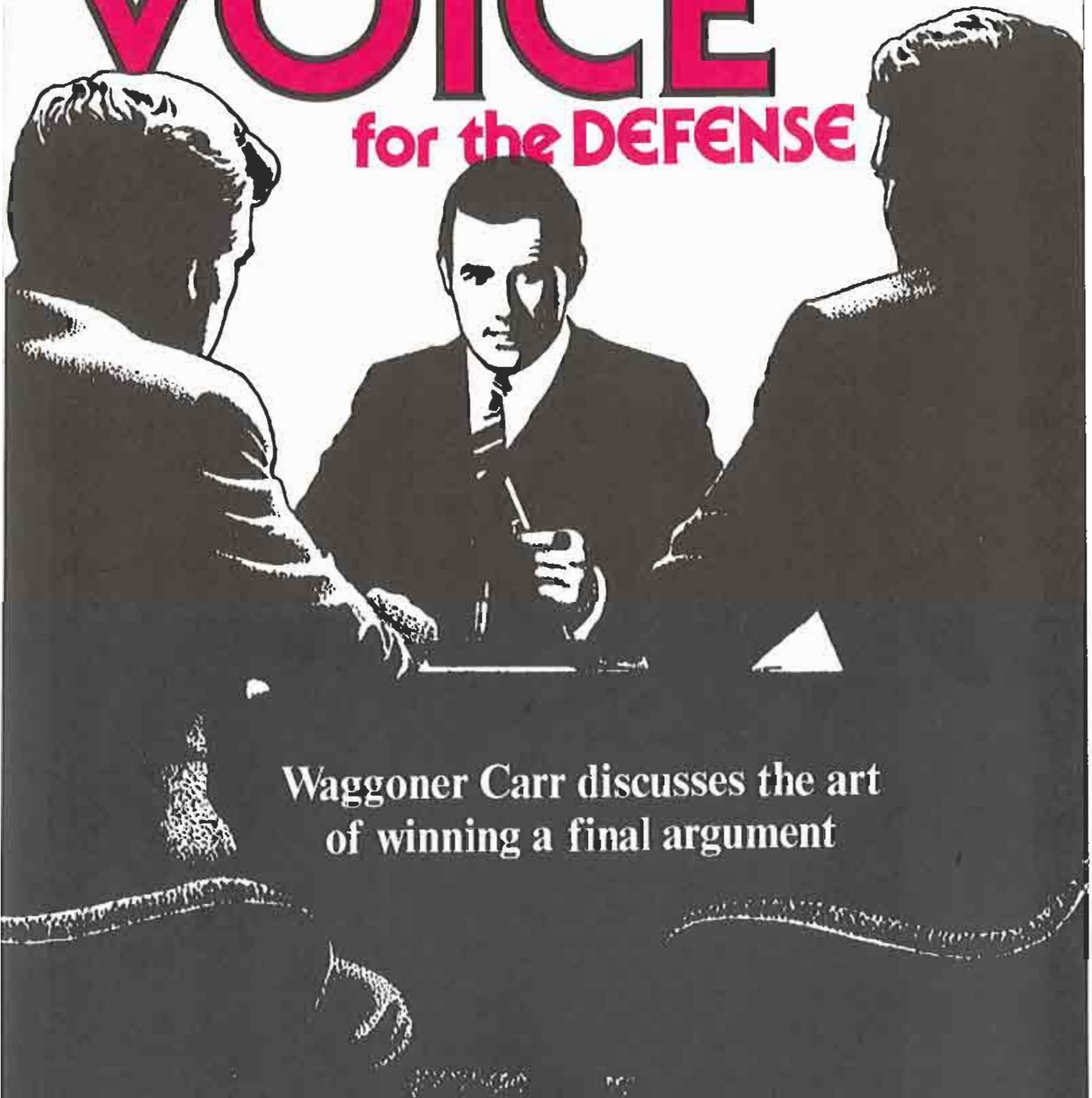
VOICE for the DEFENSE



Waggoner Carr discusses the art of winning a final argument

SEPTEMBER 1982/VOLUME 12, NUMBER 2
JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE for the DEFENSE

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REGULAR FEATURES

ARTICLES

NEWS

Editor's Corner

STANLEY WEINBERG

I was sitting there at my desk, innocently contemplating the demise of the Fourth Amendment in the *Ross* decision or the assassination of the carving doctrine by the Texas Court of Criminal Appeals, I cannot recall which one it was, when I suddenly discovered that I had been indicted!

Somewhere, somehow, as if in a Franz Kafka novel, a grand jury had convened, viewed and heard some evidence, deliberated and pronounced judgment against me.

According to the particulars, I did knowingly and intentionally (or was it recklessly?) engage in "outrageous" editorial policy and jokes in the July edition of *VOICE for the Defense*. . .aggravated "good old boyism". . ."poor judgment" . . .ignorance of individual rights. . . "bald" sexism. . . demeaning the *VOICE* and TCDLA. . .attempted neanderthal humor . . .insulting the female bar. There is one last count of exceptional bad taste.

To understand the probable cause for the charges, take a look at the Letters to the Editor section published in this edition of the *VOICE*.

It is obvious that one person's sense of humor is another one's bitter brew of insult and acrimony. And, what may be intended as a gentle poke to the funny bone sometimes causes serious bodily injury to the psyche. We do regret that any attempt to afford the legal profession a chance to laugh at itself offended any person or group.

It is hoped, however, that the members of this grand jury, all being members of TCDLA and defenders of individuals under charge and accusation, will take a wee moment and afford this accused a modicum of the presumption of innocence each of them would grant any one of their clients.

My plea is Not Guilty! I rely on the SODDI defense—Some Other Dude Did It!

The facts are that the "Significant Decisions Report" section of the *VOICE* appears in our magazine as if by magic, so to speak, as far as this editor is concerned. And, it has been that way, it seems, forever.

Kerry FitzGerald of Dallas is the editor czar of SDR and carries on his shoulders the entire responsibility for the legal and editorial content, humorous or otherwise, making up that section of the *VOICE*. His product goes to the printer complete, unseen and untouched by this editor's corner, which is fully responsible for everything else printed in the *VOICE*.

I do not censor Kerry and SDR, and he does not censor the rest of the *VOICE*. Each one of us takes the applause and the brickbats our work attracts. We each respond to it in our own way. This column is my way. Kerry, I am sure, has already responded to those whose comments are published in this issue of the *VOICE*.

One other issue remains. Those members who wrote in reaction to the July SDR zealously called for withdrawal and resignation from TCDLA. Please do not.

That zeal needs to stay in TCDLA, being used to carry on its goals and purpose for being. I honestly believe that zealous defense attorneys, banded together, stand as possibly the one final barrier between a government that overreaches and the liberty of its citizens. Our job is to challenge that government, to make those in charge of the power justify their conduct to those who do not have the power, to articulate and defend the rights of individuals who do not have the ability or resources to defend themselves.

How we are treated while doing the job of defending is sort of a test as to how free our country really is. As an independent defense bar organization we can combat overreaching authority.

Our ranks are filled with a wide assortment of individuals. We don't win many prizes from the public when we do our work and we are condemned and attacked when we do it *too* well. We need every one of you.

I move to dismiss the indictment against me so we all can get back to doing our work with zeal.

President's Report

CLIFFORD W. BROWN

"The justice of a society is not measured by how it treats its best men, but by how it treats its worst." So quoted Bobby Lee Cook, an attorney from Summerville, Georgia, a city of 8,000 people, in his luncheon speech to the assembled members of the National Association of Criminal Defense Lawyers at Steamboat Springs, Colorado, on Friday, August 13, 1982. Your president, along with vice-president, Louis Dugas, director Larry Sauer, and other members of the TCDLA, were present for the meeting.

Although he comes from a town of only 8,000 people, Bobby Lee Cook is an attorney with a well deserved national reputation, a fighter for justice at every level of our system, including appearances before the McCarthy Commission at the height of its witch hunting activities in the 1950s. His speech, which dwelt heavily upon a discussion of the state of liberty and human rights in this nation since the days of World War II, had a note of poignancy when he stated that "We are living in a sea of Constitutional riches, but are impoverished." He characterized the Burger court as being a "graveyard of constitutional rights," stating that from the constitutional ashes we must be able to rise as the Phoenix. He said that the NACDL stood at the crossroads, faced with challenges from all directions, and that we cannot afford to fail because it will be our children and their children who would "inherit the winds."

He told a story about a woman who asked Benjamin Franklin, after the Bill of Rights had been written, "What kind of a country have you given us?" Franklin's answer was, "We have given you a Republic, if you can keep it."

Bobby Lee Cook is an inspired and inspiring speaker and he challenged his listeners to stand tall in the fight for human rights by saying, "Liberty and justice do not lie in written documents—even our own great Constitution. They repose in the hearts and minds and souls of a free people, and if they are ever lost, God help us all!"

Other speakers, in presenting their Seminar topics, accentuated the crucial role of the criminal defense lawyer in the continuing fight for freedom for all people and especially the oppressed. It was a very inspirational convention for the writer and it prompts me to remind you that our own TCDLA has been and must remain in the forefront of this fight.

The Texas delegation was well represented. Louis Dugas was a candidate for, and was elected to, the Board of Directors of our national association. Our own Frank Maloney reported on his appearance before the Senate Committee which was investigating legislation to eliminate the insanity defense in the wake of the Hinckley acquittal. Frank received a stirring round of applause both for his efforts and for his report. Dean Emmett Colvin of the National College for the Defense made a report on the affairs of the College which betokened good things to come. Larry Sauer and I and the other Texas participants looked on proudly and approvingly.

But enough for that. . .

Our first Board meeting is in Austin on September 25. A membership drive will precede it on Friday September 24. All Board members, Membership Committee members, and especially the Austin members of the TCDLA are urged to turn out in force to sign up every available prospect and make this effort a springboard for a successful membership effort for the entire year. Jan Hemphill and Mike Gibson have pledged to have a table at the Advanced Criminal Law Refresher Course in Houston during the week of August 23 through 27 in order to sign up prospects there. When I first saw Lou Dugas in Steamboat Springs he greeted me with a signed membership application and a check from Dale McCleary of El Paso, Texas, who was a participant at the meeting. If you cannot make the Membership Roundup in Austin, how about going out and signing up a new member in your area and sending it to the home office that week?

Ed Mallett and Rusty Duncan have scheduled a meeting of the Legislative Committee for the 24th of September also in Austin. It seems like everything is shaping up for a great year.

It's been a great month for me. I sandwiched a two weeks vacation around the trip to Steamboat Springs and came back to work refreshed. I have received calls from all over the state (and one from out of state), commenting upon my picture on the cover of the July issue of the *VOICE*. The tenor of the comments are for me to know and you to guess at. Hopefully the *VOICE* will recover, and soon, from the impediment of having carried my picture. Continued correspondence from all over this great state, to the Association and to me as its president, convinces me of the growing importance of our efforts. I am proud to be your president. Let me hear from you with ideas on how to make TCDLA bigger and better in 1982-83.

CALENDAR OF EVENTS

From CDLP:

October 14-15—Criminal Defense Skills Course, Amarillo
(NOTE: The only one of its kind offered this year. Tuition covers course materials plus free edition of the 1982 *Criminal Defense Practice Materials,* more than 800 pages of forms, motions, and explanatory articles covering every phase of criminal defense work from the initial interview with the client through post-trial procedures.)
SPEAKERS: M.P. "Rusty" Duncan III, Richard A. Anderson, Melvyn Carson Bruder, Weldon Holcomb, Floyd D. Holder, Jr., Judge John T. Boyd, Judge Marvin Collins, Kerry P. FitzGerald, Wm. T. Habern, Judge J.Q. Warnick, Jr., Clifford W. Brown, George Gilkerson.

March 6-10, 1983—TCDLA Annual Winter/Spring Seminar, Harrah's, Lake Tahoe

THE ART OF WINNING FINAL ARGUMENT

Waggoner Carr
Austin

First, let me tell you what this Austin artide will *not* include. I will not attempt to tell you how to protect yourself from improper argument by the prosecutor. Neither will I attempt to relate any technical rules placing limits on what you can properly argue other than it is your duty to confine your argument to the record and avoid discussing matters not in evidence. However, you are permitted to draw reasonable conclusions from the testimony and exhibits.

On the other hand, my remarks will concentrate on how you can most *effectively* conclude your case with a *winning* jury argument. You are not likely to win by jury argument alone. Your jury argument is not likely to win for you unless your evidence has built a good foundation that enables you to persuade twelve good and true jurors. Given a good factual foundation, an effective jury argument can be the difference between victory and defeat.

It is my personal belief that summation is the most important component of a case. Here, you share your thoughts, ideas, reflections, techniques and principles with the jurors. It is the final argument that separates the expert attorney from the novice, the able from the clumsy, the winning from the losing lawyer.

YOU ARE ON TRIAL TOO

You must be alert to the fact that everything you do from Voir Dire to the beginning of your final argument must be done with the conscious intent to put you, as the attorney for the defendant, in a favorable light with the jury. Your personal persuasion of the jurors must begin with the Voir Dire. Your demeanor, habits, courtesy, and, the respect you show to opposing counsel and the Court must always be done for the effect it will have on the jury.

The way you dress is important. Even a wrinkled coat or trousers is likely to divert the attention of the jurors, especially lady jurors. What I am trying to impress on you is that you must be *personally* liked and respected by the jury if your argument is to carry the persuasiveness you need.

If you personally have "worn well" with the jury throughout the entire trial, even should your client be a first class bum, your credibility and believability will go a long way in getting a sympathetic verdict. In many instances you can be more important to a favorable verdict than your client! Every word, every act of the defense attorney must be consciously done or said with that in mind.

BE YOURSELF—DO IT YOUR WAY

What should be your style, your approach, in final argument? I think, number one, that you should be yourself! You should not try to be a Clarence Darrow, a Melvin Belli, an F. Lee Bailey, a "Racehorse" Haynes, or anybody else. You should be yourself. You should be natural. Adapt what you learn from reading articles, from listening to seminars, and from watching other lawyers, to your own personality, and use the ideas you have learned in your own way. In fact, improve on them if you can. Assimilate them into your own character and into your own thought process, and then do it your way and you will be much more effective.

I have seen lawyers of all kinds, of all sizes, and of all descriptions. I can tell you that there is no pattern. It is not necessary to be eloquent like a lawyer you may know, nor is it necessary to be as handsome as some lawyers you may know. I think the most important thing is to project candor, honesty, sincerity, and utter belief in your client and the merits of his or her case.

From the moment you walk into the courtroom until the moment you leave, it should come out of your pores that you believe in your case, that you believe in your client, and that you sincerely believe that he or she is entitled to a favorable verdict. Above all else, you must try to get the jury to identify, because if you cannot get them to identify, you are going to lose the case. You have to make that jury believe that "there, but for the grace of God, go I." If you can implant or convey that idea, that seed, in their minds, you are going to win.

I have heard an eminent trial lawyer say that you can get up in front of that jury, and you can thank them, and you can do this, and you can do that, and you can do everything, but if you can't, somehow or other, in your final argument make that jury feel that what it is doing is right and good and just and that when they go out of that courtroom having rendered a verdict in your client's favor they have done a good thing, and, further, that they can be proud of what they have done, and finally that they will feel that they can tell their friends and neighbors about it in good conscience—then you are not going to win, or, you are going to get a bad result.

DON'T GET BOGGED DOWN

Don't parrot testimony or review it chronologically. Most good trial lawyers will tell you that you should not spend a great deal of time going through a review or a re-hash of each and every item of evidence that has been introduced in the case. The jury will be easily bored and stray in their thinking. Bring out certain highlights of testimony from which you can logically deduct, infer or point up reasonable doubt.

It is my belief that juries decide cases on impressions. They either believe a witness or they don't and they usually don't remember all the smaller details of the testimony. For this reason I believe that you should paint the picture for the jury, tie the loose ends together for them, but

don't get bogged down in too much detail. Remember, while the opening statement in the Voir Dire is the launching of your sales campaign, your final argument is for the purpose of getting the customer, in your case the jury, to sign on the dotted line with a verdict in favor of your client.

You should ever bear in mind the fact that the jurors are strangers to the case you have studied so well for weeks and months; the evidence is presented to them in its totality, and they are expected to separate the wheat from the chaff, the important from the unimportant, and none of them is an expert in that field. They will not remember all the evidence; they will not remember all the charge of the court. They would be supermen and superwomen if they did.

Your task in argument, among others, is to select the strongest points of your own case and the weakest points in the case of your adversary, and emphasize them. Explain to the jury that it is not expected that they shall remember every word of the testimony or every sentence in the court's charge, but for their aid and benefit in coming to a correct and proper conclusion, you are going to outline some of the more important areas in the evidence, and some of the very important principles of law upon which the court has charged them.

The manner of the delivery by counsel of his closing remarks often may outweigh in effect the substance of his sentences. Artificial phrases or speech patterns are the earmarks of insincerity to even the least sophisticated juror. The use of emotionally directed argument can be treacherous if handled clumsily, and should be undertaken with care until it is spontaneous and unaffected to the listeners. This is not to condemn the practice, for when utilized properly, the stirring of the right emotional cord of the jury can yield the most extraordinary results, provided it is done with taste and feeling.

The final summary or conclusions should end as forcefully as possible; and, where a point of strong impact has been made, but some further summary is needed, it should be as brief as possible and should not detract from the high point thus established. Remember those twelve jurors facing you were sons and daughters, brothers and sisters, now mothers and fathers, before they were jurors, and to each one of them that former role is far and away more important than the role of juror. Speak to them, then, as human beings, who know much more about life and its values than they do about the rules of law.

Omit from your comments most of the evidence. Much of it is irrelevant. If you cannot prepare things for your jury talk more interesting than the evidence, quit practicing trial law.

Cicero, one of the all time great advocates, whose effectiveness in oral delivery made him master of the world and destroyed Carthage, used cadence as an ingredient in his hypnotic effect upon his audience. He practiced timing. He expected reaction. He watched for it. He waited until he saw upon the faces of the Senate or the Court dawning comprehension or acceptance. Only then did he go to the next spoonful. If you disbelieve, feed a baby and watch him have sense enough to spit it up when you crowd him. And the jury, friends, spits it out on you when they spit.

THE LAST WORD

Tell the jury that your opponent has the last word—you can't answer. For example:

> In a moment I will sit down, and I won't be able to answer the prosecutor. He may say all sorts of things I disagree with. He may get emotional, he may even get very emotional. If he does, just remember this: emotionalism is the indication of a weak argument. He may distort things; I don't know. In any event, I can't answer, because he gets the last word under the procedure we follow. I must trust you, and I do, to remember what I have said; and if he says something wrong, you will recognize it.

REASONABLE DOUBT

In discussing *reasonable doubt*, unless you have caught a police officer in a blatant lie, never pit his testimony against the defendant's. That is, don't make it a credibility contest. You must pit the officer's testimony against what is probable, what is reasonable, what is logical and what is rational.

Refer to many reasonable doubts and not limit your expression to a single reasonable doubt. Give the jury a choice of several reasonable doubts that exist in the case, and allow them to take their choice as to which of them they will use as the basis of their acquittal. To effectively do this, you must probe the testimony given to find the inconsistencies, the clouded memories, the discrepancies, and the lack of evidence, all of which foster doubt.

Give the jury *your* definition of reasonable doubt. In discussing the definition of reasonable doubt, don't you serve the judge's function by attempting to define in detail the meaning of reasonable doubt. You may mention that it is any doubt, based upon reason, that the jury may have about the evidence or lack of evidence. You may also tell the jury that the words "reasonable doubt" are usually coupled with the words "to a moral certainty," and that the judge has charged the jury with that before they can convict anyone of a crime. The jury must be convinced of the defendant's guilt "beyond a reasonable doubt and to a moral certainty." The word *"certainty"* may have a more permanent effect on some jurors than the word "doubt."

Combat the prosecutor's definition of reasonable doubt. Undoubtedly, the prosecutor will discuss reasonable doubt in his summation. The defense attorney must be realistic, logical and believable. If you are not, then the word "reasonable" will have no significance in your appeal to the jurors. You cannot be overly speculative or leave too much open to conjecture, or the jurors will soon realize that you are not being fair with them. I suggest that you employ something like the following:

> You cannot convict my client on speculation, belief or conjecture. To do so would be to violate every conception of decency and fairness. The theory of reasonable doubt does not contemplate possibilities or probabilities as the District Attorney would have you believe. Think of what a world we would live in if people were jailed because a jury of their peers thought they were *probably* guilty. That is the kind of reasoning that gives rise to fascism and the doctrines that Hitler built his dictatorship on. The sound principals upon which our laws are established would not tolerate guilt by belief or suspicion. A man must be

proven guilty beyond a reasonable doubt—to a moral certainty.

The prosecution charges my client with a commission of a serious crime. The law, which you are sworn to uphold, says, Mr. District Attorney, you must establish the defendant's guilt by credible evidence. It is not sufficient that you produce evidence which indicates that the defendant is probably guilty. You must produce evidence *which clearly establishes* beyond doubt founded in reason that no one else might have committed this act. You must, Mr. District Attorney, overcome every possible obstacle, every possible logical doubt. If you do not do this, you have not met your burden of proof.

Nothing can be left to surmise or guessswork. How tragic it would be if a man's life could be taken from him because twelve people thought that they were satisfied that he was guilty—but were not sure. That is why the law says every man accused of a crime must be proven guilty beyond every reasonable doubt. If there is any doubt whatsoever that sounds reasonable to you, then my client, under our great system of justice, is entitled to the benefit of that doubt, and should be acquitted. Ask yourself, "Am I morally certain of his guilt?" If you are, then I say that you must find him guilty. However, if you are not morally certain, then he must be acquitted.

You see this is not like an accident case or a suit involving real estate, where only property rights are determined. In such a case, the side which brings the suit needs only produce evidence that outweighs his opponent's to be successful. In those cases, if the jury makes a mistake, all that is lost is money. *But in this case, if the* jury makes a mistake and sends an innocent man to jail, no money in the world could ever compensate him for that injustice. Therefore, the law places upon the state a heavy burden of proving guilt, not merely by the weight of the evidence, but beyond doubt. You, as intelligent, civic-minded people, can appreciate the difference in the amount of proof required, and can now see what reasonable doubt really is. If you are not sure—if you have reservations—if you feel that the prosecution has left out a missing link; if you believe that this incident could have happened in any other way than the prosecution suggests, then you must give to my client the benefit of your uncertainty and find him *not* guilty. That is what reasonable doubt is all about.

YOU ARE RESPONSIBLE
— SHOW IT — FEEL IT! —

Somewhere in your final argument, you must impress upon the jury your sincere feeling of responsibility to your client. Your client is depending upon you to say the right things. That responsibility within itself, coming from a human being who faces death or years of imprisonment, as the case may be, is a serious responsibility and you must impress upon the jury that you recognize the responsibility you have. You should also tell them that when your time is up a few short minutes from now, you will transfer that heavy responsibility to them and that they, under the law, will not be able to escape the responsibility of deciding what the future of your client shall be. This is an awesome power for one human being to have over another human being.

If you do not remember anything else I have told you here, please remember that you must be *totally* sincere, *totally* dedicated, *totally* believeing in the cause of your client. Your client is on the side of RIGHT. And the jury must protect the rights of your client.

What I am trying to say is that you cannot convey a sincere attitude unless you really believe in the cause of your client. If you do not believe in the righteousness of your cause, you should never have accepted the case. But being convinced that justice is on the side of your client, you must attempt to transfer your *own* conviction into the hearts and minds of the jurors; you must undertake to establish rapport with them—to feel your heart beating in time and in tune with the hearts of the jurors.

Often, your conviction that right and justice are on your side will inspire you with the earnestness, the zeal and the fervor to make that right come true—to cause a jury's verdict to be rendered on the side of righteousness. Your conviction will enable you to impress the jury with your honesty and sincerity in the fierce battle you are waging for your client and will oftentimes be reflected in the jury's verdict.

GET THEM TO WALK IN HIS SHOES

I have previously spoken about the importance of having the jury walk in the shoes of your client. Let me give you some examples of what I mean. The prosecutor, in his opening argument, will ususally give you openings which will allow you to legitimately plead with the jury in a way that they will be "walking in your client's shoes."

For example, if in the *punishment phase* of the trial the prosecutor opposes probation by using the argument that it is like "only tapping the guilty on the wrist" or "it is no punishment at all," I suggest that you dramatically tell the jury what it is like for a person to go through what the defendant has *already* gone through and *will* go through in the future if allowed probation. I suggest something like the following:

> The prosecutor tells you that if you give probation to this defendant you shall have given no punishment to him at all. How misleading that is! I know you cannot fully realize what the defendant has already been through because it has not happened to you personally, so let's walk in his shoes for a moment.
>
> Here is a citizen of our country who has been accused of a serious crime. He has been arrested and put in jail—behind bars. He has lost his freedom. Have you ever been caged? He has been fingerprinted and mugged. Have you ever been forced to sit in a chair with a number across your chest and photographed? Then you cannot fully realize the embarrassment, the chagrin, the degrading experience that is.
>
> This defendant will forever have a picture in the FBI files of this nation with a number around his neck. He has been hauled before a judge to make a plea of not guilty. He has been required to make a

bond. He has been required to retain an attorney at considerable expense. He has spent countless hours preparing his defense, so that you, twelve strangers, might understand his side of this dispute. He has faced sorrow of his family, the suspicion of his neighbors and fellow workers.

There is no way a prosecutor can belittle those degrading experiences that a citizen of this great country lives through under these conditions. To say that this defendant has not been punished beyond belief even to this day is being unrealistic and calloused.

If you give probation in your wisdom, the stringent requirements of probation under the laws of this State must be obeyed. This citizen will be required to periodically report to a stranger and answer all questions that stranger, the probation officer, may have as to his private life. He cannot leave this county without the permission of the probation officer. No, he cannot leave the county to see his loved ones, he cannot go on a business trip, he cannot go on a vacation, without the express permission of the government. Even worse, by your decision of guilt, the defendant is now branded a felon forever.

Wherever he goes seeking lawful employment he must always anticipate a questionnaire inquiring, "Have you ever been convicted of a felony?" To that he must answer yes and, in most cases, the employment is denied. He has lost his right to vote. He is now a second class citizen denied the rights of the rest of us. Is the prosecutor being fair with you or this person when he argues that he suffers nothing if you allow him probation.

This is what I mean when I say you must dramatize in earnestness and conviction the common daily life of your client.

It does not matter whether you are in a civil case or a criminal case, you must still dramatize and bring things down to earth. One of the best examples in a civil case that I have heard recently was a lawyer who said:

Ladies and gentlemen, I am not going to torture you by going through the torment of my client's experience, by going through each and every item of suffering that he has endured in the past or that he will face in the future. This man lost both of his arms and I have been trying to think of how to best tell you what it is like to live without two arms. Let me tell you what it is like. I had lunch with my client. I ate with my knife and fork. Do you know how he ate? He ate like a dog.

His argument on damages consumed less than five minutes.

One of the best examples of jury persuasion by taking the jury for a walk in the shoes of the accused was given not long ago at a seminar by one of the outstanding criminal lawyers of Texas, Douglas Tinker. In illustrating this point Doug gave this as an example of a possible closing argument for the defense in a death penalty case while the electric chair was still used:

You have been told in great detail just precisely how Jerry Bird supposedly killed and murdered Victor Trammell. Now let's see how the State of Texas would kill and murder Jerry Bird.

Each man on death row receives a numbered file. To date there are 5,606 such files. Most of these men have been executed. Some have had their sentences commuted to life imprisonment. Some were freed because they were falsely imprisoned or improperly tried and quite likely some who were innocent were executed.

The living arrangements on death row in Huntsville are meager. There are eight five feet by ten feet cells. From their cells the condemned men can see the barber's chair down the corridor to the right and watch another death row inmate get the crown of his head and his left leg shaved so the electrodes can fit properly and effectively. To the left, opposite the barber's chair, not more than twenty steps from the farthest cell, is the "little green door" that leads into the death chamber.

The condemned man lives in a world of tension. He knows almost to the second when he will die. He sits in his cell and watches others mount the barber's chair for the quick head and leg shave, listens to the water splash as they take their last shower, shares in their last meals, sits mute as friends and family bid tear-stained farewells as they huddle in sad little semicircles outside a cell door on the folding chairs provided by the guard. The execution chair itself is an ancient piece of furniture. It is solid oak, backed, sturdy, held together by wooden pegs. It also has wires, leather straps and electrodes. The chair referred to as "Old Sparky" by the men, was built by prison inmates.

In Texas executions are performed around midnight. As the day of his execution begins Jerry Bird will be visited by the assistant warden, the man who will kill him. The warden will read him the order of the Court sentencing him to death. The warden will leave and then Jerry Bird will spend an hour or two with visitors, friends or family. At about five o'clock the phone will ring to announce the arrival of the barber. Jerry Bird will leave his cell to go to the barber's chair to have his head and leg shaved for the electrodes.

As the barber works Jerry Bird's belongings are being shifted from his own cell to the one next to the green door leading into the death chamber. He will have already had his last meal at his preceding eating hour. After the other prisoners have finished their meals the night guard will unwrap the bundle that was delivered earlier and will place its contents, Jerry Bird's death costume, on his cot. It will be a blue serge Eisenhower battle jacket with slacks to match, khaki shirt, socks and shoes without laces. After all he must not hang or strangle himself and cheat the chair.

The chaplain will return to wait with Jerry Bird. Soon there will be a knock from beyond the "green door" and the warden will say, "We are ready." The guard will

(Continued on page 27)

SIGNIFICANT DECISIONS REPORT

United States vs. Ross, _____ U.S._____, 102 S. Ct. 2157 (1982)

SEARCH AND SEIZURE: Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute--the heroin and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

HELD: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, applied to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container

that is believed to be carrying an illicit substance and that is found in a public place--even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). United States vs. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538; Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235.

(c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

(d) The doctrine of stare decisis does not preclude rejection here of the holding in Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d744, and some of the reasoning in Arkansas v. Sanders, supra.

HOPPER VS. EVANS, _____ U.S. _____, 102 S.Ct.2049 (1982)

CAPITAL MURDER - BECK RULE OF LESSER INCLUDED OFFENSE NOT APPLICABLE: Respondent was convicted in an Alabama state court of the capital offense of an intentional killing during a robbery, and was sentenced to death. At the time of respondent's trial, an Alabama statute precluded jury instructions on lesser included offenses in capital cases. The conviction and sentence were affirmed on automatic appeal. Subsequently, habeas corpus proceedings were brought in Federal District Court seeking to have the conviction set aside on the ground, inter alia, that respondent had been convicted and sentenced under a statute which unconstitutionally precluded consideration of lesser included offenses. The District Court denied relief. Pending an appeal, the Alabama statute precluding lesser included offense instructions in capital cases was invalidated in Beck v. Alabama, 447 U.S. 625, 100 S.Ct.2382, 65 L.Ed.2d392. The Court of Appeals then reversed the District Court, concluding that Beck v. Alabama meant that the Alabama preclusion clause so "infected" respondent's trial that he must be retried so that he might have the opportunity to introduce evidence of some lesser included offense.

HELD: The Alabama preclusion clause did not prejudice respondent in any way, and he is not entitled to a new trial where his own evidence negates the possibility that a lesser included offense instruction might have been warranted. The Court of Appeals misread Beck vs. Alabama, which held that due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. Here, the evidence not only supported the claim that respondent intended to kill the victim but affirmatively negated any claim that he did not intend to kill the victim. Accordingly, an instruction on the offense of unintentional killing was not warranted.

OREGON VS. KENNEDY, _____ U.S. _____, 102 S.Ct.2083 (1982)

DOUBLE JEOPARDY--PROSECUTORIAL ERROR--STANDARD: INTENT OF PROSECUTOR: During respondent's trial for theft in an Oregon state court, the State's expert witness testified as to the value and identity of the property involved. On cross-examination, he acknowledged that he had once filed an unrelated criminal complaint against respondent, but explained that no action had been taken on his complaint. On redirect examination, the court sustained a series of objections to the prosecutor's questions seeking to establish the reasons why the witness had filed a complaint against respondent. After eliciting from the witness that he had never done business with respondent, the prosecutor asked: "Is that because he is a crook?" The trial court then granted respondent's motion for a mistrial. On retrial, the court rejected respondent's contention that the Double Jeopardy Clause of the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment, barred furtherprosecution, finding that "it was not the intention of the prosecutor in this case to cause a mistrial." Respondent was convicted, but the Oregon Court of Appeals reversed, sustaining the double jeopardy claim because the prosecutorial misconduct that had occasioned the mistrial, even if not intended to cause a mistrial, amounted to "overreaching."

HELD: (1) There is no merit to respondent's contentions that the Court of Appeals' decision was based upon an adequate and independent state ground, or that in the alternative the case should be remanded in order that the court may clarify the grounds upon which its judgment rested. A fair reading rested its decision solely on federal law.

(2) Where a defendant in a criminal trial successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him only if the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial. A more general test of "overreaching" is rejected because if offers virtually no standards for its application and becuase such a rule may not aid defendants as a class. By contrast, a standard that examines the prosecutor's intent is a manageable standard to apply. Since the courts below both agreed that the prosecutor did not intend his conduct to provoke respondent into moving for a mistrial, that is the end of the matter for purposes of the Double Jeopardy Clause.

TIBBS VS. FLORIDA, _____ U.S. _____, 102 S.Ct.2211 (1982)

DOUBLE JEOPARDY CLAUSE OF FIFTH AMENDMENT DOES NOT BAR RETRIAL WHERE STATE COURT REVERSED CONVICTION BASED ON WEIGHT OF EVIDENCE: HELD: Where the Florida Supreme Court's reversal of petitioner's murder and rape conviction at a jury trial was based on the weight of the evidence, a retrial is not barred by the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

(a) A reversal of a conviction based on the weight of the evidence, unlike a reversal based on insufficient evidence where the Double Jeopardy

Clause precludes a retrial, Burks v. United States, 437 U.S. 1,98 S.Ct.2141, 57 L.Ed.2d 1; Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. Just as a deadlocked jury does not result in an acquittal barring retrial under the Double Jeopardy Clause, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal. Moreover, a reversal based on the weight of the evidence can occur only after the State has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek an acquittal. Giving him this second chance does not amount to governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.

(b) There is no merit to petitioner's arguments that a distinction between the weight and sufficiency of the evidence is unworkable and will undermine the Burks rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence.

EDDINGS VS. OKLAHOMA, ____ U.S. ____, 102 S.Ct.869 (1982)

DEATH PENALTY SET ASIDE AS MITIGATING FACTORS NOT CONSIDERED: Petitioner was convicted in an Oklahoma trial court of first-degree murder for killing a police officer and was sentenced to death. At the time of the offense petitioner was 16 years old, but he was tried as an adult. The Oklahoma death penalty statute provides that in a sentencing proceeding evidence may be presented as to "any mitigating circumstances" or as to any of certain enumerated aggravating circumstances. At the sentencing hearing, the State alleged certain of the enumerated aggravating circumstances, and petitioner, in mitigation, presented substantial evidence of a turbulent family history, of beatings by a harsh father, and of serious emotional disturbance. In imposing the death sentence, the trial judge found that the State had proved each of the alleged aggravating circumstances. But he refused, as a matter of law, to consider in mitigation the circumstances of petitioner's unhappy upbringing and emotional disturbance, and found that the only mitigating circumstance was petitioner's youth, which circumstance was held to be insufficient to outweigh the aggravating circumstances. The Oklahoma Court of Criminal Appeals affirmed.

HELD: The death sentence must be vacated as it was imposed without "the type of individualized consideration of mitigating factors. . . required by the Eighth and Fourteenth Amendments in Capital cases, Lockett v. Ohio, 438 U.S. 586, 606, 98 S.Ct.2954, 2965, 57 L.Ed.2d 973.

(a) The Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, supra, at 604, 98 S.Ct. at 2964. This rule follows from the requirement that capital punish-

ment be imposed fairly and with reasonable consistency or not at all, and recognizes that a consistency produced by ignoring individual differences is a false consistency.

(b) The limitation placed by the courts below upon the mitigating evidence they would consider violated the above rule. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, netiher may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. The sentencer and the reviewing court may determine the weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration. Here, the evidence of a difficult family history and of emotional disturbance petitioner offered at the sentencing hearing should have been duly considered in sentencing.

ZANT VS. STEPHENS, _____ U.S. _____, 102 S.Ct.1855 (1982)

DEATH PENALTY--SUPREME COURT CERTIFIED QUESTION TO GEORGIA SUPREME COURT: Stephens was convicted of murder and the sentencing jury found the following statutory aggravating circumstances: (1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony; (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions; and (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful confinement. The jury imposed the death penalty.

On direct appeal the George Supreme Court affirmed. On authority of Arnold vs. State, 224 S.E.2d 386 (1976), it set aside the second statutory aggraving circumstance found by the jury but it upheld the death sentence on the ground that in Arnold "that was the sole aggravating circumstance found by the jury" whereas in this case "the evidence supports the jury's findings of the other statutory aggravating circumstances and consequently the sentence was not impaired.

In Gregg vs. Georgia, 428 U.S. 153, 96 S.Ct.2909, 49 L.Ed.2d 859 (1976) the Court upheld the Georgia death penalty statute because of the standards and procedures set forth therein promised to alleviate to a significant degree the concern of Furman vs. Georgia, 408 U.S. 238, 92 S.Ct.2726 33 L.Ed.2d 346 (1972), that the death penalty not be imposed capriciously or in a freakish manner. However, the Court's review of the statute did not leave the court to examine all of its nuances. In this case the court is asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstances found and the sentence of death based thereon. The Supreme Court found, however, that the Georgia Supreme Court has never explained the rationale for this statement of its position and thus the Supreme Court certified to the Georgia Supreme Court the following question: What are the premises of state law that support

the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

UNITED STATES VS. FRADY, ____ U.S._____, 102 S.Ct.1584 (1982)

COLLATERAL ATTACK ON CONVICTION--PROPER STANDARD FOR REVIEW: "CAUSE AND ACTUAL PREJUDICE": In 1963, respondent was convicted of first-degree murder and sentenced to death by a jury in the Federal District Court for the District of Columbia, which at that time had exclusive jurisdiction over local felonies committed in the District. The Court of Appeals for the District of Columbia Circuit, which then acted as the local appellate court, upheld the conviction but set aside the death sentence, and respondent was then resentenced to a life term. Respondent filed the present motion in the District Court under 28 U.S.C. 2255 (the latest in a long series of collateral attacks on his sentence), seeking to vacate the sentence on the ground that he was convicted by a jury erroneously instructed on the meaning of malice, thus allegedly eliminating any possibility of a manslaughter verdict. The District Court denied the motion because respondent failed to challenge the instructions on direct appeal or in prior motions. The Court of Appeals reversed, holding that the proper standard to apply to respondent's claim was the "plain error" standard of Federal Rule of Criminal Procedure 52(b) governing relief on direct appeal from errors not objected to at trial, and finding the challenged instruction plainly erroneous, vacated respondent's sentence and remanded the case for a new trial or entry of a manslaughter judgment.

HELD: (1) This Court has jurisdiction to review the decision below, and is not required to refrain from doing so on the ground that the decision of the Court of Appeals was based on an adequate and independent local ground of decision. There is no basis for concluding that the ruling below was or should have been grounded on local District of Columbia law, rather than on the general federal law applied to all 2255 motions. The Equal Protection Clause does not require that a 2255 motion by a prisoner convicted in 1963 be treated as though it were a motion under the District of Columbia Code after 1970.

(2) The Court of Appeals' use of Rule 52(b)'s "plain error" standard to review respondent's 2255 motion was contrary to long-established law. Because it was intended for use on direct appeal, such standard is out of place when a prisoner launches a collateral attack against a conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of time allowed for direct review or by the affirmance of the conviction on appeal. To obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.

(3) The proper standard for review of respondent's conviction is the "cause and actual prejudice" standard under which, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both "cause" excusing his double procedural default and "actual prejudice" resulting from the errors of which he complains.

(4) Respondent has fallen far short of meeting his burden of showing not merely that the errors at his trial created a possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. The strong uncontraducted evidence of malice in the record, coupled with respondent's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified. Moreover, an examination of the jury instructions shows no substantial likelihood that the same jury that found respondent guilty of first-degree murder would have concluded, if only the malice instructions had been better framed that his crime was only manslaughter.

ENGLE VS. ISAAC, _____ U.S. _____, 102 S.Ct.1558 (1982)

FEDERAL HABEAS CORPUS PROCEEDING UNDER 28 U.S.C. SECTION 2254--EFFECT OF NON-COMPLIANCE WITH STATE RULE REQUIRING CONTEMPORANEOUS OBJECTIONS TO JURY INSTURCTIONS: These cases present the question whether respondents, who were convicted after separate trials on unrelated charges in Ohio state courts, and who failed to comply with Ohio Rule of Criminal Procedure 30 mandating contemporaneous objections to jury instructions, may challenge the constitutionality of those instructions in federal habeas corpus proceedings under 28 U.S.C. 2254. A provision of Ohio's Criminal Code (2901.05(A)), effective January 1, 1974, placed the burden of proving guilt beyond a reasonable doubt upon the prosecution and provided that "the burden of going forward with the evidence of an affirmative defense is upon the accused." Until 1976, most Ohio courts assumed that the statute did not change Ohio's traditional rule requiring defendants to carry the burden of proving the affirmative defense of self-defense by a preponderance of the evidence. In 1976, however, the Ohio Supreme Court, in State v. Robinson, 47 Ohio St.2d 103, 351 N.E.2d 88, held that the statute placed only the burden of production, not persuasion, on the defendant and that once the defendant produced some evidence of self-defense, the prosecutor had to disprove self-defense beyond a reasonable doubt. Respondent's trials occurred after 2901-05(A)'s effective date, but before the decision in Robinson, and none of the respondents objected to the trial court's jury instruction that the respondent bore the burden of proving self-defense by a preponderance of the evidence. The appropriate Ohio Courts of Appeal affirmed the homicide convictions of respondents Hughes and Bell before the decision in Robinson, and the Ohio Supreme Court declined to review their convictions. Neither of these respondents challenged the self-defense instruction in their appeals. On respondent Isaac's appeal of his assault conviction to the intermediate appellate court, he relied upon the intervening decision in Robinson to challenge the self-defense instruction given at his trial. The court rejected the challenge as having been waived by Isaac's failure to comply with Ohio Rule of Criminal Procedure 30, and the Ohio Supreme Court dismissed his appeal. Each respondent unsuccessfully sought a writ of habeas corpus from a Federal District Court, but the Court of Appeals reversed all three District Court orders.

HELD: (1) Insofar as respondents simply challenged the correctness of the self-defense instructions under Ohio law, they alleged no deprivation of federal rights and were entitled to no federal habeas relief under 28 U.S.C. 2254. Respondents' habeas petitions raised only one colorable constitutional claim.

(a) There is no merit to respondents' claim that 2901.05(A) implicitly designated absence of self-defense an element of the crimes charged against them and thus due process required the prosecution to prove such element beyond a reasonable doubt. Merely because a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt does not mean that it has defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Dur Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes.

(b) A colorable constitutional claim is stated by respondents' argument that since self-defense negates the elements of the crimes charged against them of voluntary, unlawful, and purposeful or knowing behavior, once the defendant raises the possibility of self-defense, the Due Process Clause requires that the State disprove that defense as part of its task of establishing voluntariness, unlawfulness, and guilty mens rea. The controversy among lower courts as to the viability of this type of claim suggests that respondents' argument states at least a plausible constitutional claim.

(2) Respondents are barred from asserting, in federal habeas corpus proceedings, their constitutional claim, which was forfeited before the State courts because of their failure to comply with Ohio Rule of Criminal Procedure 30.

(a) While the writ of habeas corpus is a bulwark against convictions that violate "fundamental fairness", it undermines the usual principles of finality of litigation. Liberal allowance of the writ also degrades the prominence of the trial and costs society the right to punish admitted offenders. Moreover, the writ imposes special costs on the federal system, frustrating both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. These costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts, and thus, as held in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594, a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, may not litigate that claim in a 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default. The principles of Sykes are not limited to cases in which the constitutional error did not affect the truthfinding function of the trial.

(b) Cause for respondents' defaults cannot be based on the asserted ground that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to

bear the burden of proving such affirmative defense. If a defendant perceives a viable constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Nor can cause for respondents' defaults be based on the asserted ground that they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, decided four-and-one-half years before the first of respondents' trials, laid the basis for their constitutional claim. During the five years following that decision, numerous defendants relied upon Winship to argue that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses, and several lower courts sustained this claim. In light of this activity, it cannot be said that respondents lacked the tools to construct their constitutional claim.

(c) There is no merit to respondents' contention that the cause-and-prejudice standard of Sykes should be replaced by a plain-error inquiry. While federal courts apply a plain-error rule for direct review of federal convictions, federal habeas challenges to state convictions, federal habeas challenges to state convictions entail greater finality problems and special comity concerns. Moreover, a plain-error standard is unnecessary to correct miscarriages of justice. Victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.

UNITED STATES VS. MACDONALD, _____U.S._____, 102 S.Ct.1497 (1982)

SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL: In May 1970, the Army formally charged respondent, a captain in the Army Medical Corps, with the murders earlier that year of his pregnant wife and two children on a military reservation. Later that year, the military charges were dismissed and the respondent was honorable discharged on the basis of hardship, but at the Justice Department's request the Army Criminal Investigation Division (CID) continued its investigation of the homicides. In June 1972, the CID forwarded a report recommending further investigation, and the Justice Department, in 1974, ultimately presented the matter to a grand jury, which returned an indictment in January 1975, charging respondent with the three murders. On an interlocutory appeal from the District Court's denial of respondent's motion to dismiss the indictment, the Court of Appeals reversed, holding that the delay between the June 1972 submission of the CID report to the Justice Department and the 1974 convening of the grand jury violated respondent's Sixth Amendment right to a speedy trial. After this Court's decision that respondent could not appeal the denial of his motion to dismiss on speedy trial grounds until after completion of the trial, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18, respondent was tried and convicted. The Court of Appeals again held that the indictment violated respondent's right to a speedy trial and dismissed the indictment.

HELD: The time between dismissal of the military charges and the subsequent indictment on civilian charges may not be considered

in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment.

(a) The Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment or to a claim under any applicable statute of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending. Similarly, any undue delay after the Government, acting in good faith, formally dismisses charges must be scrutinized under the Dur Process Clause, not the Speedy Trial Clause. Once charges are dismissed, the speedy trial guarantee--which is designed primarily to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges--is no longer applicable. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

(b) The Court of Appeals erred in holding, in essense, that criminal charges were pending against respondent during the entire period between his military arrest and his later indictment on civilian charges. Although respondent was subjected to stress and other adverse consequences flowing from theinitial military charges and the continuing investigation after they were dismissed, he was not under arrest, not in custody, and not subject to any "criminal prosecution" until the civilian indictment was returned. He was legally and constitutionally in the same posture as though no charges had been made; he was free to go about his affairs, to practice his profession, and to continue with his life.

SMITH VS. PHILLIPS, _____U.S._____, 102 S.Ct.940 (1982)

JURORS PARTIALITY--TEST OF PROSECUTORIAL MISCONDUCT: After being convicted of murder at a jury trial in a New York court, respondent moved to vacate his conviction on the ground that a juror in his case submitted during the trial an application for employment as an investigator in the District Attorney's Office, and that the prosecuting attorneys, upon being informed of the juror's application, withheld the information from the trial court and respondent's defense counsel until after the trial. At a hearing on the motion before the same judge who had presided at the trial, the motion was denied, the judge finding "beyond a reasonable doubt" that the events giving rise to the motion did not influence the verdict. The Appellate Division of the New York Supreme Court affirmed the conviction, and the New York Court of Appeals denied leave to appeal. Subsequently, respondent sought habeas corpus relief in Federal District Court, alleging that he had been denied due process of law under the Fourteenth Amendment by the

conduct of the juror in question. While finding insufficient evidence to demonstrate that the juror was actually biased, the District Court nevertheless imputed bias to him and, accordingly, ordered respondent released unless the State granted him a new trial. The United States Court of Appeals, without considering whether the juror was actually or impliedly biased, affirmed on the ground that the prosecutors' failure to disclose their knowledge about the juror denied respondent due process.

HELD: Respondent was not denied due process of law either by the juror's conduct or by the prosecutors' failure to disclose the juror's job application.

(a) Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen. Such determinations may properly be made at a hearing like that held in this case. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654. Moreover, this being a federal habeas action, the state trial judge's findings are presumptively correct under 28 U.S.C. 2254(d). Federal courts in such proceedings must not disturb the state courts' findings unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence. Here, neither the District Court nor the Court of Appeals took issue with the state trial judge's findings.

(b) The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Here, the prosecutors' failure to disclose the juror's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

(c) Absent a violation of some right guaranteed respondent by the Fourteenth Amendment, it was error for the lower courts to order a new trial. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.

HARRIS VS. RIVERA, _____ U.S. _____, 102 S.Ct. 460 (1981)

INCONSISTENT VERDICTS: Even if acquittal of co-defendant by trial judge in non-jury criminal trial rested upon an improper ground, and even assuming that acquittal was logically inconsistent with the conviction of this defendant, this defendant had no constitutional ground to complain that co-defendant was acquitted after defendant had been found guilty beyond a reasonable doubt after a fair trial. Even if acquittal of co-defendant rested on improper ground, that error did not create constitutional defect in guilty verdict against this defendant.

POLK COUNTY VS. DODSON, _____ U.S. _____, 102 S.Ct. 445 (1981)

1983 ACTION AGAINST PUBLIC DEFENDER: Defendant brought suit in Federal District Court under 42 U.S.C. Section 1983, against, among others, the attorney assigned from the public defender's office to represent him. Supreme Court held that a public defender does not act "under color of State law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a State criminal proceeding. Because it was based on such activities, the complaint against the attorney must be dismissed.

WAINWRIGHT VS. TORNA, _____ U.S. _____, 102 S.Ct. 1300 (1982)

ACCUSED HAD NO ABSOLUTE RIGHT TO APPEAL CONVICTION TO FLORIDA SUPREME COURT--ACCUSED NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL: D appealed to the Florida Court of Appeals, and his convictions were affirmed. The Florida Supreme Court dismissed an application for Writ of Certiorari on the ground that the application was not timely filed. D then filed a writ in United States District Court arguing he had been denied his right to the effective assistance of counsel by the failure of his retained counsel to file the application for certiorari timely. The Supreme Court noted that the attorney's secretary attempted to timely file the required papers but became lost while traveling to the clerk's office and did not arrive until it had closed, and thus the papers were not filed until the next day.

The United States District Court denied the petition, but the Court of Appeals reversed. The Supreme Court held that since the defendant had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely. The Court noted that in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct.2437, 41 L.Ed.2d 341 (1974) the Court had previously held a criminal defendant did not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in the U.S. Supreme Court.

TRIAL TACTICS WORKSHOP—

PERCY FOREMAN AGAINST THE TEXAS CONTROLLED SUBSTANCES ACT

At the Criminal Law Institute—"Texas Superstars"—presented at the Texas State Bar Convention in Austin this year, Percy Foreman told judges, prosecutors and defense attorneys he was convinced the present Texas law on drugs was invalid. He presented his memorandum of law to support his thesis for use in a Motion to Quash Indictment in the trial court.

NO. 000,000

THE STATE OF TEXAS) IN THE DISTRICT COURT OF

VS.) HARRIS COUNTY, TEXAS

JOE BLEAU FROM IDAHO) _____ JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF MOTION TO QUASH INDICTMENT

NOW COMES JOE BLEAU FROM IDAHO, Defendant herein, by and through his attorney, Percy Foreman, and files this his Memorandum in Support of Motion to Quash Indictment, respectfully showing the Court as follows:

1. Art. III. §35 of the Texas Constitution provides in pertinent part:

> No Bill. . .shall contain more than one subject, *which shall be expressed in its title.* But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed. (emphasis added)

The caption to House Bill 730 is misleading and was inadequate to apprise members of the legislature or the general public of the radical and drastic changes in existing law made by the Bill and thus the Bill and the law under which the indictment herein is brought is unconstitutional.

The entire caption to House Bill 730 is:

> "An Act Relating to Offenses and Criminal Penalties under the Texas Controlled Substances Act."

The Bill itself, however, has the following features and effects not mentioned in the caption:

(1) It amends many sections of existing law under the Texas Controlled Substances Act (Art. 4476-15, Vernon's Texas Civil Statutes), although the caption gives no notice that it is an amendatory act.

(2) It creates numerous new offenses, pertinent here being the offense of "aggravated" delivery of cocaine, §4.03(c) and (d)(1) of the Texas Controlled Substances Act (TCSA hereafter) which is contained in Section 3 of House Bill 730.

(3) It drastically changes the punishment scheme previously existing for manufacture of, delivery of, or possession of cocaine with intent to deliver here pertinent, increasing the punishment range to a minimum of five years confinement up to 99 years or life, and a maximum fine of $50,000.00.

(4) It arbitrarily sets increased punishment according to the weight of the substance delivered, such weight being determined on the "*aggregate weight including adulterants and dilutants*" so that the same net amount of a substance could be punished more severely if innocuous dilutants are present.

(5) It amends Title 4 of the Penal Code making it applicable to prosecutions under the Texas Controlled Substances Act, thus potentially drastically changing the evidentiary requirements in a trial involving multiple defendants under a conspiracy theory, whether conspiracy is alleged or not.

(6) It amends Article 44.04(c) of the Code of Criminal Procedure to provide that bail may be denied on appeal regardless of the length of sentence.

(7) It declares an emergency, thus insuring that the Bill would not be read aloud in the House and Senate.

Although it is clear that the courts should liberally construe the caption of an act so as to uphold its validity under Article III, Section 35 of the Constitution, a stricter rule of construction applies in the case of an amendatory act. *White v. State*, 440 S.W. 2d 660, 665 (Tex. Crim. App. 1969). Many cases have held the caption of a bill insufficient where that caption was misleading or overly broad, the purpose for the constitutional requirement often being described as:

> To advise the legislature and the people of the nature of each particular bill so as to prevent the insertion of obnoxious clauses which might otherwise be engrafted on it and become law. Fraud and deception are rendered less likely if the caption or title of an act, *which is often the only part of the bill read by busy members of the legislature,* fully apprises the members of the contents of the bill itself. *Consolidated Underwriters v. Kirby Lumber Company,* Tex. Comm.

App. 267 S.W. 2d 703; *Schlichting v. Texas State Board of Medical Examiners*, 158 Tex. 279, 310 S.W. 2d 557; *Gulf Insurance Company v. James*, 143 Tex. 424, 185 S.W. 2d 966; *Ferrantello v. State*, 158 Tex. Cr. Rpt. 471, 256 S.W. 2d 587. See also Interpretative Commentary, Vernon's Annotated Texas Constitution, Article III, Section 35. See 53 Tex. Jur. 2d Statutes, Sections 41, p. 74.

And it has been said that "insofar as it deals with captions of bills, as distinguished from the matter of multiple subjects thereof, its object is to facilitate and protect the legislative process by affording legislators and other interested people a ready and reasonably accurate means of knowledge of the contents of bills *without their having to read the full text.*" *Shannon v. Rogers*, 159 Tex. 29, 314 S.W. 2d 810. See also *Harris County Fresh Water Supply District No. 55 v. Carr*, Tex., 372 S.W. 2d 523. Ibid. 664 (emphasis added)

Immediately apparent with the instant caption is that it is overly broad and vague, makes no mention that it is an amendatory act, and fails to give adequate notice of the drastic and radical changes in the penalty provisions relating to delivery of cocaine and the method of measurement. A closer reading of the bill reveals that it also amends the Code of Criminal Procedure and the Penal Code, though no notice of such is contained in the caption.

If, indeed, the purpose of the caption is to give busy legislators (and the public) fair notice of what is contained in proposed legislation without the necessity of reading the bill, this caption does not do that. Recent cases consistently hold that such remains the purpose of Article III, Section 35.

In *Harvey v. State*, 515 S.W. 2d 108 (Crim. App. 1974), the caption:

> ". . .adding Section 186 on fleeing or attempting to elude a peace officer. . ."

was held insufficient to give notice of a drastic and material change in the penalty for such offense. The same result was reached in *Stein v. State*, 515 S.W. 2d 104 (Crim. App. 1974) and *Tumlinson v. State*, 515 S.W. 2d 113 (Crim. App. 1974).

In *Whaley v. State*, 496 S.W. 2d 109 (Tex. Cr. App. 1973) the caption:

> "An act relating to incitement to riot; providing for injunctive relief and procedure therefor; providing a penalty: and declaring an emergency."

was held insufficient as being inconsistent with the body of the act. The Court of Criminal Appeals quoted from *Gulf Insurance Company v. James*, 143 Tex. 424, 431, 185 S.W. 2d 966, 970 (1945):

> The rule of liberal construction will not be followed to the extent that it will relieve the legislature of the necessity of disclosing the real subject of the act in the title thereof, nor will it be extended so as to hold acts valid, the titles of which are deceptive or misleading as to the real contents of the acts. *Whaley v. State*, supra, at pp. 110-111.

In *Fletcher v. State*, 439 S.W. 2d 656 (Tex. 1969) the caption:

> An act relating to the licensing of polygraph examiners; creating a Polygraph Examiner's Board; granting certain powers to the Polygraph Examiner's Board; establishing minimum instrumentation requirements; providing for penalties for violation of provisions of this act; and declaring an emergency.

was held insufficient for failure to give notice that the act purported to regulate all persons who used any device to test or question individuals for the purpose of verifying truth of statements. There the Supreme Court quoted another often cited case, *Adams and Wickers v. San Angelo Water Works Company*, 86 Tex. 485, 487, 25 S.W. 605, 606 (1894):

> The inquiry is not what the legislature intended to embrace in the title, but what, by the terms employed, it did, in fact, embrace. The purpose of the constitutional requirement is to give notice through the title of the bill, not only to members of the legislature, but to the citizens at large, of the subject matter of the projected law; and thereby to prevent the surreptitious passage of law upon one subject under the guise of a title which expresses another. *Ibid.*, p. 658.

In *Lee v. State*, 352 S.W. 2d 724 (Tex. 1962), a caption, almost identical to that in question here,

> "An act concerning state prison lands in Brazoria County; and declaring an emergency"

was held insufficient, the Supreme Court stating:

> We do not believe that the caption would reasonably give fair notice to a legislator or any other person interested in the subject matter of the bill that the proposed act would provide for the condemnation of *private* lands. *Ibid.*, p. 725-726.

In *Doucette v. State*, 317 S.W. 2d 200 (Crim. App. 1958) the Court of Criminal Appeals held insufficient the caption:

> ". . .prescribing conditions incident to the sale of pistols under named conditions. . ."

where the effect of the statute was to prescribe an increased penalty for the sale of a pistol to a minor, the Court holding that such caption did not give sufficient notice.

In *Feagin v. State*, 310 S.W. 2d 99 (Tex. Cr. App. 1958), the Court of Criminal Appeals held insufficient the caption:

> An act amending Article 768, Code of Criminal Procedure, 1925, relating to credit for time spent in jail between arrest and sentence or pending appeal, so as to make its provisions applicable to misdemeanor cases; and declaring an emergency.

The question in *Feagin* was whether the body of the act, which required the pronouncement of sentence in a misdemeanor case, was fairly expressed in the caption so as to make pronouncement of a sentence a necessary predicate to appeal. The Court of Criminal Appeals said:

> Nowhere [in the caption] is notice given or suggested that the law as it then existed with reference to the passage of sentence was to be changed, or that a sentence in misdemeanor cases was to be thereafter required. *Ibid.*, p. 100.

In the instant case, nowhere in the caption is notice given that the punishment range is significantly increased or that the method of determining the punishment requires an arbitrary inclusion of innocuous substances to be weighed along

(Continued on page 26)

OUTLINE AND BIBLIOGRAPHY ON

SCIENTIFIC EVIDENCE IN CRIMINAL CASES

Jan E. Hemphill
Dallas

I. PURPOSE

This paper is intended to make the reader aware of areas of scientific evidence useful to the criminal law practitioner other than those with which most of us are already familiar. Psychiatry, psychology, radar, and alcohol influence determination have been covered at many institutes and are frequently used by criminal law practitioners. No area of scientific endeavor will be explored; rather, several areas will be mentioned so that the reader will be aware of their potential importance. Therefore, the writer intends only to encourage further exploration of the topics mentioned.

II. IMPORTANCE OF SCIENTIFIC EVIDENCE IN THE PRACTICE OF CRIMINAL LAW

Jurors are interested in scientific evidence. The popularity of TV's Quincy and the mass-marketing of such books as Milton Helpern's *Autopsy* illustrate the general public's awareness of and interest in the field of forensic pathology. Capturing the jury's interest is indispensable to the trial lawyer. Use scientific evidence whenever you can. Like demonstrative evidence, it keeps the jury interested.

The use at trial of scientific evidence can impart some objectivity to an otherwise very emotional case and this will detract somewhat from the D.A.'s tendency to inject emotionalism in certain cases. Example—trial of a mother for the murder of her six-week-old baby by delivering one or more blows to the infant's head.

III. AREAS OF EXPERT TESTIMONY OR ASSISTANCE IN CRIMINAL PRACTICE

Some areas of expertise have not been accepted by the courts, but may still be useful to you. Don't overlook any area as an investigative or plea bargaining tool simply because you can't use it at trial. Example—polygraph testing.

Among areas of expert or scientific knowledge are: drug identification, medicine, ballistics identification and comparison, forensic pathology, toxicology, chemistry, serology, fingerprints, microanalysis, neutron activation analysis, questioned document authentication, spectrographic voice identification, polygraphy, narcoanalysis (truth serum), hypnosis, voice stress analysis, forensic odontology, public opinion surveys, statistics.

IV. PREPARATION OF A CASE INVOLVING SCIENTIFIC EVIDENCE

1. Use all means of discovery you can think of to determine what evidence is available to the state and to you through the state's agencies.

a. Directly from the expert or record keeper:

Autopsy reports are public records under C.C.P.Art 49.25, Sec. 11, but lots of experienced criminal defense attorneys think they can only get these reports by a formal discovery motion or not at all. Hospital and doctors' records may be available to you by merely presenting the written authorization of the proper person. Not only the client's records, but also those of his or her minor child, are usually easily available by this method. This can be very useful in a child abuse or murder of a child case.

Get all the information you can directly from the source without asking the D.A. or the Court for it. It is much better, psychologically, to ask the D.A. for as little information as possible. I would think it harder for him to turn down one or two reasonable, informal requests than to turn down some of many such requests.

b. Informally from the D.A.

Ballistics reports, rape exam reports done at the hospital. After you obtained what you could directly from the source, get what you can informally from the D.A. and do so before filing your Motions for Discovery with the court, if at all possible.

c. Formally by Pre-Trial Motions.

File your Motions for Discovery and Inspection, Motion for Discovery of Prior Statements and Reports of State's Witnesses (following direct examination and prior to cross), and Motion for Grand Jury Testimony after you have obtained all you can from the D.A. informally, if possible. Make a record of what has been disclosed to you so that there is no dispute later as to whether a ruling of the court has been followed. Make this a matter of record either through a written agreement signed by yourself and the D.A. or through dictating same to the court reporter in the presence of the D.A. (be sure the record reflects his presence!).

2. Discuss the expert's report with someone knowledgeable in the field or with the state's expert himself, or both. Few defense attorneys discuss findings with the medical examiner who made them. You should do this before trial. Find out what his findings mean in layman's language (yours, in the case of medical evidence), their significance in your particular case, and whether these findings are consistent with your theory of the case.

3. Determine the authoritative texts in the field. Ask the expert for this information. Do a little basic reading so you are at least comfortable with the terminology and can ask intelligent questions before and during trial, and so that you don't come up with a last

minute theory that can be easily exploded in front of the jury.

4. Can you prove what you need to establish through the state's expert? Or do you have to tear him up on cross-examination? Sometimes you can obtain as much good from the state's expert witness as can the D.A. Find out before trial by doing your research and talking to the expert the state will use. Do not disclose your theory to him if you are really concerned the D.A. will hear of it and this will be damaging to your case. Also, the "impartial" expert may testify differently than you expected based on your informal conference with him. This *does* happen, and it is very frustrating.

If you can prove your contentions through the D.A.'s witness, do so. (Example—alcohol or drug content of the deceased's blood or other body fluid tested for autopsy.) It is very difficult to discredit a true expert, or even a true non-expert who is presented and "qualified" as an expert. You may be better off using the expert's testimony to support your theory than trying to discredit him by attacking his qualifications, observations, or opinions. You must decide before trial which you will do; you cannot use him to prove your theory and also attempt to discredit him before the jury. You will fail to do either if you try to do both.

5. Get your own expert witness or adviser if necessary. It's always helpful to talk with someone knowledgeable in the field who owes no allegiance to the state. Just because you discuss your case with your own expert does not mean you have to call him to testify.

6. Outline areas for direct examination of your expert and go over his testimony with him before trial. Also, prepare him for cross-examination. Outline areas for cross-examination of the state's expert, whether you are going to use him to support your theory or you plan to discredit his testimony. You must do this preparation before trial. Your best ideas will come at odd moments, while thinking about your case, not during the trial.

7. You must have a theory of the case, of course, and a theory of how the physical and other evidence fits that theory. Your theory must not be totally inconsistent with the physical facts. Test your theory before trial on others—an expert, another attorney, a layman. Remember, laymen will be your jurors. Is your theory sell-able? If it's not, and you can't make it so, it won't do you any good.

8. Ask yourself if you can utilize scientific evidence in a particular area in your case, regardless of whether the D.A. will use evidence from that area, or whether any other defense attorney has ever done so before.

In *Keller v. State*, (Tex. Crim. App., 11-5-80, #59,523, panel), the Defendant's conviction for selling an obscene film was reversed because evidence offered by him was excluded by the trial court. The evidence consisted of testimony as to how many people in Houston had viewed "Deep Throat," a comparable film, during its four year run. This evidence was of a statistical nature and admissible as circumstantial evidence relevant on the issue of contemporary community standards. (Defendant also offered, and trial court admitted, testimony from a sociologist on viewer response to "Deep Throat.")

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LETTERS ...

"You have been found guilty of all that crime stuff. You will go to prison for simply *ages* and pay an absolutely *whopping* fine."

Dear Editor:

I am writing for myself, and as President of the Harris County Criminal Lawyers Association. I have enclosed for your easy reference a copy of a cartoon printed in the "Significant Decisions" section, page 24, of the July, 1982 *VOICE*. Your editorial policy and taste in "jokes" is both outrageous and amazing for a publication of an organization dedicated to individual rights. I am a member of the Texas Criminal Defense Lawyers Association. Until this was published, I was proud of that association. Sexist attitudes such as those illustrated prevail in Texas and around the world because of such characterizations. You owe an apology to lawyers who are women and to women in general.

Women practicing law in this state have had to understand and live with the "good old boy" system, recognize it for what it is, and sometimes use it to their advantage. Judicial appointments or public election of females to the bench is still cause for headlines in Texas and around the country. Your impression of the women sitting on the criminal benches is another form of the good old boyism that is frankly getting a little old. In most cases, a cartoon is selected for a publication because it is thought to be amusing to a majority of its readership. If that was the case in this instance, kindly remove my name from membership in TCDLA aud stop my subscription to the *VOICE*. . .your message is loud and clear and I want no part of it. Your poor judgment in approving this for publication is surpassed only by your ignorance of individual rights if you instigated printing this cartoon.

On behalf of my colleagues in the judiciary, lawyers who are female, and members of TCDLA and women in general, I demand an apology.

Yours truly,
Carolyn Clause Garcia
2038 Lexington Street
Houston, Texas

Dear Sir:

I am furious about the cartoon on page SD-24 of the July 1982 issue of the *VOICE*. In this bald example of sexism you have demeaned the *VOICE* and insulted the female bar. I look to the membership of the TCDLA to refute this neanderthal attempt at humor.

Sincerely,
Julie Howell
1108 Nueces
Austin, Texas

Dear Editor:

I have discussed this cartoon with Judge Pat Lykos and Judge Joe Kegan. We all agree that it is in exceptionally bad taste.

I believe it warrants the resignation of us female TCDLA members. Do we get an apology?

Sincerely,
Barbara T. Baruch
320 Main Street
Houston, Texas

See Editor's Corner for comment.

Dear Editor:

The Criminal Defense Lawyers Project is an excellent example of dedicated staff--executive director Jeanne Kitchens and her assistant, Ellen English, working with the best criminal defense lawyers in Texas to improve personal skills and elevate the general quality of the State Bar.

During the past year I attended four of CDLP's education programs. Top quality all the way!

Sincerely,
Alton W. Ashworth, Jr.
Austin, Texas

Dear Editor:

The August, 1982 issue contained a letter I wrote to Rosalind Brinkley, which stated that I was sending my $40.00 check for two years worth of the *VOICE* for Judge John Vance in Dallas.

If I had known this letter was going to be printed, in fairness to Judge Vance I would also have stated that Judge Vance had for several months been trying to place his name on the list of judges' names who receive a courtesy copy, but his efforts were unsuccessful and that I volunteered to take Judge Vance's money and see that it was forwarded to the proper office in order that he could subscribe to the *VOICE*.

About the same time that I sent the letter which was published, another letter was sent wherein I asked the Board of Directors to consider charging all judges some fixed fee, whether $20.00 or less, for the *VOICE*. I have been told by Rosalind that the present problem is that the postmaster permits TCDLA to mail only a certain number of copies as courtesy copies, and apparently the limitation prevents at least appellate judges from receiving courtesy copies.

I believe that the *VOICE* is a publication which all judges probably read at one time or another and one that is firmly accepted in the legal community and one for which all judges would probably be delighted to pay such a nominal fee to receive. I am delighted that the judges want to receive the *VOICE*, and I think that we are missing the boat somehow if we do not make sure that all of the judges are treated equally. After all, the appellate judges also grade our papers.

Sincerely yours,
Kerry P. FitzGerald
Attorney at Law
Dallas, Texas

with the contraband, thus potentially providing different punishment ranges for the same amount of contraband.

The caption in the instant case is misleading by omission and is overly broad and vague. At a minimum, the caption should have given notice that punishments were to be increased, that existing law was to be amended and that provisions of the Penal Code and Code of Criminal Procedure were to be affected.

The caption was also misleading by omitting to state that it contained an emergency clause. If a legislator looked at the caption and wondered what the Bill was about, he would notice that there is no mention of an emergency clause so he might reasonably rely upon the required public reading of the Bill before its passage; but, of course, the declaration of an emergency does away with that requirement and only the caption of the Bill was read to the legislators before its passage.

It should be clear then that House Bill 730, at least as it applies to Defendant, is unconstitutional.

House Bill 730 contains neither a *Severability Clause* nor a *Savings Clause*. A Severability Clause normally provides that if one section of bill is declared unconstitutional it is severable from the other sections and they are to remain in full force and effect. A Savings Clause, of course, usually provides that if the act is declared unconstitutional the prior law remains in effect.

For comparison, in *White v. State, supra* there was no Severability Clause and the entire bill regarding LSD was declared unconstitutional. However, in *Harvey v. State, supra,* the amending act contained a Severability Clause and thus the conviction there could be upheld even though the penalty provision was unconstitutional.

In the instant case, the unconstitutional penalty provisions relating to delivery of cocaine is not severable from Section 3 of House Bill 730, which is the section that adds to the Texas Controlled Substances Act the entirely new Section 4.03 entitled "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 1." Furthermore, Section 3 of House Bill 730 also repeals the prior law regarding manufacture of, delivery of or possession of cocaine with the intent to deliver, which was old Section 4.03 of the Texas Controlled Substances Act entitled "Unlawful Manufacture or Delivery of Cocaine."

Thus, there presently is no existing law regarding manufacture of, delivery of or possession of cocaine with intent to deliver.

Defendant is entitled to have the indictment quashed.

Respectfully submitted,
FOREMAN, DeGUERIN & DeGEURIN

Percy Foreman
Attorney for Defendant
609 Fannin, Suite 1111
Houston, Texas 77002
(713) 224-9321

State Bar No. 07254000

CERTIFICATE OF SERVICE

I, Percy Foreman, hereby certify that a true and correct copy of the above and foregoing Memorandum of Law has been personally served upon the Office of the District Attorney of Harris County, Texas, on this the _____ day of _____, 1982.

Percy Foreman

CDLP ANNOUNCES NEW PUBLICATION

The Criminal Defense Lawyers Project proudly announces its publication of the 1982 edition of the *Federal Criminal Practice Manual.* Many of Texas' most experienced and most outstanding federal criminal law practitioners have contributed to this volume to make it one of the most practical and useful tools for the practice of criminal law in federal courts. Hundreds of pages of sample motions, memoranda of law in support thereof, forms and pleadings, as well as explanatory articles, untangle complex proceedings and rules to provide a practical foundation for representing persons accused of federal crimes. Whether you are an experienced federal court litigator or a newcomer to federal court, you will find in this volume practical assis-

tance with every phase of federal criminal trial work—from the initial proceedings before the magistrate; through suppression hearings and pretrial motion practice, trial mechanics, pleas of guilty, and sentencing or diversion; and through appeals and habeas corpus proceedings. Special chapters are devoted to the rules of evidence and practical uses to make of evidence, and federal juvenile proceedings. Besides appendices and forms attached to the different chapters, there are whole sections to provide forms, statutes and cross references, and a table of penalties. Every section of this volume has been reworked and updated to put the most recent cases and law at your fingertips; the table of contents at the beginning and the topical index at the end make this volume easy to use. Whether you are called upon by a court to provide assistance of counsel to an indigent defendant or are hired to represent federal defendants, maximize your effectiveness as an advocate by taking advantage of the experience and innovative practical advice of Texas' finest which this volume offers you.

ART OF WINNING FINAL ARGUMENT from page 8

unlock the cell and Jerry Bird will step out into the corridor and file into the death chamber where already will be the doctor, the warden and four witnesses. The warden will be behind a one-way mirror at the controls of his equipment. Jerry Bird will be asked if he has any last words. After those he will be asked to have a seat and the guards will strap him in, dampening the shaved areas on his head and leg with a saline solution before attaching the electrodes. His arms will be lashed to arm rests. His legs to the chair legs and his body to the chair with a broad strap so taut that it will straighten his spine to the chairback. The guards will stuff cotton up his nose to trap blood that might gush from ruptured veins in his brain. A mask will be placed across his face.

The warden will glance around to see that everyone is in his place and then he will nod to the executioner behind the one-way mirror; the generator will whine and snarl; Jerry Bird's lips will peel back, his throat strained for a desperate cry, his body arched against the restraining straps; then his features will purple, steam and smoke will rise from the bald spots on his head and leg while the sick sweet smell of burned flesh permeates the little room.

The generator will purr to a halt. The physician will step forward and place his stethoscope against the steaming chest and then will pronounce Jerry Bird dead. Ventilator fans will suck out the fouled air as the guards wait for the corpse "to cool off" before they remove it from the chair. The counties now pay the State $25.00 for each prisoner transferred to death row in Huntsville, a compensation for caring for before, during, and after he meets his fate.

I ask you in the name of all that is sacred and holy, how can such a spectacle as this ever magnify the law or make it honorable or preserve the peace and dignity of the State?

And they say that Jerry Bird killed in coldblood.

Bird did not lock Victor Trammell in a cell, keep him there for weeks and months, announce ahead of time the date and time of his death, and leave the condemned man to die a thousand deaths.

Ladies and Gentlemen, you and you alone can send Jerry Bird to the electric chair. There can be no division of responsibility, you can never say that the rest overpowered you. It must be your deliberate, cool, premeditated act. It takes your vote.

Winston Churchill once said, "The approach to winning an argument is to strike for that jugular and to hit it once, hit it twice, and then really hit it for the third time—this is the way to win an argument." When you have the heavy responsibility of another citizen's life in Your hands, be it death or be it prison, can you afford to do less?

When you have said your last word and returned to your seat you will know when you have been effective. The deep silence and stillness that engulfs the courtroom will be your witness. There is no greater satisfaction for a defense attorney.

But Yeroner!

SIMPLE SIMON SAYS

Submitted by Judge Gordon Gray
Fort Worth, Texas

(From *McClure v. State*, G. Crim. App., July 14, 1982)

This denial was made several times during his examination, and from it arises appellant's second ground of error, contending the trial court should have granted a new trial on newly discovered evidence because after trial appellant came up with the cancelled check showing that payment had been made.

At one point the following warm exchange occurred:

Q. Then, on November the 16th, he paid you another hundred dollars?
A. No, sir.
Q. Yes, sir.
A. No, sir.
THE DEFENDANT: Yes, sir.
THE WITNESS: No, sir.
MR. YOUNG: We object to the Defendant making his little comments.
THE COURT: Sustained. Don't make any comments.
THE WITNESS: No, sir.

THE PERFECT INSANITY DEFENSE

Submitted by Ian Inglis
Austin, Texas

(From an Unreported Texas Court of Criminal Appeals Case—*Armstrong v. State*)

RONALD C. ARMSTRONG,

defendant herein, refusing to answer to the oath, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Wilson:

Q. Ronald, what is your name?
A. (No answer.)
Q. Ronald, do you even know who I am—I am asking, Ronald, do you know who I am?
A. (Unintelligible.)
Q. Ronald, when is the last time you talked to your attorney?
A. (Defendant sits and talks unintelligibly to himself.)
Q. Mr. Armstrong, would you please tell the jury and the Court what occurred on April 1, 1976 to you?
A. (No response.)

MR. WILSON: I pass the witness.

(WITNESS EXCUSED)

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, 314 West 11th, Suite 315, Austin, TX 78701

Some of the best legal minds

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

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

MEMBERSHIP APPLICATION (Please print or type)

Name (as recorded on Bar Card) _____

Name (as desired in Membership Directory) _____

Date of Birth _____

Street or Box No.: _____

City and Zip Code: _____

Firm Name: _____

Business Telephone: AC / _____

Date Admitted to State Bar of Texas _____ Bar Card No. _____

Admitted to Practice in: _____

Law School (Name, degree, date) _____

_____

College (Name, degree, date) _____

_____

(If student, expected date of graduation) _____

Professional Organizations in which applicant is member in good standing:

_____

_____

_____

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

_____ _____

(Date) (Signature of Applicant)

ENDORSEMENT

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

_____

(Signature of Member)

_____

Print or type name of member

Mail to:
TCDLA, Suite 315, 314 West 11th Street,
Austin, TX 78701, (512) 478-2514.

ADVANTAGES FOR REGULAR MEMBERS

- TCDLA Membership Directory—referrals to and from criminal defense lawyers in over 100 Texas cities.
- Outstanding Educational Programs—featuring recognized experts on practical aspects of defense cases. TCDLA and the State Bar annually present many seminars and courses in all parts of the state.
- TCDLA Brief Bank service.
- Publications, including the monthly *VOICE for the Defense* with its "Significant Decisions Report" of important cases decided by the court of criminal appeals and federal courts.
- Attorney General's Crime Prevention Newsletter. Summaries of latest court of criminal appeals cases available to private practitioners only through TCDLA's group subscription, included in dues.
- Organizational Voice through which criminal defense lawyers can formulate and express their position on legislation, court reform, important defense cases through amicus curiae activity.
- Discounts and Free Offerings for publications of interest to criminal defense lawyers.
- Research service available at a reasonable hourly rate; messenger service in Capitol area.

ELIGIBILITY AND DUES

Effective: January 1, 1982

Voluntary Sustaining dues (VS)	$300.00
Sustaining dues (SUS)	200.00
Dues for members in the firm of a sustaining member (SMF)	50.00
Members admitted to practice: (MEM)	
2 years or less	50.00
2 - 5 years	100.00
5 or more years	150.00

Affiliate: Persons in careers which contribute to defense of criminal cases, e.g., law professors, are elibible for affiliate membership upon approval of the application and receipt of the annual dues.

Affiliate dues (AFF)	25.00

Students: Those regularly enrolled in a law school in Texas are elibible for student membership.

Student dues (SDM)	20.00

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION