VOICE for the DEFENSE

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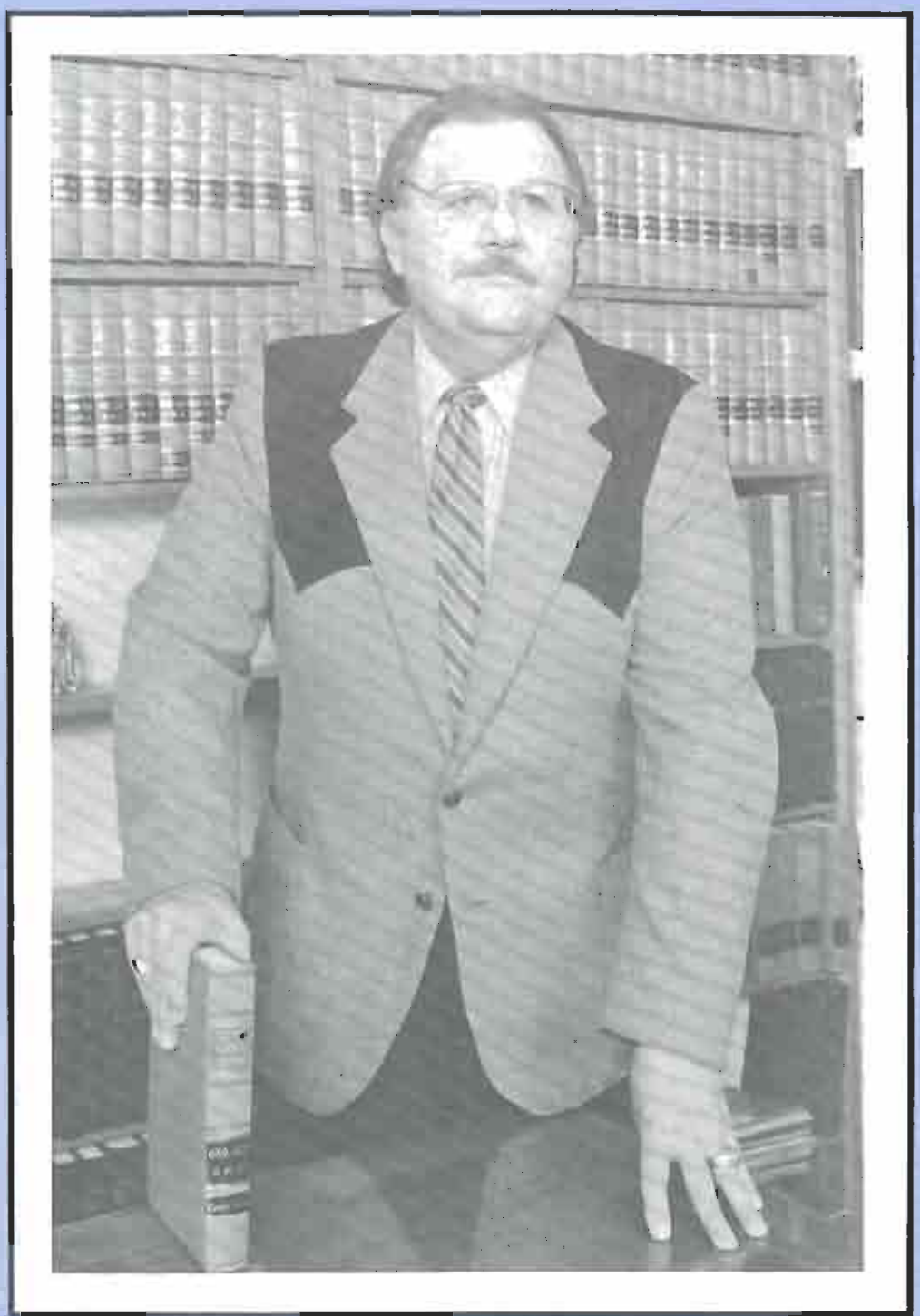

VOICE for the DEFENSE

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"Scrappy" Holmes of Longview, new president of TCDLA. From May 1977 to June 1981 "Scrappy" was editor of the VOICE. *He has served on the board and as an officer for nine years.*

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The July *VOICE* went to press before the Annual Meeting and election of officers. New officers and directors will appear on the masthead of the August issue.

EDITOR'S CORNER

M.P. "Rusty" Duncan III

In an effort to achieve at least a semblance of parity with the prosecution's members of the State Bar, Weldon Holcomb, George Gilkerson, Tony Friloux, Bill Reed, and the Association's new President, Clifton Holmes, conceived the idea of a Criminal Defense Lawyers Project in January of 1973. The Project's purpose was to make available to the state's criminal defense lawyers a viable source of continuing legal education and to help maintain an adequate pool of competent lawyers available for court appointments to represent indigent defendants. Funding came from the Governor's office through the State Bar.

To observe that their initial efforts succeeded understates the evolution of the Project: it has flourished over the last decade. For example, last year the Project sponsored ten criminal law seminars, including the annual week-long Criminal Trial Advocacy Seminar in Huntsville, that provided practical training to nearly nine hundred lawyers and judges. At ten seminars this year, the Project has trained more than twelve hundred.

Last month the Project moved its office and its equipment from the State Bar building and has leased space in TCDLA's newly remodeled building. As a result, the two organizations principally responsible for improving the quality of criminal representation in Texas are now sharing the same facilities.

The Association and the Project both will benefit from this arrangement. Historically, TCDLA members constitute most of the volunteer faculty for Project courses. Similarly, the Project's seminars provide TCDLA a forum to further its effort in organizing the state's criminal bar. Quite simply, without the exposure of the Project's courses, it is doubtful whether the Association could have become the viable, respected, and effective representative of the criminal defense bar in Texas that it is today. Conversely, without TCDLA members' contributions, the Criminal Defense Lawyers Project probably would not have been able to become one of the most successful and valuable continuing legal education programs in the United States.

Under the superior direction of Jeanne Kitchens, the Criminal Defense Lawyers Project will continue to prosper, and both the TCDLA and the entire State Bar will be improved as a result. The citizens counseled by Texas lawyers will be more effectively represented as well.

The efforts of previous editors, Clifton Holmes and Stanley Weinberg, have made the *VOICE* one of the most visible and respected products of TCDLA, as well as an important legal periodical. The *VOICE* serves most fundamentally as a means of effective communication with not only the criminal defense bar, but also with interested judges throughout the state. In the coming months, the *VOICE* will undergo subtle but nonetheless obvious changes. These changes are expected to improve its quality and add to its practical value and usefulness.

Next month, a new feature of the *VOICE* will appear. It will be essentially a general news-about-members column. Walter Boyd and Allen Isbell of Houston have kindly assumed the responsibility of compiling this feature. It will provide a means of collecting and dispersing personal information to members of the Association.

For the column to be successful, it must be contributed to by the Association's membership. Therefore, take a moment from your day, lean back in your chair, and call Walter Boyd or Allen Isbell. Brag on yourself or snitch on a friend. If this is successful, maybe we can next have a personal advice column; prospective columnists/counselors should apply to your new Editor for that position.

On a more serious note, I would like to thank Judge William Wayne Justice of the Federal District Court in Tyler for permitting me to publish the remarks he made at North Texas State University last month. They are a fine example why he is such a widely respected jurist.

Please keep me advised of your activities and your ideas for making the *VOICE for the Defense* all that it can be. I am delighted to be serving as your Editor, and I look forward to working with each of you and to contributing to this good Association.

PRESIDENT'S REPORT

Clifton L. "Scrappy" Holmes

It's been some time since I've appeared in these pages. Moving overleaf seems almost unnatural, in that my first love was the *VOICE* and I genuinely enjoyed its helm. I'm hopeful that my appearance here for the next twelve issues will be accompanied by much progress in our association. I've been preceded in this office by able and dedicated men. TCDLA has grown from a small "band of brothers" to a recognized, effective voice for the criminal defense bar, not only in Texas, but throughout the United States. I'm sincerely hopeful that I can manage this trust even half so well as those who have gone before.

I've been handed a strong, healthy organization to lead. We have a home—we're financially sound—we have a cadre of officers and directors who are dedicated and active. In the coming year these leaders and I will be calling on each of you for further commitments to our stated goal of justice through law. We need to activate our current membership, and to actively seek others to join with us. My fondest goal is to see TCDLA 2000 strong, with 2000 active, concerned members who will dedicate themselves to excellence in the representation of the citizen accused, and responsibility in support of sound principles of law and order.

Listed below are the nominated officers for 1984-85 and proposed committee chairmen. Your call to them will assure your opportunity to become active in the areas you deem interesting or important. Also printed herein is a schedule for TCDLA and the Criminal Defense Lawyer's Project for 1984-85. It's printed for a purpose. We want you there with us. Every member is invited to every Board Meeting, every seminar. Your attendance indicates your interest. We've set aside, for our annual trip, a date in early February. I'd like to hear from you regarding your desires as to where we should go. We need widespread participation in that association activity.

Finally, I am available. If you have a complaint, a concern, a request, or just want to talk to me about the overwhelming benefits of life in East Texas, call me. I need your help . . . I'm willing to ask for it . . . and I'll try to deserve it.

Until next month,

–Scrappy

Nominated Officers, Proposed Committee Chairmen and Executive Appointments 1984-1985

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Executive Appointments:	*Tim Evans, Ft. Worth*
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Significant Decisions Report	*Kerry FitzGerald, Dallas (Editor)*
State Bar Activities	*John Boston, Austin*
Travel	*Lou Dugas, Orange*
VOICE for the Defense	*Rusty Duncan, Denton (Editor)*

Members are urged to make known their interest in serving on any of the above committees. Please use the form provided below to indicate your desire to serve in any particular area.

Name _____

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I desire to serve on the following committees, listed in order of my preference:

1. _____

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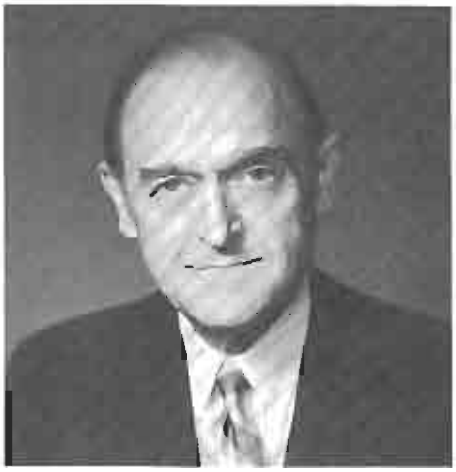

Probation as an Alternative to the Non-Violent Offender

by William Wayne Justice
Chief U.S. District Judge
Eastern District of Texas

I have been asked to comment on the topic of "Probation as an Alternative to Incarceration of Non-Violent Offenders." Rather than limit my remarks to this one specific subject, I would prefer to intertwine it within some general observations about probation as an integral part of our criminal justice system.

Whether or not one agrees with the use of probation as an appropriate sentence to impose in certain cases, the fact is that, without its use, the system itself would be completely overwhelmed by sheer numbers and cost. Institutional facilities sufficient for the incarceration of *all* convicted offenders are simply not in existence.

Aside from this single consideration, probation is plainly the most appropriate sentence to impose in many cases, especially for non-violent offenders. It is appropriate, because the sentencing of a criminal defendant is not an event that takes place in isolation, affecting only the defendant. It is an event that also affects his family, the community-at-large, and, yes, the oft-forgotten victim.

The potential interplay of all of the factors involved when a criminal defendant is incarcerated deserves our examination. The most obvious is that the defendant goes to prison, and building and operating a prison is not free. Someone pays for it, and eventually it is the tax-paying citizenry. How about the defendant's family? In many cases, they go on public assistance, and someone pays for this. While the defendant's basic needs are met in the institution where he is confined, his family is often left to fend for themselves. And, how about the victim? Who is available to make restitution to the victim, while the defendant is incarcerated?

These are only the most obvious and direct costs of the imprisonment of criminal defendants. There are other costs that, while not easily converted to dollars and cents, also add up. I am speaking of the sometimes crippling emotional effect which confinement in a prison has on the children and wives of the defendants, as well as on the defendants themselves.

So, to reiterate, the commitment of an offender to prison, as a sentencing alternative, is an occurrence that, while it affects the defendant most directly, concurrently implicates the welfare of the populace as a whole, for it frequently exerts a pernicious influence upon a great many other members of society. It has been calculated that it costs more to send a criminal defendant to the penitentiary for one year than it does to educate a student at Harvard University for the same period. Yet, as some students should be at Harvard by reason of their academic accomplishments, some offenders need to be in prison. It is incumbent upon the criminal justice system to see that only those who justify the expenses involved are the ones who are immured in prison. That one issue brings us back to the probation office and the probation officer's role in this decision-making process, since sentencing decisions by judges largely rest upon the data bases contained in presentence reports relating to criminal defendants. Unquestionably, once the issue of guilt has been decided, the single most important document available to the sentencing judge is the presentence report. And without a well prepared and documented presentence report, the sentencing of a defendant is nothing more than a shot in the dark. The judge's election to impose a probated sentence should be made on the basis of the best available information, with the result that a decision is reached which encompasses the interests of all parties concerned.

It is the presentence investigation and the resulting report that addresses most of the issues previously mentioned. Presentence reports recently prepared for federal district courts have been addressing the adversities suffered by the victims of crime, through what is called Victim Impact Statements. There, the probation officer not only investigates the direct monetary loss resulting from the crime, but also other less obvious costs such as lost wages, insurance deductibles, costs of recovery of property, and related losses that were suffered by the victim.

Another interesting and innovative development that should be observed with great interest is the use of so-called community service sentencing. In this type of sentencing, the court orders the defendant, as a special condition for his probation, to provide a specific number of hours of voluntary, non-paid service to the community. Such service may include, for example, working in a hospital, working in a senior citizens' center, or utilizing specific skills—such as welding, to build bleachers for the community's Little League ball parks—for various other worthy projects. The opportunities for the use of community service sentencing, where appropriate, are almost limitless, and the community receives actual direct, often tangible, benefits.

The development and use of restitution centers also gives promise of avoiding the unnecessary and costly confinement of many offenders convicted of non-violent crimes. Sentenced to reside in these centers, the defendant is under supervision and, additionally, is able to work, repay

the victim, pay his own room and board, and make contributions to his family. Further, the severe problems associated with the severance of the emotional ties between the defendant and his family are reduced, and the intractable difficulties resulting from the defendant's institutionalization are avoided. I sincerely hope that the development and use of restitution centers continues, so that the courts will have these resources available in appropriate cases.

Unfortunately, probation is often erroneously viewed as leniency or as a second or third chance for a defendant. Further, once a sentence has been probated, there is frequently an impression that official interest in the case wanes—that nothing else happens unless the probationer is involved in further violations of the law. Persons having these misperceptions have overlooked the supervision component of probation (that is, the activities of the probation officer with a probationer), which is vitally important. In general, most jurisdictions require the probation officer to keep informed of the probationer's conduct and to report thereon to the Court. Also, the probation office is obligated to use all means suitable to effect a positive change in the probationer's behavior. It is patent that the supervision of a probationer should consist of more than merely having the probationer "check in" with the probation officer once a month for a fifteen-minute visit. Experience has shown that good supervision of a probationer requires frequent, meaningful contacts with the probation officer. In many cases, the probation officer must become closely involved with the probationer. Without significant involvement, it is doubtful that the probationer will develop any trust in the probation officer, so that aid which is truly helpful to him can be afforded by the officer. The development of this relationship requires caseloads of manageable size. Where a probation officer is faced with a caseload of unmanageable size, he is not able to keep informed of the activities of the probationer, is unable to be sufficiently involved with the probationer, and both the probationer and the community are the losers when subsequent violations occur.

Probation officers have only a limited amount of time to spend with each probationer. Consequently, it is necessary that a classification scheme be utilized which will determine those offenders who need only minimal assistance and those who require more extensive supervision. Such a system allows the probation office to bring to bear the necessary resources for those offenders in most need. At one time, probation officers attempted too much; they sought to be all things to all people. But they have reassessed their position in recent years and have adopted more realistic attitudes. By reason of this change of thinking, we now identify probation officers as persons who can professionally detect the problems of the offender, and who can call upon and mobilize existing resources in the community, in such manner as to assist the offender in resolving his difficulties.

In instances where resources do not exist, the probation officer is faced with the problem of developing them. Referring a probationer to a resource is not simply the shuffling off of the probationer's troubles to someone else. Proper referral of the probationer to a resource requires the probation officer to furnish the referral agency with extensive and reliable information about the probationer, to coordinate closely the activities of the probationer and the referral agency, and to provide follow-up assistance. All of these tasks require considerable time and, again, it must be remembered that it is essential that probation caseloads be of manageable sizes, in order that these tasks can be carried out efficiently and effectively.

Throughout history, considerable interest has been manifested in the many attempts to identify the cause of criminal behavior and feasible responses to it. Prior to the advent of what we now categorize as the social sciences, these endeavors were mainly the province of philosophers and religious thinkers. With the development of the social sciences and the application of rigorous scientific inquiry, we have begun to develop an extensive body of knowledge concerning criminology and penology, but it is notably incomplete. We seem always to be looking for a single cause of criminal behavior, to the exclusion of any other factor. In my own opinion, what we label as criminal behavior is the result of many complex—and also interrelated—factors.

Furthermore, I submit that, there being no single cause of criminal behavior, there is no single solution of the problem—that it is multi-faceted in its nature. If there is no single solution, it is necessary that we develop multi-faceted approaches to managing the difficulties, and in overcoming the obstacles, which face us. Probation is one of the most valuable resources we have and, if used properly, has proven to be extremely effective. A well-staffed and -managed probation office is not cheap, but I would argue that the alternative—wholesale incarceration—is far more expensive.

I am aware that the use of probation is not without its critics. However, in my judgment, most of the problems related to the use of probation are the result of the failure to apply suitable and approved standards of correctional practice. It is important that the decision makers who determine policy in the criminal justice system are made aware of current standards and see to it that they are being met in their several jurisdictions. When probation is not properly utilized, we all lose. Offenders who would benefit from probation are unnecessarily confined, and the community is burdened with unnecessary expenses. Further, the community suffers the loss of the potential contribution the offender could make to it by the means already alluded to.

Probation must be a community effort. The community must be apprised adequately of the advantages of probation, the components of a properly staffed and managed office, and the opportunities for the community to participate in the probation process. Programs such as the Denton County Adult Probation Counsel certainly meet these criteria, and I most wholeheartedly commend those involved for your exemplary efforts.

It is through efforts of the probation office that the community has been apprised of the advantages of probation and that the community's support has been elicited. I am especially impressed with the participation of the leaders of the business community in these programs. This participation is especially significant, when we remember that the single most important factor in many cases is the obtaining of meaningful employment by the probationer. It is through the business community that these employment opportunities have been made available. I also note that the participation of the private sector is not just perfunctory, and delegated to some "PR" official. The actual business owners and corporate managers are the ones involved. Considering their already demanding schedules, for them to take time to participate actively and meaningfully in the program attests to their belief in the importance of this program and its contribution to the community.

SIGNIFICANT DECISIONS REPORT

JAMES SOTO, #622-82, Opinion on D's PDR: Rev'd, Judge McCormick, 6/20/84.

UPON PROPER REQUEST, COURT REPORTER MUST TRANSCRIBE TRIAL PROCEEDINGS: T/C in this assault case denied D's motion to have the court reporter take down the proceedings because the court reporter was not available. Instead, the trial judge ordered the county clerk to tape record the proceedings and then transcribe them. From the beginning of the trial until the beginning of the voir dire, the county clerk did so. Then the deputy county clerk took over the operation of the recorder and then delivered the tapes to the county clerk who deposited them in her safe and they were later transcribed. The deputy county clerk testified later that at several points throughout her transcription when she was unable to decipher what was said on the tape she left three dots in a row to show that a portion of the proceedings were missing because it was unintelligible. The C/A found that although the T/C's action may have been error it was harmless error because the specific defects in the record pointed out by the D were corrected by the T/C.

The Court held that Article 40.09(4) C.C.P. was mandatory whenever a request for a court reporter is made and any refusal to furnish a court reporter is per se prejudicial. Harm need not be shown. Cartwright, 527 S.W.2d 535.

> "We decline to santion the granting of alternatives such as the one in the instant case. We shudder to think of the condition of appellate records should such alternatives be allowed."

BENNY SNEED, #008-82, Opinion on Court's own Motion For Rehearing on State's PDR: Judgment of C/A rev'd and cause remanded to C/A, Judge Onion (dissenters: Judges Odom, Teague, Miller, Clinton), 5/23/84.

JURY MISCONDUCT--DISCUSSION OF PAROLE--NEW (OLD?) FIVE PRONGED STANDARD PRE HEREDIA ADOPTED: D was convicted of murder and punishment set at 10 TDC. Amarillo C/A rev'd on basis of jury misconduct.

At the Amended Motion For New Trial hearing three jurors testified as to the jury deliberations at the penalty stage of the trial. Juror Rock testified that after the first vote in which she voted for 5 TDC, someone mentioned or asked if it was true a prison year was only 7 months. No one answered the question and the word "parole" as such was never used and no purported to know what the law really was. Rock stated she had common knowledge that inmates are released on parole. While she testified the "discussion" after the first vote influenced her verdict, she later stated that it was her common knowledge that caused her to vote for 7 years, then 8 and in the fourth vote for 10.

Juror O'Quin believed five votes were taken. He first voted for 5 years imprisonment and after the first vote someone brought it up that the time probably would be cut in half. He confessed he could have raised the matter but he did not know the law, that none of the jurors knew and no one pretended to know the law. He guessed it was common knowledge that inmates were released before the full time assessed, but no one knew the exact time. No extensive discussions took place, parole was just mentioned. The parole "discussion" was "probably" why he raised his vote to 10 years.

Juror Carroll recalled six or seven votes, that she first voted for probation just in insure discussion on the issue which she knew would be unacceptable. A lot of people raised the parole question three or four times during the deliberations though the word "parole" was not used. These discussions consumed some 30 to 45 minutes. Someone stated that "out of ten it would be four or five", that this was just speculation as no one professed to know the law, that the comment was not new to her as she knew inmates were released on parole. She stated, however, the comment caused her to change her mind.

The Court readopted the five prong test of pre-Heredia cases. To show that a jury's discussion of the parole law constitutes reversible error, it must be shown that there was:

(1) A misstatement of the law
(2) Asserted as a fact
(3) By one professing to know the law
(4) Which is relied upon by the jurors
(5) Who for that reason changed their vote to a harsher punishment.

This test shall apply to cases under either Sections 7 or 8 or Article 40.03 C.C.P. All cases to the contrary are now overruled.

In reviewing the three jurors' testimony, the Court noted that the three could not agree as to what was said about parole, that all three had different versions and there was a conflict as to how extensive the "discussion" was. Was there just an unanswered question, was the subject just mentioned or was there a 30 minute or so discussion? The Court then chose to resolve the matter by labeling this testimony as "conflicting evidence" which was duly resolved by the trial court and therefore there was no abuse of discretion.

The Court stated that, applying the five pronged test, while the unaswered question or statements made were not accurate, they were not misstatements of the law giving the impression that the D would be eligible for parole or released earlier than the law permits. Article 42.12, Section 15(a) C.C.P. provides that an inmate of the Department of Corrections may be released on parole who has served one third of the maximum sentence imposed. There was no assertion of a misstatement of the law as a fact by anyone professing to know the law. The first three prongs of the test are missing.

Generally, we do not dwell much on dissenting opinions but Odom's is an exception. A portion of his opinion is not only well worth the reading but is also a classic and stinging rejoinder to the majority:

> "The `five pronged' test adopted by the majority flies in the face of common sense. If the jury improperly considers the parole law during deliberations on punishment, the harm to the accused is not diminished simply because the parole law was correctly stated instead of misstated, or simply because it was not asserted as a fact or by one who did not profess to know the law. As stated in the dissent in Beck v. State, 573 S.W.2d. 786, `. . . While speculation is just as harmful regardless of whether anyone professes to know whether those speculations are law or not.' It should also be obvious that an accurate statement of the parole law during jury deliberations can be just as harmful as an inaccurate one. Were it otherwise, it would not be error to include the parole law in the instructions to the jury, yet even the majority admits that it was proper to charge the jury `not to consider in deliberations on punishment how long he would be required to serve in order to satisfy the penalty assessed.' Since it is proper for the court to instruct the jury not to consider the parole law, and since it is improper for the prosecutor to argue that the jury should consider the parole law (Pena v. State,

129 S.W.d. 667) how in the name of justice and the Texas Constitution can the majority say it is permissible for the jury to subvert the parole law?
***

Paraphrasing Judge Davidson's dissent in Salcido (v. State, 319 S.W.2d 329), the majority opinion today is susceptible of but one construction, that being that such opinion is a revolt against the parole law and the Texas Constitution; this very court, which is sworn to uphold the Constitution, has taken it upon itself to nullify the Separation of Powers Doctrine and to endorse lawlessness in the jury room."

The Sneed decision is a disappointment. The Munroe test (637 S.W.2d 475) required the D to show (1) that any discussion of the parole laws took place during the jury deliberations and thereby constituted jury misconduct, and (2) that the discussion denied him a fair and impartial trial. This latter requirement could be met by showing that even a single juror voted for an increased punishment because of the discussion of the parole laws.

Instead of trying to grapple with the thrust of the problem, the Court chose to adopt a stereotyped and rigid rule. Using the Munroe test as a frame of reference, why not require "substantial discussion of parole" rather than simply "any discussion"; why not require that more than one juror be shown to have voted for an increased punishment because of parole law discussion rather than just one juror.

A real problem is that most persons (most jurors) know that most defendants in civil cases have insurance (but that is hush hush) and most defendants in criminal cases don't serve 100% of the time imposed by the sentence.

The law then instructs the same persons (jurors) not to consider this knowledge when making certain determinations because this knowledge should not have any effect on the jury's verdict.

During a trial, a typical scenario may occur as follows. The law first creates the mirage of a favorable atmosphere by instructing jurors during the voir dire and during the reading of the court's instructions not to consider the matter of parole, that this is something left up strictly to the Texas Board of Pardons and Paroles--which is tantamount to telling a juror not to think of an elephant during jury argument which is exactly what the juror then thinks of immediately. The prosecutor, during jury arguments, adamantly repeats the word "sentence" in a certain frame of reference (Ladies and gentlemen, all you are returning is a "sentence" in this case, it's just a "sentence") in order to emphasize that the jurors ought to lengthen the period of time because the punishment actually imposed will not be the sentence served due to the parole laws. What a charade. Most jurors know it and most defendants suffer because of it and as a consequence

the jurors adjourn to the jury room and begin to guess with one another or listen to a "knowledgeable individual" on the jury as to this parole business and then blithely begin to increase the punishment accordingly. The kicker to this entire routine reveals its ugly head when one or more jurors subsequently tell defense counsel or an investigator just exactly what did occur. The defense then files a Motion For New Trial to which are attached one or more affidavits. Immediately the prosecutor flees to the countryside and contacts other jurors who sat in the same case and advises them what a dastardly deed was perpetrated by defense counsel (or was it really the jury!?) who dared to accuse the jury of "jury misconduct". And sooner or later, those jurors who originally demanded that the truth be told in a court of law at the defendant's trial return to the scene (the same court) and proffer dramatically different versions of what supposedly occurred in the jury room during deliberations on the defendant's sentence. An intelligent observer--or perhaps anyone looking on--may wonder how ironic it is for a juror who once demanded to hear the truth at the defendant's trial to later be so willing to compromise the truth in an effort to preserve the verdict rendered by that juror.

Under the Sneed case, for all intents and purposes, jury "misconduct" based upon discussion of the parole law may no longer be provable in most cases. Surely the prosecutor will reply to such claims of jury misconduct: either the statements made during jury deliberations by one or more jurors did not constitute a "misstatement" of the law or the statements were only "speculation" and not assertions of fact or the person discussing the parole law was certainly not one who would subsequently admit that he or she professed to know the law (again, it was only speculation!) or the parole discussion was truly not relied upon by other jurors, or only one juror acted in reliance upon such discussion, or while subsequent votes may have raised the punishment in the case, certainly this increase was not caused by the discussion of the parole laws.

Judge Odom referred to the majority's reliance on Collins v. State, 647 S.W.2d 719 as the only hint of the cause as to why the majority launched into this revolt against the law. A concurring opinion in Collins stated that there is an "increasing frequency of cases alleging reversible error as the result of jurys' discussion of parole". Judge Odom observed that this is not any real reason to change the law. One might also observe that this concurring opinion only states that defendants allege this ground on appeal more frequently. So what? Are there more cases being reversed because jurors do not properly follow the law when instructed as to what the law really is? And if so, I assume that by following the majority's reasoning, the law should be changed so that the law will countenance the jury's "misconduct" (?).

The Sneed decision does not really solve the true problem. It just makes it extremely difficult if not impossible for a defendant who may have been seriously wronged by blatant jury miscon-

duct to obtain a new trial on that basis. We can either make the parole laws known to juries and put all the cards on the table, through appropriate legislation; or we can demand that juries follow the law and leave the matter of clemency to the Board of Pardons and Paroles.

JOHN HERNANDEZ, #134-83, Opinion on D's PDR: C/A rev'd, Judge Onion, En Banc, 5/23/84.

MOTION TO QUASH INDICTMENT BASED ON UNCONSTITUTIONALITY OF ARTICLE 4476-15 AS AMENDED SHOULD HAVE BEEN SUSTAINED: D was convicted of possession of more than 5 but less than 50 pounds of marijuana, under Article 4476-15, Section 4.051 VACS and punishment set by the jury at 18 TDC. The question is whether the C/A erred in affirming the T/C's overruling of the D's Motion to Quash the indictment due to the unconstitutionality of this article, as amended by House Bill 730 (H.B. 730, Acts of the 67th Legislature, Reg. Sess. 1981, Chapter 268, Pages 696-708, Eff. September 1, 1981), on the ground that the caption of the amendment failed to comply with the constitutional mandate of Article III, Section 35 of the Texas Constitution.

The D raised the identical issue that this Court wrote on in Crisp, 661 S.W.2d 944 (Tex. Crim. App. 1983) in declaring Article 4476-15, as amended by House Bill 730, unconstitutional. However, in Crisp this Court affirmed the convictions because "the Controlled Substances Act remained in effect as though H.B. 730 had never been enacted", because when an amendment to an act (which is what H.B. 730 was) is declared unconstitutional and invalid, the original act remains in full force and effect, even if the amendment had no savings clause. White, 440 S.W.2d 660.

In this case, however, the conviction may not be affirmed. Although the indictment could be interpreted to allege an offense under the law as it existed prior to the enactment of H.B. 730, the classification of such an offense under the prior law (and now existing law since Crisp) is a third degree felony, whereas it was classified as a second degree felony under H.B. 730. Since the D was tried by a jury, could not have been convicted of a second degree felony, and could not have been assessed punishment at 18 years under the law as it existed prior to H.B. 730, the conviction must be reversed. See Ex Parte Padilla, 666 S.W.2d 111 (Tex. Cr. App. 1984).

The Court noted the Bullard case (548 S.W.2d 13, Tex. Cr. App. 1977) wherein it was stated that when error occurs, on a punishment hearing before a jury, the Court is without authority to direct a new punishment hearing alone to a new judge or jury, but must remand the entire proceeding for a new trial. Article 44.29 C.C.P.

ERNEST ESPINOZA, #789-83, Opinion on D's PDR: C/A aff'd, Judge Odom, 5/23/84.

MOTION FOR DISCOVERY--OPEN RECORDS ACT TYPE INFORMATION SOUGHT IN CRIMINAL CASE MUST BE PURSUED IN APPLICATION FOR WRIT OF MANDAMUS IN CIVIL COURT: The D in preparing for trial in criminal case sought access to certain records of the DA's Office by use of the Open Records Act. The DA refused, but the nature of the information sought is never revealed in the opinion. The D filed in the criminal case an instrument entitled "Petition For Mandamus". The T/C and C/A denied relief. The CCA found that the Petition For Mandamus was not properly presented to the T/C and the issue of the merits of the T/C's ruling was not properly before the C/A or the CCA.

The Open Records Act, Article 6252-17a, VACS provides in Section 8 for securing disclosure of public information by seeking a Writ of Mandamus:

> "Section 8. If a governmental body refuses to request an Attorney General's decision as provided in this act, or to supply public information or information which the Attorney General has determined to be a public record, the person requesting the information or the Attorney General may seek a Writ of Mandamus compelling the governmental body to make the information available for public inspection."

Mandamus is a civil action, not a mere motion filed in the course of a pending criminal case. In a number of cases cited by the Court, it was emphasized that when the agency involved refused the particular request for information under the Open Records Act, the petitioner filed an Application For Writ of Mandamus in a district court seeking to compel the agency to disclose the information, and when the application was refused, the petitioner perfected his appeal on a civil basis. Uvalde Rock Asphalt Co. v. Loughridge, 425 S.W.2d 818 (Tex.); Hogan v. Turland, 428 S.W.2d 316 (Tex.); Austin v. City of San Antonio, 630 S.W.2d 391 (Tex. Civ. App.--San Antonio); Economic Opportunities v. Bustamante, 562 S.W.2d 266 (Tex. App.--San Antonio); Hutchins v. Texas Rehabilitation Commission, 544 S.W.2d 802 (Tex. App.--Austin). Likewise in Redd v. State, 578 S.W.2d 129 the Court was confronted with the claim that information sought by a Motion For Discovery was public information under the Open Records Act. In Redd, the Court likewise did not reach the question because of the D's failure to follow the procedures set out in the act, specifically Sections 7 and 8.

The instant appeal is from a criminal conviction. This cause was not a mandamus suit nor would be in this court if this were a mandamus action. Review of a decree or judgment in the mandamus action would be through the appeals process for civil cases. To be distinguished are mandamus actions instituted in the Court of Criminal Appeals under its original mandamus jurisdiction. A

mandamus suit filed under Section 8 of the Open Records Act is not such a proceeding.

KEVIN SZILVASY, #209-84, Opinion on D's PDR: Case remanded to C/A for reconsideration of contention, Per Curiam, 5/23/84.

QUESTION PRESENTED IN PDR WAS AS TO THE SUFFICIENCY OF CORROBORATION OF ACCOMPLICE WITNESS TESTIMONY: In D's PDR, D argued that the C/A erroneously concluded that the evidence presented at trial was sufficient to corroborate testimony given by the accomplice X. Specifically D directed Court's attention to that portion of the opinion by the C/A which provided that "further corroboration was provided by Neil Odom . . .:" The record showed that Odom did not even testify before the jury and therefore the C/A obviously erred in considering Odom's testimony in determining whether the evidence was sufficient to corroborate the testimony of the accomplice X. The case was remanded to the C/A for reconsideration of this contention, under Article 44.37 and 44.45(b) C.C.P.

HENRY WILLIS, #67,223, and 67,224, Aff'd Judge W. C. Davis, 5/23/84.

COURT'S INSTRUCTIONS TO JURY IN DELIVERY OF HEROIN AND POSSESSION WITH INTENT TO DELIVER HEROIN CASES NOT FUNDAMENTALLY DEFECTIVE: The D did not object to the charges; neither did he request any additional instructions. Therefore, review of the charges will be limited to a determination of fundamental error. Almanza v. State, #242-83 (del. 2/8/84) (second rehearing granted); White v. State, 610 S.W.d. 504 (Tex. Cr. App. 1981); Thomas v. State, 599 S.W.2d 812 (Tex. Cr. App. 1980).

The D contended that the charge in the delivery of heroin case allowed the jury to convict him on a theory not alleged in the indictment. The application paragraph of the charge tracked the allegations in the indictment verbatim. To determine whether the charge is fundamentally defective, the Court will look only to the paragraph applying the law to the facts. It is of no moment in this case that the definitional paragraph defined unlawful delivery in the words of the entire statute. While the better charging practice would be to limit the definitional paragraphs to the portions of the statute applicable to the allegations of the indictment and not to define other means of committing the offense, it is not reversible error to include entire definitions. Boston, 642 S.W.2d 799 (Tex. Cr. App. 1982).

MOTION TO SUPPRESS PROPERLY OVERRULED: Officer arranged for D to meet and sell heroin. A number of other officers acted as backups. D arrived, sold several balloons of heroin from a plastic baggie to the officer for cash, at which time the officer noticed more balloons remained in the baggie after D had removed

the officer's. D then drove off in his own car. The officer signaled the other officers who followed D, stopped him, arrested him, search him, and seized the drugs found on his person. D argued that the evidence seized pursuant to his arrest was illegal, etc. because, under Article 14.04 the State did not present any evidence that he was about to escape and thus the warrantless arrest violated Article 14.04 C.C.P. However, Article 14.01 which controls provides that no escape need be shown, as a peace officer may without a warrant arrest an offender when the offense is committed in his presence if the offense is one classed as a felony or is an offense against the public peace. The buying officer had first hand knowledge of the offense and relayed that knowledge to his fellow officers who had been watching the sale and were aware of the prearranged negotiations. The buying officer did not himself seize D but he observed the arrest from about 3/4 of a mile away and was just as much a participant in the arrest as if he had seized D himself. There was no significant time lapse or other intervening event that would take this arrest out of the ambit of Article 14.01.

> "By showing that the officer observed a crime being committed in his presence, the State has a fortiori met its constitutional burden to show that probable cause for arrest existed: that the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense. Britton v. State, 578 S.W.2d 685 (Tex. Cr. App. 1979). See Gonzales v. State, 638 S.W.2d 41 (Tex. App.--Houston, 1st Dist., 1982).
>
> The warrantless arrest of Appellant was lawful and the drugs found by the search incident to that arrest were properly admitted into evidence."

EX PARTE JIMMY TODD, #69,061, Relief denied, Judge McCormick, 5/23/84.

COLLATERAL ATTACK OF PRIOR CONVICTION USED BY JURY TO ENHANCE PUNISHMENT FAILED: Neither the petition or briefs or supporting documents indicated that the applicant objected to the introduction of the prior convictions used at his trial to enhance his punishment to life. This would generally preclude the type of double collateral review sought by the applicant here. The rule is that the failure to object at trial to the introduction of an in firm prior conviction precludes an applicant from thereafter collaterally attacking the conviction where the in firm prior conviction was used. Ex Parte Ridley, 658 S.W.2d 177 (Tex. Cr. App. 1983); Hill, 633 S.W.2d 520 (Tex. Cr. App. 1982).

It is an exception to the rule where the prior conviction complained of is based on a void indictment. Ex Parte White, 659 S.W.2d 434 (Tex. Cr. App. 1983). Under this exception the Court

reviewed the prior conviction to the extent of the indictment and found that although the attempted aggravated rape indictment did not allege the phrase "amounting to more than mere preparation that tends but fails to effect the commission of the offense intended", it did allege facts which show the act is of that character. The indictment did allege that the D attempted to have sexual intercourse and attempted to compel the C/W to submit to the said act of sexual intercourse by threatening serious bodily injury and thus the indictment was not fundamentally defective. Morrison, 625 S.W.2d 729; Cody, 605 S.W.2d 271.

EX PARTE JOHN CASHMAN, #69,128, Opinion on State's Motion For Rehearing: Relief denied, 5/23/84.

COLLATERAL ATTACK ON PRIOR CONVICTION USED FOR ENHANCEMENT FAILS: D argues thathis 1977 conviction of robbery enhanced by a 1969 Colorado robbery conviction should be set aside as the Colorado conviction has now been vacated. D received 50 years in Texas for robbery, with a prior 1969 Colorado robbery conviction being used for enhancement. At his Texas trial, he pled true to the Colorado prior conviction and no real objection was urged to the pen packet evidence. This was the first attempt to challenge his current confinement based upon the Colorado case. At the evidentiary hearing D's court appointed attorney at his 1977 Texas trial testified he had seen the pen packet and had discussed with D his prior Colorado conviction in which D had entered a plea of guilty and that as a matter of strategy he and D agreed applicant should enter a plea of true at the penalty stage of the trial. Defense counsel testified that neither from his discussion with the applicant nor from the papers did he suspect or have any question about the validity of the prior Colorado conviction. D had counsel in the Colorado case as well as in a second Colorado case (which was not used for enhancement) but D insisted that he had only a "standup" attorney at the Colorado conviction used for enhancement. D did not request counsel to make an investigation of the Colorado convictions.

The record shows that the Colorado counsel filed a Motion To Vacate The Judgment in the Colorado conviction used for enhancement on the basis that D's guilty plea of 1968 was not intelligently and knowingly entered, that there was no factual basis shown to support the plea and D was denied the effective assistance of counsel. A brief filed in support of said motion was based on only the first contention urged in the motion. On January 19, 1983 the Colorado district court granted the Motion to Vacate the Judgment but the order did not specify the basis for the court's action.

Applicant now contends that since the prior Colorado conviction was set aside some five years or so after his Texas conviction the latter conviction must now also fall entitling him to habeas corpus relief prayed for. The State argues that Applicant failed to object to the introduction into evidence of his prior Colorado

conviction at the time of his Texas trial for robbery and that by failing to object he waived any right he had to challenge the use of the Colorado conviction. The Court agreed, citing Hill, 633 S.W.2d 520 wherein the Court held that the failure to object at trial to introduction of proof of an allegedly in firm prior conviction precludes a defendant from thereafter attacking the conviction in which the prior conviction was utilized.

Some of the problems with this Cashman case as far as defense counsel are concerned are generated by the dissenting opinions by Clinton and Teague.

Clinton would grand relief and overrule the Hill case:

> "Just as a judgment of conviction entered by a trial court on an invalid indictment is void, so is one rendered on a plea of guilty that is not made intelligently and voluntarily."

Question: Granted that the Colorado district court found that the Applicant's guilty plea in 1968 was not intelligently and knowingly entered. Where are the facts stated in any of these opinions to demonstrate that the plea in fact was not intelligently and knowingly entered? What is defense counsel to do at the Texas trial if the D tells defense counsel that his attorney in Colorado was incompetent, talked only to him briefly before his entry of plea of guilty? That places Texas counsel in the position of having to prove during the 1977 robbery trial in Texas what was alleged in Colorado in 1982 or 1983. How it was proved in Colorado is left unstated by the opinions. That's one overwhelming responsibility for Texas defense counsel in this and any subsequent cases and really does not help defense counsel if one is to project the applicability of Clinton's Cashman dissenting opinion.

The Teague dissenting opinion is equally disconcerting. Teague faults the majority for at least implicitly finding that the effective assistance of counsel was afforded to the Applicant in Colorado, as the majority opinion states that the "pen papers" pertaining to the Colorado conviction were reviewed and discussed with Applicant. None of these opinions states what were included in the "pen packet". And if the pen packet was sufficient on its face, how in the world would Texas counsel be able to demonstrate in Texas that the original guilty plea was not intelligently and knowingly entered into, even if only based upon the Applicant's testimony at his own trial in Texas. Teague relies heavily upon Ex Parte Scott, 581 S.W.2d 181 wherein Scott claimed that his conviction and sentence were void because his trial counsel did not investigate the alleged prior convictions to make the determination whether they corresponded with the allegations of the indictment. Apparently in Scott, Scott had not been convicted of a previous offense before he committed the offense for which he was on trial and therefore Scott should not have pled true to the prior conviction alleged for enhancement purposes. If so, the Court was within its rights to have held that

trial counsel for Scott erred in failing to make an investigation into the prior conviction, easily done from the pen packet. But the relevance of Scott to the Cashman dissenting opinion by Teague is still left hanging. Teague simply concludes that in Cashman, trial counsel for Applicant made no formal investigation to determine whether the prior felony conviction was a valid conviction, and this was very detrimental as it was now known that a Colorado district court had now determined the conviction to be invalid. Frankly, Teague's opinion bootstraps itself and does not aid defense counsel now or in the future. Another problem with Teague's opinion is that Cashman never claimed apparently that his trial counsel was incompetent yet Teague stretches the only contention made which concerns the validity of a prior conviction into an ineffective assistance of counsel contention, which I think is unfair under the circumstances with as little guidance as is given by his dissenting opinion.

ANDREW WILSON, #350-82, Opinion on State's PDR: C/A jdgmt reversing conviction was affirmed, Judge W. C. Davis, 6/20/84.

EVIDENCE INSUFFICIENT TO PROVE ENHANCEMENT ALLEGATION DURING PUNISHMENT HEARING: D was convicted of misdemeanor assault. The record showed no plea was entered to the enhancement allegation. An assistant district clerk testified that the D had sworn before her the morning of trial that he had been given probation in 1971 for assault and convicted in 1978 for carrying a pistol. By footnote, the Court indicated no attempt was made to connect up these confessed conviction with those alleged in the enhancement paragraph. Actually, the Court's opinion does not state what convictions were even alleged for enhancement purposes. Testimony was elicited from the DA and from D's attorney that the D had filed an Application For Probation in the case which recited that the D had never been convicted of a felony. Immediately below the printed portion the following was handwritten: "Except Defendant was given probation in 1971 for assault and convicted in 1978 for carrying a pistol". The Court had before trial granted the D's request to withdraw the Application For Probation. This was the entire record for the punishment phase. The court's charge to the jury on punishment set out the enhancement paragraph and then stated:

> "To this allegation in Paragraph 2 of the information the Defendant has pleaded true."

No objection was made to the charge. The State argued that although there is no showing in the record of the D's actual pleading to the enhancement paragraph, the record shows through the charge that the D pled true to the enhancement paragraph. The D responded that the charge is not proof and there is no evidence of a plea of true.

First, the State has the burden of proof to show the prior

conviction was a final conviction under the law and that the D was a person previously convicted of that offense. Augusta, 639 S.W.2d 481. If a defendant pleads true to the enhancement paragraph the State's burden of proof is satisfied. The plea of true is sufficient proof. Harvey, 611 S.W.2d 108. The State invoked Article 44.24 C.C.P. and claimed that the recitation in the charge together with a presumption of regularity satisfies their burden of proof and in effect constitutes evidence that the D pled "true" and met the burden of proof. However, a charge is not evidence but is only a codification of the State's theory of prosecution and evidence must be presented to support the charge. A recitation in the charge is not proof. Sufficiency is reviewed by comparing the evidence to the indictment as incorporated into the charge. Benson, #60,130 (del. 12/20/83). Thus the Court was left with a charge and insufficient testimonial evidence to support that charge. Howard, 429 S.W.2d 155.

AUBREY COOK, #722-82, Opinion on D's PDR: Rev'd, Judge McCormick, 6/20/84.

JURY ARGUMENT--REFERENCE TO THE FAILURE OF THE DEFENDANT TO TESTIFY--REVERSED: During the guilt/innocence phase of the trial the prosecutor argued:

> "During voir dire I told you at that time that I would find out what the defense is the same time you find out, and a. I told you first of all there are several defenses we usually heard. A., Would-be mistaken identity. They couldn't do that because everybody identified him. B., Using the alibi. Someone else, because, `I was somewhere else. I've got my alibi, because I was playing poker with the guys.' It wasn't that. Again, because all of the evidence involved. C., Consent. There was no affirmative consent shown as to what happened during the attack. Only innuendoes and suppositions about what may have happened." (Emphasis added by Judge McCormick.)

The C/A found that there was no error in the argument because normally witnesses other than the defendant usually testify to these defenses. The Court held that the prosecutor's use of the word "I" contradicted any theory that he was referring to witnesses other than the defendant. When the word "I" is used in reference to something that the defendant might have testified to, but did not, it is illogical to think that the jury is not reminded of the defendant's failure to testify. This is a classic example of what Article 38.08 C.C.P. was trying to prevent. Cherry, 507 S.W.2d 549 (Tex. Cr. App. 1974).

KARL JOHNSON, #031-83, Opinion on D's PDR: Rev'd/Acquittal entered, Injury to child, Judge Onion, 6/20/84.

CIRCUMSTANTIAL EVIDENCE INSUFFICIENT TO PROVE CRIME ALLEGED WAS COMMITTED BY SOMEONE OR THAT IT WAS COMMITTED INTENTIONALLY: Indictment alleged that D engaged in conduct that caused serious bodily injury to a 19 month old child by striking the child on the head by a manner and means unknown to the Grand Jury. The 19 month old child was brought to the hospital on February 2 at 11:40 a.m. The child was not breathing adequately and had fresh abrasions on the child's forehead and chin. An hour later the child was dead. When an officer asked D who brought the child to the hospital, what had happened, D stated that he had his car jacked up to work on the muffler, that he went inside the trailor house to get some tools and that when he came outside the car had fallen off the jack and the child was underneath the vehicle. Medical opinion testimony showed that the injuries sustained by the child were not consistent with a car falling and striking the child, that the blow dealt the child was with an almost flat surface and not a curved surface. Officers went to the scene and found a car jack and jack stand near the car in question and noted that the lip of the jack was bent. The car was jacked up and the officers rocked it back and forth but it did not fall off the jack. The muffler was disconnected from the tailpipe.

Defense testimony showed that five days before the incident, the car had hit a pile of snow and the muffler was broken loose from the tailpipe. Apparently D had told several persons that he planned to repair the car himself soon. The owner of the car said that the lip of his car jack was not bent at the time he loaned the car to the D several days previous. The owner's manual for the car cautioned the owner to use the jack only to change tires and not to get under the car while the jack was in use. A minister testified that shortly before the time in question he visited D at his trailor urging him to go to church the next day and at this time saw the car in the yard jacked up. A neighbor of D's testified that he was summoned for help by D when D said that the car had fallen on his baby. This neighbor observed the child with his head under the tailpipe just past the mid-portion of the car. The child had a jacket with a hood over his head. They both drove the child to the hospital. Both D and D's wife were visibly upset at the hospital.

The T/C charged the jury on the law of circumstantial evidence. But see Hankins, 646 S.W.2d 191 (Tex. Cr. App. 1981).

The Court noted that the elements of the offense under the indictment are (1) a person (Appellant) (2) intentionally and knowingly (3) engaged in conduct (4) causing serious bodily injury (5) to a child 14 years or younger (6) by striking the child on the head, (7) by manner and means to the Grand Jury unknown.

The Court cited the standard of review to be followed in circumstantial evidence cases as that expressed in Wilson, 654 S.W.2d 465, 471:

> "It follows that circumstantial evidence should not be tested by an ultimate `standard of review' different from direct evidence; the standard in both kinds of cases is whether `any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'. ***
>
> Still, we are unable to devise or discover any reason, compelling or otherwise, for abandoning the utilitarian `exclusion of outstanding reasonable hypothesis' analysis for applying the above `standard for review' in circumstantial evidence cases. . . . (I)f. The evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding."

Thus, it is still clear that a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. Pickering, 596 S.W.2d 124. Proof which amounts only to a strong suspicion or mere probability is insufficient. The Court concluded that it does not appear that the State

established that a criminal act was committed by someone, the corpus delicti of the offense.
In response to the State's argument that the D's evidence of accident was rebutted by the medical testimony and the State's experiments conducted with the car jacked up on the jack, the Court cited Wright, 603 S.W.2d 838 (Tex. Cr. App. 1980):

> "The fact that the trial judge was entitled to disregard the appellant's testimony does not mean that the missing elements of the offense are supplied by rejecting this testimony."

In other words, the fact that the jury was entitled to disregard the accident story given to an officer does not mean that the missing elements of the charged offense are supplied by this rejection. The Court concluded that the State did not sufficiently show the crime alleged was committed by someone, or if it did, it did not sufficiently show Appellant's complicity in the offense. Mere presence alone is not sufficient. Nor was there a showing that the act was committed intentionally and knowingly. Stuebgen, 547 S.W.2d 29.

MICHAEL ALLEN, #875-83, Opinion on D's PDR: Jdgmt aff'd, Judge Clinton, 6/20/84.

C/A MISCONSTRUED D'S OBJECTION BUT CONVICTION AFF'D ON OTHER GROUNDS ANYWAY: D was convicted of aggravated rape and sentenced to life after jury found two enhancement paragraphs to be true. D pled not true to each enhancement paragraph. The objection in the record to State's Exhibit #3, a pen packet reflecting that D

had been placed on probation in a prior case which was subsequently revoked based upon a Motion To Revoke also in the pen packet, read:

> "The incarceration imposed by virtue of the transaction alleged in this pen packet came about as a result of a revocation of probation, according to the pen packet, and this pen packet contains the Motion To Revoke Probation and the Order. And the only judgment, only proper judgment in here is one suspending the sentence imposed and then the subsequent Motion To Revoke and is not any judgment upon which the State may rely to prove a final conviction in this cause.

A portion of the D's Motion To Quash the Indictment alleged that the second enhancement paragraph was defective for the reason that it is based on the conviction in Cause No. 135459 which did not result in a final conviction. At a pretrial hearing the D opted to reserve that and other contentions pertaining to enhancement "if we get to them".

The Court first noted that the objection was rambling and ambiguous; and that the majority of the C/A as well as the dissentor identified the documentary target of the objection to be "Motion To Revoke Probation and Order" but parted company on whether grounds for the objection had been adequately given. The CCA, with all due deference, stated that defense counsel was attempting to articulate an entirely different ground for excluding State's Exhibit #3, that the D's position was that after the initial judgment placing the D on probation there was not in the packet a subsequent final "judgment". There is not the slightest hint elsewhere in this record that the D and his counsel were concerned about prejudice on account of the packet containing a Motion To Revoke and Order thereon. The Court found that the thrust of the objection was to complain that the revocation order does not constitute a judgment showing a final conviction, not that presence of the Motion To Revoke and Order thereon was offensive. Such objection is without merit.

JAMES CRITTENDEN, #65,270, Forgery, Enhanced, 16 TDC, Rev'd/Acquittal entered, Judge McCormick, 6/20/84.

EVIDENCE WAS INSUFFICIENT TO PROVE DEFENDANT'S KNOWLEDGE THAT THE INSTRUMENT WAS FORGED OR TO SHOW DEFENDANT POSSESSED THE INTENT TO DEFRAUD OR HARM: On July 19 at noon the D and X entered a bank in Lubbock and approached an employee asking for assistance in opening both checking and savings accounts. The D presented a check drawn on the account of a Lubbock service station and made payable to the D. However, the purported maker of the check was Mr. Z, a local attorney. The employee recognized Mr. Z's name and thought it unusual he would be signing checks for a service station so she called the station owner who told her that the check had been stolen. The police were immediately summoned and

arrested the D and X. The D told the police he had received the check in the mail earlier in the day and that Mr. Z, the attorney, had been representing him in a personal injury case which had recently been settled and he thought the check was for Mr. Z and represented his share of that settlement. Mr. Z testified he had been representing the D in the personal injury case and that prior to the offense Mr. Z had informed the D that a settlement agreement had been reached but they had not yet received the actual settlement. Mr. Z testified he did not sign his name to the check.

While the State proved that the instrument was in fact forged, the State failed to present any evidence, circumstantial or otherwise, to show the D's knowledge that the instrument was forged or to show that the D possessed the intent to defraud or harm. The D made no statement from which it could be inferred that he knew the instrument was forged. The D was listed as the payee and he did not falsely represent himself. No evidence was introduced to show that anything appearing on the check was in the D's handwriting. There was no showing of any connection between the check stolen from the service station and the D prior to the time he said he received it in the mail. Finally, the D made no attempt to flee after his attempt to deposit the check was thwarted. Castanuela, 435 S.W.2d 146; Colburn, 501 S.W.2d 680; Baker, 552 S.W.2d 818. Thus the judgment of the Court is reversed and reformed to show an acquittal. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d. 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

STEVEN HELTON, #523-82, Opinion on D's PDR: Conv. aff'd, Judge McCormick, 6/13,84.

ATTORNEY/CLIENT PRIVILEGE NOT VIOLATED: During presentation of the D's case, the D's retained attorney asked the court for permission for the D himself to personally question a defense witness. Outside the presence of the jury, defense counsel informed the court that he could not ethically question the witness in that he understood the witness was going to perjure himself. Counsel then called the D to the stand. The D testified outside the presence of the jury that he desired the witness to testify, that defense counsel had advised against this and that he desired to examine the witness himself. The court told the D that he would be allowed to question the witness and his attorney would be beside him to advise him. In the presence of the jury the D conducted a brief examination of the witness. At the conclusion of this questioning, the D conferred with his attorney at which point he asked one more question of the witness. After the witness was excused, defense counsel resumed conducting the D's defense.

D's initial argument that the admonishments in Feretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) should have been given to him failed, as Feretta dealt with a

situation in which a pro se defendant waived counsel and acted alone in this self representation. Here, although the D questioned one witness himself he was at all times represented and advised by counsel. Maddox, 613 S.W.2d 275.

The D's principle contention was that his retained attorney violated Article 38.10 C.C.P. when he informed the T/C that the witness was going to commit perjury. Article 38.10 provides:

> "All of the persons, except those enumerated in Articles 38.06, 38.101, 38.11, and 38.111, whatever may be the relationship between the defendant and the witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship."

There is nothing in the record to show defense counsel obtained this information as a result of his relationship with the defendant. Secondly, the rule protecting the attorney/client relationship:

> "Is absolute as to communications made with an attorney as to past transactions and offenses, but it does not apply to future transactions when the client is contemplating the commission of a crime or the perpetration of a fraud. The purpose of it is to secure to litigants free communciation with their attorneys upon all matters involved in litigation and any other legitimate matters concerning which legal advice is desired. It extends to all matters concerning litigation or business transactions, whether pertinent to the matter in which the attorney was employed or not. But information given to an attorney or statements made to him with the purpose in mind of violating the law or being assisted in the commission of a crime is not privileged, and an attorney may divulge information given or statements made with the intent and purpose of violating the law or perpetrating a fraud without in any manner violating the rule. Ott v. State, 87 Tex. Cr. R. 382, 222 S.W. 261." Williams v. Williams, 108 S.W.2d 297 (Tex. Civ. App. - Amarillo, 1937, no writ history), at Page 299.

See also: Disciplinary Rule 4-101(C), Section 8, Article XII, Rules Governing the State Bar of Texas, following Article 320a-1 VACS. Furthermore, Disciplinary Rule 7-102(A)(4), supra specifically provides that an attorney "Shall not . . . knowingly

use perjured testimony or false evidence." The record shows that the D's attorney acted properly in trying to prevent a fraud upon the court. As shown above, the attorney/client privilege was not violated.

ANTHONY GREEN, #663-83, Opinion on D's PDR: Conv. aff'd, Judge Onion, 6/13,84.

IMPEACHMENT OF STATE'S SOLE REBUTTAL WITNESS BY PENDING PWC CASE NOT ALLOWED--NO ERROR: The State's evidence showed that the D and the deceased had been romantically involved over the years and that on the day of the shooting an argument had broken out and the D had shot the deceased several times at her home. The D claimed self defense, in that the deceased's current lover was at the house and he was under the impression that this individual was going to kill him. During a struggle with this individual, the gun that the D had was discharged several times. On cross examination of the D, the D denied that he previously had been involved in arguments with the deceased while she was with one Esther Randall and that on one occasion he had cut the deceased's purse straps and on another occasion had sliced through her coat. In rebuttal Esther Randall testified to these two incidents. After both sides closed at the guilt stage, the prosecution advised the D that Randall had a pending PWC case. When the court would not permit the D to go into the matter in the presence of the jury, the D perfected a Bill which showed that Randall had a pending case for passing a worthless check, that the $15 or $20 check had been given to a doctor, that when Randall received something in the mail she had paid off the check but was still told to go to court, that she was supposed to have been in Judge Miller's court the day before she testified and she assumed the case was still pending. The prosecutor developed that Randall had not been offered anything for her testimony and that the prosecutor had not offered to dismiss the case in exchange for her testimony. The court refused to allow the D to elicit the above testimony in the presence of the jury to establish bias and motive for her testifying as a witness for the prosecution.

The Court acknowledged the established rule that great latitude should be allowed an accused in showing any fact including pending charges which would tend to establish ill feeling, bias, motive, and animus on the part of any witness testifying against him. Article 38.29 C.C.P.; Spriggs, 652 S.W.2d 405; Massengale, 653 S.W.2d 20. The Court then emphasized that T/Cs have considerable discretion as to how and when bias may be proved and as to what collateral evidence is material for that purpose. Hodge, 631 S.W.2d 754. The Court concluded that Randall was not a material witness or an accomplice witness, was not a witness to the events at the time of the shooting nor shown to have any personal knowledge of the alleged offense. The Court emphasized that Randall was merely a rebuttal witness to the D's testimony, and that the worthless check charge had no connection with the

murder offense alleged, and the rejected evidence was in no way shown to be relevant on the issue of motive, self interest, etc. Smith, 516 S.W.2d 415. There was a strong dissent by Judge Teague who quoted from Justice Whitham's dissenting opinion in Greene, 651 S.W.2d 948 (Tex. App. - Dallas, 1983).

DONALD CUDDY, #989-83, Opinion on D's PDR: Conv. aff'd, Judge Campbell, 6/13/84.

JURY INSTRUCTIONS--SELF DEFENSE--ERROR WAIVED: Court found that although issue of self defense was raised by the evidence, the D's objections to the instructions for failing to include the "defense of self defense" were too vague to preserve error. Although defense counsel indicated he wanted an opportunity to put into the record a written request, none was in the record. Apparently a sub rosa hearing concerning the charge was held but this also was not in the record. "By failing to distinctly specify which self defense instruction he desired, Appellant failed to properly preserve any alleged error." Judge Campbell emphasized that there were 14 different instructions on self defense in McClung's "Jury Charges For Texas Criminal Practice", 1983 Edition, "any one of which could have been Appellant's desired instruction."

HERMAN BERNARD WISHNOW; No. 671-82; State's PDR, C/A Aff'd; Judge McCormick; 4/25/84.

ALCOHOL AND BEVERAGE CODE - CONSITUTIONALITY: D convicted of a violation of the Alcohol Beverage Code, Section 104.01(6) which provides that no person is authorized to sell beer at retail on the premises of the retailer which from its conduct is lewd, immoral, or offensive to public decency, including permitting lewd or vulgar entertainment or acts. In Courtemanche v. State, 507 S.W.2d 545 (Tex. Cr. App., 1974), Court of Criminal Appeals held that a statute permitting entertainment, performances, shows or acts that are lewd or vulgar where beer is sold for retail suffer from a lack of defined terms and was constitutionally too vague to be enforceable. After that decision, the Texas Legislature did not change the language, but removed the provision from the Penal Code to the Alcohol Beverage Code with the same language. The Court of Appeals held that the Courtemanche decision was controlling, in such terms still suffered from the lack of defined terms and was too constitutionally vague to be enforceable. Held: The Court of Appeals attempt to save the statute by engrafting the definitions of "public lewdness" and "sexual contact" from the Penal Code to attempt to cure the enfirm provision of the Alcohol Beverage Code was admirable, but this court finds as the Court of Appeals eventually found that even with that engrafting, the statute is too vague to give notice of the conduct that is to be found offensive.

JUAN O. FAVELA; No. 620-83; D's PDR; Reversed and Remanded; Judge Onion; 4/25/84.

APPEAL - MUNICIPAL COURT - TIMELINESS: D convicted in Municipal Court for City violation of traffic ordinance and assessed a $200 fine. D appealed, but County Court found that notice of appeal was premature and dismissed. Court of Appeals upheld decision of County Court agreeing that appeal had not been properly perfected. Facts show that D was found guilty in Municipal Court and judgment entered on January 8. Motion for new trial was filed January 16, and the motion incorporated a notice of appeal. The record reflects no hearing or ruling on the motion for new trial, and on February 12, D filed a separate written notice of appeal. County Court held that he notice of appeal given in the motion for new trial on January 16 was premature as it was given before the overruling of a motion for new trial, and therefore not timely. The County Court and later the Court of Appeals stated that they were relying on the decision of Gordon v. State, 627 S.W.2d. 708 (Tex. Crim. App., 1982) so as to apply the Texas Criminal Rules of Appeal, Rule 211 and invoking in criminal cases Rule 306(c), of the Texas Rules of Civil Procedure concerning notices of appeal that are prematurily filed. Held: The rules in effect at the time stated that from Municipal Court, a written motion for new trial must be filed by D no later than the 10th day after conviction. The motion for new trial is overruled by operation of law at the expiration of 20 days. Here, D timely filed his motion for new trial on January 16, and since there was no hearing it was overruled by operation of law on February 5, and the separate written notice of appeal given February 15 was therefore timely. Reliance upon the Gordon did not deal with the law that was in effect at that time.

THEODORE ROSEVELT PARRIS; No. 917-83; D's PDR; Affirmed; Judge Miller; 4/25/84.

SPEEDY TRIAL - WAIVER: D convicted of offense of aggravated robbery in TBC and sentenced to fifteen (15) years. D raised violation of Speedy Trial Act and was affirmed by Court of Appeals in unpublished opinion. D presents the following facts concerning speedy trial on PDR: 12/20/78 - felony information filed, D waives indictment; 1/22/79 - State announced ready; 4/11/79 - D pleads guilty and sentenced to 25 years; 9/7/79 - State announces ready and case set for competency hearing; 9/14/79 - on evidence at competency hearing, D allowed to withdraw guilty plea, D granted motion for new trial and judgment set aside, D files waiver of speedy trial act; 10/5/79 - State announces ready and D files waiver of Speedy Trial Act; 10/22/79 - State annouces ready; 1/28/80 - D indicted in different cause number for same offense; 2/11/80 - State's motion to dismiss original information is granted; 2/18- 8/26/80 - D's case reset six (6) times; 8/26/80 - D's motion to dismiss under Speedy Trial Act denied, D pleas not guilty, TBC, found guilty and sentenced to 15 years. Issue is whether earlier waiver of Speedy Trial Act has been transfered to new indictment. Held: Problem was addressed by court in Rosebury v. State, 659 S.W.2d 655 (Tex. Crim. App., 1983) where it was held that a waiver of speedy trial applies to the case (offense) not the transaction unless a waiver of speedy trial executed under one indictment/information is valid as to the new indictment/ information arising from the same transaction only if the two crimes are the same offense. Here, the single offense of aggravated robbery against the single victim is alleged. The waiver of the Speedy Trial Act is transferable.

RANDALL KING; No. 971-83; D's PDR; Affirmed; Judge Odom; 4/25/84.

INDICTMENT - POSSESSION OF MARIJUANA - USABLE QUANTITY: D convicted under indictment that alleges that "did then and there intentionally and knowingly possessed marijuana in an amount of more than four (4) ounces. D attacks indictment in that it fails to allege that the marijuana "was a usable quantity". Court of Appeals held that such allegation unnecessary in that possession of more than four ounces was a felony under Article 447615, Section 4.05, V.A.C.S., and therefore the minimum quantity requirement, i.e., a usable quantity is applicable only to the lowest grade, a Class B misdemeanor prohibiting possession of two ounces or less. D seeks reversal on PDR as this court has held in Lejeuene v. State, 538 S.W.2d. 775 (Tex. Crim. App., 1976) that this court made "a usable quantity" an element of the offense. Held: Court of Appeals did not hold that "usable quantity" was not an element, but merely that such allegation would be superfilous when the indictment charges more than four ounces. Court may take judicial notice that a certain amount of marijuana is a usable quantity and it is not necessary to use the exact words of the statute where the facts alleged are sufficient to constitute an allegation comprehensive of a statutory term.

LAURA MAE TAYLOR; No. 64,163; Reversed and Remanded; Judge Clinton; 4/25/84.

COURT'S CHARGE - UCW - POSSESSION: Police respond to a disturbance involving an exhibition of a firearm at a bar. Officer given description of persons and vehicle last seen traveling north. Officer stops vehicle matching description and removes five people from vehicle. Driver was resisting being placed under arrest when D, a passenger, stepped forward and a pistol fell from her waistband. D testifies that after leaving bar, as police approached the vehicle, the driver, her brother, handed her the pistol which she concealed in her pants. Testimony showed approximately four minutes elasped between the time police approached the vehicle and the time the pistol fell out the pants. D requested an instruction that the jury must find her not guilty if they had a reasonable doubt that her possession of the pistol was more than momentary or if they believed her version of the events. Trial Court denied. Held: Previous cases have indicated that "carrying", although never defined, includes asportation, and not mere momentary possession. The jury must be given appropriate instructions to decide whether D transported the pistol from place to place or merely possessed it for a moment. The court erred in failing to properly instruct the jury in that regard.

DISSENT: The older cases which distinquish between momentary possession and possession that was sufficent to support a conviction were decided without the benefit of a defined cupable mental state and a statutory definition of possession. The new Penal Code requires both a cupable mental state and gives guidance to the jury with the definition of possession. Charge should not be required.

JAMES ROBERT WHITE; No. 68,504; Affirmed; Judge Tom Davis; 4/25/84.

AGGRAVATED ROBBERY - SUFFICIENCY OF EVIDENCE - INTENT AT TIME OF ASSAULT: D convicted of aggravated robbery under indictment that alleges that in the course of committing theft or property owned by X, D exhibits a firearm and caused bodily injury to Y. Facts show X was loading groceries in the trunk of her car at a supermarket when Co-D approached and grabbed her purse. X struggled and refused to relinquish the purse and Co-D pulled her to the ground and dragged her along the pavement, unsuccessfully trying to get it loose. Co-D let go of purse and ran toward automobile stationed in the driveway in front of the store pursued by Y. As Y came up to Co-D, Co-D yelled to D who was in the automobile to shoot Y, and D shot Y through the windshield, striking Y in the arm. Co-D and D then left the scene. D and Co-D were pursued and when automobile crashed, D and Co-D were arrested at the scene and the gun was found. D argues that at the time he shot Y, there was no evidence that D acted with intent to obtain and maintain control of the property since Co-D had abandoned his attempt to steal the purse and was trying to escape at the time the injury took place. Held: It is clear that no completed theft is required in order for the proto constitute the offense of robbery under Sec. 29.02, Texas Penal Code, nor is it necessary that the victim theft or attempted theft and the victim of the robbery be the same. The question is whether the statute requires that a person having a "intent to obtain and maintaining control the property" at the time that he engages in the assaultive conduct. The element "intent to obtain and maintain control of the property" in Sec. 29.02, Texas Penal Code deals with the rob-

bers state of mind regarding the property involved in the theft or attempted theft, and not his state of mind in the assaultive component of the offense of aggravated robbery. Therefore, violence accompanying an escape immediately subsequent to an attempted theft can constitute robbery under Sec. 29.02. The evidence here is sufficient to show that D was a party as the get away driver to an attempted theft. D was a party to Co-D's state of mind in the "intent to obtain and maintain control of the property", and therefore D's violence accompanying the escape falls within the parameters of the statute.

CARL EUGENE KELLY; No. 68,874; Affirmed; Judge Miller, 4/25/84.

DEATH PENALTY - PARTIES - SUFFICIENCY OF EVIDENCE: Evidence shows that the victims were kidnapped from a convenience store where X, one of the victims was employed. Witness saw three black males escort X from the store to his car, and go with X in the direction of the park. Shortly thereafter, before police arrived, a witness saw the victim's car stop across from the store and drop D off. Later, as police are at the store, D approached and asked for help to start his stalled automobile parked near the store. D appeared to have blood on his shirt, his arm, his two toned shoes, and when asked, stated that he had gotten into a fight earlier that evening. D remained for a while and asked questions concerning whether or not any finger prints had been found in the store area. The victim's car was later stopped and D's billfold was found in the trunk of the victim's car along with artifacts belonging to the victims and evidence that lead the police to find the victim's body in the park. D, in a written statement, confessed to participation in the robbery, kidnapping, and murder of the store clerk. D contends the evidence is insufficient to show he was a party by his failure to preclude every reasonable hypothesis other than D intended to kill the victim. The case was submitted to the jury on an instruction on the law parties and an instruction on the law of circumstantial evidence. Held: A D is guilty as a party to an offense when he is physically present at the commission of the offense and encourages the commission of the offense either by words or other agreement... in determining whether one participated as a party in committing an offense, the fact finder may look to the events occuring before, during and after the offense and reliance may be placed on actions which show an understanding and common design to do a certain act. D's confession, in which he acknowledged that he knew that Co-D had participated in an aggravated robbery earlier and shot some people along with the acts of D that were observed are sufficient to make D a party under the standard of "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". D's act were likewise sufficient to remove him from the parameters of the decision of Enmund v. Florida, 102 S.Ct. 3368 (1982). D argues that the Enmund decision mandates a finding that D specifically intended to and did personally kill the victim named in the indictment as a necessary prerequisite for invoking the death penalty. D's reliance is misplaced in that Enmund does not limit itself merely to requirement that D have a specific intent to kill the victim named in the indictment. The imposition of the death penalty is not prohibited where D anticipates and contemplates that life will be taken or that lethal force will be employed as a result of the conduct of D.

SEARCH AND SEIZURE - CONSENT - COURT CHARGE: Evidence in the form of D's blood stained shoes were obtained pursuant to what the State claim was a consensual

search of D's home granted by D's mother. D's mother testified that the police entered her home uninvited and requested D's shoes and that she never gave the officer permission into home but he just followed me to get the shoes, and that the mere presence of police officers scared D's mother. Here, the court held that there was clear and convincing evidence to convince that trial court that the consent was voluntarily given as is the State's burden. Additionally, the failure of the trial court to include a court's charge under Art. 38.23, Code of Criminal Procedure, concerning the disregarding of evidence obtained as a result of an illegal search and seizure is not fundamental error. No instruction was requested or timely presented and therefore there is no error.

JUROR - WITHERSPOON: The text of the voir dire is set out in the opinion and shows that the jurors repeated and unequivocal denounciation of the death penalty would prevent or substantially impair the performance of his duty as a juror and his ability to follow the court's instruction and take an oath. Therefore, the juror was properly excluded in accordance with Witherspoon.

CHARLES COUNTY; No. 68950; Reversed and Remanded; Judge McCormick; 4/25/84.

COURT'S CHARGE - ACCOMPLICE WITNESS - LAW TO FACTS: D convicted of capital murder and punishment assessed at death. D charged under Section 19.03(a)(3), Texas Penal Code, which provides for the death penalty for a person who commits the murder for remuneration or the promise of remuneration or employees another to commit murder for remuneration or the promise of remuneration. D complains of instruction to jury requiring corroboration of an accomplice witness in general terms that substantially track Article 38.14, Code of Criminal Procedure. Appellant objected and requested an instruction which set out the requirement of cooroboration to the specific elements of the offense that elevated it to capital murder. Held: In Fortenberry v. State, 579 S.W.2nd. 482 (Tex. Crim. App., 1979), the Court held where the accused is charged with capital murder, the jury must be instructed, upon D's request, that the accomplice witness' testimony must be corroborated as to the specific elements that make the offense a capital crime and that failure to do so constitutes reversible error.

SPEEDY TRIAL - STATUTORY AND CONSTITUTIONAL: D raises claim of denial of statutory speedy trial after case was reset for many times over a substantial period of time so that the co-defendant could be tried first. Waivers were secured and the State had announced ready. Held: Although D established that the case had been reset many times because the State wanted to try the co-indictee first, such proof is insufficient to rebut the State's timely announcement of ready for a trial. D also claims a constitutional deprivation of speedy trial but has made no allegation or showing of how he was prejudice by the delay.

CARLOS ALAMAN MATA; No. 028-84; D's PDR; PDR Refused; Judge Onion; 5/2/84.

DISTRICT COURT - CRIMINAL JURISDICTION: D convicted of unlawful possession of firearm by felon and assessed three years in TDC. Conviction affirmed in unpublished opinion by Court of Appeals. D claims that the 156th District Court could not render a valid conviction as there is statutory authority that shows

that the 156th District Court should have only civil jurisdiction. Held: Constitution in Art. 5, Sec. 11, provides that District Judges may exchange districts and hold courts for each other when they deem expedient and it is not necessary that the docket or minutes reflect reason for exchange of benches by District Judges. Additionally, Art. 5, Sec. 8, of Constitution, establishes jurisdiction of district court over both civil and criminal cases and the legislature cannot by statute take away from a district court jurisdiction given it by the Constitution. Therefore, the court had jurisdiction to enter the judgment.

BRUCE K. ESCO; No. 61,501; State's Motion for Rehearing Granted; Judge Teague; 5/2/84.

SEARCH AND SEIZURE - PROBABLE CAUSE: The State's motion for rehearing on panel opinion that originally reversed D's case for an unlawful search and seizure. Facts show that two unidentified white males wearing disguises armed with pistols and sawed off shot gun robbed a store in Austin. Police got description of robbers and license plate number of vehicle. Five and one-half hours later, 133 miles west of Austin, automobile with D as sole passenger was stopped and office recognizing the license number from the "bolo" message arrested D and Co-D, conducted a general exploratory search of the interior of vehicle and recover every item described in the teletype bulletin except the shot gun. Officers then opened the trunk of the vehicle and viewed a briefcase which they opened that had money and personal papers belonging to D. Items seized were introduced into evidence. Held: Majority of panel did not accurately apply the meaning of the legal term "probable cause" in a flexible common sense manner. Probable cause merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be useful as evidence of a crime; it does not demand any showing of such belief is correct or more likely true than false. Texas v. Brown, 103 S.Ct. 1535 (1983). The shot-gun in the "bolo" message might have referred to a disassembled sawed off shot-gun that could fit into the briefcase. The fact that a disassembled sawed off shot gun was not found is irrelevant, only whether there was a reasonable probability if the case might contain a disassembled sawed off shot gun. This is true even though the officers never articulated that the reason that they opened the case was because they were looking for a disassembled sawed off shot-gun.

STATE OF TEXAS EX REL TIM CURRY V. HONORABLE GORDON GRAY, JUDGE; No. 69,262; Relief Denied; Judge Odom; 5/2/84.

MANDAMUS: D accused of two cases of capital murder arising out of one robbery. D tried for capital murder and given the death penalty in one case, victim X. That case was affirmed by the Court of Criminal Appeals and the United States Supreme Court denied certiorari. Subsequently, a new indictment was returned charging D in the victim Y's case alleging murder. D entered a plea of guilty to the murder charge and the reindictment on victim Y and accepted a plea bargain of thirty (30) years. The original capital murder conviction, on habeas corpus appeal to the Fifth Circuit, was reversed. The State is attempting to retry D for the death penalty on the case of victim X that was reversed in the Fifth Circuit. D has interspersed a plea of former jeopardy and way of collateral estoppel to that retrial in that the plea of guilty to the murder of vic-

tim Y coupled with the dismissal of the capital murder indictment amounted to a finding in favor of D on the capital punishment penalty issues. Judge Gray granted the motion and has limited to the State to trying D only on straight murder. State's seeks mandamus to be able to try D for capital murder. Held: The threshold question is whether mandamus is available and to justify the extraordinary remedy, the application for writ of mandamus must meet a two fold test: first, there must be no other adequate legal remedy available to the petitioner; second, the relief sought must be in the nature of a ministerial act by the respondent as opposed to a discretionary one. It is clear that the State has no other remedy, but is the order of the trial court a ministerial act or an exercise of judicial discretion? Here, D as a matter of law could not invoke collateral estoppel against the State from issues litigated in the murder case. Subsequent dismissal of the capital murder indictment for the death of victim Y did not constitute litigation of any ultimate fact issue and thus did not give rise to any collateral estoppel claim against prosecution for capital murder of victim X. As no issue of law on collateral estoppel arose from the undisputed facts, the Judge has no authority to enter the order that petitioner seeks to have set aside, and is therefore a ministerial act subject to mandamus.

BLANCH SHEALY; No. 890-83; State's PDR; Affirmed; Judge Teague; 5/9/84.

COMMERCIAL EXHIBITION OF OBSCENE MATERIAL - SUFFICIENCY OF EVIDENCE - PRESUMPTION: D, a store clerk, who was found guilty of violating Section 43.23(c)(1), Texas Penal Code, the obscenity statute, by selling to an undercover police officer a magazine which was alleged to be obscene. Court of Appeals reversed the conviction by finding that trial court had committed error when it instructed the jury that the prosecution could establish that D had knowledge of the content and character of the magazine soley because she sold the magazine to an undercover police officer, citing Davis v. State, 658 S.W.2d. 572 (Tex. Crim. App., 1983). However, Court of Appeals did not consider whether the error was harmless as per Hall v. State, 661 S.W.2d. 101 (Tex. Crim. App., 1983). Held: It is encumbant upon the prosecution to prove that D had knowledge of the content and character of the magazine which is presumptively protected by the First Amendment to the Federal Constitution. Mere fact that the cover of the magazine might be objectionable does not make the magazine legally obscene, as it is the content and character of the magazine, not the cover, which determines whether the magazine is legally obscene. Trial court instructed the jury on presumption under Sec. 43.23(e) that a person who promotes obscene material is presume to do so with knowledge of its content and character under the term "promote" under Section 43.21(a)(5) which includes any time of dissemination. The court unequivocally holds that when the promoted material is protected by the provisions of the First Amendment to the Federal Constitution or Art. 1, Section 8 of the Texas Constitution and the trial court errs by instructing the jury that the prosecution may establish through the use of the statutory presumption that the accused had knowledge of the content and character of promoted material, such can never be harmless error.

HELEN CULPEPPER; No. 896-83; State's PDR; Reversed; Judge Campbell; 5/9/84.

TRANSPORTATION OF ALCOHOLIC BEVERAGES IN A DRY AREA - INDICTMENT: D charged with transporting beer and whiskey in a dry area in violation of the Texas Alcohol and Beverage Code, Section 101.31. Court of Appeals reversed by finding the information charging D is fundamentally defective in that it fails to set out that a local option election was held by order of the commissioners court and that there was an order of the commissioners court declaring the result of the prohibition election published. Held: Texas Alcohol and Beverage Code annotated Section 251.71 provides for judicial notice of what is dry status in an area of criminal prosecution. It being apparent that the legislature intended that a charging extrament need only to allege alcoholic beverages were transported in a "dry area" to be legally sufficient, the Court of Appeals erred in reversing D's conviction for failure to include the avearments of the local option election.

JAMES CARTER: No. 612-83; State's PDR; Affirmed; Judge Onion; 5/16/84.

JEOPARDY - ENHANCEMENT PROVISIONS: D was convicted by a jury of aggravated robbery and the jury found the two enhancement allegations to be true and the court assessed D's punishment at automatice life imprisionment pursuant to Section 12.42(d), Texas Penal Code. D, joined by the State, successfully moved for a new trial on the ground that one of the prior convictions that had been used for enhancement was a probated sentence and not a final conviction. D reindicted with two new enhancement provisions, one of the ones which is the same in the original indictment and a new one to replace the enhancement allegation that had resulted in a probated sentence. D again gets life and the Court of Appeals reverses and remands for punishment on the ground that if double jeopardy doctrine precluded the State from a second opportunity in proving the habitual offenders status of D when it is a finding of insufficent evidence of that status the first time around. Held: Specific question presented is whether the double jeopardy clause bars the State from bringing any enhancement proceeding for the purpose of obtaining a life sentence under Section 12.42(d), where the State has previously failed to prove its case under Section 12.42(d) in an earlier proceeding in connection with the same primary offense. The State alleges that they should be able to get a second go around on proving D's habitual offender status as no fact previously alleged and not proved was relied upon in the new conviction. This reasoning cannot be accepted because in the second proceeding the State did not put on evidence which was simply erroneously excluded, but put on evidence which the State, by its own error, failed to present at the first punishment hearing. The evidence being insufficient, the State is barred from seeking habitual offender status on this offense. Citing Cooper v. State, 631 S.W.2d. 508 (Tex. Crim. App., 1982).

A Modest Proposal:

Delegation of Rulemaking Powers to the Court of Criminal Appeals

*by Erwin Smith McGee**

This article was written over two years ago and, given the recent push to codify rules of evidence for criminal cases, Mr. McGee has agreed to submit it for publication.

Texas' bifurcated court system has greatly complicated promulgating an integrated code of evidence applicable to both criminal and civil trial proceedings. Evidence falls within the ambit of the Supreme Court's rulemaking powers, and may be judicially promulgated. That is desirable for the same reasons that it is desirable to have court-administered rules of procedure. Rule language is neither frozen for two years, nor is it truly vulnerable to special interest legislative modification, which may engraft hypertechnical procedures that trap the unwary. However, the Supreme Court's authority does not extend to criminal proceedings; and the Court of Criminal Appeals has no similar power.

In 1981, the State Bar Liaison Committee on the Federal Rules of Evidence in drafting a codification of Texas evidence rules wanted a single, integrated code to apply to all proceedings, both civil and criminal. The Senate Interim Study on Rules of Evidence, however, excised the code's language applicable to criminal cases and transmitted the civil code to the Supreme Court for judicial promulgation. The scope of the Supreme Court-promulgated evidence code is limited to civil litigation.

What should the Legislature do with the draft of the criminal code which remains? There are three options: (1) let it languish and do nothing; (2) legislate the code by weaving it into chapter 38 of the Code of Criminal Procedure; or (3) delegate rulemaking powers to the Court of Criminal Appeals and transmit the draft of the evidence code to that Court for promulgation.

DO NOTHING

The Texas Criminal Defense Lawyers Association at the time seemed to favor letting the code languish, the longer the better. This was unfortunate since there was no valid reason why the Bar on either the criminal or civil docket should have to resort to case law to discover, for example, how to introduce a photograph or cross-examine an expert. The handiness of an evidence code as a trial aid is not lessened when an attorney is in a criminal, rather than a civil, forum. Indeed, some aspects of criminal proceedings accent the need for codification.

First, hundreds of young attorneys get their "feet wet" every year by accepting court appointments to represent indigent defendants. Thus, the chances of a criminal forum being an attorney's first trip to court are great. Similarly, if it is not by court appointment, one's initial trial exposure may be gained by heading straight into a job as a prosecutor. As a result, many of these young prosecutors are frequently outclassed by their more experienced counterparts. Consequently, not only is there more inexperience, generally speaking, facing a judge in a criminal proceeding, there is also a much greater likelihood of a greater divergence of experience between competing counsel in a criminal proceeding.

Second, criminal trials are more visible to the public. Journalists rarely, if ever, cover fender-benders and contract disputes but are ever present at a murder trial. Also, complainants are frequently exasperated if their injury does not proceed to a criminal prosecution. Victim incredulity is frequently great. Therefore, public understanding of the criminal trial proceedings would be greatly enhanced by simplified, plain language, codified rules of evidence. It could also lessen the all too frequent media story of a defendant "going scot-free" by virtue of some hypertechnical procedural trick or technicality. Codifications illuminate policy rationales underlying rules and clarify procedures to the less informed audience.

Third, a codification would save the taxpayer and defense attorney's client's money by lessening the amount of legal research preparation time that goes into a case. Except for the taxpayer aspect, criminal codification is not unique. Any comprehensive codification accomplishes this purpose.

LEGISLATE THE CODE

The second option, promulgating the code of evidence by legislative act engrafting it into the Code of Criminal Procedure, poses no severe problems except for the possible opposition of the Bar lobby and the possibility of such a severe alteration

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in Committee that the original sponsor of the codification would not want to take it up on the post-committee floor. The real problem with legislating the code, however, is the freezing of the language of the code for two years. It is impossible for any member of the State Bar Liaison Committee on the Federal Rules of Evidence, or the Senate Interim Study on Rules of Evidence, or anyone else for that matter, to answer the query, "Have we forgotten anything?" in the negative. What might fall between the cracks?

One experience comes to mind to illustrate potential gaps. The Federal and Texas proposed provisions on objections merely require that objections be based on specific grounds. However, the Codes are silent as to when evidence is presented in bulk: must the objecting party specify the portion of evidence objected to in addition to stating his specific ground? A judicially-promulgated code, by definition, can be interpreted, reworked and honed over time by the Court so as to fill in these gaps. A legislated code is frozen for two years–untouchable; and, there being no real constituency behind such a procedural rule, it might be difficult to interest a legislator into doing all that must be done to get such a "specify to portion" bill all the way through both houses and signed by the Governor. There is no doubt that any member of the Court of Criminal Appeals could give an inquirer a dozen examples of gaps in various provisions of the Code of Criminal Procedure that have been created but not filled in by subsequent legislative sessions.

Gaps in the Rules of Civil Procedure are constantly being filled in and the rules themselves polished by the Supreme Court of Texas. We need only to review some of the amendments to the Rules of Civil Procedure and rhetorically ask whether such language would gain a sufficient support to achieve legislative attention. This is not to deny that significant controversy may well attend a rule of evidence or procedure; however, the overwhelming bulk of procedural language is somniferous reading to the layman (i.e., a legislator). It is not the most interesting or exciting legislation; therefore, the gaps likely will not be filled.

When the Federal Rules of Evidence were codified, evidentiary points on appeal multiplied. Like the higher Texas courts, evidentiary points are rarely, if ever, found to be reversible error and rarely are so. Therefore, a Federal Rule of Evidence may have several interpretive versions operating simultaneously among the circuits. Since the Federal Rules are statutory, whether these interpretive splits will ever be resolved is open to serious question.

However, Congress is always in session, so if there is a major problem, at least it is possible to address it promptly. By comparison, the two-year interim between Texas legislative sessions is an enormous time period. For example, in 1965, the Texas Legislature attempted to anticipate the United States Supreme Court decision on police interrogations so as to avoid returning for a special session. The legislature, therefore, amended *Tex. Code Criminal Procedure Ann.* Article 38.22 on confessions, to provide that all subjects be taken before a magistrate as immediately as possible and given appropriate warnings before being interrogated. Shortly thereafter, *Miranda v. Arizona* was published and, of course, required the arresting officer to give such warnings. Because of Texas' bi-annual legislative sessions the State's law enforcement officers for eighteen months had to track down magistrates to warn subjects, rather than warning arrested subjects themselves.

In sum, therefore, legislating a code of evidence rules potentially subjects a balanced draft to massive special interest modification which could make it impossible to pass, and freezes the code's language, gaps and all, for two years. Indeed, the gaps may never be filled.

DELEGATE RULEMAKING AUTHORITY

The only remaining alternative is to confer rulemaking authority upon the Texas Court of Criminal Appeals and to transmit the code draft to that body for judicial promulgation. When this idea was initially presented to the State Bar committees and the criminal bar lobbies, the response was a resounding no.

One point before addressing those groups' concerns: there is an erroneous presupposition to this entire discussion, namely, that the Court of Criminal Appeals does not have rulemaking authority today. True, the Court of Criminal Appeals does not have constitutional rulemaking powers, and the Legislature has not expressly delegated it any. But under the guise of Articles 38.01 and 38.02 of the Code of Criminal Procedure, the Court of Criminal Appeals has been creating rules of procedure and evidence on an *ad hoc* basis for decades. Since specific evidentiary provisions are scanty in the Penal Code and Code of Criminal Procedure, the Court of Criminal Appeals has the power to pick and choose from the common law. Even when there are express statutory provisions, the Court of Criminal Appeals has not felt restrained in modifying them on a case by case basis. An example of this judicial exercise of authority is Article 38.28 of the Code of Criminal Procedure which provides, like the Federal Rule and correlative Texas draft code provision, that anyone may impeach any witness. The Court of Criminal Appeals, however, has held that this requires a showing of surprise if counsel is seeking to impeach his/her own witness. No language whatsoever in the Code provision intimates that any qualifying predicate like a showing of surprise attends the rule. It is travesty that the Court could not go ahead and amend the language in the code itself to reflect its decision. The unwary lawyer who relies on Article 38.28 during trial without predicating his/her impeachment on surprise will be informed promptly on appeal that case law has amended the provision.

Another example is Article 38.29 of the Code of Criminal Procedure, regarding impeachment by prior convictions. Nowhere in that statute is there a "felony or misdemeanor involving moral turpitude" requirement; read literally, the provision would seem to permit impeachment with proof of prior traffic violations. Nonetheless, the Court of Criminal Appeals summarily appended felony and moral turpitude requirements into the statute.

Suffice it to say that Texas does have evidence rules, but they are buried in: (1) Texas case law; (2) the Penal Code; (3) the Code of Criminal Procedure; (4) civil statutes; and, (5) the common law of England.

Basically, opposition to conferring rulemaking powers upon the Court of Criminal Appeals appears to be based more upon a mistrust of personalities than anything else. Similarly, the Court is said to be hypertechnical and its ability to draft rules is questioned.

Drafting ability can be dispensed with summarily. It is doubtful that the Court of Criminal Appeals would deviate substantially from the Code draft submitted, and whatever language that they adopt is very likely to be the code language substantially followed as in other jurisdictions. That the Court would attempt to "reinvent the wheel" is too doubtful to be entertained seriously. There are limited versions of any given rule of evidence.

States vary greatly in areas of substantive law (e.g., real estate, probate, penal code), but most evidence matters have long been settled; and although there are clearly distinctions in evidence practice from state to state, the distinctions are relatively clear.

That the Court of Criminal Appeals would draft something wholly foreign to current evidence practice is a fear bordering on paranoia. However, even that fear can be dispensed with by insisting that the Court of Criminal Appeals adopt a rule that is followed in at least ten states unless the rule is pursuant to some Texas unique statute, or something to like effect. This type of provision, though abhorrent to this author, could be drafted into the delegation statute. In addition, the delegation statute could direct that a permanent rules-drafting committee be appointed by the State Bar or that something like what is being done with the Rules of Civil Procedure be implemented for the criminal practice.

The hypertechnical argument actually supports the conferring of rulemaking authority. That argument was probably most severely presented by Paul Burka in the February, 1982, issue of *Texas Monthly* magazine. Mr. Burka suggested that the Court overworks statutory language and punctuation so as to interpret provisions contrary to their plain meanings. Therefore, he asserted that the court is overzealous in critiquing legislative draftsmanship and, in so doing, publishes and thereafter enforces erroneous interpretations. First, Paul Burka overworked some very limited and dated examples into a general scathing critique. Second, it is doubtful that the Court would misinterpret a rule that they themselves wrote. To illustrate the point, consider Article 38.28 of the Code of Criminal Procedure, which states that anyone may impeach a witness. If the Court of Criminal Appeals had written that provision, it is highly unlikely that they would have ruled thereafter that surprise must be shown before impeaching the witness. However, by being instructed to follow the Texas Penal Code, the Texas Code of Criminal Procedure, as well as the common law, the Court has the authority to supplement statutes with common law. Authority *vel non*, they do it. The contention here is that the Court has more freedom to rule that "black" means "white" even though the Legislature wrote "black." But the Court would be far less inclined to rule that "black" means "white" if they, themselves, wrote "black." As a practical matter, authors do not interpret their own writings hypertechnically so as to change the plain meaning of what they wrote.

Another way to view the conferring of rulemaking authority upon the Court of Criminal Appeals is to think of the Court as being an ongoing legislative criminal jurisprudence committee. It would be such a *de facto* committee because statutes always supersede court-made rules, and a delegation of rulemaking authority could always be repealed. These two aspects of the issue are the sticks which will operate as checks of those delegated rulemaking authority. In order for many of the evidence provisions to become effective—to operate—several provisions of the Penal Code and the Code of Criminal Procedure would have to be repealed (e.g., Art. 38.28, would preclude proposed Rule 607, referred to above, from ever being effective). In effect, the Court's promulgation of a rule which covers a subject governed by statute is nothing more than a recommendation that the statute be repealed and that the rule replace it. There is no force and effect of a rule until that repealer's effective date is passed. If the Court of Criminal Appeals' rule is deemed undesirable, the repealer would not be passed and the Court's rule would have to be withdrawn. If the Legislature disapproves one of the Court's rules, it merely would need to pass a statute on point, and, in effect, thereby repeal the rule. Every two years, all of the Court-promulgated rules would be subject to this kind of review. If some furor evolves around the entire Court code or a major portion of it, the Legislature would need only to repeal the delegation statute, and the entire Court code would disappear. It is this Legislative check behind delegation statutes which precludes a delegatee from going overboard with the authority to promulgate rules. Again, the delegation statute can stipulate that the effective date of any Court-promulgated rule not be before the end of the subsequent legislative session, so that each and every Court-promulgated rule is thereby subject to review. Such a stipulation is also repugnant to this author but attitudinal concerns can be structurally dealt with in this manner.

To conclude, the fears of conferring rulemaking authority upon the Court of Criminal Appeals are based upon notions that actually support such a conferral. To the extent that such fears have some validity, they can be obviated in the delegation statute.

Interestingly, virtually every other state agency or body has the power to promulgate their own rules of procedure. How the day-to-day routines, under an enabling statute, are established frequently is dictated in the enabling act or generally delegated by the Administrative Procedure and Texas Register Act. Practically the only governmental body that does not have such authority is the Court of Criminal Appeals, one of the state's highest courts. Admitting and excluding evidence is in the standard routine of a court and fundamentally little, if anything, more than that. It is due to this perfunctory aspect perhaps that the overwhelming bulk of the Federal Rules of Evidence have no correlative provision in either the Code of Criminal Procedure or Penal Code.

CONCLUSION

Texas led the way in modernizing civil procedural practices with the conferral of rulemaking authority in the early 1940's upon the Supreme Court of Texas. The Texas model has been widely followed elsewhere, but we remain woefully retarded in making similar strides with respect to criminal evidence and procedure.

If any portion of the body of law should be as clear as possible and readily accessible, it should be the procedural practices in criminal trials. A comprehensive and uniform model evidence code would be a giant step in that direction. To assure that this Code is kept up-to-date and facially accurate, it should be placed under the purview of the Court that administers it. In Texas criminal trial practice, that means that rulemaking authority ought to be conferred upon the Court of Criminal Appeals.

Resolutions of the Board of Directors

WHEREAS The Honorable CRAIG WASHINGTON has distinguished himself as the ardent defender of the underdog in representing Eroy Brown, an inmate in the Texas Department of Corrections, on capital murder charges in two successive trials and on murder charges in a third trial; and Whereas he has convinced twenty-three jurors that Eroy Brown was not guilty of capital murder or placed such a substantial doubt in their minds that they could not reach a verdict; and Whereas he has also convinced an additional twelve jurors that Eroy Brown was not guilty of murder; and Whereas he successfully won at trial and preserved through appeal of a writ of mandamus the right to review Eroy Brown's parole records at the Texas Board of Pardons and Paroles and at the Texas Department of Corrections to determine if those records contained *Brady* material; and Whereas he has had to petition a federal court for the protection of inmate witnesses to preserve their testimony and to protect their constitutional rights in the defense of an indigent; and Whereas he has had a petition for the equal protection of the laws by filing a civil rights suit in federal court to get equal payment of attorney's fees for the defense of an indigent; and Whereas despite having an illness that required his temporary hospitalization in the course of defending the cause of his client in the second death penalty trial he continued into the third trial; now therefore be it resolved that the Texas Criminal Defense Lawyers Association honors Craig Washington as an outstanding defender of the life and liberty of a citizen accused of crime, the highest calling that a lawyer can achieve.

Board of Directors
Texas Criminal Defense Lawyers Association
May 12, 1984
Lubbock, Texas

WHEREAS The Honorable KENT SCHAFFER has distinguished himself as the ardent defender of the underdog in representing Eroy Brown, an inmate in the Texas Department of Corrections, on capital murder charges in two successive trials and on murder charges in a third trial; and Whereas he has convinced twenty-three jurors that Eroy Brown was not guilty of capital murder or placed such a substantial doubt in their minds that they could not reach a verdict; and Whereas he has also convinced an additional twelve jurors that Eroy Brown was not guilty of murder; now therefore be it resolved that the Texas Criminal Defense Lawyers Association honors Kent Alan Schaffer as an outstanding defender of the life and liberty of a citizen accused of crime, the highest calling that a lawyer can achieve.

Board of Directors
Texas Criminal Defense Lawyers Association
May 12, 1984
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WHEREAS The Honorable Timothy Sloan has distinguished herself as the ardent defender of the underdog in representing Eroy Brown, an inmate in the Texas Department of Corrections, on capital murder charges in two successive capital murder trials; and Whereas she has convinced twenty-three jurors that Eroy Brown was not guilty of capital murder or placed such a substantial doubt in their minds that they could not reach a verdict; and Whereas she has had to petition a federal court for the protection of inmate witnesses to preserve their testimony and to protect their constitutional rights in the defense of an indigent; and now therefore be it resolved that the Texas Criminal Defense Lawyers Association honors Timothy Sloan as an outstanding defender of the life and liberty of a citizen accused of crime, the highest calling that a lawyer can achieve.

Board of Directors
Texas Criminal Defense Lawyers Association
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WHEREAS The Honorable Wm. T. Habern has distinguished himself as the ardent defender of the underdog in representing Eroy Brown, an inmate in the Texas Department of Corrections, on capital murder charges in two successive capital murder trials; and Whereas he has convinced twenty-three jurors that Eroy Brown was not guilty of capital murder or placed such a substantial doubt in their minds that they could not reach a verdict; and Whereas he successfully won at trial and preserved through appeal of a writ of mandamus the right to review Eroy Brown's parole records at the Texas Board of Pardons and Paroles and at the Texas Department of Corrections to determine if those records contained *Brady* material; and Whereas he has had to petition a federal court for the protection of inmate witnesses to preserve their testimony and to protect their constitutional rights in the defense of an indigent; and now therefore be it resolved that the Texas Criminal Defense Lawyers Association honors Wm. T. Habern as an outstanding defender of the life and liberty of a citizen accused of crime, the highest calling that a lawyer can achieve.

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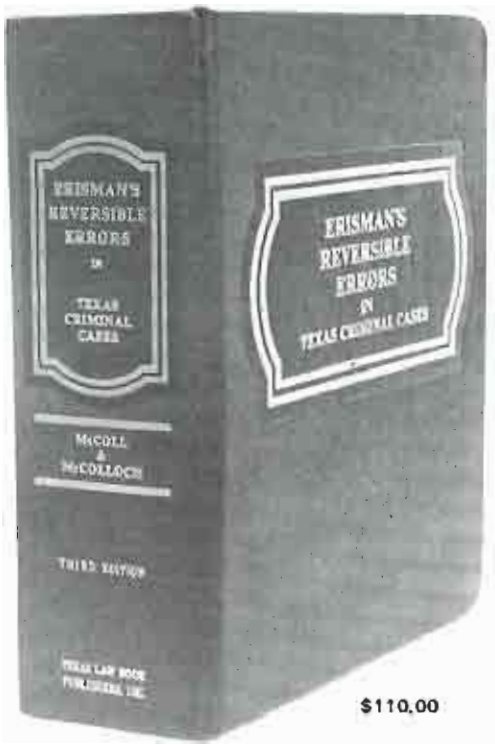
October 6	TCDLA Board, CDLP Exec. Committee Meeting	S. Padre
October 25-26	Federal Criminal Law Institute (CDLP)	Tyler
November _	DWI Seminar (TCDLA)	Orange/Beaumont
November 30	Evidence Seminar (CDLP)	Dallas
December 13-14	Criminal Defense Skills Course (CDLP)	El Paso
December 15	TCDLA Board, CDLP Exec. Committee Meeting	El Paso
January 11-12	TCDLA Key Staff Seminar	Austin
February 6-10	TCDLA Spring Trip into the Sun	To be Determined
February 14-15	Criminal Defense Skills Course (CDLP) Take your Valentine to the Livestock Show	San Antonio
February 16	TCDLA Board, CDLP Exec. Committee Meeting	San Antonio
March 3-8	Criminal Trial Advocacy Institute (CDLP)	Huntsville
March 27-31	TCDLA Presidents' Conference	Las Vegas
April 19	DWI Seminar (TCDLA)	Austin
April 19-20	TCDLA Board, CDLP Exec. Committee Meeting Fiesta in San Antonio	Austin
May 3	Evidence Seminar (CDLP)	Mid./Odessa
June 6-9	State Bar Convention Annual Criminal Law Institute TCDLA Annual Board, CDLP Exec. Comm. Meeting	Dallas Dallas Dallas
June 21 or 28	Sex Crimes Seminar (CDLP)	Austin
July 4-11	ABA Annual Convention	Washington, D.C.
July 14-20	ABA/TCDLA Trip	London
August 23	Drug Offenses Seminar (CDLP)	Houston



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*The authors are Dallas practitioners who limit their practice exclusively to criminal law. McColl, a former briefing attorney for the Texas Court of Criminal Appeals, is a certified specialist in criminal law by the Texas Board of Legal Specialization; an author/lecturer for the State Bar of Texas' Advanced Criminal Law Refresher Course for the last several years; and has published numerous articles in the field of criminal law and procedure. McColloch, also a former briefing attorney, has published numerous law review and bar journal articles on criminal law and procedure and is an active trial and appellate defense attorney.

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