VOICE for the DEFENSE

JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

DEATH FOR A NON-TRIGGERMAN: NO PLACE BUT TEXAS

AUGUST 1985

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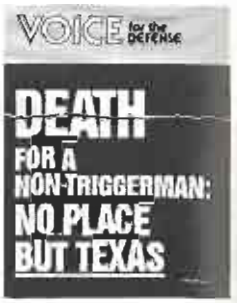
AUGUST 1985 VOL. 15, NO. 2

CONTENTS

ON THE COVER

Three men were present at the death site. The only one still alive is the man who pulled the trigger.



ARTICLES

FEATURES

NEWS

PRESIDENT'S REPORT

Louis Dugas, Jr.

To write my first report as president of TCDLA I went to the back issues of the *VOICE*, beginning with 1977, and read the first reports of other presidents. As I read each report I found a common theme expressed by each president. That theme was membership and education.

Today that theme is as important as it was in previous administrations. Lawyers who practice criminal law are being subjected to government practices almost unheard of a few years ago. The individual lawyer does not have the resources of time, talent and money to respond to a government subpoena directing the lawyer to testify before a grand jury or at the trial where his or her client is being tried. TCDLA can and does cover the gap by providing time and talent to defend individual lawyers where government overreaching seeks to abort the citizen's right to effective assistance of counsel. An individual lawyer who is not a member of TCDLA and who is subject to prosecutorial overreaching is like the little Dutch boy who put his finger in the dike to stop the flood. It may work for a little while but help will be needed. TCDLA needs the individual lawyer. As Ben Franklin once said to John Hancock on signing the Declaration of Independence, "We must all hang together or assuredly we shall all hang separately."

ON EDUCATION

Through the years I have practiced law, I have observed lawyers who practice what I call "hip pocket" law. If it ain't in their pocket, they don't know what to do. I suppose we shall always have that type lawyer among us. Fortunately they are becoming a minute minority in the bar. Young lawyers are more interested in reading and learning the law. TCDLA, since its beginning in 1971, has contributed immeasurably to the education of lawyers. Seminars are held throughout the state enabling those who seek to become better lawyers the opportunity to attend. There are no statistics on the number of lawyers who have improved as a result of attending TCDLA seminars. Today the State Bar is conducting a referendum to determine if lawyers in Texas will be required to complete minimum continuing legal education. I endorse this move by the State Bar.

Letters

Dear Rusty:

Re: "Outsiders"

I am incensed. Kerry FitzGerald had proposed several bylaw amendments at the annual meeting in Dallas last week, including one to allow absentee voting in the annual election. Tom Sharpe rose to oppose the amendment and effectively killed it, arguing that it might permit "outsiders" (his term, not mine) to gain control.

I have always suspected that there is a "them versus us" mentality lurking among some in the hierarchy in this organization, but I never expected to see it so blatantly expressed. To be sure, Cliff Brown and others spoke in favor of Kerry's amendment, but as an "outsider," I could never get the chair to recognize me. So I'll say now what I would have said at the annual meeting.

I pay $150 a year to be a member of this Association. Most of the "outsiders," I suspect, fall in this dues category and there are a lot of us. So many of us, in fact, that President Holmes could report that the Association has several hundred thousand dollars in the bank and enough left over to hire an executive director.

Maybe this Association does need a breath of fresh air. I'd never thought about it until Tom raised the point, but maybe we "outsiders" *should* rise up in rebellion and take over. Either that, or drop out and let the "insiders" finance their own private club.

Yours very truly,
Ralph H. Brock

Dear Rusty:

Re: Proposed Bylaw Changes – Voting Amendments

I have been involved in TCDLA since day one and I attended our annual meeting at the Anatole Hotel in Dallas.

The subject of changing the bylaws on the manner of voting is critical to this organization, but not as suggested.

First, if an individual cannot attend an annual meeting, but has otherwise registered for the convention, I can see where some absentee procedure could be adopted, for good cause, only.

Second, if we go to a written ballot for all members in good standing, we will create a situation which the present rules are intended to avoid. That situation relates to possible control of this organization by the block voting from the larger cities.

Third, this organization is voluntary. It is not the State Bar of Texas, and should not be run on that same basis, save and except fiscal responsibility and service to our members.

Fourth, this organization has survived because we have had regional representation in our Past Presidents. If we adopt a written ballot for voting, will we require 51% and will it be for all officers? If so, why not all directors? The reason why not is simple. We operate a non-profit corporation and we are responsible for several hundred thousand dollars of assets, dues, and seminar income. Those who have had the position of President of this organization have earned it. The written ballot will not assure us that the person elected would have the experience necessary to be President.

Fifth, if we are to let members in good standing vote, what date will we use for a cut-off?

Lastly, since we are a non-profit corporation, we have to comply with the Texas Non-Profit Corporation Act. I am not convinced that those proposals offered at the annual meeting comply with the applicable Texas law.

See you in Galveston.

Very truly yours,
Thomas G. Sharpe, Jr.

Dear Rusty:

I enjoyed Walter Boyd and Allen C. Isbell's pages in their article, "Hearsay," published in *VOICE for the Defense*, May 1985. I was intrigued by the challenge to find a sentence longer than 122 words, so I searched through my too-long list of speeches I have made during the last forty years.

Sure nuff, I found a speech I made eight years ago in Lubbock that had addressed the subject. Please look on pages 14 and 15 of the speech that I am sending you.

I enjoy your publication.

Sincerely,
Jack Pope
Chief Justice (retired)

Ed. note: On pages 14 and 15 of Judge Pope's speech "So You Want to Write an Opinion," given March 25, 1977, before the Lubbock Bar, he wrote:

> "The most effective technique for writing a long opinion is to have some very long sentences. Justice Graves of the Galveston Court of Civil Appeals in *Gillingham v. Timmins,* [wrote a] sentence that contained 387 words. But Texas has to yield to Mississippi in this category. There is a sentence . . . that has 711 words. It is two pages long with no paragraphs but copious commas and semicolons."

continued on page 8

Death for a Non-Triggerman: No Place but Texas

*by Brian William Wice**

"My object all sublime
I shall achieve in time—
To make the punishment fit the crime."

Gilbert & Sullivan
The Mikado

Shortly after midnight on October 24, 1974, Department of Public Safety agents found the bullet-riddled body of fellow agent Patrick Allen Randel in his locked car at a roadside park near George West.[1] A twelve-year veteran of the D.P.S. with some four years' experience as a narcotics agent, Randel, the first D.P.S. narcotics officer slain in the line of duty, had apparently been unaware of the imminence of danger; a cigarette was still dangling from his right hand when his body was discovered.

At the time of his death, Randel had been working undercover to set up a purchase of some $850 of methaqualone tablets from Charles Sanne and Doyle Skillern, two ex-convicts. Police arrested Sanne and Skillern in the Lower Rio Grande Valley hours after coming upon Randel's body. Skillern had the dead agent's pistol and the $850 in buy money in his possession at the time of his arrest while Sanne was found with Randel's credit cards.

The pair were indicted for killing Randel during the commission of a robbery[2] and after a trial in which neither defedant took the stand, a Live Oak County jury found each guilty of capital murder on January 23, 1975. During the punishment hearing, the jury learned that Skillern had been convicted of murder without malice in 1971 as well as of passing a forged instrument and that Sanne had been convicted of unauthorized use of a motor vehicle. The jury sentenced Sanne to life in prison but awarded Skillern the death penalty. But on December 21, 1977, the Texas Court of Criminal Appeals reversed both convictions on the grounds that the jury had been permitted to separate, over defense counsels' objections, after the charge had been read and final arguments concluded.[3]

Jury selection in the re-trial began in Rockport on March 13, 1978, following a change of venue from Live Oak County. Sanne now took the stand and confessed to firing the shots that killed Randel but only after he claimed Randel had struck him with his pistol. The jury, however, was unimpressed with Sanne's version of events and after finding Sanne and Skillern guilty, sentenced each to die on March 31, 1978.

During the course of the next seven years, Sanne and Skillern would fight to overturn their death sentences with Sanne, the confessed triggerman, eventually succeeding in September of 1980[4]. Skillern, however, did not and shortly after midnight on January 16, 1985, became the fifth convict in Texas to die via lethal injection[5]. Doyle Skillern's ill-fated attempts to set aside his death sentence and the refusal of both the Court of Criminal Appeals and the Fifth Circuit to do so making him the first non-triggerman executed in this country since 1955[6] form the basis of this article.

I.

Although Skillern and Sanne raised

Photo by Marshall Wice

* *Brian William Wice, a criminal defense attorney in Houston, is a 1976 magna cum laude graduate of the University of Houston School of Communications and a 1979 graduate of the Bates College of Law.*

A former briefing attorney to Judge Sam Houston Clinton of the Texas Court of Criminal Appeals, Wice's articles have appeared in a variety of law journals and reviews including the Texas Bar Journal, Houston Law Review, South Texas Law Review and the St. Mary's Law Review. An article that he co-authored for the latter publication won the Texas Bar Foundation's Outstanding Law Review Award in 1981. Wice's most recent contribution to the VOICE *was his April 1984 interview with Judge Clinton.*

A contributor to D *Magazine and* Texas Sportsworld *in recent months, Wice is currently at work on an article on the legal troubles of rock star David Crosby.*

some 51 grounds of error between them on their second direct appeal, a majority of the Texas Court of Criminal Appeals had little difficulty in overruling all but one in rendering its opinion affirming each conviction on September 10, 1980[7]. Sanne contended that because the jury in his first trial had found that he would not commit criminal acts of violence that would constitute a continuing threat to society, he should not have been forced to run the risk of being assessed the death penalty in his second trial. Writing for the majority, Judge Wendell Odom agreed, noting:

> ". . . [W]hen . . . the defendant has in fact received a favorable verdict on the issue of future dangerousness in his first trial, he should be entitled to the same protection against having his life placed in jeopardy a second time."[8]

This holding was little comfort to Skillern who had been found in both trials to be a continuing threat to society. His death sentence reformed to life, Sanne would be eligible for parole in 1985.[9]

It is interesting to note that the majority reached the merits of only ten of the 23 grounds of error advanced by Skillern, electing to dispose of the lion's share on procedural grounds, notably a failure to object or a tardy objection at trial. Of those grounds addressed on the merits, only two received substantial attention: the admission of the testimony of Dr. Joseph Rupp, a forensic pathologist, as to Skillern's future dangerousness and the denial of a continuance to prepare for trial.

Although found to be error, given Dr. Rupp's manifest failure to be qualified as an expert in the field of human behavior, the first contention was nonetheless harmless error, in the majority's opinion. As Judge Odom pointed out:

> ". . . the minds of an average jury would not have found the State's case [on the future dangerousness issue] less persuasive had Dr. Rupp's testimony not been admitted."[10]

The second and more troubling issue involved the trial court forcing newly-appointed counsel to trial a mere three weeks after his appointment. Jury selection in the retrial began on March 13, 1978, despite counsel's repeated objections that he needed more time to read the one available copy of the statement of facts from the first trial, interview witnesses, find an independent ballistics expert and familiarize himself with the law.[11] Although Skillern's counsel was considerably less experienced with the spectre of trying a capital case than his predecessor (whom the trial judge declined to re-appoint after the first conviction had been reversed),[12] the majority rejected this contention, tersely noting that Skillern's counsel:

> ". . . did not, however, offer proof of facts which the denial of his motion prevented him from discovering and proving, nor did he at any time state with specificity how any lack of familiarity with the record in the first trial adversely affected his handling of the instant prosecution."[13]

The dissent, authored by Judge W. T. Phillips and joined by Judge Truman Roberts, found the majority's disposition of these grounds "wholly inadequate,"[14] noting that the majority's assertion that Dr. Rupp's testimony could not have changed the vote of even one juror was "a bold departure from reason."[15] In regard to the trial court's failure to accord Skillern's attorney a continuance to prepare for trial, Judge Phillips wrote:

> "In spite of the enormous burden on the defense attorneys to acquaint themselves with the facts, the majority concludes that counsel discharged this burden merely by reading the testimony of the witnesses from the prior trial. I cannot agree that such *minimal perparation* discharges this burden, nor can I associate myself with such a cavalier attitude toward an accused's constitutional right to effective assistance of counsel."[16]

Ironically enough, the dissent did not speak to the majority's summary disposition of Skillern's 21st ground of error where complaint was made that the first and third special issues should not have been submitted to the jury during the punishment hearing of the trial given the fact that Sanne did the shooting. "It is well established that the law of parties applies to these punishment issues in a capital murder case,"[17] the majority intoned, restating the notion that a defendant could be sentenced to death even though a co-defendant was the actual triggerman.[18]

But less than two years later, the United States Supreme Court would deliver an opinion severely limiting the application of this principal,[19] giving Doyle Skillern one last attempt at breaking his date with the executioner.

II.

After the United States Supreme Court denied certiorari in February of 1982, the trial court ordered Skillern to die on March 11, 1982. The Texas Court of Criminal Appeals denied a request for a stay of execution on March 5, 1982. Only 48 hours before he was to die, the federal district court in Corpus Christi agreed to stay Skillern's execution pending an evidentiary hearing on his post-conviction contentions.[20]

It was while Skillern's appeal was pending before the Fifth Circuit Court of Appeals that the United States Supreme Court handed down its opinion in *Enmund v. Florida*[21] in July of 1982. Enmund had been sentenced to die for a murder that occurred during the course of a robbery in which he was the getaway car driver. In holding the death penalty constitutionally excessive for Enmund's criminal conduct, the court held that the Eighth Amendment did not permit:

> ". . . the imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed . . . [T]he focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims."[22]

Skillern advanced the two-fold argument before the Fifth Circuit that the *Enmund* decision precluded his execution because there was insufficient evidence of

his own personal culpability for the allegedly unexpected act of triggerman Sanne in shooting the victim and secondly, the court's charge permitted the jury to impute to Skillern Sanne's intent to kill the victim.[23] The evidence that Sanne had not elected to shoot Pat Randel until the latter had unexpectedly drawn his pistol and struck Sanne, contended Skillern, was uncontradicted.

After pointing out that the jury was not required to believe Sanne's account of the incident, the three-judge panel found that the jury could have reasonably concluded that Skillern had *agreed* in advance to kill Randel (whom they suspected of being a police informant) after they lured him away from his motel room to the roadside park.[24] The jury also could have reasonably concluded that Randel was killed immediately upon arriving at the roadwide park with Sanne (while Skillern followed in another car) according to a previous plan and that the pair returned to the motel within an hour of the killing to retrieve the $850 in buy money.[25]

In response to Skillern's correlative contention that the court's charge, in permitting the jury to find him guilty of the actual triggerman's killing even though he did not personally contemplate or intend such an allegedly unexpected act, violated the dictates of *Enmund*, the Court held:

> "*Enmund* merely invalidates a death penalty when based solely upon a defendant's criminal responsibility for a killing by an accomplice that is unintended or not contemplated by the defendant; it does not invalidate a conviction of a substantive offense of murder when guilt is so based.[26]

Restated then, *Enmund* did nothing to change the common-law rule of vicarious liability for co-conspirators in the context of the crime of felony murder. But what of the sentencing instructions that the Texas Court of Criminal Appeals had validated in their one-paragraph holding two years earlier applying the law of parties to the special issues in the penalty phase?[27] Said the Fifth Circuit:

> "It might have been preferable that an additional instruction have been given that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result, a prerequisite for imposition of the death penalty. However, no request was made for a special instruction to this effect, nor was any objection made to the charge as given."[28]

It is here that the Fifth Circuit erred by closing its eyes to the reality that any objection or special instruction requested by defense counsel would have been, at that time, patently futile in light of Texas precedent speaking to this very issue.[29] Only in *Green v. State*,[30] delivered four years after Skillern's direct appeal and 18 months after the Fifth Circuit's denial of federal habeas relief did the Texas Court of Criminal Appeals even recognize that upon proper request a defendant was entitled to such a limiting instruction.[31] Only then was the rationale relied upon by the majority in affirming Skillern's direct appeal that the law of parties applied during the penalty phase overruled by the *en banc* court.[32]

The troublesome *Enmund* issue now behind them, the panel also rejected Skillern's effective assistance of counsel/continuance complaint on much the same ground as the Court of Criminal Appeals had four years prior, although not before admitting that "this issue is not entirely free from doubt."[33] The court, however, resolved that doubt against Skillern in holding that "no reason is suggested to us as to what trial counsel might have done differently or more efficiently had more time [to prepare for trial] been afforded."[34]

Finally, the panel overruled Skillern's final contention that it was error to have permitted Dr. Rupp to express his unexpert opinion as to Skillern's potential for future dangerousness. Noting that Skillern received a death sentence at the first trial even without Dr. Rupp's testimony, the court held that "even the erroneous admission of prejudicial testimony does not justify habeas relief unless it is material in the sense of a crucial, critical, highly significant factor."[35]

Though Dr. Rupp's testimony, as Judges Phillips and Roberts had agreed,[36] might well have been the linchpin in the jury's finding that Skillern would constitute a continuing threat to society, the error in its admission had, in four year's time, gone from harmless to harmful, yet inexplicably, not harmful enough to warrant a new trial.

On December 13, 1984, the trial court gave Skillern what was to be his fourth and final execution date, ordering him to die before sunrise on January 16, 1985.[37]

III.

Having moved at a snail's pace for the last seven years, the wheels of justice now began to turn with alacrity as Doyle Skillern exhausted the last avenues of appeal. A final request for a stay of execution filed in the Texas Court of Appeals two weeks before his scheduled execution advanced the contention that Skillern was entitled to the retroactive benefit of the *Green* decision that the law of parties could no longer be applied in the punishment phase to the special issues.[38] Again refusing to speak to the merits of Skillern's complaint, the court, by an 8-1 margin, refused the request for a stay in a summary one-page decision on January 11, 1985.[39] Only Judge Sam Houston Clinton voted to stay the proceedings long enough to consider at least the substance of Skillern's request.[49]

That same day, Federal District Judge Hayden Head in Corpus Christi similarly refused a stay and the Board of Pardons and Paroles voted three-to-two against recommending to the governor to commute Skillern's sentence to life. The following Tuesday, just hours before Skillern was to be wheeled into the death chamber of the Walls Unit of the Texas Department of Corrections, Governor Mark White declined to grant the condemned man a 30-day reprieve.

At 12:19 a.m. on January 16, the executioner's solution dripped into Doyle Edward Skillern's veins. Four minutes later, the mandate of the jury—which itself had taken a mere six minutes to sentence Skillern to die in 1978—was carried out.[41]

At the time of his execution, Skillern was, ironically enough, one of the plaintiffs in a federal civil suit which alleged that the lethal drugs used to carry out death sentences in Texas and Oklahoma

caused "agonizingly slow and painful deaths" and were consequently not "safe and effective" for their intended use in executions consistent with the Federal Food, Drug and Cosmetics Act.[42] The Court of Appeals for the District of Columbia Circuit agreed with the plaintiffs that the Food and Drug Administration had a statutory duty to investigate this claim but the Solicitor General had appealed and the matter had been argued to the High Court with a decision expected sometime in the spring of 1985.[43] Yet Skillern's status as a party to this lawsuit did not keep him from being a casualty of the very execution method he had helped challenge. As Justice William Brennan succinctly noted in dissenting from his brethren's decision not to stay Skillern's execution pending a decision in the civil matter, "The irony of the Court's contrary action will not be lost on the public, when we ultimately issue a decision to a plaintiff no longer able to receive it."[44]

The author would like to thank Judge Bill Harmon of the 178th District Court in Houston for reviewing the manuscript and Ann Marie Paschal for her secretarial talents in the preparation of this article.

FOOTNOTES

1. The facts of the case are taken from *Skillern v. Estelle*, 720 F. 2d 839 (5th Cir. 1983).
2. *See* Tex. Penal Code Anno. §19.03 (Vernon 1974).
3. *Skillern v. State*, 559 S.W. 2d 828 (Tex. Crim. App. 1977).
4. *Sanne and Skillern v. State*, 609 S.W. 2d 762 (Tex. Crim. App. 1980) (reforming Sanne's death sentence to life).
5. *Houston Chronicle*, January 16, 1985 at p. 1.
6. *Enmund v. Florida*, 458 U.S. 782, 794-795 (1982) *citing* N.A.A.C.P. Legal Defense and Educational Fund, Inc., Death Row U.S.A.
7. *Sanne and Skillern v. State, supra.*
8. *Id.* at 767.
9. *Houston Chronicle*, January 16, 1985, at p. 1.
10. *Sanne and Skillern v. State, supra* at 774 *quoting Harrington v. California*, 395 U.S. 250 (1969).
11. *Skillern v. Estelle, supra*, at 776.
12. Skillern's trial and appellate counsel at the first trial was the Honorable Doug Tinker of Corpus Christi, Texas.
13. *Sanne and Skillern v. State, supra*, at 776.
14. *Id.* at 777-778 (Phillips, J., dissenting)
15. *Id.* at 779 (Phillips, J., dissenting).
16. *Id.* at 781 (Phillips, J., dissenting).
17. *Id.* at 775.
18. *See e.g. Smith v. State*, 540 S.W. 2d 693 (Tex. Crim. App. 1976) *vacated and remanded sub nom Estelle v. Smith*, 451 U.S. 454 (1981).
19. *Enmund v. Florida, supra.*
20. This procedural history is recounted in Skillern's final application for a writ of habeas corpus filed in the Texas Court of Appeals on January 2, 1985, at pp. 1-4.
21. 458 U.S. 782 (1982).
22. *Id.* at 797-798 (emphasis in original).
23. *Skillern v. Estelle, supra*, at 844.
24. *Id.* at 844.
25. *Id.*
26. *Id.* 846.
27. *See* footnote 17, *supra* and accompanying text. The three special issues at the punishment phase of a capital murder case as set out at Article 37.071, V.A.C.C.P. (1974) are:
    1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
    2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
    3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
28. *Skillern v. Estelle, supra*, at 848.
29. *See e.g. Wilder and Armour v. State*, 583 S.W. 2d 349 (Tex. Crim. App. 1979) *overruled* in *Green v. State*, ___ S.W. 2d ___ Tex. Crim. App. No. 60,133 (delivered July 11, 1984).
30. ___S.W. 2d ___, Tex. Crim. App. No. 60,133 (delivered July 11, 1984).
31. *Id.*, slip op. at p. 27 n. 4.
32. *Id.*
33. *Skillern v. Estelle, supra* at 851.
34. *Id.*
35. *Id.* at 852 *quoting Porter v. Estelle*, 709 F. 2d 944, 957 (5th Cir. 1983).
36. *Sanne and Skillern v. State, supra*, at 778-779 (Phillips, J., dissenting).
37. *See* note 20, *supra*.
38. *Id.* at 5-6.
39. *Ex parte Skillern*, ___ S.W. 2d ___ Tex. Crim. App. No. 1280-2, delivered January 11, 1985, (per curiam).
40. *Id.* (Clinton, J., dissenting).
41. These facts are found in the *Houston Post*, January 16, 1985, at p. 1.
42. The civil suit is styled *Heckler v. Chaney*, No. 84-1878, *cert. granted* ___U.S. ___ (1984).
43. *Skillern v. Procunier*, ___ U.S. ___, slip op. at 2, delivered January 15, 1985 (refusing stay of execution).
44. *Id.*, slip op. at 5 (Brennan, J., dissenting from refusal to grant stay of execution).

LETTERS

continued from page 4

Dear Rusty:

Enclosed please find a copy of a letter which I received today from Davis Scarborough expressing his appreciation for the honor which the TCDLA bestowed upon his father. I thought that you might be interested in publishing the letter in the *VOICE*.

Thank you very much,
Clifford W. Brown

Dear Clifford:

I am deeply grateful to you and to the TCDLA for the honor bestowed upon my father. We have located a picture that we think will be appropriate and will forward it to you as soon as we can get it in an appropriate size. My wife and I thoroughly enjoyed the opportunity to sit with you and your wife at the dinner, and really enjoyed the program.

Very truly yours,
Davis Scarborough

SIGNIFICANT DECISIONS REPORT

JERRY PENNINGTON, No. 971-82, Opinion on D's PDR, Aff'd, Judge Onion, 7/10/85.

COURT'S CHARGE--GENERAL OBJECTION TO SUBMISSION OF LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER IN MURDER CASE INSUFFICIENT: At trial D objected to the submission of the lesser included offense of voluntary manslaughter primarily because D, charged with murder, also faced two prior felony convictions in enhancement paragraphs and therefore if convicted of murder or voluntary manslaughter, was in the same sentencing position. D argued for the submission of murder vs. accident, period. On appeal D argued that the T/C erred in submitting the voluntary manslaughter instruction as it was not raised by the evidence. The Austin C/A addressed the ground of error but concluded that the charge was supported by the evidence and emphasized that the defense does not have the exclusive proprietary interest in the submission of lesser included offenses. The CCA held that the trial objection differed from the ground of error on appeal and thus the matter was not preserved. Among other things, Judges Clinton, Miller, and Teague decried the majority's treatment of the CCA decision and would have the CCA address the same question written upon by the C/A rather than dodging it on procedural grounds. Judge Teague particularly emphasized what had previously been written by Judge Clinton as to the real function of the CCA in reviewing Petitions For Discretionary Review under the new procedures.

* * * * *

DANNY MORGAN, No. 041-84, Opinion on State's PDR: Conviction aff'd, Judge Clinton, 7/10/85.

EXTRANEOUS OFFENSE ADMISSIBLE TO SHOW INTENT AND GUILTY KNOWLEDGE IN INDECENCY WITH CHILD CASE: 8 year old C/W visited D's home to play with D's child. In D's kitchen, D leaned over and picked the child up and very briefly touched her between her legs as he raised her up. The circumstances surrounding this act were not of themselves of such a character that the specific intent to

arouse and gratify the D's sexual desire could be attributed to the D beyond a reasonable doubt. Other evidence showed that the D had sexually touched the C/W's 10 year old sister a month prior to the indicted offense. The Court first distinguished this case from Prior, 647 S.W.2d 956 in which the circumstances surrounding the offense were clearly abundantly supportive of the inference of intent and thus there was no necessity for the admission of extraneous offenses. In this case the D did not act in such a way that a specific intent was readily inferrable.

Relying primarily upon Williams, 662 S.W.2d 344, the Court found that where intent or guilty knowledge is an essential element of the offense which the State must prove to obtain a conviction, it's materiality goes without saying. In this case it was encumbent upon the State to prove the D touched the C/W with the specific intent to arouse and gratify his sexual desire. Hence, intent was a material issue in the case. Second, that such an intent cannot be inferred from the act itself (as is true in this case) will always invariably mean that other evidence relevant to the intent, even though such evidence constitutes an extraneous transaction or offense, will be more probative than prejudicial.

> "Nor do we find that to utilize extraneous acts in this manner is tantamount to prosecuting Appellant for being a criminal in general, as the Court of Appeals believed. The inference to be drawn from the extraneous acts is not that Appellant is a child molester by nature, and therefore more than likely molested Complainant. This would indeed be to infer guilt impermissibly from the accused's subjective character. Rather, what is sought is an objective inference; that the more often Appellant touched the genitals of these neighbor children, however briefly, the less likely it is that each such touching occurred accidentally, and consequently, the more likely that in touching Complainant in the instant offense, Appellant harbored a guilty intent. We will presume the Trial Court considered the extraneous acts only in this context for purposes of the conviction before us."

The CCA concluded that the T/C was justified in relying on the extraneous acts of misconduct to convict the D and thus the evidence was sufficient to support the conviction.

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NEMECIO CARMONA, No. 602-84, Opinion on D's PDR: Aff'd, Judge Campbell, (Onion concurred; Teague, Miller, and Clinton dissented), 7/10/85.

T/C'S LIMITATION OF CROSS EXAMINATION INTO AREA OF UNADJUDICATED JUVENILE OFFENSE, I.E., A PENDING BURGLARY CHARGE DID NOT DEPRIVE DEFENSE OF EFFECTIVE CROSS EXAMINATION: 16 year old female C/W disappeared from north Austin while riding her bike. Her decomposed body was found near Waco over a month later. Subsequently, two juveniles, Garcia and Marin, having been

granted transactional immunity, turned State's evidence implicating the D and two others. Their story was that on the date in question the D and the other four were driving in north Austin, saw and kidnapped the C/W and subsequently raped her and then after knocking her unconscious threw her into a field. They returned and later drove the C/W to a field near Waco where she was shot and left.

At trial only Garcia testified against the D and his three co-defendants. Marin was unavailable as he had been in a motorcycle accident and was in the hospital. Another witness testified that four or five Mexican-American males had been see near the C/W but no identification was made. An examination of the D's car disclosed two hairs in the back seat which were similar to the C/W's.

During cross examination the defense sought to question Garcia regarding a pending burglary charge. Garcia denied knowledge of the charge. The asst. DA responsible for prosecuting juveniles testified that Garcia did have a pending charge of burglary (which was not dismissed until after the D's trial had been concluded). The C/A held that the evidence of the pending charge was inadmissible under Art. 38.29, which was clearly an error as it did not distinguish between that type of situation and the right to show motive and bias through pending criminal charges. The D relied upon Davis v. Alaska, 408 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1972), as well as United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039 (1984) (no showing of harm is necessary when a defendant is deprived of an effective cross examination).

In Davis v. Alaska: the D sought to show that his primary accuser was on juvenile probation and therefore had a motive for directing attention away from himself as a possible suspect and in fully cooperating with the police. Davis derived from Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931): the D in Alford sought to ask the witness where he was residing in order to establish that the witness was in federal custody and therefore might expect some leniency from the prosecution in exchange for his testimony. The CCA did reject the State's reliance on Garza, 532 S.W.2d 624 for the proposition that since the D failed to show that the State was actually using the pending charge as leverage, it was not error for the T/C to limit cross examination. In addition to the reasons stated for rejecting the Garza type logic, it would seem that even if a D denied knowledge of a pending case and even if a DA denied trying to use it as leverage, it is still relevant to the finder of fact. After all, how many prosecutors "wink and smile" or candidly admit what influences are brought to bear on a witness. I'd hate to see the defense have to fight such a "prosecution good faith" rule.

The Court then summarized the type of cross examination Garcia was put through to justify its holding:

"The cross examination of Joe Garcia took well over a day and a half. Garcia was cross examined not by one defense attorney, but by four. Throughout both direct and cross examination the jury was repeatedly informed of the fact that Garcia was testifying under a grant of immunity. There was no question but that he had in fact been offered and had accepted great leniency on the part of the State in exchange for his favorable testimony. Additionally, the examination of Garcia revealed the chilling picture of a 13 year old who had been sniffing glue since the age of 4, extensively engaged in both drug and alcohol abuse including the repeated use of LSD, and admitted prior entanglements with the law, including shoplifting and including the careful cultivation of his own marijuana patch. Garcia openly admitted to having committed aggravated perjury before a Travis County Grand Jury, an offense from which Garcia was not immune. In some, Garcia's testimony vividly portrayed the life of an habitual juvenile miscreant."

The Court then held that the Davis principle was not offended when a D is prohibited from asking a witness about an unrelated pending charge, provided that the D has otherwise been afforded a thorough and effective cross examination and where, as here, the bias and prejudice of the witness is so patently obvious.

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WILLIAM CHANSLOR, No. 684-84, Opinion on D's PDR, Rev'd, Judge White, 7/10/85.

D WAS ENTITLED TO LESSER INCLUDED OFFENSE INSTRUCTION ON AIDING SUICIDE IN A CASE IN WHICH D WAS CHARGED WITH SOLICITATION OF MURDER: D was a Houston attorney and businessman. In 1979 his wife of 15 years suffered a stroke and was hospitalized and eventually became confined to a wheelchair. She became severely depressed and began to desire to take her own life. In 1981 D advertised under a false name in several para-military magazines seeking to contact experts in poisoning. Eventually D contacted X in Canada and made arrangements to purchase poison from him. X contacted the Canadian authorities and they in turn arranged to have D agree to buy $2,500 worth of poison from an undercover officer at the Houston airport. This resulted in D's arrest in Houston. At trial D testified he never at any time intended to kill his wife and that his only purpose in obtaining the poison was to make it available to his wife because she had pressured him to obtain it for her. This testimony was corroborated by his wife who testified that she had frequently discussed with D her desire to commit suicide and had requested him to help her take her own life.

D's initial contention that the T/C erred in refusing to submit a defensive theory as to aiding suicide on the ground that if guilty he was guilty only of aiding a suicide. The Court noted that this argument in essence was that if D was guilty of a crime

it was a different crime than that for which he was tried and convicted. The bottom line was that a defense by its very nature if believed negates the culpability of the accused. Merely being guilty of aiding suicide without more does not negate one's culpability as to anything else, i.e., solicitation of murder.

However, the Court did hold that the T/C committed rev. error in refusing to give a jury instruction to the effect that aiding a suicide is a lesser included offense to solicitation to commit murder. In effect, the real question in this case was whether D intended to make the poison available to someone and thus aid a suicide or did he intend to feed it to an unwilling victim and thus commit murder. The appropriate rules the Court reviewed were:

(1) A D is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the D, and whether it be strong, weak, unimpeached, or contradicted. The D's testimony alone is sufficient to raise such an issue. Thompson, 521 S.W.2d 621; Day, 523 S.W.2d 302.

(2) A charge on a lesser included offense is required when the evidence raises an issue that the D, if he is guilty at all, is guilty only of the lesser included offense. Sanford, 634 S.W.2d 850.

(3) When evidence from any source raises a defensive issue or an issue of a lesser included offense, and the charge is properly requested the charge on that issue must be submitted to the jury.

(4) The Aguilar, 682 S.W.2d 556 two-step analysis: the lesser included offense must be included within the proof necessary to establish the offense charged; there must be some evidence in the record that if the D is guilty, he is guilty of only the lesser offense.

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NICHOLAS RENZI, No. 025-85, Opinion on D's PDR: Rev'd and remanded, Per Curiam, 7/10/85.

CASE REMANDED TO PERMIT C/A TO CONSIDER SEARCH AND SEIZURE ISSUE: Under a plea bargain agreement, D pled nolo contendere and eventually received an 8 year probated sentence. At trial D was informed he would be permitted to appeal the T/C's ruling on his Motion To Suppress. At trial D executed a judicial confession and the evidence seized from D was not used to support his conviction. The C/A concluded that the plea was involuntary and conditional and ordered a reversal.

The CCA acknowledged that the C/A did not have the CCA's recent decision in Morgan, 688 S.W.2d 504 (Tex. Cr. App. 1985) at the time of its decision and thus remanded the case to the C/A to address the search issue.

JOHN BELL, No. 67,153, Agg. assault, Rev'd, Judge Miller, 7/10/85.

T/C ERRED IN REFUSING D'S REQUESTED CHARGE ON RECKLESS CONDUCT IN AGG. ASSAULT CASE: The Court concluded from the evidence that it raised the issue of reckless conduct under the "guilty only" test of Royster, 622 S.W.2d 442 and Aguilar, 682 S.W.2d 556; and held that it was error for the T/C to refuse D's requested charge on reckless conduct, leaving the jury no alternative but to convict for agg. assault or to acquit.

The State's evidence showed that the C/W and his wife were in their trailor when D drove by in his pickup and eventually fired four shots from a .22 semi-automatic rifle into the occupied trailor home. One bullet passed completely through the trailor. No injuries were sustained. D was convicted of agg. assault and complained on appeal that the requested charge on the lesser included offense of reckless conduct was not given to the jury. The defensive testimony showed that at the time in question D was working at his store when he got numerous telephone calls threatening his property and his life. At one time he sent his wife and another to check on his own home. Later the same date he and his wife drove by the C/W's trailor which was directly across from D's own property. D determined that an intruder might be wandering around D's residence so he took his weapon out and fired it into the air, not at C/W's trailor. D said he never intended to shoot at the trailor or to harm anyone. It was error to fail to submit the reckless conduct charge. Lugo, 667 S.W.2d 144 (Tex. Cr. App. 1984).

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NADINE OLIVER, Nos. 115-83 and 116-83, Opinion on State's PDR, Conv. aff'd, Judge McCormick.

TWO INFORMATIONS CHARGING THE D WITH PRACTICING DENTISTRY WITHOUT A LICENSE HELD SUFFICIENT: Art. 4548a VTCS provides that "It shall be unlawful for any person to practice ... dentistry in this state ... without first having obtained a license from the State Board of Dental Examiners ... " The information in one case omitted the phrase "of Dental Examiners" following the words "the Texas State Board". The Court held that the elements of this offense provided is unlawful (1) for any person (2) to practice ... dentistry ... (3) in this state (4) without first having obtained a license. The Court then noted that the term "license" was more specifically defined by the statute as " ... a license from the State Board of Dental Examiners ... " Thus the information clearly pled the basic elements of the offense. The CCA found no fundamental error as had the C/A.

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THOMAS WILSON, No. 921-83, Opinion on State's Motion For Rehearing: Rev'd and remanded to C/A, Judge Tom Davis, 7/3/85.

TO WHAT EXTENT MUST A D ESTABLISH HIS PRIVACY INTEREST IN THE PREMISES OR VEHICLES SEARCHED AND THUS ESTABLISH STANDING TO CHALLENGE THE SEARCH? In this case the C/A aff'd in an unpublished opinion, holding that the D had no reasonable expectation of privacy in an automobile which the police searched and thus no standing to litigate the lawfulness of the search. The CCA initially takes off on an incorrect statement in the C/A opinion to the effect that the D was arrested in a car that did not belong to the D when in fact the D was apprehended at the back door of a house at 10:45 a.m. The car the police searched was parked on the street in front of the house. The D told the police he had some ID in his vehicle and the police obtained the keys to the car from the D and used one of them to open the trunk of the car.

On original submission, the CCA re-examined Sullivan, 564 S.W.2d 698 (opinion on State's Motion For Rehearing) which had held that the State may raise the issue of a D's standing to challenge a search for the first time on appeal. On original submission the CCA concluded that in light of Sullivan, it was to be applied only to those situations where the evidence showed the D had no standing to litigate the issue, which effectively reinstated the rule of Maldonado, 528 S.W.2d 234 which held that the State may not raise the issue of standing for the first time on appeal. On this Motion For Rehearing the State argued that this holding shifted the burden of proof on the issue of standing from the defense to the State.

In reviewing the testimony, the CCA noted that the D testified at the suppression hearing but not at trial and that over objection by defense, the prosecutor elicited from the D that he was using the car in question which belonged to one Michael Green, that he had actually borrowed it from him earlier in the day. Michael Green did not testify at the suppression hearing. When the defense called him as a witness at trial, Green invoked his Fifth Amendment privilege not to incriminate himself and was excused by the T/C. Thus, that the D had borrowed the car from its owner was not a disputed issue in this case. The Court thus emphasized that here the prosecutor satisfied the D's burden of producing evidence on the issue of standing when he cross examined the D; and there was nothing in the record that warranted the conclusion that the T/C did not believe the D's testimony on that issue. Under such circumstances the CCA would not sustain the denial of the Motion To Suppress on the ground that the D failed to meet his burden of persuasion on the issue of standing. The CCA held that the D established his reasonable expectation of privacy in the premises searched and denied the State's Motion For Rehearing. The judgment of the C/A was rev'd and the cause was remanded to that court for consideration of the D's claim of an unlawful search.

But the point of the case goes even further. The Court stressed the decision in Combs v. United States, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972) (per curiam), in which the validity of a search warrant was at issue. The D moved to suppress the fruits of a search made pursuant to the warrant but the District Court denied the motion. On the D's appeal, the Govt. argued for the first time that the D lacked standing to challenge the warrant's validity because the D had shown no privacy interest in the premises searched pursuant to the warrant, an argument accepted by the Sixth Circuit. However, the Sup. Ct. noted that Combs's failure to make any such assertion, either at the trial or at a pretrial suppression hearing, may well be explained by the related failure of the Govt. to make any challenge to petitioner's standing in the first place. The record in Combs was barren of the facts necessary to determine whether the petitioner had standing. Sup. Ct. next wrote: "Since there has not yet been any factual determination of whether petitioner had an interest in the searched premises that was protectible***, we vacate the judgment of the C/A and remand with directions that the case be sent back to the District Court for further proceedings consistent with this opinion."

The CCA emphasized that instead of ruling that the Govt. could not raise standing for the first time on appeal, the Sup. Ct. in Combs remanded for further factual development to allow proper resolution of the issue. The CCA in Wilson saw no reason to deviate from the Sup. Ct.'s treatment of the case in Combs.

However, the CCA immediately emphasized that the D's privacy interest in the premises searched is a substantive element of his Fourth Amendment claim which he has a burden to establish. In Wilson, apparently standing was established totally by accident and by the prosecution and thus the case was remanded for a determination of the search question. In the future perhaps we are being forewarned that if the record is barren as to facts establishing standing, the State may raise the issue of lack of standing for the first time on appeal and the defense will be out of luck. In the words of the CCA:

> "The court's subsequent decision in Rakas v. Illinois emphasizes that a defendant's privacy interest in the premises searched is a substantive element of his Fourth Amendment claim, which it is his burden to establish. Rawlings v. Kentucky, supra. The language of Rakas suggests that the court would no longer view the absence of a challenge to a defendant's standing as a 'failure' of the Government's."

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CHARLES HILL, No. 1032-83, Opinion on D's PDR, Rev'd, Judge Onion, 7/3/85.

C/W'S TESTIMONY THAT SHE HAD IDENTIFIED THE D AT A PRETRIAL LINEUP SHOULD HAVE BEEN EXCLUDED BECAUSE D WAS ILLEGALLY ARRESTED: On 3/31/78 while Robert Rivera and the C/W were parked at night off a highway, two men approached the car and eventually the co-D shot and killed Rivera and raped the C/W. The D ransacked the car and then wanted to get rid of the C/W. The co-D permitted her to leave the scene. Nine months after the offense a composit drawing was completed according to the C/W's description of the man she later identified as the D. Shown a photographic spread, the C/W was unable to identify the D. On 3/23/79 the D walked up to several police officers and told them that the co-D who was in jail was not the guilty party. At this time the D was living with the co-D's family. On 3/29/79, with no reason to justify it, officers arrested the D on a street corner across from the Lubbock County Courthouse and he was placed in a lineup and identified by the C/W.

The C/A found that notwithstanding the D's illegal arrest, the admission of the C/W's testimony concerning the identification of the D in a lineup was harmless error. The CCA reviewed the D's arguments to demonstrate the harmfulness of this error: identification in the case was the most critical issue; the C/W was the only witness to place the D at the scene of the crime; the C/W was crying and hysterical at the time of the offense and was emotionally upset; she identified the co-D after she had been hypnotized; she gave a composit drawing nine months after the offense but there were discrepancies in it between the D's actual appearance and the drawing; and she had been unable to select the D's photograph from a spread shown her a few days before the lineup. The CCA concluded that the admission of the lineup identification was not harmless error beyond a reasonable doubt; and that it could not say that the admission of the lineup identification added nothing that was calculated to cause the jury to return a different verdict than they would have returned if it had not been admitted. The Court relied upon Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1949); Hayes v. Florida, ___ U.S. ___, 105 S.Ct. 1643 (3/20/85) (where there was no probable cause to arrest the petitioner, no consent to the journey to the police station, and no prior judicial authorization for detaining him, the investigative detention at the station for fingerprinting purposes violated the petitioner's right under the Fourth Amendment as made applicable to the states by the 14th Amdmt., and the fingerprints thus take a worthy inadmissible fruits of the illegal detention). The Court also cited Chief Justice Cornelius' opinion in Kinsey, 639 S.W.2d 486, 489 (Tex. App. - Texarkana, 1982) which reiterated the elements set forth in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) i.e., (1) temporal proximity (2) presence of the intervening circumstances and particularly (3) the purpose and flagrancy of the official misconduct. In this case the

lineup occurred very shortly after the illegal arrest; there were no intervening circumstances; and the arresting officer admitted the arrest was made for the very purpose of the lineup.

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BRENDA JACOLOS, ET AL, No. 1224-84, Order on Appellant's PDR, Judge Clinton, 7/3/85.

PDR REVIEW OF C/A DECISION GRANTING OR DENYING WRITS OF MANDAMUS AND PROHIBITION: The CCA is without jurisdiction, power, or authority to review on PDR a decision rendered by a C/A in the exercise of its own original jurisdiction to grant or deny extraordinary writs of mandamus and prohibition. By Footnote 5 Judge Clinton observed:

> "That we did review denial of a Writ of Mandamus by way of PDR in Abnor v. Ovard, Judge, 653 S.W.2d 793 (Tex. Cr. App. 1983), without pausing to determine jurisdiction, power and authority of this court in the premises, means only that the matter did not come to our attention; as precedent that aberation is without value."

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EX PARTE JACKIE WILSON, No. 69,459, Relief granted, Judge Clinton, 7/3/85.

PLEA OF GUILTY INVOLUNTARY BECAUSE OF LEGAL ADVICE AS TO PAROLE CONSEQUENCES AFTER CONVICTION FOR AGGRAVATED ROBBERY: D contended in his post-conviction writ that his plea of guilty to agg. robbery was involuntarily entered because his attorney advised him that the 20 year sentence to be imposed would mean he would serve between 36 and 60 months before parole and that in exchange for his plea of guilty the DA would not recommend an affirmative finding as to a deadly weapon. The plea bargain agreement was submitted to and approved by the T/C. By affidavit D swore that he would never have pled guilty to a 20 year sentence if he had known he would have to serve a full one third of the sentence before becoming eligible for parole. The attorney's affidavit was quite general and included statements that he had no recollection of the contents of the conversation with the D but as a general rule never told any client how long they would spend in jail. The Court resolved the question by asserting that the D's understanding of his parole eligibility was manifested as an affirmative part of the plea bargain and that understanding was relied upon as an essential part of the quid pro quo for pleading guilty. The plea is involuntary as that part of the plea bargain is not or cannot be carried out and thus the D in this case was entitled to relief.

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TRACY TERRY, No. 025-84, Opinion on D's PDR, Judgment reformed, Judge W. C. Davis, 6/26/85.

JUDGMENT REFORMED BY DELETING AFFIRMATIVE FINDING "THAT A DEADLY WEAPON WAS USED IN THE COMMISSION OF THE OFFENSE", AS THERE WAS NO SPECIFIC FINDING BY THE JURY THAT THE D HIMSELF USED OR EXHIBITED A DEADLY WEAPON: A jury convicted the D of murder as authorized by a court's charge that the D "either acting alone or with another, X, as a party to the offense, did cause the death of an individual by shooting her with a .22 firearm or beating her in the head with a pipe wrench or smothering her by placing a plastic bag over her face." The jury set punishment at 10 years TDC. On appeal the D sought to have the judgement reformed by deletion of the T/C's affirmative finding that a deadly weapon, to wit, a firearm was used in the commission of the offense.

In this case the court's charge to the jury stated that the D committed murder as a party--either acting alone or with another. The jury found the D guilty of the offense of murder. No specific finding was made by the jury as the trier of fact, that the D herself used or exhibited the weapon. Thus, the judgment of the T/C was reformed by deleting the affirmative finding that a deadly weapon was used in the commission of the offense. Polk v. State, No. 294-84 (del. 5/22/85); Travelstead v. State, No. 405-84 (del. 5/22/85) (held that Art. 42.12 Sec. 3f(a)(2) means that the D himself must use or exhibit a deadly weapon during the commission of a felony or flight therefrom. When a D is a party, as defined in Sec. 7.01 and 7.02 of the Penal Code, to the use or exhibition of a deadly weapon, there must be a specific finding by the trier of facts that the D himself used or exhibited the deadly weapon.

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KENNETH LEROY MCINTIRE, JR., No. 1174-83, Opinion on State's and Appellant's PDR, Judge Clinton, 6/26/85.

T/C DID NOT HAVE AUTHORITY TO AUTHORIZE CONVICTIONS ON COUNT 1 AND COUNT 3 OF THE INDICTMENT AS EACH OFFENSE AROSE OUT OF THE SAME CRIMINAL TRANSACTION: D was convicted of agg. sexual abuse of a child and of indecency with a child stemming from a single indictment. Apparently no trial objection was made nor was the matter brought to the attention of the C/A, which on its own motion reformed the judgment to delete the second conviction for indecency, based on Ex Parte Easley, 490 S.W.2d 570 and Garcia, 574 S.W.2d 133.

The rule seems to be: when separate and distinct offenses alleged in one indictment arise from a single criminal transaction, a T/C is without legal authority to enter judgment and impose sentence for more than one offense. By Footnote 2 Judge Clinton observed: "Objection will be required to preserve the error for appeal when separate and distinct offenses are alleged in, and convictions obtained from a single indictment where the offenses arose out of different transactions. Drake v.

State, 686 S.W.2d 935.

In this case the facts showed that the anal intercourse and the touching of the C/W witness' genitals occurred contemporaneously or within minutes of one another and a single guilty intent ran through and connected both acts. Thus, the conduct arose out of the same criminal transaction.

T/C DENIED D A MEANINGFUL APPELLATE REVIEW WHEN IT DENIED THE D A HEARING ON MOTION FOR NEW TRIAL: The D was sentenced on May 15 and then filed a document personally on May 24 deemed to be a Notice of Appeal. Counsel for the D filed a Motion For New Trial June 11 which was overruled by the court on June 14 and formal Notice of Appeal entered June 24. This case gets off on the wrong foot when apparently the C/A construed the rules to mean that once Notice of Appeal was filed the T/C no longer had authority to rule on the Motion For New Trial and thus the T/C's denial of a hearing on the Motion For New Trial was proper.

To set matters straight the CCA first stated that N/A filed prior to an otherwise timely filed MNT will not deprive the T/C of jurisdiction to rule on that motion. Ex Parte Drewery, 677 S.W.2d 533.

The MNT had attached to it sworn affidavits. The D basically contended that an implied agreement by the jurors was reached to abide by a quotient verdict; one of the defense character witnesses conversed prejudicially with the affiant juror during a break in the jury's deliberations; and jury misconduct occurred in the form of discussion of the parole law. The C/A in essence ruled that an affidavit attached to a MNT must establish a prima facie case for at least one cognizable ground for new trial before a hearing on the motion is required. This was erroneous. The CCA has never stated that before a hearing is necessitated the affidavits must reflect every component legally required to establish a claim of jury misconduct.

As a matter of pleading and as a prerequisite to obtaining a hearing, keeping in mind that the purpose of the affidavit requirement is to limit the parameters of the hearing that is sought, the CCA held that an affidavit is sufficient if it demonstrates that reasonable grounds exist for believing that jury misconduct occurred, a quotient verdict was agreed upon, or a juror conversed with an unauthorized person regarding the case. The Court concluded that the bases for the new trial were pled sufficiently to entitle the D to a hearing thereon and that the D should have been afforded a hearing on the motion.

Thus, in the face of a timely MNT supported by sufficient affidavit, a T/C which denies an accused this opportunity abdicates its fact-finding function and denies the accused a meaningful appellate review. The cause was thus remanded to the T/C for a hearing on the MNT.

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Final 1985 Legislative Report

by Dain Whitworth

The 69th Session of the Texas Legislature ended May 27, 1985, with far less impact on the practice of criminal law than expected. Everyone owes a debt of gratitude and a big "thank you" to Senator Craig Washington. He deserves credit for killing numerous "bad bills" including the exclusionary rule bill and the joinder bill.

Also, Sis Meyers (who lobbies for the Austin firm of Fitzgerald, Meissner, Augustine and Alexander) spent the major portion of the last month of the session lobbying in TCDLA's behalf. Please let Sis and the members of her firm know that you appreciate her work.

In my opinion, legislation which will have the most impact on the practice of criminal law are: S.B. 37, which provides for jury instruction on parole and good time laws; S.J.R. 16 and S.B. 169, which will end fundamental error in informations and indictments; and H.B. 13, which gives the Court of Criminal Appeals authority to adopt rules of evidence for criminal cases and to make post trial rules for appellate and review procedure.

Following is a brief synopsis of the legislation enacted, with the exception of three bills vetoed by the governor. The vetoed bills were H.B. 1776 (relating to the definition of "bet"), S.B. 765 (made affirmative defense to manufacture or possession of gambling device if shipping to a jurisdiction where it is legal), and H.B. 1323 (permitted Court of Criminal Appeals to grant writ of habeas corpus if new evidence that defendant is not guilty of offense). The full text will soon be published by West in the Vernon's Texas Session Law Service, 1985, pamphlets, but in case of an emergency, you can secure a copy through the association office for a nominal fee.

I. CONSTITUTIONAL AMENDMENTS

S.J.R. 6 by Farabee. Subject to voter approval on November 5th. Amend Art. I, Sec. 20 of Texas Constitution to permit Texas to enter into agreements with other States for confinement of Texas prisoners in other States.

S.J.R. 10 by Montford. Subject to voter approval on November 5th. Amends Art. V of Texas Constitution to permit Supreme Court or Court of Criminal Appeals to answer question of law certified by Federal Appellate courts.

S.J.R. 14 by Caperton. Subject to voter approval on November 5th. Amends Art. V of Texas Constitution to create Judicial District Board to reapportion judicial districts. Reapportionment order subject to approval of Legislature. Provides that Legislature shall determine jurisdiction of courts.

S.J.R. 16 by Brown. Subject to voter approval on November 5th. Amends Art. v, Sec. 12, of Texas Constitution to define information and indictment; provides the use, contents, amendment, sufficiency, and requisites are as provided by law; and provides the presentment to a court vests the court with jurisdiction. (Eliminates fundamental error in informations and indictments.)

II. CRIMES

H.B. 8 by Polumbo. Effective 9/1/85. Amends Sec. 19.02(a)(1), P.C. to the murder of more than one person during the same criminal transaction or during different transaction but pursuant to same scheme or course of conduct, capital murder.

H.B. 51 by T. Smith. Effective 3/28/85. Amends Art. 67011-1, V.A.C.S. to strike "percent" after "alcobol concentration of 0.10" in definition of intoxication.

H.B. 85 by A. Hill. Effective 9/1/85. Amends Sec. 46.07, P.C. to make it offense to sell, rent, lease, or give or offer to do so, a club, illegal knife, or martial arts throwing star to a child younger tban 18 years.

H.B. 95 by D. Hudson. Effective 9/1/85. Amends 28.03, P.C. to permit aggregation of amounts to determine grade of punishment in criminal mischief offenses.

H.B. 149 by Burnett. Effective 9/1/85. Makes it a Class B misdemeanor to make or use a DPS insignia or facsimile thereof.

H.B. 220 by T. Smith. Effective 9/1/85. Adds a new Sec. 32.50 to P.C. creating offense of debit card abuse and makes it a 3rd degree felony.

H.B. 485 by Uher. Effective 9/1/85. Amends Secs. 31.12 and 31.13, P.C. to make it an offense to use, make, maintain or modify a cable descrambling, decoding or interception device.

H.B. 626 by Schoolcraft. Effective 9/1/85. Amends Sec. 43.25 and 43.26 to P.C. relating child pornography and making it a Class A misdemeanor to possess child pornography film.

H.B. 659 by S. Johnson. Effective 9/1/85. Amends Public Utility Regulation Act making it a Class C misdemeanor to use automatic dialing and announcing devices for solicita-

tion or collection.

H.B. 788 by Polumbo. Effective 9/1/85. Makes it a 3rd degree felony to use aircraft without FAA identification or registration or with illegal fuel tanks and provides for seizure and forfeiture. Also makes it a Class A misdemeanor to operate an aircraft while intoxicated from alcohol or a controlled substance.

H.B. 833 by Roberts. Effective 9/1/85. Amends Sec. 22.03 P.C. relating to assault on peace officer, jailer, guard or participant in court proceeding to suhstitute "deadly weapon" for "firearm or prohibited weapon."

H.B. 1055 by Wolens. Effective 9/1/85. Amends Sec. 38.07, P.C. relating to offense of escape from custody to include individuals in custody pursuant to a lawful court order.

H.B. 1365 by G. Luna. Effective 9/1/85. Amends 31.03 (c), P.C. to create presumption of knowledge on part of persons in business of buying abandoned autos, or parts therefrom, that it is stolen unless record keeping requirements are met.

H.B. 1732 by Armbrister. Effective 9/1/85. Enacts a Texas Food, Drug and Cosmetics Act and proscribes penalties for violations.

H.B. 1819 by W. Hall. Effective in part 8/26/85 and part 9/1/86. Raises drinking age to 21 on 9/1/86 and enhances penalty for DWI if defendant possessed an open container.

H.B. 1912 by C. Harris. Effective 9/1/85. Amends Sec. 42.11 P.C. to include in offense of cruelty to animals the use of a live animal as a lure in dog training or racing.

H.B. 1929 by A. Luna. Effective 9/1/85. Amends Art. 4476-13a, V.A.C.S. and the Controlled Substance Act relating to possession and use of abusable glue, aerosol paint, or other substance containing a violative chemical; making the offense a Class B misdemeanor.

S.B. 21 by Sarpalius. Effective 9/1/86. Amends Alcohol Beverage Code to raise drinking age to 21 years. (Basically the same as H.B. 1819 except does not contain open container enhancement provisions.)

H.B. 2139 by Danburg. Effective 9/1/85. Amends Sec. 22.011 (a), P.C. (sexual assault) to substitute the words "sexual organ" for the word "vagina."

S.B. 30 by Parmer. Effective 9/1/85. Amends 31.03 P.C. to provide property is unlawfully appropriated if in custody of law enforcement agents who represent it to be stolen and it is believed to be stolen.

S.B. 72 by Farabee. Effective 9/1/85. Adds a new Chapter 33 to P.C., creating offenses of breach of computer security – a Class A misdemeanor; and harmful access – a Class B misdemeanor to third degree felony, depending on value of loss or damage.

S.B. 137 by Farabee. Effective 9/1/85. Amends the Controlled Substances Act to continue the triplicate prescription provisions with amendments.

S.B. 175 by Whitmire. Effective 9/1/85. Amend P.C. to add a new Sec. 22.041, making it an offense to abandon or endanger a child younger than 15. It's a Class A misdemeanor unless imminent danger of death, bodily injury as physical or mental impairment, then a 3rd degree felony.

S.B. 185 by Brown. Effective 9/1/85. Amends P.C. to add Sec. 46.11, making it a 3rd degree felony to carry a deadly weapon in a penal institution.

S.B. 320 by Glasgow. Effective 9/1/85. Amends Controlled Substance Act to provide affirmative defense to prosecution for delivery of abusable glue or aerosol paint if presentment of apparent valid driver's license.

S.B. 346 by Glasgow. Effective 9/1/85. Amends Controlled Substances Act to redefine abusable glue and paint.

S.B. 415 by Glasgow. Effective 9/1/85. Amends Art. 4476-13a, V.A.C.S. to provide affirmative defense to prosecution for delivery of abusable glue or aerosol paint to minor if presentment of apparently valid driver's license.

S.B. 477 by Lyon. Effective 9/1/85. Amends Sec. 22.02, P.C. to make threatening a peace officer, jailer, or guard with a deadly weapon, aggravated assault.

S.B. 574 by Glasgow. Effective 9/1/85. Amends Sec. 12.42 P.C. to permit a fine not to exceed $10,000 for enhanced 1st degree felony in addition to T.D.C. time.

S.B. 670 by Howard. Effective 9/1/85. Amends the Controlled Substances Act by including in definition of practitioner a person living and practicing in another state who is licensed by the federal government to dispense prescriptions.

S.B. 652 hy Brooks. Effective 9/1/85. Amend the P.I. law (Sec. 42.08, P.C.) to permit release from custody upon agreement to consent to counseling. Provides P.I. is not lesser included offense to DWI.

S.B. 639 by Farabee. Effective 9/1/85. Amends the Controlled Substances Act, adds new substances; makes it a Class B misdemeanor to illegally possess substance listed in schedule but not a penalty group; reorganization of Act.

S.B. 1187 by Brown. Effective 6/15/85. Prohibits a city from regulating firearms and ammunition with certain exceptions.

III. CRIMINAL PROCEDURE

H.B. 10 by T. Smith. Effective 8/26/85. Continues wiretap law until September 1, 1993; places some restrictions on covert entry; adds provisions for pen registers with penalties for unlawful use.

H.B. 13 by T. Smith. Effective 8/26/85. Gives Court of Criminal Appeals authority to adopt Rules of Evi-

dence and to make post trial rules for appellate and review procedure, they must adopt by 1/1/86.

H.B. 44 by T. Smith. Effective 8/26/85. Amend Art. 44.04(h), C.C.P. to permit bail when a conviction is reversed by Court of Criminal Appeals but not final.

H.B. 235 by Tejada. Effective 9/1/85. Adds a new Chapter 56 to the Code of Criminal Procedure, dealing with rights of crime victims. Provides rights to information and notice; for victim impact statements; for reports, and for consideration of victim safety.

H.B. 393 by Hightower. Effective 9/1/85. Provides for State payment of costs for TDC inmate prosecution.

H.B. 556 by A. Hill. Effective 8/26/85. Permits Commissioner's Court to authorize acceptance of credit cards for payment of fines and court costs.

H.B. 579 by Morales. Effective 9/1/85. Adds Art. 38.072, C.C.P., to permit hearsay statement to outcry witness if victim is child of 12 years or younger and offense is Chapter 21 or 22 offense or Section 25.02, 25.06, or 43.25 offense. Also amends family code to conform.

H.B. 667 by Hightower. Effective 8/26/85. Amends Art. 43.19 C.C.P. to permit executions at a location designated by the Texas Department of Corrections.

H.B. 740 by Laney. Effective 6/12/85. Permits DPS director to appoint up to 250 railroad peace officers with jurisdiction limited to offenses related to railroads.

H.B. 987 by O. Garcia. Effective 8/26/85. Provides for peace officer training for investigation and recognition of cases involving abuse or neglect of children.

H.B. 1149 by Blanton. Effective 8/26/85. Increases statute of limitations to five years (from three years) for indecency with a child.

H.B. 1307 by Oliver. Effective 8/26/85. In lieu of detention, permits Board of Pardons and Parole to summons an inmate on parole or mandatory supervision to appear for a hearing.

H.B. 1323 by Danburg. Effective 9/1/85. Permits Court of Criminal Appeals to grant post conviction writ of habeas corpus releasing defendant based upon new evidence which would probably bring about different results on a new trial.

H.B. 1351 by Burnett. Effective 9/1/85. Gives U.S. postal inspectors powers of arrest, search and seizure for state felony offenses.

H.B. 1391 by C. Smith. Effective 8/26/85. Provides for venue for an unauthorized use of a vehicle in any county where the use occurred or in the county in which the vehicle was originally reported stolen.

H.B. 1569 by Granoff. Effective 1/1/86. Amends probation law to permit a condition of not less than 40 or more than 1,000 hours in a work program and permits probation departments to contract with governmental agencies and subdivisions for work programs.

H.B. 1747 by Blackwood. Effective 8/26/85. Permits money seized in connection with gambling and controlled substances violations to be placed in interest bearing accounts, with interest to be distributed the same as principal.

H.B. 1825 by Laney. Effective 8/26/85. Exempts prosecutor records from the open record law.

H.B. 2053 by Tejeda. Effective 8/26/85. Amends probation and parole laws to permit psychological counseling as a condition if sentenced for sex offenses.

H.B. 2433 by Blackwood. Effective 8/26/85. Amends Family Code to require report of likelihood of child abuse or neglect and permits D.H.R. to take immediate temporary possession of a child the victim of sexual abuse without a court order.

S.B. 37 by Brown. Effective 9/1/85. Provides statutory instructions on parole and good time laws. Provides that the jury can consider existence of law but not to consider extent to which good conduct may be awarded to or forfeited by the defendant and not to consider manner it may be applied to the defendant.

S.B. 59 by Lyons. Effective 8/26/85. Permits Board of Pardons and Parole to make payment of fine, costs, and fees a condition of parole.

S.B. 76 by McFarland. Effective 9/1/85. Amends Crime Victim's Compensation Act to include non-residents; to enforce taxation and collection of compensation as court costs; and prohibits compensation for lost wages for residents of same household as defendant or accomplice.

S.B. 88 by Mauzy. Effective 4/1/85. Provides that the $6 to $30 a day that jurors receive is reimbursement for travel and other expenses.

S.B. 148 by Glasgow. Effective 9/1/85. Amends Art. 37.07(b), C.C.P. to require that the judge assesses punishment unless defendant files motion for probation before trial begins or elects in writing before commencement of voir dire to have jury assess punishment.

S.B. 126 by Farabee. Effective 1/1/86 if S.J.R. 6 is approved by voters. Adopts the Interstate Corrections Compact which would permit Texas to contract with other states for holding of prisoners.

S.B. 169 by Brown. (Implementing legislation for S.J.R. 16) Effective 1/1/86 if voters approve constitutional amendment. Provides for waiver of defect in information or indictment unless defendant objects prior to trial or at pretrial if required by trial court. Permits amendment of informations and indictments at any time prior to date of trial, after notice to defendant. Can amend after trial commences if defendant does not object. Cannot amend over defendant's objection if charges de-

fendant with additional or different offense or prejudices substantial rights of defendant.

S.B. 186 by Brown. Effective 9/1/85. Amends Art. 42.08, C.C.P. to provide that a sentence for offense committed while an inmate at TDC shall be stacked on sentence serving.

S.B. 290 by Caperton. Effective upon voter approval of S.J.R. 16. Relates to judicial reapportionment.

S.B. 427 by Caperton. Effective 9/1/85. Adds a new Art. 38.34, C.C.P. to permit the use of photographs of property offered for sale or lease by persons engaged in business of selling goods or services to be used in Art. 18.16 hearings and at trial in lieu of the property.

S.B. 469 by Glasgow. Effective 9/1/85. Amends Bail Bond Board Law to add county and district clerks or their designatees to the Board.

S.B. 589 by Farabee. Effective 9/1/85. Amends Chapter 42, C.C.P. by consolidating felony and misdemeanor probation laws as Art. 42.12, C.C.P., repealing Art. 42.13; adding Art. 42.18 containing the parole and mandatory supervision law. A formal revision, making no change (theoretically) in present law.

S.B. 598 by Leedom. Effective 9/1/85. Amends Art. 67011-1, V.A.C.S. to provide for a $15 cost upon conviction if video tape used in DWI and Involuntary Manslaughter cases.

S.B. 842 by Farabee. Effective 8/26/85. Amends Art. 42.13, C.C.P. to permit revocation of parole without a hearing upon conviction in a court of competent jurisdiction of a felony offense.

S.B. 845 by Farabee. Effective 1/1/86. Provides what is to be included in a judgment in a criminal case, for a standard judgment form, and its use.

S.B. 854 by Parker. Effective 9/1/85. A formal revision of the miscellaneous articles in C.C.P. relating to court costs, fees, collection and record keeping.

S.B. 869 by Krier. Effective 9/1/85. Adds a new Chapter 5 to C.C.P. entitled Family Violence Prevention. Provides in family violence situations for peace officers to give notice of rights, to make reports, and rights to arrest; and imposes duties on prosecuting attorneys.

S.B. 1167 by Farabee. Effective 8/26/85. Permits restoration of good conduct time forfeited upon revocations not involving new criminal offenses.

S.B. 1257 by McFarland. Effective 6/14/85. Strikes "recorders" from Art. 15.06 and Art. 15.07, C.C.P. relating to issuance of a warrant.

S.B. 1292 by Caperton. Effective 6/11/85. In habeas corpus appeals where Court of Appeals affirmed the trial court on an extradition matter or reversed the trial court on a bail matter, motion for rehearing is eliminated and any petition for review must be filed within 10 days.

S.B. 1348 by Caperton. Effective 6/14/85. Amends Art. 26.13, C.C.P. to provide for admonishment prior to a plea that if not a U.S. citizen, it may result in deportation or denial of naturalization.

S.B. 1349 by Caperton. Effective 6/11/85. Amends Art. 37.10 C.C.P. to provide where jury assesses punishment and verdict includes punishment authorized and punishment not authorized, trial court or appellate court may reform by omitting part not authorized.

IV. JUVENILE LAW

S.B. 120 by Farabee. Effective 9/1/85. Extends Texas Youth Commission jurisdiction until youth reaches 21 years of age.

S.B. 253 by Farabee. Effective 8/26/85. Provides for minimum standards for juvenile detention facilities.

S.B. 550 by Caperton. Effective 9/1/85. Provides upon finding by juvenile court a ehild committed offense of DWI or drug offense, it will order DPS to suspend driver's license until 17 years or one year, whichever is longer.

S.B. 1122 by Lyon. Effective 9/1/85. Relating to consent to treatment of minors by physicians, psychologists, counselors or social workers in sex abuse, physical abuse or suicide prevention cases.

V. TRAFFIC LAWS

H.B. 913 by Millsap. Effective 9/1/85. Increases minimum fine for passing school bus receiving or discharging passengers to $50.

H.B. 1259 by Cain. Effective 9/1/85. Relates to reporting accident; to police if in municipality or within 100 feet thereof, otherwise sheriff or DPS.

H.B. 2481 by Danburg. Effective 9/1/85. Judge must inform person convicted of not having liability insurance that license will be suspended unless provides DPS with proof of financial responsibility. Effective 9/1/85, a citation for failure to have liability insurance must contain statement, upon conviction driver's license will be suspended unless provide DPS with proof of financial responsibility.

S.B. 392 by Leedom. Effective 9/1/85. Amends Art. 27.14, C.C.P., to provide in traffic offenses where maximum punishment is a fine, no need to file complaint unless plea of not guilty.

S.B. 500 by Lyons. Effective 9/1/85, but offense not punishable unless committed after 12/1/85. Seat belt law; requires driver and passengers in front seat to wear. Fine up to $200 for non-compliance or permitting child four years to 15 years to not wear.

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Hearsay

by Walter Boyd and Allen C. Isbell

Speaking of law west of the Pecos, criminal defense lawyer ***J. Franklin Urias*** (Ft. Stockton) reports to us that all drug charges against him have been dismissed for lack of evidence. The search warrant executed on his office signed by the then-mayor allegedly was signed in blank with no probable cause affidavit.

Speaking of technicalities, former candidate for the Court of Criminal Appeals ***Roy Greenwood*** now knows that simply objecting to the Court charging the jury on voluntary manslaughter preserves no error, unless the magic phrase "because the evidence did not raise the issue" is used. See ***Pennington v. State*** (Ct. Crim. App.), decided 07/10/85.

Attorneys from 33 different cities in Texas attended a highly successful DWI seminar in Houston June 21, 1985, sponsored by TCDLA. Faculty included ***Randy Schaffer, Michael Essmyer, Dan Cogdell, Ray Bass, John Ackerman, Gary Trichter, Stan Schneider, Dr. Ken Smith, Judge J. R. Musslewhite, Judge Neel Richardson, Judge Al Leal, Judge Sherman Ross, Judge Jack Pickren, Judge Joe Terracina, and Judge Andy Tobias*** of Houston, ***Randy Taylor*** of Dallas, ***Louis Dugas*** of Orange, ***Pat Donley*** of Lubbock, and finally ***Rusty Duncan*** who claims he broke his elbow playing racketball, rather than in an arm-twisting contest with other candidates for ***Judge Tom Davis'*** position. Special thanks to the workers who put this together: ***Elaine Peterson, Laurie Ramm, Rusty Hunt, Theresa Mallett, Bridgette Trichta.***

Racehorse Haynes returns from sunny California with another notch in his belt. Folsom prison slaying case tried in Sacramento results in an instructed verdict of not guilty following effective cross-examination of the State's witnesses. According to ***Haynes,*** the California Courthouse people eat sunflower seeds and bean sprouts, work from 10 to 4, and then go bicycling. ***Racehorse*** is script reader for new TV movie starring ***Andy Griffith*** to be shot sometime this year. Hearsay believes that ***Haynes*** can make it on his negotiated daily "four figure fee," while sitting and thinking by a swimming pool on the West Coast.

Robert Pelton (Houston) presented as a criminal lawyers' program the participants in the very important Court of Criminal Appeals case ***Dunn v. State*** (06/25/85): ***Detective Kent***, who took the confession determined inadmissible; ***Stanley Schneider***, who tried vigorously but unsuccessfully to see the defendant prior to his making the written confession; ***Will Gray***, who handled the suppression hearing; and ***Mike DeGuerin***, who handled the appeal. Only involved person not present was the defendant, who may not be talking.

Thomas Berg, Federal Public Defender (Southern District), ***Rick Trevathan***, and ***Jim Leitner*** successfully represent defendants in an automatic weapons case . . . ***Berg*** has secured reversals of detention orders by magistrates in two appeals. In ***United States v. McGlothan***, Cr. No. H-82-198 (S.D. Tex. January 25, 1985), the late ***Judge George Cire*** held that defendant's six prior felony convictions, standing alone, did not satisfy the danger to the community standard by clear and convincing evidence and ordered defendant released on an unsecured bond.

The London Times did a feature story on ***F. Lee Bailey, Melvin Belli*** and ***Racehorse Haynes*** . . . ***Senator Craig Washington*** was named criminal defense attorney of the year by the Criminal Law Section of the State Bar of Texas.

The Harris County Criminal Lawyers Association sponsors a law Explorer post which sent a team to the National Mock Trial Competition. The team won six out of seven rounds to win the national title. . . . the three "judge" panel for the last round of competition included: ***Robinson Everett***, Chief Justice, Military Court of Appeals, ***Bruce Beaudine***, Federal District Court Judge, District of Columbia, and ***Barbara Mendel***, President, ABA Young Lawyers Division . . . The State Bar of Texas Criminal Defense Lawyers Project sponsored an excellent seminar in Austin June 28, 1985, concerning sex crimes. Participants from 38 different cities. Last year in Texas, 2,144 people were convicted of sex crimes; only 114 acquitted. Faculty included ***Berry Roberts*** (TYLA president), ***Judge Robert D. Jones*** (CDLP Executive Committee), ***Stanley G. Schneider*** (Houston), ***Bill Habern*** (Sugarland), ***Dr. Windel Dickerson*** (Bryan), ***Ralph Lopez*** (San Antonio), ***Catherine Greene Burnett*** (Houston), ***Bob Bennett, Jack Strickland*** (Ft. Worth), ***Dain Whitworth*** (Austin), ***Judge Marvin O. Teague*** (Court of Criminal Appeals, Austin), ***Terry Keel*** (Travis County Assistant District Attorney), and ***Richard C. Grinter*** (National Center on Institutions and Alternatives, Dallas).

Juvenile Judge Criss Cole of Houston, ex-State Senator, blinded while fighting in World War II, is deceased. Surviving is his wonderful wife ***JoAnn***, who first met ***Judge Cole*** while treating him as a nurse following his war injuries.

Send us news and information about what you've heard in your area to 202 Travis, Suite 208, Houston, Texas 77002.

ASSISTANT FEDERAL PUBLIC DEFENDER for the Western District of Texas, position in San Antonio. See 18 U.S.C. §3006A. Must be bilingual (in Spanish), and be licensed for at least one year. Federal criminal trial experience preferred. Resumé or Standard Form 171 to Lucien B. Campbell, Federal Public Defender, 727 E. Durango Blvd., B-138, San Antonio, Texas 78206.

Forensic Science News

by Jack Benton, Pat H. Donley and Craig Tannahill
Forensic Associates, Lubbock, Texas

The identification and subsequent quantification of ethyl alcohol in blood and urine samples is most commonly accomplished by gas chromatography. The columns used in these gas chromatographs separate components, and their resolution yields a chart indicating the position or retention time of the component of interest. This retention time, given specific column and parameter conditions, identifies the component of interest when compared to standard components analyzed under the same conditions. The height or area of the peak produced on the resultant graph is indicative of the amount of component present. Unfortunately, a single column run is not specific, as other substances may mimic the component of interest and yield a false positive or contribute to the erroneously high reading for that component.

The single column method of blood alcohol analysis is a common practice which should be vigorously explored by the attorney faced with these test results. Only by employing two or more column runs utilizing different parameters or column material would this test procedure be considered specific. Additionally, in order to absolutely rule out the possibility of false positives, a series of standard volatiles should be analyzed under the same set of parameters to establish the ability of the run parameters to discriminate between the ethyl alcohol and other volatiles. Many laboratories utilize the single column identification method comparing the unknown components in evidence blood or urine samples to ethyl alcohol only, ignoring the possibility of other volatile contamination.

If you're a busy trial attorney
Too busy to read this message–
Keep Reading

DEPOSITIONS

by James L. Branton & Jim D. Lovett

- Video Depositions
- Injuries and Damages
- Telephone Depositions
- Basic Legal Problems encountered in deposition taking discussed with handy case citations.
- Product Liability
- Railroad Crossing Cases
- Medical Malpractice
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- Fire Insurance

- **Forms** – Sixty-five forms for use in State or Federal court, including Notices, Motions, written questions to medical witnesses, and others.
- **Aids** – Original medical illustrations, Perpetual Calendar, etc.
- **Law** – State and Federal cases topically indexed and discussed.
- **Checklists** – Twenty-nine checklists, in 10 different subjects plus checklists for preparing clients, witnesses and experts for depositions

This publication is designed for use by the busy lawyer who makes a living in the courtroom. It was written by two lawyers who have tried hundreds of cases of all types in their 50 combined years of practice. DEPOSITIONS was born of their actual experiences in taking thousands of depositions and in their efforts to learn to do so more efficiently and thoroughly. The DEPOSITIONS notebook is the result—their thought and hard work has put this information into the most useful form for the busy trial attorney.

This is *not* a publication from which to derive legal briefs. It *is* a practical travelling companion that can have the attorney ready instantly to take many depositions. It contains *checklists* of questions and *forms* for the vast majority of the cases most lawyers are likely to encounter. It also contains *practical* information, warnings and *new ideas* about depositions born of everyday necessity together with many aids that attorneys always seem to need during depositions:

- the applicable rules relating to depositions
- a perpetual calendar
- anatomical drawings
- orthopedic and neurological tests of the human back
- weights and measures
- life expectancy table

. . . and many others

The Checklists are derived from actual experiences in actual cases. For example, the two authors have taken more than a thousand medical depositions and the resulting Medical Doctor Checklist is based upon their considerable knowledge and skill. All the Checklists are thorough and complete. It would be the unusual case that required all the questions in a Checklist to be covered. The attorney taking the deposition can decide which portions of each Checklist should be used in a given case.

Since each Checklist is directed at a particular witness, it can be used by opposing counsel for different purposes. For example, if the deposition of the Injured Party is to be taken, that Checklist will be used by defense counsel to take the deposition but should also be used by Plaintiff's counsel to prepare the Plaintiff.

Preceding the Checklists there appear these items of information:

1. Scope of Coverage
2. Potential Witnesses
3. Potential Documents

The *Scope of Coverage* advises the attorney what can be expected in the Checklist of questions and cites appropriate cross-references.

The *List of Potential Documents* should be used in aid of document discovery preliminary to depositions so as to assure that counsel has all the proper documents available during the deposition. It should be used in preparing the *duces tecum* Notice of Deposition and subpoena as well as a memory refresher during the deposition.

The Forms are highly practical, proven in daily use by the authors. They are organized and indexed in a manner that will be useful to an office forms system.

The DEPOSITIONS notebook is just exactly what you would already have compiled for yourself if you had the time and sufficient experience in all areas of litigation. With it you can *be confident* that you will *ask all the pertinent questions.*

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