# TRUE BILL

THE NEWSLETTER OF THE PROSECUTOR COUNCIL
P.O. BOX 13555 • AUSTIN, TEXAS 78711

Volume 5, Number 5 October - November 1984

# PROPOSALS FOR CHANGE

## COVER FEATURES



## GENERAL NEWS



## TECHNICAL ASSISTANCE



## ETHICS



## PROFESSIONAL DEVELOPMENT



## MANAGEMENT



## SERVICES

# The Director's Corner

## by Andy Shuval

This issue contains legislative proposals at various stages of development.

The Child Abuse Proposal was approved by the Council and presented to the Joint Committee on Child Abuse, which chose the Council as the appropriate and best agency to provide technical assistance to prosecutors. One committee member said, "The Prosecutor Council is 'user friendly' and will work with the prosecutors in the field. Its motive is to help prosecutors." My thanks to the committee for its vote of confidence.

The second proposal is by the Committee on Prison Problems, composed of the seven prosecutors who have prisons in their jurisdictions. This proposal should be acted on by the Council in the next meeting. It deals with the dramatic prison crime increase which has impacted greatly on the counties affected, most of them small in "citizen" population and limited in resources. The Council is serving as a conduit to bring prosecutors' concerns to the attention of state government and suggest practical solutions to help prosecutors do their jobs.

The third and final proposal, made by Steve Chaney, is an attempt to address public concern with the present punishment system in which juries give long sentences, which too often translate into short stays in the penal system. The proposal is still in the working stages.

Please review it and write suggestions. (I am drafting my own letter to the editor for the next issue.) Let **True Bill** hear from you. Staff people from the Legislature and the Governor's office, as well as your peers, read **True Bill**. This is your chance to get your "licks in." **Make a suggestion! Make a difference!**

Andy

## 1985 TDCAA OFFICERS & DIRECTORS

At its Annual Meeting in Galveston in September, the Texas County and District Attorneys Association elected officers and directors for 1985, which are as follows:

**PRESIDENT**
**The Honorable Randy Hollums**
District Attorney, 110th J.D.
Floydada

**VICE-PRESIDENT**
**The Honorable Jerry Cobb**
Denton County Criminal District Attorney
Denton

**SECRETARY-TREASURER**
**The Honorable Mac Smith**
District Attorney, 43rd J.D.
Weatherford

**DIRECTORS**

**The Honorable Patrick Barber**
Mitchell County Attorney
Colorado City

**The Honorable Thomas L. Bridges**
District Attorney, 36th J.D.
Sinton

**The Honorable Tim Curry**
Tarrant County Criminal District Attorney
Fort Worth

**The Honorable Gerald. A. Fohn**
District Attorney, 51st J.D.
San Angelo

**The Honorable Gerald Goodwin**
District Attorney, 159th J.D.
Lufkin

**The Honorable Luther Jones**
El Paso County Attorney
El Paso

**The Honorable Robert S. Morris**
Martin County Attorney
Stanton

**The Honorable Bruce Roberson**
Ochiltree County Attorney
with Felony Responsibility
Perryton

**Mr. Carroll W. Schubert**
Bexar County Asst. Criminal District Attorney
San Antonio

**The Honorable Brock Smith**
District Attorney, 271st J.D.
Decatur

**The Honorable F. Duncan Thomas**
District Attorney, 196th J.D.
Greenville

**INVESTIGATOR SECTION**
**Mr. Rick Brush**
Calhoun County Criminal District Attorney's Investigator
Port Lavaca

## TDCAA ADOPTS RESOLUTION ON PROSECUTORIAL AUTHORITY

At one of the largest Annual Meetings ever (over 600 attendees) in Galveston in September, the Texas District and County Attorneys Association passed a resolution strongly supporting the constitutional authority of locally-elected prosecutors to handle all criminal cases.

The resolution also urged the legislature to increase funds for prosecutorial assistance and that these funds be entrusted to the Prosecutor Council, the statutorily authorized agency.

**See the copy of the Resolution, p. 13.**

## COUNCIL REVISES TRAVEL VOUCHER POLICY

At its October 19th meeting the Council revised a guideline for reimbursement. Previous policy allowed prosecutors to submit a signed blank State travel voucher along with their filled-in Council reimbursement request. The State voucher would then be completed by the Council's Financial Officer, transferring the information from the request form and correcting any mistakes. It was brought to the Council's attention by the staff of the sunset commission that this does not allow the prosecutor to verify the accuracy of the information on the State voucher.

New policy will no longer allow signing in blank. The prosecutor will submit a Council reimbursement request; the Council office will then complete the State voucher and send it to the prosecutor for signing, who will then return it to the Council.

The new policy will not be retroactive. Reimbursement requests being processed by the office at this time will continue to be processed.

This procedure, of course, requires additional correspondence and thus a delay in the timetable for reimbursement. The Council recognizes this and is working on methods to expedite reimbursement requests. The office has already employed extra temporary help to assist with the workload.



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.

FEATURE

# House Committee Selects Council to Provide Technical Assistance

*The Council presented the following proposal to the House Joint Committee on Child Abuse and Pornography in September. The committee is chaired by veteran legislator Doyle Willis of Fort Worth. One of the issues was who is best able to provide technical assistance in this area. The Committee, after a full study of the alternatives, chose the Council to provide this service.*

## Prosecution of Child Abuse

### BACKGROUND

The Prosecutor Council was created in 1977. Its purpose is to provide technical assistance and professional development training to the 330 elected prosecutors and their staffs throughout the State (Art. 332d). The Texas Constitution (Art. V, Sec. 21) gives these independent officials the exclusive authority and right to try criminal cases in Texas.

The Council was created to coordinate the activities of these offices and to provide technical assistance, training and other services to them. The Council in the last six years has developed a four pronged program to improve the quality of prosecution. The four programs are Minimum Standards, Technical Assistance, Professional Development and Other Services.

### Technical Assistance

Includes providing investigative, trial and appellate assistance. This service is usually done by utilizing one of the 1100 prosecutors and investigators already on government payroll in Texas. This method is cheaper (as it only requires reimbursement of the county) and more effective (it uses prosecutors who understand the dynamics of the situation as they often come from a similar area).

### Professional Development

Manuals:

The Council produces manuals such as the Indictment Manual. These assist and train prosecutors thereby improving the quality of prosecution by setting an unspoken minimum standard.

True Bill:

The Council publishes the **True Bill**, a bimonthly publication, to keep prosecutors informed of recent court decisions and changes in the law. It also contains "how to" articles and other articles of interest to prosecutors — usually written by other practicing prosecutors.

Courses:

The Council provides training courses ranging from the Basic Prosecution Course to specialized seminars such as the Capital Murder Seminar.

### Services

The Council provides materials which prosecutors can use in training law enforcement officials, informing the public

and coordinating with other interested groups in the community.

In the past, the Council has presented law enforcement workshops on report writing, pamphlets and information releases, and sexual assault seminars. This seminar brings together prosecutors, police officers, and rape crisis volunteers to acquaint each with the other's duties, problems and available expertise. It has been most successful.

**Mimimum Standards**

The Council is charged by statute in investigating and taking action on complaints of prosecutor misconduct and incompetence.

Some of these complaints can be resolved by using the good offices of the Council to bring the parties together, some by providing technical assistance to the prosecutor, some by explaining the proper function of the prosecutor's office to the complainant and a few by taking action against the prosecutor.

## WHAT CAN THE COUNCIL DO TO ASSIST YOU?

The Council through its Advisory Committee and its continual interaction with prosecutors can organize a coordinated effort by prosecutors to deal with this problem. The Council can provide the following services in these areas:

**Technical Assistance**

Provide consultation and advice from the investigation through appeal. If necessary, find qualified personnel to assist local prosecutors (and supply the funds to reimburse their counties, if necessary). This assistance could range from investigation, criminal trial, civil trial (such as termination or seeking protective orders), to appeals.

**Professional Development**

Use the TRUE BILL to disseminate information on how these cases can be handled. Provide a special issue. If needed, publish a manual on the subject. Provide training, if required, in the production, preservation, and use of video tapes. Special seminars on child abuse such as the sexual assault seminars would be presented. These might be done in connection with our regular regional meetings (8). The Council has special expertise in this area having served on the committee that developed the MISCAT curriculum.

**Services**

Set up a law enforcement workshop on how to investigate and handle these cases. This workshop might be done in connection with the seminars in the section above.

Distribute through local prosecutor offices information releases, pamphlets and public service announcements on the problem and how the public can help. This method is more effective than distribution from Austin directly as it involves 330 additional office and gives local interest to the information.

**Minimum Standards**

These services will increase the quality of prosecution in this area and will allow people concerned with the problem to have a place through which to channel their problems, their suggested solutions and their volunteered expertise.

**Cost**

To make this program work, the Council needs a man who has the requisite expertise in this area and also has learned and remembers the dynamics of local prosecutors' offices. This latter ability requires maturity and good judgement; both cost money.

In addition, an administrative staff person is needed who has the judgement to identify the nature of the problem or request and handle the administrative duties (hopefully someone with the abilities of Susan Butterick).

Finally, funds will be needed to cover the costs of reimbursing the counties for the time of special prosecutors, travel, printing, and other operating expenses.

The total cost of the proposal is about $147,000.□

FEATURE

# The Problems of Prison Crime

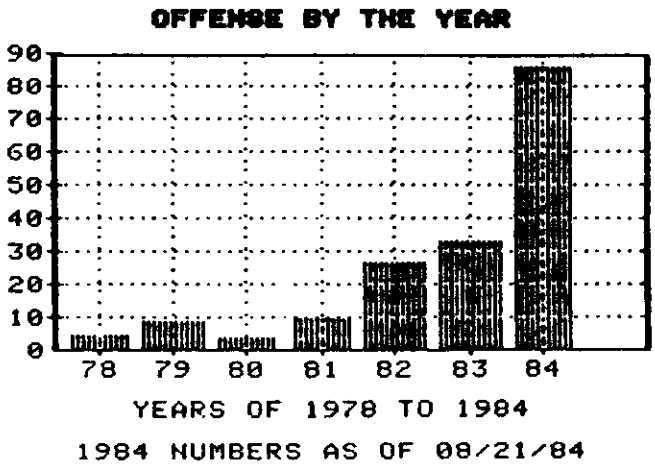
*The Council's Prison Problems Committee, made up of prosecutors with TDC units in their jurisdictions, has prepared this report for the Council which is charged by statute to make appropriate recommendations to the legislature to improve the criminal justice system.*

**The Problems of Prison Crime**

BACKGROUND

In the last three years there has been a dramatic increase in crimes committed by inmates. Using Brazoria County, as an example, the number of cases since 1978 are as follows:

**Felony Crimes Committed**
**In Brazoria County**
**By**
**Texas Department Of Correction Inmates**




At this rate the increase from last year will exceed 300% and the rate keeps escalating. For example, in the first twenty-two days of August, there were 28 stabbings reported in TDC facilities in Brazoria County. (The Source for these statistics is the prosecutor's office in Brazoria County.)

The eight counties in the state with TDC facilities are as follows:

| County | County Pop. * | Prison Pop. (9/11/84) | Prison Pop. % of Pop. |
|---|---|---|---|
| Anderson | 38,381 | 7,009 | 18.3% |
| Brazoria | 169,587 | 7,361 | 04.3% |
| Coryell | 56,767 | 2,771 | 04.9% |
| Ft. Bend | 130,846 | 2,629 | 02.0% |
| Grimes | 13,580 | 2,400** | 17.7% |
| Houston | 22,299 | 3,500** | 15.7% |
| Madison | 10,649 | 2,088 | 19.6% |
| Walker | 41,789 | 9,491 | 22.7% |

*1984 Texas Legal Directory **estimated

SPECIFIC PROBLEMS AREAS

There are three problem areas:

1. Drain on County Coffers.
2. Expense of Prosecution.
3. Expense & Liability of Defense Bar.

County Expenses: The drain on the county coffers is disproportionate to the population figures and particularly great in the smaller counties where the prison population is a much larger percentage of the whole. Consider, if you will, how many sheriff's deputies you would need to investigate crimes in your county if 22.7% of the citizens were convicted, unreformed felons (as in Walker County, see above).

TDC is presently developing a program which will station a certified investigator at each unit to train the guards and assist in

criminal investigations. This action should assist the counties but there are still the costs of providing security during trial, the costs of the trials, and the burdensome expenses of paying both the state and defense costs during the appellate process.

Prosecutors' Expenses: In addition to the county trial expense for court reporter, subpoenas, and security, there are the expenses of trial preparation, prosecution and appeal borne by the prosecutorial staff. These penitentiary, though not penitent, defendants are different from the ordinary defendants because they are usually serving long prison sentences. They have nothing to lose by being assessed the maximum sentence. Therefore, there is no incentive for them to plea bargain or otherwise limit their use of the system. They usually demand every right, privilege or opportunity afforded.

A man serving a 60 year sentence is eligible for parole just as soon as a man serving a 1,000 year sentence. It makes no difference to him how many years are added to his sentence. Therefore, why should he plead? He gets the entertainment of a court trial and perhaps, if lucky, the opportunity to escape.

The time and effort required to handle this type of case is substantially greater than the usual case. It is particularly burdensome on the more rural counties.

Defense Expenses: Attorneys who are appointed to represent defendants who are always indigent face not only the burden of the line based on incompetent counsel or some other charge of misconduct from their clients. Although one such case is probably a sufficient burden on a lawyer, in communities such as Palestine and Madisonville, lawyers must handle several of these cases on a regular basis.

## SUGGESTED SOLUTION

The Legislature is asked to appropriate to each county a sum equal to $10 for each prisoner in TDC in that county on a specific day each year. In return, the county promises not to reduce its budget below its present level, not counting the additional funds. These additional funds will be spent by commissioners' courts to cover some of the costs described above.

Additionally, the Legislature is asked to appropriate to each prosecutor who has a TDC facility in his district a like sum ($10) for each prisoner in his district on a certain day.

The Prosecutor Council will have $250,000 appropriated to it for covering the expenses of trials and appeals of special cases where the appropriations to the counties or the prosecutors are not sufficient. The Council would be specifically restricted to spending the funds for this purpose.

A.

| County | Appropriation |
|---|---|
| Anderson | $70,090 |
| Brazoria | $73,610 |
| Coryell | $27,710 |
| Ft. Bend | $26,290 |
| Grimes | $24,000 |
| Houston | $35,000 |
| Madison | $20,880 |
| Walker | $94,910 |
| **TOTAL** | **$372,490** |

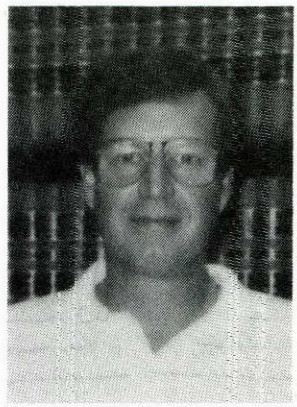
B.

| Prosecutor | Appropriation |
|---|---|
| District Attorney - 3rd J.D. Anderson | $70,090 |
| Criminal District Attorney Brazoria | $73,610 |
| District Attorney - 52nd J.D. Coryell | $27,710 |
| Criminal District Attorney Fort Bend | $26,290 |
| District Attorney - 12 J.D. Grimes & Madison | $44,880 |
| District Attorney - 349th J.D. Houston | $35,000 |
| Criminal District Attorney Walker | $94,910 |
| **TOTAL** | **$372,490** |

This working document does not address the needs of the defense bar. Contacts have been made with TCDLA and it is expected that they will have a proposal to address this specific problem. □

FEATURE

# A Proposal for Sentencing Reform



**by Steve Chaney**

*Steve Chaney is an Assistant Tarrant County C.D.A. to the Hon. Tim Curry. Mr. Curry serves on the Governor's Sentencing Commission, which is reviewing Mr. Chaney's proposal.*

**Editor's Note:** Tim is to be commended for his foresighted policy of encouraging his staff to concern themselves with improvement of the criminal justice system as a whole and not focus only on Tarrant County problems.

Similarly, your comments on this proposal are encouraged for publication in this newsletter. Staff members to the Legislature and the Governor's Office reading **True Bill** will have your input.

Like most lawyers, my career has been spent "learnin' the law" — what the latest legislative enactment or case decision is that effects the procedure, the admissibility of evidence, or the outcome of a criminal lawsuit.

We feel we deserve praise when we become proficient technicians in the law. We even formally recognize this technical achievement with certification.

Yet, there are some basic questions I have never had answered that continue to bother me.

Why do we allow a prisoner to be released after serving only 1/9th of the sentence he was assessed? Why do we tell the public we have Life and 99 year sentences in Texas when we know the maximum sentence is 60 years?

Why do we ask juries to set sentences but refuse to allow them to know of or discuss the effect of their sentences — recognizing that they will at least think of and often discuss the effect of their sentence despite our admonition? Why have the sentences become so inflated — and 25 and 35 year sentences so frequent? Everyone knows they bear little reality to the sentence actually served.

If you were to create a system of sentencing and punishment, would you ever create the one we have? The answer to me is a resounding no! So, I have a proposal for change. It too, may not be perfect, but it is a beginning for discussion and badly needed change.

The present sentencing laws has evolved to form a system of punishment that has become too complicated to calculate, has caused the sentence assessed to become inflated, and the sentence served bears little relationship to the assessed sentence. The following is a statement of the problem, objective and solution to the sentencing structure.

## PROBLEM #1

**Jurors should be informed of the effect of the sentence they assess. The question each juror asks, either to themselves or to each other while they deliberate, "If I give him X years how long will he probably be confined?" is a question that should be answered.**

**OBJECTIVE:** Allow the person who assesses sentence to know the effect of his sentence.

**SOLUTION:** Include in the charge a paragraph explaining parole eligibility. Amend 37.07 to set forth the exact charge to be given which would read as follows:

> "A prisoner is expected to serve the sentence assessed except that a prisoner who demonstrates his rehabilitation by his good conduct and his efforts to improve himself through education, work and/or successful counseling may be released on parole after he has completed serving two-thirds of the actual calendar time assessed. A prisoner under sentence of death is not eligible for parole."

## PROBLEM #2

**The relationship between the sentence served has such wide disparity that sentences assessed have become inflated, prisoners have no certainty when they will be released from custody and those assessing sentence cannot predict the effect of their sentence.**

**OBJECTIVE:** To narrow the time difference between the sentence assessed and served while providing some sentence reduction for those prisoners who have demonstrated their rehabilitation.

**SOLUTION:** Reform the parole laws to state that the sentence assessed is expected to be served but that a prisoner who demonstrates his rehabilitation by his good conduct and his efforts to improve himself through education, work and/or successful counseling may be released on parole after he has completed serving two-thirds of the actual calendar time assessed.

## PROBLEM #3

**While the Penal Code provides for a range of punishment that includes sentences up to 99 years or life, when the present laws are applied the effective sentence is 60 years. If the new sentencing structure were applied to the existing Penal Code penalty range a person assessed a 99 year sentence would have no realistic hope of parole and there would be no objective way to apply the parole laws to a life sentence.**

**OBJECTIVE:** Narrow punishment range in the Penal Code to allow application of parole law.

**SOLUTION:** Amend first degree punishment to include a minimum of 5 years and a maximum of 60 years and eliminate the category of life sentences.

## PROBLEM #4

**While the jury would be informed for the first time the effect of their sentence, the prosecutors, defense attorneys and particularly the judges would need to be aware of the deflating effect of the new sentence structure.**

**OBJECTIVE:** To have a prisoner serve approximately the same sentence under the new system as he would have under the previous system.

**SOLUTION:** A chart should be distributed which would equate the average sentenced served to that which would be served under the new system, i.e.:

If X received 30 years for armed robbery under the old system he would on average be released in 10 years; the new sentence imposed would be 15 years to produce the same effective sentence.

If X received 9 years for burglary and would be released on average in 2 years; the new sentence imposed would be 3 years to produce the same effective sentence.

## PROBLEM #5

**What effect on other laws would need to be examined?**

**OBJECTIVE:** New sentencing and other laws be made compatible.

**SOLUTION:** Research the Code of Criminal Procedure and the Penal Code to determine effect. Such changes would include:

1) Eliminate mandatory release. A prisoner would serve the entire sentence unless paroled. Good conduct would only increase opportunity for parole consideration and not affect the discharge date. Conduct for those who have not or can not be rehabilitated would be controlled by reward and punishment system within the penitentiary.

2) Eliminate automatic one-third requirement for certain offenses or for offenses in which deadly weapon is used because all sentences would carry an effective two-thirds requirement.

3) Provide for application to cases tried on or after the effective date of the new system.

4) Additional consideration might be given to restricting the Penal Code penalty ranges as follows:

**Capital Murder = 5 - 60 years.**
For the same present offenses, but maybe include multiple murder.

**1st degree felony = 5 - 60 years.**
For aggravated kidnapping, aggravated sexual assault, aggravated robbery or when the defendant used or exhibited a deadly weapon as defined in Section 1.07(A)(1), Penal Code, during the commission of a felony offense or during immediate flight therefrom.

**2nd degree felony = 5 - 30 years.**
All other previous 1st degree felonies, except listed above.

**3rd degree felony = 2 - 20 years**
Same as present 2nd degree felonies.

**4th degree felony = 2 - 10 years.**
Same as present 3rd degree felonies, except those listed as new 5th degree felonies.

**5th degree felony = 2 - 5 years.**
Include such offenses as unauthorized use of motor vehicle, criminal mischief, possession of marihuana over 4 ounces and under 1 pound, burglary of motor vehicle, etc.

Enhancement - Each previous trip to the penitentiary would enhance the punishment one degree. Enhanced 1st degree punishments would include the same floors of 15 and 25 years. □

## CORRECTION

In the Aug/Sept '84 TRUE BILL (p. 6), there was some misinformation under the "Races in November Elections" section.

John Terrill, Erath County Attorney, is not running for re-election in November as stated. Instead, he is unopposed for District Attorney of the 266th Judicial District (Erath and Hood Counties) — and he is a Democrat.

Gale Warren, listed as Mr. Terrill's Democratic opponent, is actuallly unopposed for Erath County Attorney.

Both will take office January 1, 1985.

TRUE BILL regrets the errors and thanks Erath County investigator Gerry Locke for bringing this information to our attention.

### "SOMETHING FUNNY ABOUT THAT, COUNSEL?"

Gosh knows, the legal profession is full of humor, and the courtroom is no exception.

Do you know of a funny exchange — a favorite quip — an unintentional gaffe in the proceedings — that you'd like to share? Well, here's your chance to do so for fun and profit.

TRUE BILL will pay **$10.00** for transcript excerpts it deems humorous enough to grace these pages.

Be sure to identify the County of origin for the excerpt (unless it is simply too embarassing to the parties involved!) and label the speakers as "Prosecutor," "Defense," "Judge," etc. — or similar distinctions.

All entries will be kept strictly confidential. . .up until publication, that is!

# The Texas County & District Attorney Retirement System

## by Terry Horton

*Terry Horton is the Comptroller for the Texas County and District Retirement System.*

**Editor's Note:** In the last **True Bill**, Joe Froh, Director of the Employees Retirement System of Texas, explained the Elected State Official Retirement System, which covers the elected felony prosecutors. All county attorneys restricted to misdemeanor jurisdiction, as well as most assistants, are covered under the system described here. These two articles should cover most of the employees of prosecutor's offices, athough some will be covered by the regular state retirement system. An article on it is scheduled for the next issue.

The Texas County and District Retirement System is a statutory, non-profit, public trust fund established for the purpose of providing retirement, disability and death benefits for employees of those counties and districts electing to participate in the program. The governing statute is codified as Subtitle F, Title 110B, Revised Civil Statutes of Texas.

TCDRS is a joint-contributory, advanced funded retirement plan where employees contribute a fixed percentage (4, 5, 6 or 7%, depending on employer election) of monthly compensation to individual accounts in their names, and their employer similarly contributes to an employer account a sum equal to the total monthly contributions of all employee-members. The retirement system invests all of these contributions in income-producing securities and the income realized through investments is returned to the membership annually in the form of interest on the account balance of both the individual member and the employer. Upon retirement of a member, his or her account balance is transferred to a single system-wide fund along with an amount from the employer account at least equal to, and often in excess of, the total of the member's account balance. The transferred amounts create a common pool, or reserve in trust, out of which the base, or "basic," annuity is paid. The basic annuity is thus not only fully-funded, it is funded in advance of the time when payment is required by the monthly contributions of the member and his or her employer thereby assuring that earned benefits can be paid.

In addition to the base, or "basic" annuity benefit, retiring members also receive a "supplemental" annuity funded totally by employer contributions. When TCDRS was established, it was recognized that the requirement that the employer-county make monthly contributions equal to the aggregate contributions of all its employees would be more than sufficient to match the contributions of each employee who stayed on until retirement; this is true simply because many employees will not remain in service long enough to qualify for a retirement benefit. These "excess" employer contributions thus can be used to fund an additional, or "supplemental," benefit payment that is added to the basic benefit payments made to all retired members of the System.

It should also be noted that a high rate of return on investments has allowed for a discretionary extra or "bonus" payment each year in addition to the twelve (12) regular monthly benefit payments made to retired members. This "bonus" payment is a method devised to allocate a share of a high rate of return on investment to those persons already retired just as active members participate in a high rate of return through the interest allocated to their personal accounts.

A member becomes eligible to receive monthly benefit payments on termination of employment and:

(1) completion of a period of service resulting in at least thirty (30) years credit in TCDRS, or

(2) completion of at least twelve (12) years of service and attainment of age sixty (60).

A member who leaves employment covered by TCDRS before earning thirty (30) years service credit or attaining age sixty (60) retains the right to retire [has earned a vested interest] at age sixty (60) if he or she has earned at least twelve (12) years of credited service and does not terminate membership by the withdrawal of deposits.

Also, a person who has established, through various employers, memberships in two or more of the state-wide public retirement Systems (Employees Retirement System of Texas, Texas Municipal Retirement System, Teachers Retirement System of Texas, and Texas County and District Retirement System) may combine the service credit earned in each of the Systems for the purpose of satisfying the length-of-service requirements for retirement eligibility.

At retirement, a member may select between eight (8) different plans of retirement and these plans will either pay the individual a maximum benefit for his or her lifetime or a reduced benefit that provides, under various guarantees, for continuation of payments to a designated beneficiary after the member's death.

The determination of a retirement benefit amount, in its simplest form, is based on a money-purchase formula where the member's account balance is combined with the employer credits, discussed above in conjunction with basic and supplemental benefits, to determine the total amount of funds available to provide payment in accordance with the selected plan of retirement. Since payments are guaranteed for the lifetime of the member, the member's age at retirement and selected retirement plan, along with accumulated employer credits and personal account balance, will determine the amount of each member's retirement benefit. Of course, those individuals who terminate employment without achieving retirement eligibility retain the right to withdraw their personal contributions and interest earnings.

We have previously defined membership eligibility as employment with a county or district that has elected participation in TCDRS. For most employees, participation is mandatory, not elective. However, in instances where an individual is paid by both a county and the State of Texas, the individual must elect to be treated, for retirement benefit accumulation purposes, as either a county or a state employee. In other words, an individual cannot receive simultaneous credit in two retirement systems for the same period of service unless specifically sanctioned by statute. Consequently, most prosecutors receiving compensation from both a county and the state elect coverage as an employee of the entity providing the greatest amount of retirement credit and do not participate in the retirement program of the entity paying the lessor compensation.

The Board of Trustees of the Texas County and District Retirement System is committed to the administration of a fair, equitable and secure program of retirement for the membership. Various sources of information on the program are available to the membership and include annual statements of account, annual estimates of retirement benefits, annual reports on System operations, and information handbooks. Individuals should be able to secure these items through their employer but may also contact the TCDRS office at 802 Perry Brooks Building, Austin, Texas 78701, (512) 476-6651 for additional information and assistance. □

# Resolution

*WHEREAS the Texas District and County Attorneys Association is a private organization concerned with the interests of the public and prosecutors in matters regarding law enforcement, and*

*WHEREAS the locally elected prosecutors have exclusive authority to represent the State in all criminal cases in District and inferior courts, and*

*WHEREAS the Association strongly supports the proposition that prosecutorial decisions ought to remain in local hands, and*

*WHEREAS the Prosecutor Council is the state agency charged by statute to provide assistance to prosecutors upon request, and*

*WHEREAS the Council has an effective but underfunded program of technical assistance, and*

*WHEREAS the Attorney General has made several public statements proposing legislation giving him the authority to prosecute various kinds of criminal cases without the permission of the local elected prosecutor,*

*NOW, THEREFORE, BE IT RESOLVED THAT the Texas District and County Attorneys Association in convention assembled go on record as upholding the constitutional authority of the locally elected prosecutor to be responsible for all criminal cases, and*

*BE IT FURTHER RESOLVED that the Association urge the Legislature to provide additional funds for prosecutorial assistance, and*

*BE IT FURTHER RESOLVED that these funds be appropriated to the Prosecutor Council, the state agency statutorily charged with the duty to provide prosecutorial assistance.*

*Approved 26 September 1984*

# Prosecutorial Authority

## by Andy Shuval

*A board certified Criminal Law Specialist ever since the designation was first recognized, Andy Shuval became the Executive Director of the Prosecutor Council over six years ago. He has served as County Attorney and later as Criminal District Attorney of Deaf Smith County.*

My thanks to the staff for their assistance in researching this article.

The authority of prosecutors is a much discussed topic whenever two or three of them gather together. The discussion often turns to the authority of the Attorney General as it relates to that of a prosecutor. This article is a summary of the Constitutional and statutory basis for each's power.

### Basic Authority

District and County Attorneys exercise their powers by virtue of constitutional mandate. Article 5, Sec. 21 of the Texas Constitution provides that :

> **The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.**

The Code of Criminal Procedure further spells out their criminal duties:

> **Article 2.01 Duties of District Attorneys**
>
> **Each District Attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties. . .**
>
> **Art. 2.02. Duties of County Attorneys**
>
> **The County Attorney shall attend the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination of prosecution in said county; and in the absence of the District Attorney he shall represent the State alone and, when requested, shall aid the District Attorney in the prosecution of any case in behalf of the State in the district court. He shall represent the State in cases he has prosecuted which are appealed.**

Constitutionally, the County Attorney is a state official, not a county official. As such the County Attorney is not constitutionally required "to represent the county in its general legal business or the conduct of ordinary civil actions" although the county could contract with the County Attorney to

do so. Hill Farm Inc. v. Hill County, 424 S.W.2d 414 (Ct.Civ.App. Waco, 1968), aff'd 436 S.W.2d 320 (Tx.Sup.Ct., 1969).

In conjunction with the constitutional statutory powers of District and County Attorneys, the constitutional powers of the Attorney General must be considered. These are found in Article 4, Sec. 22 of the Constitution:

> **The Attorney General. . .shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and given legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law...** (emphasis added)

The statutory authority of the Attorney General is to be found mainly in Articles 4394 through 4413. Additional statutory duties can go up to the limits provided by the Constitution, but never beyond those limitations. The authority of the Attorney General must be enumerated as our government is one of enumerated constitutional power.

The delineation of constitutional authority between the prosecutor and the Attorney General can be divided into two categories, criminal and civil.

## Criminal Authority

The leading case in Texas on which an officer is charged with the handling of criminal cases is Shepperd v. Alaniz, 303 S.W.2d 846 (Ct. Civ. App., San Antonio, 1957, no writ). In 1957, while the District Attorney of Webb County was conducting an investigation into possible criminal violations of the election code in the 49th Judicial District (Webb County), the Attorney General launched his own investigation into the same activity but with venue in the 98th Judicial District (Travis County). The District Attorney sued the Attorney General to halt his investigation; the issue was whether or not Section 130 of the Texas Election Code gave the Attorney General exclusive power to investigate violations of the Election Code or merely concurrent powers with the District Attorney. The Court distinguishing the Brady case noted:

> **"It has always been the principal duty of the District and County Attorneys to investigate and prosecute the violation of all criminal laws, including the election laws, and these duties cannot be taken away from them by the legislature and given to others. If Sec. 130 of the Election Code should be construed as giving such powers exclusively to the Attorney General, then it would run afoul of Sec. 21 of Article 5 of the Constitution and would be void. We do not deem it necessary to pass upon the question as to whether or not the Attorney General may have concurrent power with the District and County Attorneys to investigate and prosecute violations of the election law by reason of said Section 130, because if the Attorney General only has concurring power or subordinate power over such things, then clearly he did not have the power to institute a separate proceeding in the 98th District Court of Travis County to investigate and prosecute violations of the election code in the Webb County election, and thereby oust the jurisdiction of the 49th District Court of Webb County, in which the District Attorney of that district had already filed a suit and thereby invoked and gave to that court active and exclusive jurisdiction over such matters. The Attorney General and his assistants were invited to join and**

> **assist the District Attorney in the prosecution of the cause in the 49th District Court, but this they refused to do and insisted that under the provisions of Section 130 of the Election Code the District Court of Travis County, in which they had instituted a later suit, had exclusive jurisdiction of the matter and that the District Attorney was without authority to maintain the cause of action he had instituted in the 49th District Court."** Shepperd v. Alaniz, **supra** at 850.

Alaniz makes it clear that the legislature may not take jurisdiction of criminal cases away from a district or county attorney. This principle of law has been reaffirmed most recently in Taylor v. State, No. 12-83-0126-CR. Tex. App. - Tyler, March 29, 1984, unreported (see **True Bill**, June/July, 1984 for a copy of the opinion). J.M.-194 recently reiterated the authority of prosecutors to represent the State.

While it is clear that county and district attorneys represent the State in all criminal cases, their duty and/or authority to represent the State in civil matters is more difficult to summarize.

## Civil Authority

The earliest case on the subject was State v. Moore, 57 Tex. 307 (Tx. Sup. Ct., 1882) which held that the County Attorney of Travis County, not the Attorney General, had the exclusive right to sue tax collectors for failing to remit money collected for the state. The Court said that when the Constitution provided that County or District Attorneys were to represent the state in District or inferior courts, it mean just that.

However, Brady v. Brooks, 89 S.W. 1052 (Tx. Sup. Ct., 1905) took an opposite view. There, the Attorney General had filed suit in Travis County to collect taxes owed the state by corporations and individuals.

The County Attorney and District Attorney filed suit to force the Attorney General out of the case and to substitute themselves as the attorneys for the State.

In ruling against the local prosecutors, the Court stated that Moore didn't mean what it said, but if it did, then Moore was overruled:

> **"We are of the opinion that the legislature had the power to create causes of action in favor of the state, and to make it the exclusive duty (of the Attorney General) to prosecute such suits."** Brady, **supra** p. 1057.

It should be noted that Brady said the Attorney General could be granted exclusive authority of new civil causes of action. This line of thinking was reaffirmed in State v. Walker-Texas Investment Company, 325 S.W.2d 209 (Tex. Civ. App., San Antonio, 1959, n.r.e.).

There the Attorney General filed suit to enjoin the defendant from collecting usurious interest under Article 4646b, V.T.C.S. In response the defendant filed a plea in abatement alleging that the Attorney General could not file the suit without joinder by either the District or County Attorney. In response to the issue of whether or not Art. 4646b created a new cause of action in favor of the State, the Court answered yes.

> **"It is clear, that before the enactment of Art. 4646b, the State did not have any interest, such as it could assert in the courts, with reference to loan companies charging usurious interest for the loaning of money. This matter was gone into fully by the Supreme Court in Ex Parte Hughes 133 Tex. 505, 129 S.W.2d 270. It was there pointed out that the charging of usurious interest is not made a penal offense. (emphasis added) Any penalties prescribed therefore are payable alone to the borrower. Such conduct is not declared to be any kind of nuisance and certainly not a public nuisance. The State has no property rights and no civil rights of the public are included in such transaction. As a result of the holding in Ex Parte Hughes, supra, the Legislature enacted Art. 4646b. . .Art. 4646b creates a cause**

**of action in favor of the State and authorizes the Attorney General to institute suits in the name of the State to secure injunctions against persons habitually charging usurious interest upon loans. Such an Act of the Legislature does not violate Sec. 21 of Art. 5 of the Texas Constitution."** State v. Walker-Texas Investment Co., **supra**, p. 213, 214.

It is clear from the Walker case that the difference the Supreme Court found between Moore and Brady was that, in Moore the state action was the right to collect taxes, a general and inherent right of the state, while in Brady and again in Walker, the civil cause of action in behalf of the state was a new one created by the Legislature.

In this regard, the Legislature through the years has not been consistent in designating whom it wishes to represent the State in new civil causes of action. Sometimes it gives the authority exclusively to the Attorney General, sometimes to the District and/or County Attorney, sometimes to both, and sometimes it is totally silent. This inconsistency becomes apparent after only a casual perusal of enabling acts of various state agencies.

There is also no clear judicial authority as whether the general duty of representing state agencies, as opposed to handling new causes of actions, belongs to the Attorney General or the District and County Attorneys. The authority of the Attorney General has often been inferred from the provision of Article IV, Section 22, which provides that the Attorney General "shall perform such other duties as may be required by law."

The courts of this State have never had to decide if the specific grant of authority to prosecutors in Article V, Section 21, "to represent the State in all cases (emphasis added) in District and inferior courts" would allow the prosecutor to represent a state agency to the exclusion of the Attorney General if he so desired.

The rule of constitutional authority is that the legislature cannot amend or restrict a grant of authority given by the Texas Constitution. A classic example of this rule is Eades v. Drake, 332 S.W.2d 553 (Sup. Ct. 1960), in which the Supreme Court wrote that since the constitution provides that district judges were to be elected for four years, the legislature could not provide one two-year term in order to conform the election of a newly created district judge to a pattern. A strong agreement can be made that a prosecutor, if he so desired, could represent state agencies at the district court level or below.

* * * * * *

## Conclusion

In delineating the boundary of the powers between District and County Attorneys and the Attorney General, one can use a three step approach.

First, is the case criminal or civil? If it is criminal, the authority to handle the case belongs to the prosecutor and the Attorney General may participate only with the permission of that prosecutor.

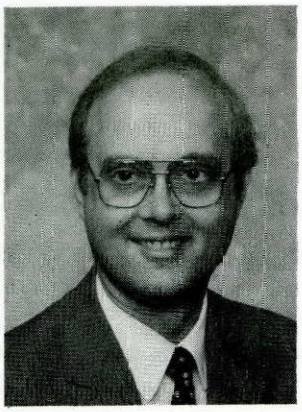
Second, if it is civil, does the case involve a new cause of action in which the Legislature has granted the Attorney General authority to act?

Third, if so, is the authority granted to the Attorney General to the exclusion of the prosecutor?

It is clear that the prosecutor can exclude the Attorney General in any criminal case.

The Attorney General can exclude the prosecutor in any civil case involving a new cause of action whose enforcement the legislature has delegated to the Attorney General exclusively.

The constitutional distribution of authority between District and County Attorneys and the Attorney General to represent the State as to the general civil litigation in district or inferior courts has yet to be determined definitely by the courts. □



# As The Judges Saw It

## Significant Decisions of the Court of Criminal Appeals

### by C. Chris Marshall

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The Court of Criminal Appeals came back into session on Sept. 19. No one can accuse it of not working hard over the recess. On its first day it delivered 34 published opinions covering over 400 pages. Nor can the Court's members be accused of a lack of independent thinking. Only 7 of the 34 opinions were unanimous. The second week the Court produced an additional 14 published opinions, only 3 of which failed to draw either concurrences or dissents. Both the quiz and the summaries are devoted entirely to these two weeks' worth of opinions. (Answers to Quiz, p. 25.)

**QUIZ**

1. The fingerprint and physical description card included in the pen packet are excluded from evidence, leaving only the pen packet mug shot to prove that the person convicted was the accused. Is that sufficient?
   _____ Yes _____ No

2. If the evidence raises the issue, can the court charge the jury on the law of parties in the absence of a party's allegation in the indictment?
   _____ Yes _____ No

3. The Felon in Possession of a Firearm state, Penal Code §46.05(a), requires that the antecedent felony involve an act of violence or threatened violence to person or property. Is arson such a crime of violence?
   _____ Yes, always
   _____ Yes, sometimes
   _____ No

4. A vehicle belonging to a corporation is burglarized. The vehicle was normally stored at the corporation's downtown warehouse, which is where it was broken into. The manager of one of the company's suburban stores is alleged as the owner. Does that manager qualify as a "special owner"?
   _____ Yes _____ No

5. The record shows that defense counsel supervised the preparation of the verdict forms and stated that he had no objection to them. No space for a "not guilty" verdict was included. Was that omission fundamental error?
   _____ Yes _____ No

6. May an accused be convicted of an attempted murder if the act involved was committed with an intent to cause serious bodily injury, or must an intent to kill be proven?
   _____ Intent to cause serious bodily injury
   _____ Intent to kill

7. The police violate Edwards v. Arizona, 451 U.S. 477, by attempting to interrogate the accused after he has asked for an attorney. May the resulting confession be used for impeachment purposes?
   _____ Yes _____ No

8. The accused testifies on guilt/innocence and admits to having been convicted in the two cases alleged for enhancement purposes. He never enters a plea of true to those allegations after the guilty

verdict is returned, nor does he enter into a formal stipulation that such convictions occurred. Under the old "automatic life" habitual law, may the judge take the punishment case away from the jury and impose a punishment of life?

_____ Yes _____ No

9. In a failure to identify prosecution under Penal Code §38.02, must the State prove that the accused knew that the person requesting identification was a peace officer?

_____ Yes _____ No

10. Is the trial judge required to entertain a motion for new trial filed within 30 days of a probation revocation and sentencing?

_____ Yes _____ No

**Sufficiency of the Evidence to be Weighed Against the Charge Given to the Jury.**

This is another case in which the trial court, without objection from the State, gave instructions to the jury which unnecessarily increased the State's evidentiary burden. The jury was instructed that a certain witness was an accomplice as a matter of law and required corroboration. On appeal the State in effect conceded a lack of corroboration, but sought to uphold the jury's verdict by arguing that the instruction was given in error and that if the corroboration aspect of the charge were ignored, the evidence was clearly sufficient to support the conviction.

The Court held that the sufficiency of the evidence had to be measured against the charge as it was given to the jury. However, as it has several other times recently, it indicated that had the State objected on the record to the erroneous instructions increasing its burden of proof, the error would have been treated as only "trial error" and resulted in only a reversal for new trial rather than the entry of a verdict of acquittal.

I personally have severe doubts that the Court is analyzing these issues correctly, but in any event prosecutors would be well-advised to object, on the record, any time it appears the trial judge is committing error against the State. It might help you on appeal. Boozer v. State, #402-82; decided 9/19/84.

**Speedy Trial Act; Re-Indictments Involving a Different Crime Out of the Same Transaction**

The accused was originally indicted for theft in connection with the burglary of a hardware store. The State announced ready for trial in a timely fashion. More than a year later the State re-indicted the case as burglary and dismissed the theft indictment. Since the State did not even have the burglary indictment on file within the Speedy Trial Act time limits its only hope was that the announcement of ready on the theft indictment would apply to the burglary charge as well.

HELD: When the State obtains another indictment alleging a different offense which was committed in the same transaction as the first offense, the announcement of ready from the first indictment does not carry over to the second. Carr v. State, #337-83; decided 9/19/84.

**Speedy Trial Act; Securing Presence of the Accused.**

The accused was indicted Sept. 4, 1979, and re-indicted with enhancement allegations added Nov. 12, 1979. The State announced ready on Nov. 20, 1979. The record did not disclose the location of the accused until Dec. 14, 1979, when he was shown to be in federal custody in Leavenworth. The State placed a detainer on him on Feb. 1, 1980, and brought him back for trial on Feb. 15, 1980. However, the accused was not tried on the state charge but instead was convicted on a federal charge and returned to Leavenworth on April 4, 1980. The State placed a new detainer on him on Oct. 29, 1980, returned him to the State in Dec. 1980, and tried him on April 27, 1981.

The Court reaffirmed that part of being ready for trial includes having the accused present. If the State cannot show that the accused's presence had been secured during

the appropriate time limit, it must show that an exception applies. From here the analysis becomes less clear, and the Court says much of the problem is due to a poor factual record.

In the end the Court concludes the State at a minimum lost readiness on April 4, 1980, by letting the accused go outside the State with no detainer lodged against him. It also added that it was not holding that the lodging of a detainer would necessarily have been enough to show due diligence in securing the accused's presence.

(Query: Would the State have to show that it had sought to invoke the Interstate Agreement on Detainers Act? That it had sought a bench warrant if the accused was imprisoned within the state?)

A worrisome possibility implicit in the concept of "losing" readiness is that even if the State attains readiness within the initial time limit, it has to maintain readiness each day thereafter. I had understood that this issue was pending in other cases already under submission. But perhaps this implication need not be drawn in future cases because here the State had not shown where the accused was until Dec. 1979 (in Leavenworth) and no detainer was lodged until Feb. 1980, so that it had done nothing to secure the accused's presence until after the initial 120-day period and therefore had never been ready within that period. Prince v. State, #763-82; decided 9/19/84.

**Accused's Desire to Force a Witness to Invoke the Fifth Amendment in Front of the Jury.**

The Court reaffirms that an accused does not have the right to force a witness (his co-defendant) to take the stand just so the jury can see him invoke the Fifth. The majority declines to reach what several judges saw as the most troubling question: whether the prosecution had infringed the accused's right to obtain witnesses in his behalf by entering into a plea bargain with the co-defendant in which one of the conditions was that he not testify in Appellant's case. Ellis v. State, #143-83; decided 9/19/84.

**Prosecution's Failure to Correct Testimony It Knows to be False; Use of Such Testimony in Second Trial.**

The accused was first convicted of capital murder, but following an appellate reversal he was retried for murder. In the first trial a co-defendant testified against him. She denied that she had been offered anything by the State, when in fact there was a tacit understanding that the State would see that her previously-imposed death sentence was reduced to a number of years. The prosecution did nothing in the first trial to correct the co-defendant's false testimony.

At the retrial the State introduced a transcript of the co-defendant's testimony from the first trial. (She was unavailable since she refused to testify even when threatened with contempt.) The Court of Appeals thought this was automatic error, holding that the failure to correct the witness' false testimony at the first trial could never be remedied at the second. The Court of Criminal Appeals disagreed with this broad statement: the error could have been cured if the prosecution had corrected the false testimony.

However, the Court agreed that reversal was required because of the manner in which the prosecution used the prior testimony. In the second trial the State not only did not concede that there had been any inducements for the original testimony, it read into the record the witness' prior testimony denying any such agreement. This perpetuated the error, and it was not cured by the fact that the defense was able to prove up the existence of an agreement through the co-defendant's attorney. See Napue v. Illinois, 360 264. Granger v. State, #316-83; decided 9/19/84.

**Automobile Inventories; Vehicle Impoundments.**

In Gill v. State, 625 S.W.2d 307, the Court had indicated that inventories of locked compartments of vehicles might be illegal. Gill is now limited to the situation where the officers have to force their way into the compartment to make the purported inventory. If the officers can enter the

compartment with a key, the inventory should be proper.

In Stephen and Kelley the Court upheld the inventory of locked automobile trunks, and in Guillett the inventory of a locked glove compartment. In each case the officers obtained the key from the car's driver.

Of course the lawfulness of the inventory depends on the lawfulness of the impoundment of the vehicle. In Stephen the Court addressed one police department's impoundment policy and found it wanting. The officer testified that his department required him to impound the vehicle if the driver was taken into custody and neither the registered owner nor his relative was on the scene to take custody of the car.

The Court said this was unreasonably narrow. The police should release the car to another licensed driver if requested to do so by the arrestee. However, that didn't help the accused here since the only other person available had no driver's license and refused to produce any identification. The car didn't have to be released to her.

Stephen is also significant because it held that when the police encountered a "container" in the trunk (a paper sack), they could inventory it also (presumably if their department's policy called for such inventories). Relying on Illinois v. Lafayette, 103 S.Ct. 2605, the Court said the police were not required to pursue other less restrictive alternatives, such as sealing such containers rather than opening them. Guillett v. State, #610-83; decided 9/19/84. Kelley v. State, #63,869; decided 9/19/84. Stephen v. State, #65,923; decided 9/19/84.

**Lack of Standing to Challenge a Search Cannot Normally Be Raised for the First Time on Appeal.**

Sullivan v. State, 564 S.W.2d 698, has often been cited for the proposition that the State may on appeal assert the accused's lack of standing to contest a search even though the State made no such express assertion in the trial court. The case does not really stand for such a broad rule. Normally the State must assert lack of standing at trial so that the issue can be fully litigated. However, in limited situations the State can raise the issue of standing for the first time on appeal: (1) if the record is sufficiently developed so that it affirmatively appears that the accused lacked standing and (2) if the State did not take a contrary position at trial on standing. Wilson v. State, #921-83; decided 9/19/84.

**Probable Cause Based on Information Known to Cooperating Police Agencies; Whether Suspect is "About to Escape."**

The investigating officer developed probable cause to connect a transient with a murder, and he put out a broadcast on the suspect to other agencies. However, he did not get a warrant for the suspect's arrest, and the Court holds that the mere fact that the suspect was a transient wasn't enough to allow a warrantless arrest under art. 14.04, C.C.P., on the theory that the suspect was "about to escape."

An officer some miles away, but on a rail line connecting with the town where the murder occurred, told railroad personnel to watch for the suspect. Some 30 hours after the murder the second officer investigated a report that an unknown person was on one of the trains in the railyard. The officer didn't have probable cause to believe this unknown person was the murder suspect, but the mere fact that the railroad people wanted the person off the train (coupled with "no trespassing" signs around the yard) gave him good cause to get the man out of his hiding place and to seek identification on the basis of a criminal trespass violation. This was not an illegal pretext stop even though the officer may have wanted to investigate the man further to try to tie him to the murder.

Having ID'd the suspect, the officer had probable cause to tie him to the murder, and given what the two agencies know, he also now had probable cause to make a warrantless arrest for the murder on the theory that the suspect was "about to escape." The legality of the murder arrest was to be judged on an objective basis; it did not matter that the arresting officer did not articulate that he thought the suspect was about to escape.

This shows how the prosecution can legitimately justify what might at first blush appear to be a bad arrest by carefully breaking down all the steps in the analysis and justifying them one by one. Bain v. State, #1118-83; decided 9/19/84.

**Appointment of Counsel for Indigent Defendants Once a Petition for Review is Granted.**

Ayala v. State, 633 S.W.2d 526, held that an indigent defendant has no constitutional right to have an attorney appointed to file a petition for review. However, the Court now holds that once a petition is granted, the indigent defendant can request an attorney be appointed to file a brief on the merits for him. Since the Court of Criminal Appeals does not itself have the power to appoint counsel, this is accomplished by abating the appeal so that the trial court can appoint counsel. Polk v. State, #294-84; decided 9/19/84.

**Timing of Request to Represent Oneself.**

The accused had a disagreement with his attorney and asked to be allowed to represent himself. This request was not made until after the jury was empanelled. The Court holds that since the accused did not couple this request with any request for a delay in the trial, the court should have at least made the inquiries about the accused's knowledge of the dangers of self-representation, with a view toward honoring the request. Johnson v. State, #63,794; decided 9/10/84.

**Counsel's Attempt to Assert His Client's Right to Remain Silent Before Counsel Has Ever Talked to His Client.**

Before he had ever talked with his client, appointed counsel told the police not to speak to his client. Officers who were not even aware of this request talked to the accused, who said he did not want an attorney, and he confessed after the appropriate warnings.

HELD: Just as an attorney cannot waive his client's right to counsel without the client's consent, he cannot invoke that right without his consent, and counsel could not have such consent when he has not even talked with his client. Holloway v. State, #68,925; decided 9/19/84.

**Fundamental Error in Charge: "Unknown to Grand Jurors" Allegation; Impeachment by Statement Taken in Violation of Art. 38.22.**

The indictment alleged that the manner and means of choking the victim were unknown to the grand jurors. The applications paragraph in the charge omitted any reference to the "unknown to the grand jurors" allegation. Appellant claimed this was fundamental error.

HELD: The allegation is not an essential element of the crime; its omission from the applications paragraph is not fundamental error. As long as there is proof in the record that the manner and means were unknown to the grand jurors and as long as there is no objection to the omission of this matter from the charge, reversal is not required.

Although the Court does it in almost an off-handed fashion, this opinion also notes that since the amendments to art. 38.22, C.C.P., in 1981, section 5 of that article has been the only one addressing the use of custodial statements for impeachment purposes. This means that any voluntary statement may be used for impeachment even if it would have been inadmissible in chief due to Miranda violations. Therefore Texas follows the same rules the U.S. Supreme Court does regarding impeachment. Garrett v. State, #68,925; decided 9/19/84.

**Invalidity of Certain Pre-Sentence Investigation Provisions of Art. 42.12, Sec. 4, C.C.P.**

In 662 S.W.2d 5, the Court conditionally granted writs of mandamus and prohibition because the judge was injecting himself into plea bargaining by looking at pre-sentence investigations prior to deciding guilt and by in effect making his own plea offer. Rather than refrain from engaging in these practices, Judge McDonald took the position

that the 1983 amendment to art. 42.12, sec. 4, allowed to him look at pre-sentence investigations prior to trial with the accused's consent.

The Court rejected this in an interesting opinion. The 1983 Legislature actually enacted two different amended versions of section 4 of art. 42.12. One version appeared in H.B. 1178 and the other in S.B. 1. Although recognizing that it must try to harmonize these two enactments, it finds the task impossible; the two are irreconcilable. Since S.B. 1 was latest in date of enactment, its provision for section 4 is the one left in effect. Since the S.B. 1 version does not aid Judge McDonald, the Court issues formal writs of mandamus and prohibition.

The stricken version of art. 42.12, sec. 4, which was part of H.B. 1178, is the one that has the provision about requiring a pre-sentence report in most circumstances. Its abrogation should be helpful for the trial courts. The version of section 4 left in effect is essentially the same as the pre-1983 wording, with a modification relating to certain DWI offenses. State ex rel. Turner v. McDonald, #69,264; decided 9/19/84.

## "Restraint" for Habeas Corpus Purposes; Use of Dismissed Probation in Later Prosecutions.

If a felony probationer is successful in living up to his probationary terms, the judge can ultimately dismiss the entire case. Art. 42.12, sec. 7. However, that same provision states that the fact of that probation will still be admissible if the person is later convicted of a crime. See the "prior criminal record" provisions of art. 37.07, sec. 3(a), C.C.P.

The Court holds that the possibility that the fact of such probation might at some time be admitted against a person is sufficient "restraint" to allow him to maintain an art. 11.07 writ to attack the original conviction even after he has served out the probation and the prosecution has been dismissed and the conviction set aside. (The indictment underlying that conviction was fundamentally defective.) Ex parte Ormsby, #69,289; decided 9/19/84.

## Guilty Plea Rendered Involuntary by Counsel's Incorrect Advice.

The accused pled guilty to aggravated sexual abuse of a child. The defense attorney had led his client to believe that he was a serious candidate for either regular probation or shock probation. In fact the trial judge could not grant either because of the nature of the offense. See art. 42.12, sec. 3(e-f). This erroneous advice relied on by the accused rendered the plea involuntary. Ex parte Kelly, #69,311; decided 9/19/84.

## Clerk's Issuance of Warrant When Class-C Defendant Fails to Appear.

The Chief Judge of the Houston Municipal Courts had entered a standing order directing the court clerks to issue a capias for the accused's arrest anytime that person failed to appear for a court hearing.

HELD: Texas law does not authorize a clerk to issue such a capias without the intervention of a magistrate to determine probable cause.

The clerks who were issuing the capiases were the same ones who had sworn to the complaint for the initial class-C offense. In addition, no complaint was ever filed charging the accused with a Bail Jumping/Failure to Appear charge. The capias was being issued for the original offense, and no magistrate ever reviewed a particular case to determine if the capias should issue. Sharp v. State, #164-82; decided 9/26/84.

## Automobile Searches

The accused was located by police inside a bar a short distance away from the scene of a robbery. He identified his car in the bar's parking lot and was arrested because that car matched the description of the vehicle used in the robbery. The police then searched the car, without either a warrant or consent, and discovered incriminating evidence. The Court rejected all the theories advanced to support the search.

The Court rejected the theory, first advanced by the Court of Appeals, that this

was a permissible New York v. Belton search of the passenger compartment following the occupant's lawful arrest. The fact that the owner was encountered inside the bar and later arrested on the parking lot meant that he was neither an "occupant" or "recent occupant" within the meaning of Belton.

The Court also refused to allow this as a probable cause search under Chambers v. Maroney. Since the car had not been first encountered on the highways and because police clearly had the time to procure a warrant, the Court would not allow a search based only on probable cause.

Likewise, an inventory theory was rejected. Although appearing to concede that police could impound a car found on private property, the Court noted there was no affirmative evidence that the police in fact were purporting to act pursuant to a departmental inventory policy. This appears to be one area of search law where the subjective state of mind of the police is actually crucial. Gauldin v. State, #518-82; decided 9/26/84.

**Use of Nunc Pro Tunc Procedures to Correct Judgment in a Prior Conviction the State Wants to Use for Enhancement.**

The judgment in a prior conviction used for enhancement recited that the crime was burglary of a habitation, but only a 4-year sentence was reflected. According to the Court, this imposition of a punishment below the statutory minimum would have rendered the entire conviction void. Having noticed this problem in advance, the prosecutors apparently filed a motion in the original convicting court and obtained a nunc pro tunc judgment reciting that the conviction had actually been for burglary of a building, making the punishment proper; the original judgment was incorrect due to a clerical error. Although the defendant didn't attack the nunc pro tunc order itself, the Court seems to have added its imprimatur to the procedure used to correct the judgment. The problem came in introducing the nunc pro tunc judgment before the trial court in the current prosecution.

There was no testimony supporting the admission of the nunc pro tunc judgment, nor did it contain any kind of a seal or certification. Hence it did not qualify as an official record and was hearsay. The Court also held that the trial court had no power to take judicial notice of the entry of the nunc pro tunc order because one court cannot take judicial notice of a different court's orders. Wilson v. State, #687-82; decided 9/26/84.

**Commencement of Voir Dire for Purposes of Jury Shuffles.**

Under art. 35.11, C.C.P., either side is entitled to a jury shuffle if the request is made prior to the commencement of voir dire. In Brown v. State, 639 S.W.2d 505, the Fort Worth Court of Appeals held that voir dire commenced for these purposes when the judge began questioning the prospective jurors for purposes of testing their qualifications. The main thrust of Yanez is to reject this part of the Brown case, in which P.D.R. had been refused.

If the trial judge has merely asked questions to test the qualifications of the venire, a request for a shuffle is still timely. And here the majority appears to be using "qualifications" narrowly to refer to the matters listed in art. 35.12, C.C.P.

If the judge goes further and asks questions about matters that would constitute grounds to challenge for cause under art. 35.16, it apparently would be too late to ask for a shuffle. (The lawyers would have already heard some answers that would help them in exercising challenges and strikes. It would be unfair to let one side ask for a shuffle because it didn't like what it was hearing.) Yanez v. State, #079-84; decided 9/26/84.

**Sudden Passion as a Defense to Murder; Fundamental Error in the Jury Charge.**

The Court had earlier held that the presence of sudden passion arising from an adequate cause is "in the nature of" a defense to murder. When sudden passion is raised by the evidence, the absence of sudden passion should be included in the applications paragraph of the murder charge, with the State required to prove its absence

beyond a reasonable doubt. On original submission in Cobarrubio the Court held that the failure to charge this way was fundamental error.

The Court has now denied the State's motion for rehearing without opinion. Judge McCormick has an excellent dissent noting that if the Court really means what it says, then every jury charge in this state has been fundamentally defective if in the applications paragraph submitting the basic offense the State has not been required to disprove any defense raised by the evidence. Cobarrubio v. State, #63,801; decided 9/26/84.

**Filing of Notice of Appeal Does Not Prohibit Trial Judge From Considering a Motion for New Trial.**

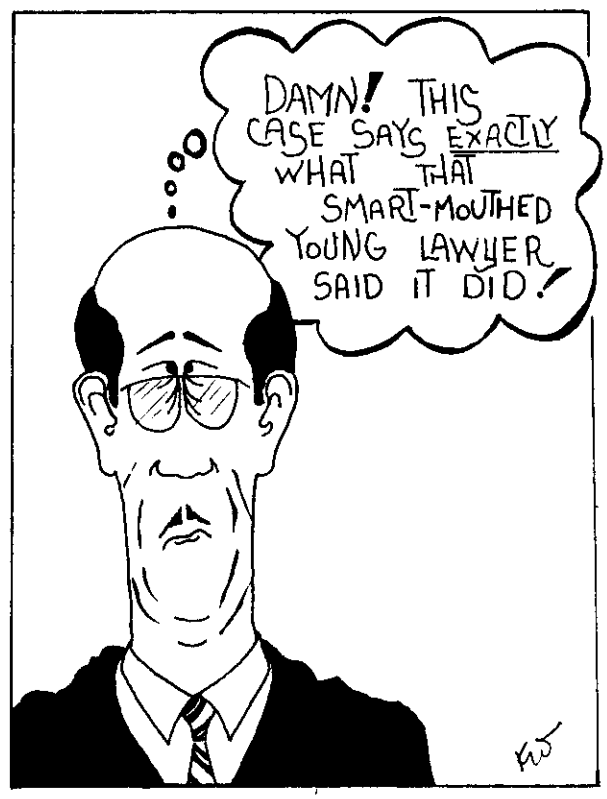
The statutes permit notice of appeal to be given either within 15 days of sentencing or within 15 days of the overruling of a motion for new trial. A motion for new trial may be filed within 30 days of sentencing.

The question had arisen whether the filing of a notice of appeal within the first 15-day period deprived the trial court of the power to rule on a motion for new trial that was otherwise timely. The Court answers this in the negative. Nothing in the statutes say that the giving of a notice of appeal ends the trial court's jurisdiction in the case. Under art. 44.11, C.C.P., it is only the filing of the appellate record in the appellate court that causes trial court jurisdiction to end, and even then the court retains power over appeal bond matters.

The Court expressly refrains from deciding whether the initial notice of appeal is sufficient when the motion for new trial is ultimately overruled. The Court noted that its prior cases (under prior law) held that a premature notice of appeal was insufficient. Judge Miller's concurrence points out that most Courts of Appeals have now held that the initial notice of appeal would be good and that the criminal courts, by virtue of criminal appellate rule 211, now follow the civil rule concerning premature notices of appeal. Ex parte Drewery, #69,225; decided 9/26/84.

**ANSWERS**

1. No. Littles v. State, #301-83; decided 9/19/84.
2. Yes. Williams v. State, #308-83; decided 9/19/84.
3. Yes, always. Hamilton v. State, #1002-83; decided 9/19/84.
4. No. Dingler v. State, #1086-83; decided 9/19/84.
5. No. Berghahn v. State, #125-84; decided 9/19/84.
6. Intent to kill. Flanagan v. State, #60,580; decided 9/19/84.
7. Yes. Garrett v. State, #69,925; decided 9/19/84.
8. No. Washington v. State, #866-82; decided 9/26/84.
9. Yes. Ledesma v. State, #682-83 & 683-83; decided 9/26/84.
10. No. Glaze v. State, #225-82; decided 9/19/84. □




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

# FROM THE Legal Counselor's Desk

by Oliver Price

*Oliver Price is the Legal Counselor for the Prosecutor Council.*

## Attorney General Opinions

### Attorney General Opinion JM-165

**Re: Whether a defendant whose adjudication was deferred under section 3d of article 42.13 of the Code of Criminal Procedure can be compelled to pay a fine after his period of probation has expired.**

The A.G. ruled that, by the explicit terms of section 3d of article 42.13 of the Code of Criminal Procedure, a defendant after a plea of guilty who fails to pay a fine imposed as a condition of probation may not be subject to a copias pro fine or other writ of execution to enforce payment of such fine once his period of supervision has expired, if proceedings to revoke probation or determine guilt have not already been instituted.

### Attorney General Opinion JM-170

**Re: Whether a county may reimburse a commissioner for payment of a traffic fine made on behalf of a county employee.**

Criminal District Attorney Frank Blazek asked the above question which the Attorney General answered in the negative.

In arriving at the negative response, the A.G. reasoned that essentially the county is being asked to pay traffic fines on citations to which individuals plead guilty or no contest. A single county commissioner cannot bind a county to make this payment.

The facts of this case reveal that the commissioner employed two county owned trucks and two independently contracted vehicles to haul gravel in making road repairs. All four received citations for excessive weight and inadequate bed, no covering to prevent spilling of the load. Our driver was a county employee, all four plead no contest and paid the fines of about $630.00. The county commissioner reimbursed the drivers out of his own pocket and seeks reimbursement.

The reimbursement was held to have been made at his own risk and the expense is not a proper charge on county funds, cf. Hood v. State, 73 S.W.2d 611 (Tex. Civ. App. - Dallas 1934, writ ref'd); AG Opinion O-2951 (1940) (individual expenses incurred by constable injured which weighing vehicles not an expense of office).

### Attorney General Opinion JM-176

**Re: Procedures for revocation of probation under sec. 14.12(a) of the Family Code of a person in contempt of court for refusal to make child support payments.**

The long opinion sets forth many citations and proposals. It finally holds that the state is to be represented by the district attorney or someone who performs those functions. Under 14.12(a) indigent probationers are entitled to court appointed counsel at revocation hearings.

The bail and notice provisions of article 42.13(8)(a) of the Code of Criminal

Procedure apply in the unlikely event that a section 14.12 probationer is detained pending revocation proceedings.

**Attorney General Opinion JM-190**

**Re: Venue of Criminal Proceedings in Justice Courts.**

Harris County District Attorney Mike Driscoll asked these questions:

1) Does article 4.12 or article 45.22 of the Code of Criminal Procedure control the venue of criminal charges filed pursuant to section 32.41 of the Penal Code in the justice courts of Harris County, and is the applicable article mandatory or directory?

2) Is it proper for a justice of the peace in Harris County to do any of the following:

1) Accept a bad check charge/ complaint for an offense which occurred in Harris County but not within his precinct?

2) Accept a bad check charge/ complaint for an offense which occurred in his precinct when the defendant resides in Harris County but not in his precinct?

3) Accept a bad check charge/ complaint for an offense which occurred in his precinct but the defendant resides in another county?

Article 45.22 of the Code of Criminal Procedure determines the venue of criminal charges filed in the justice courts of Harris County for the offense of issuing a bad check under section 32.41 of the Penal Code and its provision are mandatory. Except as provided if a justice of the peace is disqualified, it is not proper for a justice of the peace in Harris County to accept such a bad check case when the offense does not occur within his precinct, but it is proper, regardless of the residence of the defendant.

Article 45.22 provides as follows:

Section 1. No person shall ever be tried in any justice precinct court unless the offense with which he was charged was committed in such precinct.

Provided, however, should there be no duly qualified justice precinct court in the precinct where such offense was committed, then the defendant shall be tried in the justice precinct next adjacent which may have a duly qualified justice court. And provided further, that if the justice of the peace of the precinct in which the offense was committed is disqualified for any reason for trying the case, then such defendant may be tried in some other justice precinct within the county.

It is not proper for a justice of the peace in Harris County to accept a bad check case when the offense did not occur within his precinct.

The last two parts of the question were answered in the affirmative. It is proper for a justice of the peace to accept a bad check charge/complaint in both of these situations. In each of the last two situations, the offense occurs within the precinct of the justice of the peace in question and venue is proper in that precinct.

In summary, venue for misdemeanors in the justice courts in Harris County is limited to the precinct in which the offense occurs, regardless of the residence of the defendant.

**Attorney General Opinion JM-194**

**Re: Rights of prosecutors and duties of district judges under article 42.12, Code of Criminal Procedure.**

**Editor's Note:** This opinion deals with the authority of prosecutors vis-a-vis district judges and probation officers in handling probation revocation cases. Because this issue deals with the authority of prosecutors throughout the state, the Council filed an amicus curiae brief with the Attorney General's office strongly supporting the right of prosecutors to determine if revocation proceedings should be inititated. It is gratifying to note that the opinion closely follows the Council's brief on prosecutorial authority.

The following questions regarding the duties, responsibilities, and limitations of authority of the district attorney (or other state prosecutor), district judge, and probation officer under section 8(a) of article 42.12 of the Texas Code of Criminal Procedure have been asked by the District Attorney of the 24th Judicial District in regard to the procedure concerning the revocation of probation [quoting the opinion]:

"1. Does the fact that a probation revocation hearing has been held to be administrative, rather than criminal in nature, change the duties and responsibilities of the district attorney, or other state prosecutor, in the revocation proceedings compared to the filing and trying of an ordinary criminal case?

"2. Can a district attorney file a petition in district court to revoke a felony 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?

"3. If the probation officer obtains the written approval or order of the district judge to file a motion to revoke the probation of a felony probationer, is the district attorney required to file a motion to revoke regardless of the lack of merits or lack of admissible legal evidence available to revoke, or does the district attorney have the authority to screen the requests to file motions to revoke probations and to refuse to file a motion to revoke when he feels that there is a lack of sufficient, legal, admissible evidence submitted to him by the probation officer on which to prove the alleged violations, as required by the appellate courts?

"4. If the district judge goes over the evidence and facts of the case in detail with the probation officer prior to ordering that a petition to revoke be filed and not in open court with attorneys for both sides present, is the judge then disqualified to hear the revocation proceedings?

"5. After a petition to revoke a probation has been filed, can a judge refuse or decline to hear the petition to revoke?

"6. After a petition to revoke a probation has been filed, can a judge dismiss the petition to revoke without a hearing, when the state is ready for the hearing and requests that a hearing be conducted?

"7. (A) After a petition to revoke a probation has been filed by the prosecutor, can the judge transfer the hearing to another district for another prosecutor to handle, without a hearing and without the approval of the prosecutor who filed the motion to revoke and without showing good cause? (B) Can a judge not only transfer a petition to revoke as above set forth, but also combine the petition to revoke with other cases in other districts and consider all cases together without the consent of the state prosecutor?

"8. (A) If a judge calls a probationer into court and informally discusses alleged violations, without a hearing and not in the presence of the prosecutor and/or defense counsel, is the judge disqualified to hear a petition to revoke filed by the state concerning violations discussed by the judge and probationer? (B) If the judge discusses the alleged violation with the probationer, can the judge then refuse to hear a petition to revoke filed by the prosecutor covering the violations discussed?

"The subject statute reads in part as follows:

"Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the

defendant to be brought before it for a hearing without 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

"Code Crim. Proc. art. 42.12. This provision of the Adult Probation, Parole, and Mandatory Supervision Law provides little guidance in arriving at answers to your questions. We conclude, however, that the functions of the district attorney and district judge in probation revocation matters are generally comparable to their respective roles in other similar facets of criminal proceedings." [end of opinion quote]

The Attorney General cited Ruedas v. State, 586 S.W.2d 520, 523 (Tex. 1979) as its most recent exposition of the nature of a probation revocation proceeding. This case quoting the Texas Court of Criminal Appeals, helped establish that a probation revocation hearing is adversarial in nature.

The Ruedas exposition notes that Texas law requires for greater safeguards (through other jurisdictions) amounting to virtually the same procedural protections available at a criminal trial, to be afforded in a probation revocation hearing. (citing Ex parte Guzman, 551 S.W.2d 387 (Tex. Crim. App. 1977).

To quote the opinion again: "Regarding your first three questions, we refer to article 2.01 of the Code of Criminal Procedure, which requires that:

> 'Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely . . . . It shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done.'"

The Attorney General answers the first three questions as follows: "...(1) the duties and responsibilities of the state prosecutor in probation revocation proceedings are comparable to those of such prosecutor in the main criminal prosecution; (2) when in his prosecutory judgment the circumstances are appropriate, a district attorney may file a motion to revoke a felony probation without the request of the probation officer or district judge; and (3) a district attorney is not required to file a motion to revoke sought by a probation officer, if there is a lack of merit or the existence of any legal defect, but rather a district attorney should exercise appropriate prosecutorial discretion as in an original criminal prosecution. Indeed, article 2.01 as quoted above directs the prosecutor to do justice above all. Compare Model Code of Professional Responsibility, Canon 7 and especially DR 7-103(A).

"Regarding questions four and eight, the circumstances posited would not be the basis for a disqualification, because the exclusive grounds for disqualifying a judge from sitting in a criminal case are very narrowly drawn in article V, section 11 of the Texas Constitution and article 30.01 of the Code of Criminal Procedure. Ex parte Largent, 162 S.W.2d 419 (Tex. Crim. App. 1942), cert. denied, 317 U.S. 668 (1942). . .

"Questions five and six raise the issue of what sort of discretion a judge has to dispose of a probation revocation petition without a hearing. Section 1 of article 42.12 provides in part that

> It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended,

> the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas." (Emphasis added.)

"Since there is no provision to the contrary, and since the whole thrust of this statute is to place the governance of the probation system within the discretion of the judges of criminal courts, we are satisfied that, absent an an abuse of discretion, a district court judge may dismiss a petition to revoke probation without a hearing, although he could not, of course, act to revoke without a state prosecutor's having filed a motion seeking such action. Compare article 32.01 of the Code of Criminal Procedure.

"Question seven implicates section five of article 42.12 which reads as follows in pertinent part:

> (a) Only the court in which the defendant was tried may . . . alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent . . . .
>
> (b) After a defendant has been placed on probation, jurisdiction of the case may be transferred to a court of the same rank in this State having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court.
>
> (c) Any court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the court having jurisdiction of the case at the time the action is taken.
>
> . . .

"S U M M A R Y

"The responsibilities of a district attorney in a probation revocation hearing are essentially the same as those in a trial to determine criminal culpability. For example, a district attorney's determination of whether to file a petition to revoke probation must be based on his own best prosecutory judgment, not merely the request of the probation officer.

"If a district judge reviews the facts involved in an alleged probation violation matter with the probation officer or the probationer outside the presence of the district attorney, the judge, though he is not otherwise disqualified under state law, might under particular circumstances find it appropriate to decline to hear the matter at issue if he has compromised the impartiality demanded by the federal due process clause.

"Since the whole thrust of article 42.12 is to give governance of the probation system to the district judge, he may decline to hear or may dismiss a probation revocation petition without a hearing.

"Under section five of article 42.12, the district judge is authorized to transfer the hearing on a probation revocation motion with the consent of the transferee judge, and the transferee judge may consolidate such transferred matter with other cases.

### Attorney General Opinion JM-197

**Re: Application of article 6252-26, V.T.C.S., to county attorneys with felony responsibility.**

The Red River County District Attorney and County Attorney asked whether C.A.s having responsibility for felony prosecutions are "officers or employees of any agency, institution, or department of the state" within the meaning of art. 6252-26, V.T.C.S.

To quote the opinion: "Article 6252-26 reads in pertinent part:

> Section 1. (a) The State of Texas is liable for and shall pay actual damages, court costs, and attorney fees adjudged against officers or employees of any agency, institution, or department of the state . . . where the damages are based on an act or omission by the person in the course and scope of his office, contractual performance, or employment for the institution, department, or agency and:
>
> (1) the damages arise out of a cause of action for negligence, except a willful or wrongful act or an act of gross negligence; or
>
> (2) the damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States, except when the court in its judgment or the jury in its verdict finds that the officer, contractor, or employee acted in bad faith. . .
>
> Sec. 5. A member of the commission, board, or other governing body of an agency, institution, or department is an officer of the agency, institution, or department for purposes of this Act.

"The provision of section five that members of governing bodies are officers of their respective agencies, institutions, or departments for purposes of the act is not intended as an exclusion of other persons from the 'officer' category, in our opinion. See Educ. Code § 65.42. But we do not think county attorneys, whether or not they have responsibility for prosecuting felonies, are officers or employees of a state agency, institution or department of the state within the meaning of article 6252-26, V.T.C.S. See Attorney General Opinion H-1160 (1978). . .

"The term 'state officer' can be used in both a popular sense to mean an officer whose jurisdiction is coextensive with the state or, in a more enlarged sense, to mean on who receives his authority under the laws of the state. Ex parte Preston, 161 S.W. 115 (Tex. Crim. App. 1913). Cf. Harris County Commissioners Court v. Moore, 420 U.S. 77, 82 n.6 (1975). In our opinion, article 6252-26 was meant to apply only to officers and employees of state agencies, institutions and departments having statewide jurisdiction. We do not think it was meant to embrace everyone who might be considered to be within the legislative, executive or judicial departments of state government within the meaning of article II, section 1 of the Texas Constitution. Travis County v. Jourdan, 42 S.W. 543 (Tex. 1897); Jernigan v. Finley, 38 S.W. 24 (Tex. 1896); Fears v. Nacogdoches County, 9 S.W. 265 (Tex. 1888); cf. State v. Moore, 57 Tex. 307 (1882).

"In Travis County v. Jourdan, supra, the state supreme court held that although county officers are state officers in a certain sense, a statute that expressly applied to "any district judge or officer of the state government" did not apply to a county treasurer because the mention of district judges would have been unnecessary had the legislature meant for the statute to apply to all "state officers" in the broad sense. The mention of the district judge showed, the court said, that the statute did not mean to embrace any other officers on a district or county level. We believe the enactment of article 6252-19b, V.T.C.S., in 1979, coupled with the amendment and virtual reenactment of article 6252-26 in 1981, leads to a similar conclusion. . .

"S U M M A R Y

"County attorneys having responsibility for felony prosecutions are not officers or employees of any agency, institution, or department of the state within the meaning of article 6252-26, V.T.C.S."

### Attorney General Opinion JM-198

**Re: Whether certain payments to a DA for work rendered in his private capacity are proper.**

Inquiry is made by the CDA of Victoria County as to the propriety of a former CDA to perform legal services in his private

capacity in connection with certain condemnation matters. Payments were made from the county's road right-of-way fund to the CDA in addition to the regularly budgeted county salary paid him for performing his statutory required duties.

To quote the opinion:

"The additional payments were paid to him in his capacity as a private attorney and for services rendered 'on county time.' . . . We conclude that the county's contract with the CDA and the payment for legal services in the condemnation matters were not improper. . .

"In Victoria County the criminal district attorney serves as both county attorney and district attorney. . .

"[On] September 1, 1983 the criminal district attorney in Victoria County became a 'district attorney' within the meaning of the Professional Prosecutors Act, which provides that a district attorney governed by the act may not engage in the private practice of law. V.T.C.S. art. 332b-4, §2, - §5(a)." Also, A.G. Opinion JM-22 (1983) concludes that public officers are not required to observe specified working hours.

In summary, "[I]t was not improper for the commissioners court of Victoria County to contract with and compensate the CDA for legal services in certain condemnation matters that were performed in his capacity as a private attorney."

**Attorney General Opinion JM-202**

**Re: Construction of House Bill No. 718 which amends art. 5.01 of the Election Code.**

The Chairman of the Texas House of Representatives Committee on Elections requested an interpretation of House Bill No. 718 of the 68th Legislature, amending art. 5.01 of the election code to read in pertinent part [quoting the opinion]:

> "The following classes of persons shall not be allowed to vote in this state:
>
> . . .
>
> "3. Persons while incarcerated, on parole, mandatory supervision, or probation as a result of a felony conviction.
>
> "4. Persons who have been convicted of a felony, for a period ending on the fifth anniversary of the date on which the person:
>
> "(A) received a certificate of discharge by the Board of Pardons and Paroles; or
>
> "(B) completed a period of probation ordered by a court. (Emphasis added).

"Article VI, section 1 of the Texas Constitution disqualifies all felons from voting, a subject to exceptions made by the legislature.

"You seek an interpretation of the underlined language. You ask whether a certificate of discharge issued by the Texas Department of Corrections for persons sentenced prior to August 29, 1977 is the legal equivalent of discharge from the Board of Pardons and Paroles. . .

"The bill analysis to Senate Committee Substitute for House Bill No. 718 stated that under present law, a felon who has completed his sentence must have a court restore his voting rights. It stated that House Bill No. 718

> restores an ex-felon's voting right on the 5th anniversary of the date on which the person is discharged or completed a period of probation.

"This statement shows that the legislature intended that House Bill No. 718 would restore voting rights to all felons five years after completing their sentences. Such a construction of the Act would be consistent with the expressed legislative intent and, moreover, any other interpretation could make the Act vulnerable to constitutional attack as being violative of the Equal Protection Clause. . .

"Generally, courts have said that statutes regulating the right to vote should be liberally interpreted in favor of that right. . .[W]e conclude that felons

discharged by either a federal or a sister state's correctional institution or parole board, as well as by the Texas Department of Corrections, are reenfranchised five years after that event. To conclude otherwise could subject the Act to possible invalidation under the Equal Protection Clause of the United States Constitution.

"S U M M A R Y

"House Bill No. 718 of the Sixty-eighth Legislature, codified as article 5.01 of the Election code, restores the vote to persons convicted of a felony on the fifth anniversary of their discharge by the Texas Department of Corrections or by a federal or sister state prison or parole board, just like those discharged by the Texas Board of Pardons and Paroles."

**Attorney General Opinion No. JM-206**

**Re: Whether a county bail bond board may limit the number of bail bond licenses granted in that county.**

Criminal District Attorney Tim Curry contends that Article 2372p-3, V.T.C.S. does not grant the Tarrant County Bail Bond Board authority to limit the number of bail bond licenses in Tarrant County.

In agreeing with the above conclusion the Attorney General stated that although the county bail bond board is charged with the duty of regulating "all phases of the bonding business," the board is not accorded authority to establish a ceiling on the number of licenses it shall issue, citing Bexar County Bail Bond Board v. Deckard, 604 S.W.2d 214 (Tex. Civ. App. — San Antonio 1980, no writ).

Pursuant to its police power, the legislature may properly delegate to a board or agency the power to grant, refuse, revoke, or cancel licenses regulating businesses and occupations. Trimble v. State Board of Registration for Professional Engineers, 483 S.W. 2d 275 (Tex. Civ. App. - El Paso 1972, writ ref'd n.r.e.), cert. denied, 412 US 920 (1978). Such power, however, may only be exercised as expressly granted by statute or necessarily implied therefrom. Staffer v. City of San Antonio, 344 S.W. 2d 158 (Tex. 1961). Thus, in pursuit of its lawful duties, a bail bond board may investigate an applicant's reputation for honesty, truthfulness, fair dealing, and competency. Attorney General Opinion H-441 (1974).

Article 2372p-3, V.T.C.S. provided no standard upon which to base the limitation contemplated by the Tarrant County Bail Bond Board. Without direction from the statute, the board might be encouraged to regulate arbitrarily, a practice the legislature has taken pains to eliminate. Moreover, it is conceivable that a predetermined limit on the number of bail bond licenses issued could erode, rather than preserve, the right of bail.

# Open Records Decisions

**Open Records Decision No. 422**

**Re: Whether details of a shooting incident are excepted from disclosure under the Open Records Act.**

An insurance company claims adjuster is conducting an investigation into a shooting incident. The company wishes to know the details of this incident, whether it was self-inflicted, and if it was, whether it represented an attempted suicide or was accidental. Any information whatsoever concerning the shooting was requested.

Common law privacy excepts from disclosure information which contains highly intimate or embarrassing facts, the disclosure of which would be highly objectionable to a reasonable person, provided that such information is of no legitimate concern to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W. 2d 668, 682 (Tex. 1976). Information contained in medical reports might raise a claim of common law privacy if it relates to: a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures or emotional/mental distress. Open Records Decision No. 370 (1983), see also Open Records Decision Nos. 143 (1982); 262 (1980).

To be excepted by common law privacy, information must also be of no legitimate concern to the public. To quote the opinion: "In our opinion, information which reveals that an individual was the victim of a self-inflicted wound does not in itself satisfy the standard of common law privacy. Many self-inflicted wounds are accidental, and we do not believe it is reasonable to conclude that revealing the occurrence of an accidental self-inflicted wound reveals 'highly intimate' information. On the other hand, you should not reveal any details of a self-inflicted wound beyond the fact that it is self-inflicted. A self-inflicted wound is, necessarily, either accidental or intentional. If intentional, release of that fact might lead a reasonable person to conclude that the victim was suffering from 'emotional/mental distress.' We cannot require release of reports of accidental self-inflicted injuries without, by implication, revealing that reports of all other self-inflicted injuries demonstrate intent. It is necessary to conclude, therefore, that while the mere fact of a self-inflicted injury is not sufficient to meet the first criterion of the common law privacy test, any details beyond that fact do satisfy that criterion, in that they would reveal highly intimate or embarrassing facts, the disclosure of which would be highly objectionable to a person of ordinary sensibilities.

"To be excepted by common law privacy, however, information must also be of no legitimate concern to the public. Most previous decisions in this area have related to medical information. See e.g., Open Records Decision Nos. 370 (1983); 343 (1982); 262 (1980). We believe it is clear that the public has a substantially greater interest in knowing the identities of victims of crime than in knowing the identities of persons treated at a public hospital. Cf. Open Records Decision No. 339 (1982) (identity of rape victim may be withheld under common law privacy). Attempted suicide is not, however, a crime in Texas, even though it may be initially investigated by the police. In our opinion, that circumstance makes it more akin to the category of 'emotional/mental distress' than to that of homicide. As a result, there is in our view a presumption that the details of any instance of a self-inflicted wound, beyond the mere fact that it is self-inflicted, are excepted from disclosure by common law privacy. That presumption may be overcome by a demonstration that the public has a substantial interest in a particular incident."

**Open Records Decision No. 423**

**Re: Whether a photograph of a police officer arrested for sexual assault is excepted from disclosure under the Act.**

The San Antonio Police Department keeps photographs of its officers to identify one of them when the need arises, e.g., for a photograph line-up resulting from complaints against a sworn member of the department. The photo requested in this instance is maintained as part of the personal records of the department and was not taken when the officer was arrested, fingerprinted and booked; i.e. it is not a so-called "mugshot." Generally, the scope of employee privacy is narrow. Open Records Decision Nos. 336, 315 (1982); 278 (1981); 260, 257 (1980).

To quote the opinion: "This office has already held that the name of a complainant filing a complaint against a police officer, the name of the officer, and the disposition of the matter are not excepted by section 3(a)(2). Open Records Decision Nos. 350, 329 (1982); 208 (1978). See also Open Records Decision Nos. 316, 315 (1982). We conclude that the release of the photograph in the department's personnel file is not excepted from required public disclosure by section 3(a)(2) of the Open Records Act." □

**NEW SERVICE**

If you have a legal issue you cannot resolve and time is not all-important, write me, Oliver Price, a note framing the questions as specifically as possible.

I will call you to confirm our mutual understanding of the issues, then I will use the LEXIS system at the Supreme Court building to get you the current case citations.

# English/Spanish Miranda Warnings

*This English/Spanish version of Miranda warnings is used by the San Antonio Police Dept. Our thanks to Michael Schill, Asst. District Attorney for Bexar County, for giving us a copy.*

**WARNING (Arrestee/Suspect)**

Before you are asked any questions, it is my duty as a police officer to advise you of your rights and to warn you of the consequence of waiving these rights.

**1.** You have a right to remain silent.

**2.** You do not have to make any statement, oral or written, to anyone.

**3.** Any statement that you do make will be used in evidence against you in a court of law at your trial.

**4.** You have a right to have a lawyer present to advise you before and during any questioning by police officers or attorneys representing the State.

**5.** You may have your own lawyer present, or if you are too poor to hire a lawyer, the court will appoint a lawyer for you free of charge, now, or at any other time.

**6.** If you decide to talk with anyone, you can, and you can stop talking to them at any time you want.

**7.** The above rights are continuing rights which can be urged by you at any stage of the proceedings.

**DO YOU UNDERSTAND THESE RIGHTS?**

**AVISO DE DERECHOS**

Antes de que le hagamos cualquier pregunta, usted debe de comprender sus derechos:

**1.** Usted tiene el derecho de guardar silencio.

**2.** No tiene que decir nada a nadie. (Oral o escrito)

**3.** Cualquier cosa que usted diga puede ser usada en su contra en una corte de leyes, o en cualquier procedimiento administrativo.

**4.** Usted tiene el derecho de hablar con un abogado para que el lo aconseje antes de que le hagamos alguna pregunta, y de tenerio presente con useted durante las preguntas.

**5.** Si usted no tiene el dinero para emplear a un abogado, se le puede proporcionar uno antes de que le hagamos alguna pregunta, si usted lo desea.

**6.** Si usted decide contestar nuestras preguntas ahora, sin tener a un abogado presente, siempre tendra usted el derecho de dejar de contestar cuando guste, hasta que pueda hablar con un abogado.

**7.** Estos son sus derechos y los puede usar durante cualquier tiempo en este procedimiento.

**¿ENTIENDE SUS DERECHOS?**

SEARCH AND SEIZURE

by Alan Levy

# The "Protective Sweep"

*Alan Levy is an Assistant Criminal District Attorney for Denton County. He addresses developments in search and seizure and the effect on law enforcement and prosecution.*

### The "Protective Sweep" Doctrine

In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court held that a warrantless search incident to an arrest is reasonable only if it is confined to "the arrestee's person and the area within his immediate control." That area is limited to the area within which a suspect may gain possession of a weapon or possibly destroy evidence. Specifically, the Court stated that there is no justification for a warrantless search of any room other than the one in which the arrest occurs, in the absence of a well-recognized exception to the requirement of a search warrant.

Under the "protective sweep" doctrine, the exigent circumstances exception to the warrant requirement permits a cursory check of a residence when the police have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk. E.g., United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); United States v Whitten, 706 F.2d 1000 (9th Cir. 1984); cert. denied 104 S.Ct. 1593 (1984); United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982); United States v. Dien, 609 F.2d 1038 (2nd Cir. 1979); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); State v. Skaff, 450 So.2d 896 (Fla. Dist. Ct. App. 1984).

### Safety Rationale

While the United States Supreme Court has not directly addressed the constitutionality of the "protective sweep," it recently noted that "the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest." Payton v. New York, 445 U.S. 573 (1980).

In Texas, the Court of Criminal Appeals has adopted the "protective sweep" doctrine. The Texas Court accepts the majority interpretation that the Chimel holding does not prohibit a search beyond the area within an arrestee's reach, if the circumstances justify an arresting officer believing that an expanded area search is necessary for his security. Brown v. State, 605 S.W.2d 572 (Tex. Crim. App. 1980); Jones v. State, 565 S.W.2d 934 (Tex. Crim. App. 1978); Simpson v. State, 486 S.W.2d 807 (Tex. Crim. App. 1972).

### Dangerous Persons on the Premises

The courts have not been absolutely uniform in defining the factual standard required before the police are justified in conducting a protective sweep. Generally, there must be, at the time of the search, some basis for a reasonable and prudent person to believe that there may be other persons on the premises who could pose a danger to them. See generally, United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982); United States v. Manley, 632 F.2d 978 (2nd Cir. 1980), cert. denied, 449 U.S. 1112; Brown v State, 605 S.W.2d 572 (Tex. Crim. App. 1980).

Most jurisdictions, including Texas, require that the prosecution show specific and articulable facts supporting their belief that other persons who pose security risk are present on the premises. United States v. Whiten, 706 F.2d 1000 (9th Cir. 1983), cert. denied, 104 S.Ct. 1593 (1984); United States v. Gardner, 627 F.2d 906 (9th Cir. 1980), Pope v. State, 635 S.W.2d 815 (Tex Ct. App.-Dallas 1982). c.f. United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983)[government must show that there was "a serious and demonstrable potentiality for danger"];United States v. Tobar, 722 F.2d 596 (10th Cir. 1983)[the suspicion of danger must be clear and reasonable].

Unless there are exigent circumstances that would reasonably indicate that the arresting officers may be in danger, there is no exception to the warrant requirement that authorizes a protective sweep of the premises. See United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982); United States v. Dien, 609 F.2d 1038 (2nd Cir. 1979); United States v. Mangeri, 451 F.Supp. 73 (S.D.N.Y. 1978); State v. Skaff, 450 So.2d 896 (Fla. Dist. Ct. App. 1984); Pope v. State, 635 S.W.2d 815 (Tex. Ct. App.-Dallas 1982).

### Absolute Right to Sweep

A small minority of courts do not require any demonstration of exceptional circumstances. Instead, these courts support the proposition that the police have an absolute right to make a protective sweep of the premises to check for other persons who might present a security risk. United States v. Rich, 518 F.2d 980 (8th Cir. 1976), cert. denied, 427 U.S. 907 (1976); United States v. Blake, 484 F.2d 50 (8th Cir. 1973), cert. denied 417 U.S. 949 (1974); United States v. Briddle, 436 F.2d 4 (8th Cir. 1970); STate v. Dayton, 535 S.W.2d 479 (Mo. Ct. App. 1976).

Most jurisdictions, including Texas, reject the position that an arrest inside a residence is an event which automatically triggers a concommitant right to conduct a protective sweep. The difference in the majority and minority approaches arises from their differing interpretations of the Chimel case.

Texas courts, as do most jurisdictions, point to the precise language of the Chimel opinion that "routine searches" of the area beyond the arrestee's reach is prohibited, absent some other exception to the warrant requirement.

Consequently, the mere fact that the police conduct security sweeps as part of their routine procedure is not sufficient to justify the search. C.f. United States v. Gardner, 627 F.2d 906 (9th Cir. 1980); State v. Skaff, 450 So.2d 896 (Fla. Dist. Ct. App. 1984); Newton v. State, 378 So.2d 297 (Fla. Dist. Ct. App. 1980); Jones v. State, 565 S.W.2d 934 (Tex Crim App. 1978); Simpson v. State, 486 S.W.2d 807 (Tex. Crim. App. 1972).

In any arrest for a serious crime, potential for danger exists, but that possibility without more does not justify a general search of the premises. Pope v. State, 635 S.W.2d 815 (Tex. Ct. App.-Dallas 1982).

The minority jurisdictions argue that Chimel had no occasion to address the "protective search" problem. The police, in Chimel, were already in the arrestee's house waiting with family members for the arrestee to arrive. Thus, there was no necessity to conduct a sweep of the premises for security reasons. See United States v. Briddle, 436 F.2d 4 (8th Cir. 1970). Relying upon the Court's expressed concerns for the safety of the police in Chimel, as well as in subsequent opinions, the minority courts support the routine use of protective sweeps.

### Totality of Circumstances

Except in those minority jurisdictions, the burden of proof is on the prosecution to establish that the "protective sweep" was necessary for police protection. C.f. United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983); United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982); Brown v. State, 605 S.W.2d 572 (Tex. Crim. App. 1980).

In determining whether the state met its burden of proof the court looks to the totality of circumstances existing at the time of the sweep including any reasonable inferences arising therefrom. Vance v.

United States, 399 A.2d 52 (D.C. 1979). However, the bare assertion by arresting officers that other dangerous persons might have been present within the residence is not sufficient. United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975).

Although it is not possible to definitively catalogue every conceivable factor that is relevant to determining the validity of a "protective sweep," several recurrent issues arise in the cases. The potential risk to the arresting officers is one. When the police are met with armed resistance while attempting to arrest a subject, a protective sweep is reasonable. See United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); United States v. Young, 553 F.2d 1132 (8th Cir. 1977), cert. denied 431 U.S. 959 (1977).

Similarly, the courts give great weight to evidence that the arresting officers were aware of the arrestee's violent propensities or that the suspect possessed weapons, which could be used by persons on the premises to assault the officers. See United States v. Bruton, 647 F.2d 818 (8th Cir. 19810, cert, denied, 454 U.S. 868 (1981)[shootout during arrest, agents had information that the defendant possessed firearms, explosives and was traveling with another fugitive]. United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977)[police had information that the defendant was a contract killer with numerous firearms including a silencer]; United States v. Hobson, 519 F.2d 765 (9th Cir. 1975)[defendant had killed guard during escape and was a member of a violent revolutionary group]. But see, United States v. Kilodziej, 706 F.2d (5th Cir. 1983)[that defendant was known to carry a gun was insufficient since it was not shown that anyone else was likely to be present at the residence when the arrest was made].

### Narcotics Searches

The courts are in dispute about whether narcotics trafficking is a type of activity so inherently associated with violence that a protective sweep is justified.

Some courts have stated that narcotics transactions are an activity frequently associated with violence and that the police have the right to conduct a protective sweep when making an arrest in such cases. United States v. Masrszalkowski, 669 F.2d 655 (11th Cit. 1982), cert. denied sub. nom., Brock v. United States, 459 U.S. 906 (1982); United States v. Viera, 569 F.Supp. 1419 (S.D.N.Y. 1983); But see, United States v. Hatcher, 680- F.2d 438 (6th Cir 1982)[a conclusion that the protective sweep was justified because narcotics is a dangerous subject is inadequate because the same reasoning may be applied to any number of criminal arrests].

### Security Risk

Another issue that courts focus on is whether there are reasonable grounds to believe that other persons might be present who could pose a security risk to the police. Police observations of others at the residence at or near the time of the arrest, or of facts indicating the presence of others, are sufficient to satisfy most of the courts on this issue. United States v. Manley, 632 F.2d 978 (2nd Cir. 19800, cert. denied, 449 U.S.1112 [agents were aware both before and after arrests that others were present]. United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977)[other persons were seen near the residence in the company of the defendant in the hours preceding the arrest]. United States v. Gomez, 633 F.2d 999 (2nd Cir. 1980), cert. denied, 450 U.S. 994 [police heard "scurrying" noises]. Murdock v. State, 664 P.2d 589 (Alaska Ct. App. 1983); United States v. Tabor, 722 F.2d 596 (10th Cir. 1983) United States v. Rieh, 518 F.2d 980 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976)[number of automobiles at the residence indicated the presence of others].

### Violent Criminal Associates

Even in the absence of specific evidence that others are present at the arrestee's premises, a protective search may nevertheless be justified where the police have information that the arrestee's activities demonstrate a substantial possibility that he is in the company of potentially violent criminal associates or accomplices. See United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), cert. denied, 104 S.Ct. 1593 (1984); United States v. Bruton, 647 F.2d 818 (8th Cir. 1981), cert.

denied, 454 U.S. 868 (1981); Jones v. State, 565 F.2d 934 (Tex. Crim. App. 1978).

### Manner of Search

The manner in which the protective sweep is conducted is often decisive in the reviewing courts determination of the admissibility of evidence found in plain view during the sweep.

Since the rationale for the protective sweep is to protect the police from others who might pose a security risk to them, the scope of the search must not be more intrusive than necessary to accomplish its goal.

The police may conduct a quick and cursory check of the premises immediately subsequent to the arrest to look for persons, not evidence. C.f. United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983); United States v. Alonzo, 542 F.Supp. 1312 (S.D.N.Y. 1982); United States v. Mannino, 487 F.Supp. 508 (S.D.N.Y.). When the search exceeds these narrow limits, the evidence must be suppressed, unless it was validly seized pursuant to some other exception to the warrant requirements.

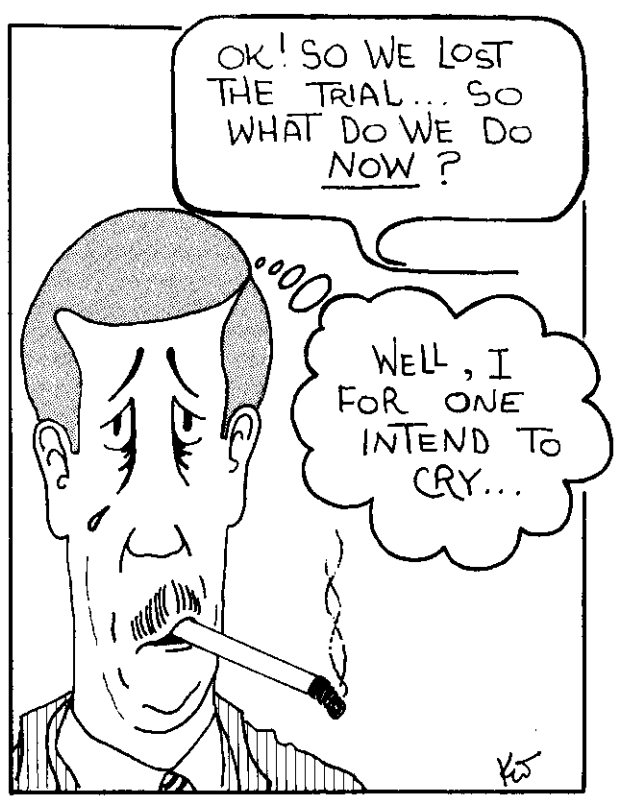
The courts will not allow "protective sweeps" to be used as a pretext to engage in a general warrantless search. Where the police search areas of the residence, that are generally inaccessible to residents, such as an attic, or areas or containers too small to contain a person, the courts will suppress any evidence obtained. See United States v. Carter, 522 F.2d 666 (D.C. Cir. 1976); Lowery v. State, 499 S.W.2d 160 (Tex. Crim. App. 1973).

The timing of the protective sweep is also important in determining whether the police were genuinely concerned with their safety or engaged in a warrantless search for evidence. Courts scrutinize searches that occur after a substantial period of time has elapsed between the arrest and the commencement of the search. A delay by police for a substantial length of time will militate against a finding that exigent circumstances required the protective sweep. United States v. Diaz Segovia, 457 F.Supp. 260 (D.Md. 1978). [Delay of 30-50 minutes].

### Summary

The protective sweep doctrine properly recognizes the necessity for law enforcement officers to control a potentially dangerous environment that may exist when they legally enter a residence to make an arrest. The Fourth Amendment is not so inflexible that it should be construed to erect artificial barriers that deprive the police of any reasonable measures necessary to protect themselves. The focus of the protective sweep is on the protection of the enforcement agent. Often, evidence will be discovered during these sweeps useful to the prosecution.

As with any exception to the warrant requirement, there is always the temptation to invoke its provisions to support a particular search even when the facts do not support its application. The simple incantation of the magic phrase "security sweep" is not sufficient to justify every search of a residence that is contemperaneous with the arrest of an occupant. The prosecution must demonstrate that there was, at the time of the search, a reasonable belief that there was a threat to the security of the arresting officers. □




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

# Sample Request for Technical Assistance

***Editor's Note:*** *One of the Council's major responsibilities is to respond to requests for technical assistance from prosecutors. The following is a sample for requests, but is by no means definitive. If you have a request, call Andy Shuval to discuss and clarify it; this will speed up the request. See Appendix "G" of the Council's 1983 Annual Report for more guidelines.*

Mr. Andy Shuval
Executive Director
The Prosecutor Council
P. O. Box 13555
Capitol Station
Austin, Texas 78711

RE: Investigation of John B. Eagle

Dear Andy:

Pursuant to our recent telephone conversation and the Council's Technical Assistance Guidelines, I am requesting a Special Prosecutor to handle the above referenced case. The following information is provided in accordance with Appendix "C," 11:

1. Nature of Case: Alleged Rape. This incident is alleged to have occurred between the defendant, a local practicing attorney and a young lady he was dating.

2. Type of Assistance: Special Prosecutor

3. Reason for Request: Public confidence would be better served by assistance of an outside prosecutor since the undersigned and most members of my staff are personally acquainted with subject. Also, the undersigned, while in private practice, had prior business dealings and case referrals from the defendant.

4. Tasks: Review of file, Grand Jury presentment, if necessary and trial, if necessary.

5. Total Estimated Time: Three to four weeks.

6. Resources: Office and staff resources will be fully available to the Special Prosecutor.

7. Money: The cost of the case shall not be over $3,000. The County is willing to pay the first $1,000 (or I will provide the $1,000 from my hot check funds) if the Council will be responsible for the other $2,000.

I would appreciate the Council's processing this request prior to _____, 198__, when the next Grand Jury convenes for this District.

Yours truly,

John Prosecutor
Criminal District Attorney
Texas County

JP/cm

## SUMMARY OF DECISIONS AVAILABLE

Campbell/McCormick Summaries: If you were unable to attend a regional meeting, you missed an excellent presentation by either Judges Chuck Campbell or Mike McCormick on recent decisions of the Court of Criminal Appeals and the U.S. Supreme Court. Their handout is divided by subject and is a useful research tool.

Marshall's Summaries: Chris has done his usual thorough, professional job in his summaries of U.S. Supreme Court Decisions in the last term.

Copies of these materials are available from the Council. Please ask for them by the underlined names above. Address requests to Mary Hees, The Prosecutor Council, P.O. Box 13555, Austin, TX 78711.

## DISCRETIONARY AUTHORITY OF COUNTY JUDGE TO TRANSFER DWI CASES UPHELD

The offices of Trinity County Attorney Joe Bell, Harris County Attorney Mike Driscoll, and the Council joined forces in a successful attempt to uphold the discretionary authority of county judges to transfer DWI cases.

In Trinity County a DWI defendant contended he would be denied due porcess and equal protection of law if he was compelled to be tried in a court presided over by a non-lawyer judge. He moved to transfer to district court, arguing that the "may transfer" language of art. 4.17, V.A.C.C.P., was intended by the Legislature to be a mandatory duty to transfer the case upon proper motion. The judge denied the motion. The defendant pursued writs of mandamus and prohibition to force the judge to transfer the case.

Mr. Bell sought technical assistance from the Council in this matter. The Council contacted Mr. Driscoll to submit an amicus curiae brief on the issue.

The Court of Criminal Appeals opinion, delivered September 19th, upheld the discretionary authority of the judge to transfer the case.

## LIABILITY INSURANCE COMPLAINT FORM

County Attorneys! Every so often you may come across this need: a copy of the complaint form to be used in cases involving financial irresponsibilty by failure to maintain automobile liability insurance.

Our thanks to David M. Douglas for sending us a copy of the form. He is Assistant General Counsel to the Department of Public Safety. (He is also the son of Leon Douglas.)

As Mr. Douglas relates, the case of Upchurch v. State, 660 S.W.2d 891 (Tex. Crim. App. 1983), held that it is not necessary for the state to allege or prove that an individual who has driven on a public highway without a policy of automobile liability insurance is not a self-insurer.

For possible inclusion in the Council publication, the Indictment Manual, the Council staff will bring the form to the attention of the manual's editor, Marvin Collins, former District Court Judge and current Chief of the Civil Section of the Tarrant County Criminal District Attorney's Office.

Here's the form:

### FAILING TO HAVE LIABILITY INSURANCE

**. . .then and there operate a motor vehicle, to wit (describe vehicle make and number) upon a public highway in (name) County of this State without a policy of automobile liability insurance in the minimum amount required by law as set out in Article 670h, Revised Civil Statute of Texas to insure against potential losses which may arise out of the operation of the above vehicle.**

# Private Reprimand

**NO. 51-84-31**

**IN RE:** **BEFORE THE**

**THE PROSECUTOR** **PROSECUTOR COUNCIL**

**DECISION OF THE COUNCIL**

BE IT REMEMBERED that on the 26th day of September, 1984, The Prosecutor Council, with the following Council members being present:

The Honorable Tim Curry
The Honorable John R. Hollums
The Honorable William M. Rugeley
The Honorable Claude J. Kelley, Jr.
The Honorable Patrick Barber
The Honorable Margaret Moore
The Honorable Howard C. Derrick
The Honorable Dick W. Hicks

considered this case and found as follows: The prosecutor allowed the good name of his office to be tarnished by being at a social gathering where the law was violated. The Council found no evidence that the prosecutor participated in the wrong doing. The Council notes that the prosecutor did not contest the charges brought against him for being present when the violation occurred. The Council also notes that the prosecutor himself promptly informed the Council of his conduct. This action on his part is a credit to him. Still the Council feels that a prosecutor, as the chief law enforcement officer in his jurisdiction, should be certain that his conduct is above reproach. Based on these findings, the Council issues this private reprimand with six members voting in favor and two members voting against its issuance.

IT IS THERFORE ORDERED, ADJUDGED AND DECREED BY THE COUNCIL that the prosecutor be, and is hereby, PRIVATELY REPRIMANDED by the Council for the conduct specified in this decision.

SIGNED this 26th day of September, 1984.

Tim Curry, Chairman
The Prosecutor Council

# Calendar

**Note:** The courses printed in **dark type** are Council approved professional development courses. All courses not in dark type need prior Council approval for reimbursement of travel expenses. The Council does not reimburse course registration fees.

**NOVEMBER**

| | | |
|---|---|---|
| 11-15 | Special Crimes—Investigation to Trial (NCDA) | New Orleans |
| 14-16 | Key Personnel (TDCAA) | Austin |
| 25-29 | Prosecution of Violent Crimes (NCDA) | Incline Village, N. Virg. |

**DECEMBER**

| | | |
|---|---|---|
| 2-6 | Criminal Investigator's School (NCDA) | San Diego |
| 5-7 | Elected Prosecutor Seminar (TDCAA) | Kerrville |
| 9-13 | The Trial of the Violent Juvenile (NCDA) | Los Angeles |
| 14-15 | General Paralegal Skills Course (SBT) | Houston |
| **12-13** | **Law Enforcement Workshop (TPC)** | **Belton** |

**JANUARY**

| | | |
|---|---|---|
| 25-26 | General Paralegal Skills Course (SBT) | El Paso |

**ACMD**-American Center for Mgmt. Devlpmt.
**CDLP**-Criminal Defense Lawyers Project
**DPS**-Department of Public Safety
**NCDA**-Nat'l College of District Attorneys
**NDAA**-National District Attorneys Association
**TDCAA**-Tex. Dist. & County Attorneys Assoc.
**TPC**-The Prosecutor Council
**SBT**-State Bar of Texas
**UT**-University of Texas Industrial Education Department

**REIMBURSEMENT DEADLINES**

Remember! TRAVEL REIMBURSEMENT APPLICATIONS must be received at the COUNCIL OFFICE within 60 days of the course attended.

**The Annual Criminal Law Update (September 25- 28, 1984)**
**DEADLINE FOR APPLICATION IS NOVEMBER 27, 1984.**

**The NCDA Trial Strategy & Techniques Course (October 7-11, 1984)**
**DEADLINE FOR APPLICATION IS DECEMBER 10, 1984.**

# The Hot Check Fee Law: Ask the Committee

*The Hot Check Fee Law is very broad, and questions arise over what are proper expenditures from the fund. This column is for your questions on the subject. It contains no official Council positions, but is intended to be reasoned opinions of your fellow prosecutors on problems arising under specific fact situations. The column is authored by members of the Hot Check Guidelines Subcommittee, a division of the Council's Advisory Committee. Chaired by the Hon. Jerry Cobb, C.D.A. for Denton County, the Subcommittee includes Kerry Armstrong, Assistant C.D.A. for Tarrant County; Ted Busch, Assistant D.A. for Harris County; the Hon. Pat Batchelor, C.D.A. for Navarro County; the Hon. Bob Gage, C.A. with Felony Responsibility for Freestone County; and the Hon. Bill Moore, C.A. for Tom Green County.*

*Send your questions (as carefully framed as possible) to the Council, care of TRUE BILL, which will forward them to the Subcommittee. If there is no consensus among the members as to the proper answer, the column will feature as many opinions as the members write.*

*As was last issue's overview of the Hot Check Fee Law, this article is by Kerry Armstrong.*

## EXPENDITURE FOR DWI VIDEOTAPE EQUIPMENT

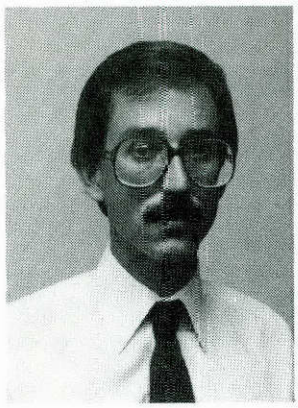
Regarding the need to videotape DWI suspects for use at trial, it would appear that there is a need in many counties to obtain the proper videotape equipment, but there is also a lack of funding for same.

Furthermore, many of these counties may have adequate hot check fee funds which might be helpful in obtaining video equipment and supplies. However, the hot check fee law (Article 53.08, C.C.P.) provides that expenditures from this fund "...may be used only to defray the salaries and expenses of the prosecutor's office,..." Therefore, an expenditure from the fund would not be lawful unless it was for a legitimate expense of the prosecutor's office.

It would certainly seem reasonable that the expenditure by a prosecutor's office for items to be used in the trial of a DWI case would be a legitimate expense of that office. Thus if the prosecutor's office was buying the equipment for itself there would be no problem. (Of course the equipment becomes county property.)

I realize that the original videotaping of the DWI suspect must occur at the situs of the breath test to be of some validity, and because such location is not at the prosecutor's office the videotape camera of necessity must be operated by a law enforcement officer.

It would thus seem that a co-operative intergovernmental project could exist wherein the prosecutor's office would obtain the videotape equipment and supplies (title to the property remaining in the county's name). The video camera and recorder could be located at the situs of the breath test equipment and be operated by the law enforcement agency to obtain evidence for use in the trial of a DWI case. Said equipment would be a legitimate expense of the prosecutor's office for which check fee funds could be used. □



# Personnel Management

## by Don McBeath

*Don McBeath is the Chief Administrator for the Criminal District Attorney's Office for Lubbock County. Using The Supervisor's Problem Solver (by W.H. Weiss; published by Amacom) as a source, Mr. McBeath focuses on personnel problems relevant to a prosecutor's office.*

I must begin with a confession -- often I attempted to snooze through classes in business administration, applying rural philosophies to the theories of management. In short, I thought the management ideas from the book were great and wonderful, but would never work in the real world.

I have since learned my earlier thoughts are true in many instances, but I have also learned that one should "not knock it until you have tried it." I do not propose to have all the answers, but I do hope to offer suggestions that might solve a problem somewhere. After all, one problem solved is one less to deal with.

**The Problem**

Overcoming resistance to change has long been a thorn in management's side. Our example is a top felony trial attorney who has worked her way through the ranks with excellence. She has proven herself and is now in mid-management decision making. She has welcomed prior advances, even though some came without additional remuneration. However, when offered the chance to move into the Appellate Division, she is hesitant. It would involve learning a totally new (and unknown) job, with a minimal pay increase. While you see the obvious benefits for her and the office, her hesitation grows.

**The Solution**

Realize that people view jobs from different perspectives. An employee may fear that the change will give others the impression that the employee has not been doing a good job. Or the employee may fear appearing incompetent while learning the new job. Furthermore, there is the fear that the new job carries less responsibility.

Show the employee that the new job will benefit both him or her and the office. Most employees have concern for the office as well as for themselves. Explain that the new job would be challenging, would carry more responsibility, and would increase the employee's knowledge and understanding of the office, prosecution, and the law.

If you sense fear or resistance from the employee, try to discuss those fears. Major concerns of the employee may be minor to you and subject to a fast and easy compromise.

After the change, show interest in the employee's accomplishments in the new position. Praise him or her when possible.

Also realize that some employees do not fear a new job, they are just not interested. They are content where they are, doing what they have been doing. One approach might be to place the person in different departments temporarily. This might be presented to the employee as a "fill in" job, while it would actually allow orientation to job areas he or she is being considered for. If the employee can see that her or she can master the task, the eventual transfer may be taken easier. □

## PLEASE NOTE: NEW POLICY ON BILLING FOR PUBLICATIONS

The Council will not longer bill for publications ordered; actual payment will be necessary in advance (not simply purchase orders) with the order.

This policy change reflects the decision in Attorney General Opinion MW-461, which held that the State Purchasing and General Services Commission is prohibited from deferring until the end of each month the collection of charges for copies of public records. Such deferral amounts to an extension of credit by the State to another entity, which is prohibited by Article III, section 50 of the Texas Constitution. Thus, the Council cannot, in effect, extend credit to prosecutors' offices by deferring collection of publication costs until after delivery.

The Council appreciates your cooperation in implementing this policy.

## POLICY RE: REQUESTS FOR EXTRA FREE INDICTMENT MANUALS

As it does with new publications, the Council provided each prosecutor's office with a free copy of the new Indictment Manual earlier this year.

Recognizing that larger offices could use additional copies, the Council has adopted the following policy:

Offices of five (5) or more prosecuting attorneys may receive a second copy without charge on request.

Offices of ten (10) or more attorneys may receive a third copy without charge on request.

In the event of hardship cases, make appeal to Andy Shuval, Executive Director.

Additional copies may be purchased at $55.00 each.

## CAR RENTAL AGREEMENTS

The State of Texas has discount agreements on car rentals with 7 companies. Rates include unlimited mileage† and are valid for state business or personal travel. Clip the adjacent card to keep in your wallet for handy reference.

A summary of the effective rates on Sept. 1, 1984, are as follows in the chart below (rates may vary from city to city because of franchise):

**CAR RENTAL AGREEMENTS**

Identify yourself as employed by the State of Texas. Know the number and/or rate for the particular company. Use a major credit card.

**Americar/Airways**.....Corporate Rate
**American International**.....Corporate Rate
**Avis**.....State of Texas Rate
**Budget**.....#444442; Gold Corp. Rate
**Dollar**.....#33 8006 07130; Gold Key Rate
**Hertz**.....#CDP ID 65800
**National**.....#5002069; State of Texas Rate

| 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 | $31.50 |
| **Compact** | 22.95 | 27.00 | 34.00 | 29.00 | 29.00 | 36.00 | 32.50 |
| **Intermediate** | 22.95 | 30.00 | 35.00 | 29.00 | 31.00 | 37.00 | 33.50 |
| **Full Size** | 28.95 | 30.00 | 36.00 | 29.00 | 34.00 | 39.00 | 35.50 |
| **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.

# Council Publications

## TECHNICAL MANUALS

**ELEMENTS MANUAL** - 4th Edition of the breakdown of the elements the prosecutor must prove to establish a conviction. Updated through the 1983 Regular Legislative Session. $2.00.

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

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

**NEW!**

**HOT CHECK MANUAL** - **New, Updated Version!** Laws and forms for collecting checks and trying check cases. $7.00.

**INDICTMENT MANUAL** - 300 pgs. on informations & indictments. Black letter law with annotations, forms, & a checklist of commonly occurring problems. Edited by Marvin Collins, former District Court Judge & current Chief, Civil Section, Tarrant County C.D.A.'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, and forms for setting up and operating a RCS section in a prosecutors's office. $3.00.

## PUBLIC INFORMATION PAMPHLETS

**ASSISTANCE FOR VICTIMS OF VIOLENT CRIME** outlines the qualifications and procedures for applying for aid under the Texas Crime Victims Compensation Act. 10 cents.

**D.W.I.** discusses the penalties and consequences of being convicted of Driving While Intoxicated and the effects of the offense on society. 10 cents.

**GUIDE TO THE PREVENTION OF SEXUAL ASSAULT** lists precautions to be taken at home, in a car, while walking, and while babysitting. Outlines steps to take if assaulted. 10 cents.

**HOT CHECKS** contains clues for detecting bad checks and procedures to follow when taking a check or when a bad check has been received. NEW REDUCED PRICE: $2.50 per 50.

**INFORMATION FOR VICTIMS AND WITNESSES** answers frequently-asked questions about the criminal justice system and how victims and witnesses assist with prosecution. 10 cents.

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

| | | Quantity | Price |
|---|---|---|---|
| **Technical Manuals** | | | |
| [ ] | Elements Manual | | |
| [ ] | Grand Jury Packet | _____ | _____ |
| [ ] | Guide to Report Writing | _____ | _____ |
| [ ] | Hot Check Manual | _____ | _____ |
| [ ] | Indictment Manual | _____ | _____ |
| [ ] | Investigators Desk Manual | _____ | _____ |
| [ ] | Reciprocal Child Support | _____ | _____ |
| | | _____ | _____ |
| **Public Information Pamphlets** | | | |
| [ ] | Assistance for Victims of Violent Crime | | |
| [ ] | D.W.I. | _____ | _____ |
| [ ] | Guide to the Prevention of Sexual Assault | _____ | _____ |
| [ ] | Hot Checks | _____ | _____ |
| [ ] | Information for Victims and Witnesses | _____ | _____ |
| | | _____ | _____ |
| | **TOTAL (PAYMENT ENCLOSED)** | | _____ |

Name _____ Office _____

Address _____ City _____ State _____ Zip _____

## 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.

# 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. Contact the Council at P. O. Box 13555, Austin, Texas 78711. (512)475-6825.

**Professional Development Training**

**COURTROOM DEMEANOR** - Informative, entertaining program covers testifying in court and the tactics of cross-examination. Alerts law enforcement officers to how witnesses are perceived by the jury and how to avoid common mistakes while on the stand. 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 introduction 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.

**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 & 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

## NEW!

**CAPITAL MURDER PROSECUTION** - Audio cassettes taped in August 1984 at the Capital Murder Prosecution Seminar at South Padre. Produced by The Prosecutor Council.

**The Initial Charging Decision** - David Crump

**Indictments & Bond Hearings** - Marvin Collins

**Voir Dire: Witherspoon and Adams Considerations** - Karen Beverly

**Selecting the Ideal Juror** - Rider Scott

**Use (& Abuse) of Psychiatric Testimony** - Rusty Ormesher

**Presentation of Evidence in the Punishment Hearings** - Rusty Hardin

**The Trial Judge's Role** - Judge George E. Dowlen, Judge Oliver S. Kitzman, & Judge Sam Robertson

**Successful Closing Arguments** - Norman Kline

**Recent Decisions** - Judge Mike McCormick

**Federal Law & Appeals Process** - Leslie Benitez, Dwayne Crowley & Bert Graham

**Public Information Programs**

**RAPE: VICTIM OR VICTOR** - Tactics women can use to reduce the risk of being raped. Preventive measures include keeping car doors locked, never opening doors to strangers, avoiding walking alone in dark, deserted places, not picking up hitchhikers, and more. 17 minutes. 1/2" VHS video tape.

**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** - Points out the special vulnerability of rural property and the common-sense steps that people who work in sparsely-populated areas can take to minimize the opportunity for crime. 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 videotape.

**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.

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

# Prosecutor Profile

**CHARLES J. SEBESTA**

The Honorable Charles J. Sebesta, Jr. was initially appointed to serve as District Attorney of the 21st Judicial District of Texas on September 1, 1975, to fill an unexpired term. The following year, he was elected to serve a full four year term. He was re-elected in 1980 and as of this writing he is currently seeking a third term.

Prior to assuming his present position, Charles was a member of a law firm in Caldwell, Texas from 1966-1970 and was twice elected Burleson County Judge, in 1970 and 1974. He has never been opposed for public office in either a primary or general election.

Born in Bryan, Texas, he received his B.A. degree in History and Political Science and his M.S. degree in Sociology and Psychology from Texas A&M. He received his Juris Doctorate in Law from Baylor University. In addition, he is a graduate of both the U.S. Army Command and General Staff College and the U.S. Army War College.

Charles was commissioned as a Second Lieutenant in the United States Army Transportation Corps in 1962 and served on active duty as a platoon leader and Company Commander in the 2nd Armored Division from 1963-1965. After his release from active duty, his initial assignment in the U.S. Army Reserves was in the Military Intelligence Corps. In December 1967, he was reassigned to the Judge Advocate General's Corps (International Law Division). He currently holds the rank of Colonel in the U.S. Army Reserve and is Commander of the 1st Military Law Center in San Antonio, Texas.

He is a member and past President of the Caldwell Rotary Club (Texas), County Coordinator for the Burleson County Chapter of the American Red Cross and an Officer and/or Director in several other civic and corporate organizations.

Charles lives with his wife (the former Jane McKenzie) and two children.

# The Sherlockers

**MARK HINNENKAMP**

Mark Hinnenkamp, like a lot of people in law enforcement, does double duty. But in a way different from most folks: He holds two jobs.

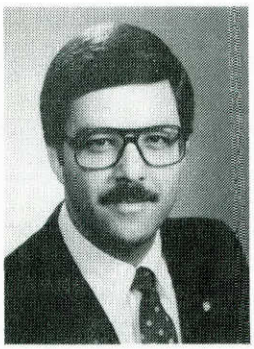
Mark began as a patrolman with the City of Lockhart. He later served as Deputy Sheriff of Caldwell County. Since 1977 Mark has been the Criminal District Attorney's Investigator in Caldwell County. But since 1978 he has also been the Chief of Police in Lockhart.

With nearly twelve years in law enforcement, Mark holds his Basic, Intermediate, Advanced, and Instructor certifications from the Texas Commission on Law Enforcement Officers Standards and Education. He is proficient in firearms training. A member of the International Association for Identification, he has testified as an expert in fingerprints. He is a respected member of the Prosecutor Council's faculty for its popular Law Enforcement Workshop, "Making a Winning Case."

Mark is unmarried and lives with his two daughters, Dyanna, 11, and Genevieve, 9.

[**Editor's Note:** Notice the lack of photos. Maybe our subjects are camera-shy. Instead of pictures, just imagine a couple of handsome, distinguished, honest, friendly faces. . .I'm sure they would both want you to! (Just teasing, gentlemen!)]

# Council Staff Profile



**R. J. "DUKE" BODISCH**

Duke Bodisch has joined the Council Staff as an Investigator. His responsibilities will include summarizing and investigating complaints under the direction of the Legal Counselor and providing technical assistance as directed by the Executive Director.

An experienced law enforcement officer, Duke spent eight years with the Harris County District Attorney's Office as an investigator, senior investigator and most recently, Lieutenant of Investigators. Prior to that he spent two years working for the Harris County Sheriff's Department.

Duke earned his Advanced Certificate from the Texas Commission on Law Enforcement Officer Standards and Education in 1978. In 1981 he received the Professional Criminal Investigator certificate awarded by the Texas District and County Attorneys Association.

Duke studied criminal investigation and law enforcement extensively. He holds an Associate and B.S. degree in Criminal Justice from the University of Houston. He is also certified by the Texas Education Agency to instruct college-level Criminal Justice courses. He has completed over 1600 hours of formal training on crime-related subjects including homicide, narcotics, advanced crime scene, arson, forensic hypnosis, offense reports and auto accident reconstruction, to name a few.

Duke is a former U. S. Marine and served in Vietnam. He is married to the former Sandra Lynn Cooke of Stephenville, Texas, and has three sons.

# Special Profile

**AMALIJA (AMY) HODGINS**

A hearty welcome to Amy Hodgins! She is the new Assistant Executive Director of the Texas District and County Attorneys Association.

Born in New York City, Amy attended Boston University and the University of Delaware, earning a B.A. in Political Science. A graduate of the Oklahoma City University School of law, Amy was on the Faculty Honor Roll and received Honors in Legal Research.

Amy interned with the Oklahoma Attorney General's Office for a year, then became an Assistant A.G. Later she served as General Counsel and as Legal Consultant to the Oklahoma State Department of Health, while also practicing privately in environmental law, civil rights and contract cases. She brings a wealth of experience to her new post: in the past four years she served as Assistant Coordinator and then as Executive Coordinator of the Oklahoma District Attorneys Training Coordination Council. Amy is licensed to practice before the Oklahoma Supreme Court, the Eastern, Northern and Western Federal District Courts of Oklahoma, the Tenth Circuit Court of Appeals, and the United States Supreme Court.

Her husband Daniel is a Patent Attorney with the Austin firm of Arnold, Durkee & White. They have three children: Katherine Jane, 18; Diane Elizabeth, 16; and Nicholas Stephen, 16.

# Classifieds

**County Court at Law Position Available** for misdemeanor prosecutor. Salary $24,000. Contact Jack Skeen, Jr., Criminal District Attorney, Smith County Courthouse, 4th Floor, Tyler, Texas 75702. 214/597-7263.

**Eastland County - Assistant Criminal District Attorney** to assist in misdemeanor and felony prosecution, juvenile cases, advise county officials, and other related duties as required. Salary negotiable, depending upon qualifications and experience. Position available immediately. Contact Emory C. Walton, Criminal District Attorney, P. O. Box 527, Eastland, TX 76448. 817/629-2659.

**Assistant District Attorney Needed** in Eighth Judicial District. Minimum of two years prosecution experience preferred. Primary responsibilities: appellant work, case intake, and trial. Salary commensurate with experience. Private civil practice allowed. Send resume to: Hon. Frank Long, Assistant District Attorney, P. O. Box 882, Sulphur Springs, TX 75482. 214/885-6544.

**Two Assistant District Attorney Positions Available:** Experience in criminal prosecution field desired but not mandatory. Salary $25,000 - $30,000, commensurate with experience. Send resume to: James Keeshan, District Attorney for the 9th Judicial District, Room 125, Montgomery County Courthouse, Conroe, TX 77301. Applicants will be contacted for appointment.

**Positions Available:** (1) 3 openings for misdemeanor prosecutors, (2) 1 opening for an appellate prosecutor, and (3) 1 opening for a misdemeanor investigator. Contact Criminal District Attorney Jerry Cobb, P. O. Box 2344, Denton, TX 76201. 817/565-8556.

**Experienced Investigator Wanted** for Erath County. Contact Gale Warren, 240 East Washington, Stephenville, TX 76401. 817/965-7838.

**Executive Coordinator Needed** for the Oklahoma District Attorneys Training Coordination Council. Experience as a D.A. or Asst. D.A. or an equivalent position in state or federal govt. for at least 3 years. Must be licensed to practice law in Oklahoma. Salary $48,000.00 (until 1/1/85), $50,000.00 (after 1/1/85). Resume to D.A.T.C.C., 3033 N. Walnut, Suite 100 West, Oklahoma City, OK 73105.

**Wanted: Research Assistant** to Bill White, Judge-Elect of the Court of Criminal Appeals. Available 1/1/85. Salary $33,000+. Send resume by December 1st to Bill White, 3011 Manila Street, San Antonio, TX 78217. Questions? Call Bill at 512/655-6721.

**FOR SALE**

**96 Vols. of Vernons Ann. Law Books** Includes Index, Penal Code, Code of Criminal Procedure, etc. with 1984 pocket parts. For info call Duke Bodisch at 512/475-6825.

EDITOR'S REMINDER: TRUE BILL will run your ad for as many issues as you need. However, it is published only every other month and thus may not serve your purpose quickly enough. Consider also placing your ad in The Texas Prosecutor, published every month by the Texas District and County Attorneys Association, 1210 Nueces, Suite 200, Austin, TX 78701. (512) 474-2436.

**The Prosecutor Council**
**P. O. Box 13555**
**Austin, Texas 78711**