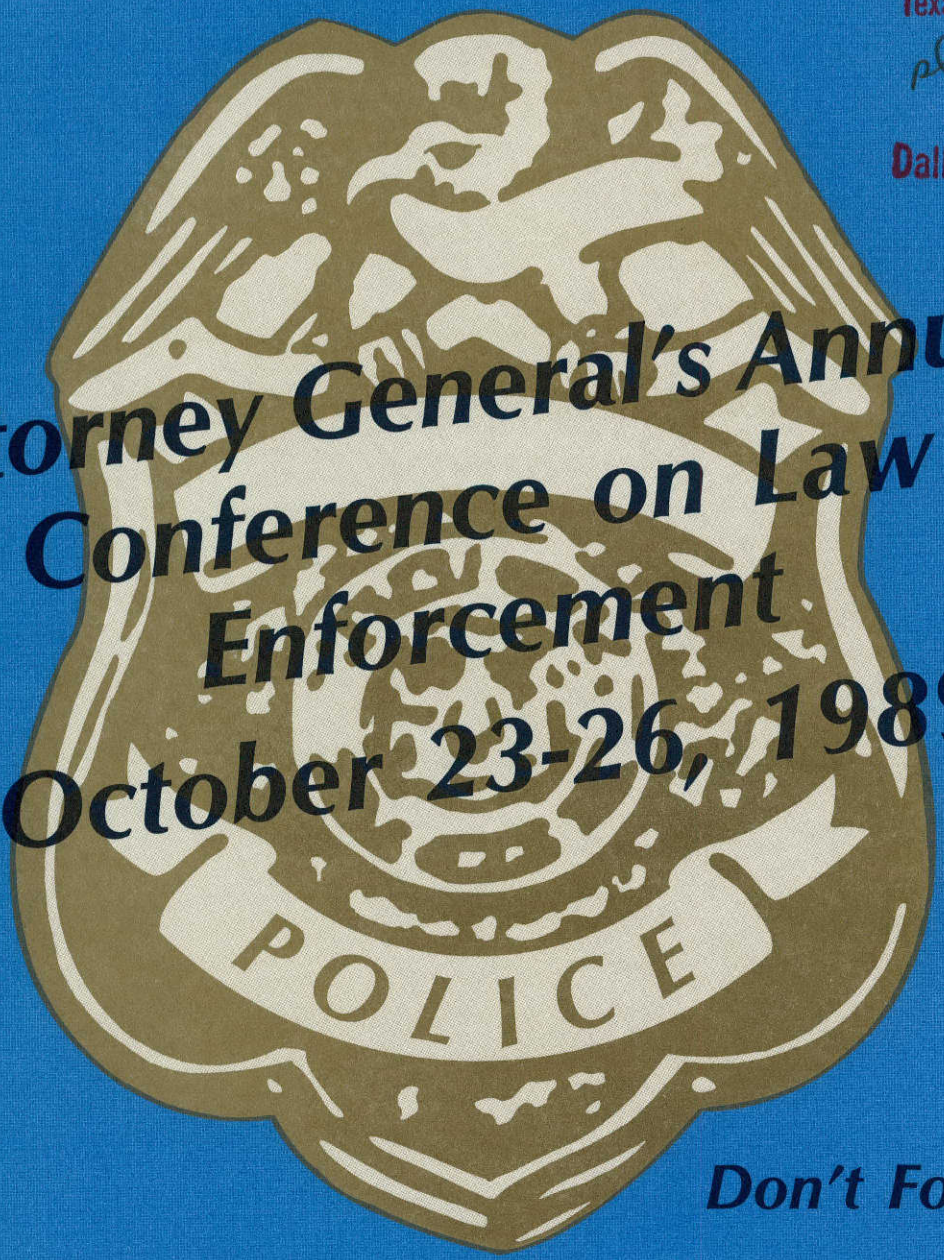
ATTORNEY GENERAL'S

October 1989

CRIMINAL LAW Update



Attorney General's Annual Conference on Law Enforcement October 23-26, 1989

Don't Forget!

JIM MATTOX
TEXAS ATTORNEY GENERAL'S OFFICE

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ATTORNEY GENERAL

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Janie Guerrero, Assistant Editor

Rosemary Kaholokula, Research Assistant

Contributions: David Gavin, Texas Department of Public Safety.

Graphics: Claude McVea

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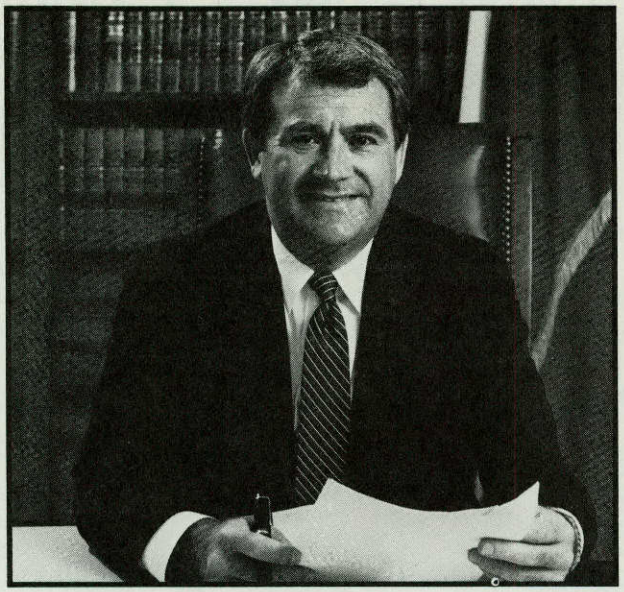

Dear friend,

The first Attorney General's Conference on Law Enforcement was held in 1950. The conference was basically a one day seminar for judges and prosecutors and continued as such throughout the 1950's and 1960's. Thereafter the annual conference became dormant.

Recognizing the need for continued training for all criminal justice professionals, I resurrected the idea of an annual conference. This year the conference offers 20 hours of training on various subjects of interest to both prosecutors and peace officers.

Prosecutors, as well as their investigators, can benefit from this year's agenda topics. Subjects such as "Using DNA as Evidence"; "New Laws"; "Building Your Child Abuse/Neglect Case for Prosecution" and "Verbal Judo" should prove useful. Prosecutors can obtain 3 MCLE credit hours and peace officers can receive 20 TCLEOSE credit hours.

Because I believe this year's conference will be the best ever, I wish to extend an invitation to prosecutors and all other criminal justice professionals to attend this year's conference October 23-26, at the Wyndham Hotel in Austin.

Sincerely,

Jim Mattox

Texas Attorney General

Attorney General's Annual Conference on Law Enforcement

October 23 - 26, 1989

"Verbal Judo"

Dignitary Protection

Personal Value Systems

New Laws Affecting Law Enforcement

Gang Activity (Banditos, Jamaicans and other "friendly" groups)

Building Your Child Abuse/Neglect Case for Prosecution

Nuclear Weapons on Your Highways

Specialized Performance Driving

Officer Death Prevention

Using DNA as Evidence

Special Features

Law Officer of the Year Award

20 TCLEOSE Credit Hours
3 State Bar MCLE Credit Hours

Exhibitors

- $75.00 registration fee with a $5.00 discount for registering before October 5.
- Make Wyndham Hotel reservations (1-800-433-2241) in Austin by October 5 to receive special room rates of $50 single occupancy or $60 double occupancy.

For further information or conference registration contact Charles Yett, Conference Coordinator, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548 or call 512/463-2026.

AGENDA

The program topics have been approved for 20 hours of continuing education credits by the Texas Commission on Law Enforcement Officer Standards and Education.

"Verbal Judo"
George J. Thompson, Ph.D., The Verbal Judo Institute, Albuquerque, New Mexico

"Officer Death Prevention"
Terry Bratton, Houston Police Academy
David Rodriguez, Dallas Police Department

Using DNA as Evidence - Panel Discussion
Rusty Hardin, Assistant District Attorney, Houston - Moderator
Bob Gage, County & District Attorney, Fairfield
Henry R. Hallyday, III, Bexar County Medical Examiners Office, San Antonio
Elizabeth Hardeman, Assistant Criminal District Attorney, Dallas
Terry Keel, Assistant District Attorney, Austin
Alan Levy, Assistant Criminal District Attorney, Fort Worth
Paul McWilliams, Assistant Criminal District Attorney, Beaumont
Bill Turner, District Attorney, Bryan

"New Laws Affecting Law Enforcement"
David Boatright, Texas Department of Public Safety

"Dignitary Protection"
Stephen P. Beauchamp, Special Agent in Charge, U.S. Secret Service

"Nuclear Weapons on Your Highways"
Peter Armstrong, Intelligence Operations Specialist, U.S. Department of Energy

"Specialized Performance Driving"
Michael R. Gentry, Texas A & M University System

"Personal Value Systems"
Tommy Honeycutt, Texas Commission on Law Enforcement Officer Standards and Education

"Building your Court Case for Prosecution of Child Abuse/Neglect"
Marie Munier, Assistant District Attorney, Harris County

"Gang Activity"
Charles Storey, Detective, Intelligence Division, Dallas Police Department
Barbara Wade, M.A., Wade Professional Services, Miami, Florida

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Monday, October 23

1:00 p.m. - 5:00 p.m.	Registration Hotel Check-in Visit Exhibitors
6:00 p.m. - 8:00 p.m.	Reception

Tuesday, October 24

7:45 a.m. - 8:15 a.m.	Welcoming Remarks
8:15 a.m. - 5:45 p.m.	Training Sessions

Wednesday, October 25

7:45 a.m. - 5:00 p.m.	Training Sessions

Thursday, October 26

7:45 a.m. - 11:55 a.m.	Training Session
1:00 p.m. - 2:30 p.m.	Awards Luncheon

STATE'S RIGHT OF APPEAL IN CRIMINAL CASES

By Rosemary Kaholokula

Previously, the State had no right of appeal in Texas courts. (Although it could petition the United States Supreme Court for review. Faulder v. Hill, 612 S.W.2d 512 (Tex.Crim.App. 1980)) This situation began to change in 1980 when the people of Texas voted to amend the Texas Constitution to, among other things, change the jurisdiction of the Court of Criminal Appeals. Tex.Const. Art. V, Secs. 5 & 6, effective Sept. 1981. Section 5, inter alia, provides:

> ... the Court of Criminal Appeals may, on its own motion, review a decision of a Court of Appeals in a criminal case as provided by law. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

To implement the above mentioned constitutional changes, the legislature amended articles 4.04, 44.01, and 44.45 of the Code of Criminal Procedure. Article 4.04, section 2, was amended to read in part:

> In addition, the Court of Criminal Appeals may, on its own motion, with or without a petition for discretionary review being filed by one of the parties, review any decision of a court of appeals in a criminal case. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

Article 44.01 (which was substantially amended in 1987) provided:

> The State shall have no right of appeal in criminal actions. However, this statute shall not be construed to prevent the State from petitioning the Court of Criminal Appeals to review a decision of a court of appeals in a criminal case, on its own motion.

Article 44.45(b)(1) was amended as follows:

> (b) The Court of Criminal Appeals may review decisions of the court of appeals upon a petition for review.
>
> (1) The State or a defendant in a case may petition the Court of Criminal Appeals for review of the decision of a court of appeals in that case.

Since article V, section 26, of the Texas Constitution still prohibited the State from appealing criminal cases, the constitutionality of articles 4.04, 44.01, and 44.45(b) was questioned. Todd v. State, 661 S.W.2d 116 (Tex.Crim.App. 1983). The Court in Todd held that, while section 26 did proscribe appeal by the State, a petition for discretionary review was not an appeal. Since the Court of Criminal Appeals may "on it's own motion review a decision of a Court of Appeals" (emphasis added), section 5 of the Texas Constitution and articles 4.04, 44.01, and 44.45(b) were entirely consistent with section 26 of the Texas Constitution.

In 1987 the Texas Constitution was again amended, this time to read:

Sec. 26. The State is entitled to appeal in criminal cases, as authorized by general law.

To implement this constitutional revision, the Texas legislature amended article 44.01, as follows, thus granting the State the right to not only petition the Court of Criminal Appeals for discretionary review, but also the right to appeal a trial court's decision in some instances. Article 44.01 of the Code of Criminal Procedure, as amended in 1987, provides:

> (a) The state is entitled to appeal an order of a court in a criminal case if the order:
>
> (1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint;

(2) arrests or modifies a judgment;

(3) grants a new trial;

(4) sustains a claim of former jeopardy; or

(5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case.

(b) The state is entitled to appeal a sentence in a case on the ground that the sentence is illegal.

(c) The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.

(d) The prosecuting attorney may not make an appeal under Subsection (a) or (b) of this article later than the 15th day after the date on which the order, ruling, or sentence to be appealed is entered by the court.

(e) The state is entitled to a stay in the proceedings pending the disposition of an appeal under Subsection (a) or (b) of the article.

(f) The court of appeals shall give precedence in its docket to an appeal filed under Subsection (a) or (b) of this article. The state shall pay all costs of appeal under Subsection (a) or (b) of this article, other than the cost of attorney's fees for the defendant.

(g) If the state appeals pursuant to this article and the defendant is on bail, he shall be permitted to remain at large on the existing bail. If the defendant is in custody, he is entitled to reasonable bail, as provided by law, unless the appeal is from an order which would terminate the prosecution, in which event the defendant is entitled to release on personal bond.

(h) The Texas Rules of Appellate Procedure apply to a petition by the state to the Court of Criminal Appeals for review of a decision of a court of appeals in a criminal case.

(i) In this article, "prosecuting attorney" means the county attorney, district attorney, or criminal district attorney who has the primary responsibility of prosecuting cases in the court hearing the case and does not include an assistant prosecuting attorney.

(j) Nothing in this article is to interfere with the defendant's right to appeal under the procedures of Article 44.02 of the code. The defendant's right to appeal under Article 44.02 may be prosecuted by the defendant where the punishment assessed is in accordance with Subsection (a), Section 3d, Article 42.12 of this code, as well as any other punishment assessed in compliance with Article 44.02 of the code.

The remainder of this article will categorize those cases where a) the State has appealed under 44.01 and b) the court has discussed the relevant law in some substantive sense.

I. Bond Forfeiture

State v. Sellers, 766 S.W.2d 312 (Tex.App. - Houston [14th Dist] 1989, no pet.). After a bond forfeiture, the defendant's attorney moved to dismiss the criminal charges that were the basis of the bonds and the defendant's surety moved to set aside the bond forfeiture (the defendant was dead). The trial absolved the surety of all liability on the bonds. The State, in attempting to appeal under 44.01, argued that this judgment modified the previous judgment nisi and so it was appealable under 44.01(a)(2). The court, however, held that the right to appeal in a bond forfeiture case was governed by article 44.42. 44.42 was not repealed or altered by the 1987 amendments to the Code of Criminal Procedure and 44.01 does not specifically give the State the right to appeal in bond forfeiture cases. Therefore, 44.42 is the applicable statute. In addition, a judgment nisi on a bail bond is not a final judgment, but more like an interlocutory judgment. Therefore, the State

doesn't have the right to appeal a final judgment on a bail bond forfeiture.

II. Mistrial resulted

State v. Watson, 764 S.W.2d 2 (Tex.App. - Fort Worth 1988, no pet.). The State attempted to appeal the suppression of evidence, under 44.01(a)(5), in a trial which had ended in a mistrial. After the trial judge declared the mistrial and proposed to "quickly select another jury and proceed to trial," the State appealed, contending that the court's order in the first trial acted as a pre-trial order to suppress the evidence in the second trial. The court first found that no pre-trial motions were made, therefore, the trial court didn't have an opportunity to rule on them. It then found that 44.01(a)(5) did "not contemplate that the State's appeal of a pre-trial ruling would involve regulating the trial court's conduct during trial."

III. Motion for Mistrial as related to subsection (a)(3)

State v. Garza, No. 13-89-066-CR (Tex.App. - Corpus Christi 1989). In this case, the trial court had granted the defense's motion for a mistrial after a verdict had been rendered. The court of appeals held that, in this case, the motion for a mistrial was the same as a motion for a new trial; therefore, the state was allowed to appeal. The court specifically held that "a post verdict mistrial ruling which returns the case to the posture in which it had been before trial is functionally indistinguishable from an order granting a new trial." It should be noted, however, that this right to appeal was moot in this case. This was so because the trial court had proceeded with a second trial, a final judgment was rendered, and the State never gave notice of appeal until after the second trial. It is well settled that "[w]here a final determination of a cause has been made, an appeal from a prior interlocutory order is moot and will be dismissed."

IV. Motion to Quash and Subsection (a)(1)

There is a conflict among the courts of appeal whether the State may appeal a trial judge's granting of a motion to quash. The State has attempted these appeals under subsection (a)(1), implicitly contending that an order to quash is the same as a dismissal of the information/indictment. The Beaumont, Corpus Christi, and Houston [1st Dist] courts have heard such appeals while the Fort Worth court and the Corpus Christi court (in a different case) have not.

State v. Sonnier, No. 01-88-00401-CR (Tex.App. - Houston [1st Dist] 1989, no pet.); State v. Coleman, 757 S.W.2d 127 (Tex.App. - Houston [1st Dist] 1988, pet. ref'd.); State V. Alaniz, 754 S.W.2d 406 (Tex.App. - Corpus Christi 1988, no pet.); State v. Barron, 760 S.W.2d 763 (Tex.App. - Beaumont 1988, no pet.).

The Courts of Appeal in the above cases heard the State's appeals of the trial judges' granting of motions to quash informations. The courts did not give any explanations or acknowledge any conflict with other courts.

State v. Hancox, 762 S.W.2d 312 (Tex.App. - Fort Worth 1988, dism. w.o.j.); State v. Moreno, 769 S.W.2d 661 (Tex.App. - Corpus Christi 1989, no pet.). Only in these two cases did the courts hold that the granting of a motion to quash was not the same thing as an order dismissing an information. Therefore, this appeal would not be heard by the court because it didn't fit under any of the enumerated subsections in 44.01. The Hancox court held, and the Moreno court was in accord, that because an information can be amended after the motion to quash is granted, then the motion is not "dismissed." The Corpus Christi court has apparently reversed its position from Alaniz without mentioning, or explicitly overruling, Alaniz. Or, perhaps the discrepancy can be better explained by the fact that in Alaniz the defendant/appellee did not argue to the court that the State could not appeal on this basis.

See also State v. Winskey, 770 S.W.2d 942 (Tex.App. - San Antonio 1989, no pet.). Although the indictment was "quashed" as opposed to "dismissed," the case was "dismissed" by the trial judge so the court of appeals noted that the charging instrument was also "dismissed." Thus, the State could appeal under subsection (a)(1).

V. Motions in Limine

State v. Alexander, 761 S.W.2d 125 (Tex.App. - San Antonio 1988, no pet.). The court held that the State may not appeal decisions on motions in limine because a ruling on a motion in limine by itself cannot create reversible error; in other words, the appeal was premature.

VI. Rules of Appellate Procedure and subsection (d)

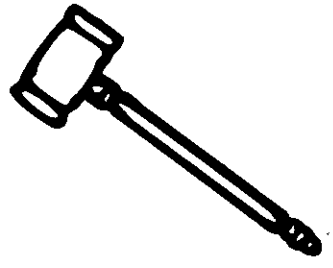
State v. Lopez, 763 S.W.2d 939 (Tex.App. - Houston [1st Dist.] 1989, pet. ref'd.). The court held that the Texas Rules of Appellate Procedure applied to the State when the State was appealing; article 44.01 is not the only statute governing appeal. In this case, the State was required to serve a copy of its notices of appeal upon opposing counsel pursuant to Tex.R.App.P. 4. See, e.g., article 44.01(h) Tex.R.App.P. 1(a): rules govern procedure in appeals to courts of appeal from district courts. Although the State did not serve notice, the court of appeals found that the appellees were not substantially prejudiced by the manner in which they did receive notification of the State's appeal. Therefore, the court suspended the requirement and decided the appeal anyway.

State v. Demaret, 764 S.W.2d 857 (Tex.App. - Austin 1989, no pet.). The court, while agreeing that the rules of appellate procedure were applicable to appeals by the State, held that courts of appeal could not grant time extensions under Tex.R.App.P. 41(b)(2). The procedural rules were not intended and may not enlarge the substantive rights of the litigants. Article 44.01(d) provides for 15 days in which the State may appeal; this provision trumps the procedural rule 41(b)(2).

State v. Sanchez, 764 S.W.2d 920 (Tex.App. - Austin 1989, no pet.). The court held that Tex.R.App.P. 74(l)(2), failure of appellant to file brief, did not apply to the State where the State is appealing. 74(l)(2) provides for a hearing to determine whether the defendant desires to prosecute her appeal, whether her counsel has abandoned the appeal, and directs the trial court to appoint new counsel if necessary. This rule was adopted before the State's right to appeal and was "plainly designed to protect the interests of a defendant/appellant." It would be absurd "for this Court to order a hearing to determine whether the prosecuting attorney has abandoned the appeal without the State's consent." The court held that the State cannot be abandoned by the prosecutor.

State v. Garza, No. 13-89-066-CR (Tex.App. - Corpus Christi 1989). The court first noted that 44.01(d) is similar to 18 U.S.C.A. sec. 3731 and that under section 3731, an oral ruling can trigger the time for filing a notice of appeal. But, if the government files a motion for reconsideration, the time for appeal runs from the date on which the motion to reconsider is denied, not from the date on which the original ruling was made. In this case, a post-trial motion for mistrial was made by the defense (and granted) at a hearing on January 5. On January 11, the State moved for the court to reconsider its ruling. The court denied this motion on January 27. The State filed its notice of appeal on February 6. The Court of Appeals held that the time for appeal ran from the denial of the motion to reconsider (Jan. 27), not from the date of the original ruling (Jan. 5), thus, the State filed within the 15 day time period required by subsection (d).

There have been many other instances of the State appealing under 44.01 than those mentioned here; this article only attempts to discuss those cases in which relevant law was substantively discussed. The rules which allow the State to appeal are fairly simple and clear cut. The prosecutor should, however, keep up with the decisions being made on 44.01, particularly those relating to the dismissal/quashing of indictments.



HATE CRIMES

By Rosemary Kaholokula

The hate crime (an attack on an individual because of what he or she is) is fast becoming a nationwide problem. The victims of hate crimes are attacked purely because of their personal characteristics which threaten and/or offend the attacker. One example is the harassment by white supremacist groups of Blacks and Jews. The damage that stems from these crimes is much more than the mere physical damage of property or persons; the entire community to which the victim belongs is hurt. Not just the Black woman or the Jew is hurt, but the Black community is hurt, the Jewish community is hurt, and the community of women is hurt. Those involved in law enforcement should be aware of what methods of combatting hate crimes are available to them and what can be done in the future for further deterrence.

Despite the fact that statistics are not yet kept by the federal government on the incidence of hate crimes, other sources (such as the Anti-Defamation League of B'nai B'rith) have provided studies which show that hate crimes are on the rise. A report issued by B'nai B'rith in June, 1988, showed a growing number of so-called "skinheads" in high schools and an increase in the number of weapons (including automatic assault rifles) believed to be in the possession of skinheads. While not all skinheads espouse bigotry, a good many do. The report claimed that the number of neo-Nazi skinheads has grown from 2000 nationwide last year to about 3000 members this year. This frightening rise in bigoted activity is making state and federal lawmakers aware of the need for legislation to deter and punish these acts.

Who are these attackers? They tend, rather alarmingly, to be young people: teenage and young adult white males. Of the 1000 people arrested in New York for all bias crimes since 1981, 700 of them were under 19 years old. 90% of those arrested for anti-Jewish incidents in 1988 were under 21 years of age. An example of group bigotry is seen in the "skinhead" organization. Although recently fracturing into a number of different, warring factions, skinheads tend to be shaved headed youths who support Nazis, wear satanic insignia and tattoos, and preach violence against Black, Hispanic, Jewish, Asian and homosexual people.

Who are the victims? According to Bias Crime and the Criminal Justice Response, a report prepared for the National Institute of Justice by Abt Associates Inc. (Abt),[1] Blacks and Jews are most often victimized. "Records from the New York City Police Department's Bias Crime Unit show that from January through June, 1987, close to two-thirds of the bias crimes reported to the unit were targeted at these groups (21% against Jews and 43% against Blacks)." Abt. According to the National Gay & Lesbian Task Force, however, homosexuals are most frequently the victims of hate crimes. Jews and Blacks are just more likely to report incidents of hate crime than homosexuals due to the homosexual's fear of retaliation and alienation from the public and even fear of further harassment by the police.

Generally, there are two types of hate crime statutes; those whose purpose is to punish such crimes, and those whose purpose is to keep records on them. Record keeping is necessary so that police know problem areas and can spot trends: Who is involved? What happened? Where is it happening? How often? To whom? At least forty three states have some sort of ethnic-intimidation legislation and at least eight states have statewide reporting systems. Punishment statutes have been further divided into 6 categories by Abt:

> 1) Statutes making specific acts of intimidation criminal offenses. Examples: property damage to places of religious worship (Texas' HB 1777), cross burning, anti-mask or hood laws, and the formation of private paramilitary organizations (Idaho, home of the "Aryan Nations Church," has one of the most comprehensive hate crimes package which includes the prohibition of paramilitary training).

[1] The report was based on findings of the National Organization of Black Law Enforcement Executives and interviews with representatives of the criminal justice system, constituency organizations and other organizations devoted to preventing hate violence.

2) Statutes proscribing acts that are already criminal offenses but specifically prohibiting these acts when they are motivated by the victim's race, religion, national origin, and sometimes sexual preference, age, or physical disabilities. Examples include harassment (Idaho's malicious harassment law makes a felony of the assault of someone on the basis of race, religion or ethnic background), intimidation, or destruction or defacement of property.
3) Statutes imposing heightened penalties for criminal conduct when motivated by religious or racial bias. Examples are Oregon's intimidation statute which raises third degree criminal mischief to second degree intimidation where motivated by bias and Texas' HB 1777.
4) Statutes which broadly proscribe interference with a person's civil rights.
5) Statutes providing for a civil cause of action specifically to individuals whose civil rights have been violated. Sample damages include: emotional distress, punitive, and costs and attorneys' fees.
6) Statutory provisions permitting the Attorney General to seek injunctive relief on the victim's behalf.

On the federal level, RICO has been the tool most often used by prosecutors in hate crime cases. For example, in 1985 federal prosecutors got convictions under RICO for nine men and one woman who were members of the "Order," a racist and anti-Semitic group, for multiple murders, armed robberies, counterfeiting, weapons violations, and arson. That same year, federal prosecutors successfully prosecuted the leader of "Covenant, the Sword, and the Arm of the Lord," a militant white supremacist group. More recently, the Justice Department, with Attorney General Dick Thornburg, has targeted the skinheads as part of an overall crack down on hate crimes. Publicized in the Austin American-Statesman, the skinhead group known as the "Confederate Hammer Skins," are under investigation in Dallas by a state-federal cooperative consisting of the FBI, the Dallas Police Department, the Justice Department's Civil Rights Division and the Dallas County District Attorney's office. The same man who successfully prosecuted the "Order," Barry Kowalski, is leading the investigation.

In the legislative arena, lawmakers are considering the Federal Hate Crime Statistics Act which is sponsored by Senator Paul Simon, D-Ill., and Representative John Conyers, Jr., D-Mich. This bill would direct the U.S. Attorney General to collect data on crimes motivated by prejudice based on race, religion, ethnicity or sexual orientation, and publish any findings. Last year a similar bill passed the House but not the Senate. This year's bill (HR 1048) was passed by the House June 28 and sent to the Senate July 6. As of August 29, the bill was pending mark up in the Senate Judiciary Committee.

Texas recently passed HB 1777, as amended by HB 103, a bill relating to vandalism at religious and burial sites. This bill amended section 28.03 of the Penal Code (relating to criminal mischief) by making a third degree felony of the damage or destruction of a place of worship or a community center that provides medical, social, or education programs and the amount of the pecuniary loss to real or tangible personal property is $20 to $20,000, or, if the damage is greater than $20,000, it is a second degree felony. This is Texas' only law relating to hate crimes.

Abt enumerated a number of issues that need to be addressed by the criminal justice system. The remainder of this article will summarize the report's findings.

Data Collection and Reporting. Accurate and complete data are needed to understand the pattern of hate crimes in a certain area. With such data, law enforcers can appropriately allocate their resources. In order for any data collection system to succeed, four issues must first be resolved:

1) "Hate crime" must be defined: What sort of damage is entailed? Who are the victims? What guidelines will be used to determine if a crime is motivated by bias?
2) The data elements to be collected must be identified: What is the location of each incident? What is the nature of the offense? What is the pattern of offenses?
3) A data collection system must be designed: How is the information to be recorded? How will the paperwork be handled?
4) The group to collect, analyze and disseminate the data must be decided: Will the police or some other community organization be responsible?

Law Enforcement. What should police executives do to develop an effective response to bias crime? Abt identified the following six steps as critical for law enforcement agencies to target bias crimes:

1) Systematic data collection regarding the number, location, and nature of bias incidents in the community.
2) Police training in the definition and identification of bias crimes, and the importance of collecting bias crime data.
3) Increased resources devoted to the investigation of bias incidents.
4) Activities designed to encourage victims to report bias crime.
5) Designation of a liaison to the affected community.
6) Collaboration with the community to prevent bias crime and its escalation.

When should a special bias unit be set up? The National Organization of Black Law Enforcement Executives (NOBLE) has suggested that the key considerations are available resources, the frequency, scope, and severity of hate violence incidents, the community's perception of bias crime as a problem, and alternative methods available to address the problem.

How can beat officers be motivated to determine whether an incident is bias related and then report it as a bias crime? Abt suggests:

1) An unequivocal and well-publicized commitment by the chief law enforcement executive to combatting bias crime.
2) Training in the reasons and procedures for targeting bias crime in order to gain the cooperation of the beat officer.
3) Transferring, disciplining, and, if necessary, firing officers who fail to follow department policy regarding the handling of bias crime.
4) Make the reporting procedures simple, e.g., use a simple stamp indicating a bias crime to stamp on the report form.

Hate crimes are a frightening but growing problem in America. Police departments across Texas must assess the extent of hate crimes in their areas and deal with it accordingly. Ignoring the problem will not make it go away.

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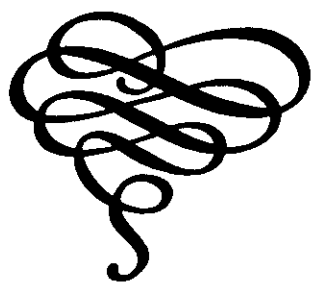


USE OF FORENSIC EVIDENCE

Crime laboratories play an important role in our criminal justice system by examining physical evidence in support of investigations and subsequent prosecution. Yet just how frequently - and effectively - is forensic evidence actually used at various stages of the criminal justice process - charging, plea negotiations, trial, and sentencing? Is forensic science "over-burdened and underutilized," as suggested by some specialists? If so, what can be done to improve the situation?

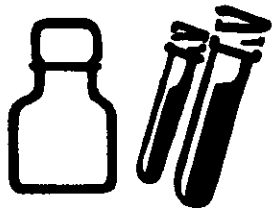
This article explores these questions. It summarizes two extensive studies of the actual uses and effects of forensic evidence.

Researchers surveyed crime lab directors across the nation. In addition, more extensive analysis focused on six jurisdictions with diverse geographical, population, organization, and case load characteristics: Chicago and Peoria in Illinois; Kansas City, Missouri; Oakland, California; and Litchfield and New Haven in Connecticut.

Forensic evidence in the criminal justice process

Among important findings of the research, police are on average about three times more likely to clear cases when scientific evidence is gathered and analyzed. Prosecutors are less likely to agree to enter into **plea negotiations** if forensic evidence strongly associates the defendant with the crime. And somewhat surprisingly, **sentences** tend to be more severe when forensic evidence is presented at trials.

By tracing the use of forensic evidence through the various steps of the criminal justice process, we can analyze its relative importance at each juncture.



Importance of forensic evidence

Forensic evidence includes such clues as fingerprints, blood and semen stains, drugs and alcohol, hairs and fibers, and firearms and tool marks.

In court, such evidence is characterized by the presence of a laboratory analysis and an expert prepared to interpret and testify to the scientific results, thus distinguishing forensic evidence from other forms of physical or "tangible" evidence such as stolen goods, articles of clothing, and other personal property.

Forensic evidence plays three important roles in the judicial process:

It establishes the elements of a crime. For example, testing suspected controlled substances proves they are drugs and, thus, that a crime has been committed.

It associates defendants with crimes or disassociates them:

- Forensic evidence (particularly fingerprint and firearms evidence) can *conclusively associate* a defendant with a crime.

- Forensic evidence such as blood, semen, hairs, and fibers can also *tentatively associate* a defendant.

(continued on page 9)

Arrest and clearance

The research tested whether scientific evidence has an appreciable effect on the clearance rates of burglaries, robberies, and aggravated assaults. After controlling for the availability of suspects, eyewitnesses to the crime, and elapsed time between discovery of the offense and its report to police, clearance rates of offenses with evidence scientifically analyzed were found to be, on average, about three times greater than in cases where such evidence is not used.

Scientific evidence has its greatest impact in cases where the chances of solution are smallest - when suspects are neither named nor identified quickly after the crime.

Charging

While acknowledging that forensic evidence offers good corroboration, prosecutors prefer the testimony of police officers and eyewitnesses when making decisions to charge. Prosecutors point out that laboratory results are typically unavailable at the time charging decisions have to be made. This reflects both the complexity of some laboratory processing and the limited resources of many crime labs.

Prosecutors also said they would rarely file charges if all they had was physical evidence. There are exceptions:

1. In those cases when forensic evidence has assisted in identifying the defendant or establishing the elements of a crime, it of course will be available at the time of the charging decision.

2. Prosecutors must defer drug or narcotic charges until results are received from the crime lab.

3. Rape cases need forensic evidence if there is a question whether intercourse actually occurred or concerning the victim's identification of the assailant.

4. Arson charges may also turn on laboratory testing of fire debris and the identification of flammable liquids or combustibles.

Plea negotiation

In many jurisdictions more than 90 percent of cases are resolved through pleas. The impact of forensic evidence at this pretrial stage depends on how strongly laboratory results associate the defendant with the offense and how well the defense can explain them away.

- Forensic evidence can also help exonerate a defendant when laboratory results are inconclusive or when they definitely disassociate the defendant from the crime.

It helps reconstruct the crime or the crime scene.

The importance attached to forensic evidence varies in relation to the case, the type of evidence, and the prosecutor's perspective. Forensic evidence is regarded as more important, and more likely to be gathered and analyzed, in violent crimes than property crimes. Yet even in violent crimes its importance is affected by other aspects of the case. In a rape case, for instance, if the defense revolves around the issue of consent, the availability of forensic evidence has little value.

Forensic evidence is also seen as more important if the analysis conclusively links the defendant to the offense. Thus, fingerprints are more highly regarded than comparisons of hairs, fibers, or bloodstains.

Finally, prosecutors seem divided in their personal evaluation of forensic evidence. One group says they find other types of evidence, at some level, open to question or suspicion, but forensic evidence is "always trustworthy." The second group views forensic evidence as corroboration for other evidence - the glue that binds other evidence together but not the keystone of a case.

If forensic evidence strongly associates the defendant with the crime, prosecutors are less inclined to offer a plea bargain. Defense attorneys may then urge clients to plead guilty and seek a reduced sentence.

When laboratory resources are limited, however, some prosecutors will not ask for laboratory workups unless a case is actually going to trial. In jurisdictions with greater resources, prosecutors tend to delay plea negotiations until they receive the lab results.

Jury trials and expert testimony

While scientific examiners do not testify in the vast majority of trials, lab directors and trial attorneys agree that forensic evidence can affect the disposition of criminal cases brought to trial.

Prosecutors believe that juries are quite impressed by scientific evidence - that they: "love to play detective" and that forensic evidence helps to "jazz things up." More importantly, juries consider scientific evidence trustworthy, not subject to human emotion and distortion. One prosecutor commented that if he had to choose between presenting a fingerprint or an eyewitness at trial, he would always go with the fingerprint.

Forensic evidence can prove to be a two-edged sword, however. When disappointed juries find it less than conclusive, they may surmise that the prosecution failed to make its case. Prosecutors are even more concerned about cases without forensic evidence. They sometimes feel obligated to call police officers or forensic experts to the witness stand to explain why physical evidence is absent.

Jury comprehension

Prosecutors stress the importance of jurors understanding forensic evidence. While prosecutors have much greater faith than crime lab directors in the ability of juries to comprehend complex scientific testimony, they believe they must teach jurors about forensic evidence and lead them through the questioning of the expert.

This requires prosecutors to be knowledgeable about the scientific evidence and its significance. While articulate expert witnesses facilitate this process, understanding their testimony also depends on the prosecutor's preparation and skills in questioning. Interaction between a well-prepared trial attorney and an articulate expert witness is critical in integrating scientific findings into the case.

The use of forensic evidence

Laboratory caseloads - This nationwide survey found that only about a quarter of crime laboratory caseloads involve personal or property crimes. About two-thirds of the work is identification of drugs and narcotics and the determination of alcohol content of samples from suspected drunk drivers. In fact, forensic laboratories fight a continuing battle to manage their drug caseloads and still respond to other investigations. This reflects the fact that drug possession or sale and driving-while-intoxicated cases require a scientific analysis for prosecution.

The courts - Analysis of prosecutor case files from 1975, 1978, and 1981 in the six study jurisdictions revealed that laboratory reports were used in about one-quarter to one-third of felony cases that had survived initial screening. These percentages remained fairly consistent across the years and across cities.

More specifically:

- Drugs and fingerprints made up from 60 to 80 percent of the evidence described in the laboratory reports. This suggests that laboratories can expect to focus on evidence that is mandatory for prosecution of a case or can conclusively link the defendant with a crime.

- The next most frequently used types of forensic evidence are firearms, blood and bloodstains, and semen; the rates of analysis of these three categories declined from 1975 to 1981. Lower usage of scientific evidence concerning nondrug offenses may reflect that (1) examiners have less free time to take on additional cases

(continued on page 11)

The research survey sought to learn how well jurors claim to understand forensic evidence, how they use the evidence in their decision making, and the weight they give it compared to other evidence. The survey concluded that juries give forensic evidence serious consideration but that it is not usually the key evidence. Here are the reasons for this conclusion:

- Jurors felt they understood scientific evidence as well as or better than other evidence. They claimed the best understanding of biological evidence and poorest understanding of chemical evidence.

- Although a quarter of the jurors surveyed said that without forensic evidence, their case's outcome would have been different (usually an acquittal instead of a guilty verdict), very few jurors specifically mentioned forensic evidence as crucial in their verdict. Witnesses to the crime were considered to be the most crucial.

- Rape cases involving biological (semen) evidence were usually the ones in which jurors considered forensic evidence crucial.

- In the relatively small number of cases in which forensic experts testified, they were ranked the most persuasive of all witnesses. Victims of crimes were ranked next most persuasive.

- A multivariate analysis found that juror understanding of forensic evidence was a significant predictor of the verdict, and that persuasiveness of the scientific expert influenced the ease with which jurors reached their verdict.

Defense challenges

Defense attorneys can challenge forensic evidence (1) during pretrial evidentiary hearings and (2) during trial, either by challenging the competency of the expert witness when the court reviews the witness's qualifications, or by cross-examining or refuting the expert's testimony.

In reality, however, attempts to have physical evidence ruled inadmissible are rarely successful. Defense attorneys usually do not challenge forensic witnesses because their credentials have been accepted by the court on previous occasions. Except in rare cases, budgetary restraints keep defense attorneys from introducing their own counter experts.

due to increasingly sophisticated (and time-consuming) analyses on evidence like bloodstains, and (2) greater time and effort must be devoted to reanalysis and testing under new quality assurance programs.

- Virtually all murder and drug prosecution files had laboratory reports, while laboratory input to rape prosecutions varied from 30 percent in one jurisdiction to as high as 70 percent in another.

- Forensic evidence is least often used in burglary, robbery, and attempted murder or aggravated battery cases.

Laboratory directors generally agreed with prosecutors on what cases need priority. They cited forensic evidence as having its greatest impact in drug and homicide prosecutions, moderate importance in arsons and burglaries, and minimal importance in aggravated batteries, robberies, and larcenies. Lab directors also believe their examinations have substantial impact in rape cases, but prosecutors are more tentative about the value of this evidence.

Although we frequently read or hear about more esoteric forms of forensic evidence - e.g., hair, fibers, glass, paint, soil, etc. - research shows they rarely appear in routine criminal cases. One reason, of course, is that prosecutors have less interest in evidence whose analysis may only partially or statistically link a defendant with a crime.

Reprinted from the National Institute of Justice's Research in Brief, U.S. Department of Justice, "Use of Forensic Evidence by the Police and Courts," October, 1987.

As a result, most defense challenges are done through cross-examination of the forensic expert or by admitting evidence through stipulation, thus avoiding the drama of the expert's testifying. The defense may attempt to muddle the issues and make the analysis seem extremely complex, implying that no one can trust or really understand tests of such complexity. Prosecutors generally feel these defense tactics are unsuccessful.

If, however, the forensic testimony involves an interpretation of forensic evidence, rather than simply an identification of a substance, the cross-examination may successfully introduce alternative explanations. Rather than attack the evidence or the expert head-on, the defense will try to "explain away" the evidence.

While defense attorneys feel at a great disadvantage in dealing with scientific evidence, practically all of those interviewed were satisfied that the results presented by the local crime laboratories were accurate and the examiners impartial.

Bench trials

Except in Chicago, nearly all the trials that occur in the study jurisdictions are jury trials, not bench trials. Thus, prosecutors could say little about judicial responses to forensic evidence and experts, but those who did noted some interesting differences in the presentation of physical evidence at bench and jury trials.

Presentation of scientific results to a judge is more streamlined. A judge who is familiar with the expert and the evidence will usually waive the qualifying of the expert witness and agree to a stipulation of the laboratory results. Still, one attorney warned that prosecutors should not down play forensic evidence simply because the case is being heard by a judge. He believed physical evidence would make a judge take the state's case "more seriously."

Prosecutors believe judges may be more discriminating and critical of forensic testimony. Compared with a novice juror, experienced judges will have heard numerous experts testify and are able better to evaluate the evidence and the testimony. In fact, some prosecutors noted that certain judges urge that laboratory personnel be "more prompt and more professional."

If an attack on forensic evidence is a key element in defense strategy, then defense attorneys believe the case should be tried before a jury. Judges are not thought to be as persuaded by intense cross-examinations, whereas one confused or doubting juror can result in a mistrial.

Conviction or nonconviction

Since nearly all defendants were eventually convicted in four of the six jurisdictions in the study, conviction statistics do not readily reveal the relative importance of any particular factor such as forensic evidence. However, the analysis indicates that overall, forensic evidence plays a rather limited role in the decision whether to convict, especially when compared with the effects of admissions, incriminating statements, and tangible evidence associating the defendant with the crime.

Forensic evidence tends to interact with other evidence to affect case outcome, especially when forensic evidence links the defendant - conclusively or probably - with the crime scene or victim. Even when the defendant offers an alibi, scientific evidence also supports convictions on the top charge when it associates the defendant with the crime.

While the presence of forensic evidence tends to help yield a conviction primarily when cases are otherwise weak (e.g., no incriminating statements), the *absence* of such evidence leads to lower conviction rates. Prosecutors in our hypothetical case reviews believe it is principally the absence of forensic evidence - usually in combination with the absence of a confession or other strong evidence - which pushes cases toward dismissal or acquittal. In rape cases, the lack of a laboratory report leads to significantly *lower* conviction rates when defendants have offered alibis.

Sentencing

Sentencing in felony courts involves two distinct, if related, considerations: (1) whether or not to incarcerate a defendant, and (2) if so, for how long.

The defendant's prior record overwhelms most other factors in the incarceration decision, followed by the seriousness of the crime of which the defendant is convicted. Laboratory reports interact with seriousness in maintaining high rates of convictions to top charges.

A very important (and somewhat unexpected) finding of this study is the strong link between forensic evidence and sentence length. Lab directors believed forensic evidence had its major impact in determining guilt or innocence and that its impact on sentencing was inconsequential. Yet the subsequent research showed that forensic evidence is the only type of evidence found to influence the severity of sanctions, while controlling for a range of other variables. Longer sentences are given defendants where laboratory reports are present.

One possible explanation of this strong influence might be that scientific evidence serves as particularly graphic and convincing corroboration of the prosecution's case, reduces any doubt in the judge's mind, and frees the judge to give the defendant a prison term in the high end of the allowed range. (Laboratory results often document vividly the character and degree of violence associated with the crime.)

A related explanation might be that the most serious and violent offenses are more likely to generate forensic evidence and laboratory analysis.

AUTOMATED FINGERPRINT IDENTIFICATION SYSTEMS (AFIS)

The AFIS technology makes many previously time consuming or impossible tasks possible. The major advantage is its ability to compare a fingerprint with all the prints available in the police file. Without AFIS, law enforcers need to have some suspects in mind as comparisons with every single print on file is effectively impossible. With AFIS, the search time for a file of under 500,000 prints may take from a few minutes to half an hour. Law enforcers need to keep in mind, however, that a fingerprint expert is still needed to verify a match.

TECHNOLOGY

To put it simply, AFIS is able to do print comparisons this way: The computer assigns a number to a print based on the ridge patterns of the print. The computer can make very fine distinctions among millions of prints, and so is able to compare among those prints in trying to find a match.

COMPATIBLE TECHNOLOGIES

Technology is available for officers to transmit prints from the crime scene to the AFIS computer at a state central repository, allowing instant identification. This is possible through photo and telecommunication technologies. At the crime scene an officer has a camera with a device attached which converts the image of the print to a number. The number can then be sent to the central repository via modem to be processed and compared.

The traditional method of identifying prints left at the crime scene can be problematic since fairly recent prints are needed and sometimes that's not possible. Also, dusting for prints doesn't work well on some surfaces, like paper or fabric. The use of chemicals and lasers, however, can eliminate these problems. Certain chemicals can restore moisture to the print or make the print visible where dusting won't, but lasers can work even where chemicals don't. Blue laser light can spot fluorescence in the chemicals found in prints. While lasers are usually used in the laboratory, portable units are being tested at crime scenes.

TEXAS

In Texas, the cities of Dallas, Houston, and Austin have installed AFIS (Austin installed Houston's old system in 1987). A state-wide system is now in the works. The 71st Legislature (regular session) appropriated over fourteen million dollars to the Department of Public Safety, Crime Records Division, for DPS to begin the purchase and implementation of AFIS. The total cost of the system is estimated at twenty six million dollars (including staffing and preparation of sites). DPS recently released the request for proposal for the bid by vendors for AFIS.

The system approved by the legislature includes:

1. A central system that will process prints taken by law enforcement agencies around the state. The local agency will send in the print by mail, then AFIS can sift through 1.5 million of the over 3.6 million prints on file with DPS.

2. Thirty one remote latent fingerprint terminals will be placed around the state and will be capable of processing an additional 450 print searches a day. The actual sites for these terminals have not been decided yet but, for design purposes, thirty one locations were chosen where, based on crime and population statistics, eighty one percent of the population and ninety one percent of crimes were covered by these remote terminals.

In addition, members of the legislature recommended that thirty remote ten-print terminals (also known as remote booking terminals) be included in the final system. These terminals would allow the booking officer to take the print of the suspect, put it into the terminal, and get a response as to the suspect's identity and record from DPS within one to four hours. The legislature will decide on these terminals in the 1991 session.

After the proposals have been received from vendors for AFIS, DPS will hold a meeting of interested agencies to discuss the remote access network. The remote access network plans will not be finalized before DPS is able to meet with local agencies. This meeting will probably occur in early 1990.

For further information on Texas' AFIS, please contact Mr. David Gavin of the Department of Public Safety at (512) 465-2078.

SOURCES

U.S. Congress, Office of Technology Assessment, "Automated Fingerprint Identification System," CRIMINAL JUSTICE, New Technologies and the Constitution, Special Report, OTA-CIT-366 (Washington, D.C.: U.S. Government Printing Office, May 1988).

Texas Department of Public Safety, "Status of the Texas AFIS Project," Texas Crime Information Newsletter, (Aug. 1989).

Special thanks to David Gavin of the Department of Public Safety.

DID YOU KNOW ???

Chapter 79 of the Human Resources Code requires that all Texas law enforcement agencies, on receiving a report of a missing child/person, immediately enter the name of the person into the clearinghouse with all available identifying features. Information inputted into the National Crime Information Center's (NCIC) Missing Persons File will be automatically entered into the clearinghouse computer system.

The clearinghouse was established to meet the needs of the law enforcement agencies and the public of the state of Texas in handling the problem of missing and unidentified persons.

The clearinghouse provides the following services:

STATEWIDE TOLL-FREE TELEPHONE LINE

The clearinghouse provides an incoming toll-free telephone line for parents, law enforcement agencies, or other individuals to provide information about missing persons. The telephone line is operational twenty-four hours a day, seven days a week.

MISSING PERSONS BULLETIN

The clearinghouse publishes and distributes a monthly bulletin of missing or unidentified persons to most law enforcement agencies. The clearinghouse also distributes the bulletin to all clearinghouses in other states and the departments of public safety in those states that have no clearinghouse and to non-criminal justice centers upon request.

BROCHURES

The clearinghouse disseminates educational and informational brochures.

FLIERS

The clearinghouse assists individuals filing missing persons reports in developing missing persons fliers.

PUBLICITY

The clearinghouse works closely with television stations, newspapers and others in an effort to publicize photographs and descriptions of missing persons.

If additional information is desired about the Texas Missing Persons Clearinghouse, please contact:

Texas Department of Public Safety
Missing Persons Clearinghouse
P.O. Box 4143
Austin, Texas 78765-4143
1-800-346-3243
512-465-2810
512-465-2811

Reprinted with permission from Texas Department of Public Safety, "Texas Missing Person Act" (MP-13, Rev. 11/88).

LETTER OPINIONS

A Letter Opinion has the same force and effect as a formal Attorney General Opinion and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent Letter Opinion, a formal Attorney General Opinion, or a decision of a court of record.

LO-88-70, June 14, 1988.

A justice of the peace may possess a gun within his or her courtroom. While a justice of the peace is not a "peace officer" (Penal Code 46.03(a)(6)), his or her courtroom is "premises under his control" (Penal Code 46.03(a)(2)). A judge should be aware, though, that when he or she does bring a gun into the courtroom, a defendant may have a claim of deprivation of due process. See Caraway v. State, 550 S.W.2d 699 (Tex.Crim.App. 1977) (no deprivation of due process because the jury was unaware of the gun and because the gun was justified in this case). [That a justice of the peace is not a peace officer was affirmed by JM-1028, Criminal Law Update, July/August 1989; that opinion stated in its summary that "judges ... may not lawfully carry handguns," but in its full opinion affirmed the LO-88-70 opinion that a justice of the peace could possess a gun in his or her courtroom.]

LO-88-85, July 20, 1988.

An individual may serve as both a constable and as the administrator of the Cooke County Emergency Medical Service. Tex.Const., art. XVI, sec. 40: a person may not hold more than one civil office of emolument at one time. The administrator of the Cooke County Emergency Medical Service is not an officer because he serves at the pleasure of the commissioners court and exercises his duties subject to their review and correction. Also, his duties and qualifications are not established by statute. Neither does the doctrine of incompatibility prevent service in both positions: the constable has no right of control over the administrator of the emergency medical service, nor does the administrator have any control over the constable.

LO-88-109, September 23, 1988.

The following summarizes the laws on compensatory time. As pertains to employees of small counties (1985 population 4,900): Section 152.011 of the Local Government Code: the commissioners court shall set the compensation of county and precinct employees who are paid wholly from county funds.

Counties are subject to the provisions of the federal Fair Labor Standards Act (FLSA). 29 U.S.C. sec. 207(a) generally requires payment of overtime compensation for hours worked in excess of forty hours in a work week, but subsection (o) provides that employees may in lieu of overtime pay receive compensatory time at a rate of not less than one and a half hours for each hour for which overtime compensation would be required by subsection (a). Subsection (k), recognizing that the work schedules of law enforcement employees often do not conform to the standard forty hour week, makes special provisions for such employees. Various exceptions set out in the FLSA to the requirements of section 207 may be relevant to particular individuals employed in law enforcement: 213(a)(1), 213(b)(20), 203(e).

LO-89-21, March 10, 1989.

A member of the judiciary may endorse a candidate for public office; such activity is not prohibited by the Election Code, nor by Canons 7 or 2 of the Code of Judicial Conduct.

LETTER OPINIONS

LO-89-38, April 26, 1989.

Where a constable performs custodial work for a sheriff at the sheriff's office and jail, the County Commissioners Court may pay the constable for such work because a person may hold both the position of constable and that of jail employee. The Texas Constitution prohibits the holding of more than one civil office of emolument at one time. A person who performs custodial work for the sheriff and assists in the feeding of prisoners is not a civil officer because he is completely under the control of the sheriff. So long as the control the sheriff exercises over the constable does not invade an area in which the constable has powers and duties the two positions are not incompatible.

LO-89-41, May 4, 1989.

Hospitalized prisoners need not be arraigned before a magistrate. It would appear that the arraignment may lawfully be held at any time prior to trial (or even at trial if the jury does not witness the arraignment) so long as two days have elapsed since a copy of the indictment was served on the defendant if the charge is by indictment, unless there is a waiver by the defendant or the defendant is out on bail. Wood v. State, 515 S.W.2d 300 (Tex.Crim.App. 1974); Thompson v. State, 447 S.W.2d 920 (Tex.Crim.App. 1969).

LO-89-43, May 23, 1989.

Where the district attorney's office holds records subject to an expunction order and the petitioner (of the expunction order) requests to see his records, article 55.01 of the Code of Criminal Procedure governs, not the Open Records Act, and the petitioner may thus examine his records.

LO-89-46, June 7, 1989.

A city commission may not reduce its funding to the police department for maintenance and repair of vehicles as the result of the forfeiture to the department of vehicles under section 5.08 of article 4476-15, V.T.C.S.

LO-89-51, June 20, 1989.

Relating to service of summons by a justice of the peace in criminal cases. Pursuant to article 23.04 of the Code of Criminal Procedure, the summons shall issue from a court having jurisdiction of the case only upon the request of the attorney representing the state. Article 23.03(a) provides that the summons shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides. There is no general statutory provision authorizing a clerk for the justice court. Summons in misdemeanors are authorized to be issued under article 23.04 in accordance with procedure in article 23.03. Since there is no general statutory provision for a clerk in justice court, the reference to the clerk issuing the summons in article 23.03 can be read as referring to the justice himself issuing the summons from his court.

If a summons is mailed to a sheriff in accordance with article 23.03 or 23.04, the sheriff has a responsibility to serve such summons, the sheriff has a duty to serve it. Local Gov't Code, sec. 85.021. "[A]n inadequate operating budget will not excuse a sheriff's failure to execute process directed to him." Attorney General Opinion H-595 (1975).

LETTER OPINIONS

LO-89-62, August 15, 1989.

When a salary grievance committee recommends an increase in salary for a justice of the peace, the increase becomes effective when nine members of the commissioners court vote to recommend such increase and the increase takes effect in the following budget year, not for the remainder of the current year. Local Gov't Code, sec 152.016(c).

ATTORNEY GENERAL OPINIONS

JM-1046 RE: Whether sheriffs or constables are entitled to fees for unsuccessful attempts at service of civil process (RQ-1660).

SUMMARY: Commissioners courts may set reasonable fees for services performed by sheriffs and constables in unsuccessful attempts to serve civil process.

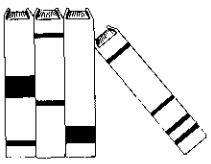
JM-1057 RE: Whether a justice of the peace may also serve as a jailer (RQ-1633).

SUMMARY: The common law doctrine of incompatibility prevents one person from serving as justice of the peace in a county and as jailer in the same county. The duties of the justice of the peace as magistrate conflict with those of the jailer as an employee of the sheriff. Moreover, arrest warrants and search warrants issued by a magistrate who is also a jailer might be invalid under the Fourth Amendment of the United States Constitution.

JM-1075 RE: Effect of amendment to rules of criminal evidence in production of clinical records (RQ-1716).

SUMMARY: Rule 509 of the Texas Rules of Criminal Evidence repeals article 5561h, V.T.C.S., insofar as it relates to any information in the clinical records relating to the diagnosis or evaluation of mental or emotional condition of a patient heretofore deemed confidential under the physician-patient privilege in criminal cases and criminal law matters. Section 57(a) of article 5547-300, V.T.C.S (which provides for the confidentiality of clinical records relating to the identity, diagnosis, evaluation and treatment of a mentally retarded person) is repealed by Rule 509 of the Texas Rules of Criminal Evidence in criminal cases and criminal law matters to the extent that such records may have heretofore been deemed confidential under the physician-patient privilege.

A subpoena issued in accordance with the provisions of article 24.02 of the Code of Criminal Procedure is sufficient to require the production of clinical records in a state criminal proceeding. A grand jury investigation is a "criminal proceeding" in both state



and federal courts. Rule 509 of the Texas Rules of Criminal Evidence is not applicable to criminal proceedings in federal courts. Articles 5561h and 5547-300, section 57, V.T.C.S., are not applicable in criminal proceedings in federal courts.

JM-1088 RE: Whether a particular district judge is a member of a county juvenile board (RQ-1756).

SUMMARY: The Juvenile Board of Willacy County consists of six members: the district judges for the 103rd, 107th, 138th, 197th and 357th judicial districts and the county judge. All six members of the board are entitled to the compensation provided for in section 5 of article 5139MMMM.

JM-1089 RE: Enforcement of the support dog laws under chapter 121 of the Human Resources Code (RQ-1749).

SUMMARY: The prosecutor at the county level -- the county attorney or in some cases the criminal district attorney or district attorney -- has responsibility for prosecuting the offense described in section 121.004(a) of the Human Resources Code, relating to discrimination against visually handicapped persons using support dogs in public facilities. Where the offense is committed in a city having a municipal court of record with jurisdiction over such offense, the city attorney may also prosecute such offense in that court.

Editor's Note

In May, it was our intention to publish a special edition of the Criminal Law Update which would contain related new laws of special interest to criminal justice professionals. Once the legislative session adjourned and the number of bills signed into law were counted, it became apparent that printing, assembly and mailing costs would be extremely high.

In order to hold costs to a manageable level a compromise was reached. We will provide our Criminal Law Update Special Edition to all attendees of the Attorney General's Conference on Law Enforcement, October 23-26, in Austin.

For more information about this conference, please call (512) 463-2026.

Here is Your Latest

CRIMINAL LAW UPDATE

From

JIM MATTOX

Texas Attorney General

Crime Prevention Hotline

Call 1-800-252-5476

Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

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