TRUE BILL

THE NEWSLETTER OF THE PROSECUTOR COUNCIL
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A WHOLE NEW MEANING TO THAT OLD EXPRESSION:

"TIME I$ MONEY!"

COUNCIL ADDS TIME REQUIREMENT TO TRAVEL REGULATIONS

TRUE BILL recently published proposed regulations for reimbursement of travel expenses to attend professional development courses. (See issue of August-September, 1983, p. 24). At its September 27th meeting in Fort Worth, the Council adopted those regulations **with the following addition under III. GENERAL REQUIREMENTS FOR REIMBURSEMENT:**

D. TIMELINESS

The applicant must apply for reimbursement within sixty (60) days of the date of the course attended; otherwise, the application should contain a written reason why it was late. A late application will not receive consideration until the end of the current fiscal year (Sept. - Aug.), at which time reimbursement shall be contingent on the availability of Council travel funds; however, upon receipt of an acceptable reason, in writing, for the lateness of the application, the Executive Director may grant an exception and allow earlier consideration.

In This Issue

The Director's Corner

by Andy Shuval

In this issue are two articles about the changes in how the State handles people you convict.

This information is provided to you so that you may be aware of the changes made by the Legislature.

As you know, both houses were very tight with the dollar this year. Many of the changes may have been due to a desire on the part of the legislators to avoid spending money on new prisons. Nationwide of course, it is the "fashionable" position to support programs for community corrections and restitution centers.

One interesting fact—Texas is no longer the state with the most prisoners confined in their state prison system. California has become first in this area. California, you may remember, is the state that led the way twenty years ago in adopting liberal parole policies. It is now pioneering determinate sentencing. California is out of step, as usual.

The more things change, the more they stay the same.

Andy

TEXAS CRIME POLL

The results of the 1982 Texas Crime Poll offer insights into Texans' attitudes.

The poll is administered by the Survey Research Program at Sam Houston State University's Criminal Justice Center. Survey instruments were mailed to a scientifically selected random sample of 2000 Texas residents. A total of 1442 useable questionnaires were returned. The sample is statistically representative of the population of licensed drivers in Texas.

As examples, participants in the survey responded as follows:

Regarding Punishment:

- 90% believe that everyone released from prison should be supervised for a certain period of time after release.
- 58% said that an inmate should be required to serve his/her full sentence and 38% said that an inmate should be released early depending on his/her behavior in prison.
- 79% said rehabilitation should be a **very important** function of Texas prisons, 80% said punishment should be a **very important** function, and 83% said that deterrence should be a **very important** function.

Regarding Effectiveness of the Criminal Justice System:

- 61% (up from 46% in 1977) believe that the crime problem in their community has become worse during the previous three years and 51% expect it to become worse during the next three years.
- 77% believe that the courts are too easy on convicted criminals.

Regarding Gun Control:

- 67% indicated that they have at least one type of gun in their home.
- 71% believe that at least one type of gun should be registered.
- 46% believe that all guns should be registered, while 26% believe that handguns should be registered.

The survey also covered attitudes regarding fear of crime, the extent to which respondents have been victims, and respondents' knowledge of other victims.

For a copy, send $2 for Publication No. 83-T-0008: Survey Research Program, Criminal Justice Center, Sam Houston State University, Huntsville, Texas 77341.

PAROLE BOARD CHANGES NTO PROCEDURE

Felony prosecutors have seen a marked increase in Parole Board-issued Notices to Trial Officials (NTO). An NTO is a prerequisite to parole release. It gives officials a chance to protest the release of a notorious inmate. Some speculate the increase reflects efforts to ease TDC over-crowding; in fact, however, it represents a Board policy change offering prosecutors more significant input in release decisions.

Formerly, an NTO issued only after a case received at least one favorable vote from the parole panel. Now NTOs are issued when case processing begins, ten months ahead of the statutory parole eligibility month (initial review cases) or the docketed review month (subsequent review cases). This gives notice to prosecutors, **prior** to panel review, and insures that panel members have the benefit of responses the NTO may generate. Notice that this means NTOs occur at initial eligibility even in cases which would be set off routinely by the Board in several successive years due to the seriousness of the offense or criminal record.

HOT CHECK SYSTEM HELP WANTED

Does your office have a computerized system for hot checks? Would you answer prosecutors' questions about your system? The Council staff is preparing a list of names and numbers. Please let them know of your willingness to share your knowledge .

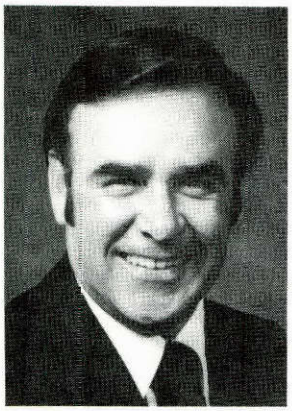
EMPLOYMENT OPPORTUNITIES

Personable, aggressive att'y for gen'l prac. in 3-man firm in Central TX town.. 2-5 yrs exp. incl. civil litigation. Resume in confidence to P. O. Box 517, Llano, TX 78643-0517.

Asst. C. A. needed 1/1/84. Expanding to 5 attys in misdemeanor prosec'n & civil responsibilities (child support, juvenile, mental health, child abuse, etc.) in growing county near Austin. Approx. $18,500 for recent grad. Resume to Bill Stubblefield, County Attorney, 3rd Floor, Williamson County Courthouse, Georgetown, TX 78626, or call 512 863-2311.

Asst. D. A. needed, felony prosec'n. From $21,000.00 + benefits or commensurate with exp. Contact Ron Felty, District Attorney, Hale County Courthouse, Plainview, TX 79072. More info call 806 296-2416 or 806 293-8481.

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



Texas Adult Probation Commission:

An Update

by Don R. Stiles

Don R. Stiles, Executive Director of the Commission since its inception in 1977, is a member of the American Corrections Association and The American Probation and Parole Association. He is a Director of the National Association of Probation Executives and a past President of the Texas Corrections Association.

The 68th Session of the Texas Legislature increased adult probation's ability to supervise an increasing number of felony offenders diverted from the Texas Department of Corrections (TDC). In so doing, the Legislature emphasized our intensive supervision probation program and gave our agency the responsibilities and funding to establish an innovative program of restitution centers in local adult probation departments.

The intensive supervision probation program was initiated during the 1981 legislative session. With appropriations of $5.5 million for the two-year period (FY '82-'83), the program's concept focussed on establishing specialized and reduced caseloads (40 felony probationers per officer) in local adult probation departments experiencing high rates of commitment to TDC. The legislative intent was for the program to divert a minimum of 1,000 offenders from the state's prisons over the two years. During the '82-'83 biennium, only 27 local adult probation departments were able to participate in the program. However, as of August 12, 1983, a total of 4,885 offenders had been placed in the program. We estimate the program would have successfully diverted 3,805 felony offenders during its first two years of operation. For the '84-'85 biennium, the Legislature appropriated a total of $14.8 million for the intensive supervison probation program and increased its expectations for the program to divert a total of 8,400 felony offenders. The Commission is taking steps to make the intensive supervision program available to all local adult probation departments in the state.

The restitution center program is perhaps the most innovative of the diversionary programs. The centers will be established by the local adult probation departments to provide the courts with another option in sentencing and diversion. The purpose of the program is clearly stated in a rider to the Commission's appropriation:

"It is the intent of the Legislature that the Adult Probation Commission should establish criteria to ensure that. . .Restitution Centers are used for offenders who would previously have been placed on regular probation or intensely supervised probation. The criteria established by the Adult Probation Commission should give the highest priority for restitution center placement to offenders on whom there has been a motion to revoke probation, and to offenders whose pre-sentence investigation report had indicated incarceration at the Texas Department of Corrections were this program not available."

The '84-'85 appropriation for the restitution center program is $12.1 million. With these funds, the Commission anticipates establishing ten centers during FY'84 and potentially diverting some 1,200 offenders over the two-year period.

At the commission's most recent meeting in Fort Worth on September 30, the Tarrant

County Adult Probation Department was awarded $392,432 to establish the first restitution center in the state. Contracting with the Volunteers of America organization, the Tarrant County department expects to have the forty-five bed facility operational this month.

Several other areas in the state have indicated an interest in establishing a restitution center and are expected to have formal applications before the Commission at their next meeting December 2nd. While some jursidiction will be able to justify a center for only their area, some may wish to join together contractually in the operation of a regional center. The Denton County Adult Probation Department is currently completing a feasibility study to design such a regional approach to serve a six to ten county area.

The concept of restitution centers is not new. Both Georgia and Mississippi have established a network of restitution centers in their states. In these states approximately 70% of the offenders placed in the centers successfully complete the program, while less than 2% are revoked for new offenses.

The Texas Legislature was specific on the qualifications of residents, the operations of a center, and the responsibilities of the Commission. Potential residents may not have committed a violent offense, can not have an extensive history of drug or alcohol abuse, may be a revoked probationer, must be a felony offender, and be employable.

The typical stay for a resident will be up to one year, with progress reviews at 3-month intervals. The probationer will be placed under intensive supervision during the first two months following release from the center. While in the center, the probationer must be employed, his wages going to the center's director for payment of:

- the cost for the resident's food, housing and supervision;
- travel expenses to and from work for the probationer;
- support of the probationer's dependents; and,
- restitution to the victim of the offense.

During off-work hours residents of the center will be required to perform community service work for governmental or non-profit agencies.

The Commission, in complying with the provisions of H.B. 658, has adopted standards for restitution centers. Additionally, the Commission staff is prepared to offer both technical assistance and training programs for those local departments establishing centers. Accountability for the program will be assured through the Commission's fiscal auditing and program monitoring.

The success of these and other diversion programs will ultimately rely on the cooperation of all of us in the criminal justice system. Our Commission and the local adult probation departments throughout the state will continue to work for efficient and effective community-based correctional programs, while coordinating our efforts with all elements of the criminal justice system.

The Texas Adult Probation Commission was created by the 65th Legislature in 1977 and is composed of six district judges and three citizen members. The Chief Justice of the Supreme Court of Texas appoints three of the district judges and two of the citizen members, while the Presiding Judge of the Texas Court of Criminal Appeals appoints the remaining members.

Currently serving on the Commission are:

Chairman:

Judge John C. Vance (Dallas)

Vice-Chairman:

Monsignor Dermot N. Brosnan (San Antonio)

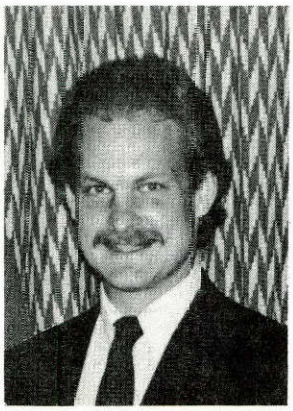
Secretary:

Ms. Diana S. Clark (Dallas)

Commissioners:

Judge Terry L. Jacks (San Marcos)
Judge B.B. Schraub (Seguin)
Mr. Max Sherman (Austin)
Judge Byron L. McClellan (Gatesville)
Judge Joe N. Kegans (Houston)
Judge Clarence N. Stevenson (Victoria)

For more information about the Commission and its other programs you may write to Texas Adult Probation Commission, 812 San Antonio Street, Suite 400, Austin, Texas 78701 or call (512) 475-1374.



Community Corrections:

The Parole Board's View

by Charls E. Walker, Jr.

Charls E. Walker, Jr. is General Counsel for the Texas Board of Pardons & Paroles.

Recent legislative and administrative changes will affect the operations of the Texas Board of Pardons and Paroles and the number of individuals being released from incarceration in TDC by order of the Board.

These changes reflect a significant shift away from warehousing prisoners and toward "community corrections." This shift was prompted by fiscal concerns, which have become acute in light of the Ruiz case. Faced with a TDC budget request of $1.5 billion for the biennium, the Legislature opted instead for the Rudd-Keller plan, which drastically reduced funds for new construction while seeking to guarantee to TDC a stable inmate population via diversions from incarceration. These diversions are to be through programs operated by local counties and districts, the Board of Pardons and Paroles (BPP), the Adult Probation Commission (TAPC), the Texas Juvenile Probation Commission (TJPC) and the Texas Youth Commission (TYC). Thus, while TDC's budget was increased a scant 3.5% to $619.7 million — less than half of what it requested —other agencies saw significant increases in budget to handle these diversionary programs:

Agency	Biennium Appropriations (millions)	% increase
BPP	$ 73.7	65.6%
TAPC	$ 114.6	111.0%
TJPC	$ 24.3	237.5%
TYC	$ 100.8	27.4%

This article will discuss several specific measures designed to decrease the number of persons incarcerated in TDC, both through an increase in the number released or transferred from confinement and through a reduction in the number transferred or returned to TDC custody.

Pre-Parole Transfer

SB 622 (the Pre-Parole Transfer bill) establishes the authority, through the efforts of the Board, TDC, and the office of the Governor, to transfer eligible prisoners from incarceration into a halfway house placement. These individuals would remain subject to TDC as "prisoners", as if in its physical custody. They would be subject to supervision by field agents of the Board. Transfer would be contingent upon approval by the Board, the Governor, and TDC. Eligible individuals include those who: are not currently confined for an offense in which a deadly weapon was used or exhibited (§3f(a), Art. 42.12, T.C.C.P.); have never been convicted of such crimes; and have never previously been denied release by the Board (initial review cases).

A rider to the appropriation indicates that funding for Pre-Parole Transfer cases contemplates "low-risk offenders who have not attained parole eligibility and who have a strong probability of being paroled on the initial review". An eligible prisoner could be released up to 180 days prior to his initial parole eligibility date, but, in fact, due to funding levels and time constraints , the Board contemplates releasing prisoners an average of 90 days before that date. These individuals, although "prisoners," would be placed in halfway houses and, if they served the remainder of their sentence prior to initial parole eligibility satisfactorily, they would be automatically transferred to a regular parole status upon attaining initial eligibility.

Because pre-parole transferees would still be "prisoners," they could be returned to

maximum security custody (actual physical incarceration in TDC) without the observance of the relatively stringent due process safeguards of Morrissey v. Brewer. Thus, re-transfer can be accomplished without any significant delay (during which the individual would be jailed locally, at county expense).

The Board and TDC have been finalizing transfer procedures under this act for some months now. No one has been transferred out of the department under this statutory authority to date; however the procedures should have become operational by October 15, 1983. The appropriation rider contemplates that the Board will maintain at least four hundred fifty (450) residential placements under this bill during fiscal years 1984 and 1985, each resident in a halfway house under the supervision of parole officers for 90 days. About 1,800 placements will be made during the year out of 2,500 eligible inmates, considering statutory and processing time limitations.

Parole in Absentia

The enactment of SB 218, effective April 26, 1983, affords the Board the statutory authority to release individuals on parole even though they are not, at the time of said release, in the actual physical custody of TDC. Individuals released under this authority would not have to be transferred from a local county jail or the prison or jail of another state or the federal system into the physical custody of TDC prior to being reviewed for and released on parole or becoming eligible for mandatory supervision release. This is already having a favorable impact on the population on hand in the Department. The Board estimated that approximately 100 inmates per year would become eligible for parole in absentia. In actuality the Board has received 170 applications for parole from inmates during July, August, and September. If this trend continues, 400 applications for parole are expected for fiscal year 1984 and for fiscal year 1985. If 50% are paroled, 200 will be released to parole supervision per year.

Appropriations riders

The Board's appropriation rider number 10 requires it to place at least 6,045 releases in halfway houses in fiscal year 1984 and at least 6,628 in fiscal year 1985. Rider number 8 recites that these individuals "should come from a class of parole eligibles who would not have been paroled without the availability of halfway house placements".

Board appropriation rider number 11 gives the Board an incentive to recommend a high percentage of eligible inmates to the Governor for parole release. The Board will receive $1,510 in fiscal year 1984 ($1,627 in fiscal year 1985) for each inmate in whose case it "recommends further investigation (FI)" over and above 45% ratio (FI Votes to cases considered). The FI per cent to date, in the first month of fiscal year 1984 stands at 46 per cent.

Increased Good Conduct Time

The provisions of Senate Bill 640, which is retroactive, increase the good conduct time available to all categories of prisoners, especially state approved trusties. Trusty good time of up to 2 and 1/2 days credit for each day actually served is provided for, in addition to such credit during times spent incarcerated in the county jail (prior to transfer to TDC) and the additional provision of up to fifteen (15) extra days credit monthly—which works out to an extra 1/2 days' credit per day served—for participation in vocational and educational programs.

TDC has not yet applied this statute to every inmate. Indeed, its first action under the new law was intended to benefit individuals subject to discharge—individuals whose cases were not covered by the mandatory supervision law due to their offenses having occurred prior to the effective date of that law. Thus the accelerated eligibility effect has not completely impacted.

Although the additional good time has resulted in a surge in mandatory supervision releases from August through October, the increase in paroles has not yet occurred. The surge in the number of eligible inmates will probably result in an increase in paroles for about two months. The additional releases should have a permanent effect on the prison population as long as the new good time laws exist. However, the increase in releases is a one-time phenomenon and will not recur.

The primary effect is to create a one-time surge in the number of paroles, mandatory supervision releases, and direct discharges as the additional good time is applied. After this surge the number of releases in all categories will return to the normal level.

In general, inmates will serve less time in TDC. As the Department reclassifies and recomputes statuses in cases subject to the educational/vocational provisions of this new law, the number of individuals to be considered for parole and early mandatory

release and the number of individuals who reach their mandatory release and discharge dates may show some increase.

Decrease in Governor Denial Rate

The Governor's rate of denial of Board recommendations for parole release has declined from 24% over the last two years of the Clements administration to a current rate of 4%. At this time, 2,000 more people per year can be expected to be released on parole than in the recent past.

Removal of the Governor From the Parole Process

The Legislature has proposed SJR 13, a constitutional amendment which would restructure the Board from a constitutionally prescribed agency to one of statutory creation. If the voters adopt that constitutional amendment in November, SB 396 would remove the Governor from the parole process while increasing the size of the Board from three to six members, all appointed by the Governor. Removal of the Governor from the parole release process would probably result in the actual release of the roughly 4% (about 500 persons) of Board recommendations which are currently being vetoed by the Governor.

Administrative Adoption of Parole Guidelines

The Board has recently adopted a discretionary guideline system which could produce a higher FI rate (further investigation or favorable initial action) while improving the quality of decision (releasing individuals less likely to commit parole violations). Research indicates that the use of the guideline system by agency decisionmakers can result in greater numbers recommended for release with said individuals enjoying a greater probability of success while on release. However, individual decisionmakers are not bound by the guidelines and may indicate in writing their reasons for not concurring in the result which the guideline would produce in a given case. The Board is currently considering 2,400 inmates for parole each month and expects this to rise to 2,600 per month before the end of 1984.

County Jail Work Release

The Legislature has also enacted, and the Governor has signed, Senate Bill 779, providing for an expanded county jail work release program. Third degree felony offenders could be ordered to serve in such programs if their offenses involved no bodily injury and if the district attorney requests that work release sentencing be arranged. Furthermore, individuals serving third degree felony sentences in a county jail work release program would be eligible to be paroled therefrom under the Board's Parole in Absentia program (SB 218; see above). (It is unknown how many individuals might be diverted from incarceration under this measure; the bill took effect September 1, 1983 and its effect has not impacted significantly to date.)

Texas Prison Management Act

Should the measures discussed above fail to keep the onhand population in check, the Board, TDC, and the Governor have recourse under the Texas Prison Management Act (SB 727), which mandates that, in an emergency overcrowding crisis, releases from custody are to be expedited in order to alleviate same.

The Prison Management Act is designed to preclude the possibility of TDC again "closing its doors" to new admissions, as it did in May of 1982. The act provides for a gubernatorial declaration of an "emergency overcrowding situation" when (1) prison population reaches 95% of "capacity," a term defined in the act, and (2) after initial efforts by TDC to check the growth have failed. Once an emergency is declared, extra "administrative" good conduct time would be awarded to eligible inmates — those in Class I or Trusty status who are not incarcerated for §3f(a) crimes. If the situation persists, additional good time awards and advancement of parole eligibility and parole consideration would be ordered.

* * * * * * * * * *

The Sixty-Eighth Session of the Texas Legislature may be regarded as a criminal justice/corrections bonanza. We have witnessed a fundamental — though by no means irreversible — shift in our approach to the problem of what to do with those who break the law in Texas. The endurance of this approach will depend upon the ability of the agencies responsible for administering diversionary programs to handle their increased responsibility without a significant increase in recidivism by those individuals now thrust back into the community for their "correctional experience". Only time will tell whether community corrections can be a safe and cost-effective approach to a problem which is as old as the law itself.

From Your Fellow Prosecutor:

Psychological Values as the Basis of the Jury's Verdict

by Robert Fisher

Robert "No Deal" Fisher, Assistant Nueces County Attorney, reports that for years this area has benefited attorneys in civil cases. Speaking from experience, he says the techniques do work.

For 50 years, behavioral scientists have researched the techniques of persuasion. Advertisers have accepted this research with open arms, making their "hidden persuaders" even more sophisticated. Lawyers have been less willing to learn from social science.

But one of the most valuable contributions to the practice of law developed by the behavioral scientist is the "psychological anchor." Psychological anchors are those three or four crucial points on which jurors base their verdict. How can we identify these anchors? How can they be utilized by the prosecutor?

In a criminal trial, there may be a variety of issues the prosecutor can present to the jury. Which issues should be selected? Which issues emphasized? A prosecutor should identify the three or four most important points for a case. All the evidence, every witness, every fact, must be related to these points.

As lawyers, we are trained to think inductively. We collect facts and draw conclusions based on those facts. However, jurors often make decisions deductively. They reason from a few fundamental premises to which they fit facts as they are received.

Lawyers have long recognized the problem of jury bias and have attempted during voir dire to ferret out prospective jurors who will not be able to view the case objectively. Despite this practice, all individuals hold attitudes that can be a source of bias simply by virtue of past experiences and values taught and reinforced.

Throughout life, each of us encounters new experiences that are difficult to reconcile with our basic psychological makeup. This clash between new information and previous attitudes has been called "cognitive dissonance," and jurors often experience it. After all, they are in a situation of relative stress. They are strangers in a place judges and lawyers are at home. They lack the overall comprehension of the case that the lawyers have. They react in the courtroom much the same way they do in everyday life, using basic coping mechanisms to deal with that which contradicts what they want to believe.

The first way of coping is to pretend that unwelcome information does not exist.

A second coping device is to twist or distort information until it becomes consistent with basic values.

A third method is to minimize the importance of the information.

The fourth maneuver is to avoid any encounter with offending facts. Jurors may do this by refusing to take responsibility for their verdict. Rather than send a defendant to death, a juror may vote for acquittal, claiming that the prosecutor failed to prove guilt beyond a reasonable doubt. Or the juror may simply not want to take responsibility for the defendant's execution.

The last method of coping is to change one's attitudes - the most difficult coping behavior. Juror's can't be readily induced to change their basic psychological structure.

To increase the chances of a favorable verdict, the prosecutor must anticipate which of the juror's basic beliefs are consistent with and which conflict with the various views of the case. The prosecutor should adopt a view supported by psychological anchors that not only establish key issues, but that are linked to the juror's attitudes and beliefs. Anchors

should be consistent with what the jurors already believe. Jurors will then be able to come to conclusions on the basis of their common sense.

How do we identify psychological anchors? They include fundamental beliefs of our society, for example: that every individual should be respected; that all people should be treated justly and fairly; that truth is admirable, lying despicable; that hard work, industry, and thrift are the proper way to success; and that sloth and shoddy workmanship or business practices should not be tolerated.

Psychological anchors frequently are crucial in jury deliberations. Typically, they provide two or three opinion leaders with the means to convert other jurors. In general, anchors provide a juror with a way to organize bits of information that are discussed during the trial, but which the juror might otherwise forget or dismiss. For the juror who may be confused, impatient, or tired, or for the juror who has prejudices that will not allow him to come to a conclusion inductively, psychological anchors provide an easy road to the desired conclusion.

Lawyers usually have an excellent grasp of legally important issues, but other points sometime become significant in unexpected ways. Post-trial interviews with jurors reveal that at times they base their verdict on matters that appeared of little consequence to the attorneys. In retrospect, the lawyers wonder how these considerations came to be so important. They are convinced that these issues were critical, but cannot see how they could have been anticipated.

The basic dynamic of jury deliberations is the resolution of cognitive dissonance. Evidence and logic clash with common sense attitudes and beliefs until a resolution is achieved. In order to bring about such a resolution, jurors often fix on issues that are apparently tangential.

The psychological anchor provides the prosecutor the key to find these important issues before the trial.

REFERENCES

1. BALES, R.F. & STRODTBECK, F.L., Phases In Group Problem Solving. Journal of Adnormal and Social Psychology, XLVI (1951) 485-495.
2. BROEDER, The University of Chicago Jury Project, 38 Nebraska Law Review 744, (1959).
3. DIAMOND & ZEISEL. A Courtroom Experiment On Juror Selection and Decision-Making. 1 Personality and Social Psychology Bulletin 276 (1974).
4. FISHER, B.A., Decision Emergence: Phases in Group Decision-Making. Speech Monographs, 1970, 37, 53-66.
5. FREDERICK, J. T., Jury Behavior: A Psychologist Examines Jury Selection. Ohio Northern University Law Review, 1978, 5, 571-585.
6. FREEDMAN, J. L. & FRASER, S. C., Compliance Without Pressure: The Foot-In-The-Door Technique. Journal of Personality and Social Psychology, 1966, 4, (2).
7. GARISHAM & LAWLESS, jurors Judge Justice: A Survey of Criminal Jurors, 3 New Mexico Law Review, 352 (1973).
8. KALVEN, H. JR, & SEISEL, H., The American Jury. Boston: Little Brown, 1966
9. KESSLER, J. B., The Social Psychology of Jury Deliberations. In R. J. Simon (ED) The Jury System in America. Beverly Hills: Sage 1975.
10. LUVERNA, P. N., The Art of Advocacy. Case & Comment, May-June, 1983, 36, 38, 40, 42, 44.
11. SANNITO, T. & ARNOLDS E. B., Jury Study Results. Trial Diplomacy Journal, 1983. 5-1, 5-11, 28; 5-2, 13-19.
12. SCHOTT, R. L., Trial by Jury: Reflections of a Juror. Trial. May 1977, 56-59.
13. SIMON, R. J., The Jury and the Defense of Insanity. Boston: Little Brown, 1967.
14. VINSON, D. E., Psychological Anchors: Influencing the Jury. Litigation 1982, 8, 20-22, 57-58.
15. VINSON, D. E., The Shadow Jury. Litigation, October, 1982. Vol. 68, 1243-1246.

Trial Reference Series

The two sheets following are designed to be cut out and inserted into a trial notebook for your handy reference.

Out-of-Court Identification of the Defendant will continue in the next TRUE BILL with questions asked to police officers and witnesses regarding line-ups.

CUT HERE

OUT-OF-COURT IDENTIFICATION
OF DEFENDANT
MEMORANDUM OF LAW

Regarding testimony by witnesses to the crime, it is proper to have the eyewitness testify on the stand that the defendant was identified by that witness on a prior occasion (assuming the ID procedure was constitutionally permissible). HOWEVER, no one else may testify that the eye witness identified the defendant as this would be bolstering. A police officer may testify as to the procedure used, to show that it was fair and did not "suggest" to the eyewitnesses who to choose. Be familiar with the following cases:

Lyons v. State 388 S.W.2d 950 (Tx. Cr. App., 1965) (conviction reversed because police testified that complainant previously identified the defendant; it was permissible however that the complainant testified as to the prior identification by photograph and at a lineup).

Williams v. State 565 S.W.2d 937 (Tx. Cr. App., 1978) (permissible to introduce photo and have eyewitnesses testify that they previously identified photograph as one of the persons who committed the crime).

Bell v. State 620 S.W.2d 116 (Tx. Cr. App., 1980) (error not preserved for review but court implicitly held, testimony by two witnesses about prior photographic identification was permissible).

Watts v. State 630 S.W.2d 737 (Tx. App., 1982, no writ) (trial judge erred when he refused to allow witness to testify as to prior identification by that witness of defendant's photograph and of defendant at a lineup).

However, under circumstances where the defense impeaches an eyewitness' identification of the defendant, bolstering may be permissible, Wilhoit v. State, 638 S.W.2d 489 (Tx.Cr.App., 1982), Smith v. State, 595 S.W.2d 120 (Tx.Cr.App., 1980) and Johnson v. State, 583 S.W.2d 399 (Tx.Cr.App., 1979). Make sure you are familiar with these cases before you seek to bolster an eyewitness identification.

Where identification of the defendant is not a major problem, a prosecutor may not wish to go into the depth the following questions suggest. In other cases, these questions may be more appropriate to a pre-trial identification hearing than the trial itself.

One last consideration is whether to put your eyewitness or police officer on the stand first. If the witness is called first then the prosecutor can evalutate the cross examination of the witness in order to determine what questions the officer should be asked. If you put your officer on first, great care should be exercised, as your eyewitness will not have been cross examined yet.

QUESTIONS REGARDING PHOTOGRAPHIC IDENTIFICATION ASKED TO POLICE OFFICERS

Questions Pertaining to the Particular Photographic Display

1. Did you have occasion to conduct a photographic display in this case, State v. _____?
2. On what date did you do so?
3. At approximately what time?
4. Where did this photographic display take place?
5. How long after the crime was this?
6. What, if anything, were the witnesses to this photographic display told before being permitted to see the photographs?
7. What are the names of the persons who viewed this display?
8. Did they all view it at the same time or did they view it separately?
9. How many photographs were displayed?
10. Describe the nature of the photographs viewed by these individuals.
    (Instruct the officer prior to questioning that he never call the photos mugshots or any similar term; instead, have him describe them as color/black-and-white photographs representing a full face and profile of certain persons, or similar descriptive terms.)
11. Were the persons in the photographs all similar in physical description?
    (Question the officer as to age range/hairstyle/race/facial features/etc., of the persons in the photos.)
12. How were the photographs displayed?
    (Have the officer explain the method of viewing: a stack of photos was set before the witness, who flipped through them, or the witness viewed photos put before him in a row.)
13. Did you or any person in your presence influence or suggest to the witness which photograph to select?
14. Did the witness see any other photographic displays prior to this one?
15. After the witness saw the photographic display, was he allowed to speak with anyone who was still waiting to view the display?

CUT HERE

CUT HERE

Questions Pertaining to the Admission of the Photopack

1. Officer, I show you what has been marked for purposes of identification as State's exhibit #_____.
2. Do you recognize the contents of that exhibit?
3. What is it?
4. Are the photographs in substantially the same condition as when you originally used them?
5. Are there any material alterations or deletions in the contents of that composite exhibit?

   Offer the photopack into evidence.

   (Do not pass the witness just yet. If the defense attorney wants a voir dire, let the judge rule on his request. Ask to let the jury see the exhibit. While they are looking at the photos, go over your notes to make sure you have not omitted any questions. When the jury is finished, you can either ask those questions you forgot or you can pass the witness.)

QUESTIONS REGARDING PHOTOGRAPHIC IDENTIFICATION ASKED TO EYEWITNESSES

Questions Pertaining to the Particular Photographic Display

1. Did you view a photographic display in this case, State vs. _____?
2. On what date did you do so?
3. At approximately what time?
4. Where did this photographic display take place?
5. Who showed you the photographs?
6. What, if anything, were you told before seing the photographs?

   (This is not hearsay; it is not being used for the truth of the matter stated, but merely to show that it was said.)
7. Did anyone else view the photos at the same time you saw them?
8. How many photographs were displayed?
9. Describe the photographs you viewed.

   (Instruct the person prior to questioning that he never call the photos mugshots or any similar term; instead, have him describe them as color/black-and-white photographs representing a full face and profile of certain persons, or similar descriptive terms.)

10. Were the persons in the photographs all similar in physical description? (Question as to age range/hairstyle/race/facial features/etc., of the people in the photos.)
11. How were the photographs displayed?
12. Did the officer or anyone else present suggest to you to select a particular photo?
13. Were the photographs of any suspects individually shown to you prior to this photographic display?
14. Did you select a photograph at this photographic display?
15. What caused you to select this photo?
16. Who is the person whose photograph you selected? (e.g., "the person who robbed me.")
17. Do you see that person in court today? Please point him out.

Questions for Identifying the Photopack

1. I show you what has been marked for purposes of identification (or admitted into evidence) as State's composite exhibit #_____.
2. Do you recognize the contents of that exhibit?
3. What is it?
4. Are they in substantially the same condition as when you originally saw them? (If the photopack has not yet been offered into evidence, do so.)
5. Have the witness pick out the photos he identified.

Questions Further Removing Any Hint of Suggestibility.

1. After you identified the defendant in the photo display did you communicate your identification of the defendant to any other witnesses participating in the display?
2. Did you ever select the photograph of any other person as being the one who committed this crime?
3. Did you ever select the photograph of another person at another photographic display as being the one who committed this crime?

Tender the Victim/Witness for Cross-Examination.

CUT HERE

From the Legal Counselor's Desk

by Scott Klippel

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

The Attorney General Opinion Committee has been very busy over the last two months; there have been several opinions of importance to prosecutors.

Attorney General Opinions

Attorney General Opinion JM-57

Re: Homeowners Assoc. & Sheriff's Office

The practice of a private homeowner's association paying money to the county to have sheriff's deputies or constable's deputies assigned specifically to patrol that neighborhood was called into question by Attorney General Opinion JM-57.

In the view of the Attorney General, those agreements are void and unenforceable. "County officials are not at liberty to base such decisions [to assign deputies] on the wishes of private groups to have public equipment and personnel specifically devoted to their interests or upon the willingness of such groups to pay therefore."

The alternatives for these private groups would be to either incorporate as a municipality and form a municipal law enforcement agency, or to hire a private security firm.

Local sheriffs and constables offices should be notified of this opinion in those counties where such agreements are currently in effect.

Attorney General Opinion JM-62

Re: Bailbondsmen & Practice of Law

This opinion deals with the worlds' second oldest profession, bail bondsmen (this second oldest profession got its start when members of the worlds' oldest profession first got busted), and to what extent they need attorneys to represent them in bail bond forfeiture proceedings.

It is improper for lay persons to file Motions for New Trials and make requests for extensions and remittance in bond forfeiture hearings as this was deemed to be the practice of law.

While an individual is entitled to represent himself, a corporation or partnership must be represented by an attorney; a non-attorney partner or sole stock holder may not do so.

Furthermore, the ability of a lay proprietor of a bond business to represent his own firm in Court is limited especially where the outcome of the bond forfeiture case would necessarily affect liability of the corporate surety who drew the bond.

Attorney General Opinion JM-65

Re: Expenditures by Commissioners Court

The Texas Constitution severely restricts the way that the Commissioners Court (or any other state body) may spend taxpayers' money.

Thus the A.G. ruled that a county may not donate money to a private non-profit hospital even though the county has no county hospital, hospital authority, or hospital district.

(Perhaps it's a good time to re-read Sections 51 and 52 of Article III of the Constitution.)

The county may, however, contract with the hospital to provide care for indigents and ambulance service so long as there is adequate consideration by the hospital to the county in return for the money spent by the county.

Attorney General Opinion JM-68

Re: Constitutionality of the New DWI Law

The Attorney General believes that SB 1, which provides that, on January 1, 1984, it will be illegal to drive an automobile while having a Blood Alcohol Concentration (BAC) of .10% or more, will pass constitutional muster.

Of course, under the old law .10% BAC or greater was merely a presumption. Note that under the new law the jury must still find that .10% BAC has been proven beyond a reasonable doubt. The breathalyzer or intoxilyzer test will still be under attack and the margin of error regarding tests at or just above .10% will still be crucial.

The opinion focused on two issues. First, is the new law void for vagueness, i.e., how will a person of ordinary intelligence know when his BAC has reached .10%? Secondly, is the .10% level a reasonable indication of intoxication?

The A.G.'s opinion nicely discusses both issues and cites several appellate decisions from other states. Cases not mentioned which you might also wish to look up are State v. Melcher, 655 P.2d 1169 (Wash. App., 1982) and State v. Hamza, 342 S.2d 80 (1976).

Attorney General Opinion JM-70

Re: The Professional Prosecutor's Act & State-Provided Funds

This one concerns everyone, as it involves money. State funds provided to prosecutors covered by the Professional Prosecutor Act (Art. 332b-4), pursuant to Section 4, are to be used solely at the prosecutor's discretion, except to increase the prosecutor's own salary. The Commissioners Court has no say in how those funds can be spent.

Furthermore, the Commissioner's Court must maintain funding at at least the same level as was in effect on August 27, 1979, the effective date of the Act.

The Professional Prosecutor Act is clearly and concisely written, but apparently one Commissioner's Court refused to believe the Act meant what it said.

Attorney General Opinion JM-73

Re: Good Time Jail Credits

This is another opinion which may affect your sheriff's office. Pursuant to Art. 5118a V.T.C.S. and §4.03, Sec. 2(a) C.C.P., where a sheriff provides good time credit to an inmate serving a jail sentence, the time the inmate served after arrest but prior to sentencing must be included in the sheriff's calculation of good time credit. However, an inmate is eligible for either good time credit pursuant to Art. 5118a or manual labor credit under Sec. 43.10, C.C.P., but not both.

Open Records Decisions

Open Records Decision 396

Re: Inmate's Trust Funds

The Sheriff of Galveston requested a decision to determine whether a list of inmates, how much they had in their inmate trust accounts, and what they were buying from the commissary was public information.

The Attorney General ruled that since the sheriff was merely a trustee of the inmate's funds, there wasn't a sufficient public concern to overcome the right to privacy. However, the A.G. said there is a legitimate public concern in how the inmates spent their money, except possibly for medication or publications.

(Thus an inmate may rest safe in the knowledge that the public will never know what trashy novels he reads or that he uses Preparation H, but he should be aware that his smoking three packs of Camels a day is open to public scrutiny.)

Open Records Decision 397

Re: Investigations into Police Misconduct

This dealt with a request for records pertaining to two investigations into alleged criminal misconduct by a police officer.

The investigations had been made 5 and 9 years prior to the request. No charges were ever filed and the statute of limitations had run.

The A.G. rejected the arguments that the investigations were exempted:

- under §3(a)(3) (information relating to litigation) since there was no evidence that litigation was reasonably expected, or
- under §3(a)(2) (information in personnel files) since the exception may be involved only when the information reveals "intimate details of a highly personal nature," or
- under §3(a)(8) (law enforcement records exception) since there was no ongoing investigation (presumably also because the statutes of limitations had run).

The A.G. did allow that names of witnesses could be witheld if to release the names could subject the witnesses to intimidation or harassment or if releasing the names would harm future prospects of cooperation between witnesses and law enforcement.

The Attorney General also denied that the information was exempted under § 3(a)(11) (interagency or intra-agency memorandum exception) since this exemption pertained only to advice, opinions or recommendations.

Section 3(a)(1) (confidentiality by law) could apply if it could be shown that the "false light" privacy exception applied. This exception was annunciated this year in ORD No. 372 (see TRUE BILL, June-July issue, p. 14) and concluded that:

> "a governmental body may withold information on the basis of false light privacy only if it finds, based upon the weight of evidence demonstrable to this office, that there is serious doubt about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal."

MEMORANDUM OF LAW REGARDING FEES CHARGED BY DISTRICT OR COUNTY OFFICIALS TO DISTRICT OR COUNTY ATTORNEYS

(This was prepared by staff at a prosecutor's request; we understand the problem is widespread.)

Article 3912e, Sec. 1 V.T.C.S. provides that:

> No district officer shall be paid by the State of Texas any fees or commissions for any service performed by him; nor shall the State or any county pay to any county officer in any county containing a population of twenty thousand (20,000) inhabitants or more according to the last preceding Federal Census any fee or commission for any service by him performed as such officer . . .

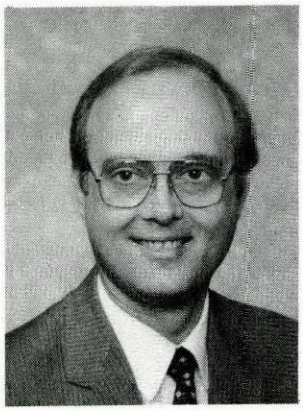
In so far as counties with populations of less than 20,000, Art. 3912e, Sec. 3 provides:

> In all cases where the Commissioners Court shall have determined that county officers or precinct officers in such county shall be compensated for their services by the payment of an annual salary, neither the State of Texas nor any county shall be charged with or pay to any of the officers so compensated, any fee or commission for the performance of any or all of the duties of their officers but such officers shall receive said salary in lieu of all other fees, commissions or compensation which they would otherwise be authorized to retain . . .

It is the obligation of each Commissioners Court at its first meeting every January to determine whether county officials shall be paid annual salaries or compensated on the basis of fees earned by them (Art. 3912e, Sec. 3). This must be reported to the Comptroller annually. According to the records at the Comptroller's Claim department, all county clerks in Texas are now paid annual salaries.

CONCLUSION

District or County Attorneys may not be charged a fee for copies of records that they request from either district clerks or county clerks.



As The Judges Saw It:

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

I hope all who attended TDCAA's annual meeting enjoyed it; Tom Krampitz and his staff are to be complimented. I had the pleasure of meeting many prosecutors and wish I had been able to talk with more of you.

Several people mentioned that the case summaries in the column seem almost too brief on occasion. Sometimes when I read over the published column I agree. I always walk a fine line between making the summary so brief that one doesn't get a good feel for the case or so long that the reader is put off by it. I hope to say enough to draw your attention to the case if you have a similar problem at the time and to provide something that will jog your memory if the problem comes up later. Please call (817) 334-1688 if I have written a poor summary or have overlooked the significance of a decision.

This column covers decisions handed down in September. The quiz is a grab-bag of cases—new, old, state, and federal. (Answers, pg. 24)

QUIZ

1. The defense declines to ask a State's witness any questions on cross, but instead announces that it reserves the right to re-call the witness for cross later (or, after asking some questions, reserves the right to re-call the witness). Can the defense re-call the witness later without turning the witness into "their witness" for purposes of the voucher rule and without sacrificing the right to ask leading questions?
   _____ yes _____ no

2. In some situations the State can impeach the defendant with proof of prior misconduct even though it has not resulted in final convictions. That right may arise if the defendant makes a misleading statement about his prior record (e.g., implying the current charge is the only run-in he has had with police). In which of these instances can the State use this right to impeach?
   _____ Misleading statement on direct.
   _____ Misleading statement on cross.

3. The police invite a suspect to the station to give a statement. The suspect is not formally under arrest; the police let him leave even though he incriminated himself. But the investigation clearly "focused" on the suspect by the time of questioning. Did this "focus" mean the suspect was "in custody" for Miranda purposes?
   _____ yes _____ no

4. Can a court clerk ever be a "neutral and detached magistrate" for purposes of issuing an arrest warrant?
   _____ yes _____ no

5. Article 1.15, C.C.P., deals with the procedures for agreeing to stipulate evidence. In which of these situations must the art. 1.15 requirements be met?
   ___ a) felony plea of guilty to the court.
   ___ b) felony plea of not guilty to the court.
   ___ c) felony trial to a jury.

6. If a hearsay statement otherwise meets the "excited utterance" requirements, is it automatically rendered inadmissible because the statement was made in response to questioning? (Assume that the questioning does not involve custodial interrogation.)
   _____ yes _____ no

7. Now assume that the person is in custody and is being questioned. The responses he gave would have qualified as excited utterances. Can the responses be admitted if Miranda warnings were not given?
_____ yes _____ no

8. Does the Texas self-incrimination clause, Art. I, §10 of the state constitution, give any broader protections than the federal Fifth Amendment?
_____ yes _____ no

9. If as a prosecutor you observe what may be jury misconduct, should you inform the judge immediately or should you investigate the matter first and inform the judge only if it appears that misconduct in fact occurred?
_____ Inform immediately.
_____ Investigate first.

10. The defendant presents a check for cashing. He is told that a bank officer must approve it. The officer approves it and the cashier cashes it. In a prosecution for forgery by passing, who must be alleged as the injured party?
_____ Bank officer.
_____ Cashier.

RECENT DECISIONS

Evans v. State
#485-82; delivered 9/14/83.

As the accused was being placed in a lineup he noticed his accomplice's attorney in the room and announced that that attorney would be representing him also. The police responded that this would not be possible because of a conflict of interest. A confession was subsequently taken with no attorney present and without any "initiation of contact" by the accused. **Held:** This was a violation of Edwards v. Arizona and the Fifth Amendment right to counsel. For the Supreme Court's latest attempts to explain what it means "to initiate further contact" under Edwards, look at Oregon v. Bradshaw, 103 S.Ct. 2830, and Wyrick v. Fields, 103 S.Ct. 394.

Ward v. State
#688-82; delivered 9/14/83.

While the State must have a charging instrument on file in the trial court in order to be ready for trial under the Speedy Trial Act, the State's readiness for trial will not be defeated even though it turns out that the indictment or information on file is fundamentally defective. The Court specifically overrules the El Paso Court of Appeals' decision saying that a **valid** charging instrument was needed to establish readiness. See Ex parte Kernahan, 643 S.W.2d 210.

In Ward the information was defective because the affidavit supporting it was unsigned. However, the reasoning behind the decision presumably applies also to the more common problem -- the fundamentally defective indictment which omits an element of the crime. In fact, Judge Miller was discussing the case at a seminar just after the decision came out, and he remarked that the Court was virtually compelled to make the decision it did. Otherwise every time the Court discovered a new fundamental defect in an indictment, that case (and all others like it) would immediately be barred from a re-trial because of a Speedy Trial Act violation.

I couldn't agree more with this decision, but I wonder if the Court isn't painting itself into corners by its continued adherence to its broad rules concerninig fundamental defects in indictments. For example, how does the holding that a fundamentally defective indictment is enough to satisfy the Speedy Trial Act square with the Court's oft-repeated statement that a fundamentally defective indictment does not even invoke the trial court's jurisdiction? Is the trial court's jurisdiction invoked for some purposes and not for others? As another example, remember that the Court has said that when the trial court's jurisdiction is not invoked (such as when the indictment is defective), jeopardy does not attach. E.g., Thompson v. State, 527 S.W.2d 888. But look at Foster v. State, 635 S.W.2d 710, to see how careful the Court had to be as it confronted the many U.S. Supreme Court cases which had implicitly found that jeopardy attached even though the charging instrument suffered from defects which would have been labeled "fundamental" in Texas. Many of us hope that these analytical inconsistencies will presuade the Court to undertake a thorough re-examination of its doctrine of fundamental error in indictments.

Also keep in mind that Ward doesn't necessarily mean that every defect in an indictment will be ignored for speedy trial purposes. The opinion does say, but without

elaboration, that the "nature of the defect and the length of [or?] reasonableness of delay" are to be considered. Finally, note that Ward also addressed the right to impound vehicles and said that the impoundment was justified by the officer's statement that since the only occupant of the vehicle was being taken to jail, the impoundment and inventory were needed to protect the vehicle and its contents. No showing that the particular vehicle was an impediment to traffic was required.

Ortega v. State
#821-82; delivered 9/14/83.

The jury charge on Credit Card Abuse required the jury to find that the accused intended to obtain property **and** services, rather than property **or** services. The Court held that since the charge was submitted in the conjunctive, the State had to show proof in the record that the accused intended to obtain both property and services; otherwise it would face a reversal for insufficient evidence and the entry of a judgment of acquittal. Ultimately the Court held that there was sufficient proof of the intent to obtain services because by presenting the credit card the accused obviously intended for the clerk to fill out the appropriate charge slips, and the clerk's efforts in doing so were said to be "professional services" within the Penal Code's definition of "services." (Penal Code §32.01(3).)

Most interesting is the Court's comment on how the State should have dealt with the erroneous conjunctive submission. (The State of course had the right to have the charge read "property **or** services.") The Court says that when the trial judge wants to submit an erroneous charge which increases the State's burden, the State should object and request a proper charge. If that request is denied and the proof is found insufficient because of the State's failure to meet the extra burden improperly assigned to it, the case will still be reversed but the error will be considered "trial error." The case will be remanded for a new trial, rather than having a judgment of acquittal entered. This is another one of those rare cases where the State may to some extent correct on appeal error committed against the State at trial.

Visor v. State
#933-82; delivered 9/14/83.

The police had obtained a combination search and arrest warrant which ordered them to arrest certain persons, including a person described only as "an unknown black female." The police arrested a black woman whom they saw exit the premises shortly before the warrant was executed. The Court holds that the order to arrest an "unknown black female" is too imprecise and is a prohibited general warrant. The Court further notes that two of its prior cases, Fisher v. State, 493 S.W.2d 841, and Rice v. State, 548 S.W.2d 725, have been called into question by Ybarra v. Illinois, 444 U.S. 85. Fisher and Rice had said that if a warrant authorized a search of specific premises and the arrest of specified persons, then it also implicitly authorized the search of unknown persons who were either on the premises at the time of the search or who entered the premises during the search. Ybarra strongly suggests that there is no right to search persons found on the premises during the execution of a warrant merely because they happen to be there.

Thompson v. State
#1009-82; delivered 8/14/83.

This case discusses what is often called the "Dempsey Rule," after Dempsey v. State, 266 S.W.2d 875. If there is evidence of some act by the deceased which would have given rise to a claim of self-defense, then the accused has the right to offer evidence explaining that act through either prior violent acts by the victim or the reputation of the victim for being violent or dangerous. Such evidence explaining the victim's action is admissible if it (1) would show that the victim was the aggressor, or (2) would support the reasonableness of the defendant's claim of apprehension of danger from the victim. In this case the Court held that the mere fact of prior UCW convictions against the victim was not probative under either branch of the Dempsey Rule.

Ex parte Mason
#1038-82; delivered 9/14/83.

This was an extradition case in which the defense was arguing that the various supporting papers for the Governor's Warrant showed a defect in the extradition process because there allegedly was no document which "substantially charged" the subject with a crime in the demanding state. Rather than simply presuming that the law of the demanding state was the same as the law of Texas, the Court said it would take judicial

notice of the laws of the sister state for purposes of examining the adequacy of the charging document. It said that while a trial court cannot take judicial notice of another state's laws, an appellate court can. Note that only a few months ago in Acosta v. State, ___ S.W.2d ___ (Tex. Crim. App.; #919-82; 6/1/83), the Court declined to take judicial notice of another state's laws where the vaildity of a prior conviction was at issue. So whether appellate courts will now take judicial notice of other laws in all situations is not clear. Also keep in mind that having an apellate court take judicial notice of other laws could hurt just as much as it helps. The law of the other state might in fact undermine our position, whereas the use of Texas law would help. We will need to research the other state's law to make sure we don't get ourselves blindsided in the appellate court, which may well mean that the best tack is simply to call the trial court's attention to the law of the sister state in the first instance.

Ex parte Crisp
#1044-82; delivered 9/14/83.

This of course is the 5-4 decision in which the Court threw out the War on Drugs legislation on the theory that the caption to the bill was defective. The Court held that the effect of throwing out the 1981 amendments was to leave the old version of the Controlled Substances Act in effect for the period of 1981-1983. If an indictment drafted under the War on Drugs amendments would still have stated an offense under the old law, the indictment is still valid, but of course the old penalty provisions apply. Motions for rehearing are being filed, but the likelihood of success is not thought to be great.

Youngblood v. State
#62,586; delivered 9/14/83.

In this auto theft case the Court finds the evidence insufficient that the named victim was the "owner" of the stolen vehicle. Apellant, a minor for civil law purposes at the time, sold a wrecked vehicle to the victim. Some two months later Appellant, without notice, "repossessed" the vehicle and sold it to someone else. The Court says that since the accused was a minor for civil purposes, he could disaffirm the contract of sale at any time during his minority, and that the resale of the car constituted that disaffirmance. This, according to the Court, immediately gave Appellant the greater right to possession of the vehicle, so the victim was not the "owner" under the Penal Code. (This gives new meaning to that old saying about "the innocence of youth.")

Houghham v. State
#62,923; delivered 9/14/83.

The defense contended that a violation of "the rule" required a reversal. A police officer witness had spoken to the mother of the victim, who also testified. Although there was a violation in a technical sense, there was no reason for reversal since the subject matter of the conversation between the witness did not really have to do with their testimony and the witnesses testified different subjects in any event. As Judge Clinton points out in his concurrence, the purpose of "the rule" is to keep the witnesses from influencing each other's testimony. So when the mother testified about a subject entirely different from what the officer had earlier testified about, there could not have been any prejudice since nothing the mother said could have bolstered the officer's testimony.

Randolph v. State
#63,079; delivered 9/14/83.

Although the murder indictment charged that the accused caused the death by "acting together" with another, the Court held that the "acting together" language was surplusage. The conviction could be upheld even if the evidence showed that the accused caused the death solely by his own actions.

Stephens v. State
#63,722; delivered 9/14/83.

This is another one of those cases holding that a defense witness did not become a reputation witness by testifying that her husband (the defendant) loved the children, supported the family, held a good job, etc. One of the questions asked the witness by the State was "Did you know that your husband had been convicted [of a certain offense]?" The State argued that even if this were an improper question in the area of reputation testimony, nevertheless it was a proper way to prove up the accused's prior criminal record during the punishment stage of the trial. Although the Court did not hold that the State could never prove up prior convictions through

the defendant's spouse, it did say that a hearsay answer to a "Did you know" question was no evidence of a final conviction.

Brown v. State
#65,431; delivered 9/14/83.

This is Texas v. Brown, 103 S.Ct. 1535, which the Court now affirms on remand. The Court split 4-1-4 on whether Art. I, §9 of the Texas Constitution gives any greater protection than the Fourth Amendment. Judge Odom simply concurred in the result, so his vote in later cases with the same question in them will decide the outcome of this issue.

Latham v. State
#65,564; delivered 9/14/83

If the defense requests a jury shuffle, the names to be shuffled are those of the trial court jury panel, not the names of all the jurors summoned for service during the week. The shuffle must be conducted in the courtroom, not in some other location such as the central jury room. Though the Court doesn't address the issue directly, it implies that in a multi-defendant case there is only one jury shuffle, but it doesn't indicate what happens if only some of the defendants want a shuffle.

Harris v. State
#65,762-63; delivered 9/14/83.

The proof showed the defendant entered the back door of a restaurant open for business, entered a storage area not for public access, and then stole several items. The burglary indictment pled that there was an entry into a building not then open to the public. The defendant claimed there was a variance between pleading and proof because the accused entered a building open to the public and then did the burglary--entering a **portion** of a building not open to the public. The majority rejects the claim, holding that the allegation of entering a building not open to the public necessarily includes an allegation of entering only a portion of a building not open to the public.

Phillips v. State
#67,562; delivered 9/14/83.

Just because cases with higher docket numbers went to trial before the trial of Appellant's case does not demonstrate that the State was not ready for trial on Appellant's case. Trying cases out of their numerical order on the docket would be no evidence of a lack of readiness on the earlier cases unless the accused at least showed that the prosecution was responsible for delaying trials on the older cases.

Mead v. State
#68,025; delivered 9/14/83

Judge Campbell's opinion, joined by Judges Tom Davis, W.C. Davis, and McCormick, is a dissent to the denial of the State's second motion for rehearing without opinion. On original submission the Court decided 5-4 that the capital venireman's promise to defense counsel to "be truthful" in answering the punishment issues prevented the State from challenging for cause, despite the juror's many previous statements that he could never vote for a death penalty and would automatically answer at least one of the punishment questions "no." Mead v. State, 645, S.W.2d 279.

What Judge Campbell and the state point out, but what we could never get the majority to mention, is that this holding is, on its face, in direct conflict with what the Court said in O'Bryan v. State, 591 S.W.2d 464, and Vigneault v. State, 600 S.W.2d 318. This was my case, and I have never been more frustrated by the Court's total unwillingness to acknowledge, much less resolve, the conflict in its decisions. I encourage anyone trying a capital case to pay close attention to these cases; make sure that the State gets in the last lick on voir dire so that the promise to be truthful is not the last thing the prospective juror says. We brought this case to the attention of Leslie Benitez, who does an excellent job handling the death penalty work in the Attorney General's Office, and she has agreed to petition for certiorari on the case.

Meanes v. State
#68,901; delivered 9/14/83.

Just as the Supreme Court itself said in Enmund v. Florida, 102 S.Ct. 3368, there is no absolute prohibition against giving the death penalty to a non-triggerman. The Constitution requires only that there be the proper showing that the non-triggerman either attempted to kill or intended or contemplated that life be taken. Since Enmund permits non-triggermen to receive the death penalty in some circumstances, the State had the right to voir

dire the jury on their ability to apply the law of parties (as modified by Enmund) on the deliberateness issue.

Morin v. State
#69,028; delivered 9/14/83.

A plea of guilty in a capital case is permissible. The accused can plead guilty, the judge can instruct the jury to find the accused guilty, and the jury will then proceed to answer the punishment issues.

Jackson v. State
#958-82; delivered 9/21/83
Barnhill v. State
#57,919; delivered 9/21/83

These cases contain a good review of the rules concerning pre-trial identification procedures. Barnhill was a case in which a formal complaint had been filed before the lineup took place, meaning that formal criminal proceedings had begun and the right to counsel had attached. Since the record did not show that counsel was at the lineup nor that counsel was waived, the lineup identification was tainted under U.S. v. Wade, 388 U.S. 218, and Gilbert v. California, 388 U.S. 263. The Court reminds us that once there is a Wade-Gilbert violation of the right to counsel, the out-of-court identification is absolutely inadmissible. The in-court ID is admissible only if the "independent source" test is met.

Jackson, on the other hand, involved the due process claim that the pre-trial ID was tainted by an unnecessarily suggestive one-on-one showup. The Court reviews the factors which determine whether a suggestive ID procedure tainted the identification, the ultimate test being whether the procedure involved a substantial likelihood of misidentification. The factors involved are listed in Neil v. Biggers, 409 U.S. 188.

Parker v. State
#67,947; delivered 9/21/83

As it did recently in Spriggs v. State, 652 S.W.2d 405, the Court emphasizes that where a witness for the State has (or has had) charges pending against him during the pendency of the case on trial, the defense is entitled to bring out the existence of those charges on cross-examination even though those charges have not or did not result in final convictions. Although art. 38.29, C.C.P, appears to preclude the use of mere pending charges for impeachment purposes, that rule gives way where the existence of the charges would give rise to a possibility of bias, animus, or a motive to testify falsely (i.e., that the witness would testify favorably for the State in hopes that it would benefit him in his own case). In other words, art. 38.29 prevents the use of pending charges where those charges would have only general impeachment value, but the pending charges are admissible where they have a **specific** impeachment value—bias, animus, or motive.

In this case the impeachment should have been allowed even though both the prosecutor and the witness, outside the jury's presence, testified that the witness had been promised no consideration in return for his testimony.

Ex parte Kernahan
#1052-82; delivered 9/28/83.

Although art. 32A.02, C.C.P., gives the State 120 days in a felony case to be ready for trial in order to avoid a dismissal under the Speedy Trial Act, art 17.151, C.C.P., says that if the State is not ready for trial on a felony within 90 days, the accused has the absolute right to be released on bail—whether by placing him on a personal bond or by lowering the bail required to an amount the accused can actually meet. In this case the State had absolutely no charging instrument on file by day 90, so the accused was ordered released on bond. That the State had put off indicting the accused because the parties had been negotiating in the hopes of disposing of the matter without going through with an indictment was held to be no excuse for not complying with art. 17.151. (This is the same Kernahan case regarding which the Court disapproved of the lower court's statement that a **valid** charging instrument was needed before the State could be ready for trial.)

Harrel v. State
#105-83; delivered 9/28/83.

In a number of fairly recent cases the Court mentioned the rule that if a weapon which is deadly per se (such as a pistol) is used in a deadly fashion and death results, then no aggravated assault charge is required even though the evidence might otherwise seem to raise the lesser offense. The theory was that the use of the deadly weapon raised a presumption of intent to kill. The Court now

says that those old cases trace back to specific statutory presumptions under the prior penal code. There being no such statutory presumption in the current code, there no longer is any presumption of an intent to kill just because a deadly weapon is used. Therefore a person causing a death by use of a deadly weapon will now be entitled to an aggravated assault submission in a murder case if he meets the usual tests for the lesser-included offense.

Wheeler v. State
#59,804; delivered 9/28/83.

Back on July 21, 1982, a panel had affirmed this conviction for possession of marihuana over 4 ounces, but the en banc Court now reverses for an illegal search. The police had become suspicious of a greenhouse which was located in a field and surrounded by barbed wire fences. Because the greenhouse covering was opaque, the officers could not see what was inside, but they kept the house under surveillance and used binoculars and night vision scopes to see what was going on inside. This surveillance took place from public roadways and from neighboring land whose owner had authorized the police entry. Apparently a helicopter was used once, but nothing was observed. Finally, the officers were observing the greenhouse through a 600-millimeter lens when they saw the louvres in front on the exhaust fan pop open, and inside they could see growing marihuana plants. They then obtained a warrant and searched the greenhouse.

Although recognizing the general rule that the observation of what is left open to view is no "search" at all under the Fourth Amendment, and also recognizing that the use of vision-enhancing devices such as binoculars and telescopes usually invokes no special Fourth Amendment problems, the court nevertheless holds that the observation of the greenhouse through the 600-millimeter lens was a "search," and an illegal one since it was done without a warrant. The Court emphasized the unusually strong objective expectation of and desire for privacy and apparently concludes that this is the type of expectation of privacy that society is prepared to recognize as reasonable in light of the long intensive surveillance that was needed to pierce the privacy of the greenhouse. (I understand that since this case seems so out of line with what everyone had thought the law to be, Cappy Eads and his staff may petition for certiorari if unsuccessful on rehearing.)

Brown v. State
#62,326; delivered 9/28/83.

A trial judge may, in his discretion, admit the results of tests or experiments conducted outside the courtroom once it is established that the experiment was conducted under conditions similar to those existing at the time of the event in question. Here the police returned to the shooting scene to see if the accused could have seen the victim through the doorway of the house if the parties had been standing in the locations described by the the victim. This was important because the accused was denying an intent to kill when he shot through the door of the house. The Court upheld the admission of this "test."

Weaver v. State
#68,125; delivered 9/28/83.

The "abduction" which is the gist of a kidnapping is an on-going, continuous act, so that where the State alleged that the accused abducted the victim with the intent to violate or sexually abuse, the State did not have to prove that such an intent existed at the moment when the abduction first occurred. It is enough that the accused have that intent during the time the victim is restrained.

If a party wants to invoke the Uniform Act to Secure Attendance of Witnesses From Without the State, art. 24.28, §4, C.C.P., the party must show in detail why the testimony of that witness is necessary and material. Bare assertions of that materiality are not enough. If the accused has not even talked to the out-of-state witness, he must do more than say that he has a "pretty good idea" that the witness will testify favorably.

ANSWERS

1. Yes. Craig v. State, 594 S.W.2d 91. The State can do the same. Firo v. State, #618-83; delivered 9/28/83; Spadachene v. State., 127 S.W.2d 466.

2. Misleading statement made on direct examination. Shipman v. State, 604 S.W.2d 182. Ex parte Carter, 621 S.W.2d 786, shows how the Court may be fairly lenient in deciding what constituted a misleading statement on direct examination. Note also that in Baxter v. State, 645 S.W.2d 812,

the Court said that some statements made on cross-examination might also give rise to impeachment as long as the prosecutor hadn't "set up" the accused. At page 816 the Baxter court also said that in the punishment stage of a case where probation is at issue, the evidence of unadjudicated offenses might be admissible, not just for impeachment, but as substantive evidence concerning the defendant's suitability for probation, citing Cleveland v. State, 502 S.W.2d 524. But keep in mind that Baxter was a 4-judge opinion, with one judge concurring in the result, one not participating, and three dissenting.

3. No. California v. Beheler, 103 S.CT. 3517. Accord: Stone v. State, 583 S.W.2d 410.

4. Yes. Shadwick v. City of Tampa, 92 S.CT. 2119.

5. a) and b). Art. 1.15 applies to all types of pleas to the court. Clark v. State, #61,040; delivered 7/20/83; Berry v. State, 504 S.W.2d 501. Williams v. State, 641 S.W.2d 925 (but art. 1.15 does not apply to a punishment hearing before the court after a jury decides guilt/innocence).

6. No. Ward v. State, #58,099; delivered 9/21/83.

7. No. Smith v. State, 507 S.W.2d 779, but at page 781 the Court indicated that a non-reponsive answer given under the grip of emotion might qualify as a "volunteered statement" falling outside the Miranda requirements, especially if the particular question would not normally have elicited an incriminating response.

8. No. Ex parte Shorthouse, 640 S.W.2d 924.

9. Inform immediately. Chambliss v. State, 647 S.W.2d 257.

10. Cashier. Stanley v. State, 646 S.W.2d 447.

REMEMBER:

Get your Travel Reimbursement Requests in to the Council on time!

See article, page 1,
COUNCIL ADDS TIME REQUIREMENT TO TRAVEL REGULATIONS

You Laws That May Have MISSED

With the pecan harvest upon us, take heed and keep the following statute at your fingertips. .

Do you have a "favorite" Texas law? Send it to us and we'll be happy to credit you with "discovering" it.

This entry was submitted by Scott Klippel, our Legal Counsellor.

Art. 6143.1. Thrashing pecans; penalty

Section 1. Wherever the term thrash is used herein, it shall mean to beat or strike with a stick or other object.

Sec. 2. It is unlawful for any person to thrash pecans from any pecan tree or cause pecans to fall from the tree by any means other than the fall caused by nature, unless:

(1) the tree is located on land owned by the person doing the thrashing; or

(2) in case the tree is located on privately-owned land, he has the written consent of the owner or lessee or his authorized agent; or

(3) in case the tree is located on land owned by the state, a county, a city, a school district, or another district or political subdivision of the state, he has the written consent of an officer or agent of the agency or political subdivision controlling the property or, if the land is within the boundaries of an incorporated city, the written consent of the mayor, or, if the land is not within the boundaries of any incorporated city, the county judge of the county.

Sec. 3. A person who violates any provision of the Act is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $5 nor more than $300 or by confinement in the county jail for not more than three months or both.

Acts 1971, 62nd Leg., p. 1289, ch. 331, eff. Aug. 30, 1971.

Calendar

NOTE: The courses listed below and printed in **dark type** are Council approved professional development courses. The reference below each approved course indicates which Newsletter gave a synopsis of this course. All courses not in dark type will need prior Council approval for reimbursement of travel expenses.

NOVEMBER

1-2	Supervising Management (Basic)(UTI)	Austin
2-4	Key Personnel Seminar (TDCAA)	Austin
3-4	Criminal Defense Skills Course (CDLP)	Amarillo
10-11	New Texas Rules of Evidence (UTL)	Austin
13-15	Investigation & Prosecution - The Prosecutor's Dual Role (NCDA) (Ref. Newsletter, Nov.-Dec. 1981, p. 11)	San Francisco
13-17	Trial Advocacy for Prosecutors (NCDA) (Ref. Newsletter, Nov.-Dec. 1981, pg. 7)	Denver
14	Effective Time Management (TTU)	Fort Worth
17	**How to Win Adult Sexual Assault Cases (TPC)** (Ref. Newsletter, April-May, 1983, p. 1, and this TRUE BILL, p. 27)	**San Antonio**
18	Effective Time Management (TTU)	Houston

DECEMBER

7-9	**Prosecutor's Investigator School (NCDA)**	**Huntsville**
8-9	Federal Criminal Law Institute (CDLP)	Dallas

JANUARY

9-13	Motor Vehicle Theft Investigators' School (DPS)	Austin
13	Special Criminal Law Institute: DWI Defense (CDLP)	Houston
15-20	Criminal Investigators' School (DPS)	Austin

CDLP - Criminal Defense Lawyers Project
NCDA - National College of District Attorneys
SBT - State Bar of Texas
TDCAA - Texas District and County Attorneys Association
TTU - Texas Tech University Center for Professional Development
DPS - Department of Public Safety
NDAA - National District Attorneys Association
TCPA - Texas Crime Prevention Association
TPC - The Prosecutor Council
UTL - UT School of Law
UTI - UT Industrial Education Department

HOW TO WIN ADULT SEXUAL ASSAULT CASES

An "ENCORE" Presentation!

THURSDAY, NOVEMBER 17th
8:30 am to 4:30 pm

MARRIOTT HOTEL, 711 EAST RIVERWALK, SAN ANTONIO

Come to the Council seminar that was well-received in Fort Worth last May.
(see Newsletter, April-May, 1983, pg. 1)
Developed by a committee of prosecutors, this course is designed to assist prosecutors in dealing with rape victims and identifying elements essential to effective prosecution.
Topics include Rape Investigation; Examination, Analysis, & Laboratory;
Rape Crisis/Victim Assistance; Prosecution of a Rape Case; and a Panel Discussion.

FREE REGISTRATION! Just complete the form below, fold the page in thirds, staple, & mail.

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Audio Visual Loan Library

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

Professional Development Training

NEW!

CHALLENGING A SEARCH AND SEIZURE - Be ready for what the other side may throw you. (And take the words right out of their mouths!) Knox Jones, noted criminal defense attorney from McAllen, explains tactics for the defense at a suppression hearing. Taped in February and updated in July 1982. Produced by the State Bar of Texas. 75 minutes. 1/2" VHS videotape.

COURTROOM DEMEANOR - Do's and don'ts of testifying in court and the tactics of cross-examination. By James Barklow, former Assistant District Attorney for Dallas County. 57 minutes. 3/4" U-Matic, 1/2" Beta, or 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 - Audio cassettes ideal for prosecutor training or for review. Trial experts share successful techniques. Produced by the National College of District Attorneys.

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

Public Information Programs

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

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

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

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

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

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

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

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

Council Publications

NEW!

CRIMINAL LAW UPDATE - 20-page summary of last year's major cases affecting law enforcement & prosecution, prepared by C. Chris Marshall, Chief of the Appellate Section of the Tarrant County District Attorney's Office.

A LAW ENFORCEMENT OFFICER'S GUIDE TO RECENT CASES - 8-page version of the CRIMINAL LAW UPDATE, prepared especially for law enforcement officers.

The Council recommends the UPDATE as a teacher's guide to a training course for officers, with the GUIDE as a handout. All elected prosecutors should have received an UPDATE and a GUIDE in October. Additional copies of the GUIDE are 25 cents; we will attach your cover letter for 5 cents more. The Council may publish these works annually, if the need exists. Let us know!

ELEMENTS MANUAL - A breakdown of the elements the prosecutor must prove to establish a conviction. Designed for peace officers and grand jurors. $2.00.

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

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

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

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

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

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

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

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

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

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Addressing the Issues

by Thomas L. Bridges

The following is the first of several articles by prosecutors who acted as discussion leaders during the prosecutorial ethics portion of the Basic Prosecution Course in June, 1983. The Honorable Thomas L. (Tom) Bridges is District Attorney of the 36th Judicial District (San Patricio and Aransas Counties). The ethics problems assigned to him during the Course concerned issues which may confront a prosecutor during his initial charging responsibilities. We'd like to thank Tom for his efforts on behalf of all prosecutors.

The decision to charge, what the charge should be, how to approach disposition of the charges — all usually depend upon the evidence available to the State. However, the accompanying circumstances may affect what otherwise might appear to be good cases.

The first hypothetical case we had was the "reluctant complainant" problem:

Defendant is a 17-year-old male. At age sixteen he was charged with assault but the juvenile court, instead of making his first trip to court memorable for its punishment, assessed an unsupervised probation.

Now, he and several friends have surrounded another teenager from a neighboring school, beat him up, and taken his wallet containing $15.00. This defendant was the ringleader. The complainant suffered bruises, was treated and released from the hospital. Two weeks later, the victim saw the defendant, determined his identity, and signed a complaint. When the defendant was arrested, he admitted verbally to the arresting officer that he was present but denied participation in the assault.

You call the complainant and speak to him and his parents about the case. They tell you that they do not wish to proceed and are adamant about it. The defendant's family has paid the complainant's medical bills and expressed their regrets over the telephone. The complainant and his family feel bad for the defendant and feel he did it to make himself look big to the other boys, all of whom had been drinking.

Since the complainant does not wish to proceed, is there any ethical problem with proceeding? The consensus among those attending the Basic Prosecution Course was that these facts present no ethical problem. Perhaps a weight-of-the-evidence problem, but no ethical problem.

Decisions like these are often easier when we review the basics: As prosecutors we represent the people of the State of Texas who have decreed through their legislative representatives that certain conduct shall be prohibited. Justification for that prohibition lies in the belief that such conduct is harmful to the People as a whole.

Whether or not an individual victim results from the prohibited conduct is really not material to the prosecutor's charging decision, ethically speaking. As a practical consideration, yes; ethically, no. The complainant/victim in this case is little more than a mere withess. What he or his parents want the prosecutor to do with the case has no direct ethical bearing on the charging decision if the prosecutor remembers that the People are also victims.

Notice I said "direct" ethical bearing on the prosecutor's decision. Indirectly the desires of the individual complainant/victim do pose an ethical problem not so easily answered. Because of his reluctance to cooperate, the complainant's testimony may make proof of an essential element difficult at best, if not impossible. Still, we are talking practical considerations: evidence, not ethics. Notwithstanding DR 7-103 of the State Bar Rules prohibiting initiation of charges not

supported by probable cause, is there one among us who would not subscribe to the general rule that says it is unethical to proceed with a prosecution in which we know we have insufficient evidence to prove an essential element?

This is the point at which you might say my righteous "People's lawyer" speech of a couple of paragraphs ago will not remove me from the horns of a dilemma. On the contrary, I believe that same return to basics is the only way to make an ethically correct decision. Who's in charge here? The prosecutor who knows all relevant information about the offense and who is hired to do something about it? Or an injured child's parents who seem determined to set an example in poor civic responsibility? Granted, the defendant's family paid the complainant's medical bills, but who paid the defendant's debt to society? Only he can do it and proceeding with the prosecution is the proper way to collect. In summary, if this case is not prosecuted, something other than ethics should be the reason.

The second hypothetical case at the Basic Prosecution Course presented a "hardball" approach to charging as affected by a plea bargain offer:

The defendant is a 35 year old male with a long history of theft, hot check, and forgery charges. Included in his record are two final felony convictions. Last week he was arrested for passing a forged check for $100.00 at a local supermarket.

When his lawyer calls you to discuss scheduling an examining trial you explain to him that the grand jury is not going to convene for four weeks, that you are very busy with a capital murder case which begins next week, and that all the prosecutors in the office are up to their ears in work.

You tell him that if his client will waive examining trial, waive indictment, and plead guilty to an information, you will recommmend a sentence of five years in T.D.C. On the other hand, if his client refuses, he will be indicted as a habitual offender and receive a minimum of 25 years. The defendant accepts the offer, pleads guilty within a week, waives appeal, and goes to T.D.C. to begin his nickel.

Three months later, after he has consulted with the Huntsville Chapter of the Inmate's Bar Association, he files a petition for a writ of habeas corpus alleging that his plea of guilty was not voluntary but instead coerced by your threat to have him indicted as a habitual offender. He also files a complaint with your local grievance committee claiming your brand of leverage is less than ethical.

Are you in trouble with the court and/or the committee? Again, the Course participants perceived no ethical problem. As one prosecutor in our discussion group said, "Leverage is the underlying basis for the plea bargaining system."

The courts have had an opportunity to address this question. In Platter v. State, 600 S.W.2d 803 (Tex. Crim. App. 1980) and Bordenkircher v. Hayes, 434 U.S. 357 (1978), re-indictments alleging enhancement counts were obtained after failure to reach plea bargain agreements. Overruling contentions of prosecutor vindictiveness, the courts said there was no improper prosecutorial conduct when the defendants were free to accept or reject the prosecutors' offers. In Ex Parte Williams, 637 S.W.2d 943 (Tex. Crim. App. 1982), the court described a plea bargain agreement as a contract which will be enforced if entered into after arm's length give-and-take negotiation between the defendant and the State.

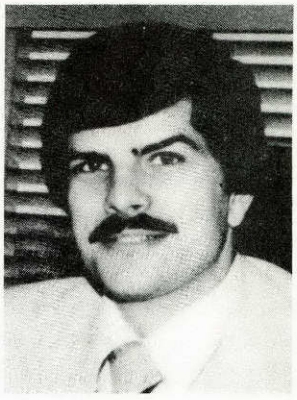
The facts in this hypothetical are at the other end of the evidence spectrum from those in the first. Here, there is an abundance of evidence. Contrary to what the crooks might wish, the mere fact that the prosecutor might consider charging the defendant with an offense less that what the evidence will support certainly creates no legal or ethical obligation to do so.

Finally, an observation on both hypothetical problems. The alternatives available to the prosecutor in each — dismiss or proceed, plead for light sentence or indict with enhancement — all are legitimate, ethical options standing alone. Only when they are placed in the context of wishes of parties not charged with prosecutorial responsibility do the so-called ethical questions arise.

As we know, that's just some of the heat that comes with our particular kitchen.

Prosecutor Profile

PATRICK JOHN RIDLEY



Pat Ridley has worn a lot of hats in Bell County. He has been a briefing clerk, an investigator, an assistant county attorney, a first assistant county attorney, and finally--since 1977--County Attorney.

Born in Canada, Pat attended junior college in Temple, receiving an Associative Arts degree. He earned both his B.A. and his J.D. from Baylor.

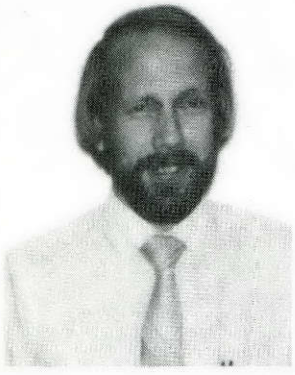
A former Director and Vice-President of TDCAA, Pat recently became President. He is Chairman of the Board of the Educational Foundation of the University of Mary Hardin Baylor. For 1983 he is in Who's Who in American Law Enforcement and Outstanding Young Men in America. He served on the committee which prepared the Council's Hot Check Manual. He has been a speaker for the Alcohol Awareness Program of the Traffic Safety Council and Texas A&M's extension service. He belongs to NDAA, the Central Texas Peace Officers Association, and the Bar Associations of Bell, Mills, and Lampasas Counties.

This year he presented DWI Awareness programs to six high schools and co-sponsored Belton's Crimebiter programs. His office handles 7000 misdemeanors and 1200 civil cases and has 2 computers to process the $500,000 expected in hot checks for 1983. About $2 million in fines, costs, and bond forfeitures will be generated by the office this year. As Pat says, "Criminals ought to be paying for the Criminal Justice System--not the taxpayers."

Pat is active in Belton's and Temple's Chambers of Commerce. A member of Temple's Lutheran Church, Pat married his high school sweetheart, Sandy Boyd. They have two sons, Patrick and Matthew.

The Sherlockers

MICHAEL FEARY



For six years, Michael Feary has been with the Harris County District Attorney's Office. Formerly an Investigator and later Senior Investigator in the Special Crimes Bureau, Mike is now Lieutenant of Investigators.

Mike attended Texas A&M, Laredo Junior College, and Central Texas College, earning an Associate of Applied Science degree in 1975. He studies accounting and business at North Harris County College in Houston.

From 1966 to 1972 he served in the Navy, rose to Engineman Second Class, and received an Outstanding Performance Citation. During this time Mike also served two years as a D.P.S. highway patrolman, then began a three-year stint as Gatesville Chief of Police. For a 1 1/2 years he managed Taylor's Auto Salvage in Copperas Cove (which may account for his passion for his Trans-Am race car). Prior to joining the Harris County Office he was an Inspector II with the Texas Dept. of Public Welfare.

Mike recently became Chairman of the Board of Directors of the Investigators Section of TDCAA. He holds Basic, Intermediate, and Advanced Certification from TCLEOSE, and is on the Council faculty for Law Enforcement Workshops. Mike belongs to the Southeast Texas Asociation for Indentification and Investigation, the Forgery Investigators Association of Texas, and the Texas Association of Vehicle Theft Investigators.

Finally, let's give credit where credit is due. "I've an excellent wife, Linda," Mike says, " who puts up with me and the race car and this job."

The Prosecutor Council
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