TRUE BILL

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

Volume 6, Number 1 January - February 1985

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The Director's Corner

by Andy Shuval

Happy New Year! The children have taken to their bosoms the presents they liked (discarded, like banana peels, the ones they didn't) and gone back to school. With the new year's resolutions made it is time to return to the "real" world.

For the Council and prosecutors that world centers around the legislature. Bob Bullock predicts the state will be **one billion dollars short** even if spending stays at its present level. This affects us even though prosecutors are only a small part of the state's budget (only $.08 out of every $100). Needless to say, adoption of needed programs or expansion of proven ones is out. If we can just hold our own, we should be happy.

The Council's budget is mostly funds spent for prosecutors either directly, such as travel or technical assistance, or through another outlet. Example: funding educational programs such as the Basic Prosecution School or the Law Enforcement Workshops.

The Council survived the initial Legislative Budget Board process handsomely. The Board wrote a budget based on only 94% of present income. Some agencies received as low as 82% of their present budget; the Council was recommended for 99.1%. (See article, p. 10.) To keep this intact against the demands of larger agencies and their constituencies will take dedicated effort by every prosecutor, assistant and investigator.

Remember: when a Council employee or member visits a legislator, he sees a special interest. When you do it, he sees a vote.

With Sunset and the budget squeeze upon us both, it is doubly important for you to visit with your representative and your senator and inform him why the Council is important to law enforcement and to you. Please do it this week and call me to say with whom you made contact and the result. Thank you and Happy New Year.

Andy

Sunset Commission Strongly Supports Continuation of Council

The Sunset Advisory Commission will recommend to the Legislature that the Council be renewed. The Sunset staff made 11 recommendations, in the following general categories: (1) Addition of the Attorney General as a Council member and coordination of his office's technical assistance activities with the Council's; (2) Limitations on providing and reimbursing for technical assistance; and (3) Limitations on travel reimbursement and method of disbursement. The Council took action to endorse 2 of the recommendations and implement a third. The Commission endorsed 3 recommendations (2 of the same the Council endorsed). The specific responses of each were as follows:

The enabling statute (Art.332d) should be amended to:

(1) Add the Attorney General or his designee to the Council membership as an ex-officio member;

Council ..... OPPOSED
Commission ..... OPPOSED

(2) Limit membership of the Council's Advisory Committee to eight members;

Council ..... OPPOSED
Commission ..... OPPOSED

(3) Require the Council to develop standards and guidelines for disciplinary proceedings;

Council ..... **APPROVED**
Commission ..... **APPROVED**

(4) Require the Council to develop a memorandum of understanding with the Attorney General for the provision of technical assistance to prosecutors;

Council ..... OPPOSED
Commission ..... OPPOSED

(5) Limit state reimbursement for technical assistance to situations where the prosecutor is unable to provide effective prosecution;
Council ..... OPPOSED
Commission ..... OPPOSED

(6) Limit the Council's reimbursement of technical assistance to 75 percent of the total assistance cost;
Council ..... OPPOSED
Commission ..... OPPOSED

(7) Prohibit agency staff from providing on-site technical assistance;
Council ..... OPPOSED
Commission ..... OPPOSED

(8) Require prior notification by prosecutors for reimbursement of travel expenses;
Council ..... OPPOSED
Commission ..... OPPOSED

(9) Require that travel funds for prosecutors be allocated based on a system which funds 75 percent of the travel expenses for each prosecutor office to attend one course per year and distributes the remainder of available travel funds as needed.
Council ..... OPPOSED
Commission ..... **APPROVED**

(10) Give the Council the responsibility to coordinate the development of a budget request for prosecutors to the Legislature.
Council ..... **APPROVED**
Commission ..... **APPROVED**

Travel reimbursment vouchers should be completed before prosecutors sign them (management improvement — non-statutory).
Council .....**
Commission .....**
**This procedure has already been implemented. Therefore, the matter is moot.

The Sunset Advisory Commission consists of Hon. Charles Evans, Chairman; Hon. Kent Caperton, Vice-Chairman; Hon. Chet Edwards; Hon. Bruce Gibson; Hon. Patricia Hill; Mr. Jess M. Irwin, Jr., Public Member; Hon. Bill Sarpalius; Hon. John Sharp; Mr. Harry J. Stone, Jr., Public Member; and Hon. Gary Thompson.

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

Public Testifies on Council Behalf

Public testimony at the Sunset Commission hearing October 30th strongly supported the Council. Over a dozen prosecutors were available to testify.

The Hon. Mark M. Humble, C.A.F.R. for Milam County, testified the Council serves as a technical assistance clearinghouse, matching the resources of one office to the needs of another. He felt the burden of providing 25% of technical assistance cost would make it impossible to prosecute some cases. For example, it would mean asking commissioners to fund prosecution of a local official with whom they have dealt closely for years. As regards the "true conflict of interest" standard for providing technical assistance, he discussed the example of a prosecutor prosecuting another elected official, leading to the defense claim that the action is politically motivated. In this situation, he argued, public confidence calls for an outside prosecutor, even though a true conflict of interest does not exist.

The Hon. Robert Morris, C.A. for Martin County, said, "The Prosecutor Council is one state agency that really helps us do our job." He came to prosecution with no experience; the Council was the only source for training. He, too, said many offices cannot afford to cover 25% of travel expenses.

The Hon. John R. "Randy" Hollums, D.A. for the 110th Judicial District and a Council member, emphasized how needed full funding of technical assistance is by the example of a capital murder case in his jurisdiction. The cost to prosecute the case would have exceeded the county's entire annual budget! He also said the Council provides training in an effort to reduce the need for technical assistance. He suggested that the recommendation to limit travel reimbursement would burden offices where one person needs the training of several courses. He noted that some cost is borne now by offices when they pay registration fees, which are not reimbursed.

In support of technical assistance by the Council, the Hon. Tom Wells, C.A. for Lamar County, discussed an instance wherein the Council coordinated other prosecutors to assist him — at no cost.

The Hon. Pat Ridley, C.A. for Bell County and President of TDCAA, presented copies of the October 29th TDCAA resolution recommending to the Commission that the Council be maintained (see copy of the Resolution, p. 5.)

The Hon. Mac Smith, D.A. for Parker County and a newly-elected Council member, spoke on the recommendation to reduce the size of the Advisory Committee, pointing out that the size provides a good mix from all types of offices throughout the state and takes the place of a full-time staff attorney with prosecutorial experience. It would be unrealistic, he said, to expect the same work from a committee of only 8.

Amy Hodgins, Assistant Director of TDCAA and former Executive Coordinator of the Oklahoma D.A.s Training Coordination Council, testified regarding Oklahoma's system requiring prosecutors to get funding from county commissioners for cases needing technical assistance. To date, corruption among Oklahoma county commissioners has generated 160 convictions — all handled by the U.S. Attorney, because local prosecutors would have had to ask those very commissioners to get funding to prosecute. Oklahoma has since abolished the system in favor of full state funding.

Also available to testify for the Council were the following persons: The Hon. Steve Cross, then D.A. for the 84th Judicial District; the Hon. Jerry Cobb, C.D.A. for Denton County; the Hon. Margaret Moore, then C.A. for Travis County; the Hon. William Rugeley, C.D.A. for Hays County; Carroll Schubert, Asst. C.D.A. for Bexar County; and Steve Capelle, Executive Director of TDCAA. □

STATE BAR OF TEXAS

Facsimile of a letter from State Bar President Tom Ramey to Sunset Commission Director Bill Wells

October 23, 1984

Mr. Bill Wells, Director
STATE OF TEXAS SUNSET ADVISORY COMMISSION
P. O. Box 13066, Capitol Station
Austin, Texas 78711

Re: Report on The Prosecutor Council

Dear Mr. Wells:

The State Bar of Texas appreciates the opportunity to respond to certain recommendations made in the above report which would impact upon the Bar.

It is our belief that the public would not be better served by transferring the Council's discipline functions to the Bar. Neither do we agree that such function would reduce overlap because there is very little overlap. There have been only about three occasions in the past five years when an individual who happened to be a prosecutor was investigated by both the Prosecutor Council and one of our grievance committees. In each instance factual information was shared but, because each entity had a different objective, facts material to one investigation were not material to the other. Therefore, while certain basic information was pertinent, the investigations necessarily went down different paths. The grievance committee sought evidence of professional misconduct under the Code o Professional Responsibility. The Council sought evidence of prosecutorial misconduct. The two are seldom the same.

For instance, it may be prosecutorial misconduct for a prosecutor not to be diligent in the handling of his prosecutorial responsibilities. This is not a violation of the Code of Professional Responsibility. Therefore, it really is not accurate to say the functions overlap. To be precise, they may run parallel for while but then they diverge. For the same reason, it is not correct to state that the investigative functions could be consolidated. Since the objectives differ, the paths to those objectives must necessarily differ as well. The objective of the Bar's disciplinary functions is to protect the public from attorneys guilty of professional misconduct while the Council's objective is to remove from office those prosecutors guilty of prosecutorial misconduct or who are incompetent.

Finally, let me say that all of us are for efficiency and cost savings in government. Change does not automatically achieve those objectives. The State Bar of Texas, supported only by the dues of its members, is the agent of the Supreme Court of Texas in the area of professional discipline. We are not equipped, nor do we have the expertise, to determine such things as the competency of a prosecutor. It is our opinion that the Prosecutor Council has a specialized role to perform and the expertise to accomplish it and that disciplining of prosecutors would be best left to it.

Very truly yours,

/s/
Tom B. Ramey, Jr.

TDCAA Resolution
October 29, 1984

WHEREAS the Texas District and County Attorneys Association is a private, non-profit corporation whose members are associated for the purpose of promoting improvement of prosecution in Texas, and

WHEREAS the Prosecutor Council is a state agency charged with responsibilities regarding technical assistance, training, discipline, and information dissemination, and

WHEREAS the Prosecutor Council is effectively executing its statutory mandate, and in so doing has assisted the Association in promoting the improvement of prosecutorial services for the people of Texas, and

WHEREAS the Prosecutor Council is currently undergoing statutory Sunset Commission review to ascertain if the functions and operations of the agency should be continued in their present agency structure,

NOW, THEREFORE, BE IT RESOLVED THAT on this the 29th day of October, 1984, the Texas District and County Attorneys Association respectfully recommends to the Sunset Commission that the Prosecutor Council and its statutory duties and responsibilities be maintained.

Approved 29 October 1984

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
708 PENDLETON STREET, ALEXANDRIA, VIRGINIA 22314
(703) 549-9222

October 29, 1984

Facsimile of a letter from NDAA President-Elect Arthur Eads to Sunset Commission Chairman Charles Evans

Honorable Charles Evans
Chairman
Sunset Advisory Commission
P. O. Box 13066
Capitol Station
Austin, Texas 78711

Re: Report on the Prosecutor Council

Dear Mr. Evans:

I am writing to endorse the past actions and operational management of the Texas Prosecutor Council. There are several areas in which the Prosecutor Council excels and performs a service that cannot be matched in its efficiency by any other agency. These areas are prosecutorial assistance and training.

Prosecutors across the State of Texas and, indeed, across this country are sensitive to requesting prosecutors from outside of their jurisdictions to handle cases initiated or first brought to the attention of the local prosecutor office. This sensitivity arises from the political nature of the local elected prosecutor and the general public. There are those cases, however, in which the interest of the public is best served by having a person removed from political office perform the services of the prosecutor to maintain confidence and total impartiality in our criminal justice system. This can only be accomplished in those isolated cases where the outside agency, or prosecutor, is of a non-political nature and is not an elected official.

The Texas Prosecutor Council not only provides the mechanism wherein the choice of special prosecutors is removed from the political process but also allows the local elected prosecutor the benefit of the talent and expertise of the finest prosecutors in that particular area of endeavor. The Prosecutor Council is in the unique position of having the ability to draw upon the services of all prosecutors in the State of Texas and thereby assuring quality prosecution.

I say this not to suggest that other agencies do not have fine lawyers but merely to state that it is extremely difficult if not impossible for any prosecutor to maintain a high level of expertise in all areas of the criminal law.

The other area of particular significance to local prosecutors is the matter of continued legal education and training of prosecutors across the State of Texas. I do not believe that any other agency or organization is as well equipped to perform this function as is the Texas Prosecutor Council.

I have served as the Chairman of the Criminal Law Section of the State Bar of Texas and know that while that Organization maintains a very fine continuing legal education program that it does not do so in the area of prosecution. I am further aware that The Honorable Tom B. Ramey, Jr., President of the State Bar of Texas, is of the opinion that the function of training of prosecutors can best be served by the Texas Prosecutor Council and not by the State Bar of Texas.

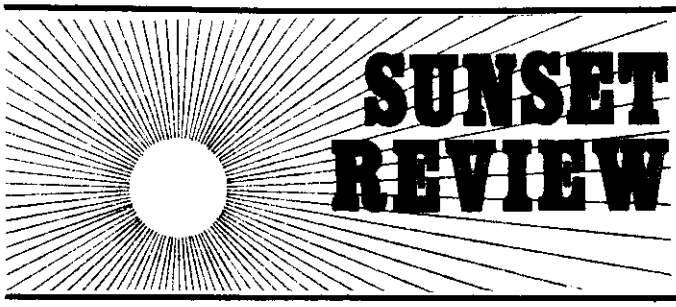
The Texas Prosecutor Council was created by the Texas Legislature to provide the mechanism for the specialized training of prosecutors. It has done so with outstanding success and a proven track record. This can best be evidenced by the fact that those prosecutors who have received or observed that training related their experiences as very beneficial and state that the training has been very professional.

I have had the opportunity to view the prosecutor councils of other states and am uniquely aware of the services which are provided by the Texas Prosecutor Council. I can assure your Commission that our Council performs in a professional manner and has been of tremendous benefit to the prosecutors across the State of Texas and to the Texas Criminal Justice System.

I am in hopes that the Texas Sunset Commission will recommend its continued service.

Sincerely,

/s/
Arthur C. (Cappy) Eads
President-Elect
National District Attorneys Association



Council Chairman Testifies at Sunset Hearing

At the October 30th hearing before the Sunset Advisory Commission, the Honorable Tim Curry, Criminal District Attorney for Tarrant County and Chairman of the Council, testified pro and con regarding many of the Sunset staff recommendations.

Regarding the recommendation that the Council's disciplinary function be transferred to the State Bar, Mr. Curry provided a copy of a recent letter from State Bar President Tom Ramey, stating that the Bar was neither equipped to nor wanted to take over the task.

Mr. Curry also brought a copy of a letter from the Honorable Cappy Eads, President-Elect of the National District Attorneys Association, endorsing the Council and its activities. (See letters, pp. 5 & 6.)

Concerning the recommendation that the Attorney General be added to the Council as an ex-officio member, Mr. Curry pointed out that the Attorney General has no authority to engage in prosecution in the inferior courts of Texas. The Sunset staff felt that, since both the Attorney General's office and the Council provide technical assistance, the recommendation would promote coordination between the two. Mr. Curry expressed the opinion that coordination is not lacking; the two offices communicate, and the local prosecutor chooses which one he or she wants to provide technical assistance in any particular case.

Unlike the Sunset staff, Mr. Curry felt that a memo of understanding between the Council and the Attorney General would be unnecessary and that if it were mandated by statute, there would be no way to enforce it upon the Attorney General.

In light of the recommendation that the Advisory Committee be trimmed to 8 members, Mr. Curry explained that the 32-member size is a working committee taking the place of a full-time attorney on staff.

The Sunset staff recommended state reimbursement for technical assistance be limited to situations where the prosecutor can demonstrate a true conflict of interest, instead of simply an inability to provide effective prosecution. Believing the recommendation is too narrow, Mr. Curry pointed out that the Code of Professional Responsibility demands that attorneys avoid even the appearance of a conflict of interest. He noted that prosecutors, being elected officials who must answer to their constituency, may often be faced with an apparent conflict, if not an actual one. Mr. Curry endorsed keeping the "effective prosecution" standard.

Mr. Curry addressed the recommendation that the Council reimburse only up to 75% of technical assistance cost. He emphasized that many small offices simply cannot afford to pay the other 25%. As a practical matter, he said, the Council tries to have prosecutors cover part of the cost.

Mr. Curry expressed opposition to the recommendation that prior notification be required of prosecutors for travel reimbursement. He noted that prosecutors' schedules are controlled largely by courts, dockets, and other events beyond their control; they simply cannot plan six months in advance to attend a course. The effect of the recommendation might well be that prosecutors would give "prior notification" for several courses, giving them the leeway to attend the ones they actually could when the time came. The result would be that some persons would be cut out of particular courses because the funds had been reserved.

Mr. Curry also stressed agreement with the staff recommendation that the Council be given the responsibility to develop budget requests of prosecutors to the legislature, as well as minimum guidelines of professional ethics for prosecutors. Mr. Curry agreed that these were appropriate and welcome functions for the Council. □

Sunset Commission Approves Statute

On December 17th the Sunset Commission met to approve the wording of changes to the Council's enabling statute, Art. 332d, V.T.C.S. Some 26 changes were suggested, from minor clarifications to substantive changes in Council structure. The Council's position on each of the Sunset staff recommendations was adopted by the Commission in almost every instance. (See related article, p. 2.)

Executive Director Andy Shuval met with the Commission later in December to suggest further changes. At that time the Council's major remaining objections were as follows:

(1) Council lay members could not be allowed to be peace officers.

(2) Council prosecutor members could not be officers of private organizations in the field of criminal justice.

(3) The total number of Advisory Committee members would be limited to 16 [its current number is 32].

The first two problems were partly alleviated by grandfathering the present Council members, thus exempting them from the eligibility requirements during their current terms. The last problem was addressed by recommending that the language limit the number of standing advisory committee members. This way, task forces or ad hoc committees would not be subject to the membership limitation.

The Commission's final recommendations as to exact wording of the statute amendments were not available at press time. □

NEW COUNCIL MEMBER ELECTED

On October 31 ballots were mailed to elected prosecutors for the purpose of voting to fill the vacancy on the Council to be created January 1, 1985. Ballots were required to be postmarked to the Council office by November 15th, 1984.

By proper procedure the candidates named below were placed on the ballot (see "New Council Member Profile," p. 43. The ballots results were as follows:

The Honorable Mac Smith
District Attorney, Parker County 113

The Honorable F. Duncan Thomas
District Attorney, 196th J.D. 46

Late Postmark 6

Mutilated Ballot (voted for both).....1

WINNERS IN NOVEMBER ELECTIONS

The following individuals won their bids for election to office (* = **incumbent**):

District Attorneys

Harris County ..... **John Holmes, Jr.***
30th J.D. ..... **Barry L. Macha**
34th J.D. ..... **Steve W. Simmons***
70th J.D. ..... **R. C. "Eric" Augesen**
84th J.D. ..... **Gene Compton**
85th J.D. ..... **William R. Turner***

County Attorneys

Aransas County..... **James L. Anderson, Sr.***
Erath County..... **Gale Warren**
Gillespie County.....**Gerald W. Schmidt***
Harris County ..... **Michael H. Driscoll***
Kimble County ..... **Donnie Coleman**
Montgomer County.....**Jim Dozier**
Stephens County..... **Jimmy L. Browning***
Ward County .....**Randy Cleveland***
Wheeler County ..... **M. Kent Sims***

COUNCIL RECEIVES CJD GRANT TO PROSECUTE PRISON CRIME

In October the Council received word from the Governor's Office that it has been granted Criminal Justice Division funds for prosecuting prison crime.

Last year the Council's Prison Problems Committee, made up of prosecutors with Texas Dept. of Corrections units in their jurisdictions, prepared a proposal outlining the problem and offering an approach (see **True Bill**, October/November 1984, p. 6).

The objective of the grant is to assemble a team of experienced prosecutors and investigators to provide expert technical assistance and to prosecute criminal cases involving inmates incarcerated with TDC.

The team will focus on counties with the largest backlog of TDC cases. These include Anderson, Brazoria, Coryell, Fort Bend, Galveston, Grimes, Houston, Madison, and Walker Counties.

The team's priority will be prosecution of crimes (1) in which the victims are prison employees or innocent bystanders and (2) in which the victims are prison inmates. In keeping with the Council's policy of protecting the exclusive right of prosecutors to prosecute criminal cases, the team will be working under the local prosecutor's authority. The team will assist the prosecutor; it will not supersede him. The local prosecutor will provide office space, secretarial services, and other usual office expenses as needed. The Council will cover travel expenses of the team.

The team consists of David P. Weeks, formerly Assistant District Attorney for the 12th Judicial District (Grimes, Madison, and Leon Counties); Paul G. Johnson, formerly Assistant Criminal District Attorney for Brazoria County; B. Byron Bush, formerly an Investigator with the Walker County Sheriff's Department; and John Blankenship, formerly an Investigator with the Brazoria County Sheriff's Department. All four men bring valuable experience to the task (see their profiles, p. 42). David and Byron will office out of Huntsville; Paul and John, out of Angleton. The grant funds the team for ten months, beginning November 1984.

JURIES SHOULD BE TOLD ABOUT PAROLE, ATAC CHAIRMAN SAYS

In Texas, juries are not allowed to know the parole laws when sentencing a convicted criminal, and this makes a mockery of our trial-by-jury system, according to Sen. J.E. "Buster" Brown, Chairman of ATAC (Associated Texans Against Crime).

ATAC is a grassroots citizens anti-crime organization holding public hearings across Texas to allow sheriffs, police chiefs, district attorneys and victims the opportunity to tell how they would improve the criminal justice system.

"What I have heard over and over again, whether in Tyler or El Paso, Amarillo or Houston, is that we must remove the blindfold from the juries and instruct them about parole laws and how they work," Brown said. "The district and county attorneys who have testifed at ATAC's regional hearings recall the anger and frustration jurors feel when they find out after the trial that the criminal they just sent to prison for 10 years may not actually serve one year before being released."

Statistics show that in 1983 a prisoner sentenced to 20 years was eligible for parole in 2 years, 8 months, 13 days, and that prisoners sentenced for 60 or more years were eligible for parole in only 8 years.

"The 1984 parole eligibility figures are even lower because now a prisoner can receive up to 90 days credit for each 30 days served," Brown said.

"I am certain that when those 12 men and women deliberate in earnest regarding sending a convicted criminal to prison for 15 years, they don't expect to see him back on the streets in two. Juries must be better informed in order to determine how long it will take for a convict to pay his debt to society."

According to Brown, because of the almost unanimous support from witnesses for change in this area, one of ATAC's main recommendations will be for jury instruction on parole laws. Brown, a former legislator, said he will introduce this legislation in the Texas Senate in January.

COUNCIL BUDGET RECOMMENDED BY LEGISLATIVE BUDGET BOARD

The Council fared better than the average State of Texas agency in the recommendations made by the Legislative Budget Board to the Legislature for 1986-87 state budgets. Agency budgets on average were recommended to approximately 94% of their 1984-85 status. By comparison, the Council's budget was recommended at 99.1% of its 1984-85 level.

All of the recommended cuts in the Council budget are in operating expenses — none in the areas of direct funding to prosecutors. The cuts amount to almost 5% of 1984-85 operating expenses; this means that overhead costs will have to be watched very closely. However, funds for technical assistance, education and travel reimbursement are recommended at the same levels as for 1984-85.

It is so important to have you write to your legislators now about the Council services and their continuation for 1986-87. If you send a letter or have a meeting on the subject, please send a copy of the letter or report of the meeting to Andy.

BREATH SPRAY AS DEFENSE TO D.W.I.

A new defense to D.W.I. has arisen in the commercially-available breath freshener "Speak Easy." Since the product contains alcohol, it has been argued that the defendant's use of it prior to arrest caused the intoxilyzer to read his breath as that of an intoxicated person.

The following was the basis for a memo on the subject by Criminalist G. A. Knowles to Lt. R. D. Brooke of the Oregon State Police. (Reprinted from a memo from the Oregon District Attorneys Association.)

Memorandum

This member was recently requested by a district attorney to test the effect of the ethanol-containing breath freshener "Speak Easy" on the intoxilyzer reading. This product lists "grain alcohol" as one of the contents.

The salient facts were listed as follows:

1. The defendant was stopped at approximately 1:05 AM and never used the spray while with the officer. He indicates to his attorney that it was used just before the officer contacted him.

2. The intoxilyzer test was given at 2:17 AM.

It was requested that tests be performed under the following conditions:

A. Breath sample given immediately after the spray's use.

B. Breath sample given at 5 minute intervals following the spray's use (5 - 15 minutes).

C. Breath sample given 1/2 hour after use.

D. Breath sample given 1 hour after use.

E. Breath sample given 1 hour and 22 minutes after use.

Results:

Writer sprayed the non-aerosol breath freshener into his mouth 7 times and immediately blew into the intoxilyzer. The reading rapidly went to a .48 and during the 3rd long breath the instrument registered a .48.

The instrument was purged one time between tests with the air blank.

The following are the results of sequential breaths after the initial test:

5 minutes .... .09 to .08 during breath sample

10 minutes .. .01 to .00 during breath sample

15 minutes ..... .00

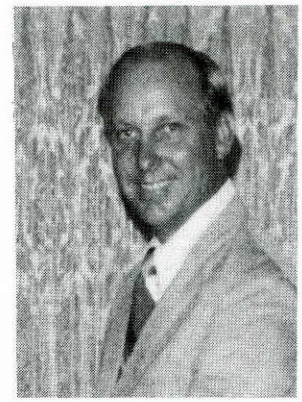
30 minutes ..... .00

60 minutes ..... .00

1 hour 22 minutes ..... .00

Editor's Note: Elected prosecutors may wish to have their local intoxilyzer operators conduct a similar test on their instruments and preserve the results as a "control" against this defense. □

Employees Retirement System of Texas



by Joe Froh

Joe Froh is the Director of the Employees Retirement System of Texas.

The Employees Retirement System was established in 1947 to reward State employees who have given their time and services to the people of the State of Texas. The System is funded on sound actuarial principles. State contributions, member contributions and investment income provide funding for benefits.

Employment by a State agency in a position not covered by another public retirement system, on a full or part-time basis, qualifies you to be a member of the System. Independent contractors and consultants are excluded from membership.

Eligibility for retirement is determined by age and years of creditable service. The minimum combinations are:

FULL BENEFITS

Ten years service at age **60**

Thirty years service at age **55**

REDUCED BENEFITS

Twenty-five years service at age **55**
(Benefit reduced from age 60)

Thirty years service at age **50**
(Benefit reduced from age 55)

The amount of retirement pay is determined by length of service and average salary. Your average salary is not affected by the interest paid on your account. However, longevity is included when determining this average. The salary figure used is the highest 36-months' average out of your last 60 months of state employment. The percentage of this salary is determined by the total years and months of creditable service established with the system. A member may qualify for 15% to 80%, depending on the length of established service.

Percentage for established credit is awarded at the rate of 1.5% for the first 10 years and 2% for each year thereafter. After 10 years of employment (minimum service required), a member qualifies for 15% of his/her average salary. After establishing 10 years of contributory service, percentage is awarded on a month-by-month basis. A member with 10 years, 1 month of retirement credit would qualify for 15.167% of his/her average salary.

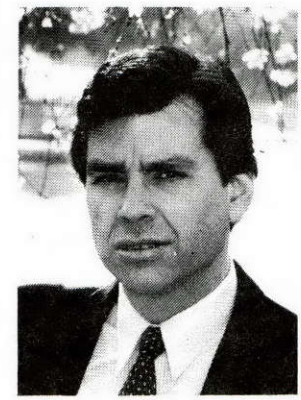
System members are given a statement of account each year, showing the account balance as well as total years and months of service for retirement purposes and beneficiary information. Please review your statement carefully. Insure that your date of birth and beneficiary information as shown are correct. If you have 20 or more years of retirement credit, see that your death benefit plan message reads as you wish. If any information is not correct, contact the Employees Retirement System at:

Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711

(512) 476-6431 **TexAn 820-9011**

This system was established for your benefit. If we can be helpful in any way, please contact us. □

Guest Viewpoint: Rethinking Crime



by Gregory Thompson

This column is designed to encourage differing viewpoints on various topics. If you have an opinion you would like to share, write to ***True Bill.***

Gregory Thompson, Executive Director of the California District Attorneys Association, has graciously given permission for this reprint from the Association's Fall 1984 Prosecutor's Brief.

There is a common miscalculation—as common as it is wrong. It goes something like this: There is violence and vandalism in our schools; teachers are spending more time policing than they are teaching; therefore, something's wrong with our schools. It sounds the same no matter how it's used. For example: Our parks—local, state, and national—are not safe places; they are filled with drugs and dangerous people; park rangers no longer provide information and guidance about nature but make arrests and investigate crime; therefore, there is something dreadfully wrong with our parks.

The miscalculation, of course, is confusing the problem and the situs of the problem. There is comfort in this miscalculation. By institutionalizing the problem, we distance ourselves from it. We do not have to deal with such troublesome issues as human nature and human responsibility; after all, the problem is with our schools; the problem is with our parks. Straighten out these institutions and you lick the problem; all we need is the "right kind" of leadership.

How did we ever discover such a comforting miscalculation? How does it perpetuate itself? Is it a dangerous miscalculation?

It is impossible to start at the beginning. A criminologist is, of course, nothing more than a son-of-a-sociologist. Sociologists had their heyday in the 1960's—back when people engaged in "patterns of interaction functionally or dysfunctionally within their primary group." Life was one large sociogram. Back in those days any junior in college could transform a noun into a verb faster than you can say Alexander Haig. But the sociology of the sixties did more than debase the language; it actually changed the way people thought—the way they viewed their problems. And while group-think language fashions have gone the way of tie-dye headbands, the point of view it described lives on. It thrives in academia in "studies on crime and its causes"; it pours into the life of our society through journalists who popularize academia's social theories.

The sociological view of crime, popularized in the media, has been institutional in its approach.

The theories have been varied. From time to time it has been said that crime is the inescapable result of poverty, social injustice, or the shape of one's body (never trust a mesomorph). Most recently the demographic argument dominates: Young people commit crimes, a theory which invites some rather "modest proposals." We could age human beings like a fine cabernet until they were beyond the crime-committing stage; or we could stop having children until science develops a 25 year gestation. Additionally, any good criminologist can tell

you that crime is a function of the laws of a society--that is, by making certain conduct criminal, we therefore create crime. This exercise in tautology is best exemplified by the slogan, "If guns are outlawed only outlaws will have guns." A cure for crime under this theory is to change the law; after all, if you make less conduct criminal you reduce crime. This theory has the benefit of simplicity, but the disadvantage of getting nowhere in controlling human conduct.

But herein lies the danger: how we define the causes of crime naturally dictates the solutions we propose.

Social theories in explaining criminal conduct have done more than provide fodder for college term papers and an outlet for federal grants; they have also shaped society's response. If crime is a function of poverty, then it is impossible to "prevent crime" until you have gone to the "root of the problem." If crime is a function of a bad birth, a cold delivery room with masked attendants, then we of course must do all we can to make this experience warm.

Criminologists, though, have consistently found these social theories unsatisfying. The categories are always too inclusive or too exclusive. Exceptions frequently overwhelm the theory's rule.

Recently, some students of criminal behavior have dispensed with social theory altogether and embraced the obvious: Criminals commit crime. That is, those individuals who are responsible for most crimes in our society are repeat, habitual, remorseless offenders. It is from this grasp of the observable that "career criminals" are targets of special hardline treatment.

It has also demonstrated that crime, as in any area of life, is a function of individual choice, of individual morality and rectitude. There are virtuous poor people and poor people who are criminals. Some young people rob liquor stores; some run in the Olympics. There are Italians in the Mafia and those who are priests. Some of my best friends are mesomorphs.

The philosopher William James made my point years ago when he wrote:

"I am done with great things and big things, great institutions and big success, and I am for those tiny, invincible, molecular, moral forces that work from individual to individual, creeping through the crannies of the world like so many soft rootlets, or like capillaries oozing of water, yet which, if you give them time will reach the hardest monument of man's pride."

This is no essay against institutional reforms. They are often sorely needed. I do mean that the dark clouds of menace, which hang over our schools and parks, cannot be dispelled by social theories which view crime independent from individual choices. Our best hope as a society—for our kids at school, for campers, hikers, and picnickers—is to address crime at the level of individual responsibility, not institutional analysis. □

Letters to the Council

[Editor's Note: The following responds to a letter to the Council from Hockley County Attorney Andy Kupper (**True Bill** (Aug./Sept. 1984). Incidentally, there is talk about funding only the larger, more metropolitan C.A.s, perhaps voluntarily. Needless to say, the present budget crisis makes any new program unlikely.]

Dear Andy:

I am the Cochran County Attorney pro tempore. Andy Kupper, Hockley County Attorney, and I share the same District Attorney as to felony cases.

I oppose statewide legislation just to solve Hockley County's problems. In the last few years statewide legislation has been written without the presence of thought concerning the legislation's effect on the lesser populated counties in Texas total 254 counties. Over one hundred of those counties would have to have full-time prosecutors paid at a salary range that would not be justified by their work load.

Let us not swat a fly with a two by four board at the expense of the state taxpayers.

Yours truly,

J. C. Adams, Jr.
Cochran County Attorney

Prosecuting Child Abusers:

Legislative Proposals for Improving Prosecution for Offenses Against Children

by Susan Butterick

Susan Butterick has worked for Rep. Doyle Willis and the House Interim Committee on Child Abuse since 1979. She graduated from the University of Texas School of Law in 1984.

The biennial report of the House Joint Study Committee on Child Abuse and Pornography was presented to the 69th Session of the Texas Legislature on January 8, 1985. The heart of the report consists of 37 formal recommendations for legislative action. This article summarizes and explains those recommendations that may affect Texas prosecutors.

The House Joint Study Committee on Child Abuse and Pornography (also known as the Child Abuse Committee) was first named in 1977, chaired then — as now — by Rep. Doyle Willis of Forth Worth. Non-legislator members were first appointed in 1981. Prosecuting attorneys who have served on the Committee are Jane Macon, City Attorney, San Antonio, 1981-82; Danny Hill, District Attorney, Potter County, 1983-84, and his representative, Joe Jernigan; and Tim Curry, Criminal District Attorney, Tarrant County, 1981-84, and his representatives, Joe Drago and Steve Chaney.

The Committee's charges have been to study the problems of child abuse and child pornography. The issue of runaway children was added to the Committee's agenda in 1983.

Since its inception the Committee's established procedure has been to hold public hearings around the state. Citizens are invited to appear and voice their concerns and recommendations about child abuse. This testimony, after research and evaluation, forms the basis for the Committee's report to the legislature. The recommendations, drafted into bills, are introduced for legislative action. With hard work and luck they will be enacted into law.

Prosecutors have always been well-represented at Committee hearings. In the last interim these prosecutors offered testimony to the Committee: Sam Millsap, Criminal D.A., Bexar County; Ralph Petty, Asst. D.A., Bell County; Marcus Taylor, Criminal D.A., Wood County; Margaret Lalk, Asst. D.A., Brazos County; Harold Gaitner, Jr., Asst. D.A., Dallas County; and Gerald A. Fohn, D.A., Tom Green Coumty. All proved articulate and compelling witnesses, and their recommendations received serious consideration by the Committee.

Demands for more frequent and more successful prosecution have begun to be heard from other Texans as well. Over the past decade, public awareness of child abuse has grown explosively. The Committee's schedule of hearings reflects this growth: in the interim between 1977 and 1979 the fledgling Committee held only three public hearings. By the 1983-1985 interim, a grand total of nine public hearings were held, attracting a record number of witnesses: nearly 200 parents, teachers, health care professionals, social workers, psychologists, law officers, attorneys and other concerned citizens.

Increased awareness has changed the public response over the years—apathy and disbelief have given way to horror and

activism. More than ever before the public is demanding state intervention, very often in the form of improved prosecution of child abusers.

In the words of one witness, "The crime in Texas which goes the least prosecuted is the crime of child abuse. We prosecute people for parking tickets more than we prosecute for crimes against children."

Responding to this demand, more than half of the Committee's recommendations address problems of prosecution. If implemented, they will provide prosecutors with improved tools to do their job.

In accord with suggestions made by witnesses across the state, the Committee has endorsed the following recommendations:

Prosecutor Council. One of the more innovative and significant recommendations is to authorize the Prosecutor Council to provide assistance to local prosecutors in child abuse cases.

The need for specialized expertise in cases involving children was repeatedly emphasized to the Committee. The victim may be pre-verbal, afraid, or incompetent. One parent frequently refuses to press charges or testify against the other. Expert witnesses are often required to disprove self-infliction of injuries. Prosecutors may be unfamiliar with these idiosyncracies and others characterizing assaults against children and hesitant to try a case without assistance.

The Prosecutor Council was recognized as the best agency to provide this assistance. Executive Director Andy Shuval suggested a number of approaches:

(1) Experienced prosecutors could be put in touch with the inexperienced;
(2) Seminars on relevant issues could be offered at regional meetings;
(3) **True Bill** could be used as a forum for questions and answers; and
(4) A specific manual could be developed.

The Committee will endorse a line item to fund this project in the Council's budget request for 1986-87.

Mandatory Child Abuse Investigator. All district attorney's offices with a jurisdiction of 300,000 or more would be required to employ at least one investigator to specialize in child abuse cases. Offices with lesser population would be encouraged to do so.

Venue Option. The venue rules would be amended to provide an alternative venue for prosecution of offenses against children: at the prosecutor's discretion, the case could be filed in the county where it was reported and investigated.

Code of Criminal Procedure Revisions: Revoke Spousal Immunity When the Victim is 16 Years Old or Less. This recommendation would make a spouse competent and compellable to testify, both as to acts and communications, in prosecution of the other spouse for Chapters 19, 21 and 22 offenses, §25.02 (Incest), and Chapter 15 offenses involving any of these when the victim is under 16. This recommendation has been filed as House Bill 53 by Rep. Doyle Willis.

Increase Statutes of Limitations for Incest and Sexual Assault. The underlying intent is to give the child victim as much time as possible to come to grips with the offense and decide to file charges. The increase would be to "not less than five years after the offense was committed or to the victim's 20th birthday, whichever is longer."

"No-Contact" Orders. Permit magistrates to issue these as a condition of bond when the charge is incest or sexual assault of a child. Washington State enacted a similar provision just this year, permitting the court authorizing release to issue by telephone an order prohibiting the defendant from having any contact with the victim; violation subjects the defendant to arrest. No-contact orders would provide an alternative to the present practice of removing the already-traumatized victim from the home.

Competency. Eliminate the competency requirement for child witnesses. Since the child victim's testimony in a sexual abuse case is often critical, allow every child to testify without prior qualification. Permit the trier of fact to determine the weight and credibility to be given the testimony.

Time to Be Served. After conviction for Chapter 21 offenses against children, allow jurors in the punishment phase to learn the effects of good time and parole before they pass sentence. HB 9, incorporating a broader version of this recommendation, has been filed by Reps. Ashley Smith, Ray Keller and Tom Waldrop.

Deferred Adjudication and Expunction. Prohibit these procedures in cases involving offenses against children.

PENAL CODE REVISIONS

Prior Conduct. Eliminate the defense of the 14-to-17-year-old victim's prior sexual conduct in prosecution for sexual assault and indecency with a child, to avoid undue prejudice and to protect the victim from the trauma of such disclosure.

Caseworker Protection. Revise the Assault chapter to criminalize assault of a Dept. of Human Resources caseworker as a third degree felony for actual bodily injury, and a class B misdemeanor for threat of same or offensive physical contact. This would provide caseworkers with the additional protection currently afforded to police officers, school teachers and residents of medical and psychiatric institutions.

Chapter 43 Revision. Sever offenses against children from those against adults. Increase the penalties when the victim is under 16, and criminalize possession of child pornography. This recommendation follows the U.S. Supreme Court's 1982 decision to refuse to extend First Amendment protections afforded adult pornography to material depicting children engaged in sexual conduct.

New Crime. Criminalize "child abandonment."

FAMILY CODE REVISIONS

Exception to Anonymity. §34.03 permits anonymous reports of child abuse. This recommendation would permit criminal investigators to learn the reporter's identity.

Reporting Loophole. The same section provides that "any person reporting child abuse is immune from liability, civil or criminal." The only bar to immunity is bad faith reporting, which is generally interpreted as "false." The Committee's proposal is to remove the possibility of an abuser reporting him/herself, then claiming immunity from prosecution.

* * * * *

More than a year's work has gone into developing these recommendations. With the publication of the report, the Child Abuse Committee's charge is fulfilled, and the Committee ceases to exist. But the real work has just begun. Active support for these proposals is essential to their success in the legislature.

The Child Abuse Committee's report in its entirety is available, free of charge, from Ms. Jane McCray, Committee Coordinator, House Joint Study Committee on Child Abuse and Pornography, Texas House of Representatives, P.O. Box 2910, Austin, TX 78769. □

True Bill will pay **$10.00** for humorous trial excerpts it uses.

CHECK WITH ME LATER, MAYBE I'LL REMEMBER. . .

Q: What does amphetamine do to you?

A: It speeds up your metabolism.

Q: And how do you feel when you take it?

A: Like your metabolism has been speeded up.

Q: Well, what does it do? Does it make your heart beat faster?

A: Yes.

Q: Does it make you drunk?

A: No.

Q: Does it make you forget things?

A: Not that I can recall.

(From Prosecutor's Brief, Fall 1984, published by the California District Attorneys Association.)

How to Spend New Year's Eve

By the Unknown Paranoid Prosecutor

The Honorable Thomas F. Lee, District Attorney of the 63rd Judicial District, sent us this with a letter saying, "A fellow with a paper bag over his head ran up to me and handed me the enclosed article. . . An obvious malcontent."

YEARS IN PROSECUTION taught me that the world can be dangerous on New Year's Eve, so I stayed home to enjoy the family and hearth. Fortunately, I had my January Texas Bar Journal, so I put another log on the fire and settled in for a pleasant evening of reading.

OPENING THE JOURNAL, I studied the table of contents in eager anticipation. Shortly, I arrived at an essay by Houston Criminal Defense Attorney W. Scott Carpenter entitled "Illinois v. Gates: Totality of Circumstances Test." Although I was familiar with Gates, I was aghast to learn that my fellow prosecutors were hatching a plan to extend the principles in that case to warrantless arrests. Fortunately, Mr. Carpenter anticipated this foul plot and signaled all bar members to be vigilant against such knavery.

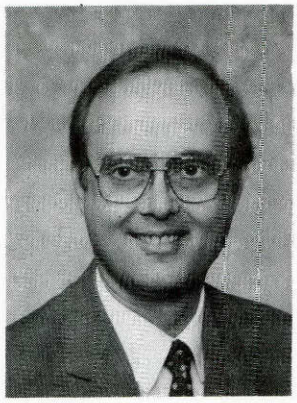
DETERMINED THAT I would not allow Mr. Carpenter's low opinion of state prosecutors to ruin my evening, I hurriedly looked for a more uplifting article. My eyes fell upon a discussion of how a state bar committee had been formed to influence the Texas Special House-Senate Committee on the Judiciary in its work to revise trial and appellate rules of criminal procedure. Our Journal editor asked Lubbock Criminal Defense Attorney Clifford Brown to explain how he, Steve Capelle, Justice Clinton and former Justice Dally worked to keep the "civil lawyers" from steering this bar committee off into a ditch. However, I found it more reasonable to visualize Steve Capelle, Justice Dally and the "civil lawyers" trying to keep Mr. Brown and Judge Clinton from steering this bar committee down the left side of the road.

BY NOW I WAS a little paranoid and had developed a slight tick, so I quickly moved on to the next article, one by Dallas Criminal Defense Lawyer Vincent Perini regarding efforts by my state bar to create a public defenders office in many areas and to increase the fees paid to court-appointed attorneys in other locales. This is indeed serious. The idea of a criminal defense attorney not getting adequate compensation and being forced to drive a Chevrolet and wear a cotton blend suit is truly revolting.

WEARY OF ENLIGHTENMENT from my brethren of the criminal defense bar, I searched for an article by a non-criminal defense attorney. I stumbled upon one by Austin Immigration Attorney Paul Parsons. Would you believe it: Mr. Parsons talked about the state bar's efforts to require judges, at the time of taking a plea, to admonish the defendant of the consequences that may result from his plea if he is in violation of any provision of U.S. Immigration Law. This rule prohibits the judge from inquiring about the defendant's citizenship; it forces the judge to assume all defendants are undocumented aliens. I conclude that this legislation is intended to assist defense attorneys who have lost the ability to speak to their clients. If this trend continues, by the year 2000 the only function a lawyer will have is to aim his client at the courthouse.

BY THE TIME I reached page 76, I was mumbling profanities and my wife sent the children from the room for fear they might repeat my exclamations at our next church social. In the piece "Is Free Speech Free?" I learned how my state bar imported famed Wyoming Criminal Defense Attorney Gerry Spence and former Criminal Defendant Ginny Float to discuss free speech. I'm a sucker for hero worship, so it's just as well I missed that conference.

NOW I CAN accept the possibility that the editor failed to notice the issue was peppered with articles by or about criminal defense attorneys. What puzzled me was, with all that attention showered on criminal defense attorneys by my state bar, what motivated them to form the Texas Criminal Defense Lawyers Association? (Humph!) Next New Year's Eve I'm going out and get drunk.



As The Judges Saw It

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

QUIZ
(See Answers, p. 23.)

1. The accused kills a man, claiming sudden passion because he had just learned the victim was having an affair with his wife. The State claims the accused was on his way to kill certain third parties, that he killed this victim only because the latter was in the wrong place at the wrong time, and that the claim of sudden passion was a recent fabrication. May the State introduce evidence of prior legal/personal problems between the accused and those third parties?
_____ Yes _____ No

2. Airport police approach a person whom they think is acting suspiciously. They ask if they could talk to him and see his ticket and identification. Have the police yet made any "stop" that would invoke 4th Amendment scrutiny?
_____ Yes _____ No

3. The accused is tried for agg. robbery based on an incident in which he and others beat a police officer and took his weapon. The accused admits taking the gun, says he didn't keep the gun but merely hid it from the officer, and claims he did so only to protect himself from the officer, who had allegedly first attacked him. Is the accused entitled to a charge on necessity?
_____ Yes _____ No

4. Article 35.04, C.C.P., allows the clerk to excuse persons summoned for jury service if they return the proper exemption card. In any other circumstance only the judge has power to grant exemptions or excuses. If the clerk nevertheless grants unauthorized exemptions, is the accused entitled to an automatic reversal?
_____ Yes
_____ No, he must show harm

5. During punishment arguments the prosecutor remarked that the defense could have asked the State's "bad reputation" witnesses, "How do you know that?" and "What facts do you know?" Is this reversible jury argument?
_____ Yes _____ No

6. An illegal arrest enables the prosecution to have the accused present at trial, where the victim makes an in-court identification. Is that ID suppressible as a fruit of the illegal arrest?
_____ Yes _____ No

7. Pursuant to a standing order, the bailiff shuffled the names of the jury panel after the judge had concluded testing their qualifications. Before any other inquiries were made, the defense asked for another shuffle. Was the defense entitled to the shuffle?
_____ Yes _____ No

8. The accused got panicky and left before the clerk cashed a forged check which the accused presented. Since he didn't receive anything for the check, can the accused be successfully prosecuted for "passing" the check?
_____ Yes _____ No

9. An officer looks in a car and sees a tire tool from which the round end has been removed and which has one end wrapped with tape. Does that give probable cause to arrest the driver for a UCW violation involving a club?
_____ Yes _____ No

Order Revoking Probation is Admissible as Part of "Prior Criminal Record" under Art. 37.07, C.C.P.

In Baehr v. State, 615 S.W.2d 713 (Tex. Crim. App. 1981), the Court held that an order revoking probation was not admissible when the State was proving up the accused's "prior criminal record" under art. 37.07 of the Code of Criminal Procedure. The Court now overrules that decision, noting that in prior cases it had held that the State was required to provide up a revocation order to establish that a probated conviction had become final.

Although we can now routinely introduce the revocation order to show a prior criminal record, the accused may be entitled to have the judge delete references in the order to other criminal violations (such as the new offense which led to the revocation) which have not themselves resulted in final convictions. Elder v. State, #375-83; decided 10/10/84.

Cross-Examination to Show Bias, Motive, Ill Will, etc; Defense Need Not Show What Excluded Answers Would Have Been to Preserve Error for Appeal.

The accused was on trial for murder; a key prosecution witness was his ex-girlfriend. Outside the jury's presence, defense counsel stated a desire to cross-examine the woman about incidents in which she attacked the accused in public, threw drinks at him, and accosted female companions of the accused. Counsel stated that this was to show bias and animus against the accused and establish a motive for her to testify falsely against him. The trial judge prohibited the questioning, and the Court of Appeals declined to address the error on the merits because the defense had not shown in the record what the witness' answers to the prohibited questions would have been.

Relying on Alford v. United States, 282 U.S. 687 (1931), and Spain v. State, 585 S.W.2d 705 (Tex. Crim. App. 1979), the Court holds that when the defense wishes to cross-examine to show prejudice (bias, ill will, motive, etc.) on the part of the witness, it need not show what the cross-examination would have affirmatively established in order to show reversible error. The error is preserved for appellate review merely by showing the subject matter of the cross-examination which was prohibited.

The Court contrasts this case with ones in which the defense is allowed to ask the question but is prevented from receiving the answer. In the latter case the defense can preserve error for appeal only by establishing in the record what the answer would have been, either by a formal bill of exceptions, an informal bill, or by an offer of proof under art. 40.09(6)(d)(1), C.C.P. (Under the latter the attorney states into the record the gist of what he would expect to adduce.)

If you have trouble seeing why the record must show what the expected answers would have been in one situation but not the other, join the crowd. The Court could have easily avoided such broad statements because it is clear that in this case the defense did establish what the answers would have been—by making an offer of proof.

The Court also notes that a corollary to the rule allowing broad cross-examination to show bias is that if the witness denies anything that would establish bias, the other side (defense or prosecution) may prove through independent witnesses the facts which would show bias. E.g., Harris v. State, 642 S.W.2d 471. Koehler v. State, #767-83; decided 10/17/84.

Punishment Argument Referring to Community Expectations is Improper.

The following presented reversible error because it went beyond being a plea for law enforcement and became an outright request for the jury to base its decision on what the community demanded: "Now, the only punishment that you can assess that would be any satisfaction at all to the people of this county would be life [imprisonment]." Cortez v. State, #026-84; decided 10/17/84.

Nighttime Landings at Clandestine Airfields: Search and Seizure Problems.

An experienced officer's knowledge of the drug importation trade, coupled with his observation that a plane landed late at night in a darkened field, guided in by flares, and that a group of persons unloaded the plane in the dark, provided reasonable suspicion to stop a pickup that departed the landing site. The officer's detection of the odor of marijuana as he approached the pickup then gave probable cause to search it without a warrant. Six bales of marijuana were found in the back of pickup. The fact that the accused was the driver of the vehicle, which had departed the landing site only a short time before, provided the "affirmative link" tying him to the marijuana. Marsh v. State, #169-82; decided 10/24/84.

Forfeiture of the Right to a Jackson v. Denno Hearing on the Voluntariness of a Confession; Procedure on Pre-trial Suppression Motions.

During cross-examination of the accused, the prosecution made repeated references to the accused's written statement in an attempt to impeach him. The prosecution did not formally introduce the statement until the rebuttal stage of the trial, when for the first time the defense objected to the statement on grounds that it was involuntary. HELD: Although the general rule is that the accused is always entitled to a hearing outside the jury's presence to investigate the voluntariness of the defendant's statement, that right depends on the making of a timely objection. Here the statement was for practical purposes made an issue when referred to for impeachment, so that an objection when the document itself was offered was too late. (Note that if a timely objection is made, the judge must hold the Jackson v. Denno hearing even if the objection is not specifically coupled with a request for such a hearing.)

The defense had argued that counsel's oral statement to the judge prior to trial, in which he mentioned he would oppose use of any confession, was a sufficient request for a hearing. However, the Court says that oral pretrial suppression motions (whether based on 4th or 5th Amendment grounds) do not preserve error if unsupported by evidence. Likewise, pretrial suppression motions filed on the day of trial may be summarily overruled, in which event the accused must make a timely objection during trial to preserve error. Indeed, the trial judge can always refuse to hold pretrial suppression hearings, forcing the defense to object at trial to obtain a hearing and ruling. Ross v. State, #1061-83, decided 10/24/84.

Rejection of Informal or Insufficient Verdicts.

The jury's punishment verdict indicated that it was assessing a 10-year sentence, but wanted only 5 years of the sentence probated. The judge attempted to remedy this by sending in a new verdict form which he hoped would make clearer what the jury's options were. The Court says this is proper because a judge has a duty to reject an informal or insufficient verdict. Although the judge should have called the jury's attention to the specific problem in the verdict, the accused waived any error in that regard by not objecting. Also, there was nothing in what the judge did which would have suggested to the jury how they should correct the problem, which would also have been improper. Neal v. State, #63,819; decided 10/24/84.

Announcement of Ready of Main Charge Carried Over to Re-Indictment Which Added Enhancement Allegation Within Original Speedy Trial Act Time Period; Admissibility in Jury Trial of Hearsay Relating to Probable Cause.

Shortly after arrest an indictment was returned charging the accused with burglary of a vehicle; the State filed an initial announcement of ready. Still within the 120-day period following arrest, the State re-indicted the case to add an enhancement allegation and dismissed the original indictment. The case went to trial more than 120 days after arrest, and at trial the State apparently made no announcement that it had earlier been ready on the enhancement allegation. HELD: Since the State's evidentiary burden on the main charge had not changed, the initial

announcement of ready carried forward to the new indictment which added only an enhancement allegation. (Note that this does not directly address the consequences of re-indicting the case after 120 days to add enhancement counts.)

The Court also reaffirms that hearsay relating to probable cause for an arrest or search is not admissible before the jury unless the accused chooses to contest those matters in front of the jury. A defense hearsay objection should be sustained. However, the erroneous admission of such hearsay is not reversible if it does not identify the accused or otherwise connect him with the information given. The officer's testimony that he was investigating a report of "a Mexican male prowling cars" was held not to be harmful. Perez v. State, #64,054; decided 10/24/84.

New Trials for "Newly Available Evidence" in Non-Capital Cases.

Etter and his co-defendant were tried jointly. The co-defendant was acquitted. Etter then moved for a new trial on the basis that his co-defendant's favorable testimony was "newly available" evidence. Etter had testified at trial; the co-defendant had not.

Etter relied primarily on Whitmore v. State, 570 S.W.2d 889, in which the Court said a capital defendant's motion for new trial should have been granted where his co-defendant's testimony became available after the co-defendant was acquitted in a separate trial. That testimony became available after the normal time for filing a motion for new trial had expired.

The Court distinguishes Whitmore as being different factually and procedurally and then addresses the basic test for newly discovered evidence: (1) the evidence must have been unknown at trial, (2) the failure to discover the evidence must not have been because of a lack of diligence by the accused, (3) the evidence must be probably true and so material that it would probably bring about a different result at another trial, and (4) the evidence must not be merely cumulative, corroborative, collateral, or impeaching.

Etter's claim failed on every point. The new evidence had not been unknown since Etter's attorney had discussed with the co-defendant's lawyer what the co-defendant's version of events was.

Etter had not exercised due diligence because he made no motion to sever the cases and have the co-defendant tried first. In fact, Etter did not even attempt to call the co-defendant at trial, and there was no showing that the co-defendant's failure to testify was based on his invocation of the Fifth Amendment privilege.

Finally, the testimony the co-defendant gave at the new trial hearing paralleled what the accused had testified to at trial and was only corroborative and cumulative.

The Court also notes that the trial judge's decision about the probable truth of the new testimony and whether it would probably cause a different result at a new trial are reviewable only on an abuse of discretion standard. Etter v. State, #314-82; decided 10/31/84.

Use of Extraneous Offenses to Prove Motive.

The accused was tried for attempted capital murder of a peace officer. The State offered proof that various narcotics and paraphernalia were in the trunk of the car occupied by the accused on the theory that a desire to prevent his prosecution for a drug offense gave the accused a motive to shoot the officer who stopped the car.

The Court acknowledged that the State did not have to prove up a full drug offense in order to establish motive; i.e., the motive could be present if the accused knew the drugs were in the car even though he might not have the type of care, custody, and control over the drugs that would have been needed to prove possession.

However, the State still had the burden of "clearly proving" that the accused was in some manner knowledgeable of the presence of the drug, and it found the evidence deficient since the car did not belong to the accused and the State couldn't show the accused in continuous control of the car. Wallace v. State, #68,434; decided 10/31/84.

Informing Capital Venire of Effect of an Individual Juror's "No" Answer to Punishment Questions; Preservation of Error.

Article 37.071(e), C.C.P., states that the prospective jurors in a capital case are not to be told that a life sentence will be automatically imposed if they are unable to agree on a verdict as to punishment issues.

During the voir dire the prosecutor repeatedly stated to the panel members that if even a single juror voted "no" to one of the questions, a life sentence would result. Although this in effect violated the above prohibition, the defense waived any error by failing to object. Johnson v. State, #69,170; decided 10/31/84.

Constitutional Necessity of a Hearing on the Allegations of a Motion to Revoke Probation.

The appellant's probation for felony theft was revoked at the conclusion of a jury trial for aggravated robbery, the robbery having been alleged as the grounds for revocation. On appeal the accused complained that he had not received a separate hearing on the revocation motion and had not known the robbery trial and revocation were being heard simultaneously.

The Court first holds that a hearing comporting with due process standards must be held before a probation can be revoked, even if no explicit request for a hearing is made. (The Court of Appeals said the hearing was waived by the probationer's failure to file a demand for a hearing.) However, where the basis for the revocation is a new offense and a trial is held on the latter, there is no due process violation when the probation is revoked without an additional "separate" hearing unless the accused can show he was deprived of the right to present relevant material to the judge's decision whether to continue, modify, or revoke probation.

Here no error was shown because the accused didn't object to the procedures used when the judge announced the revocation, nor did he challenge the procedure in a motion for new trial or for arrest of judgment. Herndon v. State, #134-82; decided 11/14/84.

A New Theft May Occur Based on Actions Taken by Receiver of Stolen Property After He is Put on Notice of True Owner's Claim.

The accused received stolen jewelry from a juvenile burglar. A detective directed the owner to the accused, who promised to return the jewelry when it was identified. When the accused then returned the items, he had substituted a cubic zirconium for a real diamond.

The indictment alleged in count one theft by receiving on the day the accused obtained the diamond from the burglary and in count two "straight" theft on the day the diamond was switched out. The jury convicted on count two, which was the only theory submitted to them.

The Court finds the evidence of theft by appropriation sufficient by holding that a new theft occurred when the accused switched out the stones after being put on notice of the true owner's right to the jewelry. By doing this, the Court sidestepped a direct confrontation with the holding of Casey v. State, 633 S.W.2d 885, in which it had held that "straight" theft (theft by appropriation) was sustainable only if the accused was involved, directly or as a party, in the initial taking of the property. Theft by receiving must cover any other situation in which the accused came into possession of the stolen property.

Judge Clinton has a good dissenting opinion agreeing with the position taken by the State's Attorney: the Court has misconstrued the current theft statutes by focusing too much on the exact manner by which the accused acquired the property, rather than on the true gravamen of the offense--depriving the owner of his property without his consent. Receiving property knowing it to be stolen is simply one way to show that the actor used the property knowing that it was without the owner's consent.

Judge Clinton argues that an indictment alleging an appropriation without the owner's effective consent ought to support a conviction for either a direct taking of the property or for a receipt of the stolen property. Berg v. State, #451-83; decided 11/14/84.

Rebuttal Material Not Rising to the Level of an Extraneous Offense.

At the punishment stage the defendant testified, admitting to prior convictions. He also admitted that he had once been addicted to heroin but claimed that he was reformed. In rebuttal the State introduced a vinyl pouch containing a syringe, a bottle cap, and a piece of cotton—all found in the appellant's car at the time of arrest. The Court held that these items were admissible because they were relevant to the appellant's claim that he had kicked his drug habit. Since there were no drug traces present and possession of the syringe wasn't itself a crime, the evidence did not technically constitute an extraneous offense. Consequently, no special instruction needed to be given to the jury limiting the use to which they could put the evidence. Taylor v. State, #423-82; decided 11/21/84.

Timelines of an Objection to an Attorney's Representation of Multiple Defendants.

If an accused makes a timely objection claiming that his attorney has a conflict of interest based on his representation of multiple clients, the trial judge must make an inquiry into the allegations. He must see that separate counsel are provided unless the chance of conflict is too remote. If the accused makes a timely objection, harm is presumed by the appellate court once it has determined that the accused was improperly required to submit to joint representation. If the complaint about joint representation is not timely raised at trial, the accused on appeal must show an actual conflict that adversely affected his attorney's representation.

In this case, the appellant had earlier agreed to his attorney's joint representation of another defendant, but on the day of trial he he said he had changed his mind. The Court refuses to find this untimely, saying that a conflict may not become apparent until shortly before trial. Indeed, it says that some objections may be timely even if made during trial. Such cases will be reversed if the trial judge refuses even to make an inquiry into the claim of a conflict of interest. Lerma v. State, #'s 62,537 & 62,981; decided 11/21/84.

ANSWERS

1. Yes, under Penal Code §19.06. Ingham v. State, #'s 818-83 & 819-83; decided 10/17/84.

2. No. Eisenhauer v. State, #889-83; decided 10/17/84.

3. Yes. Thomas v. State, #1145-83; decided 10/24/84.

4. No, he must show harm. Neal v. State, #63,819; decided 10/24/84.

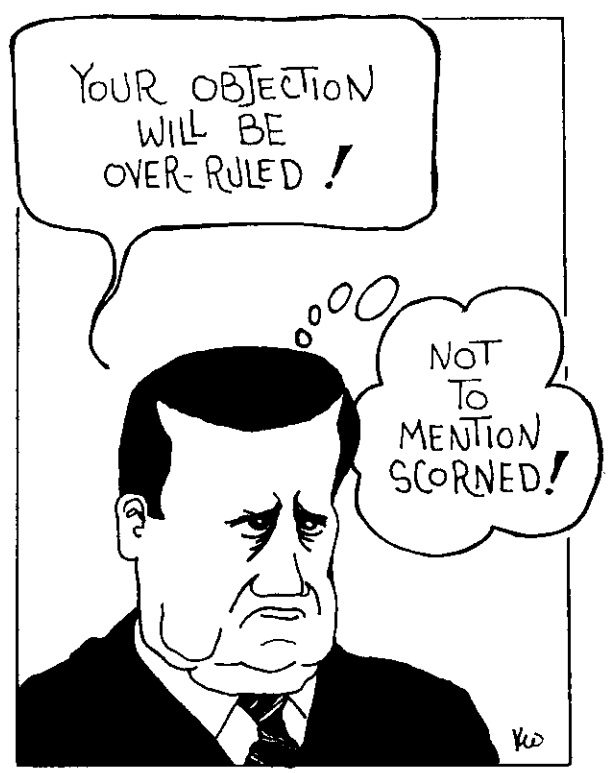
5. Yes. Green v. State, #701-83; decided 11/14/84. But an instruction to disregard will probably cure the error. Anderson v. State, 633 S.W.2d 851.

6. No. Pichon v. State, #64,137; decided 11/14/84.

7. Yes. Wilkerson v. State, #240-84; decided 11/21/84.

8. Yes. McGee v. State, #393-84; decided 11/21/84.

9. Yes. Coe v. State, #64,125; decided 11/21/84. □



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

FROM THE Legal Counselor's Desk

by Oliver Price

Oliver Price is the Legal Counselor for the Prosecutor Council.

Attorney General Opinions

Attorney General Opinion JM-208

Re: Authority of a county purchasing agent to rewrite or refuse to advertise bid specifications approved by the commissioners court.

Criminal District Attorney Tim Curry inquires whether under articles 1659b and 2368a, V.T.C.S. and the note to article 1580, V.T.C.S., the Tarrant County purchasing agent is authorized to refuse to advertise bid specifications approved by the commissioners court but while, in the purchasing agent's judgment, are so narrowly written as to deny competitive bidding.

The Attorney General cited Article 2368a, V.T.C.S., the general competitive bidding statute and Article 1659b V.T.C.S. which imposes specific duties on the Tarrant County purchasing agent once specs for bidding have been set, in concluding that the purchasing agent is not authorized either to rewrite or refuse to advertise such bid specifications.

Attorney General Opinion JM-212

Re: Authority of the Texas Commission on Jail Standards over a county work release facility.

Persons convicted and committed to jail may be entitled to participate in a work release program if a judge so provides in the sentence. Code of Criminal Procedure art. 42.03, sections 5 and 6. The convicted person is ordered confined during his off-work hours and on weekends.

In the situation posed, the county and district judge operated the work release facility but not the sheriff. No statute defines a county jail work release program. Article 5115.1, V.T.C.S. established the Texas Commission on Jail Standards. It states that the commission has authority to promulgate rules and regulations regarding the construction, maintenance, and operation of county jails and the standard of care in the treatment of prisoners.

Any person sentenced to the county jail work release program pursuant to article 42.03, section 6, of the Code of Criminal Procedure may have employment secured for him by the county sheriff. (See also V.T.C.S. art 5118b). any person who is participating in a county work release program is required by article 5118b, section 2, to remain confined in the county jail or other facility designated by the sheriff at all times except during periods of employment. The Attorney General was of the opinion that this requirement precludes the county judge or district judge from operating or maintaining any work release facility not under the supervision of the county sheriff.

Held: The Texas Commission on Jail Standards has supervision over facilities used for the confinement of prisoners on a work release program. The district and county

court does not have authority to operate such facilities independent of the county sheriff.

Attorney General Opinion JM-216

Re: Whether a district clerk must docket a transferred case before the filing fee is paid.

Harris County Attorney Mike Driscoll requested an opinion regarding a procedural matter under the Texas Rules of Civil Procedure. He asked whether the Harris County district clerk is required to assign and docket a case transferred to his county pursuant to rule 89 before a filing fee is paid and how such a case may be dismissed if such filing fee is not paid.

The Attorney General, reading Texas Rules of Civil Procedure 89 in conjunction with article 3927, V.T.C.S. expressed the opinion that together they do not require the district clerk to assign and docket a case transferred under a transfer of venue until the required filing fee of $25.00 is paid.

Any district judge of a court in the transferee county to which the case might have been assigned would have the authority under rule 89 to enter an order that the case is dismissed, notwithstanding the fact that it has not been assigned to any particular court within that county. See V.T.C.S. art. 199a (authority for local rules relating to the assignment of cases).

In summary the Attorney General held: cases transferred under a change of venue need not be assigned and docketed in the transferee county until a filing fee is paid.

Attorney General Opinion JM-219

Re: Authority of peace officers commissioned by school districts

These specific questions were raised:

1) What are the responsibilities of the Texas Commission on Law Enforcement Officer Standards and Education concerning such peace officers?

2) Do such peace officers have all the powers privileges and immunities of peace officers whenever they are in the performance of their official duties even when they are not on school property (e.g., during the hot pursuit of a person who has committed a crime on school property, the regulation of traffic on contiguous streets, and the investigation of crimes committed on school property)?

The first question is prompted by the refusal of the Commission on Law Enforcement Officer Standards and Education to license putative peace officers commissioned pursuant to section 21.483 of the Education Code which establishes that : (1) a school district board of trustees may employ campus security personnel ...; (2) campus security personnel commissioned as peace officers under section 21.483 possess "all the powers, privileges, and immunities of peace officers while on the property under the control and jurisdiction of (their employing school); (3) officers commissioned under section 21.483 must, within one year of their commission, meet all minimum standards for peace officers established by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE), or their commissions automatically expire.

It has been suggested that campus security personnel may not under any circumstances be regarded as "peace officers," because they are not within either article 2.12 of the Code of Criminal Procedure or section 51.212 or 51.214 of the Education Code and therefore ineligible to be licensed as peace officers under article 4413(29aa).

Section 21.483 expressly designates as "peace officers" campus security personnel commissioned as such under that section, and this statute is on an equal footing with article 4413(29aa). The attorney general held that when article 4413(29aa) and section 21.483 are read together and harmonized, as they must be, Calvert v. Fort Worth National Bank, 356 S.W.2d 918 (Tex. 1962), the conclusion inevitably follows that section 21.483 campus security personnel are peace officers who by the very terms of section 21.483 must meet all TCLEOSE minimum standards within one year.

The first question was answered thusly: "because campus security personnel commissioned as "peace officers" under section 21.483 of the Education Code are not eligible to be "peace officers," as defined by article 4413(29aa), the commission has no licensing responsibility concerning these officers. Under the express terms of section 21.483, the boards of trustees of the school districts of this state, not the commission, have the discretion to decide whether to commission individuals as "peace officers" under that statute and the power to issue such commission if they choose to do so. The boards of trustees must require that anyone commissioned as a "peace officer" under section 21.483 satisfy the "minimum standards for peace officers established by" the commission, including medical, education, testing and other requirements within 1 year.

The resolution of the second question depends upon the scope of their duties as defined by their employing school boards and whether they may be said to be "on property under the control and jurisdiction of the district or otherwise in the performance of (their) duties" when they engage in such activities.

In summary, the Attorney General held that the Texas Commission on Law Enforcement Standards has no licensing responsibility concerning "peace officers" commissioned under section 21.483 of the Texas Education Code. The scope of the powers of section 21.483 peace officers depends upon the nature and scope of their duties as defined by their employing school district boards of trustees and upon whether, when they engage in particular activities, they are carrying out the provisions of subchapter M of chapter 2 of the Education Code and are "on the property under the control and jurisdiction of (their employing) district or (are) otherwise in the performance of (their) duties."

Attorney General Opinion JM-220

Re: Whether a county or city may contribute funds to a local sesquicentennial committee and related questions.

Several questions regarding the status and funding of local sesquicentennial committees are raised. Other specific issues relating directly to particular city and county contributions to local committees are also raised.

The first question was answered in the affirmative: local sesquicentennial committees are "extensions" of local governing entities which create them; they are not functional extensions of the Texas 1986 Sesquicentennial Commission. Local governing entities create their local sesquicentennial committees, appoint committee members, and approve committees' master plans prior to submission of the plans to the state commission. Despite some state commission influence, local committees act primarily as agents for the local governing bodies which create them. See Attorney General Opinions JM-71 (1983); MW-533 (1982).

Limits on expenditures by local sesquicentennial committees depend upon the local governmental entities' authority to make certain expenditures . Both grants of authority to make expenditures and limits on its exercise are relevant. Counties and cities possess only the powers expressly or by necessary implication authorized by the Texas Constitution or statutes, or by local charters. Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641 (Tex. 1975) and others.

This rule applies to the power to make certain expenditures. See Attorney General Opinions JM-191 (1984); JM-65 (1983); H-1170 (1978).

No provision expressly authorizes local governmental entities to engage in local sesquicentennial activities. However, numerous general statutes expressly authorize counties and cities to engage in local activities of this sort. See, e.g. V.T.C.S. art. 6145.1.

Accordingly, local governmental bodies are impliedly authorized to make reasonable expenditures for local sesquicentennial activity authority to local committees.

The Texas Constitution expressly prohibits the use by a political subdivision of its public funds or credit for private purposes. Tex. Const. art. III, section 52;

State v. City of Austin, 331 S.W. 2d 737 (Tex. 1970); see also Tex. Const. art. XI, sec. 3; art. XVI, sec. 6. No fixed rule delineates exactly what constitutes a public purpose. Nevertheless, the statutes invite the conclusion that both the tourism and historic preservation aspects of sesquicentennial activities serve a public purpose. See, also, V.T.C.S. art. 6144f.

The Attorney General held finally that "subject to the limits imposed by article III, section 52 of the Texas Constitution, a local governing body may expend public funds for local sesquicentennial activities which serve a valid public purpose."

Attorney General Opinion JM-222

Re: Whether article 4413 (29bb) requires unarmed security personnel who are employees of individual retailers to register with the Texas Board of Private Investigators and Private Security Agents.

The Honorable Margaret Moore raised the above question. The Attorney General held that registration was not required for such unarmed security personnel when they are employed exclusively and regularly by one employer in connection with the affairs of only that employer, and the relationship of the retailer and the security personnel is that of an employer and employee.

The opinion traces the legislative history of article 4413 (29bb) and cites several cases, concluding that the amendment to section 32(a) does not impliedly repeal repeal the longstanding exemption form the act provided by section 3(a)(1) and that the provisions of both sections continue to have effect and meaning.

The opinion also notes that a simple amendment to the statute would clarify the matter if the present construction does not reflect the intent of the legislature.

The exclusion from the provisions of article 4413 (29bb) granted to certain persons by section 3(a)(1) of that act was not expressly or impliedly repealed by the regular session of the Sixty-eighth Legislature. Registration is not required in the circumstances above stated.

Open Records Decisions

Open Records Decision No. 424

Re: Whether State Auditor's reports of audit activities at TDC are Open Records.

A member of the media requests reports, findings, information and any other communications concerning the state auditor's activities at the Texas Dept. of Corrections delivered on a daily, weekly, or monthly basis from the auditor to the House Speaker.

Section 3(a)(16) of the Open Records Act excepts from public disclosure "the audit working papers of the State Auditor." Information which is not required to be disclosed to the public under the Act may still be transferred between state agencies without destroying its protected status. Attorney General Opinions H-917(1976); H-683(1975); H-242(1974). Such a transfer is not a release of records to the public.

Open Records Decision No. 164 held that each request must be the subject of an individual determination. The audit memos are protected from public disclosure by section 3(a)(16). Taken as a whole the memos reveal to a great extent what information the auditors look for in auditing an agency and their methods of finding and evaluating it. The factual information about the auditor's daily activities reflects the scope, direction and strategy of the audit. The information indicating audit strategy cannot reasonably be severed from other factual information.

Handwritten notes on certain documents are auditors' evaluations of material considered in auditing TDC and are excepted from public disclosure.

Information relating to pending litigation may be withheld pursuant to section 3(a)(3).

Section 3(a)(11) protects from disclosure "inter-agency or intra-agency memorandums or letters . . ." It protects "advice and opinion on policy matters and [encourages] open and frank discussion . . . concerning administrative action." Attorney General Opinions MW-372 (1981); H-436 (1974); Open Records Decision Nos. 406 (1984); 344 (1982).

SEARCH AND SEIZURE

by Alan Levy

Electronic Tracking Devices

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

During the past decade, law enforcement agencies have made increasing use of electronic tracking devices (ETD) in drug investigations to track conveyances such as automobiles and airplanes suspected of transporting contraband and precursor chemicals, and to monitor "controlled deliveries." This article will focus on judicial decisions relating to electronic tracking devices and identify recurrent issues arising from the use of these devices.

The courts employ a bifurcated analytical framework in addressing the issue of whether the use of an ETD constitutes a search. The courts examine the Fourth Amendment implications of (1) the installation or attachment of an ETD and (2) the monitoring of its signals. See United States v. Karo, 104 S.Ct. 3296 (1984); United States v. Knotts, 460 U.S. 276 (1983); United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979); United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978).

Installation of Electronic Tracking Devices

The installation of an electronic tracking device does not violate the Fourth Amendment unless either:

(1) the installation infringes on the defendant's expectation of privacy in the object in which it is installed, or

(2) during installation the government intrudes into an area where the defendant has a reasonable expectation of privacy.

In determining whether the Fourth Amendment is implicated by the installation of an ETD, the central issue is whether the installation invaded a legitimate privacy expectation of the person challenging it. The warrantless installation of an ETD on the exterior of an airplane or automobile while located in public areas accessible to government agents does not violate the Fourth Amendment. A person has no legitimate privacy interest in property exposed to public access. United States v. Michael, 645 F.2d 252 (5th Cir. 1981), cert. denied, 454 U.S. 950 (1981); United States v. Bailey, 628 F.2d 938 (6th Cir. 1980).

When agents must enter a premises or conveyance in order to attach the device, the installation involves Fourth Amendment interest. United States v. Parks, 684 F.2d 1078 (5th Cir. 1982); United States v. Cofer, 444 F.Supp. 146 (W.D. Tex. 1978). An agent's intrusion onto property in which the defendant has demonstrated a reasonable expectation of privacy must comply with Fourth Amendment standards. A review of several common factual backgrounds will serve to illustrate the point.

Frequently, a government agent attaches an ETD inside a container of precursor chemicals prior to its sale to a suspected narcotics trafficker. In this instance, the installation of an ETD does not violate any privacy expectations of the defendant who has not yet come into possession of the chemicals. United States v. Karo, (1984); United States v. Cassity, 631 F.2d 461 (6th Cir. 1980); United States v. Bernard, 625

F.2d 854 (9th Cir. 1981), United States v. Lewis, 621 F.2d 1382 (5th Cir. 1980), cert. denied, 450 U.S.935 (1981); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), cert. denied, 429 U.S. 1002 (1976). [The installation of an ETD in a container or conveyance prior to its transfer to a defendant does not violate a defendant's reasonable expectation of privacy, because until the transfer occurs the defendant has no right to exclude anyone from examining or using the property.]

Similarly, when an ETD is placed in an airplane or automobile with the consent of an owner exercising complete dominion over the conveyance at the time that the ETD is installed, the installation does not violate any Fourth Amendment right of a subsequent lessee. United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979); United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978).

Contraband

The government's right to examine international mail entering the United States is well established. Often such searches uncover contraband, and agents insert a "beeper" into the package to aid in surveillance during a "controlled delivery."

An individual cannot have a legitimate expectation of privacy in contraband, because he has no right to possess contraband at all. The installation of a "beeper" does not infringe on any Fourth Amendment interest since whatever the defendant's subjective expectation of privacy is in the package, it is not one that society is willing to recognize. United States v. Washington, 586 F.2d 1147 (7th Cir. 1978); United States v. Pringle, 576 F.2d 1114 (5th Cir. 1978); United States v. Emery, 541 F.2d 887 (1st Cir. 1976), but see United States v. Brock, 667 F.2d 1131 (9th Cir. 1982), cert. denied, 460 U.S.1022 (1983) (concurring opinion) [the Ninth Circuit, unlike other courts of appeals, does not consider dispositve any distinctions between beepers placed in non-contraband items and those placed in contraband.]

Courts adhering to the position that there is no Fourth Amendment expectation of privacy in contraband substances have maintained a rigid demarcation between contraband and other items that a person may legally possess. For example, while the courts have refused to recognize a Fourth Amendment interest in contraband substances such as heroin or cocaine, the same is not true for precursor chemicals that may legally be possessed. United States v. Bailey, 628 F.2d 938, n. 8 (6th Cir. 1980); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978).

Despite the absence of a definitive opinion from the Supreme Court on the 'contraband rule' and the absence of agreement among the lower courts, the proponents of a search and seizure should urge the 'contraband rule' argument as one basis of upholding a search.

Monitoring of ETD

Last term, the Supreme Court held that the warrantless monitoring of an ETD in a premises not open to visual surveillance violated the Fourth Amendment rights of those who have a reasonable expectation of privacy in the premises. United States v. Karo, 104 S.Ct.3296 (1984). The majority opinion described its earlier decision in Knotts v. United States as holding that the warrantless monitoring of an ETD does not violate the Fourth Amendment when it reveals no information that could not have been discovered by mere visual surveillance. See United States v. Knotts, 460 U.S. 276 (1983). This interpretation of Knotts when considered in conjunction with the Karo decision provides a framework for prosecutors and law enforcement agents to decide whether a prospective use of ETDs must comply with Fourth Amendment warrant requirements.

When ETDs are used to track the movement of automobiles on public roads, the device merely augments what could have been accomplished by visual surveillance. There are no Fourth Amendment implications because an individual has no reasonable expectation of privacy in his movements exposed to the public.

In such instances, the monitoring of an ETD is functionally similar to the use of binoculars, searchlights, radar, and tracking dogs. E.g., United States v. Knotts, 460

U.S. 276 (1983) [warrantless monitoring of beeper to track defendant's automobile along public highways does not violate the Fourth Amendment]. United States v. Moore, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S.926 (1978); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), cert. denied, 429 U.S. 1002 (1976) [same]. See United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978).

The same analysis applies when transponders are used to track the movement of airplanes. There is no reasonable expectation of privacy in the route traveled by an aircraft through the public airways. United States v. Butts, 129 F.2d 1514 (5th Cir. 1984), cert. denied, 105 S.Ct. 181 (1984); United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979); United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978).

The use to which the police may put an ETD without first securing a warrant is not unlimited. A warrant is required before the police can monitor a "beeper" located within a residence unless some exception to the warrant requirement such as exigent circumstances is shown. United States v. Karo, 104 S.Ct. 3293 (1984); United States v. Cassity, 720 F.2d 451 (6th Cir. 1983), vacated for reconsideration of "good faith exception," 104. S.Ct. 3581 (1984); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978).

The focus in resolving issues arising from the monitoring of ETDs is on the privacy interest in the place where the device is being kept. Under the framework of the Supreme Court's opinions in Knotts and Karo, the Fourth Amendment interest varies depending on whether the ETD is being transported in an automobile, left on commercial premises, see United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978) [warrantless monitoring of a beeper inside a commercial building upheld], or is inside a private dwelling.

As a practical matter, this means that law enforcement officials will almost always need to obtain a warrant whenever an ETD is to be placed inside a container of precursor chemicals. A survey of reported cases where "beepers" were used to track the movement of precursor chemicals demonstrates that these containers are frequently moved from one location to another, in an effort to avoid detection. Since it is impossible to predict whether the beeper-laden container will be placed in a private residence at some future point, the only feasible alternative is to obtain a warrant when the ETD is installed. This leads to the critical inquiry of what a warrant for installation and monitoring of an electronic tracking device must contain.

Content of Applications and Warrants

The content required in applications and warrants for ETDs presents some unique problems. A warrant for ETD installation and monitoring cannot identify the locations where surveillance will occur, because it is not known where the object containing the device will be taken. Normally, the application for a warrant cannot state probable cause that the ETD will be taken to any given location. In this context then, the "particularization" requirements for warrants has a different connotation than that understood in the normal search and seizure situation.

In Karo, the Supreme Court stated that it is sufficient if a warrant application states:

(1) the object into which the ETD is to be placed;

(2) the circumstances that led agents to request the installation; and

(3) the length of time of surveillance. Karo v. United States, 104 S.Ct. 3296 (1984).

An example of a warrant properly authorizing the installation and monitoring of an ETD is set out in United States v. Kupper, 693 F.2d 1129 (5th Cir. 1982):

> "Special Agents of the Drug Enforcement Agency or United States Customs are ordered to install and maintain in aircraft N-8636Z presently located within the Southern District of Texas, an electronic tracking device to aid in surveillance of the aircraft and determine the direction and location of the aircraft. . . continue the use day and night of such electronic tracking

device as a surveillance aid in the operation until the electronic device leads to the ultimate destination and location where aircraft N-8636Z enters and lands in the United States with a cargo of marihuana or other contraband. It is further ordered that this authorization to install and monitor an electronic tracking device as a surveillance aid must terminate upon the conclusion of the investigation of the above offenses or in any event at the end of thirty days from the date of this order. . ."

Time Limits

A warrant that fails to place a reasonable time limit on the use of ETD surveillance does not meet Fourth Amendment requirements. The Fourth Amendment requires a showing of not only of probable cause, but present probable cause. Unless the warrant contains a time limit, it cannot assure that the search it has authorized is reasonable. United States v. Bailey, 628 F.2d 938 (6th Cir. 1980); United States v. Cofer, 444 F.Supp. 146 (W.D. Tex. 1978).

The Fifth Circuit has suggested that a warrant containing no time limitation whatsoever is similar to a general warrant and evidence seized under such a warrant would not be admissible. United States v. Cady, 651 F.2d 290 (5th Cir. 1981).

The courts have not identified the maximum period of time that surveillance may be authorized in a single warrant. Theoretically, the period of time which is reasonable depends upon the facts presented in a given circumstance. Authorizations are frequently sought for thirty days, and some courts have suggested that thirty days is the maximum period of time that surveillance can be conducted without an application to extend the time.

See United States v. Butts, 729 F.2d 1514 (5th Cir. 1984), cert. denied, 105 S.Ct.181 (1984) [thirty days authorization] United States v. Cofer, 444 F.Supp. 146 (W.D. Tex. 1978) [stating that thirty days is the maximum length of time for a warrant authorizing use of ETDs subject to renewal.]

Two Federal Circuit courts avoided deciding the reasonableness of a ninety-day authorization by holding that when the warrant provides a time limit that is not, as a practical matter, unlimited in duration, the relevant inquiry is the actual time during which the ETD is used rather than the length of time authorized. United States v. Long, 647 F.2d 848 (11th Cir. 1982) [ninety-day authorization; used for less than week. The actual use was not reasonable]. United States v. Cady, 651 F.2d 290 (5th Cir. 1981) [warrant authorized surveillance for ninety days, but the ETD was only used for seventeen days].

Considering the current uncertainty in the case law, there is little reason to seek an authorization exceeding thirty days. If additional time is needed, a renewed application should be made.

Quantum of Proof for Execution of a Warrant

The Supreme Court has not yet addressed the question of whether a warrant for ETD surveillance should issue upon a showing of reasonable suspicion or whether probable cause is required. United States v. Karo, 104 S.Ct. 3296 n.5 (1984).

Several circuits have applied probable cause standards in reviewing warrant applications for ETD surveillance without alluding to the "reasonable suspicion" standard. See United States v. Little, 735 F.2d 1049 (8th Cir. 1984); United States v. Bentley, 706 F.2d 1498 (8th Cir. 1983), cert. denied, 104 S.Ct. 2397 (1984); United States v. Cooper, 682 F.2d 114 (6th Cir. 1982) (per curiam).

In other cases, the courts found that the applications contained sufficient facts to establish probable cause and refused to decide whether "reasonable cause" was sufficient. See United States v. Ellery, 678 F.2d 674 (7th Cir. 1982), cert. denied, 459 U.S. 868 (1982).

Suppression

The application of the exclusionary rule to suppress evidence that is the product of

improper installation or monitoring of ETD can be complex. The rule requires suppression of evidence that is the product of illegal police conduct. However, evidence is not "fruit of the poisonous tree" simply because it would not have come to light but for illegal conduct. In ETD cases, the prosecution may avoid exclusion by demonstrating that the evidence was obtained from a source independent of the illegal actions.

As noted earlier, ETD surveillance is most frequently employed in narcotics investigations. Since these offenses generally involve more than one defendant, the question of "standing" becomes important. Only those persons who have suffered violations of their constitutional rights may challenge the introduction of evidence obtained as a result of the violation. Both "standing" and the "independent source" doctrine impose substantial limitations on the reach of the exclusionary rule where ETD surveillance is challenged.

See Karo v. United States, 104 S.Ct. 3296 (1984) [In part IV the majority opinion, the court's examination of each defendant's differing privacy interests and the independent source attenuation doctrine is relied upon to affirm the convictions]; United States v. Cassity, 720 F.2d 451 (6th Cir. 1983), vacated for reconsideration of in light of the good faith exception, 104 S.Ct. 3581 (1984) [a beeper was monitored without a warrant in several homes each belonging to different co-defendant. The court held that while evidence obtained as a result of the monitoring must be suppressed, each defendant was only entitled to suppression of that evidence seized in violation of his legitimate privacy interest].

Conclusion

[1] Generally, it is strongly recommended that a warrant be secured prior to installing or monitoring an ETD.

[2] A warrant must be obtained whenever the installation requires entry onto a premises or conveyance in which there is a reasonable expectation of privacy, before law enforcement agents monitor a beeper located in a place not open to visual surveillance. □

AND MY PAST LOOKS PRETTY GOOD, TOO

Q: You know you're on probation but you don't report, you don't pay fees and you don't pay restitution.

A: I haven't had a job really backing me up as a future. I just work at restaurants. They pay $100 every two weeks, something like that.

Q: They told you, "Don't be afraid to come in because we can work out a payment schedule." They told you that over and over, didn't they?

A: It wasn't always the money. It's just not being able to get somebody to take you there. You have to pay gas money. And that's what I was looking at.

Q: That's right. You have to pay gas. And there's no assurance whatsoever that if the Judge continues you on probation that you're going to be able to pay gas to get down there.

A: I have a sure job.

Q: You what?

A: I have a sure job. There is a future behind me.

(From a probation revocation hearing in Dallas County, cross-examination by Assistant D.A. Lisa Blue.)

Reference Series

The form opposite is adapted from one by the Honorable Elizabeth Jandt, County Attorney for Guadalupe County for 16 years. Now in another 4-year term, Ms. Jandt prepared and refined the form over the years to save her and her staff's time. She graciously offers it for your use.

CUT HERE

INFORMATION FOR REQUEST TO FILE A COMPLAINT

Person(s) on Whom You Want to File a Complaint: (If more than one, use additional forms.)

Name:_____ Nickname or Alias:_____

Address:_____ Telephone Number:_____

Sex:_____ Height:_____ Weight:_____

Hair Color:_____ Age:_____ Date of Birth:_____

Any identifying scars or tatoos?_____

If offender is under seventeen (17) yrs of age please list parent's name and address:

_____

Do you have a picture of the offender?:_____

Type of vehicle used by offender:_____

Are you related to the offender?_____ If yes, how?_____

Have you ever lived with the offender?_____ If yes, how long?_____

Have you filed a complaint on this person before?_____ If so, for what and when:

_____

Did you drop the charges you filed against the offender?_____ If yes, why?_____

_____

Has the incident you wish to complain about been investigated by a police agency?_____

If yes, which agency?_____

Date on which this offense occurred:_____ Time:_____

Location where this offense occurred:_____

NOTE: The following groups of questions refer to specific types of offenses. Answer those questions appropriate to your complaint.

ASSAULT:

If offense involves bodily injury, please describe injuries:_____

_____

How did the offender assault you?_____

Were you treated by a doctor?_____

Adapted from a form prepared by
the Honorable Elizabeth Jandt, County Attorney for Guadalupe County. Used by permission.
Published in **True Bill**, Jan./Feb. '85,
by The Prosecutor Council, P. O. Box 13555, Austin, Texas 78711. (512)475-6825.

If yes, please give name, address and telephone number of doctor:_____

_____

Are you claiming restitution for expenses incurred?_____

If yes, please list amounts and have bills so this office may make copies for the file:

Doctor's fee:_____ Medicine:_____

Hospital:_____ Other:_____

THEFT:

If offense involved theft, please list items taken with serial numbers or any other identifying numbers, etc. and also list the value of the item(s):

_____

_____

Have the items been recovered by the police?_____

CRIMINAL MISCHIEF:

If offense involved damage to property please list the property damaged:_____

_____

_____

How was the property damaged?_____

_____

_____

What did it cost to repair the property? (Please have the bill of repair or estimate so that this office may make a copy and place it in the file):

_____

List Witnesses Relevant to Your Complaint:

Name:_____ Name:_____

Address:_____ Address:_____

Telephone Number:_____ Telephone Number:_____

Name:_____ Name:_____

Address:_____ Address:_____

Telephone Number:_____ Telephone Number:_____

CUT HERE

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Calendar

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

JANUARY

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

FEBRUARY

3-7	Trial Strategy & Techniques (NCDA)	San Francisco
14-15	Criminal Defense Skills Course (CDLP)	San Antonio
22-23	Legal Assistants Seminar (SBT)	San Antonio

MARCH

3-7	Coakley National Symposium on Crime (NCDA)	Amelia Island, Fla.
3-8	Criminal Trial Advocacy Institute (CDLP)	Huntsville
10-13	12th National Conference on Juvenile Justice (NDAA)	Philadelphia
10-14	Special Crimes: Investigation to Trial (NCDA)	Philadelphia
24-26	The Mentally Retarded Adult Offender (TCCD)	Austin
24-29	Senior Assistants Seminar (NCDA)	Pacific Grove, Calif.

APRIL

28-May 1	Representing State & Local Governments (NCDA)	Incline Village, Nev.

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

REIMBURSEMENT DEADLINES

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

The Elected Prosecutor Seminar (December 5 - 7)
DEADLINE FOR APPLICATION IS FEBRUARY 5, 1985.

MENTALLY RETARDED ADULT OFFENDER CONFERENCE

The Texas Council on Crime and Delinquency is holding a conference on **The Mentally Retarded Adult Offender** on **March 24-26, 1985,** at the Austin South Plaza Hotel. The conference will present a state and national perspective on the special needs of this offender group, and will examine problems and solutions as the mentally retarded offender contacts the criminal justice system from arrest through parole. T.C.C.D. has just completed a two-year research study on the subject. The registration fee is $100.00. FOR MORE INFORMATION call or write Judy Deaver, T.C.C.D., 4000 Medical Parkway, Suite 200, Austin, TX 78756, (512) 451-8425.

STATE MILEAGE REIMBURSEMENTS MUST BE REPORTED TO IRS

Employers are now required to report annual mileage reimbursements made to their employees as "other compensation" on W-2 forms if that reimbursement exceeds 20.5¢ per mile. (For years employees have been required to report mileage reimbursements exceeding 20.5¢ per mile, but the new ruling applies to employers.)

The state's mileage reimbursement is currently 23¢ per mile. Total mileage reimbursements paid during the year must be reported, not just the amount above 20.5¢ per mile. These reimbursements are not considered "wages" for purposes of income tax withholding or social security taxes.

The State Comptroller plans to supply each agency with a list at the end of the year reflecting, by employee, total mileage reimbursements in both amounts and miles traveled, as both have a bearing on IRS reporting. Any employee who has received state mileage reimbursements must file a Form 1040, rather than the simpler Forms 1040A or 1040EZ, and must complete Form 2106, for employee business expenses, in order to get the proper deduction. On Form 1040, the employee reports the total amount received for mileage reimbursement and, under the section of the form for adjustments to income, records the allowable amount for deduction.

MEMO FROM
THE
COMMISSIONERS' COURT
OF
CENSORED COUNTY

(Or
"Does Any of This Sound Familiar?")

ATTENTION: All Personnel
SUBJECT: Excessive Absences

These rules are now in effect:

SICKNESS:
No excuses, not even a doctor's statement as proof. If you are able to go to the doctor, you are able to come to work.

ABSENCE for an OPERATION:
No longer allowed. As our employee you need all of whatever you have, and you should not have anything removed, as that would make you less than we bargained for.

DEATH (Other Than Your Own):
This is no excuse. There is nothing you can do and there is always someone else in a lesser position who can see to the arrangements. However, if the funeral is in the late afternoon, we will let you off an hour early, provided you are ahead enough in your work to keep the job going in your absence.

DEATH (Your Own):
This excuse is acceptable, but a two-week notice is required as it is your duty to teach someone else your job.

RESTROOM PRIVILEGE:
Too much time is being spent in the restroom. In the future we will go in alphabetical order: those with names beginning with "A" will go from 8:00 to 8:15, "B" will go from 8:15 to 8:30, and so on. If you are unable to go at your appointed time, you must wait until the next day when your turn comes again.

The Hot Check Fee Law: Ask the Committee

THE HOT CHECK GUIDELINES SUBCOMMITTEE
Chairman, The Honorable Jerry Cobb, Criminal District Attorney for Denton County
Kerry Armstrong, Assistant Criminal District Attorney for Tarrant County
The Honorable Pat Batchelor, Criminal District Attorney for Navarro County
Ted Busch, Assistant District Attorney for Harris County
The Honorable Bob Gage, County Attorney with Felony Responsibility for Freestone County
The Honorable Bill Moore, County Attorney for Tom Green County

This column contains reasoned opinions of fellow prosecutors on problems arising under specific situations regarding the Hot Check Fee Law. It does not contain official Council positions. Send your questions to the Council, which will forward them to the Subcommittee.

The Hot Check Guidelines Subcommittee has chosen to address three questions relating to the accrual of interest on hot check fee and/or check restitution accounts:

(1) May Hot Check Fees be placed in an interest-paying account?

(2) If so, to whose benefit does the earned interest inure?

(3) To whose benefit does interest on unclaimed restitution, held in the elected prosecutor's restitution trust account, inure?

On these questions there is not much in the way of statutory or even judicial guidelines. It becomes necessary to gather what little there is and then make a best guess. Let's take what would appear to be the easiest question first, question (3).

Without a doubt, unclaimed restitution funds are private funds (as opposed to public funds belonging to the state or county) which are held in trust by the elected prosecutor for the benefit of private individuals and/or companies who were victims of a bad check fraud. Therefore, we can extrapolate some guidance from Sellers v. Harris County, 584 S.W.2d 242 (Sup. 1972).

The Sellers case stands for the proposition that interest obtained on private funds held by the county which belong to private individuals and/or companies belong to the private individual or company, less a reasonable fee for administration and handling costs. This case modified (declared unconstitutional) the previous statutory requirements under Article 1656w, R.C.S., which provided that all interest would be paid to the county. The main theory used in the Sellers case was that to keep all the interest would be an unconstitutional taking of private property without due process of law and compensation.

Thus, interest accrued on restitution trust funds should inure to the benefit of the individual and/or company for which they are being held, less a reasonable fee for administration and handling costs. This situation occurs in the first place in this case because it is unclaimed restitution and thus this will create unclaimed interest. The next step would be to take the appropriate steps to escheat this money to the state or county under the appropriate escheat statute (depending upon whether you are a county or state officer).

Questions (1) and (2) from above are a little more tricky. First of all, keep in mind that the hot check fees must be deposited in a special fund in the county treasury as required by Article 53.08, Texas Code of Criminal Procedure, and should be deposited into that fund within 30 days after receipt. (See, "The Hot Check Fee Law: An Overview," **True Bill**, August/September 1984, pp. 46-49).

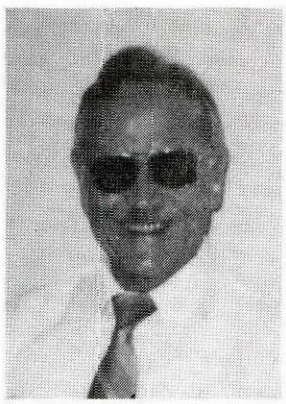
On regular county funds held in the county treasury, Article 2546, R.C.S., allows

the County Commissioners' Court to designate which funds will be allowed to be put out to earn interest. Since it is now well established that the County Commissioners have no administrative authority over the hot check fund, they can not determine whether or not this special fund can be put out to accrue interest. But as it would appear to be permissible to put certain county funds out to accrue interest, it therefore seems entirely permissible for the administrator of the hot check fee fund (i.e., the elected prosecutor) to direct that all or part of the fund be deposited in an interest-bearing account in the county depository.

Now we come to the super-tricky part of question (3): Who gets the interest generated by the hot check fee special fund? The funds are not private funds, but public funds (see Attorney General Opinion MW-584 (1982)), and thus they do not fall completely within the parameters of the Sellers case. Yet, they are not the type of county funds which are within the control of the County Commissioners' Ccurt. The manner and means of administration, control, and use of the hot check fee funds, makes them more of a hybrid "private-public" fund.

Using this approach, it would appear that the Sellers case might be of some guidance for reasoning that the interest accumulated from the use of the hot check fees should become a part of that fund, less a reasonable fee for a handling cost to which the county would be entitled.

In summary, it is the opinion of this committee that hot check fees, once deposited in the county treasury, could be put in an interest-bearing account at the direction of the elected prosecutor, and that the interest generated thereby should remain a part of the check fee fund, less a reasonable fee to the county for handling cost. Unclaimed restitution could likewise be used to earn interest, but the individual and/or company for whom said restitution was held in trust, would be entitled to said interest, less a reasonable fee for administration and handling cost. Should the restitution (and interest accrued thereon) continue to be unclaimed then the appropriate escheat statute should be utilized to clear these sums out. □



Oscar Says

Oscar Sherrell, the former Financial Officer, is presently providing his excellent services to the Council on a part-time basis.

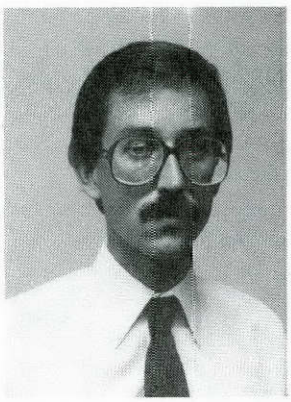
STRIVING FOR EXCELLENCE

No business, whether private, corporate or government, places a premium on shrinking violets. Employers prefer employees who have self-assurance, forcefulness and initiative — people who know their job and know that they know it.

No one can be his or her "best" without utilizing the fullest measure of courage, determination and resolution. Successful people firmly resolve to strive for excellence in every task, then use their drive to transform that resolution into reality. With resolution, each of us can win a worthwhile place among our colleagues.

NOTE FROM THE FINANCIAL DEPT.

We wish to thank everyone who had a travel voucher processed during the last few months of 1984 for their cooperation and patience. As a result of the Capital Murder Prosecution Seminar and the Criminal Law Update & TDCAA Meeting, this department was literally snowed under. All of us promise to try harder during 1985 to be more timely with reimbursements.



Personnel Management:

Sidestepping the Chain of Command

by Don McBeath

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

In this issue, we deal with the District Attorney who sidesteps the office management structure. Although the office is getting large and has a well-defined chain of command, the District Attorney (who served as First Assistant for several years prior to being elected) continues to bypass his subordinate management.

Recently he has made trial assignments and requested directly to several felony attorneys that certain cases be handled in a special manner. He bypassed the First Assistant and you, the Felony Division Chief. You learned of the trial assignments from notes on the desks of the affected attorneys and of the special attention matters when a new prosecutor came to you for help.

Your concern is that the District Attorney's assignments are conflicting with yours and causing confusion. The assistants under your supervision, you fear, will lose respect for you and be uncertain who is really their boss. Your fears are probably legitimate; however, the elected prosecutor is the big boss. Should you simply work around his assignments? Should you talk to him? What should you say?

Assuming a good line of communication with the elected prosecutor, you should talk about the problem. Explain that you realize he has the authority to assign anyone in the office to do anything, but when he bypasses you, he may be undermining your authority and weakening the office chain of command. Explain that your attorneys will tend to place the District Attorney's assignments on a higher priority than yours and that you are making new assignments two or three times because of conflicts. Tell the District Attorney you will make sure his assignments are done, but would like them made through you.

I understand not every person has a totally open and frank link with their boss. Try telling the District Attorney you discovered an attorney under your authority working on a case assigned by him. Ask if he would like you to have the attorney drop a job you have already assigned to him or if he would prefer to re-assign the initial case. He may get the message.

I also realize some bosses will refuse to discuss the problem. In this case you might be forced to live with the situation, but you could request the attorneys under your supervision to inform you immediately upon receiving assignments from the elected prosecutor. You can then make your assignments accordingly.

The problem is not limited to larger offices. In fact, bosses in smaller offices are more prone to bypass management personnel in making assignments. This can lead to trouble when there are differences of opinion or when bosses at different levels are feuding.

Remember that the chain of command is one of the keys to success in any size office. If your boss is bypassing you, you should make every effort to visit with the boss and correct the problem. □

Council Publications

TECHNICAL MANUALS

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

THE GRAND JURY PACKET - Includes the Handbook for Grand Jurors, and Elements Manual, "Crime in Texas," and articles on plea bargaining and the politics of crime. $3.00.

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

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

INDICTMENT MANUAL - 300 pgs. on informations & indictments. Black letter law with annotations, forms, & checklist of recurring problems. Edited by Marvin Collins, former Dist. Court Judge & current Chief, Civil Section, Tarrant County C.D.A.'s Office. $55.00.

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

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

PUBLIC INFORMATION PAMPHLETS

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

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

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

HOT CHECKS contains clues for detecting bad checks & procedures to follow. $2.50 per 50.

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

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

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

Name _____ Office _____

Address _____ City _____ State _____ Zip _____

Audio Visual Loan Library

Materials are available upon request at no charge to prosecutors except for return postage and insurance. Requestors are asked to return materials borrowed within two weeks, and are responsible for damage or loss while the material is in their possession. Contact the Prosecutor Council at P. O. Box 13555, Austin, Texas 78711. 512/475-6825.

Professional Development Training

COURTROOM DEMEANOR - Testifying; cross-examination tactics; how witnesses are perceived; avoiding common mistakes while on the stand. By James Barklow, former Dallas County Asst. D. A. 57 minutes. U-Matic, Beta or VHS videotape.

CHALLENGING A SEARCH & SEIZURE - Keep up with defense tactics. By Knox Jones. Produced by the State Bar in February and July 1982. 75 minutes. VHS videotape.

REPORT WRITING - Motivates and teaches the writer to produce clear and accurate reports. 27 minutes. 16mm film or VHS videotape.

TRIAL ADVOCACY FOR PROSECUTORS - Successful trial techniques. Produced by the National College of District Attorneys from 1981 course lectures. Audio cassettes.

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

CAPITAL MURDER PROSECUTION - Produced by The Prosecutor Council from August 1984 course. Audio cassettes.

The Initial Charging Decision - David Crump
Indictments & Bond Hearings - Marvin Collins
Voir Dire: Witherspoon and Adams Considerations - Karen Beverly
Selecting the Ideal Juror - Rider Scott
Use (& Abuse) of Psychiatric Testimony - Rusty Ormesher
Presentation of Evidence in the Punishment Hearings - Rusty Hardin
The Trial Judge's Role - Judge George E. Dowlen, Judge Oliver S. Kitzman, & Judge Sam Robertson
Successful Closing Arguments - Norman Kline
Recent Decisions - Judge Mike McCormick
Federal Law & Appeals Process - Leslie Benitez, Dwayne Crowley & Bert Graham

Public Information Programs

RAPE: VICTIM OR VICTOR - Tactics to reduce risk of rape. 17 minutes. VHS videotape.

CRIME PREVENTION: THE ROLE OF CITIZENS - Stresses individual responsibility. "Crimeproofing" the home, car, & family. 11 minutes. Color slides and audio cassette.

RURAL CRIME - Minimizing criminal opportunity in sparsely-populated areas; security of home, barn, 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.

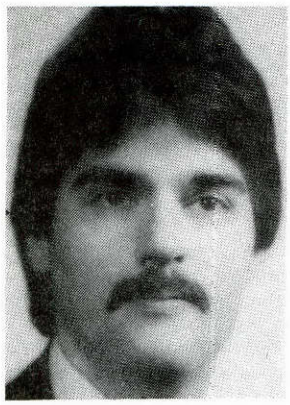
THE MYTHS OF SHOPLIFTING - Common measures used by stores to catch or deter shoplifters. Particularly useful for teenagers. 12 minutes. VHS videotape.

VICTIM RIGHTS - Victims/effects from burglary, murder, rape & child abuse. Produced by the National District Attorneys Association. 14 minutes. VHS videotape.

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

Prison Crime Prosecution Team

The Council is pleased to profile the men who began in November 1984 as its Prison Crime Prosecution team (see related article, p. 9).



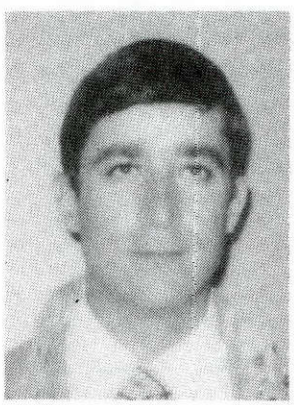
DAVID P. WEEKS

David P. Weeks is the Senior Prosecutor on the Council's Prison Crime Prosecution Team. As well as being experienced prosecuting violent crimes, he has prosecuted prison crime including trying one murder and one assault on a guard and has presented about 29 T.D.C.-related cases to grand juries.

After earning his B.A. in Philosophy from the University of Virginia, David entered the Bates College of Law in Houston. During a summer between semesters he interned with the Harris County District Attorney's Office. After graduation he spent six months with the Texas Department of Corrections Office of Staff Legal Counsel to Inmates, visiting every office in Brazoria and Fort Bend Counties. David has been an Assistant District Attorney for the 12th Judicial District (Grimes, Madison, and Leon Counties) for the past two and a half years. Raised in Virginia, David came to Texas in 1977. His wife Anna is a native Texan.

PAUL G. JOHNSON

Paul G. Johnson is the Assistant Prosecutor with the Council's new team. A Magna Cum Laude graduate, Paul earned his B.B.A. in Accounting & Economics from the University of Wisconsin, then attended the University of Houston College of Law. For nearly two years he was a Staff Attorney II (Staff Counsel for Inmates) with the Texas Department of Corrections. For a year thereafter he was in private practice with the offices of Lloyd Lunsford, in general trial practice, emphasizing family, criminal personal injury, and worker's compensation law. Paul has been an Assistant District Attorney for Brazoria County for the past three years. He's been in Texas ten years; his wife Margarett is a native Texan.



B. BYRON BUSH

As an Investigator for the Prison Crime Prosecution Team, B. Byron Bush will work closely with David Weeks out of Huntsville. A native of Lubbock, Byron attended Texas Tech University, then transferred to Sam Houston State University to complete his B.S. degree in Law Enforcement and Police Science in 1978. Byron has various types of criminal investigation training under his belt, including use of cameras in police work, correctional officer in-service training, T.D.C. supervisor training, homicide and sex crime investigation, development of latent prints, and hostage negotiation. He has his Intermediate Certification from T.C.L.E.O.S.E.

For eight and a half years Byron worked in various capacities (security, warden's office, personnel, and training) with the T.D.C. in Huntsville. For the past two years he has been with the Walker County Sheriff's Department as an investigator, patrol officer, and most recently, a special investigator on a state grant regarding crimes in the T.D.C. unit there.

JOHN LEE BLANKENSHIP

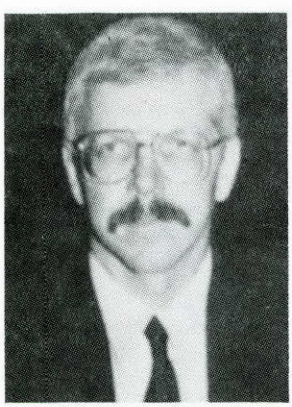
As an Investigator John will work with Paul Johnson out of Angleton. John studied Law Enforcement at Brazosport College and has numerous in-service training courses to his credit in areas ranging from auto theft and homicide to fingerprinting and photography.

In the 1970s he served as a Reserve Police Officer with the Angleton Police Department, as well as a Patrol Deputy and Jailer with the Brazoria County Sheriff's Department. With the Clute Police Department he bagan as Patrolman and worked his way up through Sergeant and Lieutenant to become Chief. Since 1983 he has been a Criminal Investigator with the Brazoria County Sheriff's Department.

John holds his Basic, Intermediate, and Advanced Certification from the Texas Commission on Law Enforcement Officer Standards and Education. A past President of the Brazoria County Peace Officer's Association, he also belongs to the National Sheriff's Association. His hobbies include hunting, fishing, and photography.

John and Magie (his wife of almost 15 years) have two daughters: Mindy, 8 and Cara, 3.

New Council Member



MAC SMITH

Mac Smith is the newly-elected member of the Prosecutor Council, taking office in January. Born in Weatherford, Texas, he graduated from Weatherford High School, then completed undergraduate and law degrees at Texas Tech.

Mac became Assistant County Attorney for Parker County and "tried D.W.I. cases for a year and a half." He joined the firm of Fulgham, Grogan & Vic and also became City Attorney for Weatherford. By 1976 he was ready to run for District Attorney — and he won, earning his keep ever since. (D.P.S reports that one of Mac's trials in 1983 was the first in Texas utilizing wiretap evidence in a jury trial. Mac brought in a life sentence.)

Prior to his Council membership, Mac served as the Chairman of the Advisory Committee to the Council. He has also served as a Director of the Texas District and County Attorneys Association, a member of the Legislative Committee of the Texas District And County Attorneys Association, and a member of the Regional Police Academy Training Committee.

He has served as President of the Parker County Bar and as a Board Director for the Heart of Texas Girl Scouts Council. As a member of the Presbyterian church, he is a ruling elder and on the board of deacons.

An avid runner, Mac completed a 26-mile marathon in 1981, in addition to numreous "10K's" (10,000 meter runs). In 1982 he came in second (behind his brother, Brock, District Attorney for Jack and Wise Counties) in the 1st Annual 5K Fun Run sponsored by the Texas District and County Attorneys Association.

Mac is married and has two daughters: Ellen, 8, and Susie, 4.

Classifieds

Assistant District Attorney Needed. Salary: mid-$20,000 range, depending on experience and ability. Will consider December 1984 graduates. Resumes and writing samples appreciated. Contact Danny Hill, District Attorney, Potter County Courthouse, Amarillo, TX 79101. 806/379-2325.

District Attorney's Investigator Needed in Brown County (Brownwood, Texas). Position available January 1, 1985. Salary $18,218.88. Some fringe benefits. Contact Steve Ellis, District Attorney, P. O. Box 1726, Brownwood, TX 76804. 915/646-0444.

American Prosecutors Research Institute - National nonprofit criminal justice institute, headquartered in Washington, D.C. area seeks candidates for position of Counsel to the Vice President - Prosecution Services and Research. Successful candidate is expected to write publishable papers on topics related to the prosecution function. Evidence of academic excellence such as law review membership required. Prefer person with knowledge and/or experience with prosecution/criminal law. Graduate degree in criminal justice, public policy, or public administration desirable. Salary up to $30,000 depending on qualifications and experience. Forward resume, writing sample, and three references to: James C. Shine, Vice President, Prosecution Services and Research, American Prosecutors Research Institute, 1033 North Fairfax Street, Suite 200, Alexandria, Virginia 22314.

Assistant District Attorney Needed for 84th Judicial District (Hansford and Hutchinson Counties). Successful applicant must be "meaner than a junk-yard dog" and willing to immediately assume full case load on trial docket. Salary approximately $33,000 per annum. Contact Gene Compton or Roy Carper, P. O. Box 3367, Borger, TX 79008. 806/274-6325.

CAR RENTAL AGREEMENTS

The State of Texas has discount agreements on car rentals with 7 companies. Rates include unlimited mileage† and are valid for state business or personal travel. Clip the adjacent card to keep in your wallet for handy reference. A summary of the effective rates on January 1, 1985, are as follows in the chart below (rates may vary from city to city because of franchise):

CAR RENTAL AGREEMENTS

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

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

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

†Americar Airways offers the first 150 miles free.

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