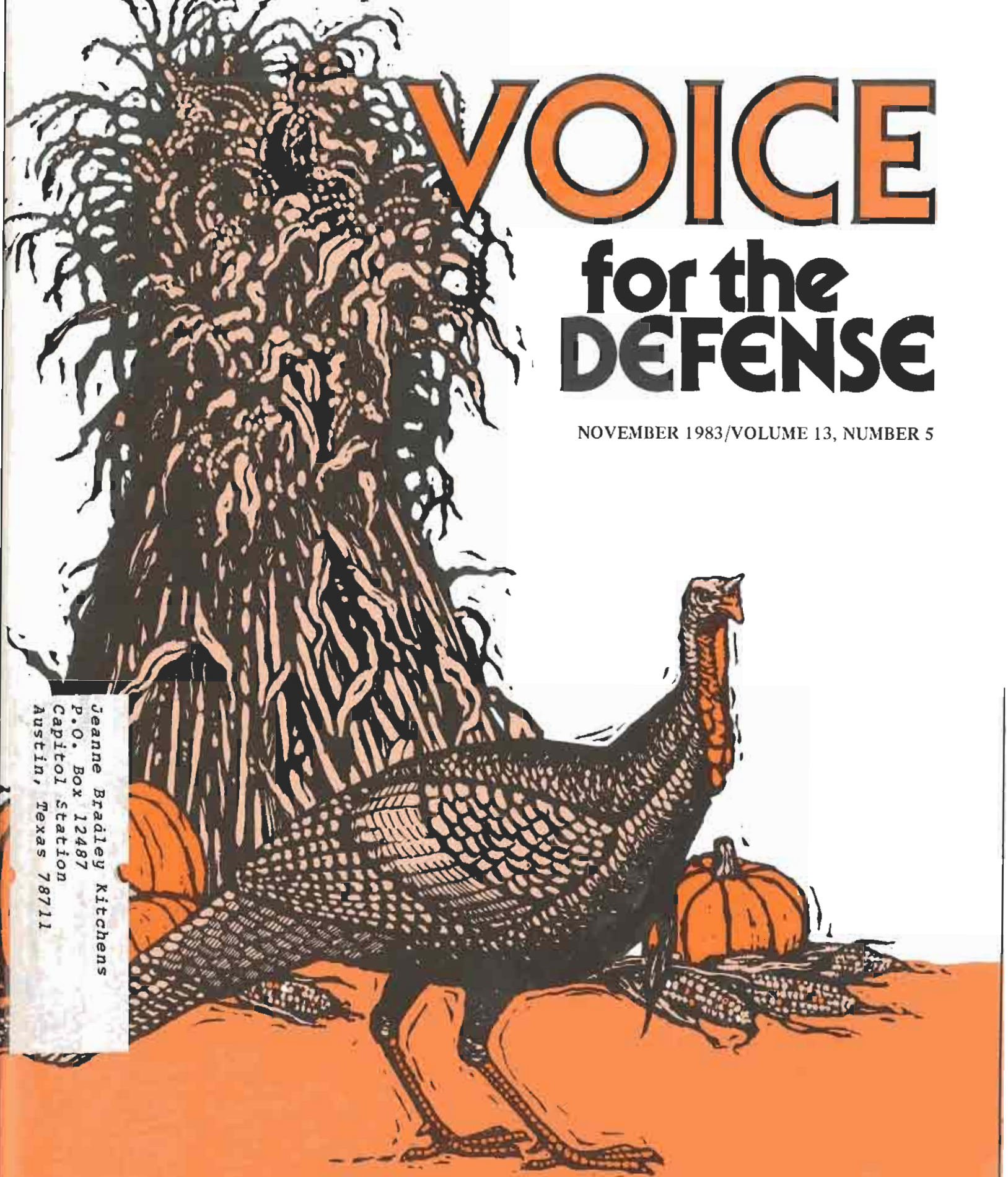

VOICE for the DEFENSE

NOVEMBER 1983/VOLUME 13, NUMBER 5

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P.O. Box 12487
Capitol Station
Austin, Texas 78711

JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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STANLEY WEINBERG

Editor's Corner

Some time back, while striding through the halls of a local police department headquarters, rushing to make sure the investigators understood that the "scumbag" the arresting officer had tossed behind bars was my client, before they convinced him it was the proper thing to confide in them, not me, my eye was caught by a headline on a paper tacked to a bulletin board.

"Different Folks," it said. Somewhere in the printed text the word "lawyers" appeared. Since that was sitting inside the sanctum sanctorum of the enforcers, I knew I needed to read it. After several quick retorts and snappy comebacks with the partner of the investigator who was assisting the chief investigator who wasn't in, and on my way out, I stopped to read what was on the bulletin board.

The writer was anonymous. At least, no name appeared anywhere to credit the author. I assume he was a policeman. What the author had to say was an apparent effort to groom up and coming police officers on the identification and tagging of the species—lawyer.

> Police officers are given an average of twelve weeks training that in theory qualifies them to shoot like Wyatt Earp, corner like A. J. Foyt, pull bad asses through car vent windows, chase burglars and robbers through dark alleys, and be able in a split second to distinguish between the real bad guy and Harry the Wino who is standing behind the dumpster taking a leak. Of course, things are put into perspective early for the rookie when his partner informs him, "The first thing you have got to learn is never to let this shit get you excited."
>
> So far, so good. Tight, terse and hits hard. Now, however, dear reader, meet the lawyer from the policeman's point of view.
>
> Lawyers spend four years learning how to escalate an issue and completely divorce it from reality. Where there are no problems, there are no fees. Thus, only through an endless chain of legal maneuver can the lawyerman make money. Certainly every man is presumed innocent until proven guilty, and it is equally as certain that each man will not get his fair trial until his attorney's fee is paid. Money is the root of most of the innocence in America. If the defendant is poor, and represented only by a court-appointed attorney, chances are he is on the way to real guilt: guilt of no fee. The lawyerman is only going to trot into the courtroom one time, plead out, throw his defendant on the mercy of the court, collect his pile of state subsidized gold, and pump his patent leather brogans back down the hall in search of a live, paying wire.
>
> Hold your breath, folks. The song is not over yet. The wind up, the pitch, and here is the conclusion.
>
> The police respond to problems and attempt to solve them. Lawyers are retained to created subterfuge and more problems. The functional gap between the two groups is obvious and insurmountable.
>
> Lawyers play the criminal justice game for fun and profit. The amount of their profit is in direct proportion to the amount of activity they can produce for themselves in the system. Thus, the gap will always remain large between those who are involved in the criminal justice system on a sliding scale of profit basis, and those who enforce the law in response to criminal activity. There may be guilty and not-guilty verdict rendered, but the lawyers are winning them all.

Color-me-red anger was the first reaction to this wonderful little tract penned by some unknown police pamphleteer, a Gorky in blue maybe unhappy when after testifying and being cross-examined in some detail by—what else—a lawyer, he discovered his slam-bang arrest and tear-em-up-and-out search violated a few basic rules listed in the constitutions of the United States and the State of Texas.

But then, I remembered the policemen who ask lawyers to represent them, and get good representation, sometimes for fees but most times not. Most of them demand and get the full benefit of those rights, too. I also remembered the good officers who understand and tell you.

So, I went and made a copy of the Bill of Rights and stuck it up on the same bulletin board. I'm sure it will do some good, somewhere, some day.

President's Report

THOMAS G. SHARPE, JR.

In the process of earning our respective livings we often take ourselves too seriously (particularly when attending Court). Something usually occurs to break our serious spells and often it is a remark by the Court. I have collected some of the Courts' comments during the last twenty years which point up the fallibility of all of us, with or without robes. Some of these short scenarios are recited, as follows:

The Court: "Marshal, will you eliminate the last two jurors before deliberations begin?"

The Court, upon hearing a noise outside the Courtroom: "Bailiff, don't just do something, stand there!"

The Court, at final arraignment: "Are you pleading not guilty because you are not guilty, or for some other reason?"

The Court: "Counsel, are you prepared to make your last argument?"

The Court, at sentencing: "You are hereby sentenced to 1000 years in the penitentiary and a two dollar fine. (Defendant faints.)

The Defense Counsel to the witness: "Would you please mumble a little louder, mam?"

The Court, upon sentencing the Defendant for the 53rd time for public drunkeness: "Sheriff, take this man behind the Courtroom and shoot him. (A form of shock probation)

Levity has a way of creeping into criminal proceedings, sometimes spontaneously and often by slips of the tongue. Hopefully, the dim setting often cast for serious criminal trials can be brightened some by use of the English language.

In one misdemeanor case the Defendant announced he was not concerned about the sentence because his lawyer had volunteered to serve it if he were found guilty.

One indigent Defendant refused appointment of counsel, claiming, "Jesus Christ is my advocate!"

The Court responded, "I still think you should have someone locally."

LETTER TO THE EDITOR

Dear Editor:

Those of us who practice criminal defense work day in and day out are accustomed to dealing with adversary type prosecutors. Many times we are met with the contradictions of "open-file policies" that aren't; prosecutors who will "let you know" and don't; and prosecutors who go a little bit beyond the "doing justice" concept and tell the witnesses how their testimony would be more than advantageously presented.

There is a breath of fresh air in Floydada, Texas. It is the District Attorney and his name is John R. (Randy) Hollums.

Rather than go through every detail that has occurred in the past year involving a criminal matter in Floyd County, suffice it to say that he is honest, open and courteous. Mr. Hollums does his job exactly as it should be done and therefore I feel it appropriate that it be brought to the attention of the Texas Criminal Defense Lawyers Association.

Thank you.

Sincerely yours,
Harry Louis Zimmermann
Dallas

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I certify that the statements made by me above are correct and complete.
(s) Nance Nelle
Executive Assistant to the President
Texas Criminal Defense Lawyers Assoc.

THE LAW AND JAMES RAY PARKER

by Brian William Wice, Houston

"The State which proposes to convict and punish an individual must produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Justice Felix Frankfurter
United States Supreme Court
Culombe v. Connecticut[1]

In the early morning hours of September 5, 1976, James Ray Parker, an ex-convict, entered the apartment of a Round Rock woman and attempted to rape her.[2] Parker was arrested within minutes of the crime and eventually indicted for the first-degree felony offense of burglary of a habitation with intent to commit rape.[3]

Given the defendant's intention to raise the insanity defense at trial, both the prosecution and the defense agreed to have Dr. Richard Coons perform a psychiatric examination of Parker to determine his competency to stand trial and his sanity at the time of the commission of the offense.[4]

After Dr. Coons determined that Parker had in fact been insane at the time of the offense,[5] the prosecution, however, without court order or notice to defense counsel, arranged to have the late Dr. John Holbrook[6] examine the defendant in the Williamson County Jail.[7] Dr. Holbrook's conclusions were contrary to Dr. Coons and defense counsel was not even aware that Dr. Holbrook had performed a psychiatric examination of Parker until several days before the trial.[8] Defense counsel did not have the opportunity to review a copy of Dr. Holbrook's report until the day of trial.[9]

When the trial commenced, Parker pled not guilty and called Dr. Coons as well as Dr. George Parker in support of his insanity defense.[10] The prosecution called Dr. Holbrook in rebuttal over defense counsel's objections that Dr. Holbrook had not been appointed by the court to examine Parker consistent with Article 46.03[11] of the Code of Criminal Procedure and that Dr. Holbrook's license to practice medicine was not on file in Williamson County.[12] The trial court overruled the objections.

After Dr. Holbrook testified that Parker was, in his estimation, sane at the time of the commission of the offense, the jury rejected the insanity defense and found Parker guilty.[13] The jury then assessed his punishment at confinement in the Texas Department of Corrections for a term of 99 years.[14]

On original submission to the Texas Court of Criminal Appeals, Parker's conviction was affirmed in January, 1980, notwithstanding his contention, among others, that the trial court erred in admitting Dr. Holbrook's testimony over his objection.[15] Writing for a unanimous court, Presiding Judge John Onion held that Dr. Holbrook's testimony was not inadmissible merely because the latter had examined Parker without having been appointed by the trial court to do so and without having notified defense counsel that such an examination was to take place.[16]

Judge Onion relied on a quartet of Court of Criminal Appeals cases [17] to reject Parker's contention and found the Fifth Circuit Court of Appeals decision in *Smith v. Estelle*[18] similarly unpersuasive. "[Because] that case dealt with psychiatric testimony from an expert who *had* been appointed by the trial court," Judge Onion wrote, "None of the holdings in that case are relevant to resolving the issue now before us."[19]

The Supreme Court of the United States, however, was to feel otherwise. Less than a year after the Court of Criminal Appeals denied rehearing in *Parker v. State*,[20] the Supreme Court delivered its opionion in what had then beeome styled *Estelle v. Smith*[21], a decision which would send shock waves through Texas' criminal justice system by eventually overturning a myriad of death sentences.

On June 29, 1981, the Supreme Court granted Parker's writ of *certiorari* and vacated the judgment of the Court of Criminal Appeals[22], remanding the case to that court for further consideration in light of *Estelle v. Smith.*[23] Of the five other Court of Criminal Appeals decisions vacated that

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[• Brian William Wice received his B.A. from the University of Houston with high honors in 1976 and his J.D. from the University of Houston Bates College of Law in 1979. He is a former law clerk to Judge Sam Houston Clinton of the Texas Court of Criminal Appeals and a former Adjunct Professor of Law at the University of Houston where he was the Assistant Director of the Legal Aid Clinic. His articles have appeared in the Texas Bar Journal, Houston Law Review, St. Mary's Law Journal, South Texas Law Journal, National Journal of Criminal Defense, Criminal Defense Magazine *and* VOICE for the Defense. *He is now a criminal defense attorney in Houston—Ed.]*

day by the Supreme Court,[24] Parker's was the only noncapital case of the lot.

The stage was thus set for the Texas Court of Criminal Appeals to take one more look at the conviction and ninety-nine (99) year prison sentence of James Ray Parker as mandated by the Supreme Court.[25]

This question of first-impression—whether the teachings of *Estelle v. Smith*[26] were applicable to a noncapital case where *ex parte* psychiatric testimony was introduced not on the issue of the defendant's future dangerousness at the penalty stage of the trial but in rebuttal to the issue of insanity at the guilt or innocence stage of the proceedings—and its resolution by the Court of Criminal Appeals is the foundation for this article.

To fully understand the import of the Court of Criminal Appeals' holding in *Parker II*,[27] however, it is first necessary to examine the Supreme Court's holding in *Estelle v. Smith*.[28] This article re-traces the path of Ernest Benjamin Smith as he fought, unsuccessfully in the state courts[29] and successfully in the federal courts,[30] to overturn his captial murder conviction and death sentence for a crime committed over a decade ago. Finally, this article examines the correctness of the Court of Criminal Appeals' decision in *Parker II*[31] while offering some thoughts on what lies ahead when James Ray Parker seeks post-conviction relief in the federal courts.

> "Some may he shocked that a convicted murderer has for the moment escaped death through what may seem to them a legal technicality. But whereas "technicalities" are often thought of as mindless and silly elevations of form over substance, the procedures denied to the Defendant in this case are basic and fundamental. They may be summed up in one word—fairness. And one need not condone the acts of this Defendant to agree that he is entitled to a fair proceeding and that he is entitled to the same opportunity to put on his evidence as is given the State."
>
> Judge Robert Porter
> United States District Court
> *Smith v. Estelle*[32]

If proprietor William Moon hadn't "reached for something," that early morning in his Scheppes grocery store in Dallas on September 23, 1973, Ernest Benjamin Smith and Howie Ray Robinson would have been just another pair of small-time armed robbers whose cases would have quickly disappeared into the system and been even quicker forgotten.[33]

What Smith said at that critical juncture of events has never fully been resolved; one prosecution witness testified that Smith said, "Watch out, Howie," but another asserted that Smith yelled, "Get him, Howie,"[34] Whatever Smith said to his partner was, however, academic, for Robinson killed Moon with a single shot to the head; Smith never fired his weapon.[35]

The pair were arrested and eventually indicted for capital murder on December 28, 1973.[36] Six weeks later, Judge R. T. Scales of the 195th district court of Dallas County, "informally" ordered then assistant district attorney Doug Mulder to arrange for Smith to be examined by psychiatrist James P. Grigson,[37] to determine whether Smith was competent to stand trial, given the State's intention to seek the death penalty.[38] On the strength of a ninety minute interview with Smith, who was never told that he was being examined for anything other than his competence to stand trial, and who cooperated fully, Dr. Grigson concluded that Smith was, in fact, competent to stand trial.[39] Filing no formal report,[40] Dr. Grigson did write a letter to Judge Scales informing him of his conclusions, a communication not discovered by Smith's lawyers until after jury selection in his case had already begun on March 11, 1974.[41] Inexplicably, they had never been informed of Dr. Grigson's appointment and subsequent examination of their client.[42]

Smith was granted a severance from co-defendant Robinson and convicted of capital murder.[43] During the penalty hearing, the State made the somewhat unusual move of resting "subject to reopening," and Smith then called his stepmother, aunt, and the owner of the weapon he had carried during the robbery-killing who testified that Smith's pistol was incapable of being fired.[44]

The State then called Dr. Grigson whose name did not appear on its witness list, a fact which would have ostensibly precluded him from testifying under an earlier order of the court.[45] But the prosecution advanced the contention—accepted by the trial court and on direct appeal by the Texas Court of Criminal Appeals—that Dr. Grigson's "appearance as a witness in rebuttal did not surprise Smith," and therefore did not offend the trial court's earlier order, permitting only those witnesses to testify whose names had been on the State's witness list.[46]

Dr. Grigson told the jury that Smith was a very severe sociopath, incapable of feeling either guilt or remorse and who, if given the opportunity, would commit "criminal acts of violence that would constitute a threat to society."[47] On the strength of Dr. Grigson's prognosis, the jury answered the three statutory interrogatories in the affirmative[48] and the court sentenced Smith to die in the electric chair.[49] The Texas Court of Criminal Appeals affirmed Smith's conviction and death sentence on July 14, 1976[50] and the Supreme Court of the United States, which had but a week earlier upheld the constitutionality of Texas' death penalty statute,[51] denied *certiorari* over the dissent of three justices.

Smith's execution date was set for April 26, 1977, one week after the Texas Court of Criminal Appeals denied his application for a writ of habeas corpus.[53] Federal district Judge Robert Porter, however, ordered Smith's execution stayed on April 22, 1977, and eight months later, Judge Porter filed his memorandum opinion setting aside Smith's death sentence.[54]

Judge Porter held that the admission of Dr. Grigson's testimony offended the Fifth Amendment in that Smith had not been apprised of his *Miranda*[55] rights prior to pre-trial examination.[56] Moreover, Smith's Sixth Amendment right to the effective assistance of counsel had been abridged by the State in not having advised defense counsel of either Dr. Grigson's appointment on their intention to call him as a witness at trial.[57]

The State appealed and a panel of the Fifth Circuit Court of Appeals affirmed Judge Porter's finding that Texas had in fact violated Smith's Fifth, Sixth and Fourteenth Amendment rights, both in the way it introduced Dr. Grigson's testimony and the way it procured it.[58] The court held that Smith's death sentence could not stand because of the prosecution's "surprise" use of Dr. Grigson as a witness, the consequences of which the court described as

"devastating,"[59] and which prevented Smith's lawyers from effectively challenging the State's psychiatric testimony.[60]

Rejecting the argument used successfully by the prosecution in the Texas courts that Dr. Grigson was a rebuttal witness and therefore not subject to the trial court's order on the listing of witnesses,[61] the Fifth Circuit condemned the prosecution's actions at trial via their surprise use of Dr. Grigson as "irresponsible conduct . . . lacking even the meager benefits some might credit to informality."[62] The court went on to hold that consistent with the Fifth and Sixth Amendments:

> Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent, was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination.[63]

The Supreme Court of the United States granted the State's petition for *certiorari*[64] and Chief Justice Warren E. Burger, writing for a unanimous court,[65] concluded that the admission of Dr. Grigson's testimony violated Smith's Fifth Amendment privilege against compelled self-incrimination because he was not advised before the examination that he had a right to remain silent and that any statement he made could be used against him at his death penalty sentencing hearing.[66]

The court also held that Smith's Sixth Amendment right to the assistance of counsel had been violated as well by the introduction of Dr. Grigson's testimony since the right to counsel had clearly attached at the time of the examination,[67] which proved to be a "critical stage" of the proceedings.[68] As the court pointed out:

> It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[69]

The failure to apprise defense counsel in advance that Dr. Grigson's interview would encompass the issue of future dangerousness, reasoned Chief Justice Burger, denied Smith the assistance of counsel in making the significant decision of whether to submit to the examination and to what end Dr. Grigson's findings could be employed.[70]

The Supreme Court's holding in *Estelle v. Smith*[71] paved the way for the setting aside of scores of death sentences throughout the State of Texas although it did not affect the validity of the underlying capital murder convictions.[72] As state law did not provide for the re-trying of the penalty phase of these cases alone,[73] the State sought and obtained gubernatorial commutation resulting in the imposition of life sentences in a substantial number of such cases over the dissent of some members of the Court of Criminal Appeals.[74]

One of the first beneficiaries of this policy was Ernest Benjamin Smith. Howie Ray Robinson, however, did even better. Sentenced to die on no less than three different occasions, he succeeded in overturning each of these death sentences[75] and eventually pled guilty to murder, receiving fifty years in prison for his efforts, some forty-nine years less than James Ray Parker.

> The lengths to which this Court will go for the sole purpose of affirming convictions astounds and embarrasses me. Resort is had to the minutest procedural technicalities. And even-handed justice under law is at best a fortuitous by-product.
>
> Judge Truman Roberts
> Texas Court of Criminal Appeals
> *Coleman v. State* 77

For the second time in three years, the Court of Criminal Appeals still refused to accept the constitutional arguments that Dr. Holbrook's testimony violated James Ray Parker's Fifth, and Sixth Amendment rights.[78] And as they have so often in the past, the court premised its holding on procedural grounds, preferring to find a waiver of constitutional error rather than meeting the substantive issues head-on.

Again, speaking through its presiding judge, the court wasted little time in disposing of Parker's initial contention that the admission of Dr. Holbrook's testimony violated his Fifth Amendment right to be free from compelled self-incrimination.[79] After noting that defense counsel did not raise the Fifth Amendment objection either at trial or on original submission,[80] Judge Onion proceeded to a summary discussion of that case law holding that the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's Fifth Amendment privilege in the same manner as would the latter's election to testify at trial.[81]

That the case he cited from, *Battie v. Estelle*,[82] was not only a Fifth Circuit case but a Fifth Circuit case which reversed a Court of Criminal Appeals decision,[83] is of no small irony. Judge Onion also relied on another Fifth Circuit case, *United States v. Cohen*,[84] to dispose of Parker's Fifth Amendment contention, noting that:

> *Cohen*, like virtually every other federal and state court addressing this issue, concluded that any burden imposed on the defense by this result [the waiver of accused's Fifth Amendment rights] is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony *without its own psychiatric examination of the accused* and by the need to prevent fradulent mental defenses.

Regardless of the fact that this rationale is correct in its application in most cases, it ignores the fact that in Parker's case, the State was not denied the opportunity to have its own expert examine the accused; the prosecution, after all, had agreed with the defense to have Dr. Coons examine the defendant[85] and ostensibly be bound by his findings. It was only after Dr. Coons' findings were contrary to the wishes of the prosecution that the latter resorted to cloak and dagger tactics to have Dr. Holbrook—whose psychiatric conclusions would almost assuredly be tailored to meet the prosecution's needs[87]—examine Parker in the Williamson County Jail.[88]

The court's decision, therefore, not only sanctioned the right of the State to agree to have one psychiatrist examine the accused only to turn around and shop for another more favorable psychiatric report, but to do so without notice to defense counsel that such an examination was to take place.

Turning to Parker's Sixth Amendment contention, the court did recognize that Parker's right to counsel had clearly attached at the time Dr. Holbrook exam-

(continued on p. 25)

SIGNIFICANT DECISIONS REPORT

EDITOR: Kerry P. FitzGerald
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ELDON ROCHESTER, No. 281-83, Opinion on Appellant's PDR, Aff'd, Judge Odom, 11/16/83.

DEFENSE WITNESS PROPERLY CROSS EXAMINED BY USE OF "HAVE YOU HEARD" QUESTIONS: Defense witness testified to D's reputation in community for truth and veracity as being good. On cross examination, state asked whether witness had heard that D had been arrested at various times for "swindle", "theft by false pretext", for "obtaining money under false pretenses", and for "swindling", all of which were answered in the negative. Court held that each of the matters was directly related to D's truth and veracity and was not subject to the objection of lack of inconsistency with that specific character trait. Livingston, 589 S.W.2d 395, 402.

JOSEPH DOYLE, No. 63,771, Rev'd, Per Curiam, En Banc, 11/16/83.

MOTION TO QUASH SHOULD HAVE BEEN GRANTED: D was convicted of threatening to kill Judge Dan Gibbs in retaliation for Gibbs' service as a public servant. Apparently all of this arose because D's wife filed for divorce and the divorce court refused to bench warrant D from prison to attend the proceedings. The indictment read in part that the defendant did:

> "Intentionally and knowingly threaten to harm another person, namely: Dan Gibbs, by an unlawful act in retaliation for and on account of the service of the said Dan Gibbs as a public servant, in that the said defendant threatened to kill the said Dan Gibbs on account of the services of the said Dan Gibbs as a judge in a prior lawsuit in which the defendant was a party."

The court held that in view of the defendant's timely Motion To Quash, the indictment was defective in that it did not specify the manner or means whereby the offense was committed. Appellant's alleged threat could have been conveyed in a number of ways, including: face to face in person, over the phone directly, through a third party, or through the mail. The evidence showed that the threat against Judge Gibbs was made to a police officer but nothing in the indictment suggested as much. The Motion To Quash alleged that the indictment failed to state to whom the threat against Judge Gibbs was made or how it was made. The court emphasized that the indictment was not fundamentally defective as it tracked the statute (Sec. 36.06(a) P.C.). Appellant's Motion To Quash entitled him to the allegation of fact sufficient to bar a subsequent prosectuion for the same offense and sufficient to give him precise notice of the offense with which he was charged. Cruise, 587 S.W.2d 403 (robbery by causing bodily injury under Sec. 29.02(a)(1)

indictment failed to allege the manner and means by which the defendant caused bodily injury to the complainant); Jeffers, 646 S.W.2d 185 (gambling promotion: indictment failed to specify the manner or means whereby the defendant received a bet and offer to bet).

JOHNNY FANCHER, No. 68,573, Aff'd, Judge Miller, En Banc, 11/16/83.

TESTIMONY OF DEFENSE WITNESS PROPERLY EXCLUDED: D argued that the court denied Appellant the right to place the testimony of William Habern, former staff counsel at TDC and currently an attorney in private practice specializing in correctional law, before the jury at the punishment phase of the trial. His testimony concerned the lack of treatment facilities at TDC. D argued this testimony would have had a direct bearing on D's eligibility for probation and on mitigation of punishment.

The court held that the determination of the relevancy of evidence lies within the sound discretion of the trial court. Williams, 535 S.W.2d 637. The judicially created factors which can be introduced in mitigation should have a relationship to the circumstances of the offense itself or to the defendant himself before or at the time of the offense. The factors which arose after the offense and independantly of the defendant are not admissible in mitigation of punishment. Stiehl, 585 S.W.2d 716.

MICHAEL JOHNSON, No. 62,417, Delivery of heroin, Aff'd, Judge W. C. Davis, En Banc, 11/9/83.

UNRESPONSIVE ANSWER OF NARCOTICS OFFICER WHICH INJECTED EXTRANEOUS OFFENSE INTO CASE WAS HARMLESS ERROR: An experienced undercover narcotics officer testified that D contacted him regarding the sale of heroin, discussed a meeting place for the purchase and then the following occurred:

> "Q. And did he (defendant) tell you that he had a meeting place which he preferred?
> A. We both agreed that the same place we had made deals before would be fine with him."

Defense counsel objected:

> "Please, Your Honor, at this time I would object to the question and answer given. I would move the Court to instruct the jury to disregard the question and answer as given for the reason that the answer refers to extraneous offenses, and the answer as given was given for the purpose and would have the result of inflaming prejudice in the minds of the jurors. And at this time, Your Honor, I will move for a mistrial."

The court denied the Motion For Mistrial. The majority opinion was somewhat critical in that the defendant failed to obtain a ruling on the objection. The court did, however, address the point. The dissenting opinion applauded the defense counsel for not only making the proper objection and in reality receiving an adverse ruling, but obtaining a signed order subsequent to this event from the trial judge which stated that the court knew the basis of the objection and overruled the objection and Motion For Mistrial. To the credit of the court, at least the court did not consider the point waived on appeal.

The court noted the uncontradicted evidence of Appellant's guilt, and held the error harmless as to D's guilt.

The second and equally important question was "whether the unresponsive answer might have contributed to the jury's assessment of punishment at 99 years confinement". The court, pointing to the defendant's prior criminal record (burglary for which he received probation which was then revoked; a motion to revoke probation based upon the defendant's having been arrested for carrying a pistol and possession of marijuana) and testimony of reputation witnesses presented by the state and the total lack of any testimony of a positive nature presented in behalf of the Appellant, concluded that the error as to punishment was also harmless. Four judges (Teague, Onion, Clinton, and Miller) emphasized the harmfulness of the answer (the answer led to only one inference--that the undercover officer had previously agreed to purchase from Appellant controlled substances and in particular heroin); that an experienced undercover narcotic officer should never have given such an unresponsive answer (Richardson, 379 S.W.2d 913); that there was no legitimate legal reason for the admission of such evidence; and that the error was not harmless as to punishment as D received the maximum term and it was quite conceivable that the jury could have been swayed by the suggestion that the defendant had frequently in the past dealt in the delivery of the elicit controlled substance heroin.

DANIEL BURKHOLDER, No. 63,901, Assault, Rev'd/Acquittal entered, Judge Tom Davis, En Banc, 11/9/83.

ASSAULT CONVICTION REVERSED AS THERE WAS NO EVIDENCE DEFENDANT CAUSED BODILY INJURY TO ANOTHER AS REQUIRED BY STATUTE: State's evidence showed an argument between C/W and D, with D firing a shot which whistled by the C/W's ear. No bodily injury shown. D was tried for aggravated assault. T/C found D guilty of assault. Court held that as evidence showed D did not cause bodily injury to another as required for a conviction for Class A misdemeanor assault (Section 22.01), the evidence was insufficient and a judgment of acquittal must be entered. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The court rejected the state's argument that the record obviously showed the T/C found it in the interest of justice to enter a judgment of guilt and punish for Class A misdemeanor under Sec. 12.44. The court first noted that the procedure followed in applying Sec. 12.44 as to first find the defendant guilty of the felony and then set aside the verdict and convict and punish as a Class A misdemeanor. Briones, 595 S.W.2d 546; Mahome, 542 S.W.2d 177; Trippel, 535 S.W.2d 178. In this case, however, the D was convicted of a Class A misdemeanor without a prior judgment or verdict of guilty of a felony, as required by Sec. 12.44. In addition there is nothing to suggest that the T/C found that a conviction for a lesser offense "would best serve the ends of justice". Since the proper procedure was not followed and since there is nothing in the record to indicate that the court was operating under Sec. 12.44, the court could not adopt the state's position.

Judges Teague and McCormick dissented, and would hold that the evidence was sufficient to convict the D of committing the Class C misdemeanor offense of assault and the judgment should therefore be reformed to so reflect.

BREWER AND TAYLOR, Nos. 65,751 and 65,752, Commercial obscenity, Rev'd, Judge Onion, En Banc, 11/9/83.

COURT'S CHARGE DEFECTIVE: Court held that the Ds properly objected to the charge on the grounds that the court had improperly stated the applicable geographical area for determining contemporary community, that the geographical area should be the state of Texas rather than limited to Dallas County. LaRue, 637 S.W.2d 934.

LINDA LOFTIN, No. 68,327, Murder, Aff'd, Judge Miller, En Banc, 11/9/83.

T/C DID NOT ERR IN FAILING TO ORDER, SUA SPONTE, A HEARING ON THE ISSUE OF DEFENDANT'S COMPETENCY TO STAND TRIAL: During a trial before the court, state's evidence showed that the D shot the victim, a person she apparently barely knew, after the victim drove into a parking lot of the apartment complex in which both resided in separate apartments. The D waited for the police and admitted doing the shooting.

Appellant offered the testimony of an attorney who had interviewed her several times, to describe harassment at her place of employment (a school) and that the principal had eventually hired the victim to move into her apartment complex to harass her, etc; a private investigator hired by the Appellant to whom she had described her harassment at work, the plot to move the victim into the complex, etc; and a doctor who said the D was suffering from a severe mental illness with the result that her psychological functioning had deteriorated to the point that she developed a "dellusional system" and believed that there were various conspiracies against her, the result of which was the commission of this offense. In rebuttal the state showed that the D was the one who approached and harassed the victim and the victim attempted to avoid the D. Her employer said that the D was a good dependable employee and no one wanted her job. A jail employee testified the D did not cause problems and did not act out of the ordinary and never complained of her treatment.

All the testimony showed the D, in spite of her alleged paranoia, communicated articulately, coherently, and responsively with those around her; held down a responsible job at the time of the offense; and was sufficiently aware of the consequences of her action in shooting the victim that she immediately recommended that the police be called. The psychiatric report submitted to the court showed the D competent but insane at the time of the offense. Trial counsel did not complain of any inability to communicate with the D and her courtroom appearance and demeanor was not shown to be out of the ordinary.

Judge Miller then carefully recites the applicable legal principles:

> "The test of legal competence to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. Art. 46.02, Sec. 1 C.C.P.; Dusky v. United States, 362 U.S. 402 (1960); Thomas v. State, 562 S.W.2d 240.
>
> Art. 46.02, Sec. 2(b) C.C.P., provides: 'If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.' (Evidence added).

Thus, a trial court is required to sue sponte hold a competency hearing when evidence coming to the court's attention raises a bona fide or reasonable doubt as to Appellant's competency.[1] Mata v. State, 632 S.W.2d 355; Morales v. State, 587 S.W.2d 418; Ferguson v. State, 579 S.W.2d 2. Evidence raising a bona fide doubt is that evidence that produces a real doubt in the judge's mind as to the defendant's present ability to consult with his lawyer with a reasonable degree of rational understanding or as to his present ability to understand the proceedings against him. Mata, supra.

In Mata, supra at 359, Judge McCormick stated:

'Generally, to raise the issue, there must be evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation. Porter v. State, 623 S.W.2d 374.' (Emphasis added).

[1]We recognize that in Sisco v. State, 599 S.W.2d 607 Judge Clinton inferentially questioned the validity of the bona fide doubt standard. We do not examine that issue in this opinion for two reasons: (1) the issue was not raised by Appellant in his brief; (2) as will be seen infra, even under the Sisco standard the result would be the same, i.e., putting aside all competing indications of competency, there is no evidence that would rationally lead to a conclusion of incompetency."

The court could not conclude that evidence of the defendant's present incompetence became sufficiently manifest during the trial on the merits that the trial judge was required, sua sponte, to halt the proceedings and conduct a separate hearing on the defendant's competency to stand trial. Eastham, 599 S.W.2d 624; Hawkins, 628 S.W.2d 71.

DONALD WALLACE, No. 68,434, Attempted capital murder, Rev'd, Judge Campbell, En Banc, 11/9/83.

ADMISSION OF EVIDENCE AS TO EXTRANEOUS OFFENSES REVERSIBLE ERROR: State's evidence showed that D was stopped for a traffic offense, then fled and a high speed chase ensued with the D and his passengers wrecking out in a ditch. The D exited the car, pointed a pistol at the officer, made a lurching movement, and then ran. When the officer fired in the air the D stopped, turned and threw his gun at the officer. The unspent round under the firing pin of the D's pistol had a small indentation which showed it had been struck by the firing pin of the pistol. The court held the evidence sufficient and noted that the failure of the pistol to fire did not show a lack of intent to kill on the part of the D.

The state then introduced a number of items into evidence which constituted marijuana and vials of cocaine and methamphetamine which were found in a paper bag in the trunk of the vehicle at the time it was searched at the scene, all over objections.

Evidence of extraneous offenses will not be received into evidence unless and until there is a clear showing that: (1) the evidence of the extraneous offense is material (2) the accused participated in the extraneous transaction being offered into evidence, and (3) the relevancy to a material issue outweighs its inflammatory or prejudicial potential. The court held that the marijuana and controlled substances had no relevance to any issue in this case nor did it show motive for the D's attempt to murder the officer,

particularly as there was no showing that the D had care, custody, and control of the substances. McCann, 606 S.W.2d 897; Thompson, 615 S.W.2d 760. Obviously the evidence was extremely prejudicial. Sanders, 604 S.W.2d 108. By footnote, Judge Campbell noted that the evidence in the case showed the D had two passengers in the car, the car had been stolen and the marijuana and vials were found in a paper bag in the trunk of the car.

EX PARTE PAUL AVILA, No. 69,175, Relief granted, Judge Campbell, En Banc, 11/9/83.

CONTEMPT OF COURT ORDER ENTERED AGAINST ATTORNEY SET ASIDE: Retained counsel failed to appear for trial and was summarily held in contempt of court. The offended judge entered an order for contempt and issued an arrest warrant. The attorney appeared three days later and was given five minutes to in affect say his last words and then was held in contempt. Subsequently a second judge held a "hearing", based upon the previously issued order of contempt and then again found the attorney guilty of contempt.

A divided court held that the attorney was denied due process as required by Taylor v. Hayes, 418 U.S. 488, 98 S.Ct. 2697, 41 L.Ed.2d 897, in that before the offended judge, the attorney was not given any show cause order nor was he informed of the charges against him but was only summarily given a chance to say a few words; and at the hearing before the second judge again the attorney was not served with any type of notice of show cause outlining the charges against him.

> "We observe that a common sense reading of Art. 1911a, Sec. 2(c) VACS requires, in essence, a trial de novo once its provisions have been invoked by a contemnor. That is, once the offended judge has made a determination that an officer of the court is in contempt of court, and the contemnor invokes his mandatory right to a hearing before another judge, the statute requires that the guilt or innocence of the contemnor shall be determined by a judge other than the offended judge."

See Ex Parte Pink, 645 S.W.2d 262; Ex Parte Martin, 656 S.W.2d 443.

NOBLE GINTHER, No. 68,737, DWI, Rev'd, Judge W. C. Davis, En Banc, 11/16/83.

T/C ABUSED DISCRETION IN SUMMARILY DENYING ADMISSIBLITY OF EXPERIMENT: D sought to introduce evidence of an experiment conducted with a breathalyzer machine to show that at the time of his arrest and at the time he was actually driving, the alcohol had not yet entered his bloodstream, and that at the time the breathalyzer test was taken by the police, about 50 minutes after the arrest, the alcohol gave a higher reading then would have been the case at the time of his arrest. D was measured at .11% of the breathalyzer by the police 50 minutes after his arrest. He claims that the experiment shows that at the time he was driving and at the time of his arrest he would have measured .043% on a breathalyzer. The statutory presumption of intoxication is triggered by reading of .10% on the machine.

During trial D attempted to develop evidence of the experiment, but the T/C sustained the state's general objections to all questions and the court did not allow the D to offer any facts concerning the experiment until after both sides had rested. The D then made a bill of exception. The T/C did not hear any facts pertaining to the possible similarity of dissimilarity of the proposed experiment to the offense charged before ruling it inadmissible.

The court did not hold that the D's experiment should have been admitted because it did not reach that point. Instead, the court held that the T/C must at least have some knowledge of the circumstances of the experiment in order to properly exercise the necessary discretion to admit or exclude the experiment. Because of the clear failure of the T/C to base the ruling excluding the experiment on any facts or knowledge of the circumstances of the experiment, the court reversed and remanded to the T/C.

The court recognized that evidence in the form of out of court experiments is admissible in the discretion of the T/C if the experiment was made under conditions similar to the event to which the experiment relates. The experiment need not be made under exactly the same conditions; the dissimilarity goes to the weight and not to the admissibility of the evidence. Aliff, 627 S.W.2d 166. The court emphasized, however, that the T/C does not have absolute discretion even in admitting or excluding an experiment. The T/C should weigh the similarities, the relevance of the experiment and even the purpose of the experiment in making a decision whether to admit or exclude evidence of it. Both the state and the defendant should receive equal consideration. If the T/C is not free to exercise absolute discretion in excluding the experiment about which it has facts and knowledge, the T/C is not free to exclude an experiment of which it has absolutely no knowledge of the circumstances. Hodge, 131 S.W. 577; Clark, 40 S.W. 992. David Berg and Philip Zelikow, counsel on this appeal, and I am advised also counsel at trial, obviously did an outstanding job in utilizing a unique approach in defense of Mr. Ginther.

THOMAS GLENN, No. 179-83, Opinion on D's PDR, Rev'd, Judge Odom, En Banc, 11/9/83.

FUNDAMENTALLY DEFECTIVE COURT'S CHARGE: The burglary of a habitation charge submitted to the jury omitted any mention of any culpable mental state, an essential element of the offense and thus the charge was fundamentally defective. West, 567 S.W.2d 515.

RICHARD ROSEBURY, No. 806-82, Possession of marihuana, Aff'd, Judge Odom, En Banc.

SPEEDY TRIAL ACT QUESTION RESOLVED BY COURT'S INTERPRETATION OF THE DEFENDANT'S WAIVER OF HIS RIGHTS UNDER THE SPEEDY TRIAL ACT: On 2/6/79 the D was arrested after delivering 5 pounds of marihuana to undercover officers. Two weeks later he was indicted for delivery and possession of a controlled substance, namely tetrahydrocannabinols. D filed a waiver of speedy trial and then pled guilty and was sentenced to prison and appealed. D was granted a new trial after Few, 588 S.W.2d 578. D was re-indicted for possession of tetrahydrocannabinol other than marihuana on 1/7/80 and filed a waiver of speedy trial on 1/18/80. On 8/4/80 the state announced ready and while assembling witnesses the prosecutor learned from the chemist that the controlled substance was marihuana. On 8/18/80 D was again re-indicted for possession of marihuana in a useable quantity of more than four ounces. No waiver of a speedy trial was filed. The case was thereafter reset a number of times by agreement and then D filed a motion to dismiss for violation of the Speedy Trial Act which was brought to the court's attention 1/19/81 and overruled at that time.

On this appeal, the D complains only of the time period before 8/18/80, the date of the third indictment, and argues that the state could not possibly have been ready for trial before that date because the state had not taken steps to prosecute him for possession of marihuana even though a laboratory report over six months earlier showed the substance possessed was marihuana. The court stated the question as whether his waivers of a

speedy trial filed under the first two indictments constituted waivers for purposes of the marihuana prosecution. The D relied upon Richardson, 629 S.W.2d 164 (Tex. App. -- Dallas, 1982) which held that an announcement of ready in one case did not constitute an announcement of ready in a second indictment for a different offense arising out of the same transaction. The court differentiated the cases, and emphasized that in this case it was the scope of the effectiveness of the defendant's waiver which was important. The waiver basically said that the D knowingly and voluntarily waived his rights to a speedy trial "within 120 days from the commencement of this case . . . and further waived my right for dismissal or discharge if the state is not ready for trial within 120 days of the commencement of this case . . .". The court emphasized that the waiver clearly applied to the case, not the transaction and therefore the issue was whether the indictments constitute prosecutions for a single case or for separate cases arising out of the same transaction. The court held that the D's waiver of his rights under the Speedy Trial Act applied to the case, which included the third indictment. The facts of this case reveal only a single offense: only a single substance was possessed, a substance originally alleged to be tetrahydrocannabinol and subsequently found to be and correctly alleged to be marihuana. Under the facts there was only one case: a single offense was committed and a single offense was alleged, although at first erroneously pleaded. Had the D possessed both substances a different issue would be presented.

Judge Odom authorized the majority opinion. Judges McCormick and Miller concurred in the result; Judge Teague did not participate. Judge Clinton concurred in a separate opinion and said, among other things, that the central element which should be the focal point is "a criminal action" as used by the Speedy Trial Act, and not "same case", "single case", and "separate cases". Judge Clinton refers to the Speedy Trial Act, Sec. 2(b), which pertains to the effect of an order granting a new trial.

Because of the construction placed upon the D's waiver of the Speedy Trial Act by those members of the court who joined in the majority opinion's reasoning, and the lengthy concurring opinion by Judge Clinton, the Rosebury case is recommended for all of us constantly engaged in Speedy Trial Act questions.

KENNETH STEPHENS, No. 63,722, Aggravated robbery, Rev'd, Judge W. C. David, En Banc.

DOUBLE ERROR--IMPROPER IMPEACHMENT OF DEFENSE WITNESS WHO WAS NOT A REPUTATION WITNESS: D's wife testified on direct that her husband loved her children, supported the family, held a steady job, and participated on a track team, etc. and was involved in the community but did not testify as to D's reputation.

First, the witness was not a reputation witness. Ward, 591 S.W.2d 810. And therefore she should not have been treated as a reputation witness on cross examination.

D's wife was asked "did you know that Kenneth Stephens, the defendant in this case, in 1969 was convicted of the offense of theft . . . the felony offense of theft of edible meat". The proper objection was made, as to the form of the question because it stated the incident as a fact (i.e., did you know) and as it was improper impeachment as the witness was not a reputation or character witness.

The rule is that when cross examining a reputation witness "the question (is to) be phrased 'have you heard' that the defendant committed a certain act? If the question is phrased 'do you know' or if it is phrased in such a way as to imply that the act

was actually committed, then the question is improper". Brown, 477 S.W.2d 617; DeGrate, 518 S.W.2d 821; Jones, 479 S.W.2d 307.

The court held that the overruling of the D's objections was reversible error, citing Nixon, No. 68,552 (7/13/82); Jewell, 593 S.W.2d 314; White, 590 S.W.2d 936; Washington, 590 S.W.2d 493.

The state introduced a new twist by arguing that the cross examination was proper as the state was simply introducing D's prior conviction through the defendant's wife's testimony. The court replied that it is untenable to suggest that a hearsay answer to a "do you know" question, doubly so when the witness indicates that she does not really know, constitutes evidence of a final conviction under Art. 37.07(3)(a). Even if the cross examination was performed in order to introduce the prior conviction, the testimony of this witness was wholly insufficient and improper to prove a prior final conviction for the purposes of Art. 37.07(3)(a). Morgan v. State, 515 S.W.2d 278.

CHARLES EVANS, No. 485-82, Opinion on D's PDR, Rev'd, Judge Tom Davis, En Banc.

USE OF D'S CONFESSION VIOLATED FIFTH AND FOURTEENTH AMENDMENTS TO US CONST. AS REQUEST FOR COUNSEL IGNORED BY POLICE: D was convicted of murdering a jewelry store employee on 6/29. D was arrested on July 6 and taken to a magistrate on July 7 and then interrogated by detectives after being warned of his rights. At 10 a.m. he was told he would be placed in a lineup and allowed to use the phone. D was told his accomplice, X, had given a statement implicating D in the murder. Prior to the lineup, D noticed X and X's attorney, A. X was scheduled to be placed in a lineup. D was told he had the right to an attorney at his lineup so D stated that A would be representing him. D did not limit representation to the lineup. The police told D that that would not be possible since A represented X and suggested D get someone else. The police testified that D seemed satisfied with that. The police conceeded that D did not waive right to counsel at the lineup and the lineup sheet reflected the same, as well as A's name as attorney. A never said he would not represent D, and A was present during D's lineup which occurred at 10:30 a.m. After the lineup D was taken immediately back to the interrogation room, again warned of his rights and told that one witness had picked his picture from a photo spread and another had identified him in the lineup. D was not told that two witnesses tentatively identified someone else at the lineup or that the witness who identified him could not place him inside the jewelry store where the murder occurred. D was allowed to talk briefly to his girlfriend and then D gave an oral statement to the police confessing to the shooting, which confession was reduced to writing.

The court rejected the state's position that D only invoked his Sixth Amendment right to counsel at the lineup and not his distinct Fifth Amendment right, thus avoiding Edwards v. Arizona, 451 U.S. 477 (1981). Here the lineup itself was part of the entire custodial interrogation process. Once the custodial interrogation has begun, if the accused requests an attorney at any stage of the process, there can be no questioning in the attorney's absence unless the accused himself initiates further communications. Once an attorney is requested interrogation must cease until the attorney is provided or the accused initiates further conversation. In this case, this means that after the lineup was completed the D should have been returned to his cell and not questioned any further until A or another attorney was there to represent him. The court distinguished Kelly, 621 S.W.2d 176 (the accused never requested the presence of an attorney; an officer merely overheard D's mother try to contact an attorney by phone) and Griffin, No. 68,924 (5/25/83) (D spontaneously withdrew his request to speak with counsel before he was reinterrogated; the initial request to speak with an attorney was honored by police). In this case use of D's confession violated Miranda v. Arizona and Edwards v. Arizona.

EARL RANDALL, JR., No. 66,813, 66,814, Rev'd Judge Miller, En Banc, 9/14/83.

SEARCH OF D'S VEHICLE ILLEGAL AS D'S ARREST WAS UNLAWFUL UNDER ARTICLE 14.04 C.C.P.: On March 24 witness X, unknown to Officer Y, told the officer that he saw an attempted burglary of a building on March 22, saw a pickup truck drive through the glass door of a store on Westheimer in Houston, and that when the witness drove his vehicle toward the truck, the truck fled. The witness got the license number and a brief description of the driver as a white male, with medium type dark hair, and a beard. Witness X had no prior criminal record. The license number belonged to a pickup truck registered to the D who was on probation for burglary of a building. The officer obtained info that the D had committed a burglary by driving a vehicle through a glass door of his store. For the next several days the officer drove by D's house but saw no pickup; on March 26 the officer issued a pickup order for D's truck and occupants for investigation of burglary. At no time did the officer request or seek an arrest or search warrant. On March 27 two patrol officers were given a teletype of this pickup order and because D's home was in their district they drove by several times. The third time they saw the truck in the driveway. After telephoning Officer Y concerning the incident, they were ordered to watch the truck and if it moved stop it. The officers waited an hour and when D got into the truck and drove off, the officers pulled it to the side of the road. At this time D made a leaning forward type motion, then exited the truck and walked to the rear where his license was requested. The officers immediately told D he was being arrested for questioning of a burglary. D was handcuffed and the officers search the vehicle and found two bags of marijuana under the seat. Later at the police garage an inventory search yielded four more bags of marijuana in a paper sack behind the driver's seat.

A police officer should always obtain an arrest warrant when possible. Hogan, 631 S.W.2d 159. Chapter 14 of the Code of Criminal Procedure describes those limited circumstances where an arrest without a warrant is authorized. Under Art. 14.04 C.C.P. a showing that the offender is about to escape is indispensible to support a warrantless arrest. King, 631 S.W.2d 486. Under Art. 14.04 C.C.P., where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed and that the offender is about to escape so that there is no time to procure a warrant, such peace officer may without warrant pursue and arrest the accused.

In this case the court could not conclude from the record that the D was about to escape or that it was not possible to secure an arrest warrant, if indeed there was probable cause to arrest the D for burglary. The court noted that the officer made no attempt to secure either an arrest or a search warrant and gave no reason for his failure to do so; and that the alleged burglary occurred some five days prior to D's arrest. There was no evidence that the D was about to escape. Nor was there a temporary detention in this case as the D was immediately arrested for investigation of burglary. The search cannot be justified as a lawful inventory search, as if the officers were not authorized to arrest D, they were not authorized to impound and inventory D's automobile. For an inventory to be legal, the impoundment must be lawful. S. Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

PAUL HERRERA, No. 07-82-0157-CR (Amarillo) Voluntary Manslaughter conviction reversed, Judge Boyd, Panel Opinion, 7/20/83

JURY MISCONDUCT DURING VOIR DIRE: No jurors answered affirmatively when asked by prosecution if "you have ever been a complaining witness that testified for the State" although subsequent to trial but prior to jury's verdict, it was learned that a juror had been a complaining witness in an assault case approximately three or four months earlier. Facts were developed at MNT hearing. CA held error to refuse new trial because of similarities of offenses; juror's failure to respond to question deprived D's attorney an opportunity to explore existence of bias and prejudice.

ULYSSES CLEMONS, No. 10-83-111-CR (Waco) Involuntary Manslaughter conviction reversed, Judge Hall, 7/21/83

FUNDAMENTAL ERROR IN PUNISHMENT VERDICT: CA finds unassigned, fundamental error in jury's punishment verdict of confinement for "not more than (10) ten years."

WORNISE McGARY, No. 05-81-01360-CR (Dallas) DWI conviction reversed, Judge Vance, Panel Opinion, 7/28/83

RECEIPT OF "OTHER EVIDENCE" WAS JURY MISCONDUCT: During jury deliberations foreperson related incident where her husband had two drinks and swerved off road into a ditch, stating that if police had taken husband downtown, he would have failed test. Another juror stated that if she had as much to drink as D, she would have been drunk; other jurors agreed. After these statements the sole hold-out juror changed her vote to "guilty." No controverting evidence was offered by State at MNT hearing. CA found jury received other evidence detrimental to D.

CHARLES REYNOLDS, No. 07-81-0192-CR (Amarillo), Murder Conviction reversed, Judge Countiss, Panel Opinion, 8/5/83

INSUFFICIENT CIRCUMSTANTIAL EVIDENCE: Although evidence supported finding that deceased was suffocated in trunk of car frequently driven by D and in which he was arrested five or six hours after her death, CA reversed because State was unable (1) to place deceased in D's presence during critical time period, (2) to place deceased in D's presence under any circumstances within several hours of her death, and (3) to offer any evidence of the events that caused the deceased to be in the trunk.

GARY VESTER, No. 07-81-0206-CR (Amarillo) Murder conviction affirmed, Judge Dodson, Panel Opinion, 8/5/83

POST HYPNOTIC IDENTIFICATION ALLOWED: Offense occurred March 31, 1978. Deceased's companion witnessed fatal shooting and was victim of rape.

One week later witness made "almost positive" photo identification of D. In mid-May a hypnotic session was conducted by sheriff of Deaf Smith County during which witness recounted several details of incident. Attempts at a composite drawing proved unsuccessful. After session witness identified D's picture. A second hypnotic session was unsuccessful and a third dealt with co-D. D challenged independent origin and recollection of identification prior to trial. CA found no due process violation in procedure used, holding "post-hypnotic identification testimony is admissible where the totality of the circumstances surrounding the hypnotic session shows that the session was not so impermissibly suggestive as to give rise to a substantial likelihood of an unreliable or misidentification." Note: Trial court had tape of the hypnotic session.

RUBEN HILL, No. A14-81-679-CR (14th Hou.) Burglary conviction reversed, Judge Ellis, Panel Opinion, 8/11/83

IMPROPER ARGUMENT BOLSTERED EYE WITNESS: At final arguments on guilt-innocence State argued outside record that sole eye-witness had a clean criminal record. After defense objection was overruled, State then compared eyewitness' credibility, because of the absence of a prior criminal record, to D's lack of credibility because of his two prior felony convictions. D had offered an alibi defense. CA reversed, holding that unsworn testimony of prosecutor injected new and harmful facts which were unsupported by evidence and improperly bolstered eye-witness' credibility.

ERTIS ALFRED, No. A14-82-457-CR (14th Hou.) Theft conviction affirmed, Judge Draughn, Panel Opinion, 8/11/83

THEFT FROM "PERSON" INCLUDES TAKING PROPERTY FROM THE "PRESENCE" OF THE PERSON: Facts: D snatched complainant's purse from the small raised portion of the grocery cart on which she had her hand. CA held theft from the person of another under Sec. 31.03 P.C. includes taking property from the "presence" of the person assaulted, as well as taking of property in actual contact with the person.

LOUIS PERCHITTI, No. C14-82-566-CR (14th Hou.) Possession of Controlled Substance conviction reversed, Judge Sears, Panel Opinion, 7/28/83

STOP AND SEARCH BASED ON DRUG COURIER PROFILE WAS UNREASONABLE: Facts: Two Houston police officers were working in plain clothes at Houston Intercontinental Airport where one officer was monitoring flights from Miami to Houston. D was one of last passengers to leave plane; he appeared nervous, he looked over his shoulder several times (as if to see if he were being followed), and he looked around terminal and baggage claim area (as if looking for someone to meet him). D, who had been carrying briefcase on plane and who had picked up suitcase from baggage claim area, was about to leave terminal building when he was stopped by officers who advised him he was suspected of transporting cocaine. CA found that at this point D was "put in custody." When

asked to identify himself and produce airline ticket, D complied. D further showed officers documents in his briefcase which demonstrated the legitimacy of his trip from Miami to Houston. CA found that at this point, officers should have realized they had no probable cause to detain D further. Instead, officers had D move to another part of airport and again asked permission to search his suitcase. D remained silent and subsequent search revealed cocaine in brown paper bag. D was never advised that he was free to leave, that he could ask for an attorney, or that he could object to the search of his person or property, or could refuse to answer any questions put to him by the officers. CA held there was no probable cause for search and any consent was not voluntary.

IRMA CARRASCO, No. B14-82-861-CR (14th Hou.) Possession of Controlled Substance conviction reversed, Judge Sears, Panel Opinion, 7/28/83

SEARCH OF LUGGAGE INCIDENT TO ARREST: Facts: D, manager of a night-club, was on her way home in the early morning hours when she was forced off the road by a hit-and-run driver. D's car was forced into guardrail and she suffered a concussion. D's employer witnessed accident and stopped to render aid, leaving to find someone to drive D home. As D waited for help to arrive, Houston Police Department made the scene. Investigating officer found D glassy-eyed and slow of speech, thus determining she was intoxicated and immediately placing her under arrest for public intoxication. Officer seized and searched D's luggage (testimony was disputed whether luggage was on D's shoulder or on the ground near her), finding several vials containing cocaine. At motion hearing officer admitted once he had luggage in his possession, D could not have taken a weapon from the luggage or destroyed any evidence that may have been inside it: he further admitted that sole purpose of looking inside luggage was to determine what caused D's intoxication. CA held search was not incident to arrest and was without probable cause.

LEE EISENHAUER, No. 01-82-0501-CR (1st Hou.) Possession of Controlled Substance conviction reversed, Judge Bass, Panel Opinion, 8/11/83

(1.) FOLLOWING GATE V. ILLINOIS WILL TEXAS COURTS CONTINUE TO FOLLOW TWO-PRONG TEST OF AGUILAR? CA acknowledged that Gate v. Illinois abolished the two prong standard set forth in Aguilar while stating that the states could retain and follow that two prong standard at their election. CA noted that Texas has not yet elected to abandon that two prong standard and reversed D's conviction because there was no showing why the officer deemed the unknown informánt credible and the information reliable. All the informant knew here was that "a person was supposed to go to Miami and obtain some cocaine"; officer had no past dealings with informant and informant had not seen contraband.

(2.) NO CONSENT TO SEARCH WHEN SIMPLY ACQUIESCENCE TO LAWFUL AUTHORITY: Facts: Unknown informant tells officers that D will

depart from Houston to Miami and return that same day with cocaine. Officers are given description of D, including clothing. After checking with ticket desk, D's departure and arrival are confirmed. Officers see D deplane and approach. D complies with request for ticket and identification. D is then advised that officers believe he is in possession of cocaine, at which point he appears nervous. D does not respond to request for permission to search him and his luggage. Another officer approaches and reconfirms statement that they believe he went to Miami to buy cocaine and now has it in his bag or on his person. When D asks, "What happens now?", he is told he could consent to search or require officers to procure a warrant. Fourth officer joins group and D is now standing backed into a phone cubicle with four officers surrounding him. Although D did not consent to a search, his luggage was searched. When no contraband was discovered, one officer commented that the cocaine was probably in his sock and another asked D where it was. Third officer then told D to "give it up" in that he was "caught." D took off his jacket, handing it to an officer and stating, "It's in the pocket." CA rejected view that D's action in handing jacket to officers was implied consent, holding that from a totality of the circumstances, D was simply acquiescing to lawful authority.

ERIC BORGEN, No. 01-82-0278-CR (1st Hou.) Sexual Abuse conviction reversed, Judge Bullock, Panel Opinion, 8/18/83

JURY ARGUMENT NOT OBJECTED TO AT TRIAL SO PREJUDICIAL AS TO REQUIRE REVERSAL: At guilt the prosecutor argued: "Well, if you believe that one thing, it remains to me undeniably clear and that one thing is as long as lawyers are for hire, justice is for sale." While acknowledging general waiver rule for failure to object to argument at trial, CA reversed because argument so prejudicial that an instruction to disregard would not have cured.

THOMAS NEEL, No. 05-82-00193-CR (Dallas) DWI conviction reversed, Judge Whitham, Panel Opinion with dissent by Judge Neel, 8/12/83

CAN TRIAL JUDGE SUA SPONTE EXCUSE JUROR WHO STATES HE CANNOT BE FAIR AND IMPARTIAL? CA says no. Facts: In bill of exception, both D and State agreed that potential juror stated he could not be fair, explaining that he had worked with DA's office and with police department. Majority states that State considered potential juror to be adverse to State and that State had used all of its preemptory challenges, so that trial court's action in excusing juror sua sponte worked to State's benefit. Dissent disagrees with characterization of record that potential juror was adverse to State, stating that prosecutor had told court he would submit juror for cause when court stepped in and excused, and noting that trial court's action benefitted D.

MICHAEL JORDAN, No. 05-82-00242-CR (Dallas) Burglary conviction reversed, Judge Vance, Panel Opinion, 8/5/83

INSUFFICIENT EVIDENCE TO SHOW POSSESSION OF RECENTLY STOLEN GOODS: Facts: D was arrested on unrelated theft charge. At that time "his" car was recovered about 300 feet away and he requested that it be impounded. During inventory search, a flashlight was found under the driver's seat; flashlight was taken during a burglary two days prior to its recovery. D was not the owner of the car. State offered no evidence to prove burglary occurred after D obtained possession of car; no evidence as to how long it had been since he occupied car when arrested; no evidence if D was sole occupant of vehicle at time it was last occupied. CA reversed holding that State failed to demonstrate that possession was personal and that D had asserted a distinct and conscious right to the stolen property.

JIMMY SHORT, No. 01-81-0912-CR (1st Hou.) Injury to a Child conviction affirmed, Judge Smith, Panel Opinion, 9/1/83

WILL UNRESPONSIVE ANSWER FROM STATE'S WITNESS THAT HE OVERHEARD D AND WIFE TALK ABOUT PLEA BARGAINING COMPEL MISTRIAL? CA says no. State's witness was called to rebut child-victim's testimony that he did not discuss the case with his parents. Of significance to CA were facts that State did not elicit the testimony, there was no other evidence of plea bargaining, and court's instruction to disregard was proper.

TONY JACKSON, No. 2-83-289-CR (Ft. Worth) Aggravated Robbery conviction affirmed, Judge Burdock, Panel Opinion, 8/25/83

WHEN IT IS LEARNED THAT IMPROPER VERDICT FORM WAS SUBMITTED, CAN TRIAL COURT RESUBMIT CORRECTED FORM TO A JURY THAT HAS CONCLUDED ITS DELIBERATIONS? CA says yes. Substitute court reporter inadvertently attached murder verdict form to the aggravated robbery charge. No evidence of murder was presented to jury. No one caught this error prior to time charge was submitted to jury. Following deliberations jury returned verdict signed on the improper form, finding D guilty "of murder as charged in the indictment." Prior to receiving verdict, trial court met with counsel in chambers and heard testimony from himself and court reporter concerning inadvertent attachment of wrong verdict form; trial court then overruled D's request for mistrial. Jury was reconvened in jury box; court instructed jury it was resubmitting charge and to continue deliberations. The new charge was different only in respect to having proper offense stated on verdict form. Jury then returned verdict of guilty on corrected form. CA held no error to deny mistrial: harmless error; desired verdict of jury is clearly shown.

CLINTON BARRIE, No. 2-83-214-CR (Ft. Worth) Burglary conviction reversed, Judge Spurlock, Panel Opinion, 8/25/83

INSUFFICIENT EVIDENCE TO SHOW POSSESSION OF RECENTLY STOLEN GOODS: State failed to show either that: (1) goods sold to third party and arguably identified by complainant as stolen property were same goods sold to third party by D, or (2) D's explanation of how he acquired stolen property was false.

IRMA ZANI, No. 04-81-00371-CR (San Antonio) Murder conviction affirmed, Judge Reeves, Panel Opinion with Dissent by Judge Tijerina, 8/31/83

WAS "CONDITIONAL IMMUNITY AGREEMENT" BAR TO D'S TRIAL? Majority holds no because D at first gave incorrect information, thus invalidating the agreement. Majority also notes that D stated she fired third shot into head of deceased and medical examiner testified this could have "directly" caused death. Dissent focuses on fact that D complied with terms of agreement by giving two written statements and that there was no evidence she refused to testify for State against her husband. Dissent also takes issue with majority's reading of medical examiner's testimony, stressing that evidence fails to establish deceased was alive when third shot fired.

(continued from p. 8)
ined him in jail and that such an examination "could" have been a critical stage of the proceedings against him,[89] a fact clearly spelled out by the Surpeme Court in *Estelle v. Smith.*[90] But the court again resorted to procedural grounds to reject Parker's constitutional claim, holding that the failure of defense counsel to voice a Fifth or Sixth Amendment objection waived any error.[91] That such objections had been held by the court to have been patently futile in light of their earlier holdings in such cases,[92] was to the majority, apparently academic in light of the Supreme Court's recent decision in *Engle v. Isaac.*[93]

Though *Engle v. Isaac*[94] had held that the mere futility of raising an objection before the state courts did not constitute "cause" for failing to so object,[95] it was not handed down until years after the trial in Parker's case. Is it reasonable to assume that defense counsel, who believed in good faith that a Fifth or Sixth Amendment objection was futile at the time of trial, could have somehow looked into the future and seen the holding in *Engle v. Isaac*[96] five years before its time? Obviously not, but the majority did not agree.

If applying *Engle v. Isaac*[97] retroactively to defeat Parker's right to counsel claim procedurally was not enough, however, Judge Onion advanced another reason why denying Parker the right to consult the counsel prior to agreeing to submit to Dr. Holbrook's examination was not reversible error. Inasmuch as the court had earlier concluded that Parker had waived his Fifth Amendment rights by advancing the insanity defense,[98] Judge Onion noted:

> It would be absurd to hold that appellant waived his Fifth Amendment rights but he could still use the denial of his Sixth Amendment right to counsel to prevent the State from using rebuttal testimony arising out of the flawed interview.[99]

This rationale begs the fundamental question arising out of the right to counsel issue of whether Parker's counsel, had he been aware of the State's intentions, would have even permitted his client to counsel with the obviously prosecution-minded Dr. Holbrook.[100] Only dissenting Judge Sam Houston Clinton would have sustained Parker's claim that Dr. Holbrook's testimony offended the dictates of the Sixth Amendment.[101] The majority, however, still refusing to accept the import of the Supreme Court's holding in *Estelle v. Smith*[102] that such fundamental constitutional error cannot be waived by merely failing to articulate the precise objection,[103] simply preferred to avail itself of the most expedient of alternatives to reach the desired result.

At the conclusion of the court's opinion in *Parker II*, Judge Onion admitted that "some of the cases cited on original submission in disposing of the first [Fifth Amendment] contention may have been called into question by *Estelle v. Smith*,[104] *e.g. Gholson v. State.*"[105] What the presiding judge meant, of course, is that Gholson obtained post-conviction relief on the basis of *Estelle v. Smith*[106] as soon as his case reached federal court.[107]

> [A poor decision] twill be recorded for
> a precedent
> And many an error by the same example
> Will rush into the state.
> It cannot be.
> William Shakespeare
> *The Merchant of Venice*

In reaffirming James Ray Parker's conviction on remand from the United States Supreme Court,[108] the Texas Court of Criminal Appeals has again demonstrated its willingness to reject a substantial constitutional claim because of a procedural waiver in failing to voice the precise objection in the trial court. Yet it comes as no great surprise that the Court of Criminal Appeals continues to give short shrift to federally-secured rights such as the right to the effective assistance of counsel as long as it continues to apply its own standard of procedural waiver of constitutional error rather than the standard employed by its counterparts in the Fifth Circuit.

The court's decision in *Parker II* rests on the tenuous ground that defense counsel should have predicted the Supreme Court's decision in *Engle v. Isaac*[109] five years before its debut, penalizing him for not voicing a patently futile objection at trial.[110] Moreover, the court's decision ignores both reality and the critical role that an attorney might have played in helping a client like Parker decide whether he wished to submit to a psychiatric examination.

As the Fifth Circuit pointed out in this regard in its affirmation of *Smith v. Estelle:*[111]

> *This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney;* it requires a knowledge of what other evidence is available, *of the particular psychiatrist's biases and predilictions,* of possible alternative strategies. . . . *For a lay defendant, who is likely to have no idea of the vagaries of expert testimony* and its possible role in a trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, *it is* a hopelessly difficult decision. There is no reason to force the defendant to make it without the "guiding hand of counsel."[112]

If the past is in fact prologue, then James Ray Parker's Sixth Amendment right to counsel will eventually be vindicated when he seeks post-conviction relief in the federal courts. Only a few years ago, the Texas Court of Criminal Appeals held in a line of capital murder cases[113] that the voicing of an imprecise objection waived any *Witherspoon v. Illinois*[114] error in the selection of the jury. Yet, as each of these cases have reached the federal courts, habeas corpus relief has been granted[115] on the authority of the Fifth Circuit's decision in *Burns v. Estelle,*[116] surely not the last Court of Criminal Appeals decision to be reversed in the Fifth Circuit.

In *Burns,* where Judge Gee pointed out that "we intervene to set aside in part the operation of state policy and procedures aimed at preventing further atrocities of this kind,"[117] the objection lodged by defense counsel was not nearly as specific as that voiced by Parker's attorney, yet specific enough to avoid a procedural waiver as interpreted by the Fifth Circuit.[118] Assaying the validity of the objection raised in *Burns,* Judge Gee noted:

> We therefore need not grapple with the question of whether counsel's actions, though imperfect for purposes of state procedure, might yet suffice to prevent a waiver for our purposes

in a matter of such gravity. That Pandora's Box we leave to another day.[119]

Given the Texas Court of Criminal Appeals treatment of the right to counsel issue in *Parker II*, it appears almost certain that such a day is coming quickly.

AUTHORITIES

1. 367 U.S. 568, 581–582 (1961)
2. *Parker v. State*, 594 S.W. 2d 419, 421 (Tex. Crim. App. 1980)
3. *Id.*
4. *Id.*
5. *CF.* V.T.C.A. Penal Code, § 8.01 (a) providing that:

   It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.
6. Dr. John Holbrook was one half of what many criminal defense attorneys regarded as the "Drs. of Death," Dallas psychiatrist Dr. James P. Grigson being the other. These psychiatrists were so named because between the two of them, they had thousands accused of criminal conduct on behalf of prosecutors across Texas, *Cf. Smith v. Estelle*, 445 F. Supp. 647, 653–654, n. 7 (N.D. Tex. 1977), and in a great many instances testified that certain capital murder defendants were sociopaths and were otherwise worthy of the death penalty. *Cf. Smith v. Estelle*, 602 F. 2d 694, 699–701 n. 7 (5th Cir. 1979). Dr. Holbrook committed suicide in 1980, Dr. Grigson is still engaged in the practice of psychiatry in Dallas where he still testifies frequently for the prosecution.
7. *Parker v. State, supra*, at 421. As set forth in Article 46.03, V.A.C.C.P., the trial court may . . . appoint disinterested experts . . . to examine the defendant. . . ."
8. *Parker v. State*, 649 S.W. 2d, 46, 50 (Tex. Crim. App. 1983).
9. *Id.*
10. *Id.*
11. *Cf.* note 7, *supra.*
12. *Parker v. State, supra* at 50.
13. *Id.*
14. *Id.* at 47. Parker's punishment was enhanced by proof of a prior felony conviction, *Cf.* V.T.C.A. Penal Code, § 12.42 (c).
15. *Parker v. State*, 594 S.W. 2d 419 (Tex. Crim. App. 1980).
16. *Id.* at 421–423.
17. *Patterson v. State*, 509 S.W. 2d 857 (Tex. Crim. App. 1974); *Gholson v. State*, 542 S.W. 2d 395 (Tex. Crim. App. 1976), *death sentence vacated sub nom Gholson v. Estelle*, 675 F. 2d 734 (5th Cir. 1982); *Stultz v. State*, 500 S.W. 2d 852 (Tex. Crim. App. 1973); *Granviel v. State*, 552 S.W. 2d 107 (Tex. Crim. App. 1977); *death sentence vacated sub nom, Granviel v. Estelle*, 655 F. 2d 673 (5th Cir. 1981). 445 F. Supp. 647 (N.D. Tex. 1977), *affd.*
18. 602 F. 2d 694 (5th Cir. 1979) *Cf.* Section I, *infra.*
19. *Parker v. State*, 594 S. W. 2d at 422.
20. 594 S.W. 2d 422 (Tex. Crim. App. 1980)
21. 451 U.S. 454 (1981).
22. *Parker v. Texas*, 453 U.S. 902 (1981).
23. 451 U.S. 454 (1981).
24. *Wilder v. Texas*, 453 U.S. 902 (1981); *Armour v. Texas*, 453 U.S. 902 (1981); *Garcia v. Texas*, 453 U.S. 902 (1981); *Simmons v. Texas*, 453 U.S. 902 (1981); *Brandon v. Texas*, 453 U.S. 902 (1981).
25. *Parker v. Texas*, 453 U.S. 902 (1981).
26. 451 U.S. 454 (1981).
27. 649 S.W. 2d 46 (Tex. Crim. App. 1983).
28. 451 U.S. 454 (1981).
29. *Smith v. State*, 540 S.W. 2d 693 (Texc. Crim. App. 1976).
30. *Smith v. Estelle*, 445, F. Supp. 647 (N.D. Tex. 1977) (death sentence vacated), *affd.*, 602 F. 2d 694 (5th Circ. 1979), *affd. sub nom, Estelle v. Smith*, 451 U.S. 454 (1981).
31. 649 S.W. 2d 46 (Tex. Crim. App. 1983)
32. 445 F. Supp. 647, 665 (N.D. Tex. 1977)
33. *Id.* at 650.
34. *Id.*
35. *Id.*
36. *Id.* at 650–651
37. *See* note 6, *supra. Smith v. Estelle*
38. 445 F. Supp. 647, 651 (N.D. Tex. 1977)
39. *Id.*
40. This failure to file a written report of the examination itself violated Article 46.02, § 3 (d), V.A.C.C.P. as it existed at the time of Smith's capital murder trial.
41. *Smith v. Estelle*, 445 F. Supp. 647, 651–652 (N.D. Tex. 1977).
42. *Id.*
43. *Id.*
44. *Id.* at 652–653
45. *Id.*
46. *Smith v. State*, 540 S. W. 2d 693, 699 (Tex. Crim. App. 1976)
47. *Smith v. Estelle*, 445 F. Supp. 647, 653–654 (N.D. Tex. 1977). Dr. Grigson's testimony in this regard tracked the language of the second of the three special issues the jury has to answer in the affirmative if the trial court is to assess the death penalty. Cf. Article 37.071 V.A.C.C.P. The other two questions are:

   Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result and [I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
48. *See* note 47 *supra.*
49. *Smith v. Estelle*, 445 F. supp. 647, 654 (N.D. Tex. 1977).
50. *Smith v. State*, 540 S.W. 2d 693 (Tex. Crim. App. 1976).
51. *Jurek v. Texas*, 428 U.S. 262 (1976).
52. *Smith v. Texas*, 430 U.S. 922 (1977).
53. *Smith v. Estelle*, 445 F. Supp. 647, 654 (N.D. Tex. 1977).
54. *Id.*
55. *Miranda v. Arizona*, 384 U.S. 436 (1966)
56. *Smith v. Estelle*, 445 F. Supp. 647, 659–664 (N.D. Tex. 1977).
57. *Id.*
58. *Smith v. Estelle*, 602 F. 2d 694, 698 (5th Cir. 1979).
59. *Id.* at 697
60. *Id.* at 699–701
61. *See* notes 45–46, *supra.*

62. *Smith v. Estelle*, 602 F. 2d 694, 703 (5th Cir. 1979). (Goldberg, J.)
63. *Id.* at 709
64. *Estelle v. Smith*, 445 U.S. 926 (1980)
65. *Estelle v. Smith*, 451 U.S. 454 (1981). Justices Brennan and Marshall joined the court's opinion while Justices Stewart and Rehnquist concurred in the judgment although neither would have reached the Fifth Amendment issue raised.
66. *Id.* at 462–469.
67. *Id.* at 469–471
68. *Id.* citing *Coleman v. Alabama*, 399 U.S. 1, 7–10 (1970) (plurality opinion) and *Powell v. Alabama*, 287 U.S. 45, 57 (1932).
69. *Estelle v. Smith*, 451 U.S. 454, 470 (1981) (footnotes omitted) (quoting *United States v. Wade*, 388 U.S. 218, 226–227 (1967))
70. *Estelle v. Smith* 451 U.S.
71. 451 U.S. 454 (1981)
72. *Id.* at 473.
73. *See Smith v. Estelle*, 445 F. Supp. 647, 654 n. 10A (N.D. Tex. 1977).
74. *See e.g. Wilder v. State*, 623 S.W. 2d 650 (Tex. Crim. App. 1981) *Simmons v. State*, 623 S.W. 2d 416 (Tex. Crim. App. 1981) *Armour v. State*, 623 S.W. 2d 650 (Tex. Crim. App. 1981) Presiding Judge Onion and Judge Clinton dissented to the majority's actions.
75. Robinson's first conviction was reversed by the Texas Court of Criminal Appeals at 550 S.W. 2d 54 (Tex. Crim. App. 1977). He was tried, convicted, and sentenced to die again but Dallas disrict judge Richard Mays granted Robinson's motion for new trial. Robinson was tried and convicted and again won a new trial before pleading guilty. *See* note 76 and accompanying text, *infra.*
76. Telephone conversation with the Office of the Dallas County Criminal District Clerk's Office, July 26, 1983.
77. 530 S.W. 2d 823, 825 (Tex. Crim. App. 1975) Roberts, J. *dissenting*).
78. *Parker v. State*, 649 S.W. 2d 46 (Tex Crim App. 1983).
79. *Id.* at 51–52
80. *Id.* at 53
81. *Id.* at 51 *quoting Battie v. Estelle*, 655 F. 2d 692, 700, 701–702 (5th Cir. 1981).
82. 655 F. ed 692 (5th Cir. 1981).
83. *Battie v. State*, 551 S.W. 401 (Tex. Crim. App. 1977) death sentence vacated *sub nom Battie v. Estelle*, 655 F. 2d 692 (5th Cir. 1981).
84. 530 F. 2d 43 (5th Cir. 1976)
85. *Parker v. State*, 649 S.W. 2d, 46, 51 (Tex. Crim. App. 1983) *quoting Battie v. Estelle*, 655 F. 2d 692, 700, 701–702 (5th Cir. 1981).
86. *Parker v. State*, 649 S.W. 2d 46, 50 (Tex. Crim. App. 1983).
87. *See* note 6, *supra.* The only reported case in which Dr. Holbrook actually testified for the defense was the first Cullen Davis murder trial where he testified at the pre-trial hearing to have a bond set. *Ex parte Davis*, 542 S.W. 2d 192 (Tex. Crim. App. 1976).
88. *Parker v. State*, 649 S.W. 2d 46, 50 (Tex. Crim. App. 1983).
89. *Id.* at 53
90. 451 U.S. 454, 470 (1981).
91. *Parker v. State*, 649 S.W. 2d 46, 53 (Tex. Crim. App. 1983).
92. *See e.g., Livingstone v. State*, 542 S.W. 2d 655, 661–662 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977).
93. 456 U.S. 107 (1982).
94. *Id.*
95. *Id.* This apparently overrules the Fifth Circuit's holding to the contrary in *Smith v. Estelle*, 602 F. 2d 694, 708 n.19 (5th Cir. 1979).
96. 456 U.S. 107 (1982).
97. *Id.*
98. *Parker v. State*, 649 S.W. 2d 46, 51–52 (Tex. Crim. App. 1983).
99. *Id.* at 53.
100. *See* Jduge Goldberg's thoughts in this regard in *Smith v. Estelle*, 602 F. 2d 694, 708 (5th Cir. 1979):
> A knowledgeable defendant, or one with vigilant attorneys, will either simply refuse to submit to an examination or will bargain with the state to have the examination conducted by a psychiatrist who is more likely to favor the defense. Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state.

Id.
101. *Parker v. State*, 649 S.W. 2d 46, 55 (Tex. Crim. App. 1983) (Clinton, J., *dissenting*).
102. 451 U.S. 454 (1981).
103. *Id.* at 468 n. 12. The Court rejected the reasoning applied by both Judge Porter and the Fifth Circuit in its affirmance that, *inter alia*:
> " . . . [Smith's counsel] can scarcely be faulted for failing to enumerate all of the many constitutional rights that the state violated when it unexpectably presented Dr. Grigson's testimony."

Smith v. Estelle, 602 F. 2d 694, 708 n. 19 (5th Cir. 1979).
Judge Onion responded to this by noting that "Smith's failure to object was due to his counsel's surprise. Such surprise is not applicable in the instant case as the circumstances indicate."
Parker v. State, 649 S.W. 2d 46, 54 (Tex. Crim. App. 1983).
104. 451 U.S. 454 (1981).
105. *Parker v. State*, 649 S.W. 2d 46, 55 (Tex. Crim. App. 1983) *citing Gholson v. State*, 542 S.W.2d 395 (Tex.Crim.App. 1976).
106. 451 U.S. 454 (1981).
107. *Gholson v. State*, 542 S.W. 2d 395 (Tex. Crim. App. 1976), death sentence vacated *sub nom, Gholson v. Estelle*, 675 F. 2d 734 (5th Cir. 1982).
108. *Parker v. State*, 649 S.W. 2d 46 (Tex. Crim. App. 1983).
109. 456 U.S. 107 (1982).
110. *Parker v. State*, 649 S.W. 2d 46, 54 (Tex. Crim. App. 1983).
111. 602 F. 2d 694 (5th Cir. 1979).
112. *Id.* at 708 (emphasis added).
113. *See e.g., Burns v. State*, 556 S.W. 2d 270 (Tex. Crim. App. 1977); *Moore V. State*, 542 S.W. 2d 664 (Tex. Crim. App. 1976); *Boulware v. State*, 542 S.W. 2d 677 (Tex. Crim. App. 1976).
114. 391 U.S. 510 (1968).
115. *See e.g., Moore v. Estelle*, 670 F. 2d 56 (5th Cir. 1982).
116. 592 F. 2d 1297 (5th Cir. 1979) *adhered to en banc*, 626 F. 2d 396 (5th Cir. 1980).
117. 592 F. 2d 1297, 1304 (5th Cir. 1979).
118. *Id.*
119. *Id.*

PROSPECTING FOR CHANGES IN THE RULES OF EVIDENCE

By Walter W. Steele, Jr.
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In an article entitled *"The New Texas Rules of Evidence In Criminal Cases or Not,"* I postulated that the new Texas Rules of Evidence, although designed to apply to civil cases only, would in fact apply to criminal cases in some instances because of the wording of art. 38.02 Tex. Code Crim. Proc.[1]

My theory, which remains only a theory, is that the Texas Rules of Evidence will apply in criminal cases to the extent that they do not conflict with either the Texas Code of Criminal Procedure or the Texas Penal Code, or other statutes setting forth rules of evidence.[2]

A necessary implication of that theory is that the Texas Rules of Evidence will overrule all case-made rules of evidence if they conflict. In other words, according to my theory, if one of the new Texas Rules of Evidence conflicts with a rule of evidence previously created by court opinions, without reference to a statute, then the Rules of Evidence control and the rule created by court opinion no longer controls.

Ultimately the Court of Criminal Appeals will decide just what impact, if any, the new Texas Rules of Evidence will have on the trial of criminal cases. Perhaps it would be useful to speculate about some of the results if the theory is correct. After all, one measure of the integrity of any theory is its feasibility or the extent to which it adds to or detracts from the system it impacts. If, as a result of my theory, the truth-finding function of a criminal trial is enhanced, that fact might be a positive motivator for the Court of Criminal Appeals to adopt it; and, of course, the contrary holds true if the truth-finding function of a criminal trial would be retarded as a result of my theory.

A recent article in the *Texas Bar Journal* by Linda Addison entitled "A Practical Guide to the Texas Rules of Evidence" provides a summary of some of the dramatic changes in civil practice brought about by the Texas Rules of Evidence.[3] In large measure, Ms. Addison's work serves as an inspiration for the following examples and comments concerning the prospective impact of the Texas Rules of Evidence on criminal cases.

Rule 202-Judicial Notice

This rule authorizes judicial notice of, inter alia, "ordinances . . . of every other state, territory, or jurisdiction of the United States." In the course of a criminal prosecution a question may arise concerning the language and/or existence of a municipal ordinance. Several Texas cases have held that a state court cannot take judicial notice of municipal ordinances. *See* Ray, *Law of Evidence,* §171 (1980) and cases cited therein. It would appear that application of Rule 202 would change the law in these cases.

Rule 404-Character Evidence to Prove Conduct

Currently, evidence of a defendant's good character can be offered for the purpose of proving that defendant acted according to that character. Rule 404 limits such offers to cases where the party is accused of conduct involving moral turpitude. Applied to criminal cases, Rule 404 would change a court-made rule of long-standing allowing proof of any germaine character, (e.g. good reputation as a peaceful and law abiding citizen) in *any* criminal case. *Lovett v. State,* 258 S.W.2d 335 (Tex.Crim.App. 1953); and *see generally Hamman v. State,* 314 S.W.2d 301 (Tex. Crim.App. 1958).

A schism of long-standing exists between civil jurisprudence and criminal jurisprudence on this point. Traditionally, rules of evidence in civil cases do not allow evidence of character, and traditionally, rules of evidence in criminal cases reach the opposite result. Ray, *Law of Evidence,* §1491-1495 (1980). Rule 404 seems to compromise between these two opposing views by allowing evidence of character, but limiting it to cases where the alleged conduct at issue involves moral turpitude. Compromise or not, Rule 404 may be of questionable usefulness in reaching the truth in criminal cases. Of course, the drafters of Rule 404 had no intention of it applying in criminal cases.[4]

Rule 405-Methods of Proving Character

Rule 404, discussed above, and Rule 405

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work together. Not until one determines that character is admissible does the issue methods of proof of that character arise. Although Rule 404 is a dubious improvement to present rules of evidence in criminal cases, Rule 405 may be considered a significant advance.

Character, the ultimate issue, can be established by (1) evidence of reputation about the characteristic trait in question, *e.g.* sobriety, or (2) evidence of personal opinion about the trait in question given by one qualified to have an opinion.

Seemingly, the Texas courts have refused to allow character to be established by personal opinion, *see* discussion Ray, *Law of Evidence*, §1432 (1980). However, some of the later criminal cases have drawn a distinction between reputation and character, and have approved direct opinion testimony from a qualified witness about relevant character traits of the defendant. *Ward v. State*, 591 S.W.2d 810 (Tex.Crim.App. 1978), testimony by defendant's wife about his traits allowed; *Johnson v. State*, 633 S.W.2d 888 (Tex. Crim.App. 1982) testimony by defendant's mother about traits allowed. Consequently, Rule 405 may simply be a restatement of existing law in criminal cases.

Rule 607-Who May Impeach

Perhaps more than any other, Rule 607 presents the most interesting and complex test for the theory being presented in this article. If applied to criminal cases, Rule 607 will abolish the infamous "voucher rule" that prevents a party from impeaching his own witness without a showing of surprise.[5] Hypothesizing that Rule 607 applies in criminal cases is more complex than the arguments presented heretofore. Recall, the central argument that the Texas Rules of Evidence are the functional equivalent of statutes and Article 38.02 Tex. Code Crim. Proc. states:

> The rules of evidence prescribed in the statute law of this State in civil suits shall, so far as applicable, govern also in criminal actions when not in conflict with the provisions of this Code or of the Penal Code.

Now, consider the fact that Article 38.28 Tex. Code Crim. Proc. states:

> A party may, when testimony of his own witness is injurious to his cause, attack the testimony in any other manner except by offering evidence of the witness' bad character.

At this point, one would surmise that Rule 607 and Article 38.28 Tex. Code Crim. Proc. are essentially the same and so the application of Rule 607 to criminal cases is moot. However, the application of Rule 607 to criminal cases is not moot because the Texas Court of Criminal Appeals has consistently refused to apply Article 38.28 according to its plain language, and instead holds that a party must not only allege surprise, but actually demonstrate surprise before that party can impeach their own witness.[6] Therefore, one can reach the conclusion that Rule 607 applies in criminal cases, but to do so, one must engage in the following reasoning:

> 1. The Texas Rules of Evidence are the legal equivalent of statutes, therefore; 2. Rule 607 would apply in criminal cases unless it is in conflict with Article 38.28 Tex. Code Crim. Proc.; 3. Rule 607 is not in conflict with the language of Article 38.28, but; 4. Rule 607 *is* in conflict with the consistent holdings of the Court of Criminal Appeals requiring the element of surprise, however; 5. By virtue of being a recently enacted "statute" Rule 607 overrides all prior court opinions contrary to its terms, therefore; 6. Rule 607 applies in criminal cases.

Rule 611-Writing Used to Refresh Memory

The impact of this rule on present Texas criminal practice is quite speculative. The second part of the rule gives the court discretion to allow or to deny a request by a cross examining party to inspect any writing used by the witness prior to testifying to refresh his memory. Of course, this rule varies to some extent from the ubiquitous *Gaskin* rule[7] because *Gaskin* gives an absolute right to inspect the writing, whether or not it is used to refresh memory, but the writing available under *Gaskin* is limited to writing made by the very witness examined.[8] Otherwise, Rule 611 seems to be in line with the refreshing recollection rules recently established by the Court of Criminal Appeals in *Ballew v. State*, 640 S.W.2d 237, 242-43 (Tex.Crim.App. 1982).

Rule 802-Hearsay Rule

A doctrine of long-standing in both civil and criminal cases is that hearsay is of no probative value, constituting no evidence at all, even if admitted without objection.[9] That rule has been completely reversed by the following portion of Rule 802:

> Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

Obviously, if the Rules are held to apply in criminal cases, the prior Texas case law will no longer be valid.

CONCLUSION

What has been discussed above are only a few of the more obvious points of change that could result if the new Texas Rules of Evidence are held to supercede prior case-made law. As always, the ultimate outcome awaits a decision by the Texas Court of Criminal Appeals. For now the part of the Texas bench and bar involved in criminal justice is free to engage in speculation and theorizing. Here, I presented my theory: I hope that it helps you to formulate your own.

FOOTNOTES

[1] The rules of evidence prescribed in the statute law of this State in civil suits shall, so far as applicable, govern also in criminal actions when not in conflict with the provisions of this Code or of the Penal Code.

[2] See generally, Steele, "The New Texas Rules of Evidence in Criminal Cases or Not," 13 *VOICE for the Defense* 5 (1983).

[3] Addison, "A Practical Guide to the Texas Rules of Evidence," 46 *Tex. B. Journal* 1024 (1983).

[4] *Supra* note 2.

[5] For a brief and precise criticism of the voucher rule see *Mahavier v. State*, 644 S.W.2d 129, 134 (Ct. of App. San Antonio 1982), Cantu, J. concurring.

[6] *See e.g. Lewis v. State*, 593 S.W.2d 704 (Tex.Crim.App. 1980).

[7] 353 S.W.2d 467 (Tex.Crim.App. 1961).

[8] *Zanders v. State*, 480 S.W.2d 708 (Tex.Crim.App. 1972).

[9] *See e.g. Lumpkin v. State*, 524 S.W.2d 302 (Tex.Crim.App. 1975).

Thoughts From Behind the Walls

A substantial segment of correspondence received by the VOICE each month comes with a return address of one unit or another of the Texas Department of Corrections. In the past, most of this correspondence has appeared solely in the "Letters to the Editor" columns of this journal. In the belief that the voices from behind those walls should not fall on deaf ears, we have created this new department for widening the scope of what we hope will become a meaningful dialogue between those engaged in the practice of criminal law and our "pen pals," in their essays, articles and letters. —Ed.

MORE ON IMPROPER ARGUMENTS

by KEITH W. SCHMIDT
No. 281755
Goree Unit

The recent series on "The Defense Attorney's Last Stand," by Walter Boyd of Houston, was very interesting. After being confined in the TDC for six years, devoting my spare time to legal study, I felt compelled to voice some of my own views and arguments on improper jury arguments of the prosecution.

My own conviction was reversed by the Texas Court of Criminal Appeals, although not for jury arguments of the prosecution, but for a fundamentally defective jury charge, *Schmidt vs. State,* 641 S.W. 2d. 244.

However, in my "Pro-se" Brief I submitted some seventeen (17) separate instances of misconduct and improper jury arguments of the prosecution. The court declined to answer any of the allegations in my Pro-se brief as well as the brief filed by my attorney.

After reading many different final arguments from the trials of other inmates, it is quite apparent that very few District Attorneys stay within the bounds of the law when giving their arguments. The following are some of my views and arguments on this subject:

References by the Prosecutor to facts or matters not in evidence have been deemed error sufficient to call for a new trial. It is the duty of the prosecutor to see that nothing but competent evidence is submitted to the jury, and above all things, he should guard against anything that would prejudice the minds of the jurors, and tends to hinder them from considering only the evidence introduced.

He should never seek by any artifice to

warp the minds of the jurors by inference and by insinuations.

The State's Attorney has been held to be under a duty to introduce all the evidence which tends to aid the court and jury in ascertaining the truth. It has been held that a prosecutor owes a duty to conduct his argument fairly, regardless of whether or not objections are continously made.

The line between denunciation and abuse which will reverse a conviction and that which will not, if one can be found other than that based on capacity to injure, seems to rest on the distinction between mere personal abuse and invective called forth by the character of the crime shown by the evidence. But to make vituperation and abuse grounds for errors in reversing a judgment it must appear that the remarks indulged in were unwarranted and that they were grossly improper, and that they were of a material character and well calculated to effect injuriously the rights of the accused. *ROBINSON vs. UNITED STATES,* (CA-5 La) 117 F. 2d 110.

To entitle the defendant to have the question considered, it must appear from the record that the statement complained of was actually made. *ROSSI vs. UNITED STATES,* 9 F. 2d 362.

Since the prosecuting attorney, in a criminal case, represents the people of the State, including the defendant, it is his duty not to lay aside the impartiality that should characterize his official actions in order to become a heated partisan, and by vituperation of the defendant, and appeals to prejudices, seek to procure a conviction at all hazards. *WARFORD vs. STATE,* 16 S.W. 886; *BISHOP vs. STATE,* 72 Tex. Crim. 1, 160 S.W. 705.

The Prosecuting Attorney should always remember whose commission he bears and should always respect the rights of the accused. Accordingly, in criminal prosecutions, it is as much the duty of the Prosecuting Attorney to see that a person on trial is not deprived of any of his statutory and constitutional rights, as it is to prosecute him for the crime with which he may be charged. *SINGER vs. UNITED STATES,* 380 U.S. 24, 13 L.Ed 2d 630.

Generally, the courts which have treated the propriety of a prosecutor raising new matters or new points during closing arguments or summation, have held that such arguments are improper. *MOORE vs. UNITED STATES,* 120 App. D.C. 173, 344 F. 2d 558.

Prosecutors, like all attorneys, are required to conform to the standards of the Code of Professional Responsibiltiy. As advocates of the State, however, they also face special ethical problems that arise from the great powers of their office and the dual role they must fulfill. On the one hand, the adversarial mode of truth finding used in our legal system exerts pressure on the prosecutor to secure convictions by presenting the strongest possible case. At the same time, it is clear that "the duty of the prosecutor is to seek justice, not merely to convict." *BERGER vs. UNITED STATES,* 295 U.S. 78 (1935); ABA STANDARD 1.1 (c), (The prosecution function) (1971); EC 7-13.

As attorneys and public officials, prosecutors must avoid even an appearance of professional impropriety and must exercise their independent, professional judgment in accord with Canons 5 and 9 of the C.P.R.

Despite the presence of defense counsel as a trained adversary, the prosecutor's role as an advocate demands recognition of special responsibilities toward the Court and the defendant during the trial. This stems in part from the duty to seek justice rather than just convictions and also reflects the protections given to a criminal defendant, as part of the presumption of innocence. The judge or jury is obligated to find guilt or innocence solely on the basis of material presented in court and in accordance with the law. The prosecutor must bear a substantial burden of avoiding any conduct and remarks that will prejudice this reasoned decision making. Unfortunately, as the record of prosecutorial misconduct preserved in appellate court decisions demonstrates, adversarial zeal, more than not, leads to improper jury arguments.

It must be borne in mind, that in criminal cases, the human mind is very susceptible to inflammatory remarks, and prosecuting attorneys should carefully guard against prejudicing the right of a person charged with a criminal offense. The trial courts should assume the responsibility of preventing this type of argument. A rebuke by the trial court in the presence of the jury may do more to end the practice of intemperate and improper arguments than repeated admonitions or even reversals by the appeals court.

A public prosecutor wields the Sword of Justice. It is his duty to recall that this sword, though forged in the flamed heat of zeal, is alloyed with the iron of restraint. And it is this duty that is often forgotten. I welcome your response!

Dear Editor:

My name is Roy Shields Jr #331597, an inmate at the Wynne unit of T.D.C., serving eight years for a burglary conviction. During my confinement in prison I have developed a hearty taste for doing legal research of criminal law. My hope is to become a paralegal or accomplished legal researcher.

I have no monies, only a wish to gain knowledge of criminal law. I am 27 years old, and if I don't best myself while in prison, I do believe I may never accomplish any tangible carrer.

I am in dire need of reading material. I hate to ask for assistance, but my yearn to learn supercedes my shyness at this point in time. If by chance you have any reading material that might aid in my learning of criminal law, circumstantial evidence, hearsay testimony, proof of corpus delecti, or any legal materials, I would be grateful to you if you would aid me in this matter. I find criminal law intriguing, and am obsessed in expanding my knowledge of such. If you decide to send me any material, I would be very grateful to you. If not, I will understand. Thank you for your attention and most valuable time. God Bless.

Roy Shields Jr. #331597
Wynne Unit-9-Tent
Huntsville, Texas 77340

P.S. Thanks for informing T.D.C. inmates in your "Editors Corner," of the recent legislation for creation of the reform package. A friend of mine had a copy. I hail your opinion that locking everyone up and throwing away the key may in future jurisprudence, not be desirable due to the costs involved, it is wise to invoke reform. Reform itself is deterrent.

(All material for Mr. Sheilds should be sent to him direct. —Ed.)

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