JOURNAL OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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© 1990 TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
Tribute to Marvin Teague

February 22, 1991

Presented by Judge Chuck Miller

We are here not only to share our common grief, but also to celebrate Marvin's life. To remember the man before he becomes the myth. To common grief, but also to celebrate self set the tone of this service in a him for the memories he gave us; for the example that he set as a husband, son, brother, friend and judge. Marvin himself set the tone of this service in a memo he sent around the court last year as he was departing for Houston to undergo his heart implant operation. His final directive was that there be no crying, and that those who are of a mind to toast him, do so with champagne, a drink of celebration.

Marvin was fond of saying that he graduated in the top 15 of his law school class, which wasn't too tough, he would add, because there were only 15 in his class who graduated. At some point in his legal career it became Marvin's sole professional ambition to become a judge on the Court of Criminal Appeals. He made it on his second try in 1980. By the time his career brought him to the Court he had honed a judicial philosophy that was hallmark by his dogged tenacity for espousing his views on individual rights. Above all else he was a staunch advocate of liberty, freedom from governmental intrusion, and the right of individuals to make free choices even to the extent, as he wrote about Texas' seat belt law, "to perhaps do foolish things and make foolish choices." He had the distinction of not drawing an opponent from either party in his reelection in 1986.

Marvin's old time unpretentious down home Texas personality served him and us well at the Court. In the written opinions Marvin authored, he had a way of continuing a stream of consciousness on paper that, speckled with humor, made you want to read him and marvel at the mind of the man. His witticisms and colorful phrases, known for years to us as Teagueisms, brought life to what otherwise could be a pretty dull place. While we boringly would say "Almanza vs. State," he would say "Almanza the Terrible" or "Adams the Execrable," and so on. When our sources would be the law dictionary his would be Lord Plowden, Shakespeare, Kipling or Alice Through the Looking Glass. There are literally hundreds of writing samples that could be recalled, and the flavor would be lost here. Nobody can do justice to Marvin's unique poetry of words except Marvin.

In his dissenting opinions Marvin could and often did destroy another judge with witty catch phrases, but his creed was that "Once we leave the conference room, we're buddies." Within the court he was our model for collegiality, generosity and unselfishness. He was one of those rare brethren that every judge and every staff member liked and had good things to say about.

Marvin was 100% judge 100% of the time he was at the Court, and he was at the Court a lot. Weekends, nights, holidays (including Presidents' Day the day before he died), Marvin worked churning out opinions on his distinctive blue legal size paper. Years before the Court tossed out its typewriters and computerized, he had bought a word processor out of his own funds to improve his efficiency. In the ten years he served on the Court he authored almost 1,000 — 1,000 opinions for the Court; in addition to over 500 concurring and dissenting opinions for himself.

But Marvin was not a workaholic. He was a life-aholic. He played as hard as he worked. From fraternizing here in Austin with local and out-of-town friends until all hours, to attending social seminar junkets in Mexico and the Caribbean, Marvin was non-stop when it came to people — he just couldn't get enough of his friends, both on and off the Court.

The day of the night that he died we had a full day's conference, and Marvin was never happier. He randomly joked and ribbed some of us; successfully got several of his opinions voted on; reminisced about seeing many of his good friends from TCDLA last weekend at their statewide meeting and seminar in Houston, and talked about the sheer ecstasy of motoring in his new Lincoln Town Car and of the rush of driving it up to the front of the Ritz Carlton in Houston with Ricki; he got to converse with Bob Huttash, with whom he worked as a lawyer for the Court 20 years ago and who was Marvin's most frequent after-hours social buddy; he bragged to us about the quality of his staff — Robin, Laura and Doug — who pleased him so much he had taken the unprecedented (for Marvin) move of giving them this week off as a reward for conscientious service. In sum: There would have been no good time to lose Marvin, but if we were to lose him there couldn't have been constructed a more pleasurable last few days for him.

To Ricki, who had the kind of selfless and unconditional love to take Marvin as he was, not trying to change him, except to re-introduce him to the concept of eating nutritious food: Ricki, you will always be a part of our Court family.

To Marvin: You always smiled, especially when you talked. It's difficult to imagine your face without a smile. So we won't. Thanks for going to the trouble to have that heart implant and giving us another year with you. From your friends on and off the Court, goodbye, Brother Teague!
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PRESIDENT’S COLUMN

The Presumption of Innocence —
A Legal Figment?

by Tim Evans

The phrase “figment of your imagination” is such a common term that I never realized that I did not know what a figment was until I decided to title this column. The Webster's definition is: “something made up, fabricated or contrived.”

I am saddened to say that our presumption of innocence appears to have deteriorated from a bedrock of fundamental freedom, to a legal fiction and now to a legal figment.

Interestingly enough, the presumption of innocence is not found in either our state or federal constitutions. It is not a part of the Bill of Rights. Rather it has been a universally accepted fundamental principle of our American common law. It is codified in the Texas Code of Criminal Procedure at Article 38.03. In the limited time available I was unable to find a similar codification in the federal statutes and I suspect there is none. Like other valuable things taken for granted, we often don’t miss them until they are gone. We must all begin to speak loudly and often of the presumption of innocence if we are to save this vanishing safeguard of freedom and individual dignity.

"I believe that when judges and prosecutors ignore the presumption of innocence they are affirmatively violating the law."

It seems that in present times the only time our courts even give lip service to the presumption of innocence is in the jury charge. At other times the presumption is being ignored. Judges ignore it when they set politically high bonds. Prosecutors ignore it when they make public statements deceptively twisting our Bill of Rights which protects the accused into a protection for “criminals.” I believe that when judges and prosecutors ignore the presumption of innocence..."

Let me ask each of you to memorize this statute and to repeat it often when challenging the court, the prosecutor, the police, and even the public to recognize and carry out their duty under the law.

A list of occasions when this duty is violated would likely fill this magazine. I here submit a partial list of areas in the law where the presumption of inno-

Continued on page 39

JUNE 1991
I thought I would make this a "thank you" and a "come on board" type of column.

First, the "come on board" part. There are lots of ways to get active in TCDLA — through committees and various functions. And through contributions to the Voice. We have an open door policy. You write, we publish. We have been particularly blessed in terms of the quality of articles and caliber of writers. Everyone has a lot of pride in writing and content. Consequently, we all benefit.

Now we want more new faces and invite more of you to contribute. I encourage you to send material. We have no elaborate ground rules save one: if the material will help the practicing criminal defense attorney, we want to use it. In return, we use your photograph and biographical sketch to thank you for making the time to contribute to the Voice. The Voice is the most visible benefit of TCDLA — we want it to importantly improve, and that means more new people. Please do not hide behind the typical excuses ("I'm too 'young,' 'inexperienced,' 'scared to put it in writing,' etc."). Writing ain't easy for any of us.

Some of you have told me you would hop aboard but just need a helpful suggestion or two. How about a few of you starting up new columns. David Botsford (Chairman of Amicus committee — where does he find the time to write so many excellent briefs, all gratis, for TCDLA defense attorneys?), has begun a column "Brief Case." Contact David if you are interested in helping. Some other new ideas include "Trial Tips" (or "Side Bar Remarks") which is tentatively aimed at making practical suggestions for trying cases; "Litigation," which could lend itself to a wide variety of different subjects of interest; "The Bill of Rights" which could cover important developments which affect the 4th, 5th, 6th etc. amendments to the Texas and/or United States Constitution.

Are any of you interested in getting involved? If so, either send an article, or pick a column (one of the above or one of your own choosing) and get busy. We will be delighted to welcome you aboard.

Next, our thanks to all who have contributed so much to the Voice in the past year. There are no "yes" people on the editorial board, which is really the first line of contributors. I continually ask for help in every conceivable way and the board comes through regularly.

Buck Files, chairman, is forever trying to steer me in the right direction. He is one fantastic lawyer and I count him as a close friend. I am certainly glad he directs the team.

Knox Jones (who appointed me editor to begin with), and Judge Chuck Miller and Judge Larry Gist are ever present mainstays. Each is well respected, solid as a rock and very busy — but never too busy to lend expertise and guidance to the Voice.

The board itself is an example of the cream of the crop of legal talent. All have volunteered to write, to edit and to advise on sensitive issues. More often than not, a member of the board changes my way of thinking. Who are they? William P. Ellison, Betty Blackwell, Cliff Brown, Judge J. Burnett, Charles Butts, Judge Sam Houston Clinton, John Hannah, Mike Heiskell, Robert B. Hirschhorn, Judge Pat McDowell, E.G. "Gerry" Morris, Rod Ponton, El Paso, Jack Rawitscher, Fort Worth.

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IN AND AROUND TEXAS

by John Boston

LEGISLATIVE
Sine die: “Without day,” meaning the end of the session, which was midnight Monday, 27 May. Praise the Lord and pass the bourbon. It ought to be con dolor. This has been one of the most hectic sessions of the Legislature I’ve seen, and those with more time than I watching the process have agreed with this assessment. But, despite the stress of this session, by the final few days we’d either already defeated what we were able to, or what we had opposed had already passed in one form or another. The wire tap, pen register and trap and trace bills died, so did the major DWI bills and the State’s right to a jury trial bill. This left two criminal law bills for the prosecutors to fight up to the last hours of the last day. Rep. Senfronia Thompson’s and Senator Carl Parker’s lawyer-in-the-grand jury bill (HB 765 — defeated) and an expanded expunction bill (HB 1838 — defeated) were to the D.A.’s this session what expanded forfeiture and the State’s right to a jury trial bills were to the defense bar in the 1989 session. Both bills this session came very close to passing and will probably be back next regular session. TCDLA supported both bills, but I don’t feel too bad that neither passed since both appeared to be destined for defeat early on, so we never had high hopes for either. The lawyer in the grand jury bill was, and is, vehemently opposed by the prosecutors, just as we oppose the state having final say over the defendant’s election of who sets punishment. However, as to the expanded right to expunction, my sense is that there is room for compromise with the D.A.s and given additional time to work out the language, an expanded expunction bill could pass next session.

At this writing, 29 May, we are still receiving enrolled bills (passed both houses but not signed by the Governor), so I do not know the exact language of all bills that passed; however, what follows is a summary of a few of the bills that have passed.

The Governor signed into law HB 407 by Ovard, which increases misdemeanor fines: Class A — $3,000, Class B — $1,500 and Class C — $500. Senator John Montford’s SB 880, the Penny bill, passed and will become law on 1 September 1991. It provides a short mitigation issue, which although not perfect, is an improvement over current law in that it allows jurors to consider, “... the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant...”. The Act deletes questions one (“deliberately”) and three (“provocation”) from Art. 37.071, C.C.P. but leaves question two relating to future dangerousness, and adds a non-trigger man issue requiring intent or anticipation of death under the law of parties. The Act further amends Art. 44.29 to provide that if a court sets aside a sentence on the basis of error affecting punishment only, the court shall order a punishment hearing with jury selection as in other capital cases. Also Art. 44.251 is amended to provide for reformation of sentence to life if the Court of Criminal Appeals finds insufficient evidence to support an affirmative answer to the two special issues or a negative answer to the new mitigation issue, Art. 37.071(e). In a related Act, HB 9 by Parker McCollough, et al, provides that if the state is not seeking the death penalty in a capital case, the defendant may waive a jury if the state consents. The life sentence under this Act would require a minimum of 35 calendar years before the defendant

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# CONTINUING LEGAL EDUCATION

**THE HONORABLE M.P. "RUSTY" DUNCAN III**

**FOURTH ANNUAL TCDLA ADVANCED CRIMINAL LAW SHORT COURSE**

**June 27-29, 1991**

The St. Anthony Hotel
300 East Travis Street
San Antonio, Texas 78205

Moderator: David Botsford, Austin, Texas

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<tr>
<th>Thursday, June 27</th>
<th>8:00-8:50</th>
<th>Registration</th>
<th>9:15-10:00</th>
<th>Arrest, Search &amp; Seizure, Jace Meeker, Chief Staff Attorney</th>
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<tr>
<td></td>
<td>8:50-9:00</td>
<td>Welcome and Opening Remarks</td>
<td>10:00-10:15</td>
<td>Court of Criminal Appeals</td>
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<td></td>
<td>9:00-10:00</td>
<td>Ethics and Attorney Misconduct, Richard Alan Anderson, Dallas</td>
<td>10:15-11:00</td>
<td>Refreshment Break</td>
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<td>10:00-10:15</td>
<td>Refreshment Break</td>
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<td>Punishment, Shannon Ross, Dallas, Asst. Criminal District Attorney</td>
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<td>10:15-11:00</td>
<td>Grand Jury, David R. Bires, Houston</td>
<td>11:00-11:45</td>
<td>Prosecutorial Misconduct, Randy Schaeffer, Houston</td>
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<td></td>
<td>11:00-11:45</td>
<td>DWI, Stuart Kinard, Austin</td>
<td>11:45-1:00</td>
<td>Lunch (on your own)</td>
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<td>11:45-1:00</td>
<td>Lunch (on your own)</td>
<td>1:00-1:45</td>
<td>Confessions, Roy O. Minton, Austin</td>
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<td>1:00-1:45</td>
<td>Recent Decisions</td>
<td>1:45-2:30</td>
<td>Appeals, Kerry P. Fitzgerald, Dallas</td>
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<td></td>
<td>1:45-2:30</td>
<td>Honorable Chuck Miller, Judge</td>
<td>2:30-2:45</td>
<td>Capital Murder, Keith E. Jagmin, Dallas</td>
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<td>2:30-2:45</td>
<td>Court of Criminal Appeals, Austin</td>
<td>2:45-3:30</td>
<td>Jury Argument, Edward A. Malleit, Houston</td>
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<td>2:45-3:30</td>
<td>Hearsay, Admissions</td>
<td>3:30-4:15</td>
<td>Refreshment Break</td>
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<td>3:30-4:15</td>
<td>Business Records &amp; Expert</td>
<td>4:15-4:30</td>
<td>Cross Examination, Russell &quot;Rusty&quot; Hardin, Houston</td>
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<td>4:30-5:15</td>
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<td>5:15</td>
<td>Friday evening: TCDLA President's Ball &amp; Annual Fund Raiser</td>
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<tr>
<td>Friday, June 28</td>
<td>8:30-9:15</td>
<td>Extraneous Offenses, Jack V. Strickland, Fort Worth</td>
<td></td>
<td>For further information about the seminar, call John Boston or Lillian at the TCDLA Austin office (512) 478-2514.</td>
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**SBOT Convention Criminal Law Institute "Superstars '91"**

Houston, Wednesday, June 19

Seminar Coordinator: C.L. "Scrappy" Holmes, Longview, Holmes Law Office

<table>
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<tr>
<th>Time</th>
<th>Program</th>
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<tr>
<td>1:30 p.m.</td>
<td>Ethics: A Prosecutor's View, Honorabke Ronald Earle, District Attorney, Travis County</td>
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<td>2:15</td>
<td>Final Argument, Richard &quot;Racehorse&quot; Haynes, Houston Law Offices of Richard Haynes</td>
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<tr>
<td>3:15</td>
<td>Legislative Update, Honorable John C. Boston, Executive Director, TCDLA</td>
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<td>3:30</td>
<td>Honorable Thomas L. Krumplitz, Executive Director, Texas District &amp; County Attorneys Association</td>
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<tr>
<td>4:15</td>
<td>Criminal Lawyering, Bobby Lee Cook, Sr., Summerville, Georgia</td>
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<tr>
<td>5:15</td>
<td>ADJOURN</td>
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Call the State Bar of Texas, (512) 463-1515 to register.
Significant Developments in Evidence Law Since the Adoption of the Texas Rules
Part 4
by Judge Chuck Miller, Susan Goggan, with assistance from Mary Jo Jirik

Article VII. Opinions and Expert Testimony
Rule 701. Opinion Testimony By Lay Witness

Rule 701 is a rule of limitation on lay witness opinion testimony.

Reid v. State, 749 S.W.2d 903 (Tex.App.—Dallas 1988, pet. ref'd) A lay witness may testify in the form of an opinion if the opinion is rationally based on the witness' perception and is helpful to a clear understanding of his testimony. Proper predicate must be laid for requirement that opinion be "rationally based on the perception of the witness."

Mitchell v. State, 780 S.W.2d 862 (Tex.App.—Houston [14th Dist.] 1988, no pet.) Defendant failed to lay proper predicate for question on truth or veracity and further failed to submit offer of proof as to what accomplice would have said had proper impeachment been undertaken.

Any lay witness may give an opinion as to intoxication in a DWI case.

Howard v. State, 744 S.W.2d 640 (Tex.App.—Houston [14th Dist.] 1987, no pet.) Arresting officer's opinion as to DWI subject's performance on the horizontal gaze nystagmus [HGN] test was admissible as opinion testimony regarding subject's intoxication. Results of the HGN test are generally admissible for qualitative, rather than quantitative, purposes. Id. at 641.

Opinions of lay witnesses are not to be substituted for the decision of the jury.

Gross v. State, 730 S.W.2d 104 (Tex.App.—Texarkana 1987, no pet.) Legal conclusions are inadmissible, and victim's opinion that defendant should be given lenient sentence was not admissible;

Hughes v. State, 787 S.W.2d 193 (Tex.App.—Corpus Christi 1990, pet. ref'd) Robbery victim's opinion as to appropriate punishment for defendant not admissible.

Accord Anguiano v. State, 774 S.W.2d 344 (Tex.App.—Houston [14th Dist.] 1989, no pet.) Officer's testimony in prostitution case that defendant was "agreeing" to engage in sexual conduct was not a legal conclusion, but rather was based on officer's perception of defendant's demeanor during the dialogue.

Villegas v. State, 791 S.W.2d 226 (Tex.App.—Corpus Christi 1990, pet. ref'd) A properly qualified lay witness who personally knows a capital murder defendant may state an opinion concerning the probability of future dangerousness of the defendant.

Rule 702. Testimony By Experts

Rule 702 allows a qualified expert to give a professional opinion if his specialized knowledge will assist the trier of fact to "understand the evidence or determine a fact in issue."

Duckett v. State, to be reported at 797 S.W.2d 906 (Tex.Ct.App. 1990) The Court of Criminal Appeals extensively discussed R.702 saying that the threshold determination for admitting expert testimony is whether the "specialized knowledge" will assist the jury per R.702. A good test for this determination is "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject."

In Duckett, a DHS social worker, who qualified as an expert, testified as an expert on the dynamics of intrafamily child sexual abuse and essentially described the "Child Sexual Abuse Syndrome" and stated that this child complainant had experienced the classic "phases" of an abuse incident and its aftermath. Most courts don't allow such testimony as substantive evidence of abuse, but do allow it to rehabilitate a victim's credibility, i.e., to explain a child-victim's post trauma behavior as a common reaction to sexual abuse where it would otherwise appear impeaching.

Thus the trial court did not abuse its discretion in deciding that there was compliance with Rules 702, 402 and 403.

The Court of Criminal Appeals has held that experts may testify at the punishment stage as to the likelihood of defendant's future dangerousness, subject to some limitations.

Sattiewhite v. State, 786 S.W.2d 271 (Tex.Ct.App. 1988) An expert witness, if properly qualified, may offer opinion as to future dangerousness but may not recommend a particular type of punishment. The Court has repeatedly rejected the recommendation of punishment, fearing such testimony would escalate into a "battle of the experts."

Id. at 290, citing and upholding pre-rules caselaw.

The Court of Criminal Appeals recently addressed the admissibility of expert testimony regarding eyewitness identifications under Rule 702. Although the Court had not previously been faced with this issue, it relied on analogous federal appellate caselaw to reach a conclusion.

Pierce v. State, 777 S.W.2d 399 (Tex.Ct.App. 1988) In a capital murder prosecution, the trial court did not abuse its discretion in refusing to admit the testimony of an architect regarding the suggestiveness of the defendant's lineup that was offered on the basis that the architect was an expert on perception and perspective. The architect's testimony was not the product of specialized knowledge that was not possessed by the jurors. Moreover, architect/artist did not personally observe lineup.

Qualification as an expert is within the discretion of the trial court and will not be disturbed absent a showing of a clear abuse.

Key v. State, 765 S.W.2d 848 (Tex.App.—Dallas 1989, pet. ref'd) The court admitted testimony of a rape counselor in determining the issue of consent in a "date rape" situation. The witness stated that, in some cases, rap-
ists befriended their victims to raise doubts about the consent issue.

Several cases have addressed the question of whether a police officer qualifies as an expert regarding certain situations. See, e.g.,

Powers v. State, 757 S.W.2d 88 (Tex.App.—Houston [14th Dist] 1988, pet. ref'd) Police officer with 25 years experience in police work not qualified to render an opinion as to whether shooting was intentional or accidental where the jury possessed the same information and could fully understand the matter.

Byrnum v. State, 762 S.W.2d 685 (Tex.App.—Houston [14th Dist] 1988, no pet.) Undercover police officer's testimony that defendant who worked as a topless dancer was encouraging officer to pay more when she danced for him at club was not admissible as police officer's opinion testimony as to whether defendant's application for probation and should have been admitted.

Kelly v. State, 792 S.W.2d 579 (Tex.App.—Fort Worth 1990, pet. granted) DNA evidence matching semen found on homicide victim's bedsheets to defendant was admissible. The court of appeals found the relevancy standard under Rules 401-403 and 702 consistent with the Frye standard, which permits admission of expert testimony based on novel scientific technique if the underlying principle and technique are generally accepted in the relevant scientific community as applied to expert testimony based on DNA evidence. See discussion of Kelly under Rule 403, supra.

Glover v. State, 787 S.W.2d 544 (Tex.App.—Dallas 1990, pet. granted) DNA fingerprinting evidence found reliable and generally accepted by scientific community per Frye. The court of appeals based its decision on the Frye standard. Contra Kelly, supra, where the court of appeals relied heavily on the relevancy standard in its application through the rules of criminal evidence. See discussion of Glover under Rule 403, supra.

Spence v. State, 795 S.W.2d 743 (Tex.App.—Austin 1990) (pet. to file cert. pending) Over objection that forensic odontology was not recognized by the scientific community, the State called an expert witness who identified the defendant as the person who made the bite marks on the deceased's skin. The Court of Criminal Appeals agreed that the field of forensic odontology is new, that experts in the field don't agree on the exact number of similarities between a bite mark obtained from a defendant and a bite mark photographed on a victim necessary to make a positive identification, and that reliability of bite mark evidence has not been universally accepted. However, experts do agree that one point of dissimilarity will prove with certainty that a particular suspect did not cause the bite mark on a particular victim. Additionally, bite mark evidence has received substantial general acceptance by forensic odontology experts to merit admissibility. The disagreement among those experts as to how many points of similarity are necessary for positive identification or attacks that insufficient background data has yet been gathered in this area are all concerns of weight, not admissibility.


Rule 703. Bases of Opinion Testimony By Experts

An expert witness may rely on otherwise inadmissible data if it is of a type reasonably relied on by experts in the field.

Harkins v. State, 702 S.W.2d 20 (Tex.App.—Fort Worth 1989, no pet.)

Pike v. State, 758 S.W.2d 357 (Tex.App.—Waco 1988, vacated and remanded, 772 S.W.2d 130 (Tex.App.—Waco 1989)) Exhibits prepared by DPS officer regarding profits, costs, etc. for methamphetamine operation were admissible as compilations of data intended to aid jury based on information reasonably relied on by experts in the field. On PDR, the Court of Criminal Appeals vacated and remanded this cause to allow appellant to supplement the record.

Austin v. State, 794 S.W.2d 408 (Tex.App.—Austin 1990, pet. ref'd) Police officer's testimony that the words "Swedish deep muscle rub" in massage parlors were often key words for prostitution admissible as expert witness opinion testimony based on officer's training, experience and years of service as police officer.

Various other examples of expert testimony in light of Rule 702 include the following:

Aghogun v. State, 756 S.W.2d 1 (Tex.App.—Houston [1st Dist] 1988, pet. ref'd) Licensed pharmacist with 36 years experience qualified to give expert opinion regarding labeling procedures commonly followed within pharmacy professions.

Wilkerson v. State, 766 S.W.2d 795 (Tex.App.—Houston 1987, pet. ref'd) Testimony of clinical psychologist with doctoral degree in counseling and psychology that defendant's "problem" of drug and alcohol abuse would be manageable over ten-year period of probation, offered at punishment phase of aggravated sexual assault prosecution, was relevant to defendant's application for probation and should have been admitted.

See discussion under Rule 403, supra.

Rule 704. Opinion on Ultimate Issues

Hernandez v. State, 772 S.W.2d 274 (Tex.App.—Corpus Christi 1989, no pet.) Expert can testify on ultimate issue of fact but may not state legal conclusion; the ultimate issue of fact in this murder case being the description of a wound causing death.

Wade v. State, 769 S.W.2d 633 (Tex.App.—Dallas 1989, no pet.) Invasion of the province of the jury is no
The Corpus Delicti of Murder After Repeal of Article 1204

by Walter W. Steele, Jr. and Ruth A. Kollman

For over a hundred years, Texas law required the body of the victim, or portions of it, be found and identified before the State could convict a person of any grade of homicide. Most recently, the requirement appeared in article 1204 of the 1925 Texas Penal Code. The Texas Legislature repealed the statute in its 1974 revisions to the Code.

Twelve years later, a woman reported a murder to Baltimore, Maryland, police. The crime, she claimed, had occurred four years earlier in Houston, Texas. The victim was one of her lovers; the murderer, another lover. She had listened while the crime took place, but did not watch. She had seen the body of the victim afterwards. A friend had helped the murderer dispose of the body. Another friend had helped clean up evidence of the crime.

The Baltimore police contacted Houston authorities. They learned the victim's family had reported him missing. Harris County indicted the alleged killer for murder. The body of the missing victim was never found. On the strength of the testimony of the three witnesses that they had observed the body and other evidence of the crime, a jury convicted the man of murder and sentenced him to ninety-nine years' confinement. The Fourteenth Court of Appeals affirmed the conviction.

These were the facts in the unpublished case of Walkoviak v. State. We related them here to illustrate a typical "no body" case. A "no body" case can also arise if a court suppresses evidence of the body under the exclusionary rule.

The questions we seek to answer are these: Could the State have obtained convictions in "no body" cases like Walkoviak before the repeal of article 1204? Are convictions easier for the State to obtain now that the Legislature has repealed the statute?

Introduction

Commentators have analyzed article 1204 in two ways. First, most conclude that a conviction in a "no body" case was impossible while the statute was in effect. We think the following examination of the adoption and application of the statute shows otherwise. Second, most assume that repeal of the statute completely eliminated the requirement of a body in a murder prosecution. We hope to demonstrate that this assumption blurs the distinction between the corpus delicti of murder and the elements of the offense of murder.

We begin our discussion with a brief comparison of the corpus delicti and the elements of the offense. Holdings before and after repeal of article 1204 are confusing unless counsel approaches those cases with a clear understanding of the difference between the two concepts.

With this distinction in mind, we sketch the historical development of the requirement of a body in a murder prosecution. We also discuss the adoption of the unique statutory requirement in Texas. We then analyze important early cases which interpreted the statute. Finally, we discuss the significant cases decided since repeal of the statute. We conclude that the repeal of article 1204 did not substantially change the State's burden in a "no body" case.

The Difference between the Corpus Delicti and the Elements of the Crime The Distinction is Important

The difference between the corpus delicti and the elements of a crime is not merely semantical. The evidence which the State must introduce to prove the corpus delicti differs from what the State may introduce to prove the elements of the crime. This has implications of immense practical significance in confession cases. We are all acquainted with the familiar rule that an extrajudicial confession must be corroborated. In Self v. State, the Court of Criminal Appeals made clear an important part of that rule:

"The State having established the corpus delicti could prove the appellant's guilt as the agent guilty of the commission of the crime by his confession unaided by other evidence."3

The Court of Criminal Appeals held in Self that the State need independently corroborate only the corpus delicti, not the elements of the crime. Thus, an understanding of the distinction between corpus delicti and elements can be critical to any lawyer concerned with corroboration of a confession.

The Corpus Delicti of Murder

Knowing now that there is a meaningful difference, we next review the definitions of the corpus delicti and the elements of a crime. Corpus delicti literally means "the body of the crime." In the popular imagination, the phrase often means the actual body of a murdered victim—the corpse. Trained legal minds recognize that the term means the body of any crime, not just a murder.

The components of the corpus delicti of any crime are: (1) the occurrence of the specific kind of injury or loss required; and (2) someone's criminality in connection with that occurrence.

Before Self, some courts in Texas had held that the corpus delicti of a murder prosecution consisted of three components: (1) the body of the deceased must have been found and identified; (2) the death of the deceased must have been shown to have been caused by the criminal act of another; and (3) the accused must have been shown to have been the guilty agent connected with the criminal act.10 In 1974, however, the Self court narrowed the definition by dropping the third component:

"This definition of the corpus delicti is obviously too broad because it includes all of the elements necessary to prove the guilt of a defendant and to sustain a conviction . . . . Most courts have held and this Court has generally held that the corpus delicti consists of two elements . . . . The first element of the
corpus delicti in a prosecution for murder is that the body or the remains of the body of the deceased be found and identified... The second element of the corpus delicti in a prosecution for murder is that the death of the deceased was caused by the criminal act of another.

By paring down the corpus delicti definition, the court narrowed which portions of an accused’s statement the State is required to independently corroborate. The Self case explicitly recognized a difference between the components of the corpus delicti of murder and the elements of the offense. The elements of a crime are defined by statute. We turn to the Texas Penal Code.

The Elements of the Offense of Murder

Section 1.07 of the penal code defines the elements of an offense as: (1) the forbidden conduct; (2) the required culpability; and (3) any required result.

The elements of the crime of murder are defined in section 19.02: a person commits the offense of murder if the person intentionally or knowingly causes the death of an individual. The two statutes operate together in a murder prosecution to require the State to show the death of a person in order to prove the “result” element.

Even though the Self court stated that proof of criminal agency is not a component of the corpus delicti of murder, section 19.02 requires proof of the accused’s criminal agency as one of the elements of the crime. In order to convict a particular defendant, the State must show both the corpus delicti and a connection between that particular defendant and the crime. The difference is that a confession can alone constitute evidence that the accused committed the crime, but must be corroborated to prove a crime occurred in the first place.

The Relevance of the Corroboration Rule to the Body Requirement

The purpose of the corroboration rule is to avoid conviction of the innocent solely on the force of a false or mistaken confession. The unpublished case of Alvey v. State from the Fifth Court of Appeals illustrates the operation of the rule. Alvey made statements to the authorities which the trial court held were inadmissible. The Fifth Court held that on remand evidence of the finding of the body and the autopsy will also be inadmissible. Alvey made other admissible statements, though, concerning the victim’s death and his involvement. Those statements may be admissible on retrial. Even without a statute requiring production of a body, the State must still prove that a death occurred, without relying solely on Alvey’s statements. Absent the evidence provided by the body, the State may find this proof of death difficult on retrial.

We now turn to the history of the unique early Texas law which mandated discovery of the body of the deceased for a murder conviction.

The Historical Development of the Body Requirement

In 1854 the Texas Legislature had appointed John W. Harris, O. C. Hartley, and James Willie as Commissioners to codify the civil and criminal laws of the state. A monumental task had confronted the Commissioners. The people of the Republic of Texas were fiercely independent and culturally diverse. The population was geographically dispersed as well as politically diffuse. The Commissioners had a number of legal commentaries available to them, as well as the codes of France and Mexico, the common law of England, and the laws of the neighboring United States. They evidently concluded that the vicissitudes of life on an enormous frontier required particular safeguards against the conviction and execution of innocent persons. Apparently one of these perceived safeguards was the body requirement.

Livingston’s Code

The Commissioners drew liberally from the work of Edward Livingston in drafting a proposed penal code. Commentators credit Livingston with writing an early penal code which was widely read and essentially copied in Louisiana and by the Commissioners in Texas. Livingston’s seminal work, however, contained no provision requiring the production of a body, either in his proposed penal code or code of evidence. Therefore, it is evident that Livingston was not the source of the body requirement.

Other Penal Codes

Because of Texas’ unique historical and geographical context, the drafters also had the codes of Mexico and France to draw upon in proposing the first Texas Penal Code. Analysts of article 1204 and its predecessors conclude without any specific reference that the requirement of a body is rooted in the Napoleonic Code. We find no such provision in the Napoleonic Code, either in the original or in English translation. Nor do we find any such provision in the Mexican penal code. Moreover, no state which derives its law from Mexican or French antecedents has the requirement. For example, neither California nor Louisiana require the production of the body in a homicide prosecution.

English Common Law

The fledgling Texas Republic had adopted the offenses known to the common law of England. Discussion abounds in English legal literature of the desirability of eliminating prosecution (and execution) of the innocent by requiring the production and identification of a body in all homicide cases. However, English admiralty courts as early as 1792 recognized that the death of the person charged to have been killed could be proved by circumstantial evidence if direct evidence was unavailable. In Rex v. Hindermarch, the Crown accused a mariner of killing his captain. Witnesses testified to hearing a loud disturbance and to seeing Hindermarch throw the captain overboard. They also testified to finding a piece of wood near the scene and blood on the deck.

Hindermarch’s counsel argued that this evidence did not prove the captain was dead. He pointed out the presence of many other vessels in the area. He suggested the captain was still alive, rescued by one of the other ships. He cited the principle set out by Lord Matthew Hale: “I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead.” The jury, however, found Hindermarch guilty, declaring they were of the opinion that he had beaten the captain to death before casting him into the sea.

Lord Hale argued that without the requirement of a body the likelihood of wrongful conviction is great. He too, feared the injustice which could result from a false or mistaken confession. He cited two notorious cases of the day in which the victims reappeared after the trials of their supposed murderers, unfortunately too late for the innocent but by then executed defendants. Nevertheless, Hale’s principle does not seem to have established itself in the common law of England. American cases which examined the development and application of the requirement also re-
American Application of the Requirement

At the point in history when the Republic of Texas was establishing its independence, American courts were struggling with Lord Hale’s suggestion. In one case from the period, piracy by the crew of a Spanish schooner against an American brig resulted in the deaths of some of the Americans. Their bodies were lost at sea. The surviving Americans testified to the murderous acts of the Spanish crew. The circuit judge analyzed the debate:

"Are we to declare, that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for conviction? That would be to subvert the whole foundations of the administration of public justice. If, on the other hand, such cases are addressed as a mere admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden conclusions and slight suspicions, there is certainly nothing objectionable in the course . . . ."

An Indiana court faced the same issue a decade later. The defendant had been convicted of murdering his victim during a robbery, after which he set fire to the warehouse where the robbery had taken place. The fire consumed the body. However, witnesses had seen the body in the flames. The court said: "The corpus delicti may, like any other part of the case, be proved by circumstantial evidence. Looking at the evidence in the record, we have no reason to doubt that the human body seen in the flames was the body of [the victim]."

The controversy continued. In 1856, a New York court instructed a jury that the State must prove that a recovered body was that of the alleged victim by the direct evidence presented by the body itself. The court stopped just short of demanding a body in all murder prosecutions by describing the requirement as a general rule subject to limited exceptions. The defendant in People v. Wilson had been charged with murdering the captain and first mate of a vessel lying at anchor off Long Island. Six months later, only one body had been recovered. The captain’s brother-in-law identified the body as that of the captain. The court instructed the jury to disregard the witness’s opinion and to draw its own conclusions as to the identity of the body from the other evidence (location, appearance, height, and tattoos). The jury convicted the man. The reporter recorded the following:

"Strong, J., in his charge to the jury, after recapitulating the evidence, and stating several rules of law applicable to the case, said that ordinarily there could be no conviction for murder until the body of the deceased was discovered. That there were several exceptions to the rule, however, as where the murder has been on the high seas at a great distance or where the body had been entirely consumed by fire, or so far that it was impossible to identify it. But in the present case, the scene of the supposed tragedy was near the shore, and there was strong reason to suppose that, if a murder had been committed, the body of the deceased would be discovered. The exception to the rule is therefore inapplicable, and the jury must be satisfied that the body discovered . . . . was that of the murdered captain, before they could convict the prisoner."

Meanwhile, back in Texas the Commissioners recommended language which implied that the rule was absolute, not subject to the exceptions born of tough cases. Perhaps they reasoned that it was in just such difficult cases that the safeguard was most required.

In analyzing the debate of the period, a California jurist correctly observed that an inflexible application of Lord Hale’s principle would mean that a murderer need only completely destroy the victim’s body to secure immunity from prosecution. He noted that later jurists accordingly refused to explicitly follow the rule in all cases. He outlined the majority approach of the period, one which he felt preserved an equality of rights between the living and the dead:

"The body should be produced and the corpus delicti established by direct evidence where possible; but in instances where the production of the body or a part of it, after the crime, was impossible—as in murder upon the high seas, or where the body had been consumed by fire, or decomposed by chemical means—the death might be proved by circumstances or inferentially, the effect of the evidence being for the jury as in all other cases."

Nonetheless, the Texas Commissioners recommended adoption of a statute which wholeheartedly embraced Lord Hale’s principle.

The Language of the Requirement

Accordingly, the Commissioners submitted a work product to the Sixth Texas Congress at the 1855-56 session which contained the following proviso, subsequently codified as article 544:

"No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found, and sufficiently identified to establish the fact of killing."

One of the earliest cases interpreting this provision lends credence to the theory that the extensive geography of the Republic of Texas impelled the drafters to propose that the requirement be included in the new penal code. The victim in Walker v. State had disappeared from his employer’s home in Hood County, about a half mile from the Brazos river. Over three months later, a resident of Richmond in Fort Bend County found a body floating face down in the Brazos, some six hundred to nine hundred miles (as the river meanders) from Hood County. The body was too badly decomposed to be recognizable. The witness could say no more than the clothing on the corpse resembled that which other witnesses testified had been owned by the supposed victim.

The Walker court observed that the State proved only that the man had suddenly and inexplicably disappeared. It reversed the conviction, holding that the State failed to prove in the first place that the man was dead, and in the second that the remains found were his.

While the State in Walker found a body, it failed to sufficiently identify it as the missing man’s. The State thus failed to satisfy the statutory component of the corpus delicti of murder in Texas: that the body of the deceased be found and identified. At the same time and for the same reason, it also failed to prove the "result" element of the offense: that the victim was dead. Thus, because the State could not identify the body as the victim's, the court would have had to reverse the conviction even in the absence of a statutory body requirement.

Another discussion of the body requirement appeared shortly after the Walker decision. In Puryear v. State, the mother of a newborn testified that the baby’s father first drowned the baby
and then burned the body in a stove. The record indicated that the State recovered bone fragments from the stove but did not present testimony identifying the bones as human. Nor did the State offer the fragments themselves into the record. The court reversed the conviction and then burned the body in a stove.

The Legislature apparently responded to this concern and agreed that only the first component need be proved by the direct evidence presented by the body. It amended the statute in 1887:

No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed.

The amended language survived until the entire statute was repealed in 1974. Commentators have characterized the amended provision as substantially the same as its predecessor. However, the amendment takes on significance when read in conjunction with the Walker case. The amendment removed any ambiguity in the statute which might have required that the State prove the victim died by criminal means only through direct evidence presented by the body itself. The amendment implies that after the change the State could prove the second component of the corpus delicti of murder (that the death occurred by criminal agency) by evidence other than that presented by the body.

This article will be continued in the next issue of Voice.

Footnotes


3. The Fifth Court of Appeals may have recently created such a case in Ayles v. State, No. 05-89-00241-0 CR (Tex. App. — Dallas, October 1, 1990, pet. ref’d [not designated for publication]). Because Ayles is unpublished, we discuss the facts only for illustrative purposes. The trial court had suppressed some of Ayles’s statements as well as evidence of his actions in leading authorities to the body of his victim. However, the trial court allowed a medical examiner’s autopsy testimony and other evidence about the finding of the body. The Fifth Court found that neither the independent source, inevitable discovery, nor attenuation exceptions to the exclusionary rule applied to the case. In holding that evidence of the finding of the body and of the autopsy were “fruits of the poisonous tree,” the Fifth Court reversed Ayles’s conviction and remanded the case for a new trial.

4. The practical result is that Ayles may be a “no body” case on retrial.

Article 549

The Walker case is also noteworthy because the defendant raised the issue that the language of article 549 (identical to its predecessor in the Old Code, article 544) contained two requirements, not just one. First, the statute required that the body be found and identified. Second, the statute seemed to require that the body itself, or portions of it, present evidence that the death occurred by criminal means. The Walker court did not reach the point because of its disposition of the identity issue, but noted that the questioned language did seem to dictate the interpretation suggested by the defendant. The court expressed its concern that article 549 limited the State’s proof of both components of the corpus delicti of murder (i.e., (1) that the victim met death (2) by

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2. See Self v. State, 513 S.W.2d 383, 384–385 (Tex. Crim. App. 1974) (connection of the accused to the murder is an element necessary to prove the guilt of the defendant but is not an element of the corpus delicti of a murder prosecution).


4. Self v. State, 513 S.W.2d at 837 (emphasis added).


Ring Around the Collar
Bank Fraud, Etc.—Part 5

by William A. White, Amber McLaughlin, Kathryn Nester—Law Clerk

1. Elements
Essentially, Sec. 1005 proscribes four offenses: Paragraph one — unauthorized issuance of bank notes; Paragraph two — unauthorized issuance of bank obligations; Paragraph three — false entry in bank records; Paragraph four — unlawful participation in benefit of an transaction.

The elements of an offense indicted under paragraph one are:
1) That defendant was an officer, director, agent or employee
2) of any Federal Reserve bank, member bank, bank or savings and loan holding company, national bank or insured bank;
3) That defendant knowingly issued the notes of the bank without authorization from the directors of such bank; and
4) That the defendant issued the bank notes knowingly and willfully and with the specific intent to conceal, defraud or deceive the bank.

18 U.S.C. Sec. 1005 (Paragraph one); See, United States v. Harrison, 279 F.2d 19 (5th Cir. 1960); United States v. Pollock, 503 F.2d 87, 91 (9th Cir. 1974); Proposed Draft Fifth Circuit Pattern Jury Charges (March 1989) at 107; United States v. Kington, 875 F.2d 1091, 1104 (5th Cir. 1989) (citing United States v. Jackson, 621 F.2d 216, 219 (5th Cir. 1980).

The elements of paragraph two include:
1) That the defendant participated or shared in or received directly or indirectly any money, profit, property or benefits through any transaction
2) of the United States or any agency thereof, or any Federal Reserve Bank, member bank, bank or savings and loan holding company, national bank or insured bank; and
3) That defendant acted with the intent to defraud.

John K. Villa, Banking Crimes, supra at § 3.03 [6]; See, United States v. United States, 368 F.2d 417 (5th Cir. 1966).

2. Authority and Discussion
As mentioned above, Sec. 1005 covers FDIC insured banks. The companion statute covering FSLIC insured institutions is Sec. 1006, which prohibits essentially the same conduct as Sec. 1005. Paragraph three of Sec. 1005 (the false entry provision) is the most widely used of the three paragraphs. Most of the reported false entry prosecutions fall into four general categories: 1) embezzlement, conversion, or misapplication where a bank employee is accused of concealing unlawful activities with false bookkeeping entries, Villa, Banking Crimes, supra, at Sec. 3.03, See, e.g., United States v. Gustafson, 728 F.2d 1078 (8th Cir. 1983) cert. denied 469 U.S. 979 (1984) (check kiting scheme); and United States v. Ray, 688 F.2d 250 (4th Cir. 1982) cert. denied 459 U.S. 1177 (1983) (theft); 2) a bank officer's misrepresentation of the bank's assets and liabilities to defraud regulators, auditors, or investors, See, e.g., United States v. Gleason, 616 F.2d 2 (2nd Cir. 1979) cert. denied 444 U.S. 1082 (1980); 3) false entries in bank records to conceal fraudulent, nominee or preferential loans, See, e.g., United States v. Duncan, 598 F.2d 839 (4th Cir. 1979) cert. denied 444 U.S. 871 (1979); and 4) issuance of bank letters of credit which are unrecorded on the bank's books or are issued without authority from the directors of the bank. See, e.g., United States v. Tidwell, 559 F.2d 262 (5th Cir. 1977); and United States v. Pollock, 503 F.2d 87 (9th Cir. 1974).

However, the false entry provision is "broad enough to cover any document or record of the bank which would reveal pertinent information to the officers or directors of the bank," United States v. Foster, 566 F.2d 1045, 1052 (6th Cir. 1977) cert. denied 435 U.S. 917 (1978), such as interoffice memos. United States v. Foster, 566 F.2d 1045 (6th Cir. 1977) cert. denied 435 U.S. 917.

It has been reported that during the "boom days" it was common for bankers to issue and not record letters of credit for themselves or friends. The bank officer's rationale for not recording the letter of credit was his belief that the letter would never be called for collection by its holder. The reasons include: 1) the purchase contract for which the letter was acting as escrow would not be defaulted upon by the buyer; 2) if it appeared that the letter would be called, the bank officer would retrieve the letter from the holder and substitute it with cash or whatever was necessary; or 3) the letter of credit acted as escrow for a void purchase contract.

Notwithstanding these reasons, or any other logical or valid reason, the simple fact that a letter of credit was issued and not recorded on the bank's books is a
punishable offense under Sec. 1005. One could argue that the government must still prove an intent to injure or defraud. But intent to injure or defraud has been held to “exist whenever defendant acts knowingly, and the result of his conduct would be to injure or defraud the bank, even though that may not have been his motive.” United States v. Krepps, 605 F.2d 101 (3rd Cir. 1979) (emphasis added).

It is unclear, but the Fifth Circuit in United States v. Southers, 583 F.2d 1302 (5th Cir. 1978) appears to hold that the standard for establishing intent to defraud in Sec. 656 cases is the same standard applicable to Sec. 1005 cases. Accordingly, the requisite intent for Sec. 1005 would be “proven by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive.” Id. at 1305 (emphasis added). However, the Fifth Circuit recently cautioned trial courts that instructing a jury that intent to injure or defraud exists if the defendant acts knowingly and the natural consequences of the action are to injure the bank is misleading to a jury who might interpret such a statement to mean that no knowledge of deception is required. United States v. Kington, 875 F.2d 1091, 1098 (5th Cir. 1989). The Court agreed that intent to injure or defraud can be inferred from the combination of knowing action and natural consequences. Id. The Southers decision widens the scope of Sec. 1005 to encompass a statement made knowing that it was not entirely accurate in any bank document or record which could have a tendency to harm the bank. See, generally, United States v. Jackson, 621 F.2d 216, 219 (5th Cir. 1980); United States v. Welliver, 601 F.2d 203, 208 (5th Cir. 1979); United States v. Foster, 566 F.2d 1045, 1052 (6th Cir. 1977); United States v. Adamson, supra. However, an entry recording an actual transaction on a bank’s books exactly as it occurred is not a false entry even though it is a part of a fraudulent or otherwise illegal scheme. United States v. Erickson, 601 F.2d 296 (7th Cir. 1979) cert. denied 444 U.S. 979; United States v. Manderson, 511 F.2d 179, 181 (5th Cir. 1975) (the entry did not represent what was not true or did not exist. It cannot be a crime to make an entry on the books of the bank which correctly reflects the transaction and was so intended.); but see, United States v. Hughes, 726 F.2d 170 (5th Cir. 1984).

3. Jury Instructions

The following is possible jury instructions for violations of Sec. 1005, paragraph 3:

You are instructed that the alleged false entry, or omission of an entry, must be made knowingly. United States v. Kington, 875 F.2d 1091, 1104 (5th Cir. 1989).

You are further instructed that there may be no conviction of making a false entry if the transaction, although fraudulent or deceptive, is correctly recorded on the books of the bank. United States v. Erickson, 601 F.2d 296 (7th Cir. 1979) cert. denied 444 U.S. 976.

To establish a violation of this section, the government must also prove beyond a reasonable doubt that: one, the entry is false; two, the defendant either personally made the entry or caused it to be made; three, the defendant knew the entry was false when he made it; and four, the defendant intended that the entry injure or deceive the person or entity named in the indictment. United States v. Kington, 875 F.2d 1091, 1104 (5th Cir. 1989).

You are further instructed that you must acquit the defendant if you find that he did not act deliberately and with intent to defraud in bringing about the falsification of the bank records. The statute denounced as criminal one who with intent to defraud or deceive “makes any false entry.” The word “make” has many meanings, among them “to cause to exist, appear or occur” Webster’s International Dictionary, (2nd Edition). United States v. Giles, 300 U.S. 41, 48 (1937).

You are further instructed that mere recklessness, thoughtlessness, inadvertence, or negligence on the part of the defendant is not sufficient to prove a specific intent to injure or defraud to support a finding of guilt under Section 1005. United States v. Adamson, 700 F.2d 953 (5th Cir. 1983) and United States v. McAnally, 666 F.2d 1116 (7th Cir. 1981).

You are instructed that the defendant did not make a false entry as to the true recipient of the loan if the loan was recorded as the borrower’s liability and it was in fact the borrower’s liability. United States v. Docherty, 468 F.2d 989, 992 (2nd Cir. 1972).

Finally, you are instructed that to convict under this statute of making false entries by an officer of a bank with intent to defraud, there must be an entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive the bank’s officers or to defraud the bank. United States v. Adamson, 700 F.2d 953, 968 (5th Cir. 1983) (emphasis in original).

Instruction for Section 1005, paragraph two:

You are instructed that violations of internal operating procedures, such as recording letters of credit, do not alone create offenses prosecutable in federal court. United States v. McCreight, 821 F.2d
Summary of Significant Decisions of the Courts of Appeals

by Roy E. Greenwood

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1. **PROBATION (EX POST FACTO LAW/EXTENSION OF PROBATIONARY TERMS)** — In August, 1986, A entered plea of guilty, and was assessed three years probation; in 1988, motion to revoke was filed, and A entered plea of true, with court continuing A on probation but extending terms and conditions of probation for one year, i.e. to August 1, 1989; on November 30, 1989, State filed another motion to revoke, and after a hearing, revoked and sentenced A to two years, and A contends on appeal that the trial court did not have jurisdiction to revoke probation because the motion to revoke was filed after the original discharge date of his probation under the original order, i.e. August 1, 1989 — A contends that he has been subject to an ex post facto violation, but CA holds that in December, 1988, when A's probation was modified, the law in effect at that time allowed extensions of probation, and even though trial court made no findings that A's probation violation was correct, A's entry of a plea of true was sufficient to show that A had violated the terms and conditions of probation and thus was qualified under the extension statute passed by the Texas Legislature in 1987; A also claims that this extension violated the ex post facto clause, but CA holds that the Tyler Court of Appeals' decision in Hill v. State, 673 S.W.2d 890, is persuasive, and holds that the probation period could be extended for up to ten years without a violation of ex post facto principle.

**COMMENT:** In Hill v. State, 673 S.W.2d 890, relied upon exclusively by CA herein, the Court of Appeals in Tyler in effect held that the length of probation, as opposed to the length of the punishment assessed, could, in effect, be modified at any time under the provisions of Article 42.12, Sections 2 and 3, V.A.C.C.P. A petition for discretionary review was filed in Hill, but dismissed by the CCA.

An interesting question has been posed . . . can the trial court extend the terms and conditions of probation, in effect, at will, prior to the effective date of the 1987 law which specifically gave courts the power to extend the term of probation? At the time that A originally committed the offense, at least prior to August, 1986, the Legislature had not authorized an extension of probation, and even under the 1987 law, the extension under the present law in a felony probation case can only then "not exceed one year." In the Hill case, decided in 1983, the court extended the period of probation for two years, which would even violate the present legislative mandate.

Why the CCA dismissed the PDR in Hill is unknown, but certainly a PDR should be taken in this case, to determine whether or not an extension of the term of probation, as opposed to the number of years to be assessed if the probation is violated, may be extended under the provisions of a statute which were not in effect at the date of the commission of the offense, under the general principles of ex post facto; if the probation cannot be extended under the ex post facto principle, then the CCA will have to determine whether or not Hill was decided correctly in the first place on the question of whether or not a probationary term may be extended under the general provisions of Article 42.12 as a mere "modification" of probation. Interesting question, and PDR should certainly be filed here.

<table>
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<tr>
<th>LAPIORTE, JOHN</th>
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1. **SENTENCES (CUMULATED SENTENCES)** — Where A was charged in two separate indictments, for the offenses of possession of marijuana and possession of speed, and both cases were set for trial together, and A's counsel apparently did not object to joint trial, and later A was convicted of both, trial court cumulated both sentences, A complains that this was improper since both sentences arose out of the same criminal episode and thus sentences were required to be concurrent under the provisions of Section 3.01 and 3.03, Penal Code; CA notes that the State may join several different charging instruments into a single action arising out of the same criminal episode if the State files a written notice of this action pursuant to the provisions of Section 3.02; in this case, the State did not file such written notice, and thus the provisions of Section 3.02 do not apply, and thus Chapter 3 of the Penal Code does not apply, thus the sentences may be cumulated.

**COMMENT:** It appears that the CA has been extremely hypertechnical by allowing the cumulation of sentences where the State did not file a special written notice that it sought to try both crimes arising out of the same criminal episode. There is no factual doubt that both crimes did in fact occur out of the same criminal episode. Apparently, A's counsel thought it appropriate to try both cases together, and thus did not object to the State's joining both indictments for trial; under this ruling, then, the Court of Appeals would apparently require, where the State seeks to try two indictments together, that A initially object to the joint trial even though it may be wise trial strategy to have both cases tried together. Then, upon A's objection, the State must file.
its written notice to proceed to one trial, and then if A is convicted he must be sentenced concurrently; on the other hand, if A objects to the joint trial, and the State does not file written notice, then the cases must be severed for separate trials, which of course then would lead to cumulated sentences if A is convicted on both.

It is clear to me that this attorney got "whipsawed." Both he and the State thought that the trial of both cases arising out of the same episode should be tried together, to save State's expense and the possibility of dual trials, and thus the parties did it by agreement, and the State did not then file this purported required "notice" and A got his sentences cumulated anyway. Had A objected, he probably could have forced multiple trials, at greater State's expense, but then the State could have clearly cumulated the sentences upon dual conviction anyway. It appears to me that this ruling by the court is unrealistic and illogical, and that since the record affirmatively shows that it was the State's intent to join two cases together in a single trial arising out of the same criminal episode, that A should not be punished due to the State's failure to file a single piece of paper on which the "notice" was contained or for wasting judicial resources in requiring two separate trials. PDR should be filed here!

NOTE: On original submission, 3-judge panel opinion affirmed conviction, but on A's MRH, en banc decision is rendered, for reversal.

1. CROSS-EXAMINATION IMPEACHMENT (EVIDENCE OF NYMPHOMANIA) — Where C/W initially attempted to withdraw prosecution, but was forced to testify upon trial judge's threat of contempt, and then A put on substantial amount of evidence with regard to fact that C/W had undergone numerous acts of sexual intercourse with other men, and had participated in "gang sex" activities, both before and after alleged offense, and where trial court refused to allow defense expert witness to testify as to medical diagnosis of "nymphomania", based on hypothetical questions, CA holds that this excluded evidence was relevant and material to the defense and was clearly necessary to impeach the State's sole and main witness, and thus CA holds that under the Sixth and Fourteenth Amendments and the Texas Rules of Evidence, the exclusion of such evidence denied appellant his right to confront witnesses against him and thus reversal ordered.

2. PROSECUTORIAL MISCONDUCT (SUPPRESSION OF EVIDENCE) — Where a co-defendant gave a statement to the prosecution which was not provided to the defense, wherein the statement indicated that after this alleged gang rape in which A was charged, that C/W asked witness to take her home, and then participated in other sexual activities with her, and did not wish to be taken home to her husband, CA finds that this evidence presented matched A's defense exactly, and was thus material and should have been turned over to defense, thus reversal order on this ground also.

3. JURORS (JURY MISCONDUCT) — Majority of CA also holds that where A proved, during MFNT hearing, that certain jurors had told other jurors that A was on parole, had escaped from jail, and had committed other extraneous acts, which affected the verdict of the other jurors, thus it was shown that the jurors received into evidence an exhibit that was not admitted into evidence, that this was improper jury misconduct which required reversal also.

NOTE: J. Biery concurs but Judges Butts and Peeples dissent.

NOTE: In 1984, A waived indictment, and entered plea to the charge of aggravated assault with a deadly weapon, and received a ten year probated sentence. In 1986, probation was revoked, and A was sentenced to eight years, and then A appealed, and pointed out that on appeal that the original judgment was void because the trial court could not grant probation since there was an affirmative finding of a "deadly weapon" in the case. On appeal, the court handed down an opinion reinstating an original ten year prison sentence to A, holding that the original probation was void. Even though opinion reinstating ten year sentence was handed down in July, 1987, A then apparently filed either a writ of mandamus or a writ of habeas corpus challenging the validity of the original proceeding.

1. GUILTY PLEAS (VOLUNTARINESS/VOID SENTENCES) — Where A filed some sort of action in the trial court, either mandamus or post conviction habeas corpus, and contended that the original plea was involuntary since the original plea was based on
Representing Clients Before Grand Juries—Part 3

by Edwin J. Tomko

If the prosecutor chooses not to follow the directives of the Department, the indictment will stand, and your strategy must shift to drafting motions to suppress or to preparing for trial. The presumption of regularity has been given additional strength by three recent Supreme Court decisions.

1. Mechanik in 1986

In Mechanik, the Supreme Court held that a jury verdict convicting a criminal defendant rendered as harmless any error in the indictment caused by joint testimony of two agents before the grand jury. The Court stated that the verdict of “guilty beyond a reasonable doubt” demonstrated a fortiori that there was probable cause to indict, and, therefore, the conviction must stand despite the Rule 6(d) violation.

In so deciding, the Court assumed that the appearance of two witnesses simultaneously before the grand jury was a violation of Rule 6(d). The Court stated, however, that a violation of Rule 6(d) does not require an automatic reversal of a subsequent conviction without any showing of prejudice.

The Court reserved opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury’s charging decision and was brought to the attention of the trial court before the beginning of trial.


The Court held in Bank of Nova Scotia that a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants. The district court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rules of Criminal Procedure, Rule 52(a).

Citing Mechanik, the Court stated that dismissal of an indictment is appropriate only if it is established that the violation substantially influenced the grand jury’s decision to indict or there is grave doubt that the decision to indict was free from the substantial influence of such violations.

The holding is troublesome because of the number of violations the defendant established before the District Court in this case. The District Court dismissed the indictment in order to send a clear message to the United States Attorney’s Office concerning its handling of the presentation of this case before the grand jury. The Court stated that errors of the type proven here can be remedied adequately by means other than dismissal of the indictment:

"For example, a knowing violation of Rule 6 may be punished as a contempt of court. See Fed Rule Crim. Proc. 6(e)(2). In addition, the Court may direct a prosecutor to show why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The Court may also chastise the prosecutor in a published opinion. Such remedies allow the Court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant."

3. Midland Asphalt in 1989

In Midland, a unanimous Court held that a district court order denying an accused’s motion to dismiss an indictment for violations of Rule 6(e) is not immediately appealable. Immediate appeal is available only when the lower court decisions are:

(a) separate from, and collateral to, rights asserted in the action;
(b) too important to be denied review; and
(c) too independent of the cause itself to require that the appellate jurisdiction be deferred until the whole case is adjudicated.

A key aspect to this decision is the holding that violation of Rule 6(e) does not create a right not to be tried. A right not to be tried rests upon an explicit statutory or constitutional guarantee that a trial will not occur. Only a defect so fundamental that it causes the grand jury no longer to be a grand jury or the indictment no longer to be an indictment gives rise to the constitutional right not to be tried. This holding dramatically limits direct appeal from denial or pre-
trial motions concerning grand jury practices.

The Court did provide a small degree of solace to an accused whose rights have been violated during a grand jury investigation by stating that a district court has the discretion to dismiss an indictment for violations of Rule 6(c). We can assume that the same holds true for other grand jury abuses. We must accept the reality, however, that when a lower court judge does not face the prospect of reversal for failing to dismiss an indictment, only truly egregious abuses will be remedied by dismissal.

II. State Grand Jury

Representing a client before a Texas state grand jury does not differ dramatically from representing a client before a federal grand jury. The fundamental principles and considerations are the same; the differences consist of technical procedures which are governed by statute or rule. This section will highlight some procedures in State practice that vary from federal practice.

A. Grand Jury Powers


Article 20.09 empowers a grand jury to inquire into "all offenses liable to indictment of which any person may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."

The scope of a State grand jury has been interpreted by the Fifth Circuit as "the authority to conduct their own investigations, to subpoena evidence and witnesses, to fail to return indictments sought by the district attorney, and to indict on matters as to which the district attorney has presented no evidence and sought no indictment."

A Texas grand jury can subpoena a witness from any other county in the State, or from any other state which has provisions for commanding persons in that state to attend and testify in Texas.

The statute also provides for the role of the attorney representing the State before the grand jury. A grand jury may request assistance or advice from an attorney representing the State on any matters of law or other questions respecting the proper discharge of their duties.

An attorney for the State may examine witnesses appearing before the grand jury and can advise the grand jury as to the proper mode of interrogation. Only an attorney for the State or a grand juror may question witnesses. The attorney for the State may interview a witness subpoenaed to appear before the grand jury outside the presence of the grand jury in order to prepare the witness for his appearance.

B. Who May Be Present at a State Grand Jury Session (Art. 20.02, 20.16)

Art. 20.02 requires the deliberations of the grand jury to be secret. The courts have held that "the best way to ensure that the evidence is not improperly used in the trials of persons charged with criminal offenses is to require a secrecy in the conduct of the grand jury investigation." The burden is upon the movant to establish that an unauthorized person was present and that a violation of art. 20.02 had actually occurred.

Art. 20.16 departs from federal practice. "The article requires each witness appearing before a state grand jury to take an oath of secrecy as to all proceedings occurring before the grand jury in the presence of the witness. The article provides for a $500 fine and imprisonment for up to six months for a violation. Thus, you cannot deafen State witnesses in order to shadow the investigation as you can with federal grand jury witnesses."

Texas courts have looked at the issue of simultaneous appearances by two witnesses before a grand jury and have decided much the same as the United States Supreme Court. In Minton v. State, a police officer testified before a grand jury under oath pursuant to art. 20.14. The officer remained in the grand jury room to coordinate the testimony of the witnesses while other witnesses testified. There was no evidence, however, that any unauthorized person was present during the grand jury’s deliberations. The Court held that the Texas rule is "when the juries are not deliberating or voting, the presence of persons who have official business in the jury chamber, such as police officers or stenographers, is not discountenanced." The Court suggested the better practice would dictate that only the prosecutor, reporter and testifying witness should be present, but that it would not dismiss an indictment where other people were present. Thus, we are left with a remedy that apparently is unenforceable in the courts.

C. Notice to Appear

1. Subpoena Duces Tecum

A subpoena duces tecum for a State grand jury is issued pursuant to Tex. Code Crim. Proc. Ann., art. 24.02. The subpoena duces tecum should give a reasonably accurate description of the documents requested, either by date, title, substance, subject matter, or names of the parties sending or receiving same. The papers requested must be material to the inquiry and evidence in the cause, and they must relate to a crime that was committed or to a person accused or suspected of a crime. The subpoena duces tecum must not be used as a “fishing expedition” where none of the factors identified above exist, or the breadth of the request is too broad or too indefinite.

2. Subpoena Ad Testificandum

A subpoena ad testificandum is issued pursuant to Tex. Code Crim. Proc. Ann., art. 24.01. There is nothing in the State system similar to the designation of “subject” or “target” created by the Department, and as such there are no limitations on subpoenaing a person who would be designated a “target” in the federal system. In fact, art. 20.17 provides a format for questioning a person who is a suspect or accused and who has been subpoenaed to appear before the grand jury. Art. 20.17 does require that a suspect or accused be furnished with a written copy of the warnings contained in that article. It also requires that the suspect or accused be advised of the offense he is suspected or accused of committing, the county where the alleged offense occurred, and the relative time of occurrence of the alleged offense. With this in mind, you may wish to contact the prosecutor to find out whether or not your client is considered to be a suspect or accused before an appearance before the grand jury. There are three considerations that may make early contact advisable. First, you do not want an unprepared client to be presented with these warnings. Second, you will want an opportunity to evaluate with your client before his appearance the pros and cons of invoking the privilege against self-incrimination before the grand jury. Third, you may want to avail yourself of the opportunity provided in State practice under art. 20.04 to appear be-

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III. The Wagner Case

A. The Procedural Background

In State v. Wagner, 791 S.W.2d 573 (Tex. App. — Dallas 1990, pet. granted), the defendant was charged with DWI as a result of his having been stopped at a sobriety checkpoint conducted by the Dallas Police Department (“DPD”). A motion to suppress was filed, and all the evidence was presented by affidavit as permitted by Article 28.01, § 1(6) of the Texas Code of Criminal Procedure.

Unlike prior cases, the State abandoned its subterfuge that the roadblock was conducted for the purpose of checking for driver's licenses and, for the first time, admitted that the roadblock in Wagner was for the purpose of apprehending and prosecuting persons suspected of DWI. See Meeks v. State, 692 S.W.2d 504 (Tex. Cr. App. 1985) (en banc); Webb v. State, 739 S.W.2d 802 (Tex. Cr. App. 1987) (en banc); and Higbie v. State, 780 S.W.2d 228 (Tex. Cr. App. 1989) (en banc), overruled, King v. State, 800 S.W.2d 758 (Tex. Cr. App. 1990) (en banc).

Exasperated that he had been reversed five times on such checkpoints, the trial judge asked the State to provide some “Texas authority” for such roadblocks, and when the State failed to provide any, he granted the motion. The State then filed a pre-trial appeal pursuant to Article 44.10 of the Texas Code of Criminal Procedure, raising as its sole point of error, that suppression should not have been granted because sobriety checkpoints are constitutional under the federal and state constitutions. Aside from responding to the narrow constitutional issue, Wagner replied in the Court of Appeals that the State had ignored independent state grounds for upholding the suppression order as well as issues regarding whether the particular roadblock failed to meet constitutional strictures, even if roadblocks are theoretically permissible under the federal or state constitutions.

B. No Authority of Law

So long as federal constitutional rights have not been infringed, the legality of a seizure or arrest carried out by local police officers is determined under state rather than federal law. Milton v. State, 549 S.W.2d 190, 192 (Tex. Cr. App. 1977). As a threshold issue, Wagner first argued an independent state ground — that DWI roadblocks are not authorized under Texas law. The need for legal authorization has been recognized as long ago as the first major appellate opinion regarding “general warrants,” from which our search and seizure protection emanated. Englick v. Carrington, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765). The Texas Court of Criminal Appeals has held that a search or seizure is prohibited unless carried out with “clear and unquestionable authority of law.” Hardinge v. State, 500 S.W.2d 870, 873 (Tex. Cr. App. 1975) (emphasis added); accord, Heady v. Boyd, 175 S.W.2d 214 (Tex. 1943); Austin & N.W.R.R. v. Chalk, 77 S.W.4d (Tex. 1924). In the Glucks case, the Texas supreme court stated that a court should look to the constitution, enactments of the legislature and the common law for authorization of a search or seizure, and if authority has not been granted therein, then the power does not exist; indeed, there is a strong presumption that that which has never been done cannot by law be done at all. See also Head v. State, 96 S.W.2d 981 (Tex. Cr. App. 1936) (holding that TEX. REV. CIV. STAT. ANN. art. 6701d-11 did not grant authority to weigh motor vehicles to any officer not specifically named therein.)

This “clear and unquestionable authority of law” principle, in reality, is the basis upon which the decisions of the Court of Criminal Appeals in Meeks and Webb are founded. It is widely misunderstood, but the true significance of those roadblocks having been subterfuges or dual in nature was to formulate the premise that the motorists there were stopped, at least in part, for a purpose other than the one expressly authorized by Revised Civil Statutes Article 6701d, § 13. Accordingly, in Meeks, the Court of Criminal Appeals held: “If a license check is not the sole reason for a detention, that detention is not authorized by the statute and cannot be upheld.” 692 S.W.2d at 508 (emphasis added).

Appellate courts in other states have reached the same conclusion that the legislature — “politically accountable lawmakers” — must explicitly grant authority to conduct DWI roadblocks and that such authority cannot be implied, because statutory authority granted to make a stop on one basis or for one purpose precludes authority on another basis or for another other purpose. State v. Henderson, 756 P.2d 1057, 1061-62 (Idaho 1988); Nelson v. Lane County, 743 P.2d 692, 695-97 (Ore. 1987); Commonwealth v. Tarbert, 535 A.2d 1035 (Pa. 1987). Accord, Op. Tex. Att’y Gen. No. 757 (1940) (Article 6701d-11 statutorily requires “reasonable belief” to weigh a motor vehicle; thus vehicles cannot be stopped or weighed merely upon suspicion.)

In Wagner, the Dallas Court of Appeals well understood the principle, stating: “Because a roadblock may be permissible to check for a driver's license does not mean it is permissible to check for drunk driving... Texas has no such administrative scheme. This is a task best left to the legislature.” 791 S.W.2d at 576. Thus, the Dallas court held that authorization from the legislature is required to permit the police to conduct sobriety checkpoints in Texas.

Proper legal authorization is a state-law requisite, wholly independent of the decision of the U.S. Supreme Court in the Sitz case. Nevertheless, the Sitz opinion bestows support to the Wagner holding, because the Michigan roadblocks were implemented only after the decision of, in the words of the Supreme Court, “politically accountable officials.” The constitutional balancing test enunciated in Brown v. Texas and its progeny, including Sitz, need not even be reached, because under such analysis, a court balances two competing policies; but, “policy” is made by “politically accountable officials,” and if the legisl-
ture has not acted, there is nothing for the reviewing court to balance.

The DPD instituted the Wagner roadblock without any authorization, except that of the city’s acting chief of police. By no stretch of the imagination can a police chief be considered politically accountable, especially in home rule cities (such as Dallas) having a council-manager form of government, where the city manager (an unelected municipal employee) exclusively possesses the power to hire and fire the chief. Furthermore, a police chief is an official of the executive branch of government and cannot create authority of law. One of the elements underlying constitutional search and seizure provisions is the doctrine of separation of powers; exercise of the police power by the executive branch is dependent upon involvement by the legislative or judicial branches. See *Johnson v. United States*, 333 U.S. 10, 13-14, 69 S. Ct. 367, 369 (1948) (point of the fourth amendment often misunderstood is that its protection consists in requiring inferences to be made by a neutral and detached judicial official rather than the police officer engaged in the often competitive enterprise of ferreting out crime).

C. The Guidelines Must Be Neutral

Wagner additionally attacked the guidelines under which the DPD conducted the roadblock (the DPD Guidelines) as not being “neutral.” The neutrality requirement under federal constitutional law derives from the following statement of the U.S. Supreme Court in *Brown v. Texas*, 443 U.S. 47, 51 (1979):

“[T]o this end, the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society’s legitimate interest require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware v. Prouse*, supra at 663. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-62 (1976).”

The guidelines are supposed to act as a substitute for a warrant in circum- scrib ing the scope the checkpoint and the actions and discretion of the officers in the field. *Martinez-Fuerte*, supra at 428 U.S. at 565-67, 96 S. Ct. at 3086-87. However, the DPD Guidelines could not meet the requisite test of “ neutrality,” a factor obviously considered by the Dallas Court of Appeals in light of the fact-based nature of its opinion.

The DPD Guidelines mandated that the checkpoint be placed in “a location with a minimum number of crossing streets prior to the checkpoint . . . to discourage motorists from turning to avoid the checkpoint.” In addition, two pursuit vehicles with designated drivers were provided with instructions to pursue anyone who sought to avoid the checkpoint. The Dallas Court of Appeals noted that, in carrying out the guidelines with respect to location and pursuit, the police compelled motorists to remain travelling on Greenville Avenue and pass through the roadblock, even if they had previously planned to exit Greenville Avenue by turning onto the cross street (Northwest Highway) in order to continue to their destinations on Northwest Highway. Finally, the DPD Guidelines directed the officers, at the outset, to ask of every motorist stopped the following two questions: (1) “Have you been drinking an alcoholic beverage?” and, (2) “Are you taking any medication or using drugs?”

By contrast, under the Michigan guidelines, and guidelines approved by appellate courts in other states (notably Massachusetts and Maryland), sobriety checkpoints were required to be located where motorists who wished to avoid the checkpoint could exit or make a U-turn, and those motorists could not be pursued or stopped unless they exhibited erratic driving indicative of possible intoxication. *Littles v. State*, 479 A.2d 903, 916 (Md. 1984); *Commonwealth of Massachusetts v. Trumble*, 483 N.E.2d 1102 (Mass. 1985); *Sitz v. Department of State Police*, 429 N.W.2d at 184-85. Indeed, under the Maryland guidelines, a motorist may drive through the checkpoint without even lowering his window or talking to the officers at all. These factors were specifically noted by Judge Davis of the Texas Court of Criminal Appeals in his *Higbie* concurrence as the type of guidelines that he and Judge McCormick would find acceptable. 780 S.W.2d at 244-45. Consequently, defense counsel should compare these guidelines approved in other states and point out those neutral elements that may not be contained in the guidelines under which their clients’ were stopped.

Moreover, the Maryland and Mas-
Evidence Law

Continued from page 9

longer a valid objection to expert testimony where psychologist testified as to possible effects upon minor victims of sexual assault in determining propriety of probation.

Byrum v. State, 762 S.W.2d 685 (Tex.App.—Houston [14th District] 1988, no pet.) Officer's testimony as to defendant's criminal intent embraced an ultimate issue of fact and was admissible in accordance with Rule 704. See also discussion at Rule 702, supra.

Gale v. State, 747 S.W.2d 564 (Tex.App.—Fort Worth 1988, no pet.) Trial court not required to give jury limiting instruction on circumstantial and opinion evidence embracing ultimate issue of fact, citing pre-rules caselaw.

Kirkpatrick v. State, 747 S.W.2d 833 (Tex.App.—Dallas 1987, pet. ref'd) Evidentiary rule authorizing opinion testimony that embraces ultimate issue of fact does not permit expert to testify as to veracity, i.e., tell jury whom expert considers jury should believe.

Duckett v. State, to be reported at 797 S.W.2d 906 (Tex.Crim.App. 1990) Identical holding as in Kirkpatrick, id., concerning child sexual abuse victim.

Article VIII. Hearsay

Rule 801. Definitions

Nicherson v. State, 792 S.W.2d 212 (Tex.App.—Houston [1st Dist.] 1990, pet. granted) Testimony of regional loss prevention manager of store as to content of loss and damage report was inadmissible hearsay in burglary prosecution, where State had not proved the business record exception, or any other exception to the hearsay rule. The Court of Criminal Appeals granted review to address the sufficiency of the evidence, not to address this holding.

801(d). Hearsay

Sallings v. State, 789 S.W.2d 408 (Tex.App.—Dallas 1990, pet. ref'd) Arrest warrant was not hearsay and was admissible in sexual assault prosecution for limited purpose of proving its existence, where warrant was not offered to prove truth of matter asserted.

Ali v. State, 742 S.W.2d 749 (Tex.App.—Dallas 1987, pet. ref'd) Any error in admitting improper hearsay testimony in criminal case may be cured and rendered harmless by trial court's instruction to disregard, unless the hearsay testimony is clearly calculated to inflame the minds of the jury and is of such character as to suggest impossibility of withdrawing impression on jurors' minds.

Burnett v. State, 754 S.W.2d 437 (Tex.App.—San Antonio 1988, pet. ref'd) Investigator's testimony that coconspirator accompanied officers to victim's grave site and pointed out the grave was not hearsay for purposes of Rule 801(d).

Acosola v. State, 752 S.W.2d 706 (Tex.App.—Corpus Christi 1988, pet. ref'd) Police officer's testimony concerning the average price for heroin in 1985 was not hearsay. The officer testified to manner which he had previously testified without objection. Further, the officer did not testify to any statement by others not testifying at the hearing.

801(e). Statements which are not hearsay

Statement against interest

Simon v. State, 743 S.W.2d 318 (Tex.App.—Houston [1st Dist.] 1987, pet. ref'd) Testimony admitted as admissions against interest by a party, which concerned conversations between witnesses and one of two defendants, was admissible in joint prosecution for sexual assault of a child. The trial court had clearly instructed the jury that it should consider the testimony only against the defendant against whom the testimony was obviously admissible.

801(e)(1). Prior statement by witness

Davis v. State, 773 S.W.2d 592 (Tex.App.—Eastland 1989, pet. ref'd) Where a witness who gave testimony in a prior trial now refuses to testify, his prior testimony is not admissible under 801(e)(1) because prior testimony is not inconsistent with present refusal to testify. A refusal to testify is not an inconsistent statement.

801(e)(1)(B). Prior statement by witness

Ray v. State, 764 S.W.2d 406 (Tex.App.—Houston [14th Dist.] 1988, pet. ref'd) Tape-recorded conversations between alleged accomplice who fired shots that killed victims and police operative were admissible in murder prosecution as prior statements offered to rebut charge of fabrication of improper influence or motive. The incriminating tapes were introduced to show the accomplice's statements were consistent with his incriminating testimony at trial, after impropriety was charged against defendant during cross-examination. The determination of admissibility is within the discretion of the trial court and will not be reversed unless a clear abuse of discretion is shown.

Haughton v. State, 752 S.W.2d 212 (Tex.Cr.App., No. 604-88, delivered June 20, 1990, MRH filed July 5, 1990) Rule 801(e)(1)(B) allows a prior consistent statement to be introduced if the declarant testifies and is subject to cross examination concerning the statement and the statement is consistent with his testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. This case adds the requirement that the consistent statement be made prior to the time the alleged motive existed. Here the statement was made after the motive to lie allegedly arose and thus shouldn't have been admitted.

Tucker v. State, 751 S.W.2d 919 (Tex.App.—Fort Worth 1988, pet. ref'd) Two prior out-of-court statements made by witness whom defendant solicited to kill his wife were admissible to rebut cross-examination suggesting that witness had asked for favors from district attorney's office while in jail. At the time he made the statements the witness had not been promised or given any money nor was he facing any charges. In fact he had a motive not to give the statement because the police did not know he was a parole violator at the time.

801(e)(2)(B). Admission by party-opponent (adoption)

Tucker v. State, 771 S.W.2d 525 (Tex.Cr.App. 1988) Tape-recorded conversation between defendant and codefendant, implicating defendant, was admissible as adoptive admission where defendant was present at all times during conversation and did not contradict codefendant's statements, and statements were not product of custodial interrogation. Defendant's acquiescence to statements which otherwise would have called for a response, adopted codefendant's admissions as her own.

Morton v. State, 761 S.W.2d 876 (Tex.App.—Austin 1988, pet. ref'd) Even if police investigator's statement to murder defendant's investigator was admissible as admission by agent of party-opponent, exclusion of evidence was harmless where other witnesses testified to same information.

801(e)(2)(D). Admission by party-opponent (coconspirator)

Williams v. State, 790 S.W.2d 643 (Tex.Cr.App. 1990) In order for out-of-court statement of coconspirator to be
Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

803(1). Present sense impression

& 803(3). Then existing mental, emotional, or physical condition

Mathews v. State, 765 S.W.2d 853 (Tex.App.—Beaumont 1989, pet. ref’d)

Testimony in capital murder prosecution that victim claimed to have over $40,000 in his possession prior to killing was admissible under hearsay exceptions for present sense impression [803(1)] or then existing mental, emotional, or physical conditions [803(3)]. The victim was explaining his actual financial status and condition as he related them to his state of mind as to his plan and motive to pay a dinner check.

803(1). Present sense impression

Cardenas v. State, 787 S.W.2d 160 (Tex.App.—Houston [1st Dist.], 1990, pet. ref’d)

Statement of murder victim’s son that defendant had shot victim was not admissible under “present sense impression” exception to hearsay rule where there was no evidence to show the son’s statement was made while perceiving the event or immediately thereafter. The statement was made the same day as the shooting with the aid of an interpreter in response to police interrogation.

Roberts v. State, 743 S.W.2d 708 (Tex.App.—Houston [14th Dist.], 1987, pet. ref’d)

Testimony by defense witness that defendant told police officers he did not have gun was offered for truth of matter asserted and was hearsay, not present sense impression, in aggravated assault prosecution. The statement, rather, was offered for the truth of the matter asserted, and thus was hearsay in its purest form. Roberts at 711.

803(2). Excited utterance

Kizpee v. State, 788 S.W.2d 413 (Tex.App.—Houston [1st Dist.], 1990, pet. ref’d)

Statements made while in the grip of violent emotion, excitement, or pain and which relate to exciting event are admissible under “res gestae” doctrine. Under “res gestae” the State may elicit comments regarding the facts and circumstances surrounding the criminal action. Here, the defendant’s statement that he was carrying a gun was not made in response to custodial interrogation and was relevant to the offense of carrying a weapon. The statement was thus admissible under the “res gestae” exception as the court found he made the statement “while in the grip of excitement.” Kizpee at 415.

Jones v. State, 772 S.W.2d 551 (Tex.App.—Dallas 1989, pet. ref’d)

There is no apparent time limitation to the “res gestae” exception. Here, the murder eyewitness’ statement was admissible under “res gestae” though the statement was made in response to specific questions by police officer to 45 minutes after the incident while the witness was still under the emotional effects of viewing the crime.

Lee v. State, 792 S.W.2d 590 (Tex.App.—Fort Worth 1990, pet. granted on other grounds)

Wife’s out-of-court identification of defendant as person who had shot her husband ten minutes earlier was admissible under “excited utterance” exception to hearsay rule.

803(3). Then existing mental, emotional, or physical condition

Tbitmire v. State, 789 S.W.2d 366 (Tex.App.—Beaumont 1990, pet. ref’d)

A statement made by murder victim to one of the State’s witnesses to the effect that he had gotten himself into a predicament that he couldn’t get out of was properly admitted under state of mind hearsay exception. The statement was offered not to prove the victim was in some sort of predicament from which he could not escape, but was offered to show the victim’s state of mind that he, and not the defendant, was the trapped partner in their marriage. The victim’s statement was offered for the limited purpose to show state of mind in response to prior testimony that alleged that the victim would kill the appellant if she left him.

Norton v. State, 771 S.W.2d 160 (Tex.App.—Texarkana 1989, pet. ref’d)

Murder victim’s statement that he was going to defendant’s shop was admissible for the limited purpose of showing that he intended to go to the shop to help defendant. However, because information gleaned from a telephone conversation generally constitutes hearsay, victim’s statement to his wife that defendant had called and asked him to come was a fact remembered and was specifically excluded from the state of mind exception to the hearsay rule. Admission of the statement, even with a limiting instruction, was reversible error because the evidence destroyed the possibility of a self-defense theory.

admissible under coconspirator exception to hearsay rule, the statement must be shown to have been made in the course of and in furtherance of the conspiracy, and could not merely be somehow "related to" the conspiracy. Pre-rules caselaw on this point was arguably unsettled. Since the promulgation of the rules, however, it appears that the "in furtherance" part of the predicate is a separate requirement, and that it is no longer sufficient that the statement be merely "related to" the conspiracy.

Davis v. State, 791 S.W.2d 308 (Tex.App.—Corpus Christi 1990, pet. ref’d)

Coconspirator exception to hearsay rule is not limited to prosecution for conspiracy, it is rule of evidence applicable to any offense.

Rule 802. Hearsay Rule

Rule 802 is the basic hearsay rule. Not many cases have been decided based precisely on this rule. The majority of hearsay litigation centers on the definitions, exclusions and exceptions to the hearsay rule.

Doyle v. State, 779 S.W.2d 492 (Tex.App.—Houston [1st Dist.], 1989, no pet.) 'Defendants' convictions for possession of marijuana were supported by sufficient evidence, even though necessary evidence showing defendants had control and knowledge of contraband came from out-of-court statements of anonymous tipsters. The statements were corroborated in part by subsequent events, and defendants did not object to hearsay statements' admissibility. The court treated the statements, entered without objection, as all other evidence in the sufficiency context, capable of sustaining a verdict.

Garcia v. State, 775 S.W.2d 879 (Tex.App.—San Antonio 1989, no pet.) This case demonstrates the interplay between hearsay Rule 802 and Crim. Evid. Rule 1101 which covers bail, except a hearing to deny, revoke or increase bail. In this case the hearsay rule did not apply in a habeas proceeding in which reduction of bail was sought. See further discussion under Rule 1101(c), infra.

Soto v. State, 736 S.W.2d 823 (Tex.App.—San Antonio 1987, pet. ref’d)

Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay, citing Rule 802.
Statements for purposes of medical diagnosis or treatment

Tissier v. State, 792 S.W.2d 120 (Tex.App.—Houston [1st Dist.] 1990, pet. ref'd) Testimony of child's treating physician concerning the child's statement that defendant charged with injury to child had hit him in stomach and told him not to tell anyone was admissible under hearsay exception for statements made for purpose of medical diagnosis or treatment.

Lee v. State, 779 S.W.2d 913 (Tex.App.—Houston [1st Dist.] 1989, pet. ref'd) Comments made by the prosecutor relating to excluded statements did not require a mistrial where the trial court sustained defense counsel's objection to the comments and instructed the jury to disregard, and error was cured when the same evidence was later admitted without objection. The excluded statements referred to comments made by a child complainant in an aggravated sexual assault case to the examining physician to the effect that she had a "feeling" to go to defendant's apartment.

Recorded recollection

Phea v. State, 767 S.W.2d 263 (Tex.App.—Amarillo 1989, pet. ref'd) Eyewitness' statements were not untrustworthy on the basis that eyewitness had suffered nervous breakdown and was under the care of a psychiatrist at the time the statements were given. The statements were thus admissible under past recollection recorded. The eyewitness testified that she recalled giving the statements, that the information contained therein was true at the time the statements were given and that she recognized her signature on the statements. Further the agent taking the statements testified that the eyewitness displayed no unusual behavior indicating that her capacity to give statements might be impaired.

Records of regularly conducted activity

Crane v. State, 786 S.W.2d 338 (Tex.Cr.App. 1990) Transcript of tape recordings of prisoner's calls from jail was not admissible under business records exception where taping of conversations was discretionary rather than regularly conducted activity. The information constituted self-serving hearsay that defendant suffered from blackouts. Self-serving hearsay statements offered by defendant as original evidence did not possess fundamental trustworthiness as contemplated by business records exception. The Court also noted that the transcript would be inadmissible under the public record exception, R. 803(6). Crane at 353, n.5.

Hinojosa v. State, 788 S.W.2d 594 (Tex.App.—Corpus Christi 1990, pet. ref'd) A citation and receipt were not admissible through the witness as business records to show that the defendant had not fled as alleged by the State. The proper predicate for business records exception must be established before such evidence is admissible. Here, there was no testimony that the witness had prepared the document or that he was custodian of the document.

Strickland v. State, 784 S.W.2d 549 (Tex.App.—Texarkana 1990, pet. ref'd) The proper predicate to admissibility of business records was met by evidence that the witness had a bachelor of science degree in chemistry and was supervisor of chemist who performed laboratory analysis on marijuana in narcotics prosecution, that standard procedures were followed in analyzing the substance. Further testimony established that the report was made by a person with personal knowledge of what the report contained, and that the report was made in the regular course of business. NOTE: Admission of records of tests performed by DPS labs are NO LONGER admissible in fact situations like Strickland. See Cole, infra. Strickland is still good law for non-law enforcement employees at non-law enforcement labs.

Cole v. State, S.W.2d ___ (Tex.Cr.App. No. 1179-87, delivered November 14, 1990, MRH filed November 30, 1990) The Court of Criminal Appeals granted review to determine whether the court of appeals erred in holding that the trial court correctly admitted hearsay evidence concerning the results of chemical tests performed by an absent DPS chemist pursuant to Rule 803(6). The Court found reversible error and remanded the cause for a harm analysis. The Court followed a two-step analysis in deciding the issue based on the facts of this case. First, the Court, following federal caselaw, determined that this report was not admissible under the public records exception of Rule 803(8)(B). Thus, the initial test is to determine whether the report in issue falls within the ambit of Rule 803(8). The Court found the chemist performing the test met the definition of "law enforcement personnel" under the rule, and therefore this report qualifies as an 803(8) matter.

Further the Court found that "the reports were not prepared for purposes independent of specific litigation, nor were they ministerial, objective observations of an unambiguous factual nature." Cole, slip op. at 9. Second, the Court recognized that the report admittedly falls within the 803(6) business records exception, but disallowed the use of Rule 803(6) as an alternative route to admit otherwise inadmissible hearsay evidence. The underlying principle is based on Congressional intent in formulating the federal rules and this Court's intent in promulgating the criminal evidentiary rules. In a situation in which 803(8) and 803(6) could conceivably both apply, 803(8) takes precedence because a contrary result would in effect vitiate the policy considerations of 803(8). NOTE: The report alone is not admissible under any circumstances under 803(8). Rule 803(8) requires the person who performed the test contained in the report to testify in order for the test results to come in. Under Rule 803(6), however, the report can be admissible, and the key to admissibility is the testifying witness. The rule does not require the specific person who made the report to testify, but does require someone with personal knowledge of its trustworthiness, such as a records custodian or other qualified witness. NOTE: In dicta there are broad pronouncements that since our rules of evidence are patterned after the federal rules, federal cases should be consulted for the meaning of those rules unless the Texas rule clearly departs in language from its federal counterpart. NOTE ALSO: In West's Federal Criminal Code and Rules, beginning at page 209, there are extensive notes of the advisory committee following each rule of federal evidence. These notes were before the Court of Criminal Appeals when it promulgated the Texas rules and may also be consulted when the Texas and Federal Rule are identically worded (as is often the case).

Records of regularly conducted activity

pet. ref'd). State did not have to give notice when introducing doctor's medical records into evidence as provided by the rule, where the State laid the predicate for the documents to be admissible by introducing the documents through the testimony of the doctor.

803(8)(C). Public records and reports

*Cowan v. State,* 787 S.W.2d 200 (Tex.App.—Amarillo 1990, pet. granted)
The court of appeals required a predicate to be established prior to the admissibility of hearsay evidence under the public records and reports exception. The Court of Criminal Appeals granted appellant's petition for discretionary review to decide specifically whether the trial court erred in excluding the exhibit relating to public records and reports. An important question underlying this ground for review is whether Rule 803(8)(C) requires that a predicate be set for admissibility.

*See also* discussion of Cole under 803(6), supra.

803(15). Statements in documents affecting an interest in property

*Madden v. State,* ___ S.W.2d ___ (Tex.Cr.App. No. 69, 625, delivered September 12, 1990, MRH denied November 28, 1990) The State introduced a handwritten list of serial numbers and guns, made out by the deceased and appearing to be a record for use in the event of loss or theft. One of the guns with a corresponding serial number was traced to the defendant. The Court of Criminal Appeals held that the list was hearsay but was admissible under Rule 803(15), which allows a statement in a document that establishes or affects an interest in property if the statement is relevant to the purpose of the document. Though Rule 803(15) usually applies to more formal documents, like a mortgage, all the prerequisites of the rule were met here and admission to prove the defendant had possessed a gun stolen from the deceased at the time of the murder was proper. NOTE: This case was tried pre-rules so the Court applied the civil rules applicable at time of trial. The Court noted that the list at issue "bears more than an adequate indicia of reliability," and that the document was properly authenticated by the victim's ex-wife. Note also that the outcome would likely be the same under the new criminal rules.

803(18). Learned treatises

*Zwack v. State,* 757 S.W.2d 66 (Tex.App.—Houston [14th Dist.] 1988, pet. ref'd) Learned treatises are to be used only in conjunction with testimony by expert witness, either on direct or cross-examination, even though authority of publication is otherwise established. Thus, court did not err in refusing to permit defendant to read portions of textbook of psychiatry to jury after State had rested, in connection with defendant's insanity defense, even though State's experts were familiar with the book and recognized it as authoritative in the field of psychiatry.

803(24). Statement against interest

*Fitzpatrick v. State,* 782 S.W.2d 1 (Tex.App.—Houston [14th Dist.] 1989, pet. ref'd)
Testimony of inmate witnesses that the defendant admitted the charged shooting in the course of armed robbery was sufficiently corroborated to permit defendant's statement to be admissible as statement against interest. The statement was corroborated by two other witnesses, one witness identified the defendant as the man she saw running out of the store and around the corner shortly before shooting, and another witness identified the getaway car as belonging to the defendant. Also at issue was the fact that one of the inmate witnesses was untruthful in testimony before grand jury regarding his prior convictions, but the court found his testimony at trial to go to the weight, not admissibility.

*Davis v. State,* 772 S.W.2d 563 (Tex.App.—Waco 1989, no pet.) Defendant's accomplice upon arrest made a statement clearly against his pecuniary or proprietary interest as defined by Rule 803(24). The State offered the statement against interest at trial and it was admitted by the trial court. The Court of Appeals cites *Ohio v. Roberts,* 448 U.S. 56 (1980) for the proposition that admissibility of such a statement must satisfy the requirements of the 6th Amendment federal constitutional confrontation clause. Under *Roberts,* the confrontation clause requires a showing of unavailability of the witness. In addition, the statement must bear adequate "indicia of reliability." Further, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception." *Roberts,* 448 U.S. 66. In the *Davis* case, the inference of reliability is clearly established once the statement falls within the declaration against interest exception. There also exists independent evidence of reliability. However, the appellate court found nothing in the record to support the prerequisite of unavailability (even though the rule itself does not so require). The court noted that the State has the burden of showing unavailability or that it made a good faith effort to produce declarant. NOTE: This case is significant because it serves as a reminder that the rules of evidence must pass constitutional muster to operate effectively.

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

Unavailability in general

*Otero-Miranda v. State,* 746 S.W.2d 352 (Tex.App.—Amarillo 1988, pet. ref'd as untimely filed) Proponent of former

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Bank Fraud
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E. False Statement Statute
18 U.S.C. Sec. 1014 states:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Land Insurance Corporation, Farmers’ Home Corporation, the Secretary of Agriculture acting through the Farmers’ Home Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Federal Credit System Insurance Corporation, or the National Credit Union Administration Board, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of the same, by renewal, defacement of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both.

The previous statute in effect before August 9th, 1989, had a maximum fine of $5,000 and a penalty range of not more than two (2) years.

1. Elements

The government must prove each element beyond a reasonable doubt:

1) That the named institution was federally insured;
2) That the defendant made a false statement to the named institution knowing it was false; and
3) That he did so for the purpose of influencing the bank’s action.

The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute ‘a scheme or artifice to defraud’ or to take the property of another ‘by means of false or fraudulent pretenses, or uttering such checks to the bank was not a factual assertion and cannot be characterized as true or false; therefore, petitioner’s conduct in depositing in banks checks that were not supported by sufficient funds did not involve making a false statement. Id. at 3091 and 3092.

F. Bank Fraud Statute
18 U.S.C. Sec. 1344 states:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
1) to defraud a financial institution; or
2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both.

Prior to FIRREA the statute designated the maximum fine as $10,000 and the maximum term of imprisonment as 5 years.

1. Elements

The elements of Sec. 1344 include:

1) That defendant participated in a scheme to defraud knowingly, willfully and with intent to defraud;
2) a federally chartered or insured financial institution. United States v. Bonnett, 877 F.2d 1450 (10th Cir. 1989).

2. Authorities and Discussion

As a result of the blow from the Supreme Court in United States v. Williams, supra by holding that check kiting cases could not be prosecuted under Sec. 1014, and other perceived limitations of existing federal fraud statutes, Congress enacted Section 1344 in 1984. This new bank fraud statute was patterned after the mail and wire fraud statutes (18 U.S.C. Secs. 1341 and 1343). Therefore, any questions of construction of Sec. 1344 can be analyzed by comparison with the mail and wire fraud statutes. The legislative commentary sets forth:

The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute ‘a scheme or artifice to defraud’ or to take the property of another ‘by means of false or fraudulent pretenses,
representations, or promises."
In a prosecution under Sec. 1344, the Government is not required to show that the financial institution incurred a loss, that the intended victim of fraud was actually defrauded, or that the defendant personally benefited from the scheme in order to prove a scheme to defraud. United States v. Goldblatt, 813 F.2d 619 (3rd Cir. 1987).
3. Scheme or Artifice
The terms "scheme" and "artifice" have recently been defined by the U.S. Fifth Circuit Court of Appeals as including among other things "any fraudulent pretenses or misrepresentations intended to deceive others to obtain something of value, such as money from the institution to be deceived." United States v. McClelland, 868 F.2d 704 (5th Cir. 1989). Further, the U.S. Fifth Circuit Court of Appeals states in United States v. Church, 888 F.2d 20 (5th Cir. 1989) that:
"We are reluctant, however to cabin the reach of the bank fraud statute by our view of the implausibility of a particular scheme to defraud. The essence of fraud is that its perpetrator has persuaded his victim to believe, beyond the dictates of reason or prudence, what is not so. That a particular scheme is impracticable, or ultimately unsuccessful, is not necessarily inconsistent with its being fraudulent.
G. Bank Robbery
18 U.S.C. 2113(a) states in part:
"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny
 ....
 Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
1. Elements
The following elements must be established:
1) That the defendant entered or attempted to enter;
2) a covered institution;
3) With the intent to commit in such institution;
4) any felony affecting such institution or any larceny;
5) and in violation of any statute of the United States.
18 U.S.C. Sec. 2113(a) (paragraph two).
2. Authorities and Discussion
The maximum sentence for a conviction under Sec. 2113(a) is 20 years. It is for this reason that a typical bank fraud prosecution is sometimes enhanced with counts alleging violations of Sec. 2113(a). See, e.g., United States v. Shlad, 730 F.2d 225 (5th Cir. 1984) cert. denied 469 U.S. 844. As was done in Shlad, to add 20 years to the potential punishment in any case prosecuted under Secs. 215, 656, 1005, 1014 or 1344, the prosecutor will only need to prove that the defendant entered the institution with the intent to commit a felony therein.
III. Evidentiary Issues
A. The Use of Violations of Civil Bank Regulations and Bank Policies and Procedures to Prove an Intent to Defraud
It has become an increasing trend by the government to introduce civil statutes which the defendant allegedly violated. Their theory is that this is evidence establishing an intent to defraud by the defendant.
In United States v. Christo, 614 F.2d 486 (5th Cir. 1980), the Fifth Circuit studied whether defendant's violations of 12 U.S.C. Sec. 375a (a civil regulatory banking statute which prohibits a bank from extending credit in excess of $5,000 to one of its executive officers) was admissible. Judge Garza held:
"as long as the essential elements of criminal misapplication under sec. 656 are pled and proven regarding the defendant's acts, it simply does not matter that the same acts might violate the regulatory prohibitions of sec. 375a. Keeping this fundamental premise in mind, we now find it necessary to add that the inclusion of sec. 375a violations in this case were legally irrelevant and we have no choice but to hold that the instructions, indeed the whole tenor of the trial, were plain error and will require reversal."
A conviction, resulting from the government's attempt to bootstrap a series of checking account overdrafts, a civil regulatory violation, into an equal amount of misapplication felonies, cannot be allowed to stand. The government's evidence and argument concerning violations of sec. 375a impermissibly injected the very purpose for which the trial was being conducted to determine whether Christo willfully misapplied bank funds with an intent to injure and defraud the bank, not whether Christo violated a regulatory statute prohibiting the bank from extending him credit in excess of $5,000. Id. at 492 (emphasis added).
The court reasoned that the jury instructions, evidence and argument at trial concerning Section 375a served to compound the error by improperly focusing the jury's attention on Section 375a. Judge Garza seriously wondered whether Christo was found guilty of willful misapplication or whether he was given eighteen concurrent 5-year sentences for overdrafting his checking account. Id.
It appears that this case was reversed mainly because the government's theory of misapplication of bank funds centered upon violation of Sec. 375a. The indictment and the government's case at trial contended that each overdraft in excess of $5,000 amounted to a violation of Sec. 375a and that these civil violations constituted a criminal misapplication of bank funds under Sec. 656. Additionally, the jury instructions followed this theory. Indeed, Christo's first argument on appeal was that "an indictment may not charge nor the government prove violations of a civil regulatory statute as the sole basis for alleged criminal misapplications of bank funds." Id. at 489.
Six years after Christo was decided, the Eleventh Circuit addressed whether or not evidence concerning violations of 12 U.S.C.A. Sec. 84 (governing lending limits of banks) was admissible. United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986) cert. denied, 479 U.S. 855 (1986). The defendants relied upon Christo in their appeal. The Court in Stefan, in upholding the conviction, recognized that Christo forbid the introduction of "civil banking statute violations solely for the purpose of proving criminal misapplication; however it does not hold that such evidence can never be introduced in a criminal misapplication case." Id. at 1098 (emphasis added). The judge stated
If the evidence of civil violations is introduced for purposes other than to show criminal misapplication and the evidence is not presented in such a way
that the jury's attention is focused on the civil violations rather than the criminal ones, there is no error.  
Id. (emphasis added).

The government argued that it would have been almost impossible for the jury to understand the case without reference to Section 84. The government established that one reason Stefan dealt with straw borrowers was to avoid the limitation of Section 84. Based upon this argument, the court held that "pertinent evidence would be lost in this and other cases if we imposed a blanket prohibition against proof relating to infractions of civil banking statutes in criminal misapplication cases." Id.

Finally, the court in Stefan ruled that the following jury instruction was proper:

You have heard reference at various times during the trial to title 12 U.S.C. Sec. 84, the civil lending limit statute. It is a civil statute or regulation which limits the amount that a federally regulated bank may lend to a borrower or related group of borrowers. Therefore, in violations of Section 84 a loan should not be considered by you as violations of the criminal law. You may consider, however, evidence of or violations of Section 84 as you would any other evidence in determining whether or not the defendants had the required intent to violate the criminal laws charged in this indictment.

Id. at 1099.

John K. Villa in Banking Crimes, Sec. 3.02[4][b](1989) stated that the distinction between Christo and Stefan was that the prosecution in Stefan did not suggest that the banking regulation supplied an element of the standard of conduct which would define the prohibited activity.

One year later, the Ninth Circuit compared the holdings in Christo and Stefan with the facts in its case. In United States v. Wolf, 820 F.2d 1499 (9th Cir. 1987) cert. denied ___ U.S. ___ 108 S.Ct. 1222 (1988) the court first addressed the issue of whether or not evidence of state bank lending limits was admissible. In holding that such evidence did not impermissibly taint defendant's prosecution, the court stated that it was clear throughout the trial that Wolf was not being tried for violating the lending limits. Further, the focus was on whether certain loans were made under a false record. The government charged and proved that Wolf concealed the identity of the true borrower of the bank's funds, and in doing so committed both misapplication and false entry. As in Stefan, violation of lending limits was not directly or indirectly an element of any of the charges. Lending limits provided background information bearing on motive and intent. The court properly made this clear in its jury instructions by describing the civil violations as background only.

Id. at 1505 (emphasis added).

Of paramount importance is the court's reasoning and holding in regard to references of violations of Regulation O (which requires approval of a majority of the board of directors to approve loans made to bank officers or executives or to businesses that they control). In holding that references to Reg. O could not be dismissed as simply background information, the court asserted that the references to Regulation O were a key part of the government's case on the misapplication and false entry counts. With regard to each of these counts, the indictment charged that Wolf committed a criminal act in part because the loan applications failed to disclose Wolf's connection with First Northwest, the ultimate beneficiary of the loans. However, neither Sec. 656 nor Sec. 1005 requires a loan applicant to reveal any particular information. The government points out that one can commit misapplication and false entry by failing to disclose a material fact on a bank document. Krepps, 605 F.2d at 109. This response begs the question whether Wolf's connection with First Northwest was a material fact for purposes of the loan applications. The loan applications themselves did not ask for such information; neither does any criminal statute. Cf. United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987) (defendant could not be convicted of conspiracy to defraud the United States simply because during certain bank transactions he concealed information that no statute required him to disclose); United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) (same).

Id. at 1505 (emphasis added).

The government asserted that the misapplication and false entry statutes were violated because defendant failed to disclose his connection with the ultimate beneficiary of the loan. Through expert witnesses, the government established that Regulation O imposed a duty on defendant to inform the bank's directors that he had an interest in the loans; the failure to make this disclosure was an important part of the government's theory. "In sum, the government used Regulation O to supply a crucial element of the misapplication and false entry charges." Id. The court noted that the government did not need to rely upon Regulation O because "the evidence that each loan application misidentified the true borrower would have been enough to sustain the convictions for misapplication and false entry." Id. at 1505, note 1 (emphasis added). The court, in reversing, ruled that the continued interjection of Regulation O evidence "created a serious risk that the jury would find Wolf guilty of criminal misapplication and false entry because he failed to comply with Regulation O." Id.

This holding has far reaching implications in that it can be paralleled with any violation of bank statutes, bank regulations, or civil statutes, the introduction of which would tend to prove any element of the crime being tried, specifically, intent to defraud.

The effect of the holding announced in Christo and Wolf keeps the jury from being improperly prejudiced. To permit the introduction of evidence that the acts in question constituted civil violations would have an unduly prejudicial impact on the jury. This is true because "Not every regulatory violation, even those which are intentional and which personally benefit the banker involved, can be said to injure or defraud the bank... If the acts reflect dishonesty, corruption, or breach of fiduciary duty, then the government should be able to explain those concepts without regard to regulatory violations." John K. Villa, Banking Crimes, sec. 3.02[4][b](1989). For example, if failure to book a letter of credit represents a dishonest act, then the government should be able to establish how it is dishonest without reference to the regulatory statute which requires it to be booked.

It is recognized that the courts are more liberal in permitting evidence regarding conformity with or violation of the bank's own policies, because the prejudicial impact on the jury is less severe. This stems from the basic premise that maladministration of a bank is not a crime, United States v.
Britton, 107 U.S. 655, 667 (1882) and that the purpose of the injure or defraud element is "to avoid making a felony out of every unauthorized bank transaction." United States v. Angelos, 763 F.2d 859, 861 (7th Cir. 1985).

The Fifth Circuit has followed the reasoning of the United States Supreme Court in Britton in holding that "McCright's many violations of the bank's internal operating procedures do not alone create offenses prosecutable in federal court." United States v. McCright, 821 F.2d 226, 229 (5th Cir. 1987). However, evidence of violations of the bank policies and procedures which are intended to protect the bank's pecuniary interest are, however, usually admitted as relevant to the issue of intent. United States v. D.W. Clark, 765 F.2d 297, 303 (2nd Cir. 1985); United States v. Mobr, 728 F.2d 1132 (8th Cir. 1984) cert. denied 469 U.S. 843 (1984); and United States v. Duncan, 598 F.2d 839, 863 (4th Cir. 1979) cert. denied 444 U.S. 871 (1979).

Therefore, only admissible are bank policies and procedures which were implemented to protect the bank's pecuniary interest. For the most part, evidence of violations of civil banking regulations are not admissible because of their prejudicial effect, especially if the banking regulation tends to prove an element of the crime on trial.

B. Prosecutorial Use of FRE 404(b) Evidence and FRE 403 Objections

Rule 404(b) of the Federal Rules of Evidence ("FRE") states:

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prosecutors have widely used this rule in bank fraud cases to get into evidence other bad acts of the defendant on the theory that it establishes defendant's intent to defraud the bank. For a recent discussion of the application of Rule 404(b), see United States v. Johnson, 872 F.2d 612, 624 (5th Cir. 1989).

In a recent trial in the Austin division of the Western District of Texas, the judge allowed into evidence the fact that the defendant, former chief execu-

tive officer of the bank, was taking the profits from the bank vending machine. United States v. Johnson, Cause No. A-88-CR-104 (W.D. Tex — Austin 1988). Whether or not the defendant took money from the vending machines was not in any way related to the charges in the indictment. The indictment charged that the defendant misappropriated funds of the bank by receiving a fee from the contractor on the new bank building.

Id. The main contested issue was whether the defendant had the requisite intent to defraud the bank. The judge apparently determined that the fact that the defendant took money from the vending machines with the same particular state of mind as that needed in the charged crimes, then admission of this evidence would tend to prove that the defendant had the same state of mind during commission of the charged acts.

The Fifth Circuit has determined that the most important factor in admission of 404(b) evidence is whether the two acts require the same state of mind. United States v. McBarnon, 592 F.2d 871, 873-74 (5th Cir. 1979) and United States v. Guerrero, 650 F.2d 728 (5th Cir. 1981).

This is true because the ultimate question is whether the defendant had a particular state of mind at the time of the actus reus alleged in the pleading; therefore, any extraneous act tending to establish the same state of mind would be relevant. There is substantial authority that the uncharged act is insufficiently similar unless it entails the same state of mind. United States v. Lemaire, 712 F.2d 944 (5th Cir. 1983) cert. denied 464 U.S. 1012 (1983); United States v. Shavers, 615 F.2d 266, 271 (5th Cir. 1980); and United States v. Wyatt, 762 F.2d 908, 910 (11th Cir. 1985) cert. denied 475 U.S. 1047 (1986). Thus, in any fraud crime, such as those detailed herein, the only misconduct admissible to prove intent to defraud would be other acts evidencing this intent. United States v. Mitchell, 666 F.2d 1385 (11th Cir. 1982) cert. denied 475 U.S. 1124 (1982).

The best argument against admission of this evidence, assuming it can be conclusively proven that the defendant committed the extraneous events, is its prejudicial effect substantially outweighs its probative value. See FRE 403.

FRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The task for the court in its ascertainment of probative value and unfair prejudice under Rule 403 calls for a common sense assessment of all the circumstances surrounding the extrinsic offense. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc) cert. denied 440 U.S. 920 (1979).

The first consideration would be the nature of the extrinsic evidence and the effect it will have upon a jury.

In addition to the highly prejudicial effect of certain 404(b) evidence, it has recently been determined that there is great popular hostility to certain crimes, one being embezzlement, that prompts jurors to return a verdict on an improper basis. See, Kalven and Zeisel, The American Jury 397 (1966) and Sin, People (Feb. 10, 1986) at 108.

The second consideration of the prejudicial effect of misconduct evidence, the first being the potentially poisonous nature of the uncharged misconduct evidence, is the similarity between the charged and uncharged acts. See Comment, Developments in Evidence of Other Crimes, 7 J.L Ref 555, 544 (1974) and Sharpe, Balancing in the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 Notre Dame Law (1984).

The more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant. United States v. Beechum, supra at 915 n. 20. The likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime increases with the increasing likeness of the offenses. Id. In these instances, it is human nature to succumb to the "he did it before syndrome" and improperly decide the defendant's fate on his character for being "once a thief, always a thief" which is the very inference forbidden by the first sentence of Rule 404(b). See Gold, Limiting Judicial Discretion To Exclude Prejudicial Evidence, 18 UCDL Rev. 59, 68, 80 (1984) and Note, Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant-Witness, 45 Albany L. Rev. 1099, 1104 (1981).

In a trial for substantive offenses, the government introduced evidence of the defendant's prior conviction of con-
sporadic to commit the substantive offenses. *United States v. Nichols*, 781 F.2d 483 (5th Cir. 1986). On appeal, the Fifth Circuit court held that the admission of the conviction was error. The court reasoned that the conviction "told the jury that [the defendant] had been found guilty of conspiring to commit the very crimes for which he was then on trial." *Id.* at 485. The court characterized the evidence as "highly prejudicial." *Id.*

*Beeneem* requires the court to determine whether the evidence's prejudicial effect "substantially" outweighs its probative value "in view of the availability of other means of proof" and other facts appropriate for making these decisions under Rule 403. *Id.* at 914. Therefore, a defendant should argue that the Government has other less prejudicial ways to establish an intent to defraud.

The Government will generally seek to admit "prior bad acts" of the defendant on the theory that they are "relevant" on the issue of intent to defraud or are relevant to explain the conspiracy, etc. More likely, the Government's true motive is to attack the character of the defendant. See *United States v. Hays*, 872 F.2d 582 (5th Cir. 1989).

District Courts tend to admit such evidence as the Court's decision will not be disturbed on appeal absent a substantial abuse of discretion. *United States v. Brown*, 692 F.2d 345, 349 (5th Cir. 1982).

It is rare to find a reversal on the FED. R. EVID. 401 (Relevancy) and 403 (Prejudice Outweighs Relevancy). Such a reversal occurred in *United States v. Hays*, supra. Even so, the Court in *Hays* acknowledged that if the case had not involved eleven witnesses who testified about unscrupulous acts of the defendant having nothing to do with charges for which the defendant was on trial, and which took up 200 pages in the appellate record, the case probably would not have been reversed. *Hays* at 588.

**C. Diminishment of Fifth Amendment Rights**

A problem which is frequently being raised, and will more frequently be raised since passage of FIRREA, is inadmissible by the defendant of his Fifth Amendment privilege against self-incrimination. A bank fraud indictment is usually followed by several years of civil litigation concerning the same facts. Therefore, the government has volumes and volumes of trial transcript setting forth the alleged scheme, including the defendant's trial testimony and his depositions. If the defendant elects not to take the stand in his criminal trial, the government simply introduces the defendant's statements made in the civil trials and in the depositions. This move has the effect of circumventing the defendant's right to not take the stand and be a witness against himself. Unfortunately, the great weight of authority holds that this evidence is admissible. See, *United States v. Ballard*, 779 F.2d 287, 291 (5th Cir. 1986) cert. denied 475 U.S. 1109 (1985) and cases cited therein.

It is imperative that attorneys counsel their clients to be more liberal in asserting their Fifth Amendment rights in civil litigation. Failing this can subject the attorney to a possible, and very likely, malpractice action.

**Evidence Law**

*Continued from page 25*

testimony of witness who cannot be subpoenaed or is otherwise unavailable must demonstrate good faith efforts prior to trial to locate and present witness. Here defendant failed to establish other reasonable means undertaken prior to trial to secure presence of witnesses who could not be subpoenaed because of their foreign residency and nationality.

804(a)(2). Definition of unavailability
& 804(b)(1). Hearsay exceptions: Former testimony

*Davis v. State*, 773 S.W.2d 592 (Tex.App.—Eastland 1989, pet. ref'd) While evidence of inconsistent prior out-of-court statement may be introduced to attack credibility of witness, such statement must be proved by competent evidence. In this case a letter was sought to be introduced as evidence of an out-of-court statement about an earlier out-of-court statement made by the coconspirator to the DA. The court of appeals ruled that though the statement could have been proven up by a letter from the coconspirator to the DA, or by the DA himself, this method of proof (letter admitting a previous admission) was insufficient.

**Article XI. Miscellaneous Provisions**

**Rule 1101. Applicability of Rules**

The overall effect of Rule 1101 is consistent with prior Texas law as to when formal rules of evidence apply in various aspects of the criminal process. It does not extend formal rules to any area where they were traditionally not followed, nor does it remove them from any area where they previously operated. 18 St. Mary's L.J. 1165 1196-1197 (1987), as quoted in

*Garcia v. State*, 775 S.W.2d 879
This case demonstrates the interplay between hearsay Rule 802 and Crim.Evid. Rule 1101 (situations where the rules are inapplicable). One such situation is a proceeding regarding bail, except hearings to deny, revoke or increase bail. In this case the hearsay rule did not apply in a habeas proceeding in which reduction of bail was sought since neither a denial, revocation or increase of bail is sought. However, 1101(c) did not carve out an exception for habeas corpus hearings where the issues are probable cause to believe an offense was committed and that the defendant committed it. Same is not a detention hearing under 1101(c)(3)(D), or a probable cause to arrest or search hearing under 1101(c)(3)(D)."

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In and Around Texas
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would be eligible for parole consideration.

Several bills related to sex crimes passed; most notable were Senator Zaffirini's SB 259 creating a sexual offender registration program ("Round up the usual suspects."); in which final form is limited to persons on probation or parole and under age 21; SB 821 by Ellis (companion HB 263 by Danburg) eliminates the spousal exemption from prosecution for sexual assault; HB 861 by Van de Putte, et al, requires law enforcement to pay costs of a doctor's appearance for the state in sexual assault cases; and SB 177 by Brown requires the use of a sexual offense examination kit for collection and preservation of evidence in sexual assault cases.

Also, there were family violence bills; one was SB 275 by Johnson, which creates a battered person syndrome defense and a related joint resolution, SCR 26, which will cause review of cases of inmates who may have had the battered person defense but were unable to raise it at trial.

During every legislative session many bills are filed that don't do much except make voters and victims' rights advocates feel good but, in general, don't help the criminal justice system very much. Most die, but some don't. One "feel good" bill was HB 520 by Gallego, which requires courts to permit a victim or close relative of a victim "to present to the court a statement of the person's views about the offense . . . " and its effects. The statement must be made after punishment has been assessed. Finally, a few miscellaneous bills, which include HB 1459 by Colbert, which allows for application of an affirmative finding of a deadly weapon to a party who had knowledge that a weapon would be used in commission of the offense. SB 883 by Montford allows a peace officer who has charged a defendant with a Class C misdemeanor, other than public intoxication, to issue a citation with notice of time and place that the person must appear before a magistrate. SB 1407 by Lyon codifies the victims' rights amendment that passed the 71st Legislature and was adopted by the voters last year. The Act includes provisions for victim restitution.

Bottom line for the 72nd Legislature: the Republic (Texas that is) remains intact, although precariously. Don't ask about the federal republic — Rehnquish continues as we celebrate the 200th anniversary of the Bill of Rights.

We will include additional bills that passed in the next issue of the Voice.

The "Habern Hole!"

Bill Habern, TCDLA Director and corrections expert, testified during the Ritz trial, and one of the problems he pointed out was the poor to nonexistent confidential communications between inmates in TDC (Institutional Division now) and their attorneys. As a result of Habern's testimony the court ordered that mail slots be provided by the system between the lawyer and the inmate to allow lawyers to give legal documents to their clients. Well, it seems that while on a visit to a client at Beto I, Habern discovered the mail slot, ironically named for him, was a fake — blocked with a steel plate. Complaints were duly filed with TDC and the Attorney General. Neither rain, nor snow, nor dark of night . . . , or is it, "Me no Alamo?"

Right Stuff

Although SB 275 passed and codifies a battered person syndrome defense — i.e., .* expert testimony regarding . . . the mind of the defendant . . . including those relevant facts and circumstances relating to family violence . . . "; TCDLA Director Bill Bratton of Dallas was able to obtain a "not guilty" verdict for his client who was accused of shooting and killing her husband while he was taking a shower. Bratton used the battered person concept based on verbal and emotional abuse of his client without mentioning the defense by name. The expert witness for the defense was Dr. Jim Grigson, who testified that the defendant believed she was in immediate danger from her husband. Bratton's two-word verdict for his client was reported in NOT GUILTY, a newsletter for criminal defense lawyers edited by Attorney Michael J. McGreevy, Sioux Falls, South Dakota.

Membership

At the time you receive this issue of the Voice, TCDLA's annual membership drive will have already begun. New members who sign during and after the Rusty Duncan Advanced Short Course (27-29 June) will remain members in good standing through December 1992. This, in addition to the other benefits TCDLA offers its members, is an added incentive to join now. Every member get a member. Semper fi.
a plea bargain for probation, which was held to be a void plea bargain, CA holds that under Ex Parte Austin, 746 S.W.2d 226, the plea herein was rendered involuntary, thus entire conviction set aside.

JOHNSON, THOMAS
#5-89-01433-CR
No. 5
State's
Dallas
Appeal
Dismissed

1. APPEALS (STATE'S APPEAL/DUAL JEOPARDY) — Where A filed motion to suppress, and then informed trial court that he was going to proceed on a trial before a court, without a jury, and trial court then indicated that they would proceed on with a motion to suppress directly into the trial before the court, and A entered plea of not guilty, and formally waived jury, and then trial court granted motion to suppress, and State appealed, CA holds that determination of when jeopardy attaches is sometimes difficult in a trial before the court, but in this case, even though the case may have begun as a pre-trial hearing, and after A entered a plea, and the court started to receive evidence after a valid jury waiver, CA holds that jeopardy did attach, and therefore State may not appeal the granting of a motion to suppress after jeopardy attaches, thus appeal dismissed.

JONES, WILLIAM
#1-89-00965-CR
No. 1
Poss. of a
Harris
Reversed

1. JURY (BATSON ERROR) — Where A made oral motion prior to jury being sworn asking for the State to be required to explain its pre-emptory challenges, and A's counsel stated in the record that there were four black jurors Striken by the State, and that A was also black, neither State nor prosecutor challenged this statement in the record or put on any evidence to controvert it, CA holds that this is a sufficient showing of a prima facie case, thus reverses and remands case for further hearing under Batson.

MORRISON, BOBBY
#14-88-00819-CR
No. 14
Agg. Sexual
Harris
Remanded

1. TRIAL COURT (COMPETENCY PROCEEDINGS) — On original submission, CA abated for further hearings since pre-trial psychiatric reports had not been included in the file, thus CA abated for a hearing to determine if there was any evidence to support incompetency; a hearing was conducted, and two psychiatrists testified that prior to the original trial they had found no indication of incompetency, but a third psychiatrist testified that he had found, retrospectively, evidence of incompetency, and thereafter trial court denied motion for a jury trial; CA holds that even though original reports filed prior to trial did not raise the issue of competency, the third psychiatrist's testimony did provide some evidence of retroactive incompetency and therefore jury trial is required, and thus case once again abated for out-of-time jury trial under Brandon v. State, 599 S.W. 2d 567.

MARTIN, EARL
#14-89-01138-CR
No. 14
Theft
Harris
Reversed

1. GUILTY PLEAS (RESERVED PLEA OF GUILTY) — Where A entered plea of guilty to the primary offense of misdemeanor theft, which was enhanced to a felony by use of prior misdemeanor convictions, and there was no plea bargaining deal, and trial court entered into an agreement to allow A to appeal pre-trial motions filed and overruled, CA holds that since there was no plea agreement, this was improper under Shallbom, 732 S.W.2d 636, as being an improper reserved plea, thus requiring the conviction to be reversed.

Roy E. Greenwood graduated from the University of Texas Law School in 1970, and thereafter, helped initiate the creation of the office now known as the Staff Counsel for Inmates at the Texas Department of Corrections. In November 1971, Mr. Greenwood was appointed as Administrative Assistant to the Texas Court of Criminal Appeals, a newly-created position, where he served until November 1978, at which time he entered private practice in Austin specializing exclusively in criminal defense practice.

Mr. Greenwood served on Governor Dolph Briscoe's COMMISSION FOR TEXAS CRIMINAL JUSTICE STANDARDS AND GOALS, was Chairman of TCDLA's Amicus Curiae Committee from 1983-1985, has been a frequent lecturer at criminal law seminars and has written numerous articles on Texas law for various publications.
Representing Clients
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before the grand jury in lieu of your client. The Texas Court of Criminal Appeals has held, however, that an accused under investigation by a grand jury does not have a constitutional right to appear in person or by counsel before the investigative grand jury and that the statutes that give an accused the right to challenge the composition of the grand jury do not require that notice of the grand jury deliberation be given to an accused. Therefore, the entire proceeding may occur without your knowledge or participation.

If your client is subpoenaed and the prosecutor is not inclined to excuse his appearance, he is bound to give testimony, whether or not he is a putative defendant. There is no absolute right, absent invocation of the privilege against self-incrimination, not to make any statement.

D. Sanctions for Contempt

The State statutes set forth specific sanctions for behavior deemed to be contemptuous of the grand jury proceeding.

Art. 20.14 provides for a $500 fine and no imprisonment for a person who has willfully evaded, in any manner, service of a summons or attachment to appear before a grand jury.

If a witness who has been subpoenaed appears before the grand jury but refuses to testify, art. 20.15 allows a court to direct the witness to answer proper questions or incur a fine up to $500 and imprisonment until he is willing to testify. The contempt is contempt of the court once the court orders the witness to testify and the witness refuses, but the witness cannot be imprisoned beyond the life of the grand jury before which he refuses to testify.

With respect to sanctions for contempt, the State courts draw a distinction between a fact witness and a witness who appears solely in the capacity of custodian of records. A custodian who appears before the grand jury pursuant to a subpoena duces tecum but refuses to provide the requested records can be fined $500 but cannot be imprisoned. A subpoena duces tecum is authorized only by art. 24.02. By its terms, art. 20.15 is restricted to the grand jury witness who "refuses to testify." There is no provision in the Code of Criminal Procedure for confinement until subpoenaed material is produced to the grand jury. In Ex parte Marek, the court was unwilling to extend the sanctions of art. 20.15 to Chapter 24 because this would extend the sanctions beyond the statutory provision. The key point seemed to be that the custodian actually appeared to advise the grand jury that he was refusing to produce the documents. The court might not have reached the same conclusion if the custodian had refused to appear altogether. The custodian can probably avoid this possibility by appearing and testifying before the grand jury, even if he does not intend to produce all of the records requested.

E. Immunity

Unlike the federal system, there is no statutory provision in Texas state practice providing for immunity, but the right of an attorney representing the State to guarantee immunity from prosecution and punishment, with the knowledge and consent of the court, has never been seriously questioned. In Ex parte Moorehouse, the Texas Court of Criminal Appeals held that incarceration for contempt for refusal to answer questions before the grand jury and district judge on the grounds that the answer would incriminate the witness would be unauthorized.

Some State statutes specifically provide for immunity such as Vernon's Texas Codes Annotated Sections 43.06 (Public Indecency), 47.09 (Gambling), and 71.04 (Organized Crime). The statutes all purport to provide "testimonial" or "use" immunity. This question was considered by the Texas Court of Criminal Appeals in Ex parte Shorthouse. Here the defendant claimed that Article I, Section 10 of the Texas Constitution, providing for protection against self-incrimination, required transactional immunity. The court held that "[t]estimonial [use] immunity is co-extensive with the scope of self-incrimination as provided in Article I § 10 and is sufficient to compel testimony over a claim of the privilege [against self-incrimination]." The court stated, however, that this holding would not affect any State immunity statutes requiring transactional immunity.

The courts have also held that immunity in either a state or federal proceeding must have equal application in the other forum. The Supreme Court so stated in Murphy v. Waterfront Commission, holding "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." States are therefore required to respect immunity granted pursuant to Title 18 of the United States Code Section 6002.

If your client faces possible state and federal investigations for related activities, it might be advantageous to approach expeditiously the jurisdiction that would value his testimony the most in hopes of obtaining immunity. This approach would at least provide an argument that a subsequent investigation by the other authority was tainted by the information provided to the immunizing authority.

The Texas Court of Criminal Appeals has stated that an attorney representing the State does not have the authority to grant immunity without approval of a court. The court went on to hold, however, that statements and admissions made by a witness that were induced by a district attorney's promise of immunity, given without court approval, were still inadmissible as evidence against the witness. F. Access to Grand Jury Transcripts

A Texas state grand jury does not have a rule analogous to Rule 6(e) (1) of the Federal Rules of Criminal Procedure, as amended in 1979, which requires all proceedings occurring before a grand jury (other than its deliberation) to be recorded. Either the prosecutor or an accused can request that the proceedings be transcribed. A Ninth Circuit case, decided before the 1979 Amendment to Rule 6 (e) (1), examined a request by an accuse to have grand jury proceedings recorded. Prior to the presentation of witnesses to the grand jury, the accused presented two separate motions to have grand jury proceedings recorded; both were denied. The Court of Appeals recognized that the prevailing rule in the circuit was that recording of grand jury testimony was permissive, not mandatory. The Ninth Circuit held that if an accused gives advance notice of his desire to seek transcription of grand jury proceedings and offers to pay the expenses, sound exercise of discretion would ordinarily call for the granting of a motion requesting a reporter to be present. The court was unwilling to invoke a rule that would provide for a dismissal of an indictment absent a clear indication of
prejudice. The court went on to state, however, that it could "give no assurance that such a rule may not be applied under similar circumstances in the future." The lesson to be gleaned from Thoresen is that "there is no harm in asking" and raising the issue at every opportunity.

The same situation exists in Texas. The Court of Criminal Appeals of Texas, in Tibbetts v. State, held that there is no authority, statutory or otherwise, which would require the recording of grand jury testimony. The court also stated that even if the testimony had been recorded, the appellant would not have been entitled to the transcript in the absence of a showing of a "particularized need." Thus, even where the proceedings have been recorded, an accused is not entitled to inspect grand jury transcripts for the purpose of ascertaining evidence in the hands of the prosecution or for discovery in general. In order to review grand jury transcripts, the accused has the burden of showing a particularized need for the review. The accused cannot request the court to conduct an in-camera review in order to establish a particularized need for review by the accused. The obligation remains with the accused to establish a particularized need to review the grand jury record before the Court or the accused will review the transcripts. Any other decision would render the secrecy required of the grand jury ineffective.

III. Conclusion

If there is a trend developing in the way courts are interpreting the rules that govern and the way prosecutors handle grand juries, it appears to be toward making it more difficult for a defendant to get relief. As this occurs, it becomes even more important that the attorney representing a person under investigation by a grand jury monitor closely all of the activities of the investigation. You must be prepared, if appropriate, to file motions for access to grand jury records and, in State practice, motions requesting all grand jury proceedings be transcribed. Access motions may be followed by motions to dismiss the indictment based upon irregularities before the grand jury. Trial judges and magistrates can be pressed to take appropriate action before trial to avoid post-conviction harmless error arguments. Where prosecutorial misconduct is apparent, but the trial court refuses to dismiss the indictment, you should consider applying continual pressure for the sanctions suggested in Bank of Nova Scotia. The key is to force the action and not to allow the prosecution to put you and your client in a defensive, reactive mode.

There are numerous decisions that an attorney and client must make during a grand jury investigation, but the most vital, and most difficult, is whether to appear and testify. For example, if the sole issue is identity, it may be advantageous for a suspect to appear and deny responsibility for the offense. If the investigation concerns a complex factual situation, however, the best practice may not be to appear. There is no magic formula you can apply to assist in making this decision, but many factors affect the final position. First, the prosecutor has an opportunity to lock a witness into an explanation of the facts. Second, the prosecutor can fashion the indictment around the witness’ explanation and, by doing so, negate the possibility of a defendant’s taking the witness stand at trial to aid in his own defense. Third, appearance of a “target” or “subject” before the grand jury forces a prosecutor to learn the case in order to interrogate the witness before the grand jury. This could result in a better reasoned indictment than might otherwise occur.

In between these two extremes are literally hundreds of situations that defense attorneys will face when making this decision. The client will almost always want to testify based on a feeling that he can convince the grand jury of his innocence. Experience has proven this not to be so, and it is important that your client understand this fact.

One final consideration: As criminal prosecutions become more complex, it becomes more important for defense attorneys to get involved as early in the investigation as possible. An attorney who has not become active and involved during the grand jury investigation runs the risk of missing many opportunities to either affect the direction of the investigation or to take advantage of mistakes that may serve as a basis to dismiss a subsequent indictment.

Footnotes
62. Id. at 72-3
63. Id. at 67.
64. Id. at 69.
65. Id. at 71.
66. Id. at 72.
68. Id. at 75.
69. Id. at 75.
70. Id. at 75.
71. Id. at 263.
72. Id. at 263.
73. Id. at 263.
74. Id. at 263.
75. Id. at 263.
76. Id. at 263.
77. Id. at 887.
79. Id. at 890.
80. Id. at 890.
81. Id. at 890.
84. Id. art. 24.28.
85. Id. at 20.03.
86. Id. at 20.05.
87. Id. art. 20.04.
91. Id.; 468 S.W.2d at 432, citing 27 Tex. Jur. 2d 261, Sec. 44.
93. Id. at 367.
94. Id. at 368.
95. Id. at 368.
Corpus Delicti of Murder

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BIBLIOGRAPHY

The authors wish to give special acknowledgement to resource materials that provided guidance in the preparation of this paper. For a more in-depth analysis of the Rules of Criminal Evidence, please see the following:


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D. The Guidelines Must Be Followed

In order to uphold a search or seizure, both the forth amendment and the Texas Constitution require the State to show that it actually followed its own procedures. United States v. New Orleans Pub. Serv., Inc., 722 F.2d 422, 428 (5th Cir. 1984); Webb v. State, 695 S.W.2d 676, 683 (Tex. App. — Dallas 1985); see Webb, 739 S.W.2d at 811. In the Wagner case, the State made no such showing; rather, the evidence revealed that the officers actually violated the DPD Guidelines. The affidavits indicated that advance warning of the checkpoint was not given to the media as required by the DPD Guidelines. The officers’ affidavits also contained discrepancies regarding the date of notice to the police public information office. There were also substantial discrepancies between the affidavits and the DPD’s official report of the operation as to the amount of time that it took to conduct the roadblock, and the DPD’s official report revealed that fewer officers in number were used to conduct the roadblock than the DPD Guidelines specified. Finally, despite the DPD Guidelines requiring all field sobriety tests to be conducted with the driver out of his vehicle, the officers’ affidavits declared that they performed horizontal gaze nystagmus tests while the drivers remained in their cars. Consequently, the DPD Guidelines failed to properly circumscribe the field officers’ discretion, and, to the extent that the officers violated the guidelines, they were obviously exercising unrestrained discretion.

The experience in the Wagner case demonstrates, once again, that it can never be assumed that the police comply with their own guidelines. Defense counsel should therefore undertake a detailed comparison of the guidelines with the affidavits or other evidence regarding operation of the checkpoint, and any guideline violations or any inconsistencies or even omissions in the State’s evidence should be specifically pointed out to the trial court. Boyd, DWI Roadblocks, 17 Voice for the Defense 14 (Mar. 1988).

The officers’ failure to follow the guidelines or the failure of the guidelines to be sufficiently neutral causes the roadblock to violate the fourth and fourteenth amendments to the U.S. Constitution. This violation is a consequence of a “strictly” fourth amendment analysis of per se unreasonable-ness that is unaffected by, and outside the scope of, the Sitz decision. Likewise, the roadblock would violate Article 1, § 9 of the Texas Constitution.

Moreover, since the State bears the burden of proof that a DWI roadblock seizure is lawful, counsel should keep a watchful eye that the State meets its burden as to each element. State v. Van Natta, 805 S.W.2d 40 (Tex. App. — Fort Worth 1991), a post-Sitz decision illustrates this problem. The Fort Worth Court of Appeals held that a DWI roadblock violated the defendant’s rights under the fourth amendment when the State elicited testimony at the suppression hearing bearing on the first and third prongs of the balancing test in Broum v. Texas, 443 U.S. 47, 50-51, 99 S. Ct. 2637, 2640-41, 61 L. Ed. 2d 357 (1979), but it wholly failed to adduce any evidence as to the second prong—that DWI roadblocks are effective in achieving the goal of preventing accidents caused by drunk drivers. The Van Natta case also stands for the proposition that the courts will decline to engage in the realm of speculation whether erratic driving observed after the motorist enters an unlawful roadblock would have been observed by the police in the absence of the roadblock.

E. Criminal versus Civil Enforcement

Even though Higbie has been overruled, it provides valuable insight regarding the viewpoints of the judges on the Court of Criminal Appeals. In the Higbie case, the Court of Criminal Appeals held that sobriety checkpoints are unconstitutional under the fourth amendment; in doing so, it also held that sobriety checkpoints are subject to review under the standards applicable to administrative searches and seizures. Judge Miller, writing for a plurality of four judges, expressed the opinion that DWI roadblocks are unconstitutional per se, because they are used by the police for gathering evidence and prosecution of crime rather than enforcement of an administrative scheme that is not part of the penal system — a distinction derived in the fourth amendment constitutional context from Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967). Judge Davis, in the concurrence in which Judge McCormick joined, stated that sobriety checkpoints are not in general unconstitutional, but they must be conducted pursuant to neutral guidelines such as those of Maryland and Massachusetts, which he discussed with approval. However, the concurring judges agreed that sobriety checkpoints are unconstitutional in Texas, because Texas has not yet acted to create a comprehensive administrative scheme that the checkpoints could further. Higbie, 780 S.W.2d at 245.

Much less disagreement exists between the plurality and concurring judges than superficially meets the eye. Both recognized that no comprehensive administrative scheme to regulate traffic safety has been enacted; that is, a majority of the Court agreed that no authority of law exists for a DWI roadblock. However, the plurality believed that DWI roadblocks can never be valid so long as they are used for criminal prosecution, even if the legislature enacts a purported administrative scheme. In other words, the plurality took the view that criminal prosecution is not action taken in furtherance of an administrative framework for the protection of public safety. Although not cited in Higbie, Texas case law lends support to the plurality’s view, because previously the Court of Criminal Appeals has drawn a sharp line of demarcation between criminal enforcement of DWI laws and civil, administrative actions for the protection of public safety, such as license suspension; they are not the same. Davison v. State, 313 S.W.2d 883 (Tex. Cr. App. 1958).

Appellate courts in our sister states have similarly barred DWI roadblocks under their state bills of rights, because of their criminal-enforcement purpose. State v. Henderson, 756 P.2d at 1062-63; Nelson v. Lane County, 743 P.2d at 694; State v. Boyanowsky, 743 P.2d 711 (Ore. 1987). Essentially, these courts believe that roadblocks violate the most important attribute of our American way of life — that the police treat you as a criminal only if your outwardly-visible actions correspond. These courts are unwilling to sacrifice the fundamental element of search and seizure protection (the prerequisite for individualized reasonable suspicion) to the interests of “efficient” law enforcement, for once that barrier is breached, the tide of law enforcement interest would overwhelm

In *Wagner*, the Dallas Court of Appeals melded the plurality and concurring views expressed in *Highbie*. The Dallas court first held that sobriety checkpoints were admittedly used for the apprehension of suspected criminals and the collection of evidence and therefore could not further any administrative scheme. Second, it held that Texas has never taken the necessary legislative steps to enact an administrative scheme that a sobriety checkpoint program could further.

**IV. Do DWI Roadblocks Violate the Texas Bill of Rights?**

A. DWI Roadblocks Possess the Characteristics of General Warrants


One criticism that can be levelled at those courts which have upheld DWI roadblocks is that they seem to embark upon an exploration of “modern-day ‘reasonableness’” based on current public opinion rather than examining what the framers had in mind when they drafted the bill of rights — in light of the general spirit of those times past. *See, e.g., Mumme v. Marrs*, 40 S.W.2d 31, 35 (Tex. 1931); *Kellert v. State*, 87 S.W. 669, 676 (Tex.Cr.App. 1905).

The structure of Section 9 of the Texas Bill of Rights lends credence to the argument that DWI roadblocks are impermissible. The second clause directly imposes limitations solely on the issuance of warrants, i.e., it only deals with the general warrant problem. The first clause, however, guarantees freedom from all “unreasonable” searches or seizures, thereby protecting against searches or seizures conducted without a warrant.

Since the immediate evil that the framers had in mind was the general warrant, does it not seem obvious that the framers contemplated that any warrantless search or seizure possessing the characteristics of the reviled general warrant would necessarily be unreasonable *per se*? The framers of the Texas Constitution could hardly have imagined that the government could accomplish without a warrant that which was precluded to it with a warrant.

**IV.** DWI roadblocks possess the most salient features of the general warrant. They are “general” in that they do not particularly describe the person to be seized. They are suspicionless seizures conducted without probable cause or any minimal level of individualized, reasonable suspicion. And, they are implemented for the purpose of criminal prosecution. As was true of the general warrants, they allow the police to go out and seize many citizens on mere surmise that statistically they will encounter a few individual offenders about whom they might then gather evidence from which they could form a belief upon which a criminal prosecution may be commenced.

The courts that have rejected DWI roadblocks clearly recognize the historical importance that the barrier of individualized, reasonable suspicion has played in marking the line between reasonable and unreasonable searches or seizures. Indeed, the Rhode Island Supreme Court declared that approval of DWI roadblocks would breach that barrier and “would shock and offend the framers” of its constitution. *Pimental*, 561 A.2d at 1352.

B. The Court of Criminal Appeals is not Obligated to Follow *Sitz*

DWI roadblocks present the best chance in many years that the Texas Court of Criminal Appeals may refuse to interpret Article I, § 9 of the Texas Constitution in “lock step” with the Supreme Court’s interpretations of the fourth amendment. DWI roadblocks present broad policy concerns distinct from relatively narrow issues, such as probable cause determinations or the limits of a search incident to a lawful arrest, in which the Court previously has opted to follow the Supreme Court. Moreover, following *Sitz* would necessitate a dramatic departure from the heretofore strict Texas requirement of individualized reasonable suspicion.

Despite past reliance upon *Eisenbauer v. State*, 754 S.W.2d 159 (Tex. Cr. App. 1988) (en banc), the Court of Criminal Appeals is not obligated to follow the Supreme Court’s analysis in *Sitz* or to reach the same result. Section 1 of the Texas Bill of Rights declares that Texas is a “free and independent state,” subject only the Constitution and laws of the United States when federal supremacy comes into play. Thus, Section 1 mandates that Texas Constitution is independently viable and imposes the duty to interpret it as such. *See Eisenbauer*, 754 S.W.2d at 166-71 (Clinton, J., dissenting). *Brown v. State*, 657 S.W.2d 797, 799-810 (Tex. Cr. App. 1983) (en banc) (Orion, Clinton, & Miller JJ., concurring; Teague, J., dissenting). Section 29 of the Bill of Rights provides that everything in the Bill of Rights is “excepted out” of the general powers of our state government, “shall forever remain inviolate,” and “all laws . . . contrary thereto shall be void.” The U.S. Constitution contains no similar provision. Section 29 is not merely literary flourish but is a flat prohibition on any infringement of Article I rights, so that the legislature, the executive and the *judicial* branches simply lack the power to restrict those rights. *Travelers’ Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1009-11 (Tex. 1934). Accordingly, *Eisenbauer* cannot be treated as stare decisis in respect to following the U.S. Supreme Court, because “no judge-made law, nor rule established by long lines of decisions” can ever be valid to the extent that it infringes on the Bill of Rights. *Kemper v. State*, 138 S.W. 1025, 1045 (Tex. Cr. App. 1911). Indeed, it is indicative that the Supreme Court remanded the *Sitz* case to the Michigan courts for a determination whether the checkpoint program is permissible under the state constitution.

**V. Conclusion**

The *Sitz* case has, in fact, settled very little in the DWI roadblock arena. Many questions — that are completely outside the scope of the *Sitz* decision — remain unanswered and will provide grist for the appellate mill for some time to come. Hopefully, many of these will be resolved when the Court of Criminal Appeals decides *State v. Wagner*.

Even if found to be permissible under the Texas Constitution, DWI roadblocks remain illegal unless the legislature or some lawmaker authorizes them. It is doubtful that the Court of Criminal Appeals will retreat from its prior rulings
in this regard. In addition, the guidelines under which roadblocks are conducted may not be sufficiently neutral or the police may violate such guidelines, causing the sobriety checkpoint to violate both the Texas and U.S. constitutions. Regardless of having briefed the points extensively, at oral argument, Wagner urged the Court of Criminal Appeals not to reach the constitutional issues but, in deference to the wholesome Doctrine of Judicial Restraint, to address only the dispositive “authority of law” issue, and to reserve the theoretical constitutional issue and issues regarding the guidelines for appropriate future cases in which same would be necessary to dispose of the case.

Therefore, Texas defense counsel should not fail to challenge every sobriety checkpoint on state grounds, and where the guidelines are not neutral or they are violated, a fourth amendment violation must still be asserted. In doing so, counsel should pay special attention to the facts of the roadblock confronting them and continue to challenge each roadblock on the grounds of the fourth and fourteenth amendments to the U.S. Constitution, Article I, § 9 of the Texas Constitution, and Article 38.23 of the Code of Criminal Procedure.

Finally, where independent state grounds are asserted, practitioners should draft orders for the trial court, and urge the appeals court, to clearly state which grounds of decision are state grounds and that in regard thereto the court’s “determination is being made on bona fide, separate, adequate and independent state grounds and that any federal cases cited are being used only for the purpose of guidance and do not themselves compel the result that the court has reached.”

VI. Post-Script

While the second installment of this article was at the printer's, in May 29, 1991, the Court of Criminal Appeals issued its decision in the Wagner case.

In a majority opinion, the court reiterated its ruling in King v. State, 600 S.W.2d 528 (Tex. Cr. App. 1980) (en banc), that the Sitz decision had overruled Higbie v. State and its progenitors “to the extent that such cases purported to be based upon the Fourth Amendment to the United States Constitution.” Slip Op. at 1. Accordingly, the Court of Criminal Appeals reversed the lower court’s decision in Wagner “to the extent that the Court of Appeals relied upon Higbie.” Slip Op. at 2. The case was remanded for consideration “in light of the Sitz case and King v. State.”

However, a majority — consisting of six judges — joined in a one-page concurring opinion, which stated that the Court of Appeals in its opinion “correctly notes there is no administrative scheme permitting DWI roadblocks in this state.” (emphasis added). The concurrence then recognized, as discussed in the first installment of this article, that in Sitz the Michigan legislature had empowered the counterpart to our Department of Public Safety to set up a statewide administrative scheme for sobriety checkpoints and that pursuant to such authorization, the guidelines were drafted and the program was implemented. The concurrence then stated that if a sobriety checkpoint program in Texas is to be consistent with the Fourth Amendment, then the Dallas Court of Appeals was correct when it said that Texas has no such administrative scheme and that this task is best left to the legislature. The concurring judges concluded by stating that the issue of legality of the roadblock in the Wagner case may be resolved in light of the Sitz decision without the necessity of addressing the question of whether the roadblock violated Article I, § 9 of the Texas Constitution.

Thus, the Court of Criminal Appeals responded to our plea for the exercise of judicial restraint. The concurring majority clearly adopted our position that the “authority of law” ground is the dispositive issue in the Wagner case and that it was unnecessary to address the federal or state constitutional questions. It is also abundantly clear that a majority of the Court advised the Dallas Court of Appeals to rewrite its original opinion and to hold upon an independent state ground that the trial judge correctly granted the motion to suppress, for the reason that DWI roadblocks are unlawful seizures in the State of Texas, because our legislature has not acted to authorize them. Therefore, Texas defense counsel should take care to assert the lack of proper statutory and administrative authorization in their motions to suppress. Because the concurring majority expressly reserved the constitutional question under Article I, § 9, as we had suggested, the possibility remains that DWI roadblocks ultimately may be found to constitute a per se violation of our state Bill of Rights.

Once a definitive holding is announced on the “authority of law” issue, and assuming that proper statutory and administrative authorization is forthcoming, the focus in future DWI cases will shift to per se unconstitutionality under Article I, § 9 and to issues concerning proof as to the neutrality of, and compliance with, the guidelines which such programs may be implemented.
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Miller, Recent Decisions: Court of Criminal Appeals, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (July 1990).
Strickland, Texas Rules of Criminal Evidence, in TEXAS CENTER FOR THE JUDICIARY, SOUTHEAST TEXAS REGIONAL JUDICIAL CONFERENCE (February 1990). ❮

President's Column
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cence is being ignored.
1. Excessive bail and pretrial detention.
2. Forfeiture of property.
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4. The trend toward dispensing with the requirement of specific intent to violate the law.
5. Attacks on the attorney-client privilege.
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