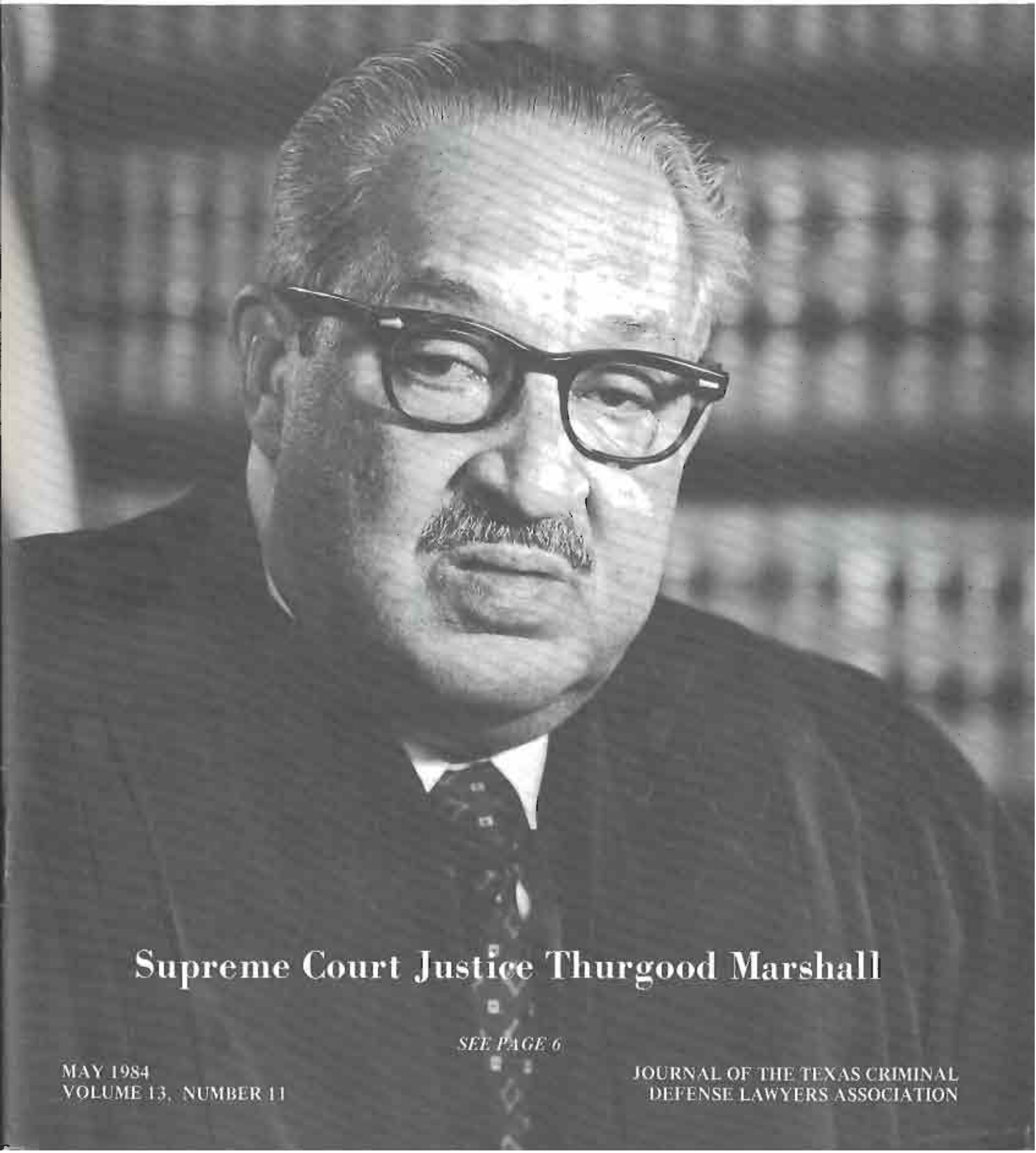
VOICE for the DEFENSE



Supreme Court Justice Thurgood Marshall

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JOURNAL OF THE TEXAS CRIMINAL
DEFENSE LAWYERS ASSOCIATION

VOICE for the DEFENSE

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REGULAR FEATURES

ARTICLES

NEWS

CALENDAR OF EVENTS

June 8 Friday — CDLP—*Institute on Appeals and Post-Conviction Remedies* Austin, Stephen F. Austin Hotel

July 3-6 — **STATE BAR CONVENTION**—San Antonio

July 4 — *Criminal Law Institute and Luncheon,* Sponsored by TCDLA, Four Seasons Hotel

July 5 — *Annual Meeting,* Four Seasons Hotel

Aug. 17 — CDLP—*Theft, Robbery & Burglary Institute,* Corpus Christi

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STANLEY WEINBERG

Editor's Corner

In a recent issue of the *National Law Journal,* the editors made special note of comments by United States Supreme Court Justice Thurgood Marshall spoken in defense of the role of lawyers who handle death penalty cases.

The editorial comment was touched off by a callous argument raised by Chief Justice Warren E. Burger in a death penalty case before the Supreme Court last year. In a concurring opinion, the Chief Justice stated that the particular case had been in the courts for 10 years and was before the Supreme Court for the fourth time:

> (T)his alone demonstrates the specious argument of 'rush to judgment.' The arguments so often advanced by the dissenters [Justices William Brennan and Thurgood Marshall] that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into a sporting contest that Roscoe Pound denounced three-quarters of a century ago.

The *National Law Journal* notes that the comments of the Chief Justice were uncalled for. We wholeheartedly agree.

Therefore, it is with great pride that we present in this issue of the *VOICE* will views of another Supreme Court Justice on the role of lawyers in death penalty cases—a strong view, as you will read.

As the *National Law Journal* and other legal observers note, Justice Marshall's beliefs about the death penalty are well known. He believes it is unconstitutional in all circumstances. His comments, however, delivered in remarks at the dedication ceremony for the 1983 Volume of the Annual Survey of American Law at the New York University School of Law, go beyond stating the obvious.

As noted by the *National Law Journal*, Justice Marshall's remarks point out the reality of the dedication with which attorneys approach death penalty cases, totally ignored by the Chief Justice in his views.

"These volunteer lawyers serve two crucial functions," Justice Marshall says. "First, they reduce the likelihood that we will execute someone 'by mistake'—by which I mean not only an innocent person, but also a person convicted in a fashion that violates the Constitution, or a person who has not been afforded an adequate opportunity to show that he deserves to live. . . .[S]econd, . . . they ensure that we . . .[are not] averting our eyes from the reality of the system of punishment we condone."

To Justice Marshall, the accusation that these volunteer lawyers are "holding up" executions is absurd. In his view, a state does not have any legitimate interest in killing a man or woman "sooner rather than later." If there is any chance that a defendant has a valid objection to his conviction or sentence, "elementary principles of justice require that his attorneys be afforded a full opportunity to present that claim to the courts before the issue is rendered moot by his death."

The efforts of these attorneys, he notes, cannot ensure that the system for determining who lives and who dies will operate rationally. The difficulty of securing effective representation has distressing side effects.

Instead of the condemnation issued by the Chief Justice, Justice Marshall expresses gratitude, admiration and gives his thanks.

We give our thanks to Justice Marshall.

President's Report

THOMAS G. SHARPE, JR.

The primary elections were held on May 5, 1984. The political advertising relating to the Judicial Race for the Court of Appeals in the Thirteenth Judicial District set an all-time record for personalizing the Criminal Defense Lawyer who chose to run against an incumbent.

The attorney who chose to run is not a member of our Association; however, the attack upon him certainly pours over to the Criminal Defense Bar at large. The advertising in the twenty counties covered by the Court claimed that the Criminal Defense Attorney "has a history of defending major felons, drug offenders, and others indicted for such serious crimes as murder, rape of a child, possession of cocaine, possession of marijuana, aggravated assault, smuggling, theft, and felony DWI." It further claimed that "He has, however, built a lucrative career defending accused criminals, avoiding their prosecution, reducing their punishment and, whenever possible, keeping them out of jail.

In addition to this type of advertising it was also claimed that the brother of the candidate in his capacity as District Attorney allowed the Speedy Trial Act to run on an offense of Felony Driving While Intoxicated where two young girls were struck by a vehicle and said individual who allegedly committed the offense was represented by the candidate.

This is the first instance since this Association was formed in 1971 that political advertising has been brought to our attention with a suggestion that it falls below the standards which should apply to Judicial Races at the Appellate Court level. Many lawyers have registered their complaints with the incumbent and this Association.

It is always difficult to evaluate motivation when advertising is used in this manner; however, it is critical that our Association takes the necessary steps to ensure some type of standards which will apply to Judges in future elections that will not condemn an attorney who happens to be successful in protecting the rights of his clients against the odds of a conviction rate in excess of 90% across the country.

I do not believe it is necessary to name either the incumbent Judge or the candidate since I am only concerned with the obvious lack of legal standards which relate to constraint and limitation in presenting the qualifications of a candidate for public office. I hope that the subject of political advertising in Judicial campaigns will not fall further into the depths of evaluating Criminal Defense Lawyers with the offenses and clients that they represent.

If representing persons accused of crime is to be considered a reason for disqualifying a candidate for service on a Court that has Criminal Jurisdiction we can start recalling all those who have paid their dues and are in fact serving as excellent Judges in our state.

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

DWI Does Dallas

A SEMINAR ON THE NEW TEXAS DWI LAW

Directors, left to right: Richard Anderson, Dallas; Scrappy Holmes, Longview; Weldon Holcomb, Tyler.

DWI DOES DALLAS, April 13th
Speaker: Charles W. Tessmer, Dallas

Left to right: Speakers Gary Trichter and Dr. Ken Smith with editor, Stan Weinberg

Jan Hemphill, Director, Dallas

First DWI Seminar a Success

On Friday, April 13, 1984, the Texas Criminal Defense Lawyers Association hosted its first DWI Seminar ever. President-elect Clifton L. "Scrappy" Holmes presided over the meeting at the Adolphus Hotel in Dallas. Our guest speakers included Randy Taylor, Louis Dugas, Jr., Gary Trichter, Dr. Ken Smith, Kerry P. FitzGerald, Ed Gray and Charles Tessmer.

Participation was outstanding. Three-hundred-fourteen lawyers and judges from every part of the state attended. Fortunately for those who were not able to attend, the DWI books are available through the Criminal Defense Lawyers Project. Overall the seminar was a very successful function and worked toward the Association's benefit in every way. A big TCDLA thanks to all!

Thoughts from Thurgood Marshall*

Executive director Jeanne B. Kitchens secured the permission of Mr. Justice Marshall's office and of the Supreme Court's publicity division to reprint this text in the VOICE. *We gratefully acknowledge that permission and these remarks.* —*Ed.*

I would like to speak briefly on behalf of a group of lawyers who have not received the recognition they deserve. I refer to the attorneys who volunteer their services to assist persons on death row in their collateral challenges to their convictions and sentences.

The importance of these lawyers derives from the fact that the right to counsel of a defendant charged with a capital crime falls short of his need for representation. Almost invariably, such a defendant is too poor to hire an attorney. Few states are willing to provide a person sentenced to death with legal assistance in any proceedings after his first petition for certiorari to the U.S. Supreme Court.[1]

It is at that point that the "volunteer" lawyers enter. A defendant whose petition for certiorari and appeal for clemency are turned down still has two main avenues of legal relief available to him: He can seek post-conviction relief from the state courts. And, after he has exhausted his state remedies, he can petition for a writ of habeas corpus from the federal courts. The preparation of the necessary papers and the presentation of arguments to those tribunals is a complex business. It requires not only a mastery of arcane procedural requirements, but also a knowledge of the sometimes unwritten standards used by different courts when assessing different kinds of claims. It is a job, in short, that requires expert, experienced legal counsel. Indigent defendants are entirely dependent for that essential service on a corps of attorneys who are willing to forgo the income they would derive from other work, to ensure that even persons convicted of the most heinous crimes receive justice.

These volunteer lawyers serve two crucial functions. First, they reduce the likelihood that we will execute someone "by mistake"—by which I mean not only an innocent person, but also a person convicted in a fashion that violates the Constitution, or a person who has not been afforded an adequate opportunity to show that he deserves to live. As most of you undoubtedly are aware, I believe the death penalty is unconstitutional in all circumstances.[2] A majority of my colleagues presently do not agree.[3] However, we are unanimous (or nearly unanimous) in our recognition that strict substantive and procedural requirements are necessary to ensure that the death penalty is not imposed arbitrarily or capriciously. As the Court has explained:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[4]

Reliability and equity in the imposition of the ultimate penalty can be achieved (if at all) only if dedicated, high-quality lawyers comb the records in cases that terminate in death sentences to ensure that the defendants' legal rights were not abridged. Those records must be scrutinized again and again to ensure that they are as error-free as is humanly possible. All too often it is not until the second or third examination of a case that a critical flaw comes to light. The case of James McCray, an epileptic black man convicted of raping and murdering a white woman, is illustrative: 8 years after his conviction and a few days before his scheduled execution, a volunteer attorney discovered a crucial error in the trial judge's instructions to the jury and persuaded the Florida Supreme Court to grant McCray a new trial.[5] Had the lawyer not been willing, at the last minute, to take on the case, McCray would have been executed.

**These remarks were delivered by Justice Thurgood Marshall at the dedication ceremony for the 1983 volume of the* Annual Survey of American Law, *New York University School of Law, April 9, 1984.*

Of course, the efforts of these attorneys cannot ensure that the system for determining who lives and who dies will operate rationally. Even a casual review of recent cases in which death sentences were or could have been imposed reveals startling unfairness. Recidivists who commit brutal, cold-blooded murders frequently get life sentences, while people like John Spinkellink, a drifter who killed another dirfter who had threatened and sexually assaulted him, are executed.[6] The most glaring of the inequities in the administration of the death penalty concerns the race of victims and defendants: a Negro who kills a white man runs a far greater risk of being executed than a white man who kills a Negro.[7] Many tbings must change before unfairness of this order is alleviated. But one essential component of any effort at reform is the provision of expert legal assistance to defendants of all races.

The lawyers who volunteer to represent convicts on death row perform a second essential function: they ensure that we do not forget what we are doing. Members of the judiciary and the society at large are all too prone to suppress the fact that, after a hiatus of over a decade, we have begun once again to kill people who kill other people. It is much easier to approve the institution of the death penalty when one is not obliged to confront the manner in which it is brought to bear on real people. By constantly exposing and reexposing to public and judicial view not only the facts of the crimes for which defendants have been sentenced to death but also the histories and personalities of the defendants themselves, the lawyers who represent them in collateral proceedings prevent us from averting our eyes from the reality of the system of punishment we condone.

Recently, this group of lawyers has been subjected to criticism by some members of the bench and bar. The most frequently heard comment is that members of the death-penalty bar too often file "frivolous" lawsuits, solely to delay the inevitable imposition of death sentences. I agree that a lawyer who deliberately institutes legal proceedings on behalf of a client who has no colorable claim for relief abuses the judicial process. But, in view of the severity and irrevocability of the impending sanction, a "colorable claim" in this context means nothing more than a claim that can be made in a lawyer-like fashion and has some chance of obtaining a reprieve. Very few coherent legal arguments can confidently be said to lie outside that category. Particularly in view of the frequency with which the Supreme Court as well as other courts abruptly alter doctrinal course in the area of criminal procedure, I would be unwilling to describe as "frivolous" more than a small percentage of the claims advanced by these attorneys.

The weakness of the charge that lawyers representing persons on death row are flooding the courts with meritless suits is further revealed by the frequency with which their arguments prevail. To focus on just one tier of the appellate process: in capital cases decided on the merits by federal courts of appeals during the past year, in which defendants challenged district-court denials of habeas-corpus relief, the defendant prevailed 46% of the time.[8]

The accusation that these lawyers are "holding up" executions has always struck me as absurd. In my view, a state has no legitimate interest in killing a man sooner rather than later. If there is any chance that a defendant has a valid objection to his conviction or sentence, elementary principles of justice require that his attorneys be afforded a full opportunity to present that claim to the eourts before the issue is rendered moot by his death.

Members of the death-penalty bar are also sometimes chastised for filing "repetitive" habeas-corpus petitions, thereby clogging the judicial system with "unnecessary" suits. It is certainly true that a deliberate decision by a lawyer not to include a potential claim in a habeas-corpus petition in order to save it for use in a subsequent petition constitutes an abuse of the writ, for which the sanction may be foreclosure of the withheld argument.[9] But it seems to me that few of the "successive" habeas-corpus suits that eventually come before the Supreme Court are the products of such improper tactics. Most contain claims that are in some sense "newly discovered." In other words, they present issues that were not apparent to the counsel who brought the preceding suit on behalf of the defendant; they involve facts not within the knowledge of the defendant or his lawyer at the time the preceding suit was filed; or they derive from changes in governing law in the interim.

It would, of course, be more convenient if all of the claims arising out of each capital case were packaged in a single proceeding. But, for unavoidable or excusable reasons, defects in a criminal trial often are revealed sporadically over a period of time. When that happens, it is the responsibility of the federal judiciary to consider each claim on its merits—to determine whether the defendant "is in custody in violation of the Constitution," and, if so, to issue a writ of habeas corpus[10]—regardless of the "tardiness" of the challenge. In other contexts, one can fairly debate whether the inevitable imperfection of decisionmaking processes and the social functions served by finality in adjudication should lead us to limit the availability of habeas-corpus relief,[11] but those arguments are out of place here. When a man's life is at stake, we simply cannot refuse to reconsider a decision that may be founded on "an error as to law or fact."[12]

I do not mean to suggest that the system by which convicts on death row obtain legal representation operates perfectly. Far from it. An informal alliance of underfunded and understaffed private organizations currently bears the responsibility for locating attorneys willing and able to volunteer their services on behalf of persons already sentenced to death. Such attorneys are scarce, and their numbers are dwindling. The coordinating organizations often have to go to great lengths to find competent lawyers.

The difficulty of securing effective representation has distressing side effects. Most importantly, when a convict finally obtains an attorney to assist him in collateral proceedings, it is often too late. The failure of the defendant or his trial counsel previously to raise an issue in state proceedings may make it impossible to present the issue to a federal court.[13] Courts at all levels are reluctant to postpone executions, and are thus all too likely to give short shrift to last-minute appeals.

Barring a change in constitutional doctrine involving the right to counsel, this system can be improved only if state governments do more to assist the organizations that are attempting to find lawyers

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SUPREME COURT PRACTICE

by Kerry P. FitzGerald, Dallas

(The second of a two-part series involving appeals in the federal system. Part one covered federal appellate practice. –Ed.)

A. STATE COURTS–APPEAL OR CERTIORARI

Title 28 Section 1257.

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

1. By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or law of the United States, and the decision is in favor of its validity.

3. By Writ of Certiorari, where the validity of a treaty of statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States.

For the purposes of this Section, the term 'highest court of a state' includes the District of Columbia Court of Appeals.

B. COURTS OF APPEALS: CERTIORARI, APPEAL, CERTIFIED QUESTIONS.

Title 28 Section 1254.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) by appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States, but such appeal shall preclude review by Writ of Certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented; (3) by certification at any time by a Court of Appeals of any question of law in any civil or criminal case as to which instructions are desired and upon such certification the Supreme Court may give binding instructions or require the entire record to be set up for decision of the entire matter in controversy.

C. JURISDICTION ON APPEAL

1. Notice of Appeal.

a. Notice of Appeal in an appeal to review the judgment of a state court in a criminal case must be filed with

the Clerk of the Court from whose judgment the appeal is taken within 90 days after the entry of such judgment, and the case must be docketed within the time provided in Rule 12.

b. An appeal in all other cases shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U.S.C. Sections 2101(a) (b) and (c).

c. Rule 10 governs the content of the Notice of Appeal. The Notice of Appeal shall specify the parties taking the appeal, shall designate the judgment of part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this court is taken.

d. A copy of the Notice of Appeal must be served on all parties to the proceeding in the court where the judment appealed from was issued, in the manner prescribed by Rule 28, and proof of service shall be filed with the Notice of Appeal.

e. The time for filing the Notice of Appeal runs from the date the judgment or decree sought to be reviewed is rendered and not from the date of the issuance of the mandate. If a Petition for Rehearing is timely filed, the time runs from the date of the denial of rehearing or the entry of a subsequent judgment.

f. The time for filing a Notice of Appeal may not be extended.

g. If appeal is taken from a federal court, the Notice of Appeal must be filed with the Clerk of that court. If the appeal is taken from a state court, the Notice of Appeal shall be filed with the Clerk of the court from whose judgemnt the appeal is taken, and a copy of the Notice of Appeal shall be filed with the court possessed of the record.

2. **Docketing Cases**

a. Not more than 90 days after entry of judgment appealed from, it shall be the duty of the appellant to docket the case in accordance with Paragraph .3 of Rule 12.

b. Counsel for appellant must enter an appearance, pay the docket fee, and file with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction which shall comply with Rule 15. The case will then be placed on the docket.

3. **The Jurisdictional Statement**

Rule 15 sets forth the specific contents of the jurisdictional statement, and provides that it must be produced in conformity with Rule 33.

4. **Motion to Dismiss or Affirm**

Within 30 days after reeeipt of the jurisdictional statement, appellee may file a Motion to Dismiss or Affirm, on the ground that the appeal is not within the court's jurisdiction or in conformity with statute or the Supreme Court Rules; or on the ground that it does not present a substantial federal question, etc. See Rule 16.1.

D. JURISDICTION ON WRIT OF CERTIORARI

1. **Time for petitioning**

a. A petition to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the clerk within 60 days after the entry of such judgment.

b. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a Writ of Certiorari in such cases for a period not exceeding 30 days.

c. The time for filing a petition runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. If a Petition for Rehearing is timely filed by any party in the case, the time for filing the Petition for Writ of Certiorari for all parties runs from the date of the denial of rehearing or of entry of a subsequent judgment entered on the rehearing.

d. An application for extension of time within which to file a petition, inter alia, must set forth with specificity the reasons why the granting of an extension of time is thought justified. See Rule 20.6.

2. **Considerations governing review on certiorari**

a. A review of Writ of Certiorari is not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefore.

b. The following indicate the character of reasons that will be considered:

1. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with the state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court,

as to call for an exercise of this court's power of supervision;

2. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;

3. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of the U.S. Supreme Court.

3. **Preliminary Matters**

a. Counsel for petitioner shall enter an appearance, pay the docket fee ($200.00, to be increased to $300.00 in a case on appeal or Writ of Certiorari or in other circumstances when oral argument is permitted), and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for petitioner to notify all respondants, on a form supplied by the court, of the date of filing and of the docket number of the case.

4. **Contents of the Petition for Certiorari—Rule 21.**

a. Petition for Writ of Certiorari shall contain, in the order here indicated:

1. The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the court.

2. A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this court contains the names of all parties. This listing may be done in a footnote. See Rule 28.1.

3. A table of contents and table of authorities, if required by Rule 33.5.

4. A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

5. A concise statement of the grounds on which the jurisdiction of this court is invoked showing:

i. The date of the judgment or decree sought to be reviewed, and the time of its entry;

ii. The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari; and

iii. Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

iv. The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

6. The Constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph l(k) of this Rule.

7. A *concise* statement of the case containing the facts material to the consideration of the questions presented.

8. If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

9. If review of the judgment of a federal court is sought,

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SIGNIFICANT DECISIONS REPORT

VICENTE VEGA, No. 1154-83, Opinion on D's PDR, Rev'd, Per Curiam, 4/11/84.

NEW TRIAL GRANTED IN ABSENCE OF VALID WRITTEN WAIVER OF RIGHT TO JURY TRIAL: CCA agreed with D's contention that the T/C committed fundamental error in conducting a trial before the court in the absence of a valid written waiver of D's right to trial by jury. Court distinguished Foster, No. 1-83-5-CR, delivered 9/29/83, Pet. ref'd wherein it was clear that a written waiver had in fact been executed by the D. Although the waiver of trial by jury had apparently been lost or misfiled in Foster, circumstantially the evidence was clear that the written waiver had been executed.

DEWEY HOSXIE, No. 867-83, Opinion on D's PDR, Judgment of C/A Rev'd, Prosecution ordered dismissed, Judge Campbell, 4/11/84.

AGGRAVATED RAPE INDICTMENT FUNDAMENTALLY DEFECTIVE: Agg. rape indictment alleged in part that D did intentionally and knowingly compel a female to submit to sexual intercourse and:

"Did then and there intentionally and knowingly by act or words, and deeds compel X to submit to sexual intercourse by placing the said X in fear of serious bodily injury".

Section 21.03(a)(2) P.C., in effect at the time of the offense, required that the threat conveyed be of "imminent" infliction of serious bodily injury. The court held that the failure to allege imminent harm rendered the indictment fundamentally defective. McDaniel, 642 S.W.2d 785.

"The State attempts to distinguish McDaniel, supra, by contending that the second allegation of 'then and there' in the indictment is sufficient to allege a threat of imminent serious bodily injury. While we agree with the State's contention that 'then and there' means 'at that time and at that place', we find that, as this indictment is worded, the phrase in question refers to when and where the threat was made and not to the nature of the threat."

CHARLES CANNON, No. 68,328, Aff'd, Judge Campbell, 4/11/84.

IMPROPER JURY ARGUMENT NOT HARMFUL TO D: C/W testified that D robbed him at gunpoint and that the D had worked for him prior to the offense for a period of two months at which time he fired D. The D testified as to an alibi. The prosecutor then argued to the jury:

"First of all, I would like to thank you for your time and the attention that you have put into this case. It hasn't been a very long case and it probably could have been just one witness, it could have been Mr. Charles W. Cooley (the C/W) who would come to the stand and say 'It was this man that robbed me at gunpoint'. And let me tell you what Mr. Cooley asked me yesterday. He said, 'Who's on trial here?'. That's what Mr. Cooley said."

The court sustained D's objection and instructed the prosecutor to stay within the testimony but overruled D's Motion For Mistrial. Clearly any non-testimonial statement made by the C/W to the prosecutor was outside the record and was improper. The question remaining was whether in view of that determination, the argument was harmful to D, and the court concluded that it was not.

"Proper jury argument must fall within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answers to argument of opposing counsel; and (4) plea for law enforcement. Todd v. State, 598 S.W.2d 286 (Tex. Cr. App. 1980). Error exists when facts not supported by the record are interjected. Berryhill v. State, 501 S.W.2d 86 (Tex. Cr. App. 1973). However, such error is not reversible unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts, harmful to the accused, into the trial."

A well reasoned dissent by Clinton stated in part:

"Analysis of this question (i.e., whether the error requires reversal) requires consideration of not only the record as a whole, including the facts adduced, the issues involved, the nature of the offense and the verdict, but also the possibility that the conviction resulted from passion or prejudice engendered by the argument, or from the jury's consideration of matters other than evidence duly processed according to law . . . It follows that a patently egregious argument might be rendered harmless by other attributes of the case such as overwhelming evidence or the failure of the argument to touch a material issue. . . Conversely the very argument which appears innocuous in one case might constitute reversible error in another. In sum, this determination can only be made case by case. Mayberry v. State, 532 S.W.2d 80 (Tex. Cr. App. 1976).

Standing alone, the improper argument complained of here does not appear to be particularly extreme, and no doubt would not require reversal if repeated in some other cases. However, as chronicled above, the only real issue in this case was whether the jury believed beyond a reasonable doubt that a man all parties agreed was upstanding, was correct in identifying the accused as his assailant. Thus, the prosecutor's informing the jury that the C/W had asked him, 'Who's on trial here?' injected inadmissible information into the proceeding which had the effect of bolstering the credibility of the very witness whose credibility was in question. Moreover, this new information inferentially indicted defense counsel for utilizing improper tactics in the defense of Appellant, when, in fact, his technique was beyond reproach. And finally, interjection of the C/W's query was calculated to operate on the emotions of the jury by castigating an inclination any juror might harbour to believe Appellant or reasonably doubt the

accuracy of his identification as the robber by the witness Cooley.

More than ten years ago the court was constrained to note the 'growing tendency by prosecutors to go outside the record in jury argument and then, on appeal, submit that such was not error. . .' Stearn v. State, 487 S.W.2d 734, 736 (Tex. Cr. App. 1972). The purpose of jury argument was reiterated, quoting from Pena v. State, 129 S.W.2d 667, 669 (Tex. Cr. App. 1939), as follows:

'The object and principle purpose of an argument to the jury, as we understand it, is to aid and assist them in properly analyzing the evidence and arriving at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence. Nor should resort be had in argument to arouse the passion or prejudice of the jury by matters not properly before them.'"

PLACEMENT OF "GUILTY" VERDICT: The D contended also that the T/C erred by violating the presumption of the D's innocence and commenting on the weight of the evidence in that the court's jury verdict form listed 'guilty' prior to 'not guilty' and thereby suggested the D's guilty to the jury. The court did not reach the contention because there was no contemporaneous objection made at the time the charge was prepared and therefore any alleged error was waived.

CLEO MOORE, No. 898-83, Opinion on State's PDR, Rev'd C/A decision and remanded to C/A to consider D's other grounds of error, Judge Tom Davis, 4/18/84.

NO ABUSE OF DISCRETION IN CONTINUING TRIAL WHEN D OBSCONDED: The D was present with counsel at the time the court ruled on preliminary motions. The D pled not guilty and the jury was selected and sworn and then court recessed until 9 a.m. the following morning, at which time the D's counsel appeared but the D, on bond, did not appear. Careful trial counsel moved to continue the case for 24 hours but had absolutely no idea where the D was. The motion was denied and the trial proceeded. The D was found guilty and punishment was set at 15 years. Six months later the D was extradited from Illinois. C/A reversed, holding the T/C abused its discretion by proceeding with the trial since there was nothing in the record to show at the time the court ruled that the D's absence was voluntary. That holding was reversed by the CCA which held that the T/C had some evidence before it to support its conclusion that the D's absence was voluntary. The D had been in court the afternoon before and had been advised to come the next day. The D was out on bond. No one had received any communication from the D or anyone else to explain his absence on the morning of trial. Since the T/C could have reasonably inferred from the information before it that the D voluntarily absented himself, the court did not abuse its discretion in denying the D's Motion For Continuance and proceeding with the trial as authorized by Article 33.03 C.C.P.

The court also rejected the C/A holding that in reviewing the validity of the court's decision to proceed with trial, an appellate court can only consider the evidence which was before the T/C at the time it made its ruling and must ignore evidence which developed subsequent to the ruling, even if such evidence substantiates the T/C's finding that the D's absence was voluntary. Of necessity the validity of a T/C's decision that a D's absence was voluntary will have to be determined in hindsight. Here the D offered no evidence at this Motion For New Trial to indicate that his absence was anything other than voluntary.

CHARLES SWEETEN, Nos. 64,087 and 64,088, Two murder convictions, Rev'd, Judge McCormick, 4/18/84.

D'S CONFESSION WAS THE PRODUCT OF AN ILLEGAL ARREST--ADMISSION WAS ERROR: On January 9 Kilgore and Longview police officers were called to a homicide scene in Kilgore. Officers found bodies of two white males, Mike Haase and Wally Parks, in a rear bedroom of a house. It appeared that both victims had died as a result of shotgun wounds. Under the body of Wally Parks was found a handwritten note bearing the signature "Chuck". One shotgun shell was found at the scene. Longview Officer Mike Maxey recalled that on January 8 he had received a telephone call from the D regarding the two victims. Maxey had known the D for over two years. During this telephone conversation, the D told Maxey that the two victims had burglarized his home. In addition he had mentioned a shotgun. Maxey mentioned the D's name as a possible suspect and then he and four other officers went to the D's house in Longview.

When the group reached the house, two officers knocked on the front door. The D's wife answered and invited the officers in. When they asked to speak to the D, she led them into a bedroom where the D was in the process of getting out of bed. An officer noticed in the room a shotgun hanging on the wall some five to eight feet from the D. The D, in response to a question, said that the gun was his and it was loaded. A pistol was also seen lying in plain view on a closet shelf and the D stated that it was also his. The officers seized both weapons, with the D's consent. The D voluntarily agreed to accompany the officers to the sheriff's office.

When the D reached the sheriff's office at about 10:45 a.m. he was taken to one of the offices, was read his Miranda rights and signed a waiver form. Four officers questioned the D for about an hour as to his whereabouts the previous 72 hours. During this time the D told the officers that he and a friend had been target shooting on January 7 out on some rural property he owned. The officers then contacted a district attorney's office which advised that the officers could hold the D for investigation without filing charges. The D, although not formally arrested, was placed in jail. Later that same day the officers asked the D if he would take them to his property where he had been target shooting and he complied. At least three armed officers accompanied the D to the farm in question, where the officers found some .12 gauge shotgun shell hulls on the ground. The shells were similar to those taken from the D's gun and similar to the hull found at the murder scene. One officer fired the D's shotgun for the purpose of retrieving an empty hull for use in a bullistics test.

The officers returned the D to the Gregg County Courthouse and put him in jail. At 8:00 p.m. the D was removed from his cell and taken to the district attorney's office where he was read his Miranda rights again and questioned for two hours by two officers and the district attorney. At the end of the interview the D agreed to take a polygraph exam the next morning in Tyler and the D was taken back to jail.

The next morning at 7:30 a.m. the D was driven to Tyler by two officers and was given a pretest interview by the polygraph examiner. At the end of the interview the D told the examiner he did not want to take the polygraph exam but he did want to talk with Mike Maxey. When the D was alone with Maxey, he admitted committing the murders. At the same time Maxey was talking to the D, another officer learned that the bullistics test had come back positive on the D's shotgun. The D was then formally arrested and taken back to Longview where he was taken before a magistrate and arraigned on two murder charges. The D was then taken to the district attorney's office where he began giving a written statement at 12:15 p.m. which culminated in his signing the statement at 2:00 p.m. on January 10.

The record is clear that from the first time the D was placed in the Gregg County Jail at 12 p.m. January 9, he was in custody. This investigative detention was clearly improper and amounted to an illegal arrest. Ussery, 651 S.W.2d 767. Probable cause did arise on the morning of January 10 when the D admitted to Maxey that he had committed the double murders and another officer learned that the bullistics test on the D's shotgun was positive. The existence of probable cause at this point in time does not negate the illegality of the D's prior detention. It is important, though, in determining whether the D's confession was the fruit of an illegal detention.

A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Taylor v. Alabama, 102 S.Ct. 2664, 73 L.Ed.2d. 314 (1982); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d. 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d. 416 (1975); Townsley, 652 S.W.2d 791; Duncan, 639 S.W.2d 314; Green, 615 S.W.2d 700.

In Brown, supra, the S.Ct. set out four factors which must be used in analyzing whether the confession was an act of free will. First, whether Miranda warnings were given--and they were in this case but the warnings alone are not sufficient in and of themselves to purge the taint of an illegal arrest. Second, the proximity of the confession to the arrest--the D confessed about 24 hours after he was first put in jail. Third, the purpose and flagrancy of the primary illegality--the officers held the D in custody even though they knew they did not have probable cause to arrest him, which amounted to a flagrant violation of the D's Fourth Amendment rights. Fourth, the presence of intervening circumstances--the D testified that he felt he was under arrest from the time the officers came to his house and that he did not feel the officers would have let him go home at any time after that. The D was not left alone and was subjected to periods of interrogation. At one point the D was driven to a rural setting, accompanied by three armed officers. The record clearly allows the reader to infer that the D was in fear of his life at this point. "The record before us shows a concentrated effort on the part of the State to extract a confession from Appellant, even though the officers involved knew they were holding Appellant without probable cause". Unlike Gant, 649 S.W.2d 30 (Tex. App. 1983), this situation is precisely what Brown was trying to prevent. The State failed to meet its burden of showing intervening events that may have broken the connection between the D's illegal arrest and his confession.

ROBERT WILSON, No. 68,048, Rev'd/Acquittal entered, Judge Tom Davis, 2/1/84.

STATE FAILED TO PROVE INTENT TO DEPRIVE OWNER OF PROPERTY: The C/W grain company voluntarily sold thousands of pounds of milo grain to Transco Corp. from 1974 to 1979. The D was the manager of Transco. During several months in the latter part of 1979 Transco Corp. paid for the shipments with checks which were returned for insufficient funds. The State tried the D for theft of property over the value of $10,000 on the theory that the D was guilty as the corporation's manager and that the consent was ineffective due to deception; that the transactions were really between the C/W and a sham Transco Corp. which was in reality a one-man operation controlled by the D. The proof among other things showed that Transco Corp. was organized in Dec. 1972 and that many other transactions occurred which were paid for properly between 1974 to 1979. The court noted that the relevant intent to deprive the owner of property is the accused's intent at the time of the taking. Peterson, 645 S.W.2d 807. The court then found that the State had failed to sustain itsburden of proof to show the requisite intent as alleged. The milo grain was voluntarily sold to the

corporation of which the D was manager. The evidence was insufficient to show the property was obtained by deception. Phillips, 640 S.W.2d 293.

THEODORE PARIS, No. 917-83, Opinion on D's PDR, Aff'd, Judge Miller, 4/25/84.

QUESTION: WHETHER THE D'S EARLIER WAIVER OF SPEEDY TRIAL IN CAUSE NO. 289804 TRANSFERRED TO THE INDICTMENT IN CAUSE NO. 309085? Yes. In Rosebury, 659 S.W.2d 655 the court held that a waiver of speedy trial applies to the case (offense) not the transaction and thus a waiver of speedy trial executed under one indictment/information is valid as to a new indictment/information arising from the same transaction only if the true crimes are the same offense. In Rosebury only a single offense was involved, that is, only a single substances was possessed. The original pleading in Rosebury named one substance erroneously and then the second pleading named marijuana. Under the facts there was only one case. Here, there was aggravated robbery which occurred Nov. 16, 1978, as against a single victim. Under the record the D previously waived a felony indictment for the offense and pled guilty to the felony information. Later the D was allowed to withdraw his plea of guilty and was granted a new trial based upon evidence from a competency hearing. The court concluded that in light of Rosebury, supra that the D's waiver of his rights under the Speedy Trial Act, Art. 32A.02 C.C.P., in Cause No. 289804 applied to the indictment for the the same offense in Cause No. 309085.

CHARLES COUNTY, No. 68,950, Capital murder, Rev'd, Judge McCormick, 4/25/84.

TRIAL COURT ERRED IN SUBMITTING AN ERRONEOUS INSTRUCTION ON THE LAW REQUIRING CORROBORATION OF AN ACCOMPLICE WITNESS: The T/C's instructions on corroboration substantially tracked Art. 38.14 C.C.P. The D objected to the charge and requested that an instruction be given which set out the requirement of corroboration to the specific elements of the offense that elevated it to a capital murder. In Fortenberry, 579 S.W.2d 482 the court held that in a case where the accused is charged with Sec. 19.03(a)(1) capital murder, the jury must be instructed upon the D's request that the accomplice witness's testimony must be corroborated as to the specific elements that make the offense a capital crime and the failure to do so constitutes reversible error. See also Granger. The court wrote in Granger, 605 S.W.2d 602:

"The essence of the capital murder offense as alleged against this Appellant is that he committed the murder, in the words of the indictment, 'for remuneration and the promise of remuneration'. *** To test the sufficiency of the corroboration in a capital murder case we are constrained to eliminate from consideration the evidence of the accomplice witness and then examine the evidence of other witnesses with the view to ascertain if there be any inculpatory evidence, that is, evidence of incriminating character which tends to connect the defendant with the commission of the offense as to that element which elevates the murder to capital murder. See Fortenberry v. State, supra. If there is such evidence, the corroboration is sufficient; otherwise, it is not."

THE DEFENDANT WAS NOT DEPRIVED OF A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT: The court reviewed the four factors of length of delay, reason for delay, the D's assertion of his right, and prejudice to the D, in rejecting the D's claim that he was denied a speedy trial under the U.S. Const. Phipps, 630 S.W.2d 942.

HERE'S WHAT HAPPENED

All of us (well, some of us) have endured the confusion of traffic accidents and tried to summzrize on those pitifully inadequate insurance forms in a few words or less exactly what happened. Here are summaries actually submitted when police asked for a brief statement on how a particular accident happened.

* * *

Coming home, I drove into the wrong house and collided with a tree I don't have.

The other collided with mine without giving warning of its intentions.

I thought my window was down, but found it was up when I put my hand through it.

I collided with a stationary truck coming the other way.

My car was legally parked as it backed into the other vehicle and vanished.

A truck backed through my windshield into my wife's face.

A pedestrian hit me and went under my car.

The guy was all over the road. I had to swerve a number of times before I hit him.

I pulled away from the side of the road, glanced at my mother-in-law, and headed over the embankment.

The gentleman behind me struck me on the backside. He then went to rest in the bush with just his rear end showing.

In my attempt to kill a fly, I drove into a telephone pole.

I had been shopping for plants all day and was on my way home. As I reached an intersection a hedge sprang up obscuring my vision.

I had been driving for 40 years when I fell asleep at the wheel and had an accident.

The accident occurred when I was attempting to bring my car out of a skid by steering it into the other vehicle.

An invisible car came out of nowhere, struck my vehicle and vanished.

I told the police that I was not injured; but on removing my hat, I found that I had a fractured skull.

I was sure the old fellow would never make it to the other side of the roadway when I struck him.

The pedestrian had no idea which direction to go, so I ran him over.

I saw the slow-moving, sad-faced old gentleman as he bounced off the hood of my car.

The accident happened when the right front door of a car came around the corner without giving a signal.

The telephone pole was approaching fast. I was attempting to swerve out of its path when it struck my front end.

No one was to blame for the accident, but it never would have happened if the other driver had been alert.

I was unable to stop in time and my car crashed into the other vehicle. The driver and passengers then left immediately for a vacation with injuries.

* * *

SUPREME COURT PRACTICE from page 10

the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

10. A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

11. An appendix containing, in the following order:

i. Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

ii. Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

iii. A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

iv. Any other appended materials.

If what is required by this paragraph or by subparagraphs 1(f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

b. The Petition for Writ of Certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any Petition for Writ of Certiorari that does not comply with the Rule and with Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46.

c. All contentions in support of a Petition for Writ of Certiorari shall be set forth in the body of the petition, as provided in subparagraph 1(j) of this Rule. No separate brief in support of a Petition for Writ of Certiorari will be received, and the Clerk will refuse to file any Petition for a Writ of Certiorari to which is annexed or appended any supporting brief.

d. The Petition for Writ of Certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendix.

e. The failure of a petitioner to present, with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Form of Jurisdictional Statements, Petitions, Briefs, Appendices, Motions, and Other Documents filed with the court.

1(a) Except for typewritten filings permitted by Rules 42.2(c), 43, and 46, all jurisdictional statements, petitions, briefs, appendices, and other documents filed with the court shall be produced by standard typographic printing, which is preferred, or by any photostatic or similar process which produces a clear, black image on white paper; but ordinary carbon copies may not be used.

(b) The text of documents produced by standard typographic printing shall appear in print at 11-point or larger type with 2-point or more leading between lines. Footnotes shall appear in print at 9-point or larger type with 2-point or more leading between lines. Such documents shall be printed on both sides of the page.

(c) The text of documents produced by a photostatic or similar process shall be done in pica type at no more than 10 characters per inch with the lines double-spaced, except that indented quotations and footnotes may be single spaced. In foot notes, elite type at no more than 12 characters per inch may be used. Such documents may be duplicated on both sides of the page, if practicable. They shall not be reduced in duplication.

(d) Whether duplicated under subparagraph (b) or (c) of this paragraph, documents shall be produced on opaque, unglazed paper 6 ⅛ by 9 ¼ inches in size, with type matter approximately 4 ⅛ by 7 ⅛ inches, and margins of at least ¾ inch on all sides. The paper shall be firmly bound in at least two places along the left margin so as to make an easily opened volume, and no part of the text shall be obscured by the binding. However, appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

2(a) All documents filed with the court must bear on the cover, in the following order, from the top of the page: (1) the number of the case, or, if there is none, a space for one; (2) the name of this court; (3) the Term; (4) the caption of the case as appropriate in this court; (5) the nature of the proceeding and the name of the court from which the action is brought (e.g., On Appeal from the Supreme Court of California; On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit); (6) title of the paper (e.g., Jurisdictional Statement, Brief for Respondent, Joint Appendix);

(7) the name, post office address, and telephone number of the member of the Bar of this Court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other members of the Bar of this Court or of the Bar of the highest court in their respective states and, if desired, their post office addresses, may be added, but counsel of record shall be clearly identified. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than 11-point or in upper case pica.

(b) The following documents shall have a suitable cover consisting of heavy paper in the color indicated: (1) jurisdictional statements and petitions for writs of certiorari, white; (2) motions, briefs, or memoranda filed in response to jurisdictional statements or petitions for certiorari, light orange; (3) briefs on the merits for appellants or petitioners, light blue; (4) briefs on the merits for appellees or respondents, light red; (5) reply briefs, yellow; (6) intervenor or amicus curiae briefs (or motions for leave to file, if bound with brief), green; (7) joint appendices, tan; (8) documents filed by the United States, or by any officer or employee of the United States, represented by the Solicitor General, gray. All other documents shall have a tan cover. Counsel shall be certain that there is adequate contrast between the printing and the color of the cover.

3. All documents produced by standard typographic printing or its equivalent shall comply with the page limits prescribed by these Rules. See Rules 15.3; 16.3, 16.5, and 16.6; 21.4; 22.2, 22.5, and 22.6; 27.1, 27.2(b), 27.3(b), and 27.4; 34.3 and 34.4; 36.1 and 36.2. Where documents are produced by photostatic or similar process, the following page limits shall apply:

Jurisdictional Statement (Rule 15.3)	65 pages
Motion to Dismiss or Affirm (Rule 16.3)	65 pages
Brief Opposing Motion to Dismiss or Affirm (Rule 16.5)	20 pages
Supplemental Brief (Rule 16.6)	20 pages
Petition for Certiorari (Rule 21.4)	65 pages
Brief in Opposition (Rule 22.2)	65 pages
Reply Brief (Rule 22.5)	20 pages
Supplemental Brief (Rule 22.6)	20 pages
Petition Seeking Extraordinary Writ (Rule 27.1)	65 pages
Brief in Opposition (Rule 27.2(b))	65 pages
Response to Petition for Habeas Corpus (Rule 27.3(h))	65 pages
Brief in Opposition (Rule 27.4)	65 pages
Brief on the Merits (Rule 34.3)	110 pages
Reply Brief (Rule 34.4)	45 pages
Brief on Amicus Curiae (Rule 36.2)	65 pages

4. The court or a justice, for good cause shown, may grant leave for the filing of a document in excess of the page limits, but such an application is not favored. An application for such leave shall comply in all respects with Rule 43; and it must be submitted at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

5(a) All documents filed with the court which exceed five pages, regardless of method of duplication (other than joint appendices, which in this respect are governed by Rule 30) shall be preceded by a table of contents, unless the document contains only one item.

(b) All documents which exceed three pages, regardless of method of duplication, shall contain, following the table of contents, a table of authorities (i.e., cases [alphabetically arranged]), constitutional provisions, statutes, textbooks, etc.) with correct references to the pages where they are cited.

6. The body of all documents at their close shall bear the name of counsel of record and such other counsel identified on the cover of the document in conformity with Rule 33.2(a) as may be desired. One copy of every motion and application (other than one to dismiss or affirm under Rule 16) in addition must bear at its close the manuscript signature of counsel of record.

7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

Rule 39 (form of typewritten papers) further provides as follows:

1. All papers specifically permitted by these Rules to be presented to the court without being printed shall, subject to Rule 46.3, be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. All copies presented to the court must be legible.

2. The original of any such motion or application, except a motion to dismiss or affirm, must be signed in manuscript by the party or by counsel of record.

6. Brief in Opposition

a. Respondent shall have 30 days after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by the U.S. Supreme Court. It should be in conformity with Rule 33, shall be as short as possible and

may not exceed 30 pages. Rule 22.2. Objections to the jurisdiction of the court to grant the writ of certiorari may be included in the brief in opposition. Rule 22.3.

7. **Disposition of Petition for Certiorari**

   a. After due consideration the U.S. Supreme Court will enter an appropriate order.

   b. Whenever a petition is granted, an order to that effect shall be entered and the Clerk shall notify the court below and counsel of record. The case will stand for briefing and oral argument. If the record has not previously been filed, the Clerk shall request the Clerk of the court possessed of the record to certify it and transmit it to the U.S. Supreme Court. A formal writ shall not issue unless specially directed.

   c. Whenever a petition is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or a justice thereof.

8. **Briefs on the Merits**

   a. Time for filing.

      1. Counsel for appellant or petitioner shall file with the Clerk 40 copies of the printed brief on the merits within 45 days of the order noting or postponing probable jurisdiction, or of the order granting the writ of certiorari.

      2. 40 printed copies of the brief of the appellee or respondent must be filed with the Clerk within 30 days after the receipt by him of the brief filed by the appellant or petitioner.

      3. A reply brief will be received no later than one week before the date of oral argument, and only by leave of court thereafter.

      4. The period of time may be enlarged as provided in Rule 29, upon appropriate application.

      5. No brief will be received by the Clerk unless the same shall be accompanied by proof of service as required by Rule 28.

   b. Contents of brief.

      1. Brief of appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

         i. The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for ceritiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the court may consider a plain error not among the questions presented but evidence from the record and otherwise within its jurisdiction to decide.

         ii. A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this court contains the names of all such parties. This listing may be done in a footnote. See Rule 28.1.

         iii. The table of contents and table of authorities as required by Rule 33.5.

         iv. Citations to the opinions and judgments delivered in the courts below.

         v. A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

         vi. The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text, if not already set forth in the jurisdictional statement or petition for certiorari, shall be set forth in an appendix to the brief.

         viii. A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

         ix. The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

         x. A conclusion, specifying with particularity the relief to which the party believes himself entitled.

      2. A brief on the merits shall be as short as possible but in any event shall not exceed 50 pages in length. A reply brief shall not exceed 20 pages in length.

      3. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.

9. **Rule 36 governs the Brief of An Amicus Curiae**, which should follow the same form as set forth above under Rule 34 for Briefs on the Merits. Amicus Curiae Brief may not exceed 20 pages in length if submitted prior to consideration of the jurisdictional statement or the petition for writ of certiorari; if submitted in a case before the court for oral argument, it shall not exceed 30 pages in length.

E. ORAL ARGUMENT–RULE 38

1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. Counsel should assume that all members of the court have read the briefs in advance of argument. *The court looks with disfavor on any oral argument that is read from a prepared text.* The court is also reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has heen noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties.

2. The appellant or petitioner is entitled to open and conclude the argument. When there is a cross-appeal or a cross-writ of certiorari it shall be argued with the initial appeal or writ as one case and in the time of one case, and the court will advise the parties which one is to open and close.

3. Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the allotted time. Any request for additional time shall be presented by motion to the court filed under Rule 42 not later than 15 days after service of appellant's or petitioner's brief on the merits, and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation.

4. Only one counsel will be heard for each side, except by special permission granted upon a request presented not later than 15 days after service of the petitioner's or appellant's brief on the merits. Such request shall be by a motion to the court under Rule 42, and shall set forth with specificity and conciseness why more than one counsel should be heard. Divided arguments are not favored.

5. In any case, and regardless of the number of counsel participating, counsel having the opening will present his case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

7. By leave of court, and subject to paragraph 4 of this Rule, counsel for an amicus curiae whose brief has been duly filed pursuant to Rule 36 may, with the consent of a party, argue orally on the side of such party. In the absence of such consent, argument by counsel for an amicus curiae may be made only by leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Any such motion will be granted only in the most extraordinary circumstances.

F. REHEARINGS–RULE 51

1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding in forma pauperis under Rule 46) accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court. See also Rule 52.2.

2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph 1 but its grounds must be limited to intervening circumstances of substantial or controlling effect or to other sutstantial grounds not previously presented. Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

3. No response to a petition for rehearing will be received unless requested by the court, but no petition will be granted without an opportunity to submit a response.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.

G. MANDATES

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. In a case coming from a state court, mandate shall issue as of course after the expiration of 25 days from the day

the judgment is entered, unless the time is shortened or enlarged by the court or a justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment, or is filed after the court adjourns, the judgment or mandate of the court will not be stayed unless specifically ordered by the court or a justice.

3. In a case coming from a federal court, a formal mandate will not issue, unless specially directed; instead, the Clerk will send the proper court a copy of the opinion or order of the court and a certified copy of the judgment (which shall include provisions for the recovery of costs, if any are awarded). In all other respects, the provision of paragraph 2 apply.

THURGOOD MARSHALL from pg. 7

for defendants sentenced to death,[14] and more lawyers come forward to volunteer their services.

The attorneys who currently are shouldering our collective burden deserve our gratitude, not our scorn and not simply our tolerance. They are making enormous sacrifices—emotional as well as financial. Prosecution of a single appeal on behalf of a person on death row frequently involves months of exhausting, seemingly futile effort. One lawyer has described the process as a "self-lacerating investment of time and energy."[15] To the attorneys willing to make such investments, again and again, I wish to express my admiration and thanks.

1. At present, a state is constitutionally obliged to provide legal representation for an indigent defendant only at trial and in an appeal of right. Compare *Ross v. Moffitt*, 417 U.S. 600 (1974), with *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963). The Supreme Court has never considered whether an indigent defendant who is charged with a capital offense is entitled to assistance in the later stages of the appellate process.
2. *See Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 358-369 (1972) (Marshall, J., concurring).
3. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976).
4. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *see also Zant v. Stephens*, 462 U.S. ——, —— (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982); *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972) (Stewart, J., concurring); *id.*, at 313 (White, J., concurring).
5. *See* D. Clendinen, "Rising Death Row Population Burdens Volunteer Lawyers," *New York Times*, Aug. 23, 1982, p. A15, col. 4.
6. *See Spinkellink v. State*, 313 So. 2d 666, 673-74 (Fla. 1975) (dissenting opinion); Kaplan, The Problem of Capital Punishment, 1983 U. Ill. L.F. 555, 576.
7. *See, e.g.*, Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization (October 1983) (unpublished); *Pulley v. Harris*, ——U.S. ——, ——(1984) (Brennan, J., dissenting) (citing other studies); David Bruck, "Decisions of Death," *The New Republic*, Dec. 12, 1983, pp. 21, 24.
8. Figures compiled by NAACP Legal Defense and Educational Fund, Inc.
9. *See Sanders v. United States*, 373 U.S. 1, 17-19 (1963); 28 U.S.C. § 2254 Rule 9(b) (1982).
10. 28 U.S.C. § 2241 (c) (3).
11. Cf. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 *Harv. L. Rev.* 441 (1963).
12. Cf. H. Hart & H. Wechsler, The Federal Courts and the Federal System 1238-1239 (1953).
13. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).
14. Promising efforts are being made by the state of California to set up a publicly funded organization to coordinate the location of counsel for persons on death row. *See* B. Girdner, "Criminal Law Notebook," Los Angeles Daily Journal, Sept. 23, 1983, p. 3.
15. Statement by A.C.L.U. attorney Henry Schwarzschild, quoted in "The Queen of Death Row," *Time*, Dec. 31, 1979, p. 60.

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SOME OBSERVATIONS ON THE DWI LAW

by Louis Dugas, Jr., Orange

The legislation amending the driving while intoxicated laws is not state of the art. This article is my attempt to place a few well chosen, from my point of view, observations demonstrating the foibles contained therein.

Beginning at the beginning with the title midway it reads:

> ". . .amending Chapter 173, Acts of the 47th Legislature, Regular Session 1941, as amended (Article 6687b, Vernon's Texas Civil Statutes) by adding Section 4A and amending Subsections (a), (b) and (d), and adding Subsections (e), (f), (g) and (h), Section 24; . . ."

This portion of the title is misleading. It does not indicate which section of Article 6687(b) is amended. For example, Article 1 of 6687(b) has subsections (a), (b) and (d).

"(a) defines vehicles
(b) defines motor vehicles
(c) defines school bus"

Upon reading Section 2 of the Act (SB.1, 68th Legislature Chapter 303) we see an apparently different intent. It appears the Legislature intended to amend Section 24, Chapter 173, Acts of the 47th Legislature, Regular Session, as amended (Article 6687(b)) Vernon's Texas Civil Statutes.

It appears that the title is afflicted with a similar disease as the one which befell the Controlled Substance Act. I suggest you file a motion based on language in *White v. State*, 440 SW2d 660 (1969) to challenge the constitutionality of the title. In the White case, the court held that the function of a title was to facilitate and protect the legislative process by affording legislators and other interested persons a ready and reasonably accurate means of knowledge of the contents of bills without having to read the entire text. The court continued:

> "Since that is the function of the title, requirements in legislative bills are determined by what the title says and not by what it was intended to say."

Second, I suggest that you file a motion seeking probation under 6687(b) Sec. 24(d), which you contend is still in effect. This section allows a person to retain his license if placed on probation by the Court.

My observations which follow are not scientific, still a jury is not composed of scientists. "Alcohol concentrations" must be defined by the court in the charge. If this is done, the analysis below could be argued to the jury. Section 3 of the Act listed in Vernon's as 6701 1-5 is in question. The first definition is as follows:

> "(1) 'Alcohol concentration' *means:* (emphasis added for later emphasis)
> (a) the number of grams of alcohol per 100 milliliters of blood;"

Usually blood for testing is taken in vials containing 3 cc's which is the same as 3 milliliters. Can you visualize filling 33 1/3 cc vials for a blood test. Or what about using a 50 cc tube so you will only have to do it twice. A 50 cc vial is used normally to irrigate or for tube feeding. The normal blood test for intoxication uses from 1 to 2 cc's of blood.

Moving on with definitions:

> "(B) the number of grams of alcohol per 210 liters of breath;"

One liter of breath is equal to 1,000 cc's. A liter is 1.057 U.S. quart. 210 liters of breath are the same as a 55 gallon drum of breath. Anyone capable of giving that much breath is going to be drunk just from expelling air. Most breath machines use about 53.5 cc's of breath. The definition also does not require the breath to be "alveolar" which the machine maker's claim is the only air which affords a proper test result.

Remember the word "means" was underlined. The Supreme Court of the U.S. in *Colaute v. Franklin*, 58 L.Ed. 2d 596, 607, said:

> "As a rule, a definition which declares what a term 'means' excludes any meaning that is not stated."

Another pertinent definition:

> "(4) 'Public place' has the meaning assigned by Section 1.07(a)(29), Penal Code."

Section 1.07(a) (29) Penal Code defines: "Public place" *means* any place to which the public or a substantial group of the public has access and includes, but is not limited to, *streets,* highways, . . ."

Reading the statute, particularly Section 4, it recites that refusal of the test is grounds for suspension of your license to drive if it occurred on a public highway or beach. There is nothing in Section 4 of the Act mentioning streets. I suggest that you move to set aside any suspension of your client's license for failure to give a test if he or she is arrested on a city street.

The Act in Section 4 sets out requirements for testing (6701 1-5, Sec. 3b). It requires that the DPS establish rules approving testing methods and the conditions of breath testing and analysis. These must be published in the Texas Register. Since this is a new statute it is a mandatory requirement. To date, I have not seen any rules offered or adopted. Move to suppress the test results for this failure to publish in the Texas Register.

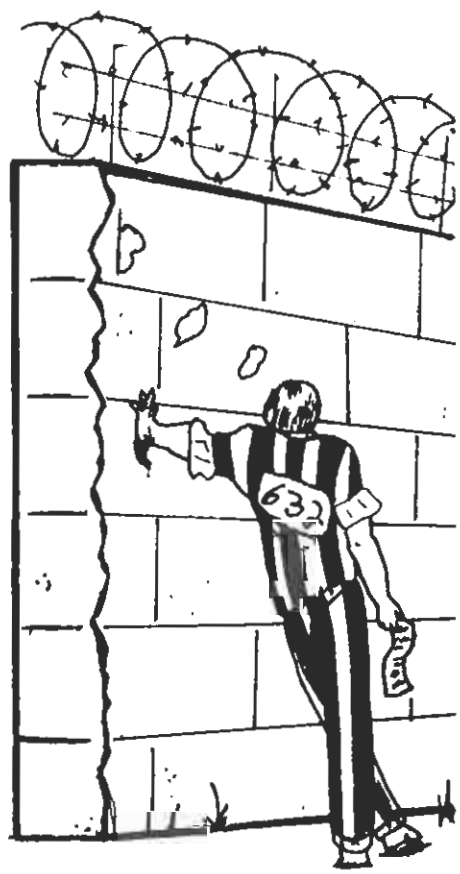
Finally, Section 28 of the Act is under observation. This is the section dealing with other Acts and spells our whether or not they are continued or repealed. Reading Sec. 28(a), one notes that 6704 1-5, in effect before January 1, 1984, died on January 1, 1984. It was not carried forward as evident from a reading of Section 28(a).

> "Section 28. (a) [20] A person who before the effective date of this Act refused to submit to a test is subject to the law in effect when the refusal occurred, *and that law* is continued in effect for *the disposition of administrative proceedings* against the person." (Emphasis added)

There is no presumption of intoxication existing in cases which occurred before January 1, 1984. I am certain there are other blemishes, but for now these suffice.

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.



Dear T.C.D.L.A.:

This is a request, respectfully submitted, to you for legal assistance in contesting the constitutionality of the "Mandatory Supervision" law as authorized by Article 42.12 C.C.P.

The factual application of Mandatory Supervision raises several logical and legal issues which briefly are:

1. Mandatory Supervision is not parole, and parole is not Mandatory Supervision;
2. Mandatory Supervision only applies to one being released from T.D.C. who will live in America, but not to an alien who will be deported to another Country upon release from T.D.C.
3. Mandatory Supervision is "Constructive Custody and Future restraint;" and
4. Mandatory Supervision requires a prisoner or inmate to serve his sentence in installments; and
5. Mandatory Supervision makes all sta-

tutory laws authorizing the award of "Good-Time" for good behavior and efficient performance of duties during incarceration in T.D.C. null and void.

A case in point: ExParte Johnny Morris, No. 66603 (En Banc, January 20, 1982) where the Texas Court of Criminal Appeals held in pertinent parts as follows:

> While good conduct time credit may be earned by good behavior and efficient performance of duties during incarceration, it does not become vested and *may be forfeited for violating T.D.C. rules.*" (Emphasis Supplied.)

While it may appear that my five (5) listed allegations are consummated, such is not the case. A mass form of hypocrisy is being perpetrated on the public as well as the inmate population of T.D.C. An inmate in T.D.C. is encouraged to earn all the "good-time" possible in order to advance his or her early release. However, after earning such "good-time" and being released from T.D.C., such inmate forfeits the "earned good-time" upon accepting lawful release, and must do his or her complete sentence under "Mandatory Supervision."

The analogy is like unto a wage earner working to earn a certain promised salary. He fulfills his required duties. However, when "pay-day" finally arrives, the wage earner forfeits his salary by accepting it.

Further, an inmate of T.D.C. can be denied a parole and given a "serve-all" notification from the Texas Board of Pardons and Paroles. However, after satisfying the "serve-all" and being released from T.D.C., the released person is told and compelled to sign an agreement accepting a form of Parole. "Mandatory Supervision."

In conclusion, may I submit that I have many, many other facts that I could mention regarding this subject, but respect for your members' busy schedules compels my restraint until at such time I am honored with your favorable response.

Appreciatively yours,
HARRY GREEN
T.D.C. No. 369944
T.D.C. Huntsville Unit
P.O. Box 32
Huntsville, TX 77348

Send all correspondence direct to Mr. Green. –Ed.

Dear Editor:

As we drink cup after cup of coffee late into the night, we read our borrowed issues of *VOICE for the Defense*. We copy page after page of notes to use in our attempts to vindicate ourselves. We are indigent inmates turning to your readers for help. No one on our wing receives your magazine. If any of you would be so kind as to send us any past issues of *VOICE for the Defense* (or any other law books), it would be greatly appreciated. The following men on J-line at the Eastham Unit have formed a group together for a common cause and pool our few law books. Please send to the following inmates the above:

Harmon Victor Sturm	T.D.C. No. 358225
Michael Harvey Vail	T.D.C. No. 281286-A
Edward Eugene Peterson	T.D.C. No. 356216
Jimmy "Dowg" Smith	T.D.C. No. 312434

Our purpose is *not* to harass the officials of the Texas Department of Corrections, but only to obtain our liberty through the judicial system. We try to maintain ethical standards and emulate the better attorneys of this state. We strive to gain the respect of the officials of the Texas Department of Corrections and establish credibility in the judicial system.

All of us would appreciate correspondence with anyone interested in law. Michael Harvey Vail hopes to one day be employed as a para-legal or in some phase of law work. Please send him any information you might have on employment in the law profession.

I personally need help and advice on an indictment for the offense of AGGRAVATED KIDNAPPING. I would appreciate anyone who would be so kind as to respond. The indictment reads as follows:

> *****on or about the 6th day of May A.D. 1983, and before the presentment of this indictment, in the County of Dallas, and State of Texas, did then and there intentionally and knowingly abduct another person, to-wit: Jane Doe and without said Jane Doe's consent did then and there restrain said Jane Doe by using and threatening to use deadly force on said Jane Doe and said John Lee Jones did then and there intentionally and knowingly abduct the said Jane Doe with the intent to violate and abuse sexually the said Jane Doe.

The names, place, and date of the foregoing indictment are fictitious. The above indictment has two (2) defects I am trying to attack.

The first defect is that no guilt knowledge or intent was alleged in the *using and threatening to use deadly force.* The gist of the offense of Aggravated Kidnapping, Sec. 20.04, Texas Penal Code, is *using and threatening to use deadly force.* Without the culpable mental state of intentionally and knowingly, directly before and acting upon the aggravating act of *using and threatening to use deadly force,* the indictment above only alleges the lesser offense of KIDNAPPING, Sec. 20.03, Texas Penal Code. The omitted culpable mental state should have alleged the actor's state of mind in restraining Jane Doe by *using and threatening to use deadly force. See* the cases of *Ex Parte Santellana,* 606 S.W.2d 331; and *Ex Parte Bunch,* 608 S.W.2d 641 for comparison. Both of these are aggravated robbery cases that apply the same reasoning.

The second defect is the failure to allege an *intent to prevent the liberation* of Jane Doe.

> Sec. 20.04. Aggravated Kidnapping.
> (a) A person commits an offense if he intentionally or knowingly abducts another person with the intent to:
>
> > (4) inflict bodily injury on him or abuse him sexually:

The word "restrain" was substituted for the word "abduct." It would become necessary to add the phrase, "with intent to prevent his liberation," as the mental state accompanying the act of abducting. *See* the cases of *Carpenter v. State,* 551 S.W.2d 724; and *Ex Parte Pruitt,* 610 S.W.2d 782 for comparison.

By the way, this is not my indictment. I am trying to help another inmate win his freedom from an unjust 40 year sentence, by way of habeas corpus. Although I attended S.M.U., I have never been an attorney. We collect no fees. We are rewarded by helping other human beings, who have been unjustly convicted. It might be noted that we do not always believe that everyone is unjustly convicted. I personally am serving a LIFE sentence for a burglary that I did *not* commit.

Two other quick indictment questions for your readers.

1. Does the word "Individual" have to be alleged in an indictment for Murder, Sec. 19.02, (a)(1)?? I have found some cases where the State's argument was supported by old law that say no. By the definition of "Individual" I contend that it *must* be alleged to show a human being who has been born and is alive.
2. Does the culpable mental states of knowingly and intentionally need to be alleged directly before and acting upon the word appropriate in a Theft Sec. 31.03 indictment, if the phrase *intent to deprive owner* is alleged in the last part of the indictment??? *My prior conviction.*

I would again like to thank Mr. Joseph A. Connors, III, for sending me a copy of his "Confessions and Suppression Proceedings" last year.

We pray that this letter will be published. May GOD bless you for providing space in your magazine for the men and women behind the walls.

Thank you,
HARMON VICTOR STURM
T.D.C. No. 358225
Eastham Unit J-Line
Route 1 Box 16
Lovelady, Texas 75851

Dear Editor:

I've prepared a Petition for Declaratory Judgment which concerns itself with the constitutionality of Section 151.314(e)(3) of the Texas Tax Code. This section imposes a sales tax on certain items sold in all commissaries of the Texas Dept. of Corrections. This is the *first* suit of its nature in the history of Texas jurisprudence. This same issue can be litigated to ascertain the legality (constitutionality) of the sales tax in Texas which would benefit all Texas citizens. For the sake of brevity, I will touch on the essence of my suit so as to not burden this writing with the entire 40 page memorandum of law that accompanies the original suit.

Bob Bullock, the state comptroller, and the United States Treasury Dept. in Washington, office of the mint, have told me that Article I, Section 10 of the United States Constitution, "is binding on the states." I knew that. I just wanted an official determination. Art. I, Sec. 10 declares:

> No state shall . . . coin money; emit bills of credit; make any Thing but gold and silver coin a Tender in payment of debts.

In tandem, Texas law upholds the dictates of Art. I, Sec. 10. Article 43.02 V.A.C.C.P. provides:

> All recognizances, bail bonds, and undertakings of *any* kind, whereby a party becomes bound to pay money to the state, and all fines . . . shall be collected in the *lawful money of the United States ONLY.* (emphasis added)

Likewise, Title 12 United States Code, Section 152 declares:

> The terms 'lawful money' and 'lawful money of the United States' shall be construed to mean gold and silver coin of the United States.

Further support is garnered from Title 31 U.S.C. 5001 (formerly 31 U.S.C. 371; amended 1982 by Public Law 97-2548) which provides:

> U.S. money is expressed in dollars, dimes or tenths, cents, or hundreths, and mills, or thousanths . . . and all accounts in the public office and all proceedings in the courts must be kept and had in conformity to this regulation, had in dollars of the money of the U.S.

(The last half of the cited law is the substantive element. A full report is discussed in the House report; HR Rep. No. 97-651.)

State officials have used the legendary defense of citing 31 U.S.C. 392 and the case of *Juilliard v. Greenmen*, 110 U.S. 421 as a meaus to set up great currents of strife. However, in defense against the tar brush of frivolity, I counter with the case of *Hagar v. Land Reclamation, District No. 108,* 111 U.S. 701, which held that legal tender laws enacted by Congress *do not apply* to state entities; that what the states make a tender in payment of taxes is NOT a federal question. The *Hagar* case was a *unanimous* decision which was held three months AFTER the *Juilliard* case. By extension, that which the states make a tender in payment of taxes is that which they intend to utilize in discharge of state obligations. Also, the unequivocal mandate of Art. I, Sec. 10, prohibits the states from making "anything *but* gold and silver coin a tender in payment of debts."

Nowhere in the entire U.S. Constitution is the U.S. Congress granted the power to establish a legal tender. That power has always resided in the individual states. Art. II, Art. IX, Amendment X, *Craig v. Missouri,* 4 Pet (29 U.S.) 410; *Gunn v. Barry* 82 U.S. (15 Wall) 610.

Time and again it has been said that Texas has some of the best legal minds and constitutionalists. They must be talking about me.

The gist of this thorny legal issue essentially springs from the fact that state officials, albeit disingenuously, and NOT commensurate with their oaths of office, said oath taken to uphold the constitution, have cast a smoke screen far afield to debauch our *legal* monetary system, which is a far cry from the dictates of the Supreme Law of the Land. It is appalling indeed! This is the very reason America is in an economic crisis. I have but one thing to say:

While this misbegotten weed may briefly flourish to block the path of reason, so shall it be swept away like a tumbleweed in the strong currents of law.

Constitutionally yours,
R. WAYNE JOHNSON
T.D.C. No. 282756
Ellis Unit H20 11/2
Huntsville, Texas 77343

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
314 West 11th, Suite 315
Austin, TX 78701
(RETURN POSTAGE GUARANTEED)

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

Date _____ _____
(Signature of Applicant)

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

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Mail to:

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Austin, Texas 78701
(512) 478-2514

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- Research service available at a reasonable hourly rate; messenger service in Capitol area.

ELIGIBILITY AND DUES

Effective: January 1, 1982

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

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

Affiliate dues (AFF)	25.00

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

Student dues (SDM)	20.00

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION