TRUE BILL

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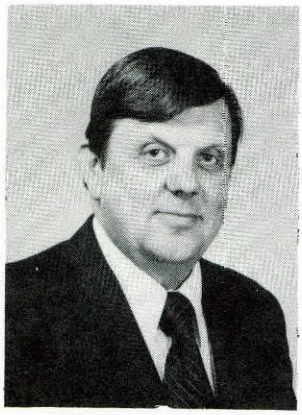
VICTIM-WITNESS ASSISTANCE ISSUE



The Director's Corner

by Andy Shuval

On April 6th, the Council finalized contract courses for the rest of the fiscal year; see p. 39 for information on the Basic Prosecution Course and the Capital Murder Seminar.

As in 1982, the Council will co-sponsor regional seminars with TDCAA. Focusing on the upcoming Legislative session, three important areas will be covered: the Legislative Program (by TDCAA), the Sunset Process (by the Council) and Victim-Witness Assistance (by both). Suzanne Willms, Director of the Crime Victims Clearinghouse, will present the assistance program. The last Legislative session revealed much interest in helping victims and witnesses. Suzanne will emphasize how prosecutors can help solve the problem and avoid more state-mandated programs which never seem to provide financial assistance. I think you will find her program helpful to your office.

The regional meetings give us the chance to visit and get your feedback. I hope to see you there. A questionnaire in June will ask you to evaluate current programs. Of course, your personal comments are always helpful.

The Council is looking to replace Scott, who is leaving to take a job paying considerably more. Scott has had the welfare of prosecution at heart. He has served the Council and prosecutors well. Each of us wish him well. Anyone wishing to move to Austin, please let me know. A major effort will be made in the next Legislative session to upgrade the position salary.

Andy

Federal News

PROPOSED FEDERAL ASSISTANCE TO CRIME VICTIMS

In March, U.S. Attorney General William French Smith sent Congress a proposed "Victims of Crime Assistance Act of 1984." Under the proposal, a Crime Victims' Assistance Fund would receive $45 - $75 million a year from fines paid by federal defendants. The Act would make available up to 50% of the money to state victim compensation programs, 30% to nonprofit or public victim assistance agencies, and 20% for federal victim assistance.

A "Son of Sam" provision would prohibit a federal criminal from profiting financially from selling the rights to the story of his crime. Such profits would be diverted either to the criminal's victims or to the Assistance Fund.

The Fund would receive even more revenue if Congress passes the President's Comprehensive Crime Control Act, which would impose higher fines for federal crimes.

ARMED CAREER CRIMINAL ACT PASSES U.S. SENATE

For three years, controversy followed the development of legislation which would turn third-offense armed burglaries and robberies into federal offenses. On February 23rd the controversy ended with the passage in the U.S. Senate (92-0) of a compromise bill, the Armed Career Criminal Act (S.52).

The compromise came in an amendment, sponsored by Sen. Edward Kennedy, D.-Mass., and Sen. Strom Thurmond, R.-S. Carolina, and passed by the Senate 77 to 12.

The bill, as originally sponsored by Sen. Arlen Specter, R. - Penn., would have applied to third-time robbers on either the federal or state level. The amendment limits the bill only to those offenders whose third armed robbery or burglary is committed against a bank or on federal property.

For a copy of S.52, contact the Council.

Council News

INDICTMENT MANUAL SENT OUT TO ELECTED PROSECUTORS

A free Indictment Manual, the Council's newest publication, was mailed in April to each elected prosecutor, who is responsible for the copy while holding office. (It is not your personal copy.) Additional copies are $55.00 each. Large offices may request more free copies by writing to Andy Shuval.

The manual is edited by Marvin Collins, formerly District Court Judge and currently Chief of the Civil Section of the Tarrant County District Attorney's Office. It includes General Forms for Complaints, Informations, and Indictments, as well as a Checklist of Common Problems inherent in drafting and a table of Punishment Ranges for offenses. It devotes a section each to Black Letter State Law, the Penal Code, and Drug-Related Offenses. All three sections are extensively annotated. Future sections are planned on the Alcoholic Beverage Commission, Parks and Wildlife, and Miscellaneous Offenses. Updates will be provided. Please relay to Andy Shuval or David Kroll any comments or corrections.

ARSON COUNCIL HONORS PROSECUTOR COUNCIL

A Texas Advisory Council (A.T.A.C.) on Arson honored the Prosecutor Council with a plaque at its banquet March 15th in Austin. The plaque, signed by A.T.A.C. President Ron Hawthorne, was presented in recognition and appreciation of the Council for its publication, the Investigators Desk Manual. The banquet accompanied A.T.A.C.'s Arson School held March 13-17 at the Villa Capri for some 250 investigators.

REIMBURSEMENT DEADLINE

Remember: travel reimbursement applications must be to the Council within 60 days of the course attended. The Prosecutor's Investigator School DEADLINE IS MAY 29, 1984.

TRUE BILL is published bi-monthly by The Prosecutor Council as an information medium for prosecutors throughout Texas. Articles, inquiries, and suggestions are always welcome.

Commission on Sentencing Meets

The Commission on Sentencing Practices and Procedures met March 12, 1984, in the Texas Law Center in Austin.

Dr. Rolando del Carmon, Professor of Criminal Justice, Sam Houston State University, reviewed the social objectives of sentencing: rehabilitation, deterrence, incapacitation, and retribution. However, there is little agreement on the actual purposes of sentencing. To understand them, one must understand judges and the other actors in criminal justice, and the wide discretion these people exercise. He asked: Is Texas below the national standard in sentencing? Should plea bargaining be abolished? Can jury sentencing still be justified? He concluded that the Commission must impose enough structure to insure justice but not so much as to become mechanical and inhuman.

Judge Larry Gist, State District Court Judge, Beaumont, noted that the sentence imposed has virtually no relationship to the time served because discretion as to how much time is spent in confinement is delegated to persons outside the judicial process. As to whether punishments are appropriate to the crimes, he noted that judges have a variety of alternatives (work release, shock probation, etc.) but these can only be used with certain offenses. He suggested jury sentencing should either be abolished or juries should have the same information sentencing judges have.

The Honorable Tim Curry, District Attorney for Tarrant County, made no claim to represent all prosecutors, but felt he could express some feelings shared by most: "Don't fix a wheel unless you are sure it needs fixing." According to most prosecutors, plea bargaining is such a wheel. Prosecutors are in a better position to know what sentence should be recommended than the court. Judges should function as referees seeing that the defendant and the state get their rights. Plea bargaining is a reflection of what a jury would do in that instance. Different communities present different standards and differences in sentencing are not bad if they are appropriate to that community. He doubts any significant discrimination based on race, etc., exists in Texas. He expressed the prosecutorial response to penitentiary overcrowding is to build more prisons. He urged the Commission to consider — irrespective of costs, disparity, and other problems — what the people of Texas want.

John Byrd, Executive Director of the Board of Pardons and Paroles, discussed parole, discharge, mandatory release, and good time, particularly as it was liberalized by SB 640. A significant percent of TDC's population is statutorily eligible for parole at any given time. The Texas Prison Management Act mandated that the Board insure that TDC not be closed to new admissions because of overcrowding. He suggested the Commission consider a paper, "The Leveling Effect of Parole in Texas."

Dan Beto, Chief Adult Probation Officer, Brazos County, noted that the last Legislature was asked to choose whether to continue to fund maximum security prisons or to convert some of the state funding to probation and parole. Funding for Community Corrections was increased and these disciplines were called on to provide greater service. House Bill 1178 called upon the courts to require probation officers to conduct presentence investigations in felony cases to insure more equitable sentencing. The adult probation discipline is developing restitution programs, community service projects, using intensive supervision and looking for alternatives to incarceration.

Senator Ray Farabee, Chairman of the Commission, asked that consideration be given to sentencing disparity which occurs when highly competent prosecutors come up against weak and/or inexperienced defense attorneys or when very capable defense attorneys overwhelm under-staffed prosecutors, situations which the Commision will address in the future.

Dr. Ben Crouch, Assistant Director, Public Policy Resources Laboratory, Texas A&M University, discussed both surveys and data on actual sentencing practices as ways of gathering information needed to help the Commision with its work.

Victim-Witness Assistance:

An Interview with Suzanne McDaniel Willms

Suzanne McDaniel Willms is the Director of the Texas Crime Victims Clearinghouse, a division of the Office of the Governor.

How did you get involved in victim-witness assistance?

In 1976, then District Attorney Carol Vance asked me to help initiate the first prosecutor's victim witness operation in Texas. My first response was "Victim What?" However, I was soon convinced that the project was a worthy one. Since then, other prosecutors have shared Carol's view and made a commitment to establishing assistance for crime victims.

How does the Texas Crime Victims Clearinghouse assist in this area?

The Clearinghouse was established by Governor Mark White in 1983 a part of the Governor's Office. It serves as the first central source of information in Texas for and about all victims of crime. It networks efforts of existing programs, assists emerging projects and distributes a quarterly newsletter to some 8,500 Elected officials, citizens' groups, law enforcement agencies, crime victim compensation liaisons, rape crisis centers, family violence shelters, and mental health counselors.

In January the Clearinghouse opened a toll free number (1-800-252-3423). This will provide the focus and support necessary to continue and improve the coordination of service for crime victims in Texas.

The Clearinghouse has been working with the Prosecutor Council and TDCAA to integrate victim-assistance workshops into the Council's Regional Meetings this summer.

What will be the focus of the workshops?

The workshops will draw upon criminal justice professionals, forensic experts, and resource specialists on the following topics: "How to Start a Victim Witness Program," "Child Victim Witnesses," "Victims of Sexual Assault," and "Victims of Family Violence." Developments in legal issues and criminal justice responses will be discussed along with community input.

Since the Clearinghouse began, have prosecutors shown more interest in victim-witness assistance?

I am convinced by the requests we have had from police and prosecutors that they are ready and willing to improve their response to victims. After the last annual TDCAA meeting, we had many information calls and several visits by concerned prosecutors. By showing these concerned professionals a simple, efficient method to better their response to victims, I hope to improve the victim's involvement in the criminal justice system.

To quote the National District Attorneys Association draft on victim-assistance: "To the victim, crime is a devastating event. To the law enforcement official or criminal justice professional, it is an everyday occurrence." In the rush of daily dockets and the burden of heavy case loads, it is understandable that the victim can be overlooked. Nonetheless, I am encouraged by the interest and leadership shown by prosecutors in this area.

What benefits do you foresee from victim-witness units in prosecutor's offices?

First of all, victim-witness assistance is sorely needed. U. S. Department of Justice studies show that witness noncompliance continues to be a serious problem, with 10% to 50% of those affected failing even to report the crime. Misinformation about the system continues to grow and even to be hyped by media. The proliferation of well-run victim-assistance units could combat both problems. As the public becomes more aware of the responsiveness of the criminal justice system, they will rely on it more and witness noncompliance should drop.

Secondly, I foresee better management of cases. Early contact and notification of the victim eliminates many questions directed to the prosecutor and his staff. Often a victim's questions are simple, such as "How do I get my property back?" or "How do I apply for Crime Victims Compensation?" Unfortunately, these questions can easily pile up as telephone messages on the desk of a busy prosecutor. In the meantime, the victim becomes more frustrated. Designating one person in the office to answer these calls disposes of the matter and frees up the rest of the staff and the prosecutor.

Postponements also present a problem to victims and witnesses. For example, a sole owner of a small business closes his shop each time the case was to be heard, only to go to court to hear that his case was postponed again. This problem can be addressed by an "on-call" system administrated by the person handling victim calls. Of course, it is not always possible to free up one person for this purpose. Other methods can help and have been used in other states. The key, naturally, is simply to have a system.

What specific results have you seen from programs already implemented?

For example, with the Houston program instituted by District Attorney John Holmes, we began with one person for eight district courts. With the addition of staff, we were able to provide more than notification of case status. (If, as a victim, you don't know the criminal's name, it's often hard to discover where the case is in the system). We were able to get to the courtrooms and sit through the trial with the victim. (As the prosecutor is in the courtroom, the victim is sometimes left out in the hall.) The Houston progam also emphasized community interaction. I served as chair of an Interagency Council on Rape - made up of representatives from hospitals, law enforcement, and community service providers. Together, we worked out a plan to present to the medical society for the improved treatment of rape victims.

The cooperation among the agencies improved because we found out first hand what was going on in a particular problem area, and frankly, because it's much simpler to get a quick answer if you know a contact in an agency. Several other cities have developed interagency groups, such as sexual assault councils in Odessa and Waco.

Do you have any suggestions for a prosecutor interested in organizing a victim-witness assistance unit?

The Clearinghouse has compiled a "Victim Witness Procedure Manual" for prosecutors containing sample notification forms, brochures and information on current victim witness guidelines in Texas prosecutors offices. The procedure manual and a resource directory will be available this summer.

We also have the capability to visit an office when requested, observe daily case flow, and suggest actual implementation of these procedures. I encourage prosecutors to contact us for more information on programs happening throughout the state or in other states.

A survey questionnaire we developed produced interesting responses. For example, in Fort Worth, District Attorney Tim Curry frequently calls upon Jane Bingham, Director of the Tarrant County Women's Center, Rape Crisis Program, to assist victims through the court and to help orient the grand jury.

If you are interested in the questionnaire or would like to fill one out for your community, please contact the Clearinghouse at (800)-252-3423. □

Selected Victim-Witness Assistance Programs in Prosecutor's Offices

Our thanks to the Texas Crime Victims Clearinghouse for its help in compiling this information.

BELL AND LAMPASAS COUNTIES

Sponsor: District Attorney Cappy Eads.
Size of Program Staff: 1
Contact Person: Mr. Eads.
Services/Goals: In 1977, the office began sending out notices to every victim in whose case a guilty plea had been entered, notifying the victim of when and where the pleas would be taken and giving information on how to notify the office in the event that the victim would like to testify. The letter (average: 1,200/year) stipulates the restitution procedure and explains how to contact the probation office. In addition, the office is in the third printing of several brochures for victims - "The Rights of Victims," "Child Abuse," "Rape," "The Rights of Witnesses," and "Know Your District Attorney's Office."

BEXAR COUNTY

Sponsor: District Attorney Sam Millsap.
Size of Program Staff: 5 (2 Assistant D.A.s, 2 advocates, 1 paralegal)
Contact Person: Denise Martinez, Assistant D.A.
Services/Goals: The Domestic Violence Unit provides support for the victims of domestic violence and a plan for the prosecution of domestic violence cases. A "no drop" policy exists with regard to filed domestic violence cases, to reduce the number of requests to drop charges by a victim pressured by the abuser. Many victims report relief when told of the policy.

DALLAS COUNTY

Sponsor: Criminal District Attorney Henry Wade. (Funded February 1980 by a Federal/State grant.)
Size of Program Staff: 6 (1 investigator, 1 child victim coordinator, and 4 interns)
Contact Person: Mary Ledbetter, Investigator.
Services/Goals: This Division assists in locating witnesses and provides travel arrangements for out-of-county witnesses, information and referral for sexual assault victims, assistance to victims for compensation claims, and escort services to child victims. Workers screen all felony cases filed to target potential claimants for victims compensation (forms are automatically mailed with the Division's telephone number and location) and send information on court proceedings.

ECTOR COUNTY

Sponsor: District Attorney Michael Holmes.
Size of Program Staff: 1
Contact Person: Shirley Carroll, Victim/Witness Administrator.
Services/Goals: Preliminary and follow-up letters are sent to keep the victim informed. The Program is using video tape in the testimony of child victims so the child will not be exposed to harsh courtroom proceedings. Mr. Holmes would like the program to become a two-person unit. A PR campaign will seek to generate support and interest in the program.

EL PASO COUNTY

Sponsor: District Attorney Steve Simmons. (The CJD 5-year descending grant is now 80% county-funded and 20% grant match. It is expected to be 100% county-funded next year.)

Size of Program Staff: Rape and Child Abuse Special Prosecutor Unit: 2

Contact Person: Debra Kanof, Assistant D.A.

Services/Goals: One goal is to obtain a CJD grant for a Victim/Witness Coordinator. Services include videotaping of children's testimony for courtroom use, training sessions with professionals to educate them on sexual assault and child abuse, and a group counseling program geared for offenders (offered in conjunction with the Department of Human Resources).

HARRIS COUNTY

Sponsor: District Attorney John B. Holmes, Jr. (Originally funded by a federal grant, now by the county)

Size of Program Staff: Witness Office: 6 (2 funded by last phase of a grant.) Intake Division, Screening: Trained volunteers.

Contact Person: Gail O'Brien, Witness Office Director.

Services/Goals: This office (the pioneer prosecutor-based effort) provides case status notification, property return assistance, employer intervention, daily docket listings, court accompaniments, transportation information, translator information, and community resource referral. Recommendations are made to the prosecutors after case review by the volunteers, who are familiar with resource services and provide support through the system, whether or not charges are filed.

TARRANT COUNTY

Sponsor: Criminal District Attorney Tim Curry. (A grant application is pending before the North Central Texas Council of Governments for first-year operations.)

Size of Program Staff: 4 (Projected: 1 director, 2 coordinators, and 1 clerk)

Contact Person: Anita McKesson, Administrative Assistant, with the committee developing the program.

Services/Goals: If approved, operations should begin in October.

TRAVIS COUNTY

Sponsor: District Attorney Ronnie Earle, Travis County and the City of Austin. (Originally set up as a joint effort of the D.A.'s and C.A.'s offices, and the Austin Police Department and funded from 1978-1981 by a L.E.A.A. grant.)

Size of Program Staff: 3

Contact Person: Marnie Parker, Assistant D.A.

Services/Goals: The program offers crisis counseling, referrals to community agencies, help and support with police and court procedures and case status, property return assistance, assistance in filing for victim compensation and restitution, helping with employer problems, emergency transportation and child care.

PLEASE NOTE: If the victim-witness activities of your office are not listed here, please write to David Kroll to let the Council know of your activities (whether planned or actually ongoing) for updating this list in future issues of TRUE BILL.

Technical Assistance

From Your Fellow Prosecutor:

Interviewing Children in Sex Abuse Cases

by Lisa Blue, Ph.D., J.D.

Lisa Blue is an Assistant District Attorney with the Dallas District Attorney's Office. She received her Masters and did doctoral work in Counseling Psychology at the University of Virginia. At North Texas State University she completed her Ph.D. in Counseling Psychology. She is a Diplomate in Forensic Psychology.

This article is designed to aid the prosecutor dealing with children who have been sexually abused and who will be testifying in court. Unfortunately, too many sex abuse cases are tried where the child's testimony reflected the awkwardness felt by the prosecutor in dealing with the child.

The first interview with the abused child is not at all unlike the first session between a psychotherapist and patient. The goal must be to gain the child's trust. Thus, making the child feel at ease is essential. The prosecutor should ask questions which are non-threatening. Conversations about favorite movies, TV shows, musicians and school activities help break the ice. The more the child talks the more the child's anxieties should decrease. Following this "warming up" period the prosecutor should ask the child if he knows why they are visiting together. This assesses several things: first, how open the child will be in describing the actual offense; secondly, how aware the child is of the legal proceedings pending. Moreover, this should provide the prosecutor with some clue as to the child's emotional state. The prosecutor should tell the child that he is a lawyer concerned for the child and that the purpose of the meeting is to help the child every way possible. Use the child's first name continuously because this reinforces a close relationship between the prosecutor and the child.

When it comes time to ask the child about the specifics of the offense, give the child the choice of speaking privately with the prosecutor or having an adult whom they feel close to present. This is necessary to reinforce the child's feelings that they are in control of the situation and not at the mercy of a stranger. Before the details of the offense are discussed the prosecutor should tell the child the following:

1. "There are many other children who have gone through the same thing you have." This makes the child feel that he is not the only one in this situation and gives him a group identity.

2. "There is no need to feel embarrassed or uncomfortable because I have spoken with many other brave children like you." Again, reinforcing a group identity.

3. "You are not in any trouble because you have done nothing wrong." Explain to the child that the defendant should have known better and that it was normal for the child to follow the orders of an adult.

4. "The reason we are working together is to stop the problem from happening in the future." Reinforce the feeling that the child is working with you, the prosecutor.

Having the child assess the particular details of the offense can be difficult. The first thing the prosecutor should do is ask the child what terminology he or she uses for male and female genitalia. Always use the child's terms when discussing the offense. Depending upon how detailed the child can

describe the offense, the prosecutor may want the child to use anatomically correct dolls to depict the offense or draw out what happened to them. The use of dolls or illustrations is very effective for a child, especially in front of a jury because it provides a demonstrative aid as well as includes details of the offense which may not be in the child's vocabulary.[1] Some children actually prefer to act out with their own bodies what the perpetrator did to them.

When the child speaks of the details of the offense the prosecutor should be sure to reinforce this behavior by what is commonly called "stroking." This means simply telling the child how proud you are of him, giving him a hug, patting him on the back or merely touching the child's hand. Abused children especially need this type of reinforcement from the adults they come in contact with because of the psychological damage created by the perpetrator.

If the child is having difficulty in relating the incident to the prosecutor, the interview should be stopped and the prosecutor should attempt to assess what the child fears and what his anxieties are directed at. Ask the child what is holding them back from discussing the incident. Common fears are usually: anticipating the trial, fear of being removed from the home, loss of a parent's love and disciplinary action against the child. Once these fears are assessed they should be discussed openly by the prosecutor. Another important aspect of this part of the interview is to encourage questions from the child. When a child asks questions and receives an open and honest answer this will help reinforce the trust between child and prosecutor. The most important part of interviewing sexually abused children is for the prosecutor to feel comfortable with the topic of sex. It is certain that any apprehension about discussing sex on the prosecutor's part will be picked up and reflected in the child's testimony.

[1]Anatomical dolls can be purchased in Caucasian or Black at: "Teach a Body," 2544 Boyd Street, Fort Worth, TX 76109.
Adult Pair (male/female) $75.00
Child Pair (boy/girl) $60.00
From Analeka Industry, Inc., P.O. Box 141, W. Linn, OR 97068:
Father, male & female child (set) $98.50
Adult female (sold separately) $38.50

When closing the interview, it is always a good idea to take the child in the courtroom and show the child where the judge, jury, and prosecutor sit. It is preferable to have the child physically take the witness stand so that the child will be familiar with the surroundings. Many children fear testifying in front of the perpetrator and thus the child should be told that it is a normal fear and they do not have to look at the defendant except briefly to identify him. (Some witness chairs will swivel; show the child how the chair can be turned so that he can avoid eye contact with the defendant). When in the courtroom, explain exactly what the procedure will be (i.e., direct and cross-examination) and tell the child that sometimes the other lawyer may try to confuse them, but all that the child should do is tell the truth and not worry. Make sure you know what the child will say on the stand when asked the difference between the truth and a lie. If after the interview the prosecutor determines that the child will not make a good witness in front of the jury or judge then videotaping the child should be considered as an alternative.

This can be done under Art. 38.071 C.C.P. which states:

§2(a) *The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:*

1. *no attorney for either party was present when the statement was made;*
2. *the recording is both visual and aural and is recorded on film or videotape or by other electronic means;*
3. *the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;*
4. *the statement was not made in response to questioning calculated to lead the child to make a particular statement;*
5. *every voice on the recording is identified;*
6. *the person conducting the interview of the child in the*

recording is present at the proceeding and available to testify or be cross-examined by either party;

7. *the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and*
8. *the child is able to testify.*

§2(b) *If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.*

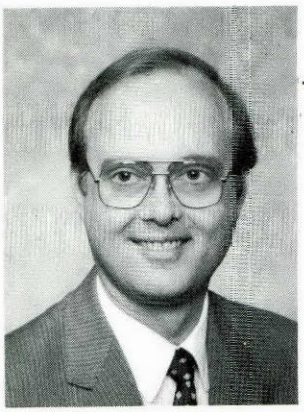
§3 *The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during the testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.*

I feel it is preferable to use the child as a live witness when possible because the emotional demeanor is more apparent in a live witness than on videotape. Perhaps this is because the defendant is present, which causes the child to feel more anxiety and apprehension. This demeanor adds credibility to the child witness by showing the psychological fear the child is experiencing.

In many ways children are much better witnesses than adults. Once their confidence is gained, children are easier to work with because many children do not understand the full consequence that their testimony has on the defendant. Children have such a strong need for approval that when the prosecutor creates a relationship with the child, the child will follow the prosecutor's direction in providing testimony.

If after interviewing the child, the prosecutor feels the child will make an extremely poor witness and if there is no physical or medical evidence to substantiate the victim's claim, then the aid of a licensed psychologist might also be helpful. A trained clinical child psychologist can use such techniques as play therapy and projective techniques as the Rorschach, the Thermatic Apptitude Test and the House Tree Person Test to determine if abuse has actually occurred. The psychologist can testify that the child demonstrates aberrant behavior consistent with a child who has, in fact, been sexually abused. The psychologist can be used during the trial just as a prosecutor uses a medical examiner during a murder case, to show that the prosecution's theory of the case is consistent with what the medical examiner has found. The psychologist may also qualify as an outcry witness, or can be used as a rebuttal witness depending on the strategy the prosecutor wishes to employ. Under the Code of Criminal Procedure § 38.07, "Testimony in Corroboration of Victim of Sexual Offense," in a case involving sexual abuse, sexual assault and related crimes, other witnesses can testify what the victim told them about the sexual assault even though in other crimes this would be inadmissible as bolstering.

In conclusion, interviewing children in sex abuse cases is an art. If a prosecutor can learn some basic principles about child psychology, the prosecutor will find that child abuse cases are not as difficult to deal with as is commonly believed and that in fact, often they are easier to work up and try than cases involving adult victims. Furthermore, social agencies are available to support the child and the child's family by rendering specialized services. Presently, there is a new statewide victim assistance service (1-800-252-3423) that will inform parents of specialized social services available in their particular area. □



As The Judges Saw It

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

Chris Marshall is the Chief of the Appellate Section of the Tarrant County District Attorney's Office in his home town of Fort Worth.

This column covers decisions handed down from February 8 through March 28, 1984. A few decisions from the U.S. Supreme Court are included. Also, at the end of the column I have listed the most significant cases that are now pending in the Supreme Court on confession and search-and-seizure issues. Some have already been argued; others have only recently had certiorari granted. Many of the pending cases deal with issues that we encounter every day in criminal law, and the knowledge that a decision will be forthcoming may help in your handling of current prosecution. (Answers to Quiz, page 20.)

QUIZ

1. Once trial has commenced, can there be any valid amendments to the indictment, as to either form or substance?
   _____ No
   _____ Yes, as to form only.
   _____ Yes, as to form and substance.

2. If the jury recommends probation in a felony case, does the period of probation have to be the same as the time assessed as punishment?
   _____ No _____ Yes

3. A dealer sells drugs to an undercover officer by taking the money and telling the buyer he can find the drugs hidden at a specific location. Is that an actual transfer or a constructive transfer?
   _____ Actual _____ Constructive

4. In an Indecency With a Child prosecution, must the State prove that the accused knew that the person present was younger than 17?
   _____ No _____ Yes

5. Seeking to determine the cause and origin of the fire, arson investigators enter a fire-damaged residence several hours after the fire has been extinguished. There is no warrant, no consent, and no exigent circumstances. Was the entry legal?
   _____ No _____ Yes

6. A probation officer learns that one of her probationers may have committed a rape/murder. She summons him to her office and he confesses to her. One requirement of his probation was that he "be truthful" with his probation officer. Was the probation officer's questioning "custodial," such that Miranda warnings were required?
   _____ No _____ Yes

(Questions 7 and 8 are for trivia buffs only).

7. When did the Court of Criminal Appeals come into existence?
   ____1845 ____1876 ____1892 ____1925

8. The statutory history under the Code of Criminal Procedure often refers to something called "O.C.," followed by an article number. "O.C." refers to Texas' first code of criminal procedure, the "Old Code" or "Original Code." When did that code take effect?
   ____1845 ____1857 ____1879 ____1911

Hardesty v. State
#68,447-49; decided 2/8/84

Re: (1) Inducements which will void a confession; (2) relevancy of trial testimony to appellate review of a pre-trial ruling on the admissibility of evidence.

An Irving detective told the suspect that he would file only one case on him if the suspect would clear up all his business involving offenses committed in Irving. The suspect then made statements admitting to an offense in Irving and in another city.

The promise to file only one case was the type of inducement by one in authority that rendered involuntary the admission to the Irving offense. However, the Court holds the confession to the other offense admissible. Since the Irving detective made no representations concerning what other jurisdictions might do, his promise did not taint the other confession.

In deciding the question the Court considered the evidence developed both at trial and at the pre-trial hearing. However, the Court said that the general rule would be that where a pre-trial ruling on evidence is at issue, the appellate court would look only at the evidence from the pre-trial hearing when reviewing the judge's ruling. This is because the State doesn't have the burden of proving up at trial, in front of the jury, the admissibility of a confession or seized evidence.

For example, the probable cause to arrest or search can be kept from the jury at trial (it may contain hearsay or reference to extraneous offenses), unless the defense wants to litigate probable cause in front of the jury or unless it simply fails to object if the State offers evidence on probable cause.

Thus the defense can limit appellate review of pre-trial rulings to the evidence brought out at that hearing by not itself relitigating the issue in front of the jury and by objecting if the State attempts to bring before the jury evidence that is relevant only to the pre-trial issue.

This provides an incentive for prosecutors to fully litigate suppression issues at pre-trial hearings. It will be risky to hope that later testimony at trial will clean up or clarify problems the developed in the pre-trial testimony.

Robles v. State
#488-83; decided 2/15/84.

Re: Burglary; if the entry is with the intent to steal, must the intent be to steal from the structure entered?

No. Here the accused entered a bank president's home as part of an extortion scheme to steal from the bank. Citing the extremely close connection between the entry and the intent to commit theft, the Court holds that it is not necessary to prove that the intended theft was to occur within the premises burglarized.

The State need only prove that the entry was made for the purpose of furthering the commission of the intended theft.

Duhart v. State
#738-83; decided 2/15/84.

Re: Procedures following the revocation of a "deferred adjudication probation."

Article 42.12, sec. 3d(b), C.C.P., does not mandate a separate punishment hearing after the revocation of a deferred adjudication probation. However, all the opinions in the case indicate that there may be some situations where fairness would require that an accused be allowed to put on more punishment evidence if he requests to do so.

For example, an accused might still need to prove up his eligibility for "regular" probation, or so much time might have passed since the adjudication was deferred that new facts may have arisen which could mitigate punishment.

It appears that the accused would not have a right to put on additional punishment evidence if that evidence could have been offered at the original hearing at which the adjudication was deferred.

Daniel v. State,
#65,357; decided 2/15/84.

Re: (1) Applicability of art. 38.22 to statements made while the suspect is out on bond; (2) State's duty to disprove exculpatory statements in a confession.

Where the accused voluntarily came to the police station while he was free on bail and gave a statement, the art. 38.22 warning requirements did not apply. Such a situation is not "custodial."

The confession which the State introduced contained certain statements about the circumstances of the shooting which caused the trial judge to include a charge on self-defense. The accused argued that if the statements raised the issue on self-defense, then they were also exculpatory enough to entitle him to a charge that the State is required to disprove exculpatory statements which it introduces. The Court gets around that by saying that while the statements in the confession might have arguably raised the issue of self-defense, they did not establish self-defense as a matter of law, so that the trial judge did not have to instruct on exculpatory statements introduced by the State. It noted that such an instruction would have been tantamount to an instruction to acquit since the State had no independent evidence to rebut the shaky self defense claim.

Nash v. State,
#541, 542, & 543-83; Decided 2/22/84.

Re: The insanity defense and lesser-included offenses.

The accused was convicted of involuntary manslaughter. He had been the driver of one of the vehicles involved in a fatal accident. The defense offered psychiatric testimony that the accused suffered from post-traumatic stress syndrome and in certain circumstances was not aware of the danger he might be in. A charge on the insanity defense was given, but the defense argued that it was also entitled to a charge on criminally negligent homicide. The Court said the medical evidence meant the accused was either guilty of involuntary manslaughter or was guilty of nothing at all.

Lewis v. State,
#63,237; decided 2/22/84.

Re: Automobile passenger's standing to contest searches and seizures.

While the passenger of an automobile may be able to establish standing to challenge the stop or search of the vehicle, he must establish a violation of his own rights.

The Court noted that in Rakas v. Illinois, 439 U.S. 128 (1978), a passenger was said to have no standing to contest the search of a car just because of his presence in it. However, the passenger there challenged neither the initial stop of the car nor his removal from it.

In Lewis the passenger did not challenge the stop of the car, which was clearly legal, but she did challenge her continued detention after the driver had been given a traffic citation and her removal from the car. The Court said the standing questions turned on whether the search was conducted by "exploiting" the accused's continued detention and removal of the car. The Court answered this in the negative: the drugs could have been found without removing her from the car and would have been found even if she had been allowed to leave the scene herself. The drugs were on and under the car seats.

Vasquez v. State,
#266-893; decided 2/29/84.

Re: (1) State's duty to elect; (2) judicial notice.

The arson indictment alleged two theories of the crime: that the accused burned the structure knowing that it was within an incorporated town and knowing that it was located on the property of another. The theories were submitted in the alternative to the jury, and it returned a general verdict of guilty.

On review the Court found the evidence sufficient to support one theory but insufficient to support the other. The conviction is upheld because where a general verdict is returned, it is enough that the

evidence is sufficient to support any one theory submitted. However, the Court says this is not the case in two situations: (1) where the accused at trial objected to the submission of one theory on the grounds that there was insufficient evidence to support it or (2) where the accused moved for the State to elect which theory it wanted submitted.

I think the Court is incorrect regarding the second exception. My understanding has been that where the State has pled different theories of a single crime, it has the right to have the jury charged on each theory that is supported by the evidence. E.g., Crocker v. State, 573 S.W.2d 190 (Tex.Crim.App. 1978; Zanghetti v. State, 618 S.W.2d 383 (Tex.Crim.App. 1981). Likewise, where the State pleads more than one offense arising out of a single transaction, it has the right to submit each theory to the jury. Crocker v. State; Koah v. State, 604 S.W.2d 156 (Tex.Crim.App. 1980).

The Court cited Espinoza v. State, 638 S.W.2d 479 (Tex.Crim.App. 1982), as support for its second exception. However, Espinoza was a case in which the evidence showed that distinct offenses had occurred, each of which would have been supported by the single count in the State's indictment.

This most commonly occurs in drug cases where the accused made more than one sale of the same drug to the same person on or about the same date. The usual language in a one-count indictment for delivery would describe each sale. In that unusual situation the defense can force the State to elect. This is sometimes called the "election of acts doctrine" because the State must choose which particular criminal act in its proof it wants to rely on for conviction.

(The one other situation in which the accused can force the State to elect occurs when the State in one indictment has misjoined separate offenses which were not part of the same transaction. Smith v. State, 234 S.W. 893 (Tex.Crim.App. 1981).)

The Court also held that judicial notice cannot be taken that a town or city is an incorporated one. Proof must be offered.

Pannell v. State,
#61,527; decided 2/29/84.

Re: Prosecutor's violation of the Disciplinary Rules as a basis for excluding evidence.

The prosecutor talked to a defendant whom he knew to be represented by appointed counsel in the case. The defense attorney had not given his consent to the conversation between the prosecutor and his client, so the prosecutor was in violation of DR 7-104(A)(1). The accused thereafter gave a statement, and there was clearly a valid waiver of the right to counsel.

The question was whether a violation of the Disciplinary Rules is the type of "violation of the laws" that renders tainted evidence inadmissible under art. 38.23, V.A.C.C.P.. The Court said it was not. Ethical violations alone will not ordinarily cause a reversal of the conviction; such violations are best handled in other forums. (The Dallas Court of Appeals had reached a contrary conclusion in Henrich v. State, #5-82-819-CR; decided 12/12/83).

Although this decision should prevent the reversal of convictions for unethical conduct by the prosecution, it will no doubt encourage the filing of grievances against prosecutors. We'll probably all need to bone up on the DR's to insure that we are not inadvertantly violating any disciplinary rule. Careful study of the DR's to see how they affect prosecutors is especially important since many rules were written with the private practitioner in mind. Their applicability to the criminal area may be unclear or may seem to prohibit conduct which normally has been thought permissible.

Obviously every prosecutor wants to comply with the DR's and it probably will be fairly easy for the prosecutor to avoid any direct ethical violations. What I worry about is how the DR's affect our relationship with the police. When will they be our agents, so that their conduct, which may be in strict conformity with the applicable statutes and constitutional decisions but would be ethical violations if engaged in by an attorney, be attributed to us?

For example: What should we tell a police detective who calls up and says he has a person in custody, against whom a felony complaint has been filed, who wants to give a confession? The detective adds that the accused's defense attorney has told the police not to talk to him. The police have honored that request but the accused has asked to talk to them and said he doesn't want to talk to his lawyer.

I assume if the detective had just gone on and taken the statement there would have been no problem. But if we tell him that the constitution and statues permit him, but not us, to take that statement, have we "caused" the detective to talk to the defendant and violated DR 7-104(A)(1) because we know the defense attorney hasn't consented to any conversations with his client?

Do we have to look stupid by telling him we just can't answer his question one way or the other, and does it even help our ethical position to decline to give any answer?

Is it permissible, and does it enhance the detective's view of how the legal system works, to tell him that the prosecutor can't tell him to take that statement because it might subject that prosecutor to a grievance but that there wouldn't have been any problem if the detective had taken that statement without calling for advice?

What should a prosecutor say if this same situation is posed to him as a hypothetical when he is lecturing at a police training session? I wish I knew the answers. The Prosecutor Council has a group working on these problems, and in the near future there may be some firmer answers to these questions.

Wicker v. State,
#68, 821; decided 2/29/84.

Re: The inevitable discovery doctrine.

The accused gave an oral statement identifying the location of the victim's body. This statement was arguably tainted by an illegal arrest. However, the court held the fact of discovery of the body was admissible under the "inevitable discovery doctrine." The testimony showed that the body was in a beach area heavily used by tourists and would have been discovered soon. The precise location of the body was also given in a later written statement which the court found not to be tainted.

Note that the U.S. Supreme Court has already heard arguments in a case where the exact parameters of the inevitable discovery doctrine have been made an issue. Nix. v. Williams, #82-1651, argued 1/18/84.

Woodward v. State,
#092-82; decided 3/7/84.

Re: Probable cause to arrest based on information known to cooperating police agencies.

In assessing probable cause to arrest, a reviewing court will take into account all of the information known to cooperating police agencies at the time of arrest. Here the Austin police did not have probable cause at the time they issued a request for other departments to be on the lookout for and arrest the murder suspect. However, the officers who arrested him some two hours after the murder knew he was on a highway leading from Austin, which was less than two hours away, and that he was heading away from Austin. Coupled with what Austin officers knew, this was sufficient to give probable cause.

Holloway v. State
#69,979-80; decided 3/7/84.

Re: Prospective juror's bias as a basis for defense challenge for cause.

The prospective juror said she was not sure if she could be fair and impartial since she had been the victim of a recent burglary. The defense challenge for cause should have been sustained.

This situation contrasts with Peters v. State, 575 S.W.2d 560 (Tex.Crim.App. 1979), where the juror first expressed doubt whether he could be fair but later unequivocally professed an ability to be fair and impartial.

Ortega v. State
#821-82; decided 3/14/84.

Re: Definition of "service" under the theft and credit card abuse statutes.

The opinion on original submission of this case was handed down on 9/14/83 and was discussed in the October-November 1983 issue of TRUE BILL, Vol. 4, No. 5.

The Court now decides that the salesclerk's time spent in filling out the charge slips for a normal credit card transaction is not "service" within the meaning of Penal Code §32.01(3). This was important because the jury charge had unnecessarily required proof of a theft of both goods and services, and the filling out of the charge slip was the only thing remotely approaching a "service" that was proved up.

The Court reiterates that if the State had objected to the unnecessary requirement that both goods and service be proven, it would have obtained a remand for new trial rather than an instructed verdict of acquittal on appeal.

Heard v. State
#187-83; decided 3/14/84.

Re: DWI; intoxication as a result of liquor acting in combination with drugs.

The accused put on evidence through an expert that her actions might have been caused by the prescription drugs she was taking and that the drugs would have enhanced the effect of alcohol on the person.

Although the information charged simple DWI based on the influence of intoxicating liquor, the trial court charged the jury that it could convict if it found the accused was under the influence of intoxicating liquor in combination with drugs.

The Court said this was not an improper expansion of the charge beyond what had been alleged, but only an application of the law to the facts.

Lugo v. State,
#312-83; decided 3/14/84.

Re: Accused's right to a lesser-included charge where his own testimony negates an element of the lesser offense.

The Court of Appeals had rejected the claim that a lesser-included charge on involuntary manslaughter should have been submitted in this murder prosecution. The State's evidence would have raised the issue of recklessness, but the Court of Appeals said no charge on involuntary manslaughter was required since the accused's own testimony negated recklessness.

The Court of Criminal Appeals rejects this approach. Citing its many cases saying that an accused is entitled the submission of a defensive theory that is raised anywhere in the record, even if other evidence contradicts that theory, the Court holds that the right to a lesser-included offense submission is not defeated just because the accused's testimony negates the defensive theory that is otherwise raised.

The Court justifies this on the theory that the jury can accept as much or as little of a witness's testimony as it chooses, and then cites cases where the jury could have reasonably disbelieved part of the accused's testimony but reasonably believed other parts. Here the Court says the jury could have reasonably disbelieved the accused's testimony that he did not know that the gun he pointed at his wife was loaded but could have reasonably believed that he did not intent to kill her. Consequently, the jury could have reasonably concluded that the accused acted recklessly.

Presumably the key here is what the jury could have "reasonably" believed or disbelieved. Surely in some cases the accused's testimony could negate what otherwise might have appeared to be a plausible defensive theory.

For example, suppose in a murder case that the State's evidence fairly raised the possibility that the fatal shot was fired accidentally, but the accused then took the stand and testified that he intentionally fired the shot in self-defense because the victim was drawing a gun on him. Could a jury

reasonably disbelieve the defendant's own testimony of an intentional shooting, so that a defensive theory of accident was raised?

Miller v. State
#347-83; decided 3/14/84.

Re: (1) Identifying the accused at trial; (2) basis for officer's belief that substance observed was drugs.

The proper way to make the record reflect that a witness, when referring to "Mr. Miller" or the "man at the end of counsel table," was actually referring to the accused is for the prosecutor to ask that the record reflect that the witness was referring to the defendant. However, if the prosecution fails to do that and the accused makes no issue at trial that he was not the one the witnesses were referring to, he cannot raise the identity issue for the first time on appeal.

Relying on Texas v. Brown, 103 S.Ct. 1535, the Court finds that the officer had probable cause to make a plain view seizure of suspected drugs (a clear envelope of white powder seen in the suspect's pocket).

The finding of probable cause can be based on a review of all the circumstances known to the trained officer, and the presence of probable cause isn't defeated even though the officer concedes he had no way of knowing exactly what drug might be in the envelope. Although the prosecutor should have developed what training and experience led the officer to believe that the substance was a drug, the absence of such testimony isn't necessarily fatal.

Cardona v. State
#658-83; decided 3/14/84.

Re: Sufficiency of probationary condition requiring attendance at a treatment program.

The probationer was required to "attend the Houston Regional Council on Alcoholism until released by the court." The Court found this was too indefinite, especially since it never established any time or date on which he was to being attending the program.

The Court was also displeased because the probation officer had made no issue of the non-attendance at the program until it was time to seek a revocation.

Noel v. State
#827-83; decided 3/14/84.

Re: (1) Time for asserting Speedy Trial Act rights; (2) raising an issue for the first time in response to a petition for review.

The accused does not waive his speedy trial rights just because he waits until the day of trial to file or urge his motion to dismiss. Most pre-trial motions are considered timely as long as they are urged prior to the announcement of ready or even prior to the start of testimony. Finch v. State, 629 S.W.2d 876 (Tex.App. — Fort Worth 1982), is overruled with regard to its statement concerning when a speedy trial motion to dismiss must be filed.

At oral arguments in response to the appellant's petition for review in this case, the State argued that the Speedy Trial Act was void because its caption in the original bill suffered form the same defect as the one to the War on Drugs legislation, which was thrown out by Ex parte Crisp.

Four judges agreed with the State, one disagreed, and the other four sidestepped the issue by saying the State could not bring that up for the first time in response to an appellant's petition for review since it had not raised the issue in the lower courts and had not filed its own petition. Those four judges said only the accused can have things considered "in the interests of justice."

Cain v. State
#63,935; decided 3/21/84.

Re: Reopening the case for additional defense evidence.

The basic rule is said to be that the decision to reopen the evidence is committed to the discretion of the trial judge. However, if the defense asks to reopen to present evidence which is admissible and if that request is made prior to the reading of the charge and jury arguments, then the

court must reopen unless there is a clear showing that reopening would delay the trial or otherwise impede the administration of justice.

Here the Court found reversible error in refusing to reopen where the witness at issue had been on the stand three separate times and the defense had declined to ask any questions on cross-examination the last time, which was just before both sides closed. This seems to amount to a per se rule allowing the defense to reopen as long as the witness is in the courtroom and the charge hasn't been read to the jury. Prior cases indicate the burden is on the State to make a record why reopening would delay the trial or otherwise impede justice.

Lopez v. State,
#509-83; decided 3/28/84.

Re: Raising fundamental error for the first time in a petition for review.

The Court holds that the accused has the right to raise fundamental error in a petition for review even though the issue had not been raised before the court of appeals.

The appellant suddenly discovered that the record contained no jury waiver. Note that if a waiver had been executed but inadvertantly omitted from the appellate record, the record could be supplemented in the Court of Criminal Appeals to the same extent as in the court of appeals. Tex.Cr.App.R.

PENDING SUPREME COURT CASES

Massachusetts v. Sheppard. #82-963, and **United States v. Leon,** #82-1771, both argued 1/1/7/84. Applicability of a "good-faith exception" to the exclusionary rule of the Fourth Amendment. Opinion below in Sheppard: 441 N.E.2d 725.

Nix v. Williams, #82-1651; argued 1/18/84. Application of the inevitable discovery exception. Opinion below: 700 F.2d 1164 (8th Cir.)

United States v. Karo, #83-850; cert. granted 1/18/84. 34 Cr.L.R. 4153. Warrantless installation of beeper where original owner consented to the installation. Opinion below: 710 F.2d 1433 (7th Cir.).

California v. Trombetta, #83-305; cert. granted 1/11/84. 34 Cr.L.R. 4141. Whether due process requires the prosecution to preserve evidence for possible use by the accused or to gather possibly exculpatory evidence for the accused. Has to do with breathalyzer samples. Opinion below: 142 Cal.App.3b 138.

INS v. Delgado, #82-1271; argued 1/84. Propriety of immigration sweeps of factories which have probable cause to believe employ illegal aliens. Opinion below: 681 F.2d 624 (9th Cir.).

United States v. Jacobsen, #82-1167; argued 12/7/83. Whether a warrant is needed to conduct a field test of items seized on probable cause to believe they are illegal drugs. Opinion below: 683 F.2d 296 (8th Cir.).

New Jersey v. T.L.O., #83-712; cert. granted 11/30/83. 34 Cr.L.R. 4097. Applicability of exclusionary rule to searches of students by public school officials. Opinion below: 463 A.2d 934 (N.J.).

Hudson v. Palmer, #'s 82-1630 & 82-6695; cert. granted 6/29/83. 33 Cr.L.R. 4094. Whether inmate has reasonable expectation of privacy in his prison cell.

Block v. Rutherford, #83-317; cert. granted 11/9/83. 34 Cr.L.R. 4073. Whether prisoner has the right to observe searches of his prison cell.

Segura v. United States, #82-5298; argued 10/83. Whether proescution may introduce evidence which is seized under a warrant where officers illegally entered house to secure the premises before the warrant was issued. Opinion below: 663 F.2d 411 (2d Cir.).

Oliver v. United States, #82-15, and **Maine v. Thornton,** #82-1273, argued 11/8/83. Viability of the open fields doctrine. Opinions below: 686 F.2d 356 (6th Cir.) and 453 A.2d 489 (Me.).

Welsh v. Wisconsin, #82-5466; argued 10/83. Warrantless entry to arrest for non-jailable offense. Has to do with entering home to arrest a person suspected of recent DWI. Opinion below: 321 N.W.2d 245 (Wis.).

Berkemer v. McCarty, #83-710, cert. granted 1/11/84. 34 Cr.L.R. 4141. Necessity of giving Miranda warnings to person arrested for misdemeanor traffic offenses.

New York v. Quarles, #82-1213; argued 1/18/84. Whether Miranda warnings have to be given where questions are asked as part of the process of effecting the arrest. Here the officer asked "Where is the gun?" Opinion below: 444 N.E.2d 984 (N.Y.)

Oregon v. Elstad, #83-773; cert. granted 3/5/84. 34 Cr.L.R. 4213. Whether oral confession given in absence or Miranda warnings necessarily taints written confession given one hour later after proper warnings and waiver. Opinion below: 658 P.2d 552 (Ore.App.).

California v. Carney, #83-859; cert. granted 3/21/84. 34 Cr.L.R. 4225. Applicability of "automobile exception" to a motor home which is fully mobile and which police have probable cause to believe contains seizable items. Opinion below: 34 Cal. 3d 597.

United States v. Abel, #83-935; cert. granted 3/21/84. 34 Cr.L.R. 4225. Whether a witness can be properly impeached by showing that he belongs to a society whose members are sworn to commit perjury for each other. Opinion below: 707 F.2d 1013 (9th Cir.).

ANSWERS

1. No, but some improper amendments may be harmless, at least if requested by the accused. Howard v. State, #168-83; decided 2/8/84.

2. No, it can be anything between 10 years and the minimum pen time for the crime. The judge has the same option when he gives probation. Bridges v. State, #68,781; decided 2/15/84.

3. Constructive. Davila v. State, #506-83; decided 2/29/84.

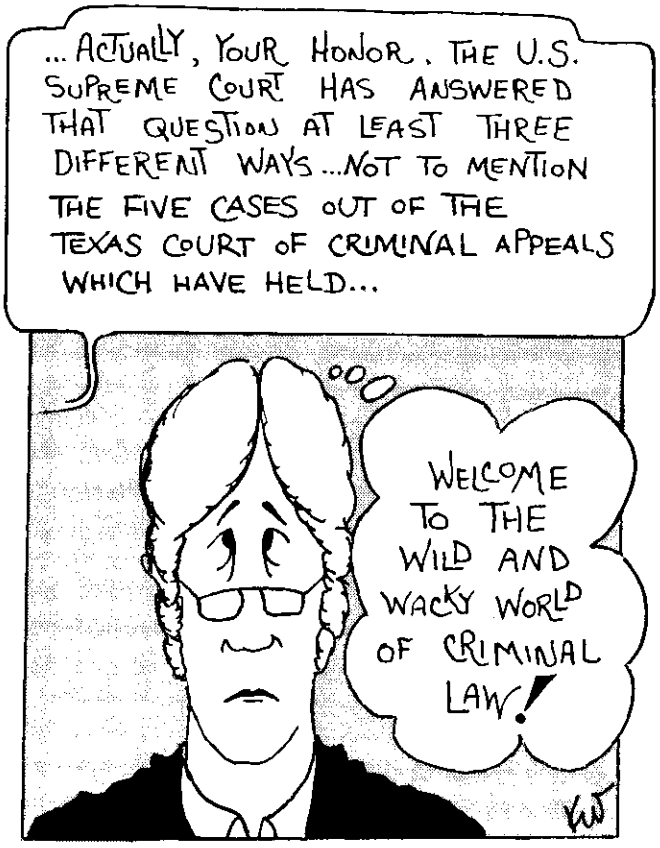
4. No. Roof, #497-83; decided 3/14/84.

5. No. Michigan v. Slifford, 104 S.Ct. 641 (1984).

6. No. Minnesota v. Murphy, 104 S.Ct. 1136 (1984). The opinion also discusses when a state can threaten to revoke a probation for the probationer's refusal to answer questions.

7. 1892.

8. 1857.



Cartoon by R. Kristin Weaver, former Asst. D.A., now Attorney at Law, Dallas.

Trial Reference Series

The following sheet is designed to be cut out and inserted into a trial notebook for your handy reference.

STATE OF TEXAS

V.

FRANCES LOUISE FINSTER TURNER

IN THE DISTRICT COURT OF

FORT BEND COUNTY

268TH JUDICIAL DISTRICT

MOTION TO COMPEL PRODUCTION OF DENTAL IMPRESSIONS

COMES NOW STATE OF TEXAS, represented by Donald W. Bankston, Assistant District Attorney, and moves the Court to order and compel the Defendant, Frances Louise Finster Turner to submit to examination by Dr. Lloyd Hartmann, D.D.S., and taking by Dr. Lloyd Hartmann, of dental impressions, molds, and photographs of teeth of Defendant, Frances Louise Finster Turner.

I.

Said impressions, molds, and photographs are necessary for comparison to photograph of bite mark on deceased, Robert Turner.

II.

State asserts forensic dentist, Paul Stempson, D.D.S., can make identification from said photograph to dental impressions, molds, and photographs of Defendant, Frances Louise Finster Turner.

III.

State previously attempted securing said dental impressions by means of search warrant issued November 17, 1983, where upon the Defendant refused to submit to said procedure.

VI.

Said production is allowed by law and not within protection of any state or federal statute or within any state or federal constitutional safeguards.

WHEREFORE PREMISES CONSIDERED, State prays that upon hearing, the Court ORDER and COMPEL the Defendant, Frances Louise Finster Turner, to submit to examination by Dr. Lloyd Hartmann, D.D.S., and taking by Dr. Lloyd Hartmann, D.D.S., dental impressions, molds, and photographs of teeth of Defendant, Frances Louise Finster Turner.

Respectfully submitted,

Donald W. Bankston

Hearing on matter set for _____ of December, 1983, at 9:00 a.m.

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Published in TRUE BILL, Apr./May '84,
by The Prosecutor Council, P. O. Box 13555, Austin, Texas 78711. (512) 475-6825.

ORDER

On _____ day of December, 1983, after having considered said Motion, it is ORDERED, ADJUDGED, and DECREED that the Defendant, Frances Louise Finster Turner be compelled to submit to examination by Dr. Lloyd Hartmann, D.D.S., and further submit to production and taking of dental impressions, molds, and photographs of teeth Defendant, Frances Louise Finster Turner by Dr. Lloyd Hartmann, D.D.S., said examination and production of dental impressions molds, and photographs of teeth of Defendant, Frances Louise Finster Turner by Dr. Lloyd Hartmann, D.D.S., is to be completed on or before January 4, 1984.

SIGNED and ENTERED this _____ day of December, 1983.

_____
Judge Presiding

* *

If you ever argue for a motion to compel production of dental impressions, you should be familiar with Doyle v. State, 263 S.W.2d 779 (Tex.Crim.App. 1954) and Patterson v. State, 509 S.W.2d 857 (Tex.Crim.App. 1974).

In case you were wondering about the outcome of the Turner case, the defendant was found guilty of the capital murder of her husband and sentenced to life imprisonment.

In addition to the dental impressions, the defendant was ordered to give prosecutors a writing sample. She refused to comply with either judicial order. For tactical reasons, Donald Bankston, the prosecutor, placed into evidence the defendant's failure to provide a handwriting exemplar but not the failure to provide dental imprints. The rationale that Don used to convince the judge to allow evidence of the refusal to be introduced was the case of South Dakota v. Neville, 103 S.Ct. 916 (1983) which held that the Fifth Amendment was not a bar to introduction into evidence of the refusal to take a breathalizer test.

There have been several Texas cases from various Courts of Appeals following that ruling (Ashford v. State, 658 S.W.2d 216 (Ct. of App. - Texarkana, 1983); Gresset v. State, (No. 05-82-00493, Ct. of App. - Hou. 1st, Dec. 2/2/84)). A petition for discretionary review has been granted in Gressett so we will soon get an idea of where Texas stands in relation to Neville.

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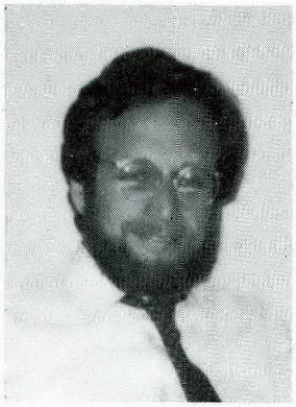


From the Legal Counselor's Desk

by Scott Klippel

Scott Klippel, Legal Counselor for the Prosecutor Council, summarizes relevant Attorney General Opinions, Open Record Decisions, and other items of interest to prosecutors.

Attorney General Opinions

Attorney General Opinion JM-128

Re: Firemen's Eligibility to Take Promotional Exams - Article 1269M, Sec. 14, V.T.C.S.

The Attorney General interpreted the requirement of Art. 1269M, Sec. 14(A)(2) that a fireman be in a position for two continuous years before being eligible to take the promotional exam for the next higher classification to mean that the two years of continuous service be with the same fire department, since Art. 1269M Sec. 14(D)(5) allows promotions only to those firemen who have spent two years with the same fire department.

Thus, firemen who spend two years with one fire department, and then change jobs to another department, are not eligible to take the exam or be promoted until they have spent two continuous years with the second fire department.

Attorney General Opinion JM-129

Re: Service by a County Commissioner as a Trustee for a Community College; Doctrine of Incompatibility.

The question arose as to whether a County Commissioner of Dallas County could also serve as a member of the board of trustees of the Dallas County Community College. Citing Thomas v. Abernathy County Line Independent School District, 290 S.W. 152 (Tex.Comm.App. 1927) and State v. Martin, 515 S.W.2d 815 (Tex.Civ.App., San Antonio 1932, no writ), the Attorney General stated that "[t]he common law doctrine of incompatibility prevents one person from accepting two offices where one office might thereby impose its policies on the other or subject it to control in some other way."

In ruling that the positions were incompatible, the Attorney General looked at two major areas. The first was that the Community College was entitled to have county tax assessors and collectors assess and collect their taxes; this could put the trustees in conflict with the Commissioners Court as the work required by the Trustees might have slowed the collection of county taxes. Furthermore, the County Commissioners controlled the budget of the assessors and collectors. A second reason cited was that the trustees could veto the construction of county roads over college land and this could put them at odds with the Commissioners' Court, putting the duties of a Commissioner in conflict with the duties of a trustee.

Attorney General Opinion JM-132

Re: Automatic Resignation from Office

Article XVI Section 65 of the Texas Constitution provides that if certain county officials announce their candidacy for another state or federal office while there is

more than one year left to serve in their current office, then they automatically vacate the office they hold. In the present case, this law was applicable even though it turned out that the office holder was ineligible to serve in the new office that he had announced he would run for.

Attorney General Opinion JM-133

Re: Service by City Councilman as a County Auditor; Doctrine of Incompatibility

In another decision regarding incompatibility, the Attorney General stated that the offices of city councilman and county auditor were incompatible.

A city council can authorize agreements with the county for the operation of various joint programs; a county auditor has the responsibility to approve or disapprove payments made by the county. This power could come into conflict with the duties of a city councilman where there is a question of the transfer of funds or property between the county and the city.

Attorney General Opinion JM-135

Re: Collection of Penalties for Delinquent Taxes

Section 33.07 of the Tax Code provides that where a taxing unit or appraisal district contracts with an attorney to collect delinquent taxes, an additional penalty of up to 15% of the taxes and interest due may be imposed to defray collection costs.

The Attorney General states, however, that where the taxing unit or appraisal district contracts with a county or city attorney in their official capacity, then such penalty may not be imposed; the Attorney General felt that neither county or city attorneys had statutory authority to enter into a contract in their official capacity to represent taxing units or appraisal districts.

This decision could create a boom for private attorneys who want to go into the public tax collection business. A move is now afoot to get the next Legislature to amend the relevant statutes to allow county and city attorneys to continue to collect delinquent taxes and be compensated for this additional work.

Attorney General Opinion JM-140

Re: Eligibility of Law Enforcement Officer Shot While on a Private Job for Disability Benefits.

This opinion dealt with a DPS officer who, while off duty, worked as a plain clothes security guard in a grocery store. During a robbery the officer was shot while trying to apprehend the robbers. At issue was whether or not this was an occupational disability which would entitle the officer to disability retirement benefits.

Stating that "[t]here is ample authority for the proposition that a commissioned peace officer is, unlike other employees, on duty at all times and is therefore obligated to exercise his authority whenever there is a breach of peace within his jurisdiction" the Attorney General ruled that while at the time of the robbery he was employed in a private capacity, his obligation as a peace officer to apprehend a robbery suspect governed his actions and thus at the time of the attempted apprehension when he was injured, he was acting within his public duty as a peace officer rather than within his private capacity as a security guard.

Attorney General Opinion JM-141

Re: Service by County Commissioner on Sesquicentennial Commission; Doctrine of Incompatibility

In yet another decision dealing with the simultaneous filling of two public positions, the Attorney General ruled that a county commissioner may serve on the Texas Sesquicentennial Commission.

While a county commissioner is in the judicial branch of government, a member of the Texas Sesquicentennial Commission would exercise few executive powers and those would be de minimus. Thus Article II, Sec. 1 which precludes an individual from holding positions in different branches of state government would not be violated. As no

compensation is paid for service on the Sesquicentennial Commission, two offices of emolument are not involved (See Article XVI, Section 40 of the Texas Constitution). Lastly, as there was "no relationship of dominion or accountability between the commissioners court and the Sesquicentennial Commission," filling of both offices by the same person was not violative of the common law doctrine of incompatibility.

Open Records Decisions

Open Records Decision #408

Re: Information in Criminal Files

This decision reiterates Open Records Decision No. 127 interpreting Houston Chronicle Publishing Company v. City of Houston, 531 S.W.2d 177 (Tex.Civ.App., Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) as to what information from a police department is available to the public and what is not. For your assistance, we are reprinting the summary from the opinion:

I. INFORMATION AVAILABLE TO PUBLIC

A. Police Blotter

1. Arrestee's social security number, name, alias, race, sex, age, occupation, address, police department identification number, and physical condition
2. Name of arresting officer
3. Date and time of arrest
4. Booking information
5. Charge
6. Court in which charge is filed
7. Details of arrest
8. Notation of any release or transfer
9. Bonding information

B. Show up Sheet (chronological listing of persons arrested during 24-hour period)

1. Arrestee's name, age, police department identification number
2. Place of arrest
3. Names of arresting officers
4. Numbers for statistical purposes relating to modus operandi of those apprehended

C. Arrest Sheet (similar chronological listing of arrests made during 24-hour period)

1. Arrestee's name, race, and age
2. Place of arrest
3. Names of arresting officers
4. Offense for which suspect arrested

D. Offense Report — front page

1. Offense committed
2. Location of crime
3. Identification and description of complainant
4. Premises involved
5. Time of occurrence
6. Property involved
7. Vehicle involved
8. Description of weather
9. Detailed description of offense
10. Names of investigating officers

II. INFORMATION NOT AVAILABLE TO PUBLIC

A. Offense Report — all except front page

1. Identification and description of witnesses
2. Synopsis of confession
3. Officer's speculation as to suspect's guilt
4. Officer's view of witness credibility
5. Statements by informants
6. Ballistics reports
7. Fingerprint comparisons
8. Blood and other lab tests
9. Results of polygraph test
10. Refusal to take polygraph test
11. Paraffin test results
12. Spectrographic or other investigator reports

B. Personal History and Arrest Record

1. Identifying Numbers

2. Name, race, sex, aliases, place and date of birth and physical description with emphasis on scars and tatoos
3. Occupation, marital status, and relatives
4. Mugshots, palm prints, fingerprints, and signature
5. Chronological history of any arrests and disposition

While not dealt with in Open Records Decision No. 127, police officers narrative summaries were held to be public information in Open Records Decision No. 354 (1982) unless their release would unduly interfere with law enforcement or crime prevention or if the narrative fell within the inter-intra agency memo exception found in Se. 3(a)(11).

The Attorney General also stated that the fact that the person arrested later had all charges dropped for insufficient evidence was not a valid reason for refusing to release this information on "false light privacy" grounds. The fact that all charges were ultimately dismissed should be noted at the time all other information is released (See Open Records Decision No. 397, TRUE BILL, Oct./Nov., 1983).

Open Records Decision #409

Re: Release of Names of Burglary Victims

The Attorney General stated that police departments when requested to, had to release the names and addresses of burglary victims. Having your home burglarized, the Attorney General felt, was not so "highly intimate or embarrassing" as to make that information fall within the common law right to privacy exception of Section 3(a)(1).

However, the Attorney General did note that where it could be shown that the identification of the victim "would, in a particular instance, unduly interfere with law enforcement or crime prevention" an exception might be made, but only on a case-by-case basis, for example where "certain burglaries may . . . exhibit a pattern, the discovery of which might disclose an investigative technique."

AS WE WENT TO PRESS

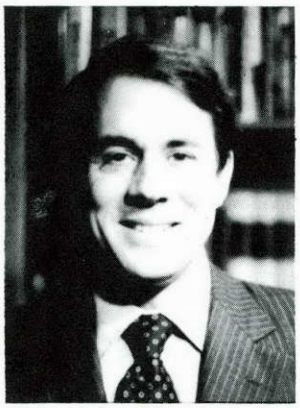
Attorney General Opinion #JM-146 states that persons arrested for DWI prior to Jan. 1, 1984, may receive deferred adjudication in court proceedings held after Jan. 1. The new DWI law only prohibits those arrested after Jan. 1 from getting a deferred adjudication. A more detailed analysis will appear in the next TRUE BILL.

Laws You May Have MISSED

Prosecutors should be aware that F.W.I. (Flying While Intoxicated), unlike D.W.I., has no enhancement provisions for second and third convictions. Our guess is that if you walk away from your first offense, you are not going to want to do it again, and if you don't walk away, you won't be able to do it again.

Art. 46f-3. Operation of aircraft while intoxicated

Any person who drives, operates or pilots an airplane, aircraft, heavier-than-aircraft, or lighter-than-aircraft, dirigible or balloon within the airspace of the State of Texas or drives, operates or pilots such craft upon a public airstrip with the State of Texas, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the county jail for not less than fifteen (15) days nor more than two (2) years, or by a fine of not less than Two Hundred Dollars ($200) nor more than One Thousand, Five Hundred Dollars ($1,500), or by both such fine and imprisonment.



Final Argument in Criminal Cases

by Ray Moses

Ray Moses is a Professor at South Texas College of Law in Houston. He has had a varied legal career, including service as an Assistant District Attorney for Harris County and as an Assistant United States Attorney for the Southern District of Texas. He is the author of several books, including Criminal Defense Sourcebook and Scientific Evidence in Criminal Cases. His latest effort is the 624-page Final Argument in Criminal Cases - a Texas Lawyer's Guide containing well over a thousand samples of argument. This article is excerpted from Chapter 2 of that workbook, "Permissible Argument." Should you want to obtain the workbook, send a $65 check or money order to Ray Moses, P. O. Box 66212, Houston, Texas 77266. Mr. Moses welcomes receipt of examples of jury argument for inclusion in the supplement to the workbook.

Reasonable deduction from the evidence

The experienced prosecutor's right to discuss reasonable deductions from the evidence provides him with an opportunity to imply his own opinion as to the defendant's guilt without expressly entering this forbidden zone of argumentation. In addition, this right gives him enough leeway to subtly bolster his witnesses and attack the opposition's.

The appellate courts allow counsel in final argument to draw from those facts in evidence all inferences that are fair, reasonable and legitimate. Counsel is given wide latitude in this respect so long as the argument is supported by the evidence and offered in good faith. Deductions, i.e., inferences, may be based upon facts that the jury has heard and seen in the courtroom during the presentation of evidence. The following inferences have been held to be reasonable: that being an informer is a hazardous profession. See Vaugh v. State, 607 S.W.2d 914 (Tex.Crim.App. 1980). See also Salinas v. State, 542 S.W.2d 864 (Tex.Crim.App. 1976); that some marijuana finds its way into the possession of high school children. See Ramirez v. State, 293 S.W.2d 653 (Tex.Crim.App. 1956); that whiskey is an intoxicating liquor. See Banks v. State, 230 S.W. 994 (Tex.Crim.App. 1921); that a bullet is deflected from a straight course by striking an object. See Borrer v. State, 204 S.W. 1003 (Tex.Crim.App. 1918). Clearly then, prosecutors may argue fair and reasonable deductions, i.e., inferences, from the evidence. See Hughes v. State, 563 S.W.2d 581 (Tex.Crim.App. 1978). For example, a prosecutor may argue flight of the defendant as evidence of guilt and witness demeanor as evidence of fear of the accused. See Bilbrey v. State, 594 S.W.2d 754 (Tex.Crim.App. 1980). Similarly, a prosecutor may argue that the accused was not telling the truth when his testimony is in conflict with the prosecution's evidence. See Bridges v. State, 624 S.W.2d 718 (Tex.App. 1981).

When the evidence supports the use of vile and descriptive epithets, the courts have allowed their use by the prosecutor. For example, a prosecutor has been allowed to refer to the accused as a "burglarizing, cop-hating man." See Whittington v. State, 580 S.W.2d 845 (Tex.Crim.App. 1979). Other examples include the prosecutor's reference to the defendant as a "dealer," "pusher" or "dope peddler" when such description was supported by the record. See Cazares v. State, 488 S.W.2d 110 (Tex.Crim.App. 1973); Rodriguez v. State, 496 S.W.2d

(Tex.Crim.App. 1973); and Arocha v. State, 495 S.W.2d 957 (Tex.Crim.App. 1973); the prosecutor's argument using epithets, justified by the record, that the defendant was a "thug and a butcher." See Lott v. State, 299 S.W.2d 145 (Tex.Crim.App. 1957); the prosecutor's allusion to the accused as "This criminal." See Gray v. State, 277 S.W.2d 107 (Tex.Crim.app. 1955); the prosecutor's statement, supported by the evidence, that the crime was a "professional" job. See Powell v. State, 502 S.W.2d 705 (Tex.Crim.App. 1974); the prosecutor's description of a killing as an "assassination," when such description was supported by the evidence. See Stafford v. State 481 S.W.2d 831 (Tex.Crim.App. 1972); the prosecutor's reference to the accused as a "cold-blooded brute" when such description was supported by the record. See Borders v. State, 161 S.W. 483 (Tex.Crim.App. 1913).

Prosecutors often use the rhetorical question as a means of raising the spectre of consequences of an accused's actions. For example, the appellate court has approved a rhetorical query by the prosecutor as to how much crime would result from the combination of the amount of marihuana involved in the case and the pistol recovered from the defendant. See Brown v. State, 263 S.W.2d 261 (Tex.Crim.App. 1953).

Use of an appropriate analogy also allows prosecutors to legitimately stray from the facts of the case. In instances where the particular analogy is a poor choice in terms of similarity with the case, the appeals court will not construe it as improper. See Givens v. State, 554 S.W.2d 199 (Tex.Crim.App. 1977). For example, in a case where the evidence showed that the accused planned the offense and employed cohorts to carry it out, a prosecutor's analogy using Hitler as an historical example of a person who used others to carry out his scheme was held proper. See Bolding v. State, 493 S.W.2d 181 (Tex.Crim.App. 1973).

The prosecutor can apparently make some rather boastful claims about the quality of his evidence without being considered to render a personal opinion. For example, the prosecutor may tell the jury that he believed the prosecution has presented the clearest case of this type of crime that had ever been presented in a court in this state. See Cave v. State, 274 S.W.2d 839 (Tex.Crim.App. 1955).

Answer to the defender's argument—invited error

Many devastating closing arguments by prosecutors have taken place because a careless defender went overboard and opened up a normally forbidden area for prosecutorial reply. The Texas procedure allows the prosecutor to open and close the final argument. Obviously, the prosecutor can argue by invitation only after the defense has opened the door during its own argument. For this reason, the careful prosecutor will always reserve part if not most of his allotted time for rejoinder. The prosecutor does this with the knowledge that he will get the last word but also in the expectation that the defender will venture to argue about otherwise prohibited subjects, thus opening the way for the prosecutor to legitimately argue about the subject.

The rule of invited error is that if the accused's counsel goes outside the record in his argument, the prosecutor is then also permitted to go outside the record to respond to that argument. See White v. State, 618 S.W.2d (Tex.Crim.App. 1981); Porter v. State, 601 S.W.2d 721 (Tex.Crim.app. 1980); Reynolds v. State, 505 S.W.2d 265 (Tex.Crim.app. 1974). See also Smith v. State, 541 S.W.2d 831 (Tex.Crim.App. 1976) for an example of the appellate court stretching this rule to uphold the propriety of an argument that contained improper implications. One limitation on the rule of invitation is that when the defender's argument is not objectionable, the prosecutor may not go outside the record and argue facts not in evidence. Another limitation is that the prosecutor's argument may not exceed the invitation of defense counsel's argument. See Johnson v. State, 611 S.W.2d 649 (Tex.Crim.App. 1981) holding that a defender's argument for probation does not invite a comment on the defendant's failure to testify; Garrison v. State, 528 S.W.2d 837 (Tex.Crim.App. 1975). Thus, if the defender's arguments are supported by the record and, therefore, proper, then any prosecutorial response that is not supported by the record is improper. In addition, as mentioned above, even if the defender's arguments are not supported by the record,

and improper, then a response by the prosecutor going outside the record will be improper, provided that it exceeded the limits of the proper scope of the invitation. For example, the defender's argument calling the jury's attention to the accused's right to remain silent does not invite the prosecutor to reply, "Why do you think he did not want to testify? He had nothing to say up here in his defense. That's why he did not want to testify." See Franks v. State, 574 S.W.2d 124 (Tex.Crim.app. 1978). But see Slater v. State, 317 S.W.2d 203 (Tex.Crim.App. 1958) which holds that if the counsel for the accused discusses his failure to testify, the prosecution may discuss it. If a defender argues that if the accused had done other bad things, the prosecutor would have presented them in evidence, the prosecutor cannot argue the existence of prior bad acts because that exceeds the invitation. Instead, he may argue that the rules of evidence prevent proof of prior bad acts. See Garrison v. State, supra. Similarly, a defender's argument concerning failure of the prosecutor to call witnesses does not allow the prosecutor to argue out of the record that the absent witnesses were serving prison terms. See Thornton v. State, 542 S.W.2d 181 (Tex.Crim.App. 1976).

Defenders must beware of opening the door to otherwise inadmissible character argument. It is the rule that the prosecution may respond in its argument to defense contentions that defendant has a good character, particularly when such argument by defense counsel is: (1) misleading such as when counsel argues that the defendant has no convictions; (2) over-broad such as when the defender argues that the defendant has led a clean life; (3) outside the record such as when the defense contends that the evidence showed that defendant has no other arrests or charges; or (4) an incorrect statement of the law such as when the defender asserts that the prosecution did not have anything bad to introduce against the defendant. See Garrison v. State, supra.

The defender may open the door to a whole universe of otherwise improper prosecution argument including: matters not otherwise in evidence. See Abels v. State, 489 S.W.2d 910 (Tex.Crim.App. 1973); reputation of witnesses. See Curry v. State, 213 S.W. 268 (Tex.Crim.App. 1919); otherwise inadmissible convictions or charges against the defendant. See Jordan v. State, 500 S.W.2d 638 (Tex.Crim.App. 1973).

The prosecutor is allowed to react apologetically in commenting about things that the defender has said or done. For example, the appeals court has okayed a prosecutor's remark during punishment stage of trial in which he apologized to the jury for the defense attorney who had told them their verdict of guilt was wrong. See Johnson v. State, 527 S.W.2d 525 (Tex.Crim.App. 1975). □

NOT TOO LATE TO ANSWER

It's not too late for you to turn in your completed Budget Questionnaire.

The response so far is admirable:

District Attorneys	74%
County Attorneys	60%
Criminal District Attorneys	74%
County Attorneys with Felony Responsibility	75%

However, misdemeanor prosecutors are running about 10% behind their level of response to the last Budget Questionnaire two years ago; felony prosecutors, about 5% behind.

But your response can make this accumulated information all the more comprehensive and valuable.

The Council hopes to have all the responses entered on its computer this summer and available for statistical comparison. This will provide a useful reference when you need to persuade your commissioners that your proposed budget is reasonable and necessary.

About two-thirds of all elected prosecutors have responded. Don't be in the minority! Your cooperation and assistance are appreciated, by both the Council and your fellow prosecutors.

WHO DECIDES
To File the Motion to Revoke Probation:
The Judge or the Prosecutor?

On April 29, 1983, Wiley Cheatham, District Attorney for the 24th Judicial District, requested an Attorney General opinion as to what role a judge can play in the decision to revoke probation. On February 21, 1984, the Attorney General's office requested that The Prosecutor Council brief the issue. After briefing, it is the conclusion of the Council that there is no legal basis for a judge to participate in the decision to revoke probation. What follows is the text of the Council's brief.

PROBLEM: Among the questions Wiley Cheatham asked, the principal one is: Can a district attorney file a petition to revoke a felony probation in district court for a probation which was granted in one of the counties served by the district attorney, without the request of the probation officer and/or the district judge or is the district attorney prohibited from filing a petition to revoke a felony probation unless requested to do so by the probation officer and/or the district judge?

ANSWER: The Council responded as follows:

The authority of county and district attorneys to represent the State of Texas in the district and inferior courts is found in Article 5, Section 21 of the Texas Constitution. It was summarized in the Shepperd case as follows:

> "It has always been the principal duty of the district and county attorneys to investigate and prosecute the violation of all criminal laws . . . and these duties cannot be taken away from them by the Legislature and given to others."
>
> Shepperd v. Alaniz, 303 S.W.2d 846, 850
> (San Antonio, Ct. of App., 1957) No writ.

A probation revocation hearing is a procedure occurring within the framework of the original criminal prosecution conducted by the prosecuting attorney. Revocation proceedings begin with the filing of the motion to revoke probation. Champion v. State, 590 S.W.2d 495, (Tex. Cr. App., 1979). While the hearing is not a criminal trial in the constitutional sense, it does take the form of an adversary proceeding in which the defendant is entitled to counsel. Ruedas v. State, 586 S.W.2d 520, (Tex. Crim. App., 1979), Ex parte Guzman, 551 S W.2d 387, (Tex. Cr. App., 1977); Ex parte Flores, 537 S.W.2d 458, (Tex. Cr. App., 1976). A significant difference between a trial and a revocation hearing is that the judge is the sole trier of fact, McKinney v. State, 615 S.W.2d 223, (Tex. Cr. App., 1981), with the power to determine the credibility of witnesses and whether the allegations in the motion to revoke are true, Garrett v. State, 619 S.W.2d 172, (Tex. Cr. App., 1981), Langford v. State, 578 S.W.2d 737, (Tex. Cr. App., 1979).

With these thoughts in mind, consider these two questions - what is the role of the judge in the decision of whether to file a motion to revoke probation and if he does initiate the proceedings, is his act consistent with the Texas and United States Constitutions as well as all other applicable statutes and rules?

The statutes are poorly written. Art. 42.12, Sec. 8(a) addresses the initiation of procedures to revoke felony probation. It makes no mention of who is responsible for drafting and filing a motion to revoke but does give the State the power to amend that motion. Art. 42.13, Sec. 8(a) governing misdemeanor probation is written in much the same language as 42.12, Sec. 8(a), but without any reference to the power of the State to amend a motion to revoke. The only explicit grant of power to a judge in either Art. 42.12(8)(a) or Art. 42.13(8)(a) pertaining to the initiation proceedings is the right to issue a warrant for the defendant's arrest to answer the allegations in the motion to revoke.

Federal constitutional requirements mandate that a neutral, detached magistrate determine whether sufficient probable cause exists to issue a warrant. The benchmark case involved an instance where a prosecutor's office performed both a prosecutorial role and a judicial role, Coolidge v. New Hampshire 403 U.S. 450, 91 S. Ct. 2022 (1971). Justice Stewart wrote in the opinion, "the whole point of the basic rule [separation of prosecutorial and judicial functions] . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations" (emphasis added) Coolidge supra, at 2029. A judge who would make a prosecutorial decision to file (or not to file) a motion to revoke places himself in the same untenable position if he then makes the judicial determination of whether sufficient probable cause exists to support the issuance of a warrant. To meet the constitutional requirements of Coolidge, a different judge would have to make the latter decision.

Even if a judge were allowed to initiate (or not initiate) revocation proceedings, the question arises as to whether the same judge can legally or ethically preside at the revocation hearing. In Ex rel. Bryan v. McDonald, (No. 69, 137, Tex. Cr. App., Dec. 14, 1983) the Court of Criminal Appeals discussed whether a judge should be allowed to view a presentencing report prepared by the probation officer prior to the determination of a defendant's guilt or innocence - a report which necessarily contains information about the defendant's alleged crime. The Court cited two reasons why it was improper for the judge to review the report prior to the determination of the guilt or innocence of the defendant.

The Court noted that Canon 3(A)(4) of the Code of Judicial Conduct states:

> "A judge should . . . neither initiate nor consider ex parte or other private communications concerning a pending or impending proceeding."

Secondly, the Court wrote that the inspection of the report prior to the determination of guilt or innocence was violative of due process of law as required by Art. I, Sec. 19 of the Texas Constitution and the 14th Amendment of the United States Constitution stating:

> "Wholesale evidence, almost always of a hearsay nature, not sworn to and not subject to the rigors of cross-examination, is obviously considered by the trial court under the system in question as a matter of course before a plea is even entered . . . The respondent's practice of reviewing prior to a determination of guilt, unsworn testimony not subject to the rigors of cross-examination, a review that does not take place before opposing parties in a court of law, is for all practical purposes an in camera proceeding."

Assuming the Court's holding in Ex rel. Bryan is correct, then a judge may not go through the steps necessary to determine if a motion to revoke should be filed and expect to be the magistrate who issues the warrant and the judge who sits at the hearing. The State Constitution, State laws, 42.12(8)(a) and 42.13(8)(a), and the Canons of the Code of Judicial Conduct prevent a judge from filing the motion to revoke and then acting as the trier of facts in the case.

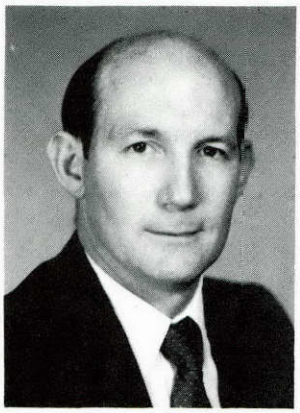
One interesting aside is what happens to judicial immunity if a judge steps out of his judicial role and assumes a prosecutorial and investigative one? That issue is not discussed here.

In summary, a judge may not participate in the decision making process of whether to file a motion to revoke probation because 1) it violates the Texas Constitution, Article V, Section 21 by taking away the authority of the prosecutor; 2) it violates the due process requirements of the U. S. and Texas Constitution, and 3) it violates the Judicial Canons of Ethics. □

COUNCIL BRIEFING SERVICE

Upon the request of a prosecutor, the Prosecutor Council may do legal research or brief issues of importance to prosecutors generally.

If you have requested or intend to request an Attorney General opinion regarding a matter that may have a wide impact on prosecution in Texas and you would like the Council to prepare a brief on the matter, please contact Andy Shuval.



Addressing the Ethical Issues:

Public Office/Private Practice: Reconciling the Conflicts

by Thomas F. Lee

The Honorable Thomas F. Lee is District Attorney of the 63rd Judicial District, composed of Val Verde, Edwards, Terrell, and Kinney Counties. A graduate of St. Mary's Law School, he practiced law privately for five years before becoming an Assistant District Attorney. He has been the District Attorney since October 1978.

"It is not the choice between good and evil that tries men's souls, but the choice between conflicting loyalties."

-- U.S. Senator Sam Ervin

When a lawyer agrees to represent the public and at the same time pursue a private practice, he invites a number of problems. Combining a public and private practice of law is fraught with the possibility of conflict between the public interest and the private needs of a lawyer's client. Every prosecutor needs to be aware of the ethical problems that arise from this arrangement.

A prosecutor owes his first loyalty to the public. In this regard, a prosecutor is prohibited from becoming involved in any professional relationship that might cause him to advocate a position adverse to the public interest. Even in those limited situations in which a prosecutor is allowed to represent a civil litigant in a matter in which his office has an official connection, he should avoid even the appearance of impropriety.

In considering the measures one should exercise to avoid a conflict of interest, it is important to understand the vantage point for evaluating the potential for conflict. Obviously, with the application of enough imagination every private case a prosecutor takes on has the potential for conflict. The important consideration is to perceive the possibility of conflict by exercising provident care when the relationship with the private client is first developed. Even when no danger of a conflict can be seen, a careful prosecutor will explain to private clients that his primary obligation is to safeguard the interests of the public and what the procedure would be for withdrawing from representation should a conflict develop.

Our society has become concerned with the conduct of attorneys and bar associations have increased the pressure on its members to adhere to proper ethical standards. It is clear that prosecutors owe an even greater responsibility to the public to exercise high moral and ethical conduct. In this regard, we can be proud that prosecutor associations are paying close attention to this subject.

During the Basic Prosecution Course last June, time was devoted to the examination of ethical problems related to prosecution. The following are some of the hypothetical situations considered in regard to the issue of conflicts of interests.

FACT SITUATION #1

You are an Assistant County Attorney in a three person County Attorney's Office. When you returned to your hometown after completing law school, you renewed a friendship with a highschool classmate, who now owns a successful construction business. He asks you to draft some contracts and do some collection work.

ETHICAL PROBLEM A

Does it matter whether or not he does business with the county?

DISCUSSION

Yes. It matters a great deal that the contractor in this situation does business with the county. It is common to observe a contractor involved in negotiating contracts with a county, settling difficulties related to the performance of the contracts and engaged in disputes with the county. In these endeavors, the contractor as well as the county deserves uncompromising legal representation. Before an assistant county attorney becomes involved with a client hoping to contract with the county, that prosecutor should recognize the restraints placed upon his actions.

Canon Five of the Texas Code of Professional Responsibility obligates a lawyer to exercise independent professional judgment on behalf of his client. The Canons, their ethical considerations and disciplinary rules require loyalty by a lawyer to his client. EC 5-1, EC 5-14. Texas law makes it clear that the county attorney must provide legal advice to the county when asked to do so. TEX. REV. CIV. STAT. ANN. Art. 334. A prosecutor is prohibited from taking a position adverse to the state. Tex. C.C.P. Ann. Art. 2.08 (1965). This assistant county attorney owes his loyalty to the county.

It is hard to imagine a situation wherein an assistant county attorney would be permitted to represent a client in any dealings with the county. It would even be difficult for this prosecutor to represent the contractor in transactions not involving the county since the relationship would dilute his loyalty to the county when it came time to represent the county against the contractor.

ETHICAL PROBLEM B

Suppose the contractor does no work for the state so you have decided that ethically you can draft his contracts and do his collection work. You file suit against a person who failed to pay for work he did. A week later you see that the 16-year-old son of the person you filed the suit against was arrested for criminal mischief. What do you do?

DISCUSSSION

A sixteen-year-old is subject to adjudication under the Texas Family Code. A juvenile proceeding is prosecuted by the state and the parent of the child is named in the petition, summonsed and can be held financially responsible for the actions of his child. TEX. FAMILY CODE. ANN §53.04 (1978); §53.06 (1973) and §54.041 (1983).

The prosecutor who represents the state in this juvenile action should avoid any involvement that will call into question his fairness. If this assistant county attorney continues to represent the contractor against the debtor, and also prosecutes the debtor's son in the juvenile action, such circumstance would constitute a direct conflict of interest.

Even if we assume that the county attorney's office is not responsible for the prosecution of the juvenile, the continued representation of the contractor against the debtor will engender an attitude that the son is being prosecuted as a reprisal or to encourage a settlement of the debt. Therefore, the assistant county attorney should advise his client to seek new representation in his dispute with the debtor.

ETHICAL PROBLEM C

A month later, a person to whom you sent a demand letter walks into your client's office and punches him in the mouth and breaks your client's jaw. Your client calls you and want the person arrested. How do you handle this situation?

DISCUSSION

As a practical matter this assistant county attorney is as much a party to this dispute as the contractor or debtor. It is

reasonable to assume that the demand letter played some part in motivating the debtor to strike the contractor. If this assistant county attorney appears for the state in the criminal prosecution such would raise a serious question of impropriety.

Canon Nine of the Code of Professional Responsibility dictates that a lawyer should avoid even the appearance of impropriety. Prosecutors should avoid any behavior that would call into question the integrity of the prosecutor's office and discourage any claim of misuse of prosecutorial authority. BAR COMMITTEE OPINION 143 (March 1957).

This assistant county attorney should direct his client to call the appropriate law enforcement agency to report the assault but should avoid involvement in the criminal or civil litigation against the debtor.

ETHICAL PROBLEM D

How do you advise your client to proceed regarding bad checks he has been given by several customers?

If you are the elected county attorney how do you respond to charges that your assistants are more vigorously prosecuting hot checks referred from people they represent than other hot check cases?

DISCUSSION

Citizens of a community are entitled to the services of their prosecutor's office regarding the collection or prosecution of hot checks. Those rights are not forfeited when a citizen becomes the client of the assistant county attorney. Therefore, this prosecutor may provide the same services to his client he would provide to any other citizen with a hot check problem.

The situation presents a different twist if we assume the assistant county attorney is being paid by the contractor to collect a check. In this regard, the prosecutor should avoid using his position to influence the collection or threaten criminal action.

A prosecutor should take care to insure that he does not use the weight of his office to benefit a private client. If he is confident that his clients and his assistant's clients enjoy no special privileges then he should make that known to all that might raise the criticism.

ETHICAL PROBLEM E

The union representing the workers of your client's company go on strike. They file an unfair labor practice grievance against him in federal court. You agree to represent him and study for the case all night. On the way to the courthouse you hear on the radio that 10 picketers of your client's business were arrested for trespass and disorderly conduct. Can you continue to represent him in federal court?

DISCUSSION

The controlling rule is that if a public prosecutor is employed or contemplates being employed to represent a party in a civil matter at a time when his duties as a public prosecutor require him to investigate or prosecute criminal charges against one of the parties to the civil matter, he is disqualified due to actual or potential conflict of interest.

If however, his duties as a public prosecutor have been fully performed and terminated before he is approached on the civil matter, and he has gained no confidential information by reason of his public position, he is not ethically disqualified to represent the civil suitor. BAR COMMITTEE OPINION 332 (August 1967).

Even though this fact situation presents the reverse of facts contemplated by the rule stated in Opinion 332, the same analogy applies. This prosecutor is actively involved in representing a party to a civil action when called upon to investigate and prosecute a criminal charge against the other party. Such action constitutes an actual conflict of interest and the prosecutor cannot continue to represent the contractor in federal court.

ETHICAL PROBLEM F

At 2:00 a.m. Saturday morning you get a telephone call from your client that he has been arrested for D.W.I. Your client wants to know:

(a) Should he take the breathalizer test?

(b) Will you come get him out of jail?

Would your answer be different if your client was arrested in the next county?

DISCUSSION

The Texas Code of Criminal Procedure precludes a prosecutor from taking a position adverse to the state. Tex. C.C.P. Ann. Art. 2.08.

If this assistant county attorney were to engage in the practice of advising clients charged with criminal violations such would result irreparable damage to the cause of law enforcement and prosecution. This prosecutor should avoid giving his client advice or arranging for release from custody.

Texas Code of Criminal Procedure, Article 2.08 is clear in its restrictions upon Texas prosecutors. One does not circumvent the requirement established by this Article by driving to another Texas county to defend criminal clients. It is clear that the fact that this client was arrested in a neighboring county would make no difference to the solution of this problem.

FACT SITUATION #2

Your social life has involved you with a divorced woman with two small children. Her ex-husband has not made child support payments in over a year but since the woman was working she didn't bother to try to get him to pay. She just lost her job and is in desperate need of those child support payments. What can you do?

DISCUSSION

The degree of involvement of the assistant county attorney in any action filed against this former husband depends upon the prosecutor's relationship with the ex-wife. A friendship with the ex-wife will not preclude the prosecutor from prosecuting the ex-husband. However, if the word "involved" means an engagement, pending marriage or a serious relationship, then the prosecutor's participation in this matter may be improper.

It appears the ex-husband can be subjected to a non-support action or criminal prosecution under Texas Penal Code Article 25.05. The prosecutor's office would have jurisdiction over both cases. Once again, the propriety of prosecuting either or both cases would depend upon the degree of this county attorney's involvement with the ex-wife.

Canon Nine of the Code of Professional Responsibility advises that a lawyer should avoid even the appearance of impropriety. If this prosecutor is involved with the ex-wife and appears on behalf of the state in the prosecution of the ex-husband, such action would cast a shadow upon the integrity of the prosecutor's office.

FACT SITUATION #3

You are an elected county attorney. You learn that each of your assistants represents a driver in a car wreck. You call these assistants to your office and they explain to you that the injuries suffered in the collision are not serious and that the representation of opposing parties to the litigation will not affect the office.

Can you see any ethical problem in this? Can you see a problem as an office administrator? Is it advisable to have office guidelines on these matters?

DISCUSSION

When considering the application of the Code of Professional Responsibility, a prosecutor's office must be viewed in the same manner as a law firm.

Since it is improper for two members of the same law firm to represent opposing parties to cause of action, the same would hold true for two assistant county attorneys. CANON FIVE OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

A prosecutor has an obligation to provide the public with a prosecutor's office that is efficient, honest and above reproach. It would be wise for the elected prosecutor to have a clear understanding of the limitations on the types of private cases their assistants can pursue. □

DISCIPLINARY REPORTS TO BE PUBLISHED

Starting in the next issue of TRUE BILL, summaries of dispostions by the Council of complaints against prosecutors will be published in the Ethics Section. Names and locations of the prosecutors involved will not be published unless, as in past issues, the Council's disposition is of a public nature.

Examples of the kind of summaries to be printed can be found in the Council's 1983 Annual Report, Appendix "C."

It is hoped that the publication of these reports will alert prosecutors to the types of complaints filed and ways to avoid them. Many complaints are the result of lack of communication, poor public relations, overworked or understaffed offices, or simply misunderstanding on the part of the complainant. A citizen may not fully understand the demands and schedules of the office, and this can result in the feeling that his/her case is not getting the attention it deserves. Of course, a complaint may have substantial merit, and it is to the benefit of prosecutors generally to learn of the action taken by the Council in such a case.

ONE MAN'S ANSWER

This poem is part of the way that Archie Wilder, County Attorney of Wilson County, chose to answer a complaint against him lodged with the Council.

Twenty-five years
A member of the Bar
Praised and condemned
Both near and far
Senators, Congressmen
Winos and pimps
Bleeding heart liberals
Doctors and wimps
All honors received
Are gently packed in a box
But the complaint of Malloy,
Baumann, Presley and Cox
Shall go in a frame
And hang on my wall
Twenty-five years
Greatest honor of all.

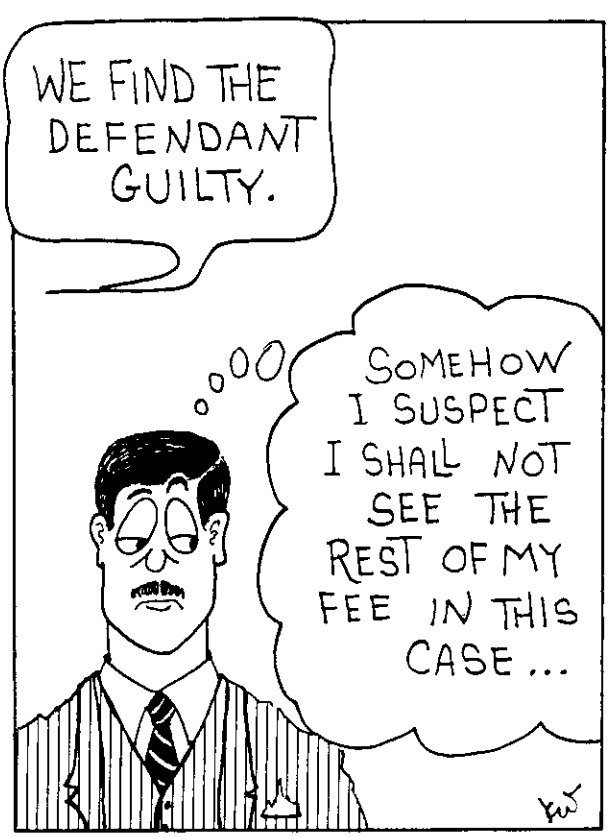
Printed with permission of Archie Wilder.

THERE'S STILL TIME TO ANSWER

Have you returned your Budget Questionnaire to the Council? Most of your fellow elected prosecutors have. But a response by each of you is important. Every completed questionnaire makes the information gathered that much more complete and representative of prosecutors' offices throughout Texas. The response has been as follows:

Total # of Positions	# Q'naires Returned	Percent Returned
77 D.A.s	57	74%
169 C.A.s	101	60%
35 C.D.A.s	26	74%
24 C.A.w/F.R.s	18	75%

But it's not too late! We would still appreciate hearing from you. The Council hopes to have the results on its computer by this summer and available in statistical form for prosecutors to utilize in planning future budgets.



Cartoon by R. Kristin Weaver,
former Asst. D.A., now Attorney at Law, Dallas.

Professional Development

What is Stress?

Based on information from the Sid W. Richardson Institute for Preventive Medicine, this article is designed as an orientation to the concept of stress and how we react to it. Future articles will examine how we can learn to cope with stress and manage both its detrimental and beneficial effects.

The topic of stress is so popular today that it can be hard to discern its meaning. It is easier to say what stress is not:

Stress is not nervous tension.

Stress is not the discharge of hormones from the adrenal gland, although the two may often be related.

Stress is not simply the by-product of a negative occurrence. Stress can be caused by quite ordinary, even positive events.

So what is stress? It has been described as the nonspecific response of the body to any demand. Thus stress is a "state" of the body and can bring about emotional, physical, chemical, and/or behavioral changes. In the book The Stress of Life, Hans Selye described the response of the body to stress factors ("stressors") in three stages:

1. **Alarm.** Stress is induced; biochemical changes produce a release of adrenalin.

2. **Resistance.** The stress is overcome; the body returns to normal.

3. **Exhaustion.** If stress continues and the body cannot adopt, Alarm stage returns.

The changes in the Alarm phase prepare the body for survival. This response, commonly called "fight or flight," is necessary for the body to meet the demands of situations that require additional strength, energy, and endurance. But this response is not desirable for prolonged periods of time.

Symptoms during the Alarm phase are:

Rapid pulse
Increased perspiration
Pounding heart
Tightening stomach
Tensing of muscles in arms and legs
Shortness of breath
Gritting of teeth
Clenching of jaws
Inability to sit still
Racing thoughts
Excessively gripping emotions

If you experience these symptoms often, consider it a warning that you are overly stressed. Other changes to look for include:

Often working late
Difficulty making decisions
Making safe choices, not the best ones
Excessive daydreaming or fantasizing
Sexual or romantic indiscretions
Sudden increase in drinking or smoking
Use of antidepressants or tranquilizers
Vague, disconnected speech or writing
Excessive worrying
Constant repetition of the same subject
Outbursts of temper or hostility
Harping on personal failures/shortcomings
Constant reference to death or suicide
Hypochondria
Insomnia
Feeling inadequate, rejected, or insecure
Sudden reversal of usual behavior

One might easily assume that all stress is negative. This is not true. No one would be happy without some stress because it brings stimulation — and without stimulation you have boredom. This positive type of stress has been called "eustress" or "euphoric stress." It can produce strength, increased resistance, and other positive reactions. It can be experienced by people who feel challenged by their work, confident, and in control of their lives. It is in contrast to "distress," a negative, defeated reaction leading to weakness and vulnerability.

An overstressed individual becomes less capable of successfully dealing with new stressors. The ability to adapt depends on one's biochemistry, strength, psychological and emotional makeup, values, attitudes, habits, and other factors. The goal is not to eliminate all stressors, but to improve the manner in which each of us responds. □

Calendar

NOTE: The courses listed below and printed in **dark type** are Council approved professional development courses. All courses not in dark type will need prior Council approval for reimbursement of travel expenses.

MAY		
1	Effective Time Management (TTU)	Houston
6-9	Legislative Conference (NDAA)	Arlington, VA
7-11	Crime Scene Search School (DPS)	Austin
8	Effective Time Management (TTU)	Dallas
8-10	Narcotics Investigation School (DPS)	Austin
9-11	**Annual Civil Seminar (TDCAA)**	**Houston**
10	Effective Time Management	San Antonio
11	Effective Time Managment (TTU)	Austin
13-17	The Trial of the Violent Juvenile (NCDA)	Philadelphia, PA
15	Effective Time Management (TTU)	Lubbock
18	Special Criminal Law Institute: DWI Defense	El Paso
20-24	Trial Advocacy for Prosecutors (NCDA)	Boston, MA
JUNE		
4-8	Criminal Investigator's School (DPS)	Austin
5-7	Narcotics Investigator School (DPS)	Austin
8	Special Criminal Law Institute: Appeals and Post-Conviction Remedies (CDLP)	Washington, D.C.
8-15	**Executive Prosecutor Course (NCDA)**	**Houston**
11-15	Motor Vehicle Theft Investigator's School (DPS)	Austin
18-21	**Basic Prosecution Course (TPC/TDCAA)**	**Austin**
18-22	Senior Safety Security Seminar (NCPI)	Louisville, KY
29-July 2	Crime Prevention and Youth: Protecting Our Future (CPC)	Washington, D.C.
JULY		
6-20	**Career Prosecutor Course (NCDA)**	**Houston**
9-13	Burglary & Theft Investigator's School (DPS)	Austin
11	**Regional Meeting (TPC/TDCAA)**	**Tyler**
12	**Regional Meeting (TPC/TDCAA)**	**Abilene**
18	**Regional Meeting (TPC/TDCAA)**	**Salado**
19	**Regional Meeting (TPC/TDCAA)**	**Midland/Odessa**
25	**Regional Meeting (TPC/TDCAA)**	**Huntsville**
26	**Regional Meeting (TPC/TDCAA)**	**CorpusChristi**
AUGUST		
1	**Regional Meeting (TPC/TDCAA)**	**Amarillo**
2	**Regional Meeting (TPC/TDCAA)**	**Ft.Worth**

CDLP-Criminal Defense Laywers Project
CPC-Crime Prevention Coalition
DPS-Department of Public Safety
NCDA-National College of District Attorneys
NCPI-National Crime Prevention Institute
NDAA-National District Attorneys Association
TDCAA-Tex. Dist. & County Attorneys Assoc.
TPC-The Prosecutor Council

COUNCIL APPROVES COURSES AND REGIONAL MEETINGS

On April 6th the Council approved measures to further develop the Basic Prosecution Course, a Capital Murder Course and Regional Meetings.

The Council accepted the recommendation of the Education Subcommittee of the Advisory Committee that the Basic Prosecution Course be geared to prosecutors with 1 to 3 years' experience. The recommendation was based on the results of a Council questionnaire. (See TRUE BILL, Feb./Mar. '84, p.40 for a results summary.)

The Basic Prosecution Course, set for June 18 - 21, will cover the following topics:

MONDAY

The Role of the Prosecutor in a Democratic Society.

Prosecution in Small Towns.

The Charging Decision: Intake after arrest; Maintaining good police relations; Keeping your complainants and witnesses satisfied; Use of victim assistance personnel; When to hold examining trials; Law & procedure on conducting examining trials.

Grand Jury: Role; Investigative Powers; Reports; Presenting cases; Demonstration; How to orient a Grand Jury; Use of Prosecutor Council packet.

Indictments: Black Letter Law on indictments; Fundamental defects in indictments; Practical tips on drafting indictments; and charging defendants with multiple counts; Use of Prosecutor Council Indictment Manual.

What the Investigator Wished the Assistant Learned in Law School: How to effectively use your investigator and the resources available to him.

TUESDAY

Statements: Legal Prerequisites and Admissibility.

Interviewing and Interrogation Techniques.

Plea Bargaining: Black Letter Law; When and how a defendant may enforce an agreement; Threats to re-indict for a higher degree if the defendant refuses an offer; The Judge's role; How to take a plea in court.

Plea Bargaining: Panel Discussion.

Breakout Session: Juveniles/Forfeitures - CSA/Mental Health/Probation Revocations.

Jury Selection Theory.

Panel Discussion.

Search and Seizure: Black Letter Law; Recent developments; When & how to conduct a suppression hearing; Discussion on burden of going forward; Burden of proof; Adequacy of motion papers.

WEDNESDAY

Voir Dire and Opening Statements: Black Letter Law, tactics and demonstration.

Prosecutorial Ethics: Group Discussion, presented by the Prosecutor Council.

Prosecutorial Ethics: Panel Discussion.

Direct and Cross-Examination: Black Letter Law; Presentation of witnesses.

Trial: Witnesses; Demonstrative evidence; Arresting Officer (Description of Crime Scene; Introduction of photos and videotapes); Breathalyzer Expert.

THURSDAY

Jury Charge: Black Letter Law; avoiding fundamental error.

Sentencing Hearing: Demonstration; Black Letter Law; Pen Packet Introduction; Reputation and Character Witnesses; Defendant's Mother.

Theory of Punishment & Final Argument.

The Education Subcommittee will supervise the development of the Capital Murder seminar proposed for August.

The Regional Meetings, held jointly with TDCAA, will focus on three major areas. TDCAA will present legislative concerns of prosecution and an overview of recent case decisions affecting prosecution. The Prosecutor Council will address its procedures and progress before the Sunset Commission. Lastly, the Texas Crime Victims Clearinghouse will present topics relating to victim-witness assistance and its usefulness to a prosecutor in handling cases. (See related article, p. 5.)

The Regional Meetings schedule can be found on the Council Calendar, p. 38. □

REFERENCE MATERIALS ON SENTENCING

These materials were compiled by the National Criminal Justice Reference Service for the National Conference on Sentencing held January 18-20, 1984 in Baltimore, Maryland. **Copies are available on loan from the Council.** Except where otherwise indicated, all materials were sponsored by NIJ/NCJRS. (See TRUE BILL, Vol.5/No.1, Feb.-Mar. '84, p.44 for more information.)

1. **Determinate Penalty Systems in America - An Overview.** Assessments of various approaches. By A. von Hirsch and K. Hanrahan, Crime and Delinquency, V 27, N 3 (July 1981), pp. 289-316.

2. **Implementation of the California Determinate Sentencing Law.** A study of the responses to DSL, case disposition, bargaining and probation. By J.D. Casper et al., Stanford University Department of Political Science, Stanford, Calif. 1983: 266 p.

3. **Incarceration and Its Alternatives in 20th Century America.** Concepts and treatment from 1870 to 1940; analysis of the progressive reform movement. By D.J. Rothman. 1979: 80 p.

4. **Mandatory Sentencing - The Experience of Two States.** NIJ Policy Brief on Massachusetts and New York. By K. Carlson, Abt Associates, Inc., Cambridge, Mass. 1983: 27 p.

5. **Mandatory Sentencing and the Abolition of Plea Bargaining - The Michigan Felony Firearm Statute.** An examination of the simultaneous attempt to abolish plea bargaining and introduce mandatory sentencing in Wayne County (Detroit), Mich. By M. Heumann and C. Loftin, Law and Society Review, V 13, N 2, Special Issue (Winter 1979), P 393-430. 1979: 38 p.

6. **Monetary Restitution and Community Service - Annotated Bibliography.** A list of works on monetary and community service restitution programs, legal issues, and evaluations of restitution programming. University of Minnesota School of Social Development, Duluth, Minn. 1980: 157 p.

7. **Multijurisdictional Sentencing Guidelines Program Test Design.** Steps for examining the applicability of statewide sentencing guideline programs designed to reduce sentencing disparity. National Instutute of Justice, Washington, D.C., 1978: 59 p.

8. **Perspectives on Determinate Sentencing - A Selected Bibliography.** A list of more than 200 publications about the impact of determinate sentencing on correctional systems, relevant legislative issues, and the debate on the merits of determinacy. By W.D. Pointer and C. Rosenstein, National Criminal Justice Reference Service, Rockville, Md. 1983: 95 p. NCJ-84151

9. **Principles of Guidelines for Sentencing - Methodological and Philosophical Issues in Their Development.** By L.T. Wilkins, Abt Associates, Inc., Cambridge, Mass. 1981: 81 p. NCJ-76216

10. **Selective Incapacitation.** Strategies based on data from inmates, suggesting the significant reductions in crime can be achieved without increasing the number of offenders incarcerated. By P. W. Greenwood and A. Abrahamse, the RAND Corporation, Santa Monica, Calif. 1983: 150 p.

11. **Sentencing Guidelines - Structuring Judicial Discretion, Volume 3 - Establishing a Sentencing Guidelines System.** By A. Gelman, Criminal Justice Research Center, Albany, N.Y. 1982: 246 p.

12. **State Law and the Confidentiality of Juvenile Records.** Summaries of State laws on juvenile fingerprinting and juvenile records; media access to such. Search Group Inc., Sacramento, Calif. Sponsored by the Bureau of Justice Statistics. 1983: 14 p.

13. **Structured Plea Negotiations.** Text design intended to increase the equity, efficiency, and effectiveness of plea bargaining. 1979: 45 p.

Council Publications

ELEMENTS MANUAL - Recently released 4th Edition of the breakdown of the elements the prosecutor must prove to establish a conviction. Updated through the 1983 Regular Legislative Session. Ideal for peace officers and grand jurors. $2.00.

A LAW ENFORCEMENT OFFICER'S GUIDE TO RECENT CASES - An 8-page summary of last year's major cases affecting law enforcement & prosecutors, prepared for law enforcement officers. 25¢.

THE GRAND JURY PACKET - Acquaints grand jurors with their duties and the problems of law enforcement. Includes the Handbook for Grand Jurors, an Elements Manual, "Crime in Texas," and articles on plea bargaining and the politics of crime. $3.00.

GUIDE TO REPORT WRITING - For use by law enforcement officers to ensure that reports better meet the requirements of prosecutors. 1-25 at $1.75 each, 26-99 at $1.65 each, 100 plus at $1.50 each.

HOT CHECK MANUAL - Laws & forms for collecting checks and trying check cases. $7.00.

HOT CHECK PAMPHLET - Pamphlet for prosecutors to give to merchants and others who receive bad checks. Clues for detecting bad checks, procedure to follow when taking a check and the procedure to follow when a bad check is received. Space for an imprint. $5.00 per 50.

Highlight

INDICTMENT MANUAL - New, 300-page loose-leaf publication on informations and indictments. Contents include the Black Letter State Law with annotations, forms, and a checklist of commonly occurring problems. The editor is Marvin Collins, formerly Distict Court Judge and currently Chief of the Civil Section of the Tarrant County Criminal District Attorney's Office. $55.00.

INVESTIGATORS DESK MANUAL - Includes investigative techniques, information sources, evidence, investigative and administrative forms, bibliography, and glossary. $25.00.

RECIPROCAL CHILD SUPPORT MANUAL - Laws, procedure, & forms for setting up and operating a RCS section in a prosecutor's office. $3.00.

All publications listed are prepared by The Prosecutor Council. Prices include postage and handling.

----------CUT ALONG DOTTED LINE----------

	Quantity	Price
Elements Manual	_____	_____
Grand Jury Packet	_____	_____
Guide to Report Writing	_____	_____
Hot Check Manual	_____	_____
Hot Check Pamphlet	_____	_____
Indictment Manual	_____	_____
Investigators Desk Manual	_____	_____
Law Enf't Officer's Guide to Recent Cases	_____	_____
Reciprocal Child Support	_____	_____

Name_____ Office_____

Address_____ City_____ State_____ Zip_____

BILL MY OFFICE

BILL:_____

Audio Visual Loan Library

The Council's audio-visual materials are available upon request at no charge to prosecutors except for return postage and insurance. Requestors are asked to return materials borrowed within two weeks, and are responsible for damage or loss while the material is in their possession.

Professional Development Training

Highlight

COURTROOM DEMEANOR - Informative and highly entertaining program contains numerous examples of the do's and don'ts of testifying in court, and the tactics of cross-examination. Especially geared to law enforcement officers, it alerts them to the atmosphere of the courtroom, how witnesses are perceived by the jury, and how to avoid common mistakes while on the stand. The tape is a popular staple of the Council's Law Enforcement Workshops. By James Barklow, former Assistant District Attorney for Dallas County. 57 minutes. 3/4" U-Matic, 1/2" Beta, or 1/2" VHS videotape.

CHALLENGING A SEARCH & SEIZURE - Useful for prosecutors to keep up with tactics of the defense. Knox Jones speaks in this presentation of February and July 1982. Produced by the State Bar of Texas. 75 minutes. 1/2" VHS videotape.

REPORT WRITING - Motivates the writer to produce clear and accurate reports and teaches him how. Consequences of unclear writing are shown through incorrect interpretation by prosecutor. 27 minutes. 16mm film or 1/2" VHS videotape.

TRIAL ADVOCACY FOR PROSECUTORS - Use these audio cassettes in the office, the house or car as a review or an introduciton to successful trial techniques. Produced by the National College of District Attorneys from 1981 NCDA course lectures. Most of the tapes are 1 hour or less. Extremely popular in the past, an extra set of the tapes has been purchased by The Council for loan to prosecutors.

Jury Selection - Norman Early
Jury Selection - Murder and Death Penalty Cases - Richard Huffman
Real, Documentary and Demonstrative Evidence - Christopher Munch
Opening Statement - Michael Ficaro
Direct Examination and Witness Interview - S.M. "Buddy" Fallis
Closing Argument - Rebuttal to Defense Stock Arguments - Munch & Roll
Cross-Examination - S.M. "Buddy" Fallis
Meeting the Insanity Defense - John M. Roll

Public Information Programs

CRIME PREVENTION: THE ROLE OF CITIZENS - Stresses individual responsibility for safety of self and property. "Crimeproofing" the home, car, family, and individual. Removal of the opportunity for crime. Designed for all age groups. 11 minutes. Color slides and audio cassette.

RURAL CRIME - The special vulnerability of rural property. Includes security of home, barns, tools, machinery and tractors. 18 minutes. Color slides and audio cassette.

FRAUD AND OTHER CON GAMES - The common street swindles. Especially effective for senior citizens groups. 15 minutes. Color slides and audio cassette.

BEATING THE BURGLAR - Crime prevention techniques to use at home. Useful for all age groups. 12 minutes. Color slides and audio cassette.

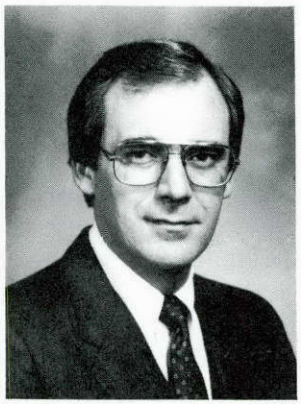
THE MYTHS OF SHOPLIFTING - Common measures used by stores to catch shoplifters or deter them. Particularly useful for showing to teenagers. 12 minutes. 1/2" VHS video tape.

VICTIM RIGHTS - Victims and effects from Aggravated Burglary, Murder, Rape and Child Abuse. Produced by the National District Attorneys Association and narrated by Arthur Hill. 14 minutes. 1/2" VHS videotape.

RAPE: VICTIM OR VICTOR - Tactics to reduce the risk of rape. 17 minutes. 1/2" VHS video tape.

HOT CHECKS - For presentation to merchants and clerks to help deter criminal check activity. 35 minutes. 35 minutes. Color slides and audio cassette.

Prosecutor Profile



STEPHEN F. CROSS

Stephen F. Cross, District Attorney for the 84th Judicial District, obviously likes his job. "I have enjoyed serving the citizens of Hutchinson and Hansford Counties, and I am proud of the accomplishments of the D.A.'s office during the past ten years," he said. "Since I took office, we have dramatically reduced the pending backlog of cases and have decreased the average time in getting a defendant to trial."

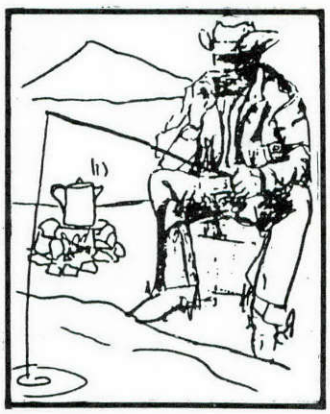
Born April 15, 1946, in Borger, Texas, Steve graduated from Darrouzett High School. He is a 1968 graduate of West Texas State University, earning a B.S. degree in government. He attended the University of Texas Law School, earning his J.D. in 1971. He practiced law briefly in Perryton, and after serving in the U.S. Army as an infantry officer, he came to Borger and presently practices law with the firm of Cross and Milner.

Steve was one of approximately twenty prosecutors from across the state who was selected to participate in the First Texas Gvernor's Conference of Prosecution February 15th in Austin. The conference was held to formulate a law and order program to be presented to the next legislative session. Steve currently serves as a Director of the Texas District and County Attorneys Association and on the Advisory Board for The Prosecutor Council. He has taught and published articles on ethics for prosecutors, and has taught and sponsored educational programs for law enforcement officials. He is also a member of the National District Attorneys Association and is past President of the Borger Bar Association.

Steve and his wife Suellen have two children, Michelle and Mark.

The Sherlockers

RICHARD R. SCOTT



Editor's Note: Well, I tried to get a picture of Richard, but the closest thing I received was what you see here. Maybe it's accurate after all.

Richard R. Scott knows his craft. Actually, there are at least two crafts he knows mighty well: fishing and law enforcement. To hear other folks tell about it, he's pretty effective at both of them.

"Scottie" (as he is known) has had a long career in law enforcement, starting with service in the Air Force as a combat officer in Korea. He was with the military police and upon returning to the States was in charge of the stockade at Webb Air Force Base in Big Spring. Here he found the woman that would become his wife. He was offered a position by former Sheriff Slim Gabriel. One of Richard's lasting contributions to the Sheriff's Office came after a night in which he and Chester Derrick arrested an uncooperative, violent man. In short, they both received their fair share of abuse. Soon Richard and Chester became the "fathers" of the screens in the S.O. cars to protect the officers. The idea caught on and today's deputies have the two men to thank.

Richard has the distinction of being the first person ever hired by Ector County as a prosecutor's investigator. He has worked for two County Attorneys and now works for the District Attorney for Ector County. He also serves on the Board of the Investigator Section of TDCAA.

Classifieds

PROSECUTOR COUNCIL LEGAL COUNSELOR Position available. Provide legal advice to the executive director on matters of law affecting the running of the agency (including EEOC) as well as in the area of criminal law. Provide technical assistance to Texas prosecutors, from investigation through post conviction habeas corpus. Assist in the education of prosecutors regarding their responsibilities in the area of ethics; suggest programs to executive director in this area. Assist executive director by summarizing complaints against prosecutors & investigating some; prepare legal memoranda. Provide Education Services with legal assistance. Primarily responsible for Technical Assistance and Ethics sections of bi-monthly newsletter. Help develop mailout materials, manuals, syllabi for courses. Responsible for the contents of library. Other duties as assigned. Salary: $29,952 (going to $30,852 on Sept. 1). Merit pay increases also possible. Send resume to or call Andy Shuval, Executive Director, The Prosecutor Council, P.O. Box 13555, Austin, Texas 78711. (512) 475-6825.

POSITION AVAILABLE: Full Time Assistant District Attorney. Salary: $25,000 plus insurance and retirement benefits. Primary responsibilities will be working with Grand Juries, intake and screening of new cases and non-jury court appearances. Must be licensed in Texas. Prefer someone with at least one year experience in public or private practice although not an absolute requirement. Will consider a recent graduate. To apply, call or write Deana Bell: 258th Judicial District Attorney's Office (Polk, San Jacinto & Trinity Counties) P.O. Box 508, Groveton, Texas 75845. Telephone: (409) 642-2401.

EDITOR'S REMINDER: We are happy to print your ads for as many issues as you need. However, be aware that TRUE BILL is published every other month and thus may not serve your purpose quickly enough. Consider also placing your ad in The Texas Prosecutor, which is published every month by the Texas District and County Attorney's Association, 1210 Nueces, Suite 200, Austin, TX 78701. Phone (512)474-2436.

CAR RENTAL AGREEMENTS

The State of Texas has discount agreements on car rentals with 7 companies. All rates are with unlimited mileage† and are valid for state business or personal travel. A summary of these agreements and the effective rates on April 1, 1984 are as follows:

Daily Rates	Americar/ Airways	American Int'l	Avis	Budget	Dollar	Hertz	National
Sub-Compact	$22.95	$25.00	$33.00	$29.00	$28.00	$35.00	$30.50
Compact	22.95	27.00	34.00	29.00	29.00	36.00	31.50
Intermediate	22.95	30.00	35.00	29.00	31.00	37.00	32.50
Full Size	28.95	30.00	36.00	29.00	34.00	39.00	33.50
Dial Toll Free 1-800 PLUS:	292-5700	442-5757	331-1212	527-0700	421-6868	654-3131	227-7368

†Americar Airways offers the first 150 miles free.

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