty;
      c. Consent of the defendant;
   4. Period—
      a. Grant—may not exceed two years. Tex. Rev. Civ. Stat. Ann. art. 4476-15 §4.12(a); *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979);
      b. Adjudicate ("revoke")—may not exceed two years, art. 4476—15 §4.12(a);
      c. Removal—at the discretion of the judge up to two years;
   5. Appeal—
      a. Of decision to place on conditional discharge—no appeal, *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim. App. 1979);
      b. Of decision to adjudicate guilt and assess punishment ("revoke")—no appeal. *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979);
      c. Bail—because conditional discharge is "conceptually similar" to deferred adjudication, *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979), and because bail is available pending the adjudication hearing in a deferred adjudication proceeding, *Ex Parte Laday*, 594 S.W.2d 102 (Tex.Crim.App. 1980), bail may be available pending appeal of conditional discharge, if any such right to appeal exists, *cf. McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979).
   6. Future use—after final discharge and dismissal, nonpublic record of the proceeding is retained by the director of the Department of Public Safety "solely" for determining future eligibility for conditional discharge. *McIntyre v. State*, 587 S.W.2d 413 (Tex.Crim.App. 1979).

C. Regular Probation
   1. Authority—Tex. Code Crim. Pro. Ann. art. 42.12 §3;
   2. Definition—it is a final conviction *during* the period of probation, Tex. Code Crim. Pro. Ann. art. 42.12 §7: ". . . released from all penalties . . . resulting from the offense of which he has been *convicted* . . . ;" "should the defendant *again* be *convicted* of any criminal offense"; Texas Attorney General's Opinion No. M-640 (1970) on employment application, one cannot truthfully say he has never been convicted of a felony).

3. Eligibility—ends of justice, the best interest of the public as well as the defendant. Article 42.12 §3;
4. Period—
   a. Grant—not to exceed ten years, Article 42.12 §3;
   b. Revoke—not to exceed the term of probation assessed, Article 42.12 §8(a);
   c. Remove from probation—the lesser of one-third of the original probationary period or two years, Article 42.12 §7.
5. Appeal—
   a. Of decision to grant probation—descretion is absolute and unreviewable, *Flournoy v. State,* 589 S.W.2d 705 (Tex.Crim.App. 1979);
   b. Of decision to revoke appeal allowable on question of sufficiency of evidence to revoke, *Walkovak v. State,* 576 S.W.2d 643 (Tex.Crim.App. 1979);
   c. Bail—not available as a matter of right pending revocation (Tex. Code Crim. Pro. Ann. art. 42.12 §8(a), but entitled to bail pending appeal.
6. Future use—released from all penalties and disabilities resulting from the offense except that it is admissible in the future after conviction on the issue of penalty only.

D. Employment Applications and Restoration of Civil Rights
1. Employment Applications—
   a. Regular Probation—a person who is discharged from *regular* felony probation under §7 of Article 42.12 Tex. Code Crim. Pro. Ann. may not truthfully state that he has never been "convicted" of a felony in an application for employment, Texas Attorney General's Opinion No. M-640 (1970); otherwise "released from all penalties and disabilities" and information/indictment dismissed. Article 42.12 §7.
   b. Deferred Adjudication—after one has been successfully discharged under Article 42.12 §3d(c) he may truthfully state that he has never been convicted of a felony because there was never any finding of guilt or adjudication of guilt or entry of judgment. "A dismissal and discharge under this section may *not* be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense . . . " Article 42.12 §3d(c);
   c. Conditional Discharge—same as deferred adjudication. Tex. Rev. Civ. Stat. Ann. art. 4476-15(b) and (c).
2. Restoration of Civil Rights—one who is discharged from regular felony probation under Tex. Code Crim. Pro. Ann. art. 42.12 §7 has his rights of citizenship restored, including:
   a. the right to vote (Atty. Gen. Op. Nos. M-640 [1970] and M-795 [1971]);
   b. the right to serve on a jury (Atty. Gen. Op. No. M-640 [1970]);
   c. the right to run for and hold public office (Atty. Gen. Op. No. M-184 [1972]);
   d. Pardon—for the purposes of Article 42.12 §7 Tex. Code Crim. Pro. Ann., there is no difference in the rights reinstated by a pardon or a restoration of citizenship, (Atty.Gen.Op.No. H-587 [1975]). ■

SPECIAL SEMINAR TRIAL ATTORNEYS
CRIMINAL and CIVIL

THE SINGLE CHEMICAL TEST FOR INTOXICATION: HOW RELIABLE ARE THE NUMBERS THAT CAN:

—Put your client in Jail?
—Bar your plaintiff from civil recovery?

Presented by:
- Edward F. Fitzgerald, J.D., a Massachusetts trial attorney

and

- David N. Hume, Ph.D., Professor Emeritus of analytical chemistry (M.I.T.)

Co-Authors of the recent article in *Massachusetts Law Review,* "The Single Chemical Test for Intoxication: A Challenge to Admissibility," Winter 1981, Vol. 66, No. 1

■■■ THE CHALLENGE IN CRIMINAL AND CIVIL CASES ■■■

- Absorption of Alcohol: The Rise and Fall of the BAC
- The True BAC Time Curve and the Later Single Test
- Pre-Trial Protective Measures
- Use of the Expert Witness; The Theory in Practice
- Raising the Challenge when No Expert Available
- Use of the Prosecution Expert; The "Backdoor" Approach
- The "Flunked" Test as Proof of Lack of Intoxication
- The Tools of Defense—Motions, Affidavits, Briefs
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8:30 am – 4:00 pm

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OCTOBER 7 – Wednesday – SAN ANTONIO
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PLEASE REGISTER BY SEPTEMBER 15. WE RESERVE THE RIGHT TO CANCEL IF INSUFFICIENT REGISTRATION.

EXECUTIVE COMMITTEE MEETING – continued

presidents not attending included Anthony Friloux, Phil Burleson, George Gilkerson, David Evans, George Luquette and Vince Perini.

President Charles McDonald expressed his desire that the Executive Committee be more active than in past terms.

COMMITTEE APPOINTMENTS

Charles McDonald referred members of the Executive Committee to the 1974-75 records of the association setting forth the duties of each committee and stated that committee appointments be limited to people who want to work.

Legislative Committee

Richard Harrison suggested that Ed Mallett continue as chairman of the Legislative Committee. It was suggested that Dain Whitworth definitely still wants to participate in the legilative process. McDonald recommended the following slate of members: Ed Mallett, Dain Whitworth, Vince Perini, Arch McColl, Steve Capelle and Dave Sheppard.

Membership Committee

George Luquette was recommended as chairman. Other members suggested included: Robert Turner, Cecil Bain, Robin Pearcy and Jan Hemphill.

Publications Committee

Clif Holmes said that for the past two or three years, this committee's efforts have mainly been dealing with "Significant Decisions Report," but that there is a wealth of materials relating to the Project that someone should be putting together to sell. Bob Jones reported that the Executive Committee had agreed that TCDLA will submit legislative material to the Project. Maloney reported that he had just finished a paper which he plans to submit. Clif Holmes reported that the Breathalyzer Manual is ready for print. Discussion was held regarding the *Criminal Law Outline* and why it was not mailed to members this year. Bob Jones reported that we didn't have the funds this year. Frank Maloney stated that he feels this publication is a necessity. Charles McDonald stated that the price of this publication be checked and that arrangements be made to obtain future issues.

In the discussion of the chairmanship of the publications committee, Steve Capelle noted that Joseph Connors was enjoying the position. Clifford Brown and Clif Holmes agreed that he made a good chairman. Charles McDonald appointed Connors as chairman and suggested John Boston, Knox Jones, Ken Houp, Kerry FitzGerald and Stan Weinberg as committee members. Knox Jones was asked to notify Joseph Connors of the appointment.

New business under the publications category included a request from Professor Wendorf at Baylor that TCDLA provide a law review. Charles McDonald has spoken with the editor in Waco and is awaiting a letter outlining their request.

Steve Capelle commented about the tardiness of the June issue of *VOICE for the Defense.* Clif Holmes reported that each post office can hold the bulk mail postage up to four days. He reported that Austin usually gets the issues out within that period but smaller cities are often two weeks late receiving copies.

Bob Jones introduced the idea of producing video tapes for statewide distribution. A program showing what happens to a young person from the Texas Department of Corrections on up could be leased to schools on the elementary level as well as presented on public education channels. Discussion was held regarding the availability of money to produce the materials and Jones pointed out that the Project had been funded through April and that other money was available from the government. He noted that we should have both the TCDLA logo and the State Bar logo on the materials.

The Death Penalty Defense Workshop scheduled for September 11-13 in Houston was discussed by Clif Holmes. He reported that we would be receiving 25% of the profit from the seminar.

Clifford Brown noted that he feels that TCDLA should help local groups with their seminars, such as in Temple. John Boston could be called upon to do the leg work while we put the materials in useful form.

1982 Convention Planning Committee

Bob Jones was appointed to chair a TCDLA Bicentennial Committee for the State Bar's convention in Austin next year. He reported that approximately two to four thousand lawyers are expected. If we could go to the State Bar section and make a proposal to put on a first-class seminar with top speakers who draw crowds, we could split the profit 60/40. Clifford Brown noted that his son Mike could assist with the details.

Bob Jones reported that be was pleased with the support received from the Houston group at the convention with their participation in the hospitality suite. Steve Capelle was appointed chairman of next year's hospitality room.

Finance Committee

The Finance Committee will be chaired by Louis Dugas as secretary-treasurer. Members include: Charles McDonald, president; Clifford Brown, president-elect; Steve Capelle, assistant secretary-treasurer; and Charles Butts.

Continuing Legal Education Committee

Discussion was held regarding the chairman to be appointed to the Continuing Education Committee. Names submitted included those of the "Joseph Connors type" including: Robert Turner, Arch McColl, Bruder, Turner of Dallas, and Duncan, a North Texas professor. Charles Butts agreed to help set up the committee and to talk to Robert Turner regarding the position.

Bob Jones reported that Pete Thompson had made 30 copies of an educational tape (14 minutes long) that could be used at conventions and seminars.

Clif Holmes proposed that committee be formed to help find speakers and plan workshops for local groups. He suggested that an article he submitted to the *VOICE* saying that "We help you find someone." Clifford Brown noted that Lubbock has had a good response from the courthouse regarding their local group.

Office Procedures Committee

Louis Dugas was asked by Charles McDonald to chair an Office Procedures Committee. Clif Holmes offered to assist with the project. McDonald specifically mentioned that consideration be given to limiting services provided in the Brief Bank area, requests from prisoners regarding legal information publicized in the *VOICE,* and membership categories available to attorneys.

Steve Capelle noted that the staff at the headquarters office had been reduced significantly over the past few years and noted that the membership has increased. Frank Maloney asked if an executive director might be needed; Charles McDonald said no but that services need to be limited with the reduced staff.

VOICE for the Defense Advertising Committee

Steve Capelle noted that the percent of complimentary memberships has increased. Clif Holmes said that he wished

(Continued on page 34)

NEW APPELLATE RULES

Editor's Note: TCDLA is indebted to the Honorable Thomas Lowe, Clerk, Texas Court of Criminal Appeals, for furnishing us a copy of the new rules of appeal in time for them to be published herein. As we noted elsewhere, the new rules have been placed in this journal in such a way that you will be able to pull them out of your copy, along with the "Significant Decisions Report," for inclusion in your trial and work books.

A. GENERAL PROVISIONS

Rule 1. Short Title.

These rules are promulgated under the authority of Articles 40.10, 44.33, and 44.45 of the Code of Criminal Procedure and shall be known as the Texas Rules of Post Trial and Appellate Procedure in Criminal Cases. They may be cited as Tex.Cr.App. R. ___ .

Rule 2. Effective Date.

These rules take effect on September 1, 1981.

Rule 3. Scope of Rules.

(a) These rules, in conjunction with the Code of Criminal Procedure, govern procedures in criminal cases (1) in post-trial proceedings in the trial court, (2) in appeal of non-death penalty cases to the courts of appeals, (3) in appeal of death penalty cases to the Court of Criminal Appeals, and (4) in discretionary review of a decision of a court of appeals by the Court of Criminal Appeals.

(b) These rules shall not be construed to extend or limit the jurisdictions of the trial courts, the courts of appeals, or the Court of Criminal Appeals as established by law.

Rule 4. Suspension of Rules.

In the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may, except as otherwise provided in these rules, suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Provided, however, that nothing in this rule shall be construed to allow any court to suspend the requirements or provisions of the Code of Criminal Procedure.

Rule 5. Signing of Pleadings.

Every pleading, brief, and motion of a party represented by an attorney shall bear the manuscript signature of at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, and telephone number. The pleadings, brief, and motions of a party not represented by an attorney shall bear his manuscript signature and shall state his address and telephone number.

Rule 6. Motions for Extension of Time.

All motions for extension of time under Article 40.09 (13), of the Code of Criminal Procedure shall be in writing and shall be filed with the clerk of the appellate court in which the case will be filed. All motions shall be filed at least one week before the deadline for the filing of the item in question. Each such motion shall specify in the following order:

(1) the court below, in which the case is pending;

(2) the number and style of the case in the court below;

(3) the offense for which the appellant was convicted;

(4) the punishment assessed against the appellant;

(5) the present deadline for the filing of the item in question;

(6) the length of time requested for the extension;

(7) the number of extensions of time which have been previously granted regarding the item in question;

(8) the facts relied upon to show good cause for the requested extension; and

(9) when an extension of time is requested for the filing of a transcription of the court reporter's notes, the facts relied upon to show good cause must be supported by the affidavit of the court reporter which shall include the court reporter's estimate of the earliest date when the transcription can be completed.

Rule 7. Computation.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday (as defined by Article 4591 of the Revised Civil Statutes), in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor such legal holiday. See Article 5429b-2, Section 2.04, Revised Civil Statutes.

Rule 8. Uniform Terminology.

(a) In appellate and discretionary review proceedings from criminal convictions, the parties should be referred to as "the appellant" and "the State."

(b) In habeas corpus cases, the person for whose relief the writ is asked should be referred to as "the applicant." See Article 11.13, Code of Criminal Procedure.

(c) Procedural labels such as "appellee," "petitioner," "respondent," "movant," etc., should be avoided unless they are necessary to clarify a question of procedural law.

[Rules 9-100, reserved for expansion.]

B. TRIAL COURTS

Rule 101. Bystander's Bills of Exception.

After a trial judge has approved a formal bill of exception subject to qualification or has refused a formal bill of exception, the party filing the bill, if unwilling to accept the court's qualification or refusal, may, not later than 15 days after receipt of such notice, file a bystander's bill of exception, and the clerk shall include same in the record. The bystander's bill of exception shall consist of the signed affidavits of three respectable bystanders who are citizens of this state, attesting to the correctness of the formal bill of exception before it was qualified or refused by the trial judge. The bystanders' affidavits shall be filed as part of the record in the cause, with copies of the bystanders' affidavits sent immediately to opposing counsel. The truth of the matter in reference to which a bystander's bill of exception is filed may be controverted and maintained by affidavits, not exceeding 5 in number on each side, to be filed with the papers of the cause, within 10 days after the filing of the bystander's bill of exception and to be considered as a part of the record relating thereto. The truth of such bill of exceptions shall be determined on appeal from such affidavits.

Rule 102. Approval of Record.

(a) The trial court must approve the record on appeal and any supplemental record or modification of the record. See Article 40.09(7), Code of Criminal Procedure.

(Continued)

(b) If the record comprises more than one volume, the trial court's approval must clearly show that it extends to all the volumes of the record.

(c) The use of Forms 1, 2, 3, or 4 (see Appendix) shall be sufficient approval of the record.

Rule 103. Transmission of Record.

(a) The record, on approval by the trial court, shall be filed with the clerk of the trial court, who shall immediately transmit it to the appropriate appellate court. Appellate briefs are not to be filed in the trial court, and the transmission of the record shall not be delayed because briefs were not filed. See Article 40.09(9) and (10), Code of Criminal Procedure.

(b) If an appeal in a non-death penalty case is being taken from a county which is in more than one supreme judicial district, the clerk shall write the numbers of the supreme judicial districts on identical slips of paper (or other indistinguishable objects) and put them in a container. When an approved record is filed with him, the clerk of the trial court shall draw a number from the container at random, in a public place, and he shall transmit the record in that case (and any companion cases) to the court of appeals for the correspondingly numbered supreme judicial district.

[Rules 104-200, reserved for expansion.]

C. COURTS OF APPEALS

Rule 201. The Record on Appeal.

While Article 40.09 of the Code of Criminal Procedure sets forth the basic rules with respect to the preparation of the record on appeal, the following supplements those basic rules:

(a) The clerk's transcript shall contain, in addition to the matters set forth in Article 40.09(1) and those materials designated by the parties in accordance with Article 40.09(2), a detailed index indicating the page on which each document in the clerk's transcript may be found, copies of the notification to the parties of the completion of the record, copies of the notification to the parties of the approval of the record, and the order of the trial court approving the entire record (with all volumes which are approved properly identified in the order; see Rule 102). The clerk's transcript shall be designated as Volume I of the record (or more if necessary) and each page of such transcript shall be numbered consecutively.

(b) The statement of facts (the transcription of the court reporter's notes) shall be designated as Volume II (or the next consecutive Roman numeral). Each separate hearing (pretrial hearing, voir dire, trial on the merits, sentencing, etc.) shall be bound in a separate volume, or in as many volumes as necessary to prevent each from being over 2 inches thick, and the first page of the statement of facts of each separate hearing shall be numbered "1."

(c) The court reporter shall include at the beginning of each volume of the statement of facts both an alphabetical and chronological index referring to the page at which the direct examination, the cross-examination, the re-direct examination, and the re-cross examination of each witness begins. The index may be as shown in the following example or in any other form which shows the same information:

INDEX

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
John Doe	4	8	16	20

The index shall be placed in front of each volume of the statement of facts and a master index of all witnesses shall be placed in the first volume of the statement of facts. The court reporter shall also show in a separate table in the first volume of the statement of facts the page at which any exhibit or other document copied therein appears, and the pages at which it is identified (when an exhibit is identified by more than one witness, page references shall be made where each witness identified the exhibit), offered, marked, received, and shown. The table of exhibits may be as shown in the following example or in any other form which shows the same information:

EXHIBITS' TABLE

EXHIBIT NUMBER	DESCRIPTION	MARKED	IDENTIFIED	OFFERED	REC'D	SHOWN
S-1	Copy of Judgment in Cause #13112	3	4	5	6	82

The statement of facts shall be typewritten and be on opaque and unglazed white paper not less than 13-pound weight, 8-½ by 11 inches in size, in good clear standard type of pica size, 10 or 12 letters per linear inch, double spaced and in upper and lower case type, an average of 25 lines of type per page and typed on only one side of the paper, with no sheets cut or mutilated. The margin on the left-hand side of the page shall be not less than 1-¼ inches nor more than 2 inches. The pages shall be numbered consecutively at the bottom of each page, securely bound on the left margin, and labeled on the cover thereof "Volume___ of ___Volumes."

(d) The copy of the appellate record forwarded to the appellate court will contain legible copies of the exhibits, not the originals. The appellate court may order that the originals be forwarded if necessary. Physical evidence (guns, clothing, narcotics, etc.) will not be forwarded to the appellate court, but each item of physical evidence will be described on a separate piece of paper. The copies of the exhibits received in each separate hearing, including descriptions of physical evidence, forwarded to the appellate court will be placed in numerical order at the end of the statement of facts of that hearing, or in a separate volume if the record is voluminous.

Rule 202. Briefs.

(a) All briefs, whether filed under Article 40.09 of the Code of Criminal Procedure or otherwise, shall be printed or typewritten on 8-½ inch by 11 inch letter size pages or the equivalent thereof. Briefs should be as short as possible, but in no event shall they exceed 50 pages unless leave of the appellate court is first obtained. Typewritten or printed lines must be double spaced. All pages shall have margins of at least 1 inch at the top, bottom, and each side. Briefs must be compact, logically arranged, concise, and free from burdensome, irrelevant, and immaterial matter. Citations to the appellate record (R) shall indicate the number of the volume in Roman numerals and the number of the page in Arabic numerals being cited, in the following form: "R. IV-123." Briefs not complying with this rule may be disregarded and stricken by the appellate court.

(b) An original and 3 copies of each brief shall be filed with the court.

Rule 203. Uniform Docketing.

(a) Each criminal case filed in a court of appeals shall be

assigned a docket number that comprises 4 parts, separated by hyphens: (1) the number of the supreme judicial district, (2) the last 2 digits of the year in which the case is filed, (3) a number which shall be assigned to criminal cases in sequence as they are filed in each calendar year, and (4) the designation "CR." (For example, the first criminal case filed in the Court of Appeals for the Fourteenth Supreme Judicial District shall be assigned the docket number "14-81-001-CR"; the first criminal case filed in 1982 shall be, "14-82-001-CR," and so on.)

(b) The clerk shall put the docket number of a case on each separate item (volume of clerk's transcript, volume of statement of facts, brief, motion, pleading, letter, etc.) that is received in connection with that case, as well as putting the docket number on the envelope.

(c) The record of each criminal case shall be filed in one or more congress tie manilla envelopes of the following specifications: extra heavy weight stock, one-piece construction with flaps, non-collapsing style construction with closed corners, width of 14-½ inches, height of 9 inches, thickness of ½ inch, 1 inch, 1-½ inches, 2 inches, 3 inches, or 4 inches. The front of each envelope shall be printed substantially as shown in Form 5 (see Appendix).

(d) The clerk shall enter the information called for on the cover of the first envelope containing the record in each case. If additional envelopes are used in a case, they need only show the docket number, the appellant's name, and the contents of the envelope (for example, "R. Vols. III-V").

Rule 204. Notification of Submissions.

The clerk of each court of appeals is directed to use all reasonable diligence to notify counsel of record of all settings in criminal cases, though the failure to receive notice will not necessarily prevent or defeat the submission of the case on the day on which it is set. Within 15 days of the mailing of the notice of the setting, all counsel of record will acknowledge receipt of such notice and advise the clerk whether or not oral argument is desired. Failure to advise the clerk will constitute a waiver of oral argument. Provided, however, that a court of appeals may direct that a particular case be argued orally.

Rule 205. Oral Arguments.

Unless extended by the court of appeals in special cases, the total maximum time for oral arguments shall be 20 minutes per side. Counsel for appellant or applicant is entitled to open and conlcude the argument. Counsel will not be permitted to read at length from briefs, records, or authorities. Counsel may make an oral correction to his brief, but multiple additional citations should not be made orally; they should be reduced to writing and filed with the clerk.

Rule 206. Submissions in the Courts of Appeals.

(a) Except as provided in Article 1812(b) of the Revised Civil Statutes and these rules, original submissions of criminal cases in a court of appeals shall be to a panel of the court consisting of three justices. A majority of the panel shall constitute a quorum and the concurrence of a majority of the panel shall be necessary for a decision. Except as otherwise provided in these rules, the decision of a panel of a court of appeals shall constitute the final decision of the court.

(b) If for any reason only two justices participate in the decision of a panel of a court of appeals consisting of more than three justices and they cannot concur in a decision because they are equally divided, the chief justice of the court of appeals shall designate another justice of the court to participate in the decision of the case. After such justice is designated, the panel may order the case reargued, at its discretion. In the alternative, the chief justice of the court of appeals may convene the court en banc for the purpose of deciding the case. The en banc court may order the case reargued, at its discretion.

(c) If a court of appeals consists of only three justices and for any reason only two justices participate in the decision and they cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to Article 1812(d) of the Revised Civil Statutes. The reconstituted panel may order the case reargued, at its discretion.

(d) Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision. If a majority of the justices of the court sitting en banc cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to Article 1812(d) of the Revised Civil Statutes. The reconstituted en banc court may order the case reargued, at its discretion.

(e) A hearing or rehearing en banc is not favored and should not be ordered except in extraordinary circumstances. A vote need not be taken to determine whether a cause shall be heard or reheard en banc unless a justice of the en banc court request a vote. If a vote is requested and a majority of the membership of the en banc court vote to hear or rehear the case en banc, the case will be heard or reheard en banc; otherwise, it will be decided by a panel of the court.

Rule 207. Opinions in the Courts of Appeals.

(a) On all opinions or orders delivered by a panel of a court of appeals or a member thereof in regard to a case submitted to a panel, there shall be noted the identification and composition of that panel. Each panel shall determine by majority vote whether the opinon of that panel in a given case shall be signed by a justice or issued per curiam and whether the opinion or opinions shall be published. If a rehearing of a panel's decision is granted, the opinion or opinions from the panel in that case shall not be published until after the decision on rehearing is issued. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case.

(b) A majority of justices shall determine whether opinions delivered by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(c) An unpublished opinion shall neither be deemed nor cited as precedent.

(d) If a case is decided by a certificate of affirmance or reversal, the certificate shall identify each issue that was decided and the supporting authorities that were relied on in deciding that issue.

(e) Immediately after the delivery of an order or opinion of a panel or any member thereof with reference to a criminal case assigned to that panel, the clerk shall distribute a copy thereof to all justices of the court.

(Continued)

(f) The court en banc and each separate panel may deliver an opinion or announce an order or decision from the bench or otherwise at any time.

(g) On the date of delivery of any opinion or order in a criminal case, the clerk of the court of appeals shall mail copies of said opinions or orders to (1) counsel of record for the appellant, (2) counsel of record for the State, (3) the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, (4) the Clerk of the Court of Criminal Appeals, and (5) the clerk of the trial court.

Rule 208. Rehearings.

(a) A decision by a panel may be modified or overruled by a majority of the membership of the panel that initially decided the case or by a majority of the justices sitting en banc. Except as is otherwise provided, motions for rehearing shall be disposed of by the panel that initially decided the case. See Rule 206.

(b) After the decision of a panel is delivered, any party desiring a rehearing must, within 15 days after the decision is delivered, present to the court a motion for rehearing. Such motion shall distinctly specify the grounds relied on for rehearing and be accompanied by such written argument in behalf of the motion as may be desired. Oral argument in support of the motion will not be permitted. No reply to a motion for rehearing need be filed unless requested by the court. If a motion for rehearing is granted, the court may make final disposition of the cause without reargument, or may order the case resubmitted (with or without oral argument), or may make such orders as are deemed appropriate under the circumstances of the particular case. Sufficient copies of all such papers shall be filed with the clerk so that each member of the en banc court will have a copy. The party presenting the motion and the respondent, if he submits a reply, shall certify that copies of all such papers have been delivered to the opposite party. A copy of all such papers and written argument thereon shall be distributed to the justices by the clerk or the administrative staff of the court. Except as provided in Rule 206(c), the motion shall be disposed of by the panel that initially decided the case. If a majority of the justices of the panel that initially decided the case are of the opinion that the case should be reheard, the motion shall be granted and the case shall be resubmitted to the panel for a decision, with or without oral argument as a majority of the panel shall decide. If a majority of the panel are of the opinion that the case should not be reheard, the motion for rehearing shall be overruled.

(c) A majority of the justices of the en banc court may order an en banc reconsideration of any decision by a panel within 15 days after such decision is issued on its own motion. In such event, the panel decision shall not become final, and the case shall be submitted to the court for an en banc review and disposition. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said 15 day period, or (2) by written order issued within said 15 day period, either with or without an en banc conference.

(d) If the panel or the en banc court delivers an opinion on first motion for rehearing, the losing party, within 15 days after such opinion is delivered, may seek a second rehearing by availing himself of and following the rules and procedures above set forth with respect to motions for rehearing.

Rule 209. Mandate.

(a) When a decision of a court of appeals becomes final, the clerk of such court shall issue a mandate in the case to the trial court.

(b) A decision of a court of appeals shall be final:

(1) at the expiration of 45 days after the final ruling of the court, unless

(A) a petition for review has been filed within 30 days after the final ruling of the court of appeals, or

(B) the Court of Criminal Appeals has filed an order for review of the decision on its own motion, or

(2) at the expiration of 15 days from the date of refusal of the Court of Criminal Appeals to grant a petition for review.

(c) As used in these rules, "final ruling of the court" means (1) the 16th day after the date of the delivery of the court's opinion or order where a motion for rehearing is permitted under Rule 208 but is not filed or rehearing is not granted on the court's own motion, (2) the day after the date of the overruling of a motion for rehearing where a further motion for rehearing is not permitted under Rule 208, or (3) if a motion for rehearing pursuant to Rule 208(d) is granted, the day after the date of the disposition of the case on rehearing, whichever is later.

Rule 210. Stay of Mandate.

(a) The mandate of the court of appeals shall be stayed automatically where:

(1) a petition for discretionary review to the Court of Criminal Appeals has been filed with the clerk of the court of appeals which delivered the decision within 30 days after the final ruling of the court of appeals, or

(2) the Court of Criminal Appeals, or a judge thereof, has filed an order for review of the decision of the court of appeals. See Rule 303. The order for review shall be filed with the Clerk of the Court of Criminal Appeals. When such order is filed, the Clerk of the Court of Criminal Appeals shall immediately notify the clerk of the court of appeals which rendered the decision. In such event, the clerk of the court of appeals shall withhold or recall the issuance of the court of appeals' mandate, whichever is appropriate.

(b) A court of appeals may stay the issuance of its mandate for not more than 60 days to permit the timely filing of an appeal or petition for writ of certiorari to the Supreme Court of the United States.

Rule 211. Rules of Civil Procedure.

Where not inconsistent with the Code of Criminal Procedure and these rules, as they now exist or may hereafter exist, the Rules of Civil Procedure shall govern proceedings in the courts of appeals in criminal cases.

[Rules 212-300 reserved for expansion.]

D. COURT OF CRIMINAL APPEALS

Rule 301. General Rules Governing Appeal of Death Penalty Cases.

Article 40.09 of the Code of Criminal Procedure and Rules 201 and 202(a) of these rules shall govern the appeal of a case in which the death peanlty has been assessed. An original and 3 copies of the briefs shall be filed in such cases.

(Continued on page 24)

SIGNIFICANT DECISIONS REPORT

Editor: Kerry P. FitzGerald
Contributing Editor: Arch C. McColl III

COURT OF CRIMINAL APPEALS DECISIONS

FORRESTAL S. ALLISON, No. 67,400, Probation Revocation, Affirmed, Judge Onion, 7-15-81.

LESSER INCLUDED OFFENSE: D was originally charged with burglary of a habitation. On motion of the State, the offense was reduced to burglary of a building with the approval of the court. D plead guilty and received probation. Later D plead true to State's revocation motion. On appeal D now argued the State erred in reducing the original offense to burglary of a building. C.C.A. held that burglary of a building is a lesser included offense of burglary of a habitation. Jones 532 SW2d 596, 601.

The greater offense, when properly alleged, necessarily includes all the lesser included offenses whether each of their constituent elements are alleged in the wording of the indictment on the greater or not.

FORRESTAL S. ALLISON, No. 67,402, Probation Revocation, Affirmed, Judge Onion, 7-15-81.

CREDIT CARD ABUSE INDICTMENT SUFFICIENT: D plead true to State's revocation motion and then appealed, arguing that the credit card abuse indictment was fundamentally defective as it did not include necessary elements of the offense, to-wit: that D knew that the credit card was used without the effective consent of the card owner. The indictment alleged that D did with intent

to fraudulently obtain property and services, namely one watch, bath towels, and rugs, and gold lighter from X, knowingly and intentionally use and present a Sanger Harris credit card #111 with knowledge that the card had not been issued to the said defendant and that the said card was not used with the effective consent of the cardholder Y. C.C.A. held that the indictment did include all essential elements of the offense, and that Ex Parte Mathis 571 SW2d 186 and Ex Parte Walters 566 SW2d 622 were distinguishable.

EX PARTE RONALD SALFEN, No. 67,886, Relief Granted, Judge Dally, En Banc Opinion, 7-15-81.

TRIAL COURT WITHOUT AUTHORITY TO HOLD WITNESS IN CONTEMPT OF COURT: Salfen, a minister, was a witness in a habeas corpus proceeding for the reduction of the appearance bond of Williams, who was charged with a criminal offense. On cross-examination Salfen was asked: "Have you discussed it in any capacity whether or not she would run off?" Salfen refused to answer the question. At the end of this hearing, the court reduced Williams' bond. Two weeks later Salfen was ordered to appear again in court to determine if he should answer said question and to determine the sufficiency of the bail. Salfen again refused to answer the question on the basis of the clergyman-penitent privilege and was held in contempt of court.

Before a court can hold a witness in contempt, three things are necessary: 1) jurisdiction of the subject matter, (2) jurisdiction of the person, and (3) authority of the court to render the particular judgment. Ex Parte Duncan 95 SW2d 675. Here, the initial habeas corpus hearing terminated in the court reducing Williams' bail, and thus the setting of bail was res judicata. Korn 400 SW2d 564. The trial court did not have the authority at the second hearing to propound the questions which the court did to Salfen or to order Salfen to answer the questions, since the "subject of inquiry" before the court on that date was not to determine the sufficiency of Williams' bond. Absent such authority, Salfen's refusal to answer the questions was not contemptuous. C.C.A. declined to reach the constitutionality of the statute providing for clergymen-penitent privilege (Article 3715a, V.A.C.S. (Supp. 1981)).

MARIAN ZANGHETTI, No. 58,061, Murder, 10-yrs. probated, Affirmed, Judge Onion, Panel Opinion, 7-8-81.

COURT'S CHARGE SUFFICIENT - ALLEGATIONS CONJUNCTIVELY PLEAD MAY BE DISJUNCTIVELY SUBMITTED IN COURT'S CHARGE: Indictment alleged that D caused X's death by striking his head with a glass bottle and by striking his head with a piece of wood and by means and manner unknown to the grand jury. Court's charge submitted each alternative in the disjunctive, which was satisfactory. C.C.A. also noted that culpable mental states ("intentionally and knowingly") have been conjunctively alleged but disjunctively submitted in the court's charge and that same was not error. Mott 543 SW2d 623. See also Ely 582 SW2d 416 (deceptive business

practices case) and Cowan 562 SW2d 236 (an aggravated rape indictment: "submit and participate"--court's charge: "submit or participate").

MARVIN BELL, No. 59,469, Aggravated Robbery, 75-TDC, Opinion on State's motion for rehearing: Affirmed, Judge Onion, En Banc.

CROSS-EXAMINATION OF D REGARDING POSSESSION OF MARIJUANA CONVICTION NOT ERROR: On direct examination D was asked whether there was anything in his past which was of a criminal nature. D said there was and then testified he had been in prison for embezzlement, that this was the only time he had been to prison and that he was not guilty of the aggravated robbery charge for which he was on trial. On cross-examination D admitted being fined for a criminal offense of fleeing from a police officer, without objection. D.A. asked whether D had been arrested for possession of marijuana, over the objection that the question was asked to inflame the minds of the jury and "this is not against moral turpitude". Then without objection, D.A. showed D had been convicted in that case, and further that D had been arrested on two other occasions for two aggravated robberies, all without objection. On redirect-examination, D showed he had filed a motion to be tried on all three robbery cases at the same time, but the D.A. refused and that he had possessed "two joints" in the marijuana case and that when convicted of fleeing from the officer he was not represented by counsel.

C.C.A. affirmed, noting first that this ground of error was advanced in D's untimely filed pro se brief which C.C.A. would not consider as unassigned error in the interest of justice, as it was not a question of constitutional dimension or a serious question of law that justice required its discussion. In addition, D's objection was not sufficient; even if the objection were sufficient, D opened the door on direct-examination, i.e., D left the jury with the impression that he had nothing in his criminal past except the embezzlement conviction; and the error, if any, was harmless beyond a reasonable doubt.

PHOTOGRAPHIC SPREAD - TESTIMONY AND EXHIBITS NOT BOLSTERING: Complainant testified regarding D's involvement in aggravated robbery. Complainant testified that before trial he had identified D's picture from a photographic spread. The photographs, including D's, were admitted into evidence over the objection of "bolstering". The admission of the testimony and exhibits was proper. Lyons 388 SW2d 950 (while a witness who has identified her assailant at the trial may testify that she also identified him while he was in custody of the police, others may not bolster her unimpeached testimony by corroborating the fact that she did not identify him) is clearly distinguishable.

GEORGE LEATHERWOOD, No. 59,782, Theft, Life, Reversed, Judge W.C. Davis, Panel Opinion, 7-22-81.

AVAILABILITY OF PRIOR CONVICTIONS TO ENHANCE PUNISHMENT: The two prior felony convictions used to enhance D's punishment had already been successfully used to enhance an earlier conviction and therefore under the old law were not available to be used in this case again. However, the enactment of Section 12.46, P.C. changes this rule ("the use of a conviction for enhancement purposes shall not preclude the subsequent use of such conviction for enhancement purposes").

MARY ROBERTS, No. 60,339, Interference with child custody, 2-yrs. probated, Affirmed, Judge Teague, Panel Opinion, 7-22-81.

INTERFERENCE WITH CHILD CUSTODY PROVISION IS CONSTITUTIONAL: In this case D legally took the child out of Texas and thereafter retained the child in Colorado in violation of a valid order by a Texas court adjudicating custody of the child, in violation of Section 25.03(a)(1). C.C.A. held the statute constitutional citing Justice Oliver Wendell Holmes' opinion in Strassheim vs. Daily 221 U.S. 280 wherein it was stated:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its grasp."

C.C.A. noted that in cases prosecuted under Section 25.03, P.C., the act of retaining the child outside the state, in violation of a valid Texas Court Order, has the necessary consequence and detrimental effect and result of frustrating the power of the Texas Judiciary and of denying a Texas resident the possession of a child to which he has been awarded a legal custody. This interest in protecting the viability of its judgments and the rights of possession of its residents gives Texas jurisdiction to punish the acts of a person committed wholly outside the territorial boundaries of Texas when those acts thwart this valid interest. For these reasons Texas has jurisdiction of the subject matter of this cause and is justified in punishing the acts of D now that she is "within its grasp". See also Section 1.04, P.C.

EARNEST HEGGINS, No. 60,361, Permitting intoxicated person to remain on licensed premises, Reversed/Acquittal Entered, Judge Roberts, Panel Opinion, 7-22-81.

EVIDENCE INSUFFICIENT TO PROVE D WAS AN "AGENT": D was prosecuted under Section 104.01 of the Alcoholic Beverage Code. The information alleged that while the agent of X, a retailer authorized to sell beer, D knowingly permitted an intoxicated person to remain on licensed premises. The term "agent" was defined in Ackley 592 SW2d 606 as "one who is authorized by another to

transact business or manage some affair for him, and to render to him an accounting of such transaction***The chief distinction between an agent and a servant is that an agent is employed to represent his principal in business dealings and to establish contractual relations between him and third persons, whereas the servant is not."

The State chose to allege D was an "agent" rather than a "servant" or an "employee". The only State's witness was a police officer who testified he went to a certain club and saw D standing behind the bar acting as a bartender. He saw D serve canned beer and bottled beer to the patrons, one of whom was intoxicated. The officer arrested that man, others and D. The officer never saw an employment contract. C.C.A. noted that it was not called upon to decide whether this evidence would have proved that D was a servant or an employee, for no such allegations were made. C.C.A. only held that the evidence was insufficient to prove that D was an agent, as that statutory term must be construed.

FILMON TAVE, No. 60,697, Murder, Life, Reversed, Judge Odom, Panel Opinion, 7-22-81.

COURT'S CHARGE - IMPROPER LIMITATION VIA INSTRUCTION ON "PROVOKING THE DIFFICULTY": The State's theory was that D shot the deceased without any provocation whatever. D testified he shot the victim after the victim had assaulted him. If not called for by the facts, a charge on provoking the difficulty constitutes an unwarranted limitation on the right of self defense. This charge is applicable in those cases in which the first attack is made by the deceased, but is induced by words and conduct of the accused reasonably calculated and intended to provoke an attack which may be used by him as an occasion for doing harm to his adversary. Dirck 579 SW2d 198. There was no evidence to support a provoking the difficulty charge and thus its submission was unwarranted.

PATRICK MURPHY, No. 60,900, Burglary of a habitation, Life, Reversed, Judge Onion, Panel Opinion, 7-22-81.

ENHANCEMENT PARAGRAPH - DATE OF OFFENSE NOT PROVED: State failed to prove that the second offense alleged for enhancement of punishment was committed subsequent to the first alleged conviction having become final as required by Section 12.42. Here the State did not introduce a copy of the indictment or any other evidence indicating the date of the offense. Jefferson 611 SW2d 102.

BRADY BOLTON, No. 63,616, Aggravated Assault, 20-TDC, Reversed.

EX PARTE BRADY BOLTON, No. 66,414, Relief Granted, Judge Onion, En Banc, 7-22-81.

D'S PRIOR CONVICTIONS FOR BURGLARY DEFECTIVE - D INDIGENT AND NOT REPRESENTED BY COUNSEL: During the punishment phase, State introduced evidence as to one prior burglary used for enhancement

of punishment, and two other prior burglaries, as part of D's prior criminal record. While this aggravated assault case was on appeal, D filed a post-conviction writ under Article 11.07, C.C.P. attacking all three prior burglary convictions on the ground that he had been indigent and was not represented by counsel. At trial this objection was made but nothing was offered in support of the objection and it was overruled. At the hearing on the writ, affidavits were introduced, including one from the attorney who prosecuted D in the three prior burglaries. This attorney stated he did not recall whether D was represented by counsel, but the trial records did not show D was appointed counsel which lead him to believe that D was not represented by counsel, appointed or otherwise. The trial court, in its findings of fact and conclusions of law, stated that the presiding judge at that time did not, as a matter of practice, appoint counsel for indigent defendants; that it was his common practice to allow the D.A. and the defendant to enter pleas of guilty before the court without affording the defendant the opportunity to consult with counsel. The C.C.A. concluded the evidence supported the trial judge's findings, and thus the burglary convictions were set aside. Since the trial in the aggravated assault case was before the jury at the penalty stage of the trial, D was entitled to an entirely new trial. Ex Parte Millard 587 SW2d 703.

DONALD GIPSON, No. 67,041, Aggravated Rape, Life, Affirmed,
Judge Roberts, Panel Opinion, 7-22-81.

EXTRANEOUS OFFENSE OF RAPE PROPERLY ADMISSIBLE: State showed that D and others abducted X from a parking lot of her apartment, drove to a vacant house, and at knifepoint all four raped her in the car. D testified that he and three others were driving around, that Davis told him to follow X's car, that he wasn't sure what was going on, but did follow directions to the vacant house and it was Davis's idea to rape X and that all four men did and that D was afraid of Davis. On cross-examination, D stated he committed the rape because he was afraid of Davis and because Davis held a knife to his neck and threatened him. This case was tried on D's plea of guilty before a jury.

In rebuttal, over objection, the court allowed Y to testify that D raped her about a week before he raped X. When Y stopped her car to buy a paper a man holding a knife accosted her and forced her to drive to a vacant house (the same one to which X was taken). A car followed them. At the house Y and the abductor were joined by two other men, including D. D told the other men to leave the room because he could not perform sexual intercourse in front of other people. The men left and D raped Y. No one used force or threats against D.

C.C.A. held that D's testimony raised issues of the degree to which he was a knowing and willing participant in the planning and commission of the offense. The evidence offered in rebuttal was relevant to these issues. The dangers of confusing and prejudicing the issue of guilt, which underly the rule against proof

of extraneous offenses, are absent here when the issue of guilt is itself absent. Garcia 581 SW2d 168. D's argument that he had no notice he would be required to defend against proof of an extraneous fails as at trial he did not claim he was surprised and did not ask for continuance. Further, the notice D claims he should have been given was not practical here as the evidence was offered in rebuttal to D's evidence in litigation. Garcia 581 SW2d 168, 179.

EX PARTE GREGORY YOUNG, No. 67,599, Extradition, Affirmed, Judge McCormick, Panel Opinion, 7-22-81.

NO DUE PROCESS VIOLATION WHEN WEST VIRGINIA INDICTMENT FAILS TO STATE DATE OF OFFENSE: D argued that because the West Virginia indictment upon which the requisition was based failed to state the date on which the offense was allegedly committed, he was denied due process of law. C.C.A. disagreed. Pearce 23 SW 15.

> "If the indictments against relator are defective under the laws of the demanding state, he can so show in that state. Such question is not one for the determination of the courts of this state." Ex Parte Woodland 177 SW2d 62.

JESSE GARRETT, JR., No. 67,750, Probation Revocation, Affirmed, Judge Teague, Panel Opinion, 7-22-81.

USE OF ANIMATE OR INANIMATE OFJECTS MAY CONSTITUTE AN ASSAULT: In this case after a lengthy confrontation between D and his family and the police, D pointed his doberman pinscher at a police officer and said "See. Sic". The police officer in question immediately shot the dog. The State's Motion to Revoke alleged in part that D knowingly and intentionally threatened the complainant with imminent bodily injury by threatening "to sic a doberman pinscher dog on" the complainant. As to the commission of the offense of assault, as set out in Section 22.01(a)(2), P.C., there is no longer a requirement that any form of weapon be used, as previously required. An assault under this provision may be accomplished through the use of an animate object, such as a dog like a doberman pinscher.

CHARLES STROTHER, JR. No. 67,805, Possession of controlled substance, Affirmed, Comm'r Keith, Opinion approved by Panel (Roberts, Dally, and Teague), 7-22-81.

PLEA OF GUILTY - COURT DID NOT MISLEAD D AT TIME PLEA OF GUILTY ACCEPTED: After D's Motion to Suppress Evidence was overruled, D waived his right to trial by jury, entered into a stipulation of evidence wherein he judicially confessed to the offense charged and plead guilty to a reduced charge of possession of a controlled substance. The stipulation contained a confession that "I did then and there unlawfully, intentionally and knowingly possess a controlled substance, namely, methamphetamine". The court,

in part, admonished D that if the court approved the plea bargain and did not assess the punishment at more than the plea bargain "your right to appeal would be limited in that you would have to get my consent to appeal the case...except for any question of law raised by written motion or pleadings on file". D advised the court he understood and that there were motions including a Motion to Suppress Evidence on file, but that D did not anticipate at the time that he would be appealing. Apparently, D contended on appeal that he was mislead by the court in a manner similar to that in Wooten 612 SW2d 561 (where defendant was induced to plead guilty by agreement that he could appeal issue of denial of statutory right to speedy trial, and this arrangement was approved by court, plea was not made knowingly and voluntarily). Here, there was no evidence that the trial court in any manner mislead D at the time of the acceptance of the plea of guilty.

SEARCH AND SEIZURE ISSUE WAIVED: In view of D's judicial confession and that no evidence obtained as a result of the search was introduced upon the trial, no search and seizure issue was presented. Ferguson 571 SW2d 908, Brewster 606 SW2d 325.

EX PARTE PAUL WOODWARD, JR., No. 67,931, Parole Revocation Proceeding, Appeal Dismissed, Judge Odom, Panel Opinion, 7-22-81.

ATTACK ON PAROLE REVOCATION PROCEEDING MUST BE BY POST-CONVICTION HABEAS CORPUS PETITION UNDER ARTICLE 11.07, C.C.P.: C.C.A. held that D improperly attacked the parole revocation proceeding by utilizing Article 11.06, C.C.P., for pre-indictment situations. All such attacks must proceed under Article 11.07, C.C.P., even though the validity of the conviction is not at issue. Ex Parte Chamberlain 586 SW2d 547.

"You might say my salary goes into five figures—my wife and four daughters."

Excerpted from Case & Comment

FEDERAL CASES - FIFTH CIRCUIT

U.S.A. v. Stratton, U.S.A. v. Smith, Nos. 78-5586, 78-5589, Judge Goldberg, 7-6-81, Direct Appeal, Conviction Reversed and Remanded.
RICO - CHANGING VENUE OVER OBJECTION WAS ERROR - VIOLATION OF RIGHT TO BE PRESENT AT TRIAL - RIGHT TO AN IMPARTIAL JURY: Defendants, a Florida circuit judge and others, were prosecuted in the United States District Court for the Eastern District of Louisiana for conspiring to participate in a pattern of racketeering activity in violation of the RICO statute. The Fifth Circuit held that the indictment properly alleged the "enterprise" to be Florida's Third Judicial Circuit. Some of the defendants filed motion for a change of venue. One defendant, however, expressly refused to join in those motions for change of venue and a second defendant stated, "I know of no grounds to object to [the change of venue] motions," stating that his clients stood "neutral." Held: Reversed:

> While the trial court may well have been nobly motivated by the conclusion that the fairest place for all these defendants was a trial outside the middle district of Florida, it is for the defendant and his attorney to determine whether adverse pre-trial publicity is so pervasive that the defendant should waive his [Sixth Amendment] right to be tried in the State and district in which the alleged crime was committed. The Court does not have the option of waiving this right on behalf of the defendant in transferring venue....

The Sixth Amendment right elaborates on the same right presented in Article III, Section 2, Clause 3 of the United States Constitution that the trial of all crimes shall be held in the State where the crimes shall have been committed, as well as the Fed. R. Crim. P. 18. The defendant who stated that his client stood "neutral" did not implicitly or explicitly waive his venue right. The trial court committed error by trying some of the case with an absent defendant who had had a heart attack and then using the same jury, which had already convicted his co-defendants, to decide that ailing defendant's case. This was both a violation of the defendant's right to be present at trial and the right to trial by an impartial jury.

U.S.A. v. Parry, No. 80-5341, Judge Morgan, 6-29-81, Direct Appeal, Conviction Reversed.
EVIDENCE - DEFENSIVE - RECENT FABRICATION - NOT HEARSAY: The defendant was convicted of conspiring to distribute narcotics. The defendant presented testimony that he, in good faith, believed that he was working for the undercover agents assisting them in locating drug dealers. As proof of this, Parry testified that he had learned that one agent was working undercover several days before he had met the agent. In support of this, the defendant related a conversation he had had with his mother shortly before he met the agent. The trial court excluded the evidence as hearsay.

On appeal, the Fifth Circuit held: The out-of-court statement made by the defendant to his mother that an individual who had been calling on the telephone was a narcotics agent was not hearsay, since it was not offered to prove the truth of the matter asserted, but, rather, was offered as circumstantial evidence of the defendant's knowledge that the individual was a narcotics agent. In addition, the out-of-court statement was admissible as a prior consistent statement offered to

rebut the government's charge that the defendant had fabricated his story. The error was not harmless since the excluded testimony was the only available evidence that could corroborate the defendant's story that he had known of the agents' true identity.

Pride v. Estelle, No. 80-1488, Judge Tate, 6-30-81, Habeas Corpus, Reversed in Part.
COMPETENCY: Evidence was enough to generate a "real, substantial doubt." At the State level, after a competency hearing, at which the petitioner was found competent, and after a jury trial, at which defendant was convicted for aggravated robbery in Texas, the petitioner was shipped to TDC and within three months was evaluated by the staff to be both mentally retarded and a chronic paranoid schizophrenic. Petitioner's Writ of Habeas Corpus in federal district court was denied without a hearing. The Fifth Circuit held: There was substantial evidence to require an evidentiary hearing in federal district court where (1) as early as three months after trial petitioner was diagnosed as mentally defective at TDC; (2) two medical experts determined that petitioner was presently incompetent and (3) one medical expert has concluded that petitioner must have been incompetent at the time of his trial.

U.S.A. v. Webster, No. 79-5013, Judge Hill, 7-2-81, En Banc, Appeal, Conviction Reversed.
SIGNIFICANT DECISION - HEARSAY NO LONGER ADMISSIBLE IN THE FIFTH CIRCUIT TO REBUT THE DEFENSE OF ENTRAPMENT: The defendant was convicted of distributing cocaine to an undercover DEA agent. When he raised the defense of entrapment, the government, over his objection, put on the stand a DEA agent who testified that "A few months before the arrest he had been told by a reliable informant that he had purchased cocaine from the defendant on several occasions." Held: Reversed. This type of evidence is no longer admissible in this court. The ruling today brings the Fifth Circuit in line with all the other circuits.

U.S.A. v. Guerrero, No. 80-1460, Judge Tate, 7-16-81, Direct Appeal, Conviction Reversed and Remanded.
EXTRANEOUS OFFENSE - HEARSAY - ERROR: A physician was convicted of illegally dispensing controlled substances to a patient who was an undercover government agent. Held: The district court improperly admitted testimony of the government witness to the effect that she had "heard" that drugs could be obtained from the physician.

She also testified that she noticed five or six young people in the physician's waiting room whom she knew to be drug users. She told the physician that she had a chronic backache and nervousness. She filled out a detailed medical history information sheet.

The government introduced this evidence to show the doctor's unlawful intent. But absent some evidence that the defendant acted with unlawful intent in prescribing to the undercover agent, it cannot be said that the extraneous offense testimony is in any way relevant to the question of his intent in prescribing to a third party:

> There is nothing to indicate that the drugs prescribed [to the undercover agent] were an inappropriate medical response to [her] complaints or that the drugs were dispensed in an unusual amount or frequency.

The government's argument that the hearsay about other people obtaining drugs was not offered for the truth of the matters asserted therein is rejected by the court because the information was solicited in response to direct questions from the government concerning her knowledge of whether pills "were actually dispensed by" the defendant to these other people. "The admission of this hearsay evidence alone is sufficient grounds for reversal."

Escobedo v. Estelle, No. 80-1500, Judge Randall, 7-6-81, Habeas Corpus, Reversed. FEDERAL HABEAS CORPUS - EXHAUSTION WHILE STATE APPEAL PENDING: The petitioner pled guilty in 1970 to the charges of felony theft. He did not appeal. In October of 1977, he was convicted of burglary and given an enhanced sentence on the basis of the 1970 conviction. He has appealed the 1977 conviction, but the Texas Court of Criminal Appeals has not yet ruled.

The question is whether he can file a Writ of Habeas Corpus attacking the enhanced convictions while his appeal, which also allows him to attack those convictions, is still pending in the Texas Court of Criminal Appeals? The answer is yes, he can, because "the mere possibility of success in additional State proceedings does not bar federal consideration of the claim."

The petitioner has already presented his Application for Writ of Habeas Corpus to the state district court and to the Court of Criminal Appeals which dismissed the petition without written opinion. This procedure qualifies as having fulfilled the exhaustion doctrine of having been "fairly presented to the state court."

Beebe v. Phelps. No. 80-3504, per curiam, 7-16-81, Habeas Corpus, Relief Granted. GOOD TIME DENIAL IS EX POST FACTO VIOLATION: The petitioner sought restoration of his good time which had been revoked when the prisoner was convicted, while on parole, of possession of a firearm. The Court of Appeals held that the application of the Louisiana statute, under which the prisoner forfeited previously earned institutional good time (not to be confused with street time while on parole), was a violation of the Ex Post Facto constitutional provision. Although the forfeiture provision was in effect prior to petitioner's parole, it was subsequent to his commission of the offense of armed robbery and the Court of Appeals held that the date of the offense was the controlling date for application of the Ex Post Facto doctrine to any increase in punishment.

Rule 302. Discretionary Review in General.

(a) The Conrt of Criminal Appeals, on its own motion, with or without a petition for discretionary review being filed by the appellant or the State, may review a decision of a court of appeals in a criminal case.

(b) Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

(c) In determining whether to grant or deny discretionary review, the following, while neither controlling nor fully measuring the Court of Criminal Appeals' discretion, indicates the character of reasons that will be considered:

(1) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;

(2) Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;

(3) Where a court of appeals has decided an important question of state or federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(4) Where a court of appeals has declared unconstitutional, or appears to have misconstrued, a statute, rule, tegulation, or ordinance;

(5) Where the justices of the court of appeals have disagreed upon a material question of law necessary to its decision; and

(6) Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

(d) A motion for rehearing in the court of appeals shall not be a prerequisite to the granting of discretionary review, with or without petition, by the Court of Criminal Appeals.

(e) The Court of Criminal Appeals or any judge thereof may enter an order requiring the clerk of the court of appeals to forward promptly the original record in the case, the opinions of the court of appeals, the motions filed therein, and certified copies of any judgments and orders of the court of appeals to the Court of Criminal Appeals in order to aid the Court in deciding whether to grant or deny discretionary review. If discretionary review is not granted, the Court will enter an order to return the appellate record to the clerk of the court of appeals.

Rule 303. Discretionary Review Without Petition.

(a) The Court of Criminal Appeals may on its own motion by a vote of any fonr judges of the Court grant review of a decision of a conrt of appeals in a criminal case at any time before the court of appeal's decision becomes final as determined by Article 42.04a of the Code of Criminal Procedure, Rule 209, and this rule. See Article 44.45(a), Code of Criminal Procedure. An order granting review shall be filed with the Clerk of the Court of Criminal Appeals who shall send a copy to the clerk of the court of appeals.

(b) In order or provide sufficient time for the Court of Criminal Appeals to decide whether to grant or deny discretionary review, the Court or a judge thereof may file an order for review with the Clerk of the Court of Criminal Appeals who shall send a copy to the clerk of the court of appeals.

(c) Unless otherwise limited in the order itself, an order for review shall extend the 45 days' time before a court of appeals' decision in a criminal case becomes final for an additional 45 days. An order for review shall be signed by a judge of the Court of Criminal Appeals.

(d) An order granting review prevents the decision of a court of appeals from becoming final pending the further order of the Court of Criminal Appeals.

(e) If fonr judges do not agree to review a decision of a court of appeals within the time as extended under (c) above, the decision of the court of appeals becomes final.

Rule 304. Discretionary Review With Petition.

(a) The Court of Criminal Appeals may review a decision of a court of appeals in a criminal case upon petition by the appellant or the State. See Article 44.45(b)(1), Code of Criminal Procedure.

(b) The original or a legible copy of the petition shall be filed with the clerk of the court of appeals which delivered the decision within 30 days after the final ruling of the court of appeals as determined by Article 42.04a, Code of Criminal Procedure, and Rule 209. See Article 44.45(b)(2), Code of Criminal Procedure.

(c) Even if the time specified in paragraph (b) has expired, a party who is otherwise entitled to file a petition may do so within 10 days after the timely filing of another party's petition.

(d) A petition for discretionary review shall be as brief as possible. It shall be addressed to "the Court of Criminal Appeals of Texas" and shall state the name of the party or parties applying for review. The petition shall include the following:

(1) Index. The petition shonld contain at the front thereof a subject index, including an abbreviated rendition of the ground or question presented for review, with page references where the discussion of each ground or question presented may be found and also a list of authorities alphabetically arranged, together with references to pages of the petition where same are cited.

(2) Statement of the Case. The petition shall contain a brief general statement of the nature of the case. Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the grounds or questions to which they are pertinent.

(3) Statement of the Procedural History of the case. The petition should state the dates of the delivery of any opinion or order of the conrt of appeals, the dates of the filing of any motion for rehearing or a statement that none was filed, and the dates of the overruling of other disposition on any motions for rehearing.

(4) Gronnds for Review. A statement of the grounds upon which the petition is predicated shall be stated in short form without argument and the grounds shall be separately numbered. Where the party filing the petition has access to the record, he shall (after each gronnd) refer to the page of the record where the matter complained of is found. In lieu of grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious.

(5) Reasons for Review. A direct and concise argument, with supporting authorities, amplifying the reasons relied on for the granting of review. See Rule 302(c). The opinions of the court of appeals will be considered with the petition, and statements therein, if accepted by counsel as correct, need not be repeated.

(6) Prayer for Relief. The nature of the relief sought by the petition should be clearly stated.

(7) If any petition for discretionary review is unnecessarily lengthy or not prepared in conformity with these rules, the Court may require same to be redrawn.

(8) The petition for discretionary review may be typewritten or printed. If it is typewritten, it must be with a double space between the lines and on heavy white paper (8-½ inches x 11 inches) in clear type. Ten legible copies of the petition shall be delivered to the Clerk of the Court of Criminal Appeals either by counsel or by the clerk of the court of appeals from copies furnished by counsel. The clerk of the court of appeals shall file the original or a legible copy of the petition and forward it, together with any copies furnished by counsel, to the Court of Criminal Appeals. See Article 44.45(b)(3), Code of Criminal Procedure.

(e) When a petition for discretionary review is filed in the court of appeals, the petitioner shall, at the same time, cause copies of the petition to be delivered to the attorney of record for the respondent and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711. See Article 44.45(b)(4), Code of Criminal Procedure.

(f) Within 15 days after the filing of the petition for discretionary review the clerk of the court of appeals shall note upon his record the filing of said petition, and forward to the Clerk of the Court of Criminal Appeals the petition and any copies thereof furnished by counsel, together with the original record in the case, the motions filed therein, and certified copies of any judgments, opinions and orders of the court of appeals. The clerk need not so forward any exhibits that are not documentary in nature unless ordered to do so by the Court of Criminal Appeals. See Article 44.45(b)(5), Code of Criminal Procedure.

(g) The petition with the original record in the case, the motions filed therein, and certified copies of any judgments, opinions, and orders of the court of appeals shall be filed with the Court of Criminal Appeals.

(h) The Clerk of the Court of Criminal Appeals shall receive all petitions for discretionary review, shall file the petition and the accompanying record from the court of appeals, shall enter the same upon the docket, and shall notify the attorneys of record by United States Mail of the filing and docketing of petitions for discretionary reveiew in the Court of Criminal Appeals. The respondent shall have 30 days after the receipt of the petition with the Clerk of the Court of Criminal Appeals. All replies shall state the date a copy of the petition was received by the respondent. When a reply is filed or the time for filing same has expired, the petition shall be deemed submitted to the Court and ready for disposition. The Court may dispense with notice and may grant the petition immediately upon the filing of the petition where, in its opinion, the circumstances require it. See Article 44.45(b)(4), Code of Criminal Procedure.

(i) An original and 10 legible copies of all replies and other briefs, motions, and papers shall be delivered to the Clerk of the Court of Criminal Appeals for filing. True copies of such instruments shall be served on the opposing counsel and the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

(j) The petition, or brief, or any reply may be amended or supplemented at any time when justice requires upon such reasonable terms as the Court may prescribe. The record may be amended in the Court of Criminal Appeals under the same circumstances and on the same terms as in the court of appeals.

(k) After administrative processing, a petition for discretionary review shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such assignment is made shall have the responsibility for making an initial review and of reporting on such petition to the Court for a determination of whether to grant or refuse the petition for discretionary review.

If four judges of the Court of Criminal Appeals do not vote to grant a petition for discretionary review, the Court will refuse the petition with a docket notation "refused." If four judges vote to grant the petition for discretionary review, the Court shall enter the docket notation that discretionary review is "granted" and the case shall be set for submission on oral argument. Provided, however, that the Court, in its discretion, upon granting discretionary review and without hearing oral argument, may affirm, reverse, reform, correct, or modify the decision of the court of appeals, making such further orders as may be appropriate. Moreover, after the granting of discretionary review, if five judges are of the opinion that discretionary review was improvidently granted, the petition may be dismissed. See Article 44.45(b)(6) and (7), Code of Criminal Procedure.

(l) When the Court refuses or dismisses a petition for discretionary review, whether the respondent has filed a reply or not, the Clerk of the Court will retain the petition, together with the record and accompanying papers, for at least 15 days from the date of rendition of the order refusing or dismissing discretionary review. At the end of that time, if no motion for rehearing has been timely filed, or upon the overruling or dismissal of such moton, in case one has been filed, the Clerk of the Court of Criminal Appeals shall transmit to the court of appeals which rendered the decision below a certified copy of the orders refusing or dismissing such petition and of any order overruling a motion for rehearing thereof, and shall return the appellate record to the clerk thereof, but shall retain the petition for discretionary review.

Rule 305. Notification of Submissions.

The Clerk of the Court of Criminal Appeals is directed to use all reasonable diligence to notify counsel of record of all settings, though failure to receive notice will not necessarily prevent or defeat the submission of the case on the day on which it is set. Within 15 days of the mailing of the notice of the setting, all counsel of record will acknowledge receipt of such notice and advise the Clerk whether oral argument is desired. Failure to so advise the Clerk will constitute a waiver of oral argument. Provided, however, that the Court may direct that a particular case be argued orally.

Rule 306. Briefs on the Merits.

(a) If review is granted, the petitioning party (or, if there was no petition, the party who lost in the court of appeals) shall file a brief within 30 dyas after the granting of review.

(Continued)

(b) The opposing party shall file a brief within 30 days after the filing of the petitioning party's brief.

(c) Briefs shall comply with Rule 202(a). Copies shall be filed and served as required by Rule 304(i).

Rule 307. Oral Arguments.

Unless extended by the Court of Criminal Appeals in a special case, the total maximum time for oral argument shall be 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the argument. Counsel will not be permitted to read at length from the briefs, records, or authorities. Counsel may make an oral correction to his brief, but multiple additional citations should not be made orally; they should be reduced to writing and filed with the Clerk.

Rule 308. Opinions.

(a) A majority of the jduges shall determine whether opinions delivered by the Court of Criminal Appeals shall be signed by a judge or be issued per curiam and whether they shall be published.

(b) Unpublished opinions shall neither be deemed nor cited as precedent.

(c) On the date of delivery of any opinion or order the Clerk of the Court of Criminal Appeals shall mail copies of said opinions or orders to (1) counsel of record for the appellant, (2) counsel of record for the State, (3) the State Prosecuting Attorney, (4) the clerk of the trial court, and (5) the clerk of the court of appeals which rendered the decision below.

Rule 309. Rehearings.

(a) A motion for rehearing may be filed with the Clerk of the Court of Criminal Appeals within 15 days after the initial opinion or order is delivered, unless the time is shortened or enlarged by the Court. However, no motion for rehearing will be received from an order granting discretionary review.

(b) The motion for rehearing must briefly and distinctly state its grounds, together with any supporting arguments. A reply to the motion need not be filed unless requested by the Court. An original and 10 copies of the motion and any reply thereto shall be filed. Copies of the motion and any reply shall be delivered to the opposite party aud the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711. Any motion for rehearing or reply thereto may be amended or supplemented with leave of the Court at any time prior to final disposition. A motion for rehearing or a reply thereto is not subject to oral argument.

(c) If five members of the Court are of the opinion that a rehearing should be granted in whole or in part, the motion will be granted and the cause will be thererafter set for submission to the Court. Otherwise, the motion for rehearing will be denied.

(d) The Clerk will give all parties notice of the disposition of the motion.

(e) If a motion for rehearing is granted, the Court may resubmit the case without oral argument. If oral argnment is permitted, counsel will be limited to 15 minutes per side. The movant is entitled to open and conclude the argument. The Clerk will notify all parties of the time for such resubmissions.

(f) If the Court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission, the losing party may file a motion for rehearing within 15 days after said opinion is delivered. In such event, the procedures outlined in (a) through (e) above will be followed.

Rule 310. Mandate.

When a decision of the Court of Criminal Appeals becomes final, the Clerk of the Court shall issue a mandate to the court below. A decision of the Court shall be final at the expiration of 15 days from the ruling on the final motion for rehearing or from the rendition of the deicsion if no motion for rehearing is filed. See Article 44.02a, Code of Criminal Procedure.

Rule 311. Stay of Mandate.

The Court of Criminal Appeals may stay the mandate of the Court for not more than 60 days on verified motion of a party to permit the timely filing of an appeal or petition for writ of certiorari to the United States Supreme Court. After the expiration of the time mentioned in this rule, the mandate of the Court shall issue.

Rule 312. Assignments and Submissions En Banc.

(a) The Court shall sit en banc for hearing appeals in death penalty cases, cases of discretionary review, cases in which leave to file was granted uuder Rule 313(a), cases which were docketed under Rule 313(c), and rehearings under Rule 309.

(b) The Clerk, as directed by the Court, shall at appropriate times in advance of sumbission set cases for submission en banc.

(c) After they are submitted, the cases shall be arranged by the Clerk in 9 separate stacks, with such stacks to be as nearly equal in terms of workload as the Clerk in his judgment shall determine. The Court shall then, in the presence of a majority of the judges, determine by lot which stack shall be assigned to which judge for initial study, drafting of opinion, and reporting to the en banc conference.

Rule 313. Assignment and Disposition of Original Applications for Writ of Habeas Corpus, Other Extraordinary Writs, Special Cases, and Post-Conviction Applications for Writ of Habeas Corpus.

(a) A motion for leave to file must accompany all original applications for writ of habeas corpus, mandamus, and other extraordinary writs and motions and 10 copies of all such papers shall be presented to the Clerk for distribution to the judges of the Court. After administrative processing, all original applications for writ of habeas corpus, mandamus, and other extraordinary writs, shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such assignment is made shall have the responsibility for making an initial review and of reporting on such case to the Court for a determination of whether to grant leave to file. Upon presentation to the Court, motion for leave to file may be denied or the application may be handled in accordance with such other instructions or orders as shall be issued by the Court. In the event at least five members of the Court are of the tentative opinion that the case should be filed and set for submission, motion for leave to file will be granted and the case shall then be handled and disposed of in accordance with such instructions or orders as may be issued by the Court. No motions for rehearing or reconsideration will be entertained from the denial of a motion for leave to file an original application. The Court, however, may reconsider such a denial of a motion for leave to file on its own motion.

(b) Motions for extension of time and motions filed with respect to cases pending on the Conrt's docket (e.g., to advance on the docket), after administrative processing, shall be presented by the Clerk or the administrative staff to the Presiding Judge, or to a judge designated by the Presiding Judge, who may

grant or deny the motion or refer it to the en banc conference for consideration. The motion will be handled and disposed of in accordance with the instructions of the Presiding Judge, the designated judge, or the en banc conference.

(c) After administrative processing, all post-conviction applications for writ of habeas coprus pursuant to Article 11.07 of the Code of Criminal Procedure shall be assigned by the administrative staff to a judge, in rotation, and the judge to whom such an assignment is made shall have the responsibility of making an initial review and reporting on such case to the Court. The Court may deny relief upon the findings and conclusions of the trial court with or without an evidentiary hearing. The Court may likewise deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate. In the event that at least five members of the Court are of the tentative opinion that the case should be filed and set for submission to the Court, the cause will be docketed and heard as though originally presented to the Court or as an appeal. No motions for rehearing or reconsideration will be entertained from a denial of relief without docketing of the cause. The Court, however, may on its own motion reconsider such initial disposition.

Rule 314. Undisposed of Cases at End of Term.

All cases filed in the Court of Criminal Appeals and not disposed of at the end of the term shall be automatically continued to the next succeeding term of said Court.

[Rules 315-400 reserved for expansion.]

Rule 401. Transition Rule.

Former Court of Criminal Appeals Rules 1, 2, 3, 4, 5, 8, 9, 10(a), 12, 13, 14, and 15, as amended, insofar as they are applicable to the direct appeal of non-death penalty cases to panels of the Court of Criminal Appeals, shall remain in effect until the Court shall dispose of all non-death penalty cases appealed to the Court of Criminal Appeals and which are still pending in the Court at the time these rules take effect.

APPENDIX

FORM 1

In the________________________Court of

________________________County, Texas

Approval of Record on Appeal without Hearing

The Clerk having made notice of completion of the record by certified or registered mail to the parties or their respective counsel, and neither having filed and presented to the court in writing any objection to the record within 15 days after the mailing of such notice, and the Court having no objection to the record, the Court approves the following parts of the record on appeal:

Transcript, Vol. I, comprising pages 1- ____,
Transcript, Vol. II, comprising pages____ - ____,
Statement of Facts, Vol. III, comprising pages 1-_____,
Statement of Facts, Vol. IV, comprising pages ____ - ____ ,
[etc.].
Signed on _________________ , 19____ .

____
Judge Presiding

FORM 2

In the________________________Court of

________________________County, Texas

Approval of Record on Appeal after Hearing

[Select one of the following:]

[1] The defendant [*or* "the State," *or* "both parties"] having presented to the Court in writing an objection to the record within 15 days after the mailing of the notice of completion of the record, [*or*]

[2] The Court having failed to approve the record within 5 days after the expiration of the 15-day period following the mailing of notice of completion of the record,

the Court set the matter down for hearing, and, after hearing, entered orders which caused the record to speak the truth. Such proceeding is included in the record. The Court approves the following parts of the record on appeal:

Transcript, Vol. I, comrpising pages 1-____ ,
Transcript, Vol. II, comprising pages ____ - ____ ,
Statement of Facts, Vol. III, comprising pages 1-____ ,
Statement of Facts, Vol. IV, comprising pages ____ - ____ ,
[etc.].
Signed on_________________ , 19____ .

____
Judge Presiding

FORM 3

In the ________________________Court of

________________________County, Texas

Approval of Supplemental [or "Modified"]
Record without Hearing

A supplemental record [*or* "modification of the record"] having been deemed necessary on the defendant's motion [*or* "the State's motion," *or* "both parties' motion(s)," *or* "the court's own motion," *or* "the order of the Court of Appeals," *or* "the order of the Court of Criminal Appeals"], and the defendant and the State having been notified by certified or registered mail of same, and neither party having objected within 5 days from receipt of notice, the Court approves the following parts of the supplemental [*or* "modified"] record:

Supplemental Transcript, Vol. I, comprising pages 1-____ ,
Statement of Facts, Vol. III, comprising pages 1-____,
[etc.].
Signed on _________________ , 19____ .

____
Judge Presiding

FORM 4

In the ________________________ Court of

________________________County, Texas

Approval of Supplemental [or "Modified"]
Record after Hearing

A supplemental record [*or* "modification of the record"] having been deemed necessary on the defendant's motion [*or* "the State's motion," *or* "both parties' motion(s)," *or* "the court's own motion," *or* "the order of the Court of Appeals," *or* "the order of the Court of Criminal Appeals"],

(Continued)