TRUE BILL

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SPECIAL SENTENCING ISSUE

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The Director's Corner

by Andy Shuval

For one who hates meetings, the National Conference on Sentencing held in Baltimore last month was a pleasant surprise. The lectures were limited but meaty; the panels were ably filled and informative. The pace allowed time to discuss the material with fellow Texas attendees, among them:

Tom Davis, Judge of the Criminal Appeals;
Larry Gist, Judge of the Criminal District Court in Beaumont;
Mel Hazelwood, General Counsel for Senate State Affairs Committee;
Gilbert Pena, Executive Director of the Criminal Justice Division of the Governor's Office; and
Charles Shandera, Executive Director of the Criminal Justice Policy Council.

The informality provided several opportunities to pick the brains of the attendees from other states. With the exception of a windy moderator who contributed little, the conference was one of the best I have attended in a long time. I learned a lot.

There has been a growing acceptance in the country in the last ten years that the theory of rehabilitation has shown that it does not work, particularly as it has been practiced through the use of indeterminate sentencing and the granting of broad discretionary powers to parole boards as to when to release the inmate.

Several alternatives have been proposed and adopted by some of our sister states. The diversity of the approaches is interesting but most striking are the differences between states that have elected to try the same approach. For example, both Pennsylvania and Minnesota have adopted Sentencing Commissions in an attempt to eliminate the disparity in sentences within the state but the rules adopted by the commission cause a most different result. Today there is probably as much disparity between Minnesota and Pennsylvania as there is between any two states with different sentencing systems.

This issue includes various articles on sentencing to acquaint prosecutors with the history, terminology and issues in the sentencing debate. Unfortunately, Senator Farabee's proposed article has been delayed until the next issue.

Among the sections is a new one, "Letters to the Council," which has a letter from Joe Collina, an assistant in Tom Bridge's office. I hope it is the first of many letters from other prosecutors which will provide not only incisive critiques but also constructive alternatives.

The most striking thing I've learned from my association with prosecutors is that they are extremely talented and dedicated. We Texans are lucky to have the quality of prosecution we have. It compares favorably with the best of the other states and rates well above the average.

Please use this talent and dedication to assist the Legislature in coming up with a common-sense Texas sentencing plan. With such prosecutorial input and impact the baby can be saved and the bath water thrown away.

Andy

Gov. White Pledges Support for Prosecution

On February 16th, the first Governor's Conference on Prosecution was held at the State Bar Center. At Governor White's invitation about 25 to 30 prosecutors attended. The meeting allowed a full exchange of ideas between the prosecutors and Governor.

In his remarks, the Governor commended prosecutors for "keeping the pipeline full." He said he wanted to work with them to improve the State network for fighting crime and repeatedly pledged his support in assisting prosecutors in getting adequate funding.

During the conference, free-wheeling discussions were held on the way the parole law is working. Neal Pfeiffer, former CDA of Bastrop County and currently a member of the Parole Board, pointed to his concern with the way TDC administers the good time laws. Governor White said one of his aides will look into the matter.

Council members Randy Hollums and Margaret Moore discussed the concerns and legislative goals of prosecution. Both emphasized that adequate funding was the most important single need of prosecutors.

Pat Ridley, president of TDCAA, described the Crime Biter Program in Bell County which was the pilot project for the Prosecutor Council's program presently before the CJD awaiting a decision on funding.

After listening to prosecutors, Governor White asked their help in putting together a crime prevention program. He commended Pat for the Crime Biter program and said he would try to find funding for it so that it could be presented statewide. Prosecutors in turn said they would work with the Governor to make crime prevention an effective criminal justice program in Texas.

Other speakers the attendees heard were Senator Ray Farabee, Representative Robert Bush, State Prosecuting Attorney Bob Huttash, and a representative of Senator Glasgow's office.

Prosecutors' reactions after the meeting reflected their appreciation for the opportunity to visit with the Governor and to explain the concerns of prosecutors. They were pleased with the receptiveness of the Governor to their problems. For more details, see the TDCAA March Newsletter or call Andy Shuval at the Council office.

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

The Status of Sentencing Laws

From a Report of The Bureau of Justice Statistics

Editor's Note: This is a condensation of an article presented in August 1983 by the Bureau of Justice Statistics, a part of the U.S. Department of Justice. It will bring the reader up to date with the structures in place in January 1983 that determined the length of time a person spent in prison in the U.S. This presentation provides a framework for discussing future changes as they are proposed. It contains a single summary picture; it does not reflect all the variations within each State.

The United States has experienced dramatic changes in the laws under which people are sent to prison and in the mechanisms that control how long they stay there. A decade ago, in most jurisdictions, the courts had primary control over who went to prison, subject to negotiations carried out in the plea-bargaining process, within broad limits set by legislative statute. The parole board controlled the length of the prison term within broad limits set by the court and by law.

This general model had many variations but was the predominant approach to setting prison terms. In the past decade, however, legislative control over the sanctioning process has increased, accompanied by concerns about sentencing disparities, doubts about the efficacy of rehabilitation, and increased interest in incapacitation and deterrence. At the same time in some jurisdictions, the judiciary and the parole boards have taken steps to formalize their control over specific components of the sanctioning process. This report covers the status of sentencing in the various states and the federal system as of January 1983.

Control over setting prison terms

The power to set prison terms is distributed in various ways among the legislative, judicial, and executive bodies in each State. Most often, it is the judge who decides whether to punish by imprisonment or an alternative. This decision may be shared in part with other actors in the judicial system. Juries, prosecutors, and defense attorneys may recommend sentences. Sometimes dispositions are worked out in advance through plea-bargaining agreements involving the prosecutor, the defendant's attorney, and often the judge as well.

If a convicted offender is to serve a prison term, the judge selects a minimum term, a maximum, or both, within the range provided by the penal code for that offense or offense class. The parole board, based on a regular review of the offender's case, determines the appropriate time for the release of the offender to the community. Versions of this model continue to exist in most States. In each State, the legislature plays an important role in defining the limits of judicial and executive (parole board) powers, restricting discretion or providing leeway to determine the amount of time a person serves in prison.

Court discretion in length of prison terms

The States vary in the degree of court and parole board discretion provided by law. The States can be described as either broad or narrow in the degree of judicial discretion over sentence length. Court discretion is defined as narrow if the range of sentencing options available to the judge is restricted by law to less than 1/3 the statutory maximum sentence length for each offense. For example, for persons convicted of a crime carrying a 12-year statutory maximum, judges

with narrow discretion must select a sentence from within, at most, a 4-year range.

Under this definition, judicial discretion over sentence length is narrow in only a few jurisdictions. In the remaining ones court discretion is classified as broad, although the judically imposed sentence may have little impact on the actual length of time an offender remains in prison.

Parole board discretion

In most States, the parole board may alter the amount of time served in prison by releasing prisoners to community supervision before the maximum sentence date. In some jurisdictions the legislature has limited the releasing power of the parole board by requiring that prisoners must serve a flat minimum or proportion of the maximum sentence before becoming eligible for parole. In other jurisdictions parole board discretion is extensive — relatively unconstrained by law or not constrained at all. In cases where the discretion available to the parole board by law is broad, the board may nonetheless choose to exercise its discretion narrowly.

Most States, the Federal system, and the District of Columbia give some degree of discretion in the release of prisoners to the parole board. Where the parole board has this power, persons entering prison may have no clear idea of exactly when they will be released. Two persons receiving the same sentence may actually serve different lengths of time in prison. Thus the power of the parole board to release prisoners may diminish the role of the judge in setting prison terms.

Determinate sentencing

In nine States — California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, and North Carolina -- the discretionary power of the parole board to release prisoners early has been eliminated. Under the sentencing statutes in these States, prisoners receive fixed sentences, which they must serve in full, minus any time off for good behavior. These States are commonly known as the determinate sentencing States.

In all determinate sentencing States, parole boards continue to handle revocations and good-time decisions. Discretionary paroling may also continue in these States, to a limited extent, for persons sentenced to life imprisonment and for persons sentenced before the current structure went into effect.

Determinate sentencing first appeared in Maine in 1976. By 1979, six other States (California, Colorado, Illinois, Indiana, Minnesota, and New Mexico) had eliminated the discretionary releasing power of the parole board for all or most State prisoners During the last 4 years, however, only two States, North Carolina and Connecticut, have abolished parole board discretion. The nine determinate sentencing States differ considerably in the size and nature of their correctional populations and the procedures under which prison terms are imposed.

In the four determinate States with broad judicial discretion (Maine, Connecticut, Illinois, and Indiana), the judge has great power to determine time served in prison. In Maine, statutes provide very broad ranges for four general classes of offenses (each carries a maximum but no minimum). The judge selects a single term from within that broad range, a flat sentence that must be served by the inmate. In Illinois, sentencing ranges are provided for seven classes of offenses. Extended ranges are provided for cases where aggravating factors are present. The judge selects one term from these ranges. The more serious the felony, the broader the sentencing options. For a less serious felony such as shoplifting, the regular sentencing range is 1 to 3 years with an extended range of 3 to 6 years. For a more serious felony such as armed robbery, the regular term range is 4 to 15 years with an extended term range of 15 to 30 years.

By contrast, in the five determinate sentencing States where judicial discretion is narrow — California, Colorado, Minnesota, New Mexico, and North Carolina — the sentence prescribed by law becomes the most powerful factor in determining actual time served in prison. California law provides three specific sentencing terms for each offense or group of offenses. The middle term must be chosen in the absence of either mitigating or aggravating factors, the latter of which must be charged and proven in court. The prison term imposed must be justified by the proven

facts of the case, and each case is reviewed by the Board of Prison Terms. In California, persons convicted of the same offense are likely to serve very similar periods of time in prison. Consequently, plea bargaining to negotiate the offense for which a defendant will be charged becomes particularly crucial in determining sentence lengths.

Mandatory prison terms

For a first-degree murder where the death penalty is not imposed, a prison term has always been customary, and this custom is usually written into law. Many States have identified other offenses for which a prison term is deemed mandatory, and, for these offenses, have legislatively removed the court's discretion over the in/out decision (the decision to impose a prison term or to provide an alternative such as probation, fines, or suspended sentence).

The four broad offense categories in which mandatory prison terms are most often legislated are violent crime, habitual crime, narcotics violation, and crime involving the use or possession of firearm. Almost all of the States have mandatory prison term statutes in at least one of these categories. For those convicted under such statutes, a judge has no choice but to impose a prison sentence.

The most common mandatory prison-term statutes are for violent crime (a category that includes murder); 43 States have such laws. Habitual-offender laws, aimed at the career criminal, are in effect in 30 States. Mandatory prison terms for narcotics and firearm offenses tend to be the result of more recent legislation. Twenty-nine States and the District of Columbia have drug laws with mandatory imprisonment provisions and 37 States and the District of Columbia now have gun laws with mandatory prison terms for certain violations.

Statutes setting mandatory minimums are not necessarily the same as mandatory prison-term statutes. For example, a habitual-offender statute that dictates a mandatory minimum sentence or a statutory add-on term may be relevant only if the judge chooses a prison sentence. Mandatory prison-term statutes refer only to those crimes for which the court's discretion over the in/out decision has been eliminated by law.

Sentencing guidelines

In some States, the judge's decision to impose a prison term is constrained by the existence of sentencing guidelines. Sentencing guidelines consider the relative severity of an offense along with an offender's prior criminal history and background to derive a recommended sentence for the court. Three States — Minnesota (1980), Pennsylvania (1982), and Utah (1979) — have established statewide sentencing guidelines with specific recommendations on the in/out decision as well as the length of prison terms. In Minnesota and Pennsylvania, sentencing guidelines have been approved by the State legislature and written into law. In Utah, the State court system has guidelines formulated by administrative policy. In Washington, Florida, and Maryland statewide guidelines have been legislatively ratified but in January 1983 were not yet in effect.

While the criminal statutes in virtually all States detail a general range of sentencing options deemed appropriate for any particular crime, sentencing guidelines attempt to direct the court to the available options it should choose in any given case. In each of the sentencing-guideline States, a sentence range is specified for most offenses based on the seriousness of the offense and the extent of the criminal history of the offender.

The range and form of the prescribed sentence can vary significantly from State to State, as the cases of Minnesota and Pennsylvania demonstrate. In Minnesota, a non-imprisonment alternative is the recommended sentence for most property crimes in which the offender's criminal history is not extensive. Pennsylvania guidelines, in contrast, generally specify non-confinement only for misdemeanor offenses where mitigating circumstances are involved. For normal misdemeanor cases, minimum ranges of 0 to 6 or 0 to 12 months are specified regardless of an offender's prior record. Furthermore, Minnesota sentencing guidelines provide judges with a relatively narrow sentence range for a given level of offense severity combined with a given history of criminal activity. From this range, one fixed term is chosen. Pennsylvania sentencing guidelines, however, are broad, specifying a minimum range, an aggravated minimum range, and a mitigated minimum range, from which the judge chooses a minimum term. (The maximum term is set by statute.)

A sentencing commission in each State monitors the use of the guidelines and departures from the recommended sentences by the judiciary. Written explanations are required from judges who depart from guideline ranges. The Minnesota Sentencing Guidelines Commission states that "while the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist." Pennsylvania sentencing guidelines stipulate that court failure to explain sentences deviating from the recommendations "shall be grounds for vacating the sentence and resentencing the defendant." Furthermore, if the court does not consider the guidelines or inaccurately or inappropriately applies them, an imposed sentence may be vacated upon appeal to a higher court by either the defense or the prosecution.

Six other court systems — Maryland, Massachusetts, Rhode Island, Vermont, Washington, and Wisconsin — have sentencing guidelines that currently apply only in certain jurisdictions or to a limited range of offenses. In some cases these selectively applied guidelines represent the pilot phase of a study that may eventually lead to the establishment of a statewide sentencing guideline policy.

Parole guidelines

In 14 States, the District of Columbia, and the Federal system, the discretion of the parole board to release prisoners is limited by explicit parole guidelines enacted by the legislature or voluntarily adopted by parole boards. In California, parole release has been eliminated for all prisoners under the authority of the California Department of Corrections except for those serving life imprisonment terms. The Board of Prison Terms applied parole guidelines to determine prison-term lengths for those prisoners. In Minnesota, parole guidelines are used only for prisoners sentenced before the advent of determinate sentencing in 1980.

Although nearly all States have legislative statutes that define general criteria for parole release, formal parole guidelines attempt to make these criteria explicit and measurable. Parole guidelines are used by parole boards to measure the presumed risk that an offender will commit additional crimes while on parole based on such factors as the offender's prior convictions, substance abuse history, and prison behavior. A decision on when to release an offender (i.e., on how long a term should be served) is then made by the parole board based upon both the presumed risk and the severity of the current offense. Most guidelines allow for exceptions to specified term lengths if mitigating or aggravating circumstances are involved. Prison behavior, either good or bad, is often considered.

Reducing prison terms: Good-time policies

Good-time policies in most States significantly contribute to prison-term reduction. All but four States (Hawaii, Pennsylvania, Tennessee, and Utah) award prisoners days off their minimum or maximum terms for maintaining good behavior or participating in various prison activities or programs. The amount of good time that can be accrued varies widely among States — from 5 days a month to 45 days a month in several States. Texas presently allows up to 9 days good time for each day served. Good time can be an incentive to encourage cooperative behavior, and can result in a major reduction of the sentenced term.

Good-time policies are often written into State statutes but may also be non-statutory system-wide correctional policies. Good time is typically awarded and administered by a State's department of corrections or by individual prison wardens.

Forty-odd States, the Federal System, and the District of Columbia award good-time credit to prisoners for good behavior. Typically, this credit is automatically awarded and subtracted from a prisoner's sentenced term at the time of prison entry and then rescinded in whole or in part for unsatisfactory behavior. In Oregon, good-behavior credit is subtracted from the maximum sentence and so does not affect a prisoner's parole eligibility date or actual time served unless the prisoner is not paroled and serves the maximum term. But more often the minimum sentence is reduced by good time, so that good-time policies become a significant element in prison-term length. This is particularly relevant for States that have eliminated discretionary parole release.

GLOSSARY

Common Terms Used In the Current Sentencing Debate

Accountability: A desire to require the sentencing authority to give reasons to the public and the victim for the imposition of a particular sentence.

Determinate Sentencing: A system of sentencing where the prisoner must serve the time given him in court (less good time). Parole Boards have no authority to release a prisoner earlier. (See also **Indeterminate Sentencing.**)

Disparity: The differences in the sentences of offenders for like offenses under similar circumstances.

General Deterrence: This policy serves warning on the population as a whole that criminal behavior will result in offical sanctions by "throwing the book." This philosophy goes hand-in-hand with "retribution" (see below). (See also **Specific Deterrence.**)

Good Time Policies: Policies designed to give a prisoner incentive to behave while incarcerated. They should not be confused with a parole board's discretion to release a prisoner. They are usually statutory and applied by the prison authorities or the parole board.

Incapacitation: A strategy for controlling crime by locking up the offender so that he cannot prey upon the community. (See also **Selective Incapacitation.**)

Indeterminate Sentencing: A system of sentencing where the prisoner serves time until the parole board believes he is rehabilitated, at which time he is released.

Judicial Sentencing Guidelines: Guidelines (usually advisory) developed by the judiciary to make sentencing more uniform.

Mandatory Sentence: Sentence set by the legislature which requires a minimum prison term for certain crimes or offenders.

Parole Guidelines: They are intended to see that the decisions of who gets paroled are more uniform. They can be either developed by the legislature or the commission or both.

Retribution: A theory of punishment recently gaining favor which bases the punishment on the crime.

Selective Incapacitation: A strategy that attempts to identify and incarcerate high-rate offenders as opposed to collective incapacitation in which all offenders who commit a crime (robbery, for example) get a certain penalty (i.e., 5 years). (See also **Incapacitation.**)

Specific Deterrence: This policy provides a sentence that is unpleasant, such as a term in prison, in the hopes that the offender will find the experience distasteful enough that he or she will refrain from future criminality. (See also **General Deterrence.**)

Statutory Sentencing Guidelines: Guidelines adopted by the legislature. They are usually initially developed by a sentencing commission which then monitors their applications.

THE SENTENCING DILEMMA

If the Judge doesn't understand his underlying program, how can the public?

In one recent case the defendant's lawyer entered a plea for leniency based on the argument that this was "a classic case of a young person whose early life was formulated by hanging around with the wrong people." The judge rejected the plea, stating that he saw it as "a classic case of second-degree robbery where two individuals went out and robbed another with what appeared to be a gun." The judge admonished the young man to accept culpability for his crime. In effect, he said, "You chose to do wrong, and now must pay in full for your crime. You will receive harm for harm." **(Retribution)**

At the same time, however, the judge stated that a major factor in sentencing was "deterrence to others." The judge said he was giving notice to the community that those who commit crimes of violence will "not be slapped on the wrist, but will be hit hard." **(General Deterrence)**

Yet, after this speech, the judge sentenced the youth to a term of zero to seven years. **(Indeterminate Sentencing)** That means the youth will serve zero to seven years, being let out of prison when the parole board thinks that he is rehabilitated or when they judge that he has learned his lesson **(Specific Deterrence)** or when they judge that he is no longer a threat to society **(Incapacitation)**.

Excerpted and adapted from Travis et al. Corrections: An Issues Approach. 2nd Ed. 1983.

A few States award good time under methods that do not reduce sentence length. In New Hampshire, for example, a number of "disciplinary days" are automatically added to the minimum term of each offender, and it is from this number that good behavior days are subtracted. Thus, if the prisoner accrues all of his good time, the automatic disciplinary days will be canceled out, and his parole eligibility date will occur, as scheduled, on the completion of his minimum sentence. Otherwise, he is penalized by a delay in his eligibility date.

Good-time reductions based on positive actions of the prisoner are being utilized in 33 States and the Federal system. These reductions result from participating in various productive programs (work, school, rehabilitative counseling, medical research, blood donation) or from meritorious conduct (including success under minimum security). In January 1983, the California Department of Corrections eliminated automatic time off for good behavior; prisoners sentenced after that date must earn all of their good time through work or school participation.

Emergency crowding provisions

Another kind of prison-term reduction responds to prison crowding. Michigan's Emergency Overcrowding Act requires that when the prisons exceed 100% capacity for 30 days, all parole eligibility dates are moved up 90 days. Similar schemes were adopted by Connecticut, Georgia, Illinois, Iowa, Ohio, and Oklahoma and are pending in other legislatures. (Texas adopted a rollback scheme in the last legislative session. When a prison's population reaches 95%, all inmates automatically receive 30 days' good time credit.)

Further reading

- A National Survey of Parole-Related Legislation Enacted During the 1979 Legislative Session. Bureau of Justice Statistics, 12/79, NCJ-64218.
- Probation & Parole 1981, 8/82, NCJ-83647.
- Prisoners in 1982, 4/83, NCJ-87933.

REFERENCE MATERIALS ON SENTENCING are available from the Council. **See p. 44.**

Advisory Committee Sets Goals

At its February 17th meeting the Advisory Committee to the Council considered various topics through its sub-committees. Here is a summary of the sub-committee reports.

Education

Based on the Education Questionnaires received by the Council, the subcommittee recommends approval of the Investigators School.

In regards to the Basic Prosecution Course, it was noted that the majority of respondents feel the course should be prioritized to prosecutors with 3 years of experience or less, and that it should incorporate more practical nuts-and-bolts type information.

The subcommittee recommends the adoption of the same attendance requirements as the State Bar uses, i.e., if an attendee misses more than four (4) hours of a contract course, a letter must be submitted to the Executive Director indicating why the time was missed. If the Executive Director finds the reason is not satisfactory, the attendee will not be reimbursed by the Council for travel expenses.

Regarding seminars, the committee recommends one on Capital Murder to be held 1 to 2 days prior tc the Capital Murder course on August 9th-11th. A committee including Louis Raffaelli, Ed Walsh and others form Houston and Dallas will study this possibility. Regarding wiretapping, the subcommittee felt that there is not wide enough use to have a seminar. They suggested a pamphlet instead. The subcommittee felt that the topics of "DWI" and "Seizure and Forfeiture" could be incorporated into the Regional Meetings.

In the area of computers, Louis Raffaelli has a software package for prosecutors that perhaps could be purchased through the Council for standardization of offices.

Investigators

Since the reponse on the expert witness resource directory has not been great, the subcommittee proposes incorporating it in the Investigator Desk Manual, which will be updated in the next few months. Update sheets, it was suggested, could be published as tear-outs in TRUE BILL. Another questionnaire should be sent to all investigators and prosecutors to find out what they feel should be incorporated in it.

The sub-committee felt a Controlled Substance Manual, with cross references between generic and pharmaceutical names of drugs, would be useful. It might be incorporated into the Investigators Desk Manual.

Services

The subcommittee recommends that 3 or 4 hours of each Regional Meeting be devoted to victim assistance and one hour to stress management. The victim assistance program will be done in cooperation with the Texas Crime Victims Clearinghouse, a division of the Governor's Office.

The revisions to the Hot Check Manual have been completed; the new edition is forthcoming. The Crime and Punishment book has been resived and is ready to go out to TDCAA.

The committee recommends two new pamphlets, one on DWI and another on Drugs to go out to school kids at the junior and senior high level. (Funding for this project will need to be discussed with the Governor.) It was thought a good idea to prepare pamphlets that prosecutors could pass out at presentations of Council public information programs. The Crime Prevention Institute in San Marcos was named as a possible good source for public information pamphlets.

The subcommittee recommends the Council do a series of news releases about what a member of the public can expect when a case is filed, perhaps titled "How a Case is Handled." Prosecutors interested in assisting with the writing of this or other news releases are encouraged to contact the Executive Director.

Ethics

Regarding the ethics section at the last Basic Prosecution Course, the subcommittee believes the program was too long. It recommends an initial presentation of the prosecutor's responsibilities (15-30 minutes), a short handout and several questions for the audience to think about during the course. At the end of the course, the questions could be discussed.

The subcommittee suggested that a new subcommittee be developed to study the need for guidelines for those offices who administer hot check funds.

Technical

The subcommittee proposed one amendment to the guidelines for requests for technical assistance. The wording on paragraph B.6 on page 36 would change to read:

> "The Technical Assistance Review Committee shall be composed of the Chairman of the Advisory Sub-Committee on Technical Assistance and two members of that sub-committee selected by the Chairman."

To develop regional networks for technical assistance, it was announced that Scott Klippel, Legal Counselor for the Prosecutor Council, would send out letters to large offices requesting a roster of department heads.

Operations and Management

The Council will be sending out the 1984 Budget Update Questionnaire and will be sending out a list to all members of the Advisory Committee of prosecutors in their regions to contact and encourage them to fill out the questionnaire.

Carrol Schubert of Bexar County had sent his office manager to a seminar on office management and iwll be sending the council information received on this seminar. The State Bar will be putting on an Office Management seminar, as well as sending the Council a catalog of tapes and videos available on the subject.

Letters to the Council

Dear Andy:

I read your "The Director's Corner" [regarding sentencing and the need for prosecutor input] in the most recent TRUE BILL. I write this letter for myself. I do not speak for the entire staff nor for Mr. [Tom] Bridges [District Attorney, 36th Judicial District]. I appreciate the opportunity for input.

I practiced for 9 years in Illinois as a prosecutor and as a defense attorney. You may know that Illinois has the judge do ALL the sentencing.

The Texas system is far superior for the following reasons:

1. [Illinois] Judges are a product of their non-judicial experience. Thus, some are prosecution oriented and some are pro defense. They sentence accordingly, with much disparity.

2. Because of #1, the attorneys in Illinois are notorious for judge-shopping. The "old salts" of the legal community shop. Neophytes learn the hard way the price of not shopping.

3. Judges are often suspected (sometimes for good cause) of sentencing for political reasons or because of their preference for the attorneys practicing before them.

4. Because juries are a cross-section of the community, their verdicts reflect the will of the people. Lawyers/Judges are hardly representative of the community. They are by status and education "atypical."

5. Jurors always have to compromise to obtain unanimity. Compromise tempers the extremes of sentences and makes them more just.

I have only been practicing in Texas as an Assistant D. A. since May of last year. But, I hate to see your system change. It's great.

Best regards,

Joe Collina

Significant Decision

CALDWELL CDA GOES TOE-TO-TOE WITH COMMISSIONERS COURT

Angered by the cuts that his Commissioners Court made in his budget request, Jeffrey Van Horn, Criminal District Attorney of Caldwell County, filed a petition for a writ of mandamus to require the Commissioners to approve his budget intact. He made the argument that Art. 332a, Sec. 5, stating that prosecuting attorneys shall fix staff salaries subject to the approval of the Commissioners Court, coupled with the exclusion of district attorneys from Art. 3912 K (allowing commissioners courts to set certain salaries and expenses), meant that approval must be granted so long as all expenses were necessary and reasonable.

The precedent for the lawsuit was Commissioners Court of Lubbock County v. Martin, 471 S.W. 2d 100 (7th Ct. App., 1971) Ref. N.R.E. That case held that Section 10 of Art. 42.12 C.C.P., which authorized district judges to fix the salaries of probation officers "with the advice and consent of the commissioners court," required the commissioners court to approve the district judges' determinations so long as the expenditures were necessary and reasonable. The Attorney General in 1976 was asked to give the same mandatory construction to the term "subject to the approval of the commissioners court" found in the wording in Art. 332a, Sec. 5,. However, he declined to do so (Attorney General Opinion H-908), ruling that while "with the advice and consent" was properly found by the Court in Martin to be ambiguous and thus open to judicial interpretation, the phrase "subject to the approval" was unambiguous, and gave the commissioners court the right to reject a prosecutor's budget no matter how reasonable.

Armed with the Attorney General's opinion, which of course is not law but an opinion of what the law is, the Commissioners Court hired a high-powered Austin firm to represent them. When the dust settled, Jeff emerged victorious from trial on two fronts. The judge ruled that the Commissioners Court had to approve the prosecutor's budget as proposed so long as it was necessary and reasonable, and that Jeff's proposed budget was, in fact, necessary and reasonable. The Commissioners have not yet decided whether to appeal.

Jeff or his assistant Todd Blomerth will be happy to answer questions you might have about the lawsuit. Copies of the pleadings and trial memorandum are available from the Council.

GOVERNOR ANNOUNCES CRIME VICTIMS ASSISTANCE PHONE NUMBER

At a press conference on January 20th Governor Mark White announced the opening of a toll-free telephone number in the State of Texas that crime victims can dial to find out what services are available to them in their communities.

By calling 1-800-252-3423, support groups in Texas can receive technical assistance from a member of the Governor's staff in organizing projects to help crime victims.

The victims assistance line is a project of the Texas Crime Victims Clearinghouse, a division of the Governor's Office established six months ago with a $109,000 grant from the criminal justice division.

"The words 'criminal justice' too often refer to justice only for the criminal. We have forgotten that for every crime there is at least one victim," Governor White said.

Among individuals and groups who have been instrumental in improving services to crime victims in Texas, the Governor recognized the Council, represented at the conference by its legal counselor, Scott Klippel.

The Crime Victims Clearinghouse will hold workshops on how to aid crime victims for law enforcement agencies, prosecutors, and service organizations. It will sponsor Crime Victims Rights Week the third week in April and host the first organizational meeting of crime victims rights groups in Texas.

For further information, contact Suzanne Willms, director of the Crime Victims Clearinghouse, at (512) 475-0360.

Technical Assistance

From Your Fellow Prosecutor:

Jury Selection in a Capital Case

by Richard C. Bax & R.K. Hansen

Richard C. Bax and R. K. Hansen are both former Harris County Assistant District Attorneys. Over the years each has tried numerous capital murder cases, including three as co-counsel to each other. In January they left the office to practice law together in Houston.

When prosecuting capital cases, the most obvious opportunity for error exists in jury selection. You, the prosecutor, may deliver your voir dire to as many as one hundred citizens in order to select twelve fair and impartial jurors who will assess the death penalty if it is warranted. At the same time, you must produce a record which can withstand the scrutiny of defense counsel and appellate review. This is one of the most complex and lengthy process in our criminal justice system. In this space, it is impossible to discuss adequately all of the potential pitfalls. This article will merely suggest how to approach a capital voir dire; it cannot substitute for individual preparation, research, and most of all, experience.

Obviously, the State seeks to empanel twelve citizens who have professed a belief in the purpose of a death penalty law and have indicated that they could and would participate in a verdict resulting in the assessment of the death penalty in a proper case. Conversely, the State seeks to exclude any person who, for whatever reason, cannot participate in a legal process which provides for the death penalty.

Prospective jurors usually have two common attributes. First, they are understandably nervous with the procedure of individual examination and, second, they want to be good citizens and follow the law. Either attribute can hinder them from being totally open and prevent you from acquiring the information you need to reach an informed decision as to their qualifications. Therefore, time must be devoted to establishing some rapport with each individual. Explain to the prospective juror that there are no right or wrong answers to any questions; if their answers reflect how they feel, they have responded properly. Assure them that no one desires to debate or quarrel with their opinions or attempt to change their beliefs. The goal of this introduction is to let the prospective juror know that it is perfectly acceptable to disagree with the law and still be a good citizen.

Once the juror is at ease with the surroundings and this role, you should inquire into their personal feelings concerning the State's right to take a life as punishment for certain crimes. Ask the jurors to share with you, in their own words, their opinions and beliefs regarding the death penalty. Determine if the jurors have any religious or moral beliefs that would prevent them from returning a verdict of death in a proper case. Attempt to discover the underlying factors that led to the particular beliefs held, how long the juror has held those beliefs, and how strongly such beliefs would influence their verdict.

Encourage the prospective jurors to do the talking. Ask simple, direct questions; then sit back, listen, and learn. However, do not take every response about the death penalty literally. Beware the juror who says he favors the death penalty, but on closer examination reveals he could never participate in such a verdict and would rather have someone else decide the issue. On the other hand, do not overlook the juror who states he does not believe in the death penalty and then cites the reason that "no one is ever actually executed." Obviously, such situations as these provide essential areas for further discussion.

If you establish that the prospective juror is in favor of the death penalty, attempt to

educate him so as to prevent the defense from later challenging him on any ground and, at the worst, to cause the defense to exercise a pre-emptory challenge. Begin by explaining the law of capital punishment procedure so that the prospective juror understands clearly that a juror's role is to be an unbiased trier of the facts who believes in all areas of the law and, further, that the law must be followed. This will later enable such prospective juror to inform defense counsel that the death penalty is not automatic and must be based solely on the evidence and the law. Likewise, if you have done your job, defense counsel will have to accept the prospective juror's statement that confessions taken improperly not only should be disregarded, but will be disregarded, even if it means an otherwise guilty defendant may be turned loose on the streets. A commitment from a juror to follow the spirit of the law, as well as the letter of the law, is essential to his ultimately remaining on the jury despite an experienced defense counsel. Many other issues too numerouse to list provide fertile ground for the defense to use as pitfalls for the unsuspecting juror.

Encourage the prospective jurors to do the talking.

Ask simple, direct questions; then sit back, listen, and learn.

However, one procedure which we have used with a great deal of success is to conduct a general capital voir dire at first; then listen carefully to the initial defense voir dire. Once you learn their tactics, you can begin to take those issues away from them as you go along.

Now suppose that a prospective juror is opposed to the death penalty. There are only two possible means whereby a juror of this belief can be excluded. The first and easiest method, although the most costly, is the use of a pre-emptory challenge. The preferred method is a successful challenge for cause under the Supreme Court decisions in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). However, before challenging a juror under these cases, you should be well-versed in the legal requirements they present.

Witherspoon held that prospective jurors could not be challenged for cause simply because they expressed general opposition to the death penalty as punishment for certain types of crimes. The court held that such disqualifications were constitutionally impermissible unless the juror's position was such that the juror would automatically vote against the death penalty in all cases without regard to the facts, or that their feelings concerning the death penalty would prevent them from rendering an impartial decision as to the guilt of the defendant.

Witherspoon held that prospective jurors could not be challenged for cause simply because they expressed general opposition to the death penalty.

In Adams, the United States Supreme Court struck down Article 12.31(b) of the Texas Code of Criminal Procedure which provided for the disqualification of prospective jurors who were unable to state under oath that the mandatory penalty of death or life would not affect their deliberations on any fact issue. The Court upheld the State's right to exclude jurors whose beliefs would cause them to ignore the law or to violate their oaths, but barred the State from excluding a juror simply because he might be affected by the prospect of participating in a verdict of death.

In dealing with a juror who opposes the death penalty, you must take the extra steps required by Witherspoon and Adams and thereby avoid the premature challenge of such a juror. To do otherwise will inevitably lead to an unsuccessful prosecution before you call your first witness to the stand.

Starting with the basic premise that it is impossible for persons opposed to the death penalty to participate in the capital punishment process, you must aid the prospective juror in reaching this conclusion the juror experiencing any feelings of guilt for holding such a view. This can be done by demonstrating respect for the juror's viewpoint and assuring him that he is not alone in his opinion. This conciliatory approach, if handled properly will allow the juror to gain confidence in his position and thereby assist you in leading him down the

path allowed by Witherspoon and Adams. You must irrevocably commit the jurors to the proposition that they could never, under any circumstances, set aside their feelings against the death penalty and return a verdict which would result in the death of another human being. At this point, and at this point only, does a proper challenge under Witherspoon and Adams exist. However, to further protect the record, the juror should be committed to the fact that he would automatically, without regard to the evidence, answer one or more of the special issues required by Article 37.071 of the Texas Code of Criminal Procedure in the negative to avoid the infliction of death as punishment for a capital crime.

If you are unsure a challenge for cause exists, exercise a pre-emptory. Otherwise, you may find yourself starting over, only a few years later.

Needless to say, you will still find persons who adhere to the untenable position that, despite their opposition to the death penalty, they will still answer the special issues honestly, even if such answers might result in the assessment of the death penalty. (In our experience, we have heard of only one instance where such a position was accepted as a truism by the prosecutor. In this case the juror was asked if he was sure he could follow the law and evidence in view of his personal beliefs. He responded that since he had done it once before he felt sure he could do it again. And he did.)

But remember: if you are unsure if a challenge for cause exists under Witherspoon and Adams, the better practice would be to exercise a pre-emptory challenge if you have one left to use. Otherwise, you may find yourself starting over, only a few years later.

There will be instances where you will come upon persons who will demonstrate tendencies associated with both being in favor of and opposed to the death penalty, or perhaps they just do not provide you with enough solid answers upon which yoiu can make a decision.

If both sides are unsure as to the prospective juror's position, and if the proceedings are fairly amenable, you may be able to excuse the individual by agreement. This saves time and avoids the unnecessary risk of accepting the juror or being forced to use a pre-emptory challenge.

Depending on the individual juror, you might consider allowing the juror to contaminate himself. For example, if a juror is susceptible to agreeing that he would always answer Special Issue No. 1, as provided in Article 37.071 of the Texas Code of Criminal Procedure, "yes" in any case where he believed beyond a reasonable doubt a defendant was guilty of capital murder, you could allow him to take that position and thereby leave him vulnerable to a challenge for cause by the defense. In effect, you may force the defense to excuse a juror whom the State did not desire anyway and whom the defense would not have excused otherwise.

There are many other factors which will come into play in selecting a capital case, among which are the strengths or weaknesses of the prosecution, evidentiary issues peculiar to the State's case, and the number of strikes available to either side at any given time in the selection process. No two cases are ever alike. Although a brief overview of strategy involved in selecting a capital jury may be helpful, the process can only be mastered with hard work, experience, and a thorough understanding of your case.

Prosecution of Unemployment Insurance Fraud

by Susan F. Eley

Susan F. Eley is an attorney in the Office of the General Counsel of the Texas Employment Commission. She is in charge of all cases involving the fraudulent obtaining of unemployment benefits. Formerly, she was an Assistant County Attorney with the County Attorney's Office.

To the uninitiated, Mr. Dub L. Dipper may seem like thousands of other Texans: a college-educated suburbanite holding down a white-collar job on the public payroll. But, Dub L. Dipper is in fact a double-dipper. He collected unemployment benefits even though he had a job. As a matter of fact, he did it twice—in 1980 and then again in 1981.

Both times, Mr. Dipper paid the State back only after being charged and arrested by the local prosecuting attorney acting on a complaint from the Texas Employment Commission. The combined efforts of the TEC and local authorities in the case of Mr. Dipper recouped nearly $4,000 for the State.

Unemployment Insurance Fraud is a misdemeanor offense specifically set out in Art. 5221(b) §14(a), V.T.C.S.:

> Whoever makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this Act or under the unemployment compensation law of any other state, or under any Act or Program of the United States administered by the Commission, either for himself or for any other person, shall be punished by fine of not less than One Hundred Dollars ($100), nor more than Five Hundred Dollars ($500), or by imprisonment for not less than thirty (30) days nor longer than one (1) year, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

Prosecutors should note that charging these cases under the felony theft statute is prohibited, since the above statute specifically addresses this area. See Jones v. State, 552 S.W.2d 836.

The true story of Mr. Dub L. Dipper illustrates how unemployment insurance cheaters are caught and prosecuted. When the then unemployed Mr. Dipper filed his first claim with the TEC in 1980 he was told to report any earnings. Every week he signed a form saying he was still unemployed, even though he soon found a good job with a government agency which included a staff car among its perks.

Unfortunately for Mr. Dipper, the TEC does a quarterly computer run that matches social security numbers of people on unemployment with wage reports from all employers, both private and state. After an investigation by state and local TEC employees and Mr. Dipper's employer, Dipper was notified that he had violated provisions of the Unemployment Compensation Act. Mr. Dipper's benefits were terminated and restitution ordered.

> Any person who by willful nondisclosure or misrepresentation by him, or by another for him, of a material fact, has received any sum as benefits under this Act while any conditions for receipt of benefits imposed by this Act were not fulfilled in his case, or while he was disqualified from receiving benefits, forfeits such benefits and the rights to benefits which remain in the benefit year in which such nondisclosure or misrepresentation occurred. The Commission may to the same extent

cancel such benefit rights of any person who has attempted by such willful nondisclosure or misrepresentation to obtain or increase benefits. Such forfeiture or cancellation may be effective only after opportunity for fair hearing before the Commission or its duly designated representative has been afforded such person.

Prosecutors should note that Section 14(e) is the TEC administrative procedure to cancel benefits and recover overpayments. At this point TEC asked for its $1,564 back. Criminal charges were not then contemplated.

Mr. Dipper, however, failed to respond after having been contacted via certified letter. Consequently, at the request of TEC, the local prosecuting attorney charged Dipper with unemployment insurance fraud and had him arrested. That finally got Mr. Dipper's attention. Shortly thereafter, the Commission received a cashier's check from Dipper and a request to drop the charges. The complaint was dismissed; Dipper's record was clean.

Less than a month later, Mr. Dipper found himself unemployed again. Naturally, he hotfooted it down to the local TEC office and filed for unemployment benefits on February 11, 1981. As before, he was warned about reporting earnings. As before, each week he signed documents saying he was jobless. He began receiving his unemployement insurance benefits on April 14th, the same day he started work--this time for a local school district--without telling the TEC. Naturally, the computer turned him up on a cross-match, and once again the TEC sent out a certified letter demanding repayment.

"The Texas Employment Commission is not running an interest-free loan program to assist you," a Commission staff attorney grumbled in a letter to Mr. Dipper.

Perhaps chastened by his previous arrest, Mr. Dipper this time offered to pay the $2,268 in benefits he collected. Although he was employed full-time, with a comfortably modest income, he informed the TEC that he was only able to make payments of $63 per month, which he soon discontinued.

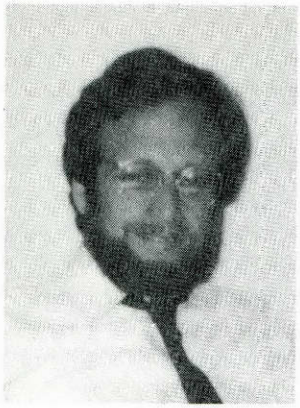
As the statute of limitations was about to run, the TEC staff attorney again provided the local prosecuting attorney's office with full documentation on the case and prepared all the charging instruments. Mr. Dipper was charged and arrested again.

As it had a year earlier, the filing of charges and the arrest worked like a charm. On May 12, 1983, the TEC received a letter with a cashier's check for the full amount of restitution and a letter asking--once again --for a dismissal because "I would not want my record to show any wrong-doing," stated Mr. Dipper. TEC sent a letter to the prosecuting attorney stating that although restitution had been received, TEC would be glad to participate in the prosecution of unemployment insurance fraud. In this instance, however, the prosecutor exercised his powers of discretion, and decided not to pursue the case further.

As this case illustrates, the Texas Employment Commission is interested in filing criminal charges for their deterrent effect. Mere restitution of the fraudulently received funds is available through filing civil lawsuits. The staff carefully screens the cases, singling out only the most serious offenders for prosecution. In 1983, out of the 897,504 initial claims for unemployment benefits, there were 5,456 cases where the sanctions provided in Article 5221b, §14(e), were imposed, i.e., benefits were terminated and restitution demanded. Of these 5,456 fraud cases, however, only 898 were referred to local prosecutors for criminal action. The Texas Employment Commission is not interested in using local prosecutors as mere collections agents for restitution, but instead in bringing to their attention those individuals who are truly deserving of criminal prosecution. Decisions on the ultimate disposition of the case are always left to the local prosecutor.

Realizing that prosecutors are overworked and generally unfamiliar with our operations and enforcement provisions, the Commission provides prosecutors with complete charging instruments and documentation on all cases. Additionally, a staff attorney with prosecution experience is available to answer questions or give assistance, including even trying the case if requested to do so by the local prosecutor.

A comprehensive packet of information on the actual trial of unemployment insurance fraud is available by writing to me at the Office of the General Counsel, Texas Employment Commission, TEC Building, Austin, Texas 78778, or by calling (512)397-4390.



From the Legal Counselor's Desk

by Scott Klippel

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

Attorney General Opinions

Attorney General Opinion JM-99

Re: County Treasurer Contracting with the County

The question arose of whether or not it was permissible for a county treasurer who owned and operated a "right-of-way service company" to contract with the county to perform such services, which were separate and apart from his duties as treasurer.

Two statutes which address the issue of self dealings are Articles 2340 and 2364 V.T.C.S. The former prevents County Commissioners from being directly or indirectly interested in any contract with the county; the latter prevents county officials from being interested in contracts with the county for stationery supplies (See A.G. Opinion JM-82, TRUE BILL, December 1983-January 1984).

Three other possibilities existed, however, which might have made the proposed contract invalid. First, it could have violated the Penal Code provisions regarding official misconduct; secondly, it could have violated the treasurer's oath of office; and thirdly, there might have been a common law conflict of interest which would have voided the contract on public policy grounds.

Regarding official misconduct, the Attorney General noted that as long as the treasurer's official duties were segregated from his private business concerns, there would appear to be no problem. Regarding the oath of office, there was no proscription against such a contract. And lastly, regarding the conflict of interest, the Attorney General noted that the County Treasurer simply collects and disperses money, and has no function regarding the county's acquisition of right-of-ways, thus negating an inherent conflict of interest between the treasurer's public role and his private interests.

Attorney General Opinion JM-100

Re: Sec. 2(e) of the Open Meetings Act

Section 2(e) of the Open Meetings Act (Art. 6252-17 V.A.T.S.) provides that:

> "Private consultations between a governmental body and its attorney are not permitted except in those instances in which the body seeks the attorney's advice with respect to pending or contemplated litigation, settlement offers and matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act."

It is obvious what is meant by pending or contemplated litigation or settlement offers, but what are "matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act"? The Attorney General states that this refers to those instances where an attorney-client privilege could arise. Thus, when a public body sought their attorney's legal advice, they could do so in executive session.

However, "[t]he closed door discussion with the attorney must be limited to legal matters. General discussion of policy, unrelated to legal matters is not permitted. . .merely because an attorney is present."

Attorney General Opinion JM-102

Re: Full-Time Deputies Serving Without Pay

Attorney General Opinion JM-102 does a very nice job of summarizing itself:

> "It is our opinion that state law does not require lawfully appointed deputy peace officers to necessarily receive any compensation. However, we believe that any person commissioned as a peace officer by a city or a county who will receive no compensation must nevertheless perform some legitimate law enforcement duties. It is not a proper purpose for a deputizing authority to designate an individual as a peace officer who will do nothing for the political entity facilitating his appointment. Furthermore, we do not believe that a person may be deputized as a peace officer often trained, educated and certified often at public expense solely to enable that person to secure private employment in a security related field. See JM-57 (1983).* The Private Investigators and Private Security Agencies Act makes an exception from its licensing requirements for 'a person who has full-time employment as a peace officer'. . .We do not address the unasked questions concerning the legality or liability which might arise from the practice of permitting peace officers to utilize public property and authority in the pursuit of personal and private gain in connection with employment in the private sector."

Under the above circumstances, two questions arise: (1) Why would anyone now want to be a deputy and serve without pay? (2) Why would a sheriff wish to appoint someone under those conditions in view of the potential liability?

*As noted in TRUE BILL, Oct.-Nov. 1983, homeowner associations may not pay deputies to patrol neighborhoods.

Attorney General Opinion JM-103

Re: County Funds for Recreational Centers

The issue raised in this opinion was whether or not a county money may be used to fund the operations of a Senior Service Center. For the sake of the opinion it was assumed that the center would provide social and recreational programs for the elderly.

Counties may expend public funds only when authorized by the Constitution or by statute. As Art. 1014c-1 and 6081t V.T.C.S. authorize counties to operate recreational centers, funds for a senior citizen center are properly spent "[a]s long as the facility. . .is open to the public, i.e., so long as no member of the public is precluded from its use not withstanding that it may be primarily designed to assist the elderly. . ."

Attorney General Opinion JM-107

Re: Computation of Misdemeanor Jail Time

This opinion deals with the issue of computation of misdemeanor jail time, especially where time is being served for failure to pay a fine pursuant to 43.09 C.C.P. At the outset, however, it is strongly urged that all prosecutors be familiar with the cases of Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1971), Williams v. Illinois, 399 U.S. 235, 90 SCt 2018 (1970), Ex parte Tate, 471 S.W.2d 404 (Tex. Crim. App., 1971), and Ex parte Minjares, 582 S.W.2d 105 (Tex. Crim. App., 1979), which place limitations on the State's ability to incarcerate indigents for failure to pay fines.

The rules regarding computation of time are as follows:

(1) Fines from two or more misdemeanors when converted to jail time run consecutively;

(2) Where one misdemeanor conviction results in a sentence of jail and a fine, the serving of the jail sentence does not accumulate credit towards the fine;

(3) Where two misdemeanor sentences are imposed on one day, one for failure to pay a fine, the other being a straight jail sentence, the two sentences run consecutively; and

(4) Where a defendant is already in jail for failure to pay a fine on a misdemeanor conviction and subsequently receives a jail sentence on another misdemeanor, the time runs concurrently unless the judge specifically orders them run consecutively.

Additionally, the Attorney General states that the 72 hour jail rule of Art. 6687b §34, V.T.C.S. (and presumably also the new DWI law) is not the same as a three day jail sentence. The Attorney General did state, though, that "in light of the difficulties encountered in the daily operation of a large jail, it was reasonable to release an individual as close to the seventy-second hour as is practicable."

Attorney General Opinion JM-109

Re: Treasurer Reports to the Commissioner's Court

The county treasurer is required to make financial reports to the Commissioner's Court and county auditor as required by Articles 1634, 1635, 1636, 1709 and 1709a.

In the words of the Attorney General: "To the extent that Attorney General Opinion WW-765 (1959) stands for the proposition that Articles 1634, 1635, and 1636 are impliedly repealed by the auditor statutes, it is expressly overruled."

Attorney General Opinion JM-111

Re: Parole Revocation Procedures

This opinion reiterates constitutional and statutory procedure as required by Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972) and Art. 42.12 §21(a), C.C.P., for the re-incarceration of parolees. After a parolee is arrested on the authority of a board-issued prerevocation warrant, he may not be returned to TDC prior tc the completion of a local hearing held pursuant to Board of Pardons and Parole Rules (found at 37 Texas Administrative Code, section 145.45) or the waiver of such a hearing. A sheriff is obligated to hold such a prisoner until TDC may lawfully take charge of the prisoner and TDC may not lawfully take charge of such a prisoner until the completion or waiver of that hearing.

Attorney General Opinion JM-112

Re: Open Container Ordinances Promulgated by Counties or Cities

The Attorney General stated that counties and cities do not have the power to ban the possession of open containers of alcoholic beverages in motor vehicles.

The Texas Alcoholic Beverage Code provides that the Code exclusively governs the manufacture, sale, distribution, transportation and possession of alcoholic beverages except where otherwise specifically provided in the Code. Those specific exceptions include:

(1) the assessment of local fees
(2) prohibiting sales in residential areas, or near churches and schools
(3) regulating the sale of beer within the city limits, and
(4) adopting the laws for sale of mixed beverages.

An open container law would be outside these exceptions and thus impermissible.

Attorney General Opinion JM-113

Re: Art. 38.31, CCP - Deaf Persons

This opinion reviews the requirements of Article 38.31, Code of Criminal Procedures, regarding the appointment of interpreters for deaf persons in criminal proceedings.

It is the opinion of the Attorney General that the failure to abide by the statutory requirements could be violative of a deaf defendant's constitutional right to confrontation and thus be reversible error.

Furthermore, although the statute spells out that an interpreter must be paid a reasonable fee set by the court after considering the recommendations of the State Commission for the Deaf, it is silent as to who actually pays the fee.

The Attorney General felt that in light of similar provisions in 38.80, C.C.P. and 3712a(d) V.T.C.S., which make the county liable for paying interpreters, the county likewise should pay for interpreters provided under §38.31 C.C.P.

Attorney General Opinion JM-114

Re: Reproduction Costs Under the Open Records Act (Art. 6252-17a, §9(a) & (b)).

It is the opinion of the Attorney General that the provisions of the Open Records Act which allow government agencies to recover actual costs of reproduction of public records does not allow the requestor to be charged for the time an employee takes to reproduce that material. When the State Purchasing and General Services Commission sets the charges pursuant to Art. 6252-17a; §9(a) it includes those costs in the figure set. Furthermore there should not be any charges for the time it takes an employee to delete material the requestor is not entitled to.

Open Records Decisions

Open Records Decision - 403

Re: Federal Grand Jury Testimony

Where a federal judge ordered the release of federal grand jury testimony to four specified individuals (the state prosecutor, a private attorney, the district judge and the sheriff), Rule 6(e) of the Federal Rules of Criminal Procedure forbid its release under the Open Records Act, Section 3(a)(1) "information deemed confidential by law." This is in addition to the fact that the grand jury is an arm of the judiciary and thus not subject to the Open Records Act.

Open Records Decision - 404

Re: Litigation Exception

A request was made for certain records that the State Board of Insurance had regarding an accident involving an amusement ride at the State Fair. The State Board of Insurance sought to have the records exempted from disclosure under Section (a)(3), the pending or anticipated litigation exception. It was expected that the city where the State Fair was held would be involved in the litigation as a party. The Attorney General ruled that as the State Board of Insurance was not going to be a party, this section could not be invoked. The city itself would have to apply to keep the record private.

Prosecutors should be aware that if other agencies have records that prosecutors wish to be exempt under Section a(3), the prosecutor should join in the request of the record holder to keep those records from being publicly disclosed.

Open Records Decision - 405

Re: State Auditor's Report

The issue here was whether or not a state auditor's report critical of a state employee should be released. It was argued that this information was part of the employee's personnel file and thus exempt under Sec. 3(a)(2).

The Attorney General stated that the right-to-privacy test is applicable to the personnel file exception. The test involves these criteria:

(1) Is the information highly intimate or embarrassing?
(2) Would the release be highly offensive?
(3) Is the public interest in disclosure minimal?

In a discussion of the inter-or intra-agency memorandum exception, Sec. 3(a)(11), the Attorney General states that the purpose of that section is to "protect advice and opinion on policy matters and to encourage open discussion concerning administrative action." Thus, just because information is in memo form does not necessarily exempt it from disclosure.

Sidenotes

Attorney General Opinion JM-68 (See TRUE BILL, Oct.-Nov. 1983) stated that the new DWI bill with its provision making it illegal to drive with a blood alcohol content of .10% or more, should be held constitutional. Both the California Supreme Court (Burg v. Municipal Court, 34 Criminal Law Reporter 2269) and the Arizona Supreme Court (Fuenning v. Superior Court, 34 Criminal Law Reporter 2270) have recently upheld similar statutes in their own jurisdictions.

In dealing with a void for vagueness claim, the California Supreme Court made the following comments: "[W]e observe that the real thrust of appellant's argument is that the statute is in effect 'void for preciseness.' His complaint is not that the language of the statute is vague or ambiguous, but that it is too exact. His novel theory is that the statute fails to notify potential violators of the condition it proscribes because it is impossible for a person to determine by means of his senses whether his blood alcohol is a 'legal' 0.09% or an 'illegal' 0.10 percent. . . It is difficult to sympathize with an 'unsuspecting' defendant who did not know if he could take a last sip without crossing the line, but who decided to do so anyway. The very fact that he has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute." **Caveat Imbibor.**

What Will They Think of NEXT?

While it may be an apocryphal tale of the Texas defense attorney who, after his client was convicted of the axe murder of both his mother and father, asked the jury to have mercy on his client because he was an orphan, we have the following true case from California.

In People v. Baha Asgari, the defendant was convicted of the first-degree murder of his wife. His defense was alibi and to that end he testified; fifteen other witness testified to his alibi as well. After the conviction he finally admitted to a probation officer that he did do his wife in.

On appeal, the appellate lawyer argued that **the trial attorney was incompetent for having believed the defendant's story.** Thus, because the trial attorney believed that the defendant did not kill his wife, the attorney did not pursue other issues such as self-defense, provocation, diminished capacity, or lesser included offenses.

HELP!

TRUE BILL needs your help. In order to keep putting out informative and useful issues, we need articles by you for "From Your Fellow Prosecutor" and the "Trial Reference Series."

"From Your Fellow Prosecutor" could especially use articles on:

1. How to convince your Commissioners Court to give you an adequate budget. (For one solution, see page ___.)

2. Successful punishment hearing arguments, especially for the first time offender and/or the DWI defendant.

3. The successful use of the new section of the Code of Criminal Procedure allowing for the video taping of the testimony of child victims (Art. 38.071).

If you would like to write an article, please call our legal counselor, Scott Klippel, or mail him an outline of your article.

The "Trial Reference Series" attempts to provide concise series of questions, motions, or other trial-related material that prosecutors would want for their trial folders. We ask that you go through your files and if you find anything of general interest, please mail us a copy.

Trial Reference Series

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

For this edition of the Trial Reference Series, the Council is grateful to the California District Attorneys Association for permission to adapt from its manual, Driving Under the Influence, Chapter 8, "Examination of the Arresting Officer."

CUT HERE

DIRECT EXAMINATION OF ARRESTING OFFICER IN A DWI CASE FROM INITIAL OBSERVATION TO TIME OF ARREST

(NOTE: You may wish to have the court reporter pre-mark all the exhibits and show them to defense counsel before the officer takes the stand in order to expedite the testimony.)

1. **WHAT IS YOUR OCCUPATION AND ASSIGNMENT?**

2. **HOW LONG HAVE YOU BEEN A POLICE OFFICER?**

(NOTE: Ask the next three questions only if the officer can remember details about training. When the testimony about the procedures in the instant case is compared with the procedures learned in training, it will enhance the appearance of objectivity.)

3. **WHERE DID YOU RECEIVE YOUR POLICE TRAINING?**

4. **WHILE YOU WERE RECEIVING YOUR TRAINING, DID YOU RECEIVE INSTRUCTION REGARDING INVESTIGATION OF CASES OF DRIVING WHILE INTOXICATED?**

5. **WHAT WAS THAT TRAINING?** (The answer should emphasize training regarding spotting intoxicated drivers and administering field sobriety tests (FST)).

(NOTE: The next two questions are designed to show that the officer doesn't arrest everyone whose driving isn't perfect.)

6. **APPROXIMATELY HOW MANY TIMES HAVE YOU PARTICIPATED IN ARRESTS FOR DRIVING WHILE INTOXICATED?**

7. **APPROXIMATELY HOW MANY TIMES HAVE YOU PARTICIPATED IN STOPPING A MOTORIST SUSPECTED OF BEING INTOXICATED AND CONCLUDED THAT THE MOTORIST WAS NOT INTOXICATED?**

8. **WERE YOU ON DUTY ON** (date of arrest) _____ **AT ABOUT** (time of arrest) _____?

9. **WHAT WAS YOUR ASSIGNMENT?**

10. **WERE YOU IN A MARKED OR UNMARKED PATROL CAR?**

11. **WERE YOU IN UNIFORM?**

(NOTE: Depending on the facts of case, decide whether to ask questions 12-13 below.)

12. **WERE YOU ALONE OR WITH A PARTNER?**

13. **WHO WAS YOUR PARTNER?**

14. **ON** (date of arrest) _____ **AT ABOUT** (time of arrest) _____ **DID YOU OBSERVE A** (color) _____ (make and model) _____ **AUTOMOBILE?**

15. WHERE WAS THAT AUTOMOBILE WHEN YOU FIRST OBSERVED IT?

16. HOW MANY PERSONS DID YOU OBSERVE IN THE AUTOMOBILE AT THAT TIME?

17. WHAT WAS YOUR LOCATION WHEN YOU FIRST OBSERVED THE (describe make) **_____ AUTOMOBILE?**

18. WHAT DREW YOUR ATTENTION TO THE (describe make) **_____ AUTOMOBILE?**

19. AFTER (repeat what officer said in answering #18) **_____, WHAT DID YOU DO?**

20. PLEASE DESCRIBE YOUR OBSERVATIONS.

(NOTE: You must develop the entire driving and parking sequence. Create a verbal movie for the jury. Place them in the patrol car with the arresting officer. Remember that they weren't there and as they sit in the jury box they are not faced with the immediate prospect of having a two-ton projectile of steel and glass smash into a pedestrian, another car, or a telephone pole. Be sure to cover any of the following which are relevant:

(a) distance between officer and vehicle;
(b) period of time and/or distance officer observed vehicle;
(c) road and traffic conditions;
(d) character of area;
(e) vehicle's response to red lights, horn, loudspeaker, siren;
(f) how far from curb vehicle was stopped.)

21. IMMEDIATELY AFTER THE (describe make) **_____ AUTOMOBILE STOPPED, WHAT DID YOU DO?**

22. DID YOU OBSERVE THE DRIVER OF THE AUTOMOBILE AT THAT TIME?

23. DO YOU SEE THE PERSON WHO WAS DRIVING THE (describe make) **_____ AUTOMOBILE IN COURT TODAY?**

24. PLEASE IDENTIFY THE DRIVER FOR THE COURT AND JURY.

25. WOULD YOU PLEASE DESCRIBE THE PHYSICAL APPEARANCE AND THE CONDUCT OF THE DEFENDANT AT THE TIME YOU STOPPED HIM/HER?

(NOTE: At this point, frame questions covering the period from just after the stop to just before the field sobriety tests. Include whatever fits into this time span:

(a) smell of alcoholic beverage on defendant's breath;
(b) manner in which the wallet was handled and license removed;
(c) manner in which defendant stepped from the car;
(d) manner in which defendant walked, e.g., leaning on car for support, swaying back and forth;
(e) description of defendant's face, eyes, clothing, speech.

Again, create a verbal movie for the jurors. Help them to see and hear what the officer saw and heard.)

CUT HERE

26. OFFICER, WOULD YOU PLEASE EXPLAIN TO THE JURY WHAT FIELD SOBRIETY TESTS ARE?

(NOTE: Check with officer before asking questions 27-28 below.)

27. DID YOU ASK THE DEFENDANT TO PERFORM ANY FIELD SOBRIETY TESTS?

28. DID YOU EXPLAIN THE PURPOSE OF THE FIELD SOBRIETY TESTS TO THE DEFENDANT?

29. WHAT DID YOU TELL HIM?

30. WHERE WERE YOU AND THE DEFENDANT STANDING WHEN YOU ASKED THE DEFENDANT TO PERFORM THE FIELD SOBRIETY TESTS?

31. WHAT WAS THE CONDITION OF THE SURFACE?

32. WHAT WERE THE LIGHTING CONDITIONS?

33. WHICH FIELD SOBRIETY TEST DID YOU ASK THE DEFENDANT TO PERFORM?

(The following is a list of possible Field Sobriety Tests:

(a) walk-the-line;
(b) modified position of attention;
(c) one foot balance;
(d) finger-to-nose;
(e) alphabet recitation;
(f) speech-finger coordination.

Sometimes a pupillary reaction test is also given; however you may wish to ignore the pupillary reaction test entirely on direct examination. It is never very crucial to the case, and this tactic avoids an objection from the defense on the ground that the officer is not qualified to testify as an expert on problems of the eye. The defense might be lured into the trap of asking about the pupillary reaction test on cross-examination. Prepare the officer for this.)

34. DID YOU GIVE ANY DIRECTIONS TO THE DEFENDANT?

35. WHAT DID YOU SAY?

36. DID YOU ALSO DEMONSTRATE THIS TEST FOR THE DEFENDANT?

(NOTE: The attorney should consider asking the officer at this point to demonstrate for the jury the FST's in the manner demonstrated to the defendant at the time of the arrest.)

37. DID THE DEFENDANT ATTEMPT TO PERFORM THE (name of FST) _____?

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38. PLEASE DESCRIBE THE DEFENDANT'S PERFORMANCE.

(NOTE: Never ask the officer if the defendant "passed" any given test.)

39. If officer gave defendant another chance on this FST: **DID YOU GIVE THE DEFENDANT ANOTHER OPPORTUNITY TO ATTEMPT TO PERFORM THE** (name of FST) _____?

40. DID YOU THEN ASK THE DEFENDANT TO PERFORM ANOTHER FIELD SOBRIETY TEST?

41. WHICH ONE?

(NOTE: Repeat #34-41 until all field sobriety tests are covered.)

42. IN YOUR OPINION, DID THE DEFENDANT SUCCESSFULLY COMPLETE THE FIELD SOBRIETY TESTS YOU ADMINISTERED?

43. WHAT IS THE BASIS FOR YOUR OPINION?

44. AT ANY TIME BEFORE OR DURING THE ADMINISTRATION OF THE FIELD SOBRIETY TESTS, DID THE DEFENDANT COMPLAIN OF ANY PHYSICAL DEFECTS OR INJURIES?
(If yes: **WHAT COMPLAINTS DID THE DEFENDANT MAKE?)**

45. DID YOU OBSERVE ANY PHYSICAL DEFECTS OR INJURIES:
(If yes: **WHAT DID YOU SEE?)**

If defendant complained of, or officer noticed, any defects or injuries: **DID YOU TAKE INTO CONSIDERATION DEFENDANT'S** (defect or injury) _____ **WHEN YOU MADE YOUR EVALUATION OF THE DEFENDANT'S PERFORMANCE ON THE FIELD SOBRIETY TESTS?)**

46. AFTER COMPLETING THE FIELD SOBRIETY TESTS, DID YOU FORM AN OPINION AS TO THE STATE OF THE DEFENDANT'S SOBRIETY?

47. WHAT WAS THAT OPINION?

48. ON WHAT DID YOU BASE YOUR OPINION? (Driving, observations of defendant, FST's.)

49. WHAT DID YOU DO NEXT? (Placed defendant under arrest.)

(AT THIS POINT, THE OFFICER'S TESTIMONY CONTINUES FROM THE POINT OF TRANSPORTING THE DEFENDANT BACK TO THE POLICE STATION.)

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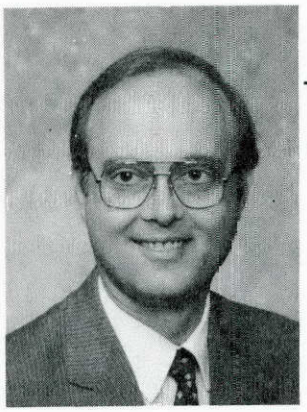

As The Judges Saw It

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

This covers cases from December 1983, January 1984, and the first week of February 1984. As has been the case for several months, decisions interpreting the Speedy Trial Act hold center stage. First, the quiz. (Answers, pg. 34.)

QUIZ

1. If during a probation revocation hearing the accused does not make an issue of his identity (i.e., whether he is the person who was originally placed on probation in that case), may he raise identity on appeal as a sufficiency of the evidence question?
_____Yes _____No

2. During his direct examination a defense witness gives testimony favorable to the accused. When the State cross-examines him (and its questions are germane to the direct testimony), the witness invokes the Fifth Amendment and refuses to answer. Can the judge strike the witness' testimony on direct?
_____Yes _____No

3. If a trial judge proposes to change venue on his own motion, must the judge offer evidence in support of his own motion?
_____Yes _____No

4. In a prosecution for felony escape, will the accused ever be allowed to assert a defense of necessity on the grounds that he needed to seek medical treatment?
_____Yes _____No

5. After the law is explained to him, the prospective juror says that the fact of an indictment would make him think that an accused was "a little bit guilty." Should a defense challenge for cause be sustained?
_____Yes _____No

6. A conviction is reversed on appeal because, among other things, the State offered insufficient evidence to support the verdict of "true" under the enhancement portion of the indictment. Since the enhancement allegation does not go to guilt/innocence, can the State try to prove that allegation again at the retrial?
_____Yes _____No

RECENT DECISIONS

Kalish v. State
#036-82; decided 12/14/83.
Patterson v. State
#63,902; decided 12/21/83.

Re: Effect of a Speedy Trial Act dismissal on other offenses arising out of the same transaction.

Article 28.061 of the Code of Criminal Procedure provides:

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by [the Speedy Trial Act] is sustained, the court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction.

In Kalish and Patterson the Court held that art. 28.061 means what it says, deciding in

those cases that the Speedy Trial Act dismissal of class-C misdemeanors barred the prosecution of all other offenses arising out of the same transaction.

In Kalish the dismissal of a public intoxication charge barred a felony prosecution for possession of cocaine, which was found on the accused at the time of the PI arrest. In Patterson the dismissal of a driving-without-headlights case barred a related DWI prosecution.

It's not entirely clear how the Court is ultimately going to define "same transaction" for these purposes. Both cases so far have involved at least one offense that the Court described as "continuing in nature," such as an offense involving possession. The Court also talks of the offenses having been committed "contemporaneously." If this means that at least one of the offenses must be "continuing," so that the second offense is committed at the very same time that the first offense is being committed, the "same transaction" test might be hard for the defense to satisfy in many situations.

The real test will come when the Court addresses sequential offenses — one offense completed before the next begins — which occur during what in common parlance is a single criminal transaction.

For example, what if the defendant robs a convenience store operator, then rapes her, and finally murders her? Under the old carving doctrine, these offenses would have been part of a single transaction, but is this the case under art. 28.061 since the offenses are not being committed at precisely the same instant?

What if the example involved the robbery of the store operator, the rape of a customer, and the murder of a police officer who responded to an alarm at the store? Under the old carving doctrine separate prosecutions were possible if the victims of the crimes were different, even though the crimes occurred during a single transaction. Will art. 28.061 change that? Your guess is as good as mine, but the Court does make it fairly clear in Patterson that old carving doctrine cases are of limited use in defining a "transaction" for Speedy Trial Act purposes.

Ex parte Crisp
#1044-82; rehearing denied 12/7/83.

Re: Caption to War on Drugs Bill deficient.

The Court rejected the State's argument that the caption to the War on Drugs legislation gave notice of some of the changes contained therein, so that at least part of the bill was good. The Court holds that the entire caption was deficient and the entire bill falls.

McClennan v. State
#212-83; decided 12/7/83.

Re: Bias as a basis for disqualifying a judge.

Previously the Court had said that the only grounds for disqualifying a judge were the matters catalogued in TEX. CONST. art V, sec. 11: (1) interest in the case, (2) relationship with either party within the proscribed degree of consanguinity or affinity, and (3) prior service as counsel in the case.

Now the Court says bias can be a basis for disqualification if the bias is of such a nature and to such an extent as to deny a defendant due process of law. (Query: Does this mean a judge can't be disqualified for bias against the State?) It's not clear how one decides if the bias is that severe. The appellant had suggested that "...a movant must show that if a reasonable man knew of all the circumstances, he would harbor doubt about the judge's impartiality." The Court said even that standard wouldn't help the appellant, who complained of the judge's statement that he wouldn't consider probation on certain facts. Since the trial judge had not refused to consider probation in every sexual-abuse-of-a-child case, but only in such cases involving certain facts, no improper bias was shown.

The Court also addressed how a motion to recuse the trial judge is to be handled. Art. 200(a), sec. 6, V.A.C.S., states that "a district judge shall request the Presiding Judge to assign a judge of the Administrative District to hear any motions to recuse such district judge from a case pending in his court." The Court holds that if the motion to recuse alleges on its face a ground which would require recusal, then art. 200(a) must be followed and a different judge must hear the motion. Any other request for recusal can be decided by the trial judge.

McCullough v. State
#351-83; decided 12/7/83.

Re: Procedure when No. Carolina v. Pearce violated.

The accused was first convicted by a jury and given 20 years. At the retrial the trial judge was asked to assess punishment, and he gave 50 years.

The Court of Appeals said this violated North Carolina v. Pearce and reformed the punishment to show 20 years. The Court of Criminal Appeals did not question the ruling concerning the applicability of No. Carolina v. Pearce, but held that the appellate court could not reform the punishment. The case had to be sent back to the trial court for re-assessment of punishment.

(I think the State will be petitioning for certiorari on the No. Carolina v. Pearce issue.)

Huddleston v. State
#68,450-51; decided 12/7/83.

Re: Fundamental error; inclusion of "unlawfully" in jury charge.

The jury charge on aggravated kidnapping required the jury to find that the accused "unlawfully, knowingly, or intentionally" abducted the victim. The accused argued that inclusion of the word "unlawfully" meant that the jury could have decided that the conduct was unlawful, without ever finding that the proper culpable mental state was present. The Court held that viewing the charge as a whole, this was not fundamental error. Although this was not fundamental error, chances are that it would have been reversible if objected to; the word "unlawful" should not have been in the indictment or charge.

Hall v. State
#68,717; decided 12/7/83.

Re: Jury shuffle in capital cases.

In this capital case the trial judge summoned prospective jurors 24 at a time. Judge Teague's opinion says that if a timely request is made, the accused is entitled to have the names of those jurors shuffled pursuant to art. 35.11, C.C.P. The opinion expressly declines to decide if this would be the case when a special venire is summoned under art. 34.01, C.C.P. The precedential value of this opinion is unclear since four judges simply concur, one dissents, and one did not participate at all.

State ex rel. Bryan v. McDonald
#69-137; decided 12/14/83.

Re: Judicial involvement in plea-bargaining.

The respondent district judge, prior to making a determination of guilt, was reviewing the pre-sentence report and issuing a "court's proposed assessment of punishment," which set out the range of punishment the trial judge would consider if the accused would plead guilty. Writs of mandamus and prohibition were conditionally granted to put an end to this practice.

The Court first noted that at the time these proceedings arose there was no statutory authority for a judge to view the presentence report prior to a determination of guilt. It notes that art. 42.12, sec. 4(c), C.C.P., now permits an accused to consent in writing to the judge's viewing of the report prior to a guilt determination, but the Court declines to say if that statutory authorization would comply with due process.

It earlier said that Judge McDonald violated due process by looking at the pre-sentence report before he passed on the guilt of the accused. The Court also reiterated that judges are not to participate in plea negotiations. Due process is violated if a judge does so.

Travis Bryan and Bill Turner are to be congratulated for bringing this situation before the Court.

Todd v. State
#017-81; decided 12/21/83.

Re: State's right to petition for discretionary review.

The Court finally holds that petitions for review may be granted to review rulings against the State without violating the prohibition against appeals by the State. The majority deals with this by saying that

whenever a petition for review is granted, it is granted on the Court's motion, no matter which side actually filed the petition.

Judge Onion's concurrence prefers to view the discretionary review provisions as just an extension of the basic appellate process which the accused must first invoke. When an accused does that, he cannot complain if the State seeks to take the process to its limit.

Murphy v. State
#912-82; decided 12/21/83.

Re: Felony-murder and the merger doctrine. Pleadings using non-statutory language.

The merger doctrine is a limitation on the felony-murder rule. If the underlying (or precedent) felony is an assault which is inherent in the homicide, then the two acts "merge," and the felony-murder rule cannot be used to raise the offense to a species of murder. The felonious criminal conduct must be different from the assault which causes the homicide if the felony-murder rule is to apply. For example, in Garrett v. State, 573 S.W.2d 543, the underlying aggravated assault was the very same act that directly caused the death of the victim; felony-murder could not be charged.

In Murphy the underlying felony was an arson, alleged to have been committed to collect insurance proceeds, and thus was not "inherent in the homicide." Although the fire which constituted the arson was also the agent causing the death, the arson wasn't meant as an assault against the person, so the felony-murder rule would be applicable.

The arson part of the indictment did not include the element "...knowing that the structure is insured against damage or destruction." However, the Court pointed out that use of the statutory phraseology is not necessary as long as the element is supplied by "necessary inclusion" in the words actually used. The indictment alleged that the structure was torched "with the intent to collect insurance for damage and destruction," which the Court said necessarily implied knowledge that the structure was insured. Therefore the indictment was not fundamentally defective.

Measeles v. State
#1110-83; delivered 12/21/83.

Re: Petitions for review of interlocutory orders.

The Court of Appeals ordered an appeal abated pending the filing of a complete statement of facts. The State disagreed with that disposition and petitioned for review of the abatement. The Court of Criminal Appeals refused the petition, saying that it will not ordinarily entertain petitions for review of interlocutory orders by the courts of appeals.

Benson v. State
#60,130; decided 12/21/83.

Re: Sufficiency of the evidence to be measured against the allegations presented to the jury in the charge.

This opinion considers whether, in assessing the sufficienty of the evidence, the proof is measured against the allegations in the indictment or against the language in the jury charge by which the offense in the indictment was actualy submitted to the jury. The Court holds that the proof is to be measured against the jury charge.

In this case the indictment alleged generally that the burglary was done with the intent to commit the offense of retaliation. The proof would have supported that allegation. However, the jury charge narrowed that theory by charging on an intent to retaliate against a "witness." The proof showed the victim was an "informant" only, not a "witness," so the proof was deficient as the crime was presented to the jury. The Court said this rendered the entire prosecution defective, and it entered a judgment of acquittal. It did imply that this was another situation in which the State might have received a remand for a new trial rather than an acquittal if it had objected at trial to the jury charge.

Williams v. State
#66,708-09; decided 12/21/83.

Re: Extraneous offenses; tests for admitting in direct and circumstantial evidence cases distinguished.

In a direct evidence case the admissibility of an extraneous offense turns first on whether the issue on which the offense is relevant is contested. In a circumstantial evidence case in which the State is seeking to introduce the extraneous offense as part of its case-in-chief, the first question is simply whether the extraneous offense is relevant to a material issue which the State must prove. Only when these first hurdles are overcome do you move to the prejudice-vs.-probative-value considerations.

The upshot of this is, I think, that it should be much easier to admit extraneous offenses during the case-in-chief in a prosecution based on circumstantial evidence. We apparently start off in such a case with the supposition that every element is contested, so that all we need show is that the extraneous offense is logically relevant to the State's case. On the other hand, in a direct evidence case we must point to more of an actual contest regarding a particular element to which the extraneous offense is relevant. Of course in either situation we must then show that probative value outweighs prejudice before the evidence actually comes in.

This opinion also stresses that Albrecht v. State, 486 S.W.2d 97, does not contain an exhaustive list of the theories allowing the admission of extraneous offenses. Other reasons for their admission may arise in a particular case. For example, in this case the extraneous offense was not technically relevant to prove identity, because the accused was clearly the person present at the time of the crime, but it was relevant to prove that he was a party to the crime because he had participated in a similar robbery some months earlier.

Turner v. State
#68,605; decided 12/21/83.

Re: Hands and fists as deadly weapons.

Where the indictment alleges that the murder was committed by striking with fists and choking with hands, a guilty verdict does not by itself constitute a finding that a deadly weapon was used. The judge made a finding that the hands and fists were deadly weapons based solely on the judicial confession to the crime. There apparently must be some testimony about the relative size of the parties, the size and condition of the hands or fists, or the manner of their use before a deadly weapon finding can be made regarding an object that is not a deadly weapon per se.

Hicks v. State
#064-82; decided 1/4/84.

Re: Effect of State's waiver of death penalty.

Although the Court has often said that the State cannot waive the death penalty in a capital murder prosecution, it now clarifies that by saying that the State cannot waive the death penalty so as to deprive the accused of any of the rights he would have in a capital prosecution. Thus the waiver of the death penalty does not automatically present fundamental error; a reversal is required only if the waiver was coupled with the loss of some specific right the accused would have in a capital case. Here the accused received a jury trial and he was allowed the 15 peremptory strikes normally allowed a capital defendant. Since there was no prejudice to the accused, the waiver of the death penalty presented no error requiring a reversal.

Sanders v. State
#63,900; decided 1/4/84.

Re: Lesser-included offenses of theft from the person.

The Court now holds that Theft $5-20 is not a lesser-included offense of Theft from the Person. Article 37.09, C.C.P., talks of one offense being a lesser-included offense of another if the two differ only in the risk of injury involved. Here theft from the person and theft $5-20 do not differ only in the risk of injury to the victim; they also differ in the value of the property, if any, which must be proven. Hence one is not a lesser-included offense of the other.

Rodriguez v. State
#64,277; decided 1/4/84.

Re: Entrapment; objective test adopted.

The en banc Court has now made clear that Penal Code sec. 8.06 embodies an objective theory of entrapment. The predisposition of the accused is irrelevant.

Predisposition may still be relevant to an extent under our statute, but it would have to do with the predisposition of the populace in general, rather than with the predisposition of the particular defendant. Section 8.06 talks of the effect the police conduct would have on persons generally, and one could at least argue to the jury that many things which the defense claims constitute entrapment would not induce anyone to commit the crime unless they were already predisposed. For example, look at the various opinions in Bush v. State, 611 S.W.2d 428. Even if predisposition is relevant in this sense, I doubt that it would permit the introduction of extraneous offenses against the accused just because he claimed entrapment.

Williams v. State
#64,651; decided 1/4/84.

Re: Parole law discussion as a reason for changing vote on punishment. Wording of cumulation orders.

In this case there was extensive discussion of the parole law, and at least one juror voted for a higher punishment after that discussion. However, that juror would not unequivocally state that she changed her vote upwards because of the discussion, and she mentioned other factors that had some bearing on her final vote, such as hunger, fatigue, the lateness of the hour, and her desire to go home. The Court concludes that the conflict in the juror's testimony concerning her reasons for changing her vote, coupled with the trial judge's opportunity to hear the juror's testimony and observe her demeanor, permitted the trial judge to conclude that the juror did not vote for a higher punishment because of the discussion of the parole law. (And this was true even though the trial judge did not specifically say why he was denying the motion for new trial.) Consequently, there was no reversible error.

This appears to be the best way of countering the effects of the jury's discussion of the parole laws. Thorough questioning will probably result in most jurors admitting that there was some reason other than, or at least in addition to, the parole discussion that led them to vote for a higher punishment. Apparently almost any conflict along those lines will permit the trial judge to conclude that the vote was not changed "because of" the discussion.

This case also holds that a cumulation order is insufficient if it says only that one sentence is "to be stacked on" another. The order must fairly carefully track the statutory language, which talks of the punishment in the second case beginning "...when the judgment and sentence in the preceding cause have ceased to operate."

Turner v. State
#927-82; decided 1/11/84.

Re: Assertion of rights under Speedy Trial Act.

In order to obtain a reversal for a violation of the Speedy Trial Act, art. 32A.02, C.C.P., the accused must expressly invoke that statute in the trial court. Where the accused mentioned only the Sixth and Fourteenth Amendments in his speedy trial motion in the trial court, he could not rely on appeal on the state Speedy Trial Act.

Porier v. State
#67,344; decided 1/11/84.

Re: Admissibility of testimony from a prior trial.

In order to introduce testimony from a prior trial in the case, the offering party must meet the requirements of art. 39.01, C.C.P. One requirement is that the offering party provide evidence, under oath, of the witness' unavailability. The unavailability of the witness cannot be established by hearsay. While the State satisfied the "oath" requirement by having one of the prosecutors testify concerning the witness' absence, the predicate was not satisfied when he could offer only hearsay statements concerning why the witness was medically unable to attend court.

Ashby v. State
#650-83; decided 1/25/84.

Re: Exhibiting harmful material to minors.

The accused showed a portion of a movie film to a small child. According to the victim

the film had "naked people" in it. The accused was convicted of "Display of Harmful Material to Minor," Penal Code sec. 43.24. He contended that whether the content of the film, taken as a whole, was harmful to minors depended on what the entire film contained, and not just on what the portion shown to the child contained. The Court rejects this, noting that the state can constitutionally prevent the exhibition of material to minors even though the exhibition of the same matter to adults would be constitutionally protected. Under sec. 43.24, we look only to whether the "dominant theme taken as a whole" of what was actually exhibited to the minor was harmful.

Williams v. State
#098-82; decided 1/18/84.

Re: Standard for determining whether to empanel a jury to try the issue of competency to stand trial when the issue is first raised during trial.

What this case does is reconcile prior cases which tried to define when a trial judge must empanel a jury on competency. Earlier cases had indicated that a higher showing of incompetency had to be made in order to require a full hearing on competency if the issue was first raised in the midst of trial. The Court now says that the standard for empanelling a jury on competency is the same whether the competency issue is raised prior to or during trial.

In either situation the trial judge must decide if there is "some evidence" to support a finding of incompetency to stand trial. The judge does this by looking only at the evidence which might support a finding of incompetency and disregarding any evidence which might support a finding of competency. If the "some evidence" test is met, the judge must empanel a jury to decide the ultimate question of competency. Art. 46.02, C.C.P.

However, if the issue of competency is first raised during trial, the judge does not have to halt the trial and conduct the full-blown competency hearing immediately. He can wait until after verdict to decide if there is "some evidence" to support a finding of incompetency, and he can then hold the formal competency hearing at any convenient time prior to sentencing.

Lloyd v. State
#63,582; decided 1/18/84.

Re: Delay attributed to the State under the Speedy Trial Act.

The Speedy Trial Act is concerned primarily with delay that is within the control of the prosecution. If the State could have reasonably prevented the delay, it will not be allowed to exclude the time caused by the delay.

Here the State delayed over a month in submitting the suspected drugs to a chemist and then claimed that the unavailability of a lab report was an excuse for not presenting the case to the grand jury and obtaining an indictment within 120 days. The Court rejected that argument because the prosecution sat on the evidence before submitting it to the lab. It also remarked that a lab result is not required to establish probable cause in front of the grand jury.

(I agree with the latter statement of the law, but except for the delay in submitting the evidence, I would have thought the State ought to be commended for not asking for an indictment until it was sure what the suspected substance really was.)

The Court also was unwilling to use the fact that the grand jury only met for a few days each month as an excuse for not getting an indictment on time. Again, it said that under the record the State controlled how often the grand jury actually met during a month and how many cases it reviewed each day. The State was responsible for that delay.

Hoston v. State
#536-82; decided 2/1/84.

Re: Sufficiency of evidence; standard of review in direct and circumstantial evidence cases.

The Court reiterates that both classes of cases are subject to the same standard of review regarding the sufficiency of the evidence. The question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The evidence is to be reviewed in the light most favorable to the verdict. The Court explicitly overrules prior

cases saying that circumstantial evidence cases were viewed in light of the presumption of innocence.

Lippert v. State
#023-83; decided 2/1/84.

Re: Detention and search of persons on premises during execution of a search warrant.

The accused was stopped and searched when he entered premises which were being searched pursuant to a combination search and arrest warrant. The accused was not named in the warrant and there was no probable cause to believe he was subject to arrest nor any reasonable suspicion that he was armed at the time of his arrest and search.

Relying on Ybarra v. Illinois, 444 U.S. 85, the Court stresses that there is no right to arrest or search persons merely because they are on premises which are being searched pursuant to a warrant. A number of pre-Ybarra Texas cases, which seemed to approve such practices, are overruled.

Although Michigan v. Summers, 452 U.S. 692, would permit the police to detain the "occupants" of the premises during the execution of the search warrant, that right to detain does not extend to persons who are merely present at the time of the search. Even persons detained under Summers apparently could not be searched unless probable cause were present. Also, the fact that evidence of criminal activity is uncovered during the execution of the warrant does not automatically authorize the arrest of every person present; those arrested must be connected to the contraband so that probable cause is present.

Wagner v. State
#61,601; decided 2/1/84.

Re: Trial court's duty to consider late motions and late notices. Submitting the voluntariness of a confession to the jury.

On May 19 defense counsel was mailed an order stating that motions for continuance must be filed by May 31. Counsel filed a motion for continuance on June 16, when the case was set for trial on June 19. Held: the motion was untimely and could be overruled by the trial judge for that reason. See Hernandez v. State, 643 S.W.2d 397; art. 28.01, C.C.P.

Art. 46.03, C.C.P., requires a notice of insanity defense to be filed 10 days prior to the date the case is set for trial. The defendant filed a notice of insanity defense on June 16, when the case was set for trial on June 19. Since no good cause for the late filing was established, the trial judge was correct in not letting the accused offer evidence on his insanity defense. The Court said this was so even though the trial was ultimately delayed due to a competency hearing and did not actually start until June 26, which would have been 10 days after the notice was filed. The Court stressed that at the time the judge ruled the notice untimely, the case was set for June 19.

In order to have the jury pass on the voluntariness of a confession, the accused must raise the issue in front of the jury. The issue cannot be submitted to the jury if the voluntariness question was raised only in front of the judge at a Jackson v. Denno hearing.

ANSWERS

1. No. Riera v. State, #350-82; decided 1/18/84.

2. Yes. Keller v. State, #095-83; decided 1/11/84.

3. No. Cook v. State, #158-83; decided 2/1/84. The judge must hold a hearing to allow the parties to put on whatever evidence they desire either in favor of or against the change of venue, but the judge can change the venue on his own motion without any evidence in the record supporting his decision. However, the judge's order must state the grounds for the change of venue. Art. 31.01, C.C.P.

4. Yes, but under very limited circumstances. Thiel v. State, #63,774; decided 2/1/84.

5. Yes. Homan v. State, #364-83; decided 2/1/84.

6. No. Porier v. State, #67,344; decided 1/11/84.

Public Reprimand

NO. 51-83-22

IN RE: BEFORE THE

ROLAND D. SAUL PROSECUTOR COUNCIL

DECISION OF THE COUNCIL

BE IT REMEMBERED that on the 6th day of January, 1984, The Prosecutor Council was legally and duly called into session for the purpose of conducting a hearing on the above entitled and numbered cause. The Chairman determined that a quorum was present, the following Council members being present:

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

After hearing witnesses and evidence gathered on behalf of the Prosecutor Council, the prosecutor and his attorney presented additional witnesses and evidence. After the conclusion of the testimony of all the witnesses and after deliberations, the Council made the following findings:

1. The prosecutor, through negligence, failed to properly supervise his staff and permitted conflicts of interest to develop and exist between his public office and his private law firm, Saul, Smith, and Davis, P.C., specifically as follows:

   a. A member of the law firm of Saul, Smith, and Davis, P.C., who was contemporaneously serving as an Assistant Criminal District Attorney; was retained to represent the family of a pedestrian who had been killed in an automobile accident. After this event, the Criminal District Attorney of Deaf Smith County caused the driver of the vehicle to be indicted for Involuntary Manslaughter.

   b. A member of the law firm of Saul, Smith, and Davis, P.C., who was contemporaneously serving as an Assistant Criminal District Attorney; was retained to defend his client in a contempt proceeding stemming from the client's failure to abide by an agreed-upon child support order. It was the duty of the Criminal District Attorney's Office to prosecute the contempt charge. Additionally, the lawyer who filed the motion to modify the child support order had the year before, as an Assistant Criminal District Attorney, represented the State in obtaining the child support order he was now attempting to modify.

   c. A member of the law firm of Saul, Smith, and Davis, P.C., who was also an Assistant Criminal District Attorney defended a client in a criminal case in another county in contravention of Article 2.08 C.C.P.

2. The prosecutor failed to recognize a conflict of interest and take appropriate action to avoid the appearance of impropriety namely, he accepted a criminal complaint against an individual when the prosecutor knew that his law firm represented parties adverse to that individual in a federal civil action and when that criminal action was related to the subject matter of the civil lawsuit.

3. The prosecutor, through negligence, failed to properly supervise an attorney performing work for the Deaf Smith County Criminal District Attorney's Office in that he allowed funds of the State of Texas to be mishandled, specifically as follows:

   A member of the law firm of Saul, Smith, and Davis, P.C., (not the prosecutor himself), was paid $935.87 for work performed for Deaf Smith County. This check was deposited into the Saul, Smith, and Davis, P.C. account in which the prosecutor had a proprietary interest. The check was drawn upon the District Attorney's State Account, and by law, funds in that account may not be used for the personal benefit of the District Attorney.

Based on these findings, the Council voted 8 to 1 that the prosecutor should be publicly reprimanded.

THEREFORE, Roland D. Saul, Criminal District Attorney of Deaf Smith County, is publicly reprimanded by the Council for the conduct specified in this decision.

Signed this 9th day of February, 1984.

Tim Curry, Chairman
The Prosecutor Council

Addressing the Ethical Issues:

Brady Material, Part II

by Stephen F. Cross

The Honorable Stephen F. Cross is the District Attorney of the 84th Judicial District. He was assisted in the preparation of this article by Michael D. Milner, Attorney at Law.

Due to the importance of the issue and the depth of discussion, the article is presented in two parts. Part I, which appeared in the last TRUE BILL, focused on the requirements of the Code of Professional Responsibility. Part II, below, deals with the response of the Texas courts.

The Texas Court of Criminal Appeals has held that a prosecutor must at least disclose to the defense all evidence that is (1) material, as set forth in Brady and Agurs, (2) exculpatory, and (3) admissible. Iness v. State, 606 S.W.2d 306 (Tex. Crim. App. 1980). If it is determined that any one of these three elements is missing, then the failure to disclose should not require a reversal. Although Iness held that "the withholding of inadmissible material does not violate the Brady rule," the Court noted that the evidence was not admissible as **either** substantive evidence nor as impeachment evidence. Iness, at 310. A prosecutor should, therefore, carefully consider whether or not the evidence would be admissible as substantive or as impeachment evidence before deciding to withhold it. Furthermore, the 5th Circuit has indicated that, despite the fact that evidence may be inadmissible, it may nevertheless be material in the defendant's location and production of witnesses whose testimony may be admissible and also in the preparation of his defense, regardless of whether the undisclosed evidence is intended to be admitted into evidence or not. Sellers v. Estelle, 651 F.2d 1074, 1077 (5th Cir. 1981).

Generally, only exculpatory evidence, evidence probative of the accused's innocence, and not inculpatory or incriminating evidence, is required to be disclosed. See, Iness, at 308. If the evidence is partly inculpatory and partly exculpatory, it falls within Brady must be disclosed. Sellers, supra, at 1077. Evidence that may not be exculpatory as to the defendant's commission of the crime may be considered favorable or exculpatory with respect to the degree of the crime charged or in that it corroborates the defendant's account of the circumstances surrounding the crime. See, U.S. v. Hibler, 463 F.2d 455 (9th Cir. 1972) (failure to disclose police officer's testimony that would have corroborated the defendant's version of the robbery required a new trial); Ridyolph v. State, 503 S.W.2d 276, 277-78 (Tex. Crim. App. 1974) (failure to disclose upon request a police report indicating the existence of a witness, unknown to the defense, who apparently could have given testimony favorable to the defendant on the issue of whether the defendant was guilty of negligent homicide or murder with malice). Any doubt as to whether the evidence is exculpatory should be resolved in the defendant's favor.

The only exception to the rule that the evidence must be exculpatory before disclosure is required is if the evidence relates to the credibility of the state's witnesses. Any agreement concerning the future prosecution of a state's witness, whether directly or indirectly conveyed to the witness, must be disclosed. Granger v. State, 653 S.W.2d 868, 876 (Tex. Ct. App.-Corpus Christi 1983); Burkhalter v. State, 493 S.W.2d 214, 217-18 (Tex. Crim. App. 1973), cert. denied, 414 US 1000 (1973). It has also been held that the arrest and conviction reports of the state's witnesses constitute impeachment evidence and must therefore be disclosed if such witnessses are called to testify. Perkins v. Feure, 691 F.2d 616, 619 (2nd Cir. 1982); See, Greer v. State, 523 S.W.2d 687, 689 (Tex. Crim. App. 1975).

A prosecutor must disclose the prior inconsistent statements and descriptions,

written or oral, given by witnesses called to testify since the inconsistencies may serve to impeach their credibility. So even though written statements of witnesses are excepted from pre-trial discovery under Article 39.14, it is now well settled that statements of witnesses who testify, whether or not contained in police reports, must be disclosed if they contain any impeachment evidence. See, Tex. Code Crim. Proc. Ann. Art. 39.14 (Vernon 1966); McNeil v. State, 642 SW2d 526, 527-28 (Tex. Ct. App. Houston [14th Dist.] 1982); Crutcher v. State, 481 SW2d 113, 114-17 (Tex. Crim. App. 1972). In Crutcher the Court found reversible error in the failure to disclose an offense report containing a description made by the state's key identification witness which was inconsistent with the physical age and appearance of the defendant.

However, not all prior statements containing conflicting descriptions or discrepancies are considered material enough to require reversal. Of coure, the standard of materiality applied depends upon whether or not a specific request has been made for such statements. See, McNeil, supra; Adams v. State, 577 S.W.2d 717, 722-24 (Tex. Crim. App. 1979); Frank v. State, 558 S.W.2d 12, 13-15 (Tex. Crim. App. 1977). It has also been found that contradicting testimony given at a grand jury by a state's witness was subject to disclosure. U.S. v. Herberman, 583 F.2d 222 (5th Cir. 1978).

The written statements of witnesses who are not called to testify must still be disclosed if they contain any exculpatory evidence. See, Davis v. State, 516 S.W.2d 157, 162 (Tex. Crim. App. 1974). In addition, police offense and investigatory reports and the results of tests conducted by the state, although normally considered work product and hence not discoverable, must be disclosed if they contain any exculpatory evidence. See, McNeil v. State, 642 S.W.2d 526, 527 (Tex. Ct. App. Houston [14th Dist.] 1983) (police offense and investigatory reports); Boles v. State, 598 SW2d 274, 280 (Tex. Crim. App. 1980) (ballistic's report); Florio v. State, 532 SW2d 614, 617 (Tex. Crim. App. 1976) (blood test); Means v. State, 429 S.W.2d 490, 495 (Tex. Crim. App. 1968) (forensic report). The results of any psychiatric examination must also be disclosed if they contain any favorable information as to the defendant's incompetency to stand trial or as to his insanity at the time of the alleged offense. Ex Parte Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979). Grand Jury testimony containing exculpatory statements must be disclosed whether or not the witness testifies at trial. U.S. v. Campagnudo, 592 F.2d 852, 859 (5th Cir. 1979). Virtually all material evidence favorable to the accused, either as direct or impeaching evidence, and within the state's possession or knowledge must be disclosed to the defense and the lack of a request is not as controlling as it may have once been.

The prosecutor's obligation to disclose is a continuing burden that is not relieved merely because the prosecutor does not have the favorable evidence at the time the defendant requests it. Granveil v. State, 522 S.W.2d 107, 119 (Tex. Crim. App. 1976). Any newly discovered evidence, direct or impeaching, that is favorable to the defense must be disclosed whether or not a request has been made and would include the existence of witnesses, their statements, and any identification made at a line-up or through a photo array.

The prosecutor must disclose the favorable evidence before the defendant enters a plea of guilty. See, Quinones v. State, 592 S.W.2d 933, 941-42 (Tex. Crim. App. 1980); Ex Parte Lewis, 587 S.W.2d 697, 703 (Tex. Crim. App. 1979). Although generally the constitutional validity of a guilty plea is that it be voluntarily and intelligently made and that counsel be reasonably competent and render effective assistance, the discovery of the State's evidence prior to trial so as to permit more effective plea bargaining is not normally a component of the constitutional right to effective assistance of counsel. Meyers v. State, 623 S.W.2d 397, 401 (Tex. Crim. App. 1981); Quinones v. State, 592 S.W.2d 933, 941-42 (Tex. Crim. App. 1980). But the true focus of analysis in disclosure cases returns to the test explained in Agurs. Quinones at 942. In Lewis, supra, the defendant, on the same day he was appointed an attorney, pleaded guilty to murder. He was sentenced to five years to life. Subsequently, he filed an application for habeas corpus relief alleging that he had been deprived of his rights as a result of the prosecutor's failure to disclose, prior to the entry of his guilty plea, the contents of a letter from a psychiatrist questioning the defendants' sanity and his competency to stand trial. In reversing the conviction, the court held that information about the incompetence

of a defendant can be of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request, and "that the prosecutor's duty to disclose favorable evidence (whether relating to the issue of competence, built, or punishment, extends to defendants who plead guilty as well as to those who plead not guilty." Lewis at 701.

As Lewis and Quinones suggest, the prosecutor's failure to disclose prior to the entry of a guilty plea may negate the making of an intelligent plea. These cases do not, however, require disclosure of evidence that is not exculpatory or of other factors generally affecting the prosecutor's bargaining power, such as lack of direct or scientific evidence, admissibility of evidence, or witness unavailability. Section 3.11 of the ABA Standards Relating To The Prosecutions Function requires disclosure "at the earliest feasible opportunity." Therefore, the better practice is to disclose all potential Brady material as soon as possible.

Related to this duty to disclose is the duty to refrain from deliberately misrepresenting the truth or knowingly using perjured testimony to obtain a conviction and the corresponding obligation to correct testimony known to be false. As DR 7-102 mandates, a lawyer shall not "knowingly use perjured testimony or false evidence" nor "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." State Bar of Texas, Rules and Codes of Professional Responsibility DR 7-102 (A)(4)(6); See also, ABA Standards Relating To The Prosecution Function, Sec. 5.6 (A). ("It is unprofessional conduct for a prosecutor to knowingly offer false evidence whether by documents, tangible evidence, or the testimony of witnesses.")

Not only is a prosecutor who knowingly participates in the introduction of false testimony or who fails to correct testimony known to be false subject to disciplinary action, but also, as was held by the Supreme Court in Napue v. Illinois, 360 U.S. 264 (1959), either practice deprives a defendant of his due process rights under the 14th Amendment. Therefore, if there is any reasonable likelihood that the false testimony which the state knew of and failed to correct could have affected the judgment of the jury, the conviction would be reversed. This duty exists even though the false testimony is volunteered by the witness and takes the prosecutor by surprise and even though the jury is aware of other evidence lesseninig the impact of the false testimony. The Court found it immaterial that the false testimony went merely to the credibility of the witness rather than going directly to the evidence against the defendant since "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." 360 US at 270.

CONCLUSION

A prosecutor's constitutional obligations to disclose favorable evidence and to correct testimony known to be false are merely minimum obligations. The scope of these duties may not be used to measure the prosecutor's ethical conduct in these areas. The constitutional duty to disclose requires the prosecutor, even in absence of a request, voluntarily to disclose all favorable evidence which tends to negate the guilt, mitigate the degree of the offense, or reduce the punishment. It includes evidence relating to the credibility of a witness, both substantive and non-substantive impeachment evidence. The duty extends to evidence otherwise excepted from pre-trial discovery. The duty is continuous, requiring disclosure of all such newly discovered evidence. In most instances the duty is satisfied if the evidence is disclosed at trial, but, where a guilty plea is expected, the disclosure should be made prior to the entry of the plea. Obviously, the better practice would be to resolve any doubt regarding disclosure in favor of the defendant and to make the disclosure as soon as possible.

With respect to the duty to refrain from using and to correct false testimony, the prosecutor has both an ethical and constitutional duty to correct all testimony known to be false, whether solicited or not, and that includes testimony that may be technically correct yet seriously misleading. Any understanding between the state and one of its witnesses or the witness' attorney regarding future prosecution must be disclosed and brought to the attention of the jury. If a witness indicates that he will testify falesly, the prosecutor should inform him that he, the prosecutor, is under a duty to disclose and to correct any false testimony and that the witness may not only be humiliated in the courtroom for testifying falsely but may also be subject to prosecution for perjury.

CHILD SEXUAL ABUSE WORKSHOPS

The Council has approved a series of workshops given by the Multidisclipinary Institute for Child Sexual Abuse Intervention and Treatment (MISCAIT). **However, the Council will pay travel expenses only, and not per diem reimbursement.** Each workshop offers intensive training in the theory and practice of sexual abuse. The training is for professionals in all fields who are involved in remedying the problems of sexual abuse in order to increase understanding and cooperation among the various professions. The team approach to investigation, intervention, and treatment will be a primary focus. MISCAIT will offer ongoing consultation to communities and professionals in conjunction with training activities.

The following topics will be covered:

- Overview of Child Sexual Abuse
- Family Dynamics in Incest Cases
- Human Sexuality Concerns in the Intervention and Treatment of Sexual Abuse
- Dynamics and Typology of the Offender
- Dynamics of the Child Victim
- Dynamics of the Non-Offending Spouse
- Investigation and Interviewing Approaches in Cases of Sexual Abuse
- The Role of Criminal Court
- The Role of Civil Court
- Case Preparation for Court Proceedings
- The Role of Probation and Parole
- Treatment Referrals
- Treatment Modalities
- Community Team Exercises

The remaining workshop dates in 1984 are:

March 12-16	June 4-8
April 2-6	July 9-13
May 14-18	August 6-10

All training will be conducted at:

Tarrant County Junior College
1500 Houston, Room #113
Fort Worth, Texas

The fee per trainee is $20.00. (NOTE: Registration fees will NOT be reimbursed by the Council.) CEU's will be available for MICSAIT Trainees. TCLEOSE approval has been granted. Lodging has been arranged at a government rate at the Hilton, which is within easy walking distance of the training site.

For further information call or write:
John Brogden, Educational Director
MICSAIT
3114 South Riverside
Fort Worth, Texas 76119
(817) 921-3411, Ext. #259

PROSECUTOR'S INVESTIGATORS SCHOOL

The Council's Annual Investigators School will be held March 26 - 30, 1984, at the Dept. of Public Safety in Austin. The Council has contracted with TDCAA to put on the course.

The Council has mailed registration forms to elected prosecutors and to investigators. **RETURN THE FORMS TO TDCAA, NOT TO THE COUNCIL.** As usual, the Council will reimburse for travel and per diem expenses.

Remember that reimbursement applications must be to the Council within 60 days of the school. Thus the DEADLINE IS MAY 29, 1984.

HAVE YOU COMPLETED YOURS YET?

The 1984 Budget Questionnaire

By now this questionnaire should have reached each elected prosecutor's office. It is designed to gather vital statistics on the funds, salaries, personnel, and needs of prosecutors -- and it provides a good source of information for prosecutors when preparing their budgets to go before their commissioners courts. Furthermore, the statistics are a valuable resource for TDCAA in its lobbying efforts before the legislature.

A high level of response to the questionnaire is critical to the thoroughness and accuracy of this information as a profile of the status of prosecutor's offices throughout the state.

Please take the time to answer it completely and return it promptly. Your efforts will be appreciated not only by the Council, but also by your fellow prosecutors.

EDUCATION QUESTIONNAIRE GIVES PROFILE OF NEEDS

Recently the Council sent an Education Needs Questionnaire to elected prosecutors, assistants, and investigators. The Advisory Committee appreciates the excellent level of response. This article will point up some of the trends in the responses for each group.

As regards the Basic Prosecution Course, the general consensus is that it should be directed to prosecutors with less than 3 years' experience. Elected prosecutors and assistants, when asked to choose from a list the subjects they thought most important, picked these topics most often: "Complaints, Informations and Indictments," "Controlled Substances," "DWI," "Examination, Cross and Impeachment," "Search and Seizure," and "Search Warrants." They wrote in "Ethics" and "URESA" as topics not mentioned that they wanted included.

As regards the Investigator School, most respondents thought the topics listed were adequate, that the course should be directed to investigators with less than 3 years' experience, and that the SWAT training film (as an alternate topic) should be excluded. There was also a consensus for excluding "Plea Bargaining from the Defense Standpoint," and for including "Witness Interview and Preparation."

As regards other specialized courses needed, all three groups spoke out strongly for a course on "DWI." Elected prosecutors and assistants also emphasized "Capital Murder" for experienced prosecutors.

In choosing the weakest areas of their offices, prosecutors and assistants often chose "Trial Preparation," and "Office Management." Elected prosecutors and investigators often selected "Personnel Management" and "Keeping up with New Laws/Changes in Statutes."

Lastly, all three groups mentioned the need for more video-taped materials on loan for in-office or classroom use.

Copies of the summary results of each group (elected prosecutors, assistants and investigators) are available upon request.

Calendar

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

MARCH

5-9	Criminal Investigators' School (DPS)	Austin
11-15	11th National Conference on Juvenile Justice	Las Vegas, Nevada
12-16	Investigation of Assault & Death School (DPS)	Austin
13-15	Narcotics Investigation School (DPS)	Austin
18-22	Forensic Evidence (NCDA)	Orlando, Florida
19-23	Burglary & Theft Investigators' School (DPS)	Austin
26-30	**Prosecutors' Investigator School (TPC/TDCAA)**	**Austin**

APRIL

1-5	Prosecution of Violent Crime (NCDA)	Chicago, Illinois
6	Special Criminal Law Institute: Assault (CDLP)	McAllen
8-11	Public Civil Law Problems (NCDA)	San Francisco
9-13	Crime Scene Search School (DPS)	Austin
11-15	11th National Conference on Juvenile Justice (NDAA)	Las Vegas, Nevada
16-20	Investigation of Assault and Death School (DPS)	Austin

MAY

6-9	Legislative Conference (NDAA)	Arlington, Virginia
7-11	Crime Scene Search School (DPS)	Austin
18	Special Criminal Law Institute: DWI Defense (CDLP)	El Paso
20-24	Trial Advocacy for Prosecutors (NCDA)	Boston, Massachusetts

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

Services

GOOD P.R. FOR PROSECUTORS

Information Releases are issued regularly by the Council to elected prosecutors. Each deals with a topic of public interest, and may be endorsed by the prosecutor for printing in a local newspaper. The series has a variety of topics on file, as well as future ones planned. If any listed below interest you, please contact the Council for a copy. Boldfaced ones are recommended as "timeless" information.

Sep 80 **Drug Abuse**
Nov 80 Pardons & Paroles
Dec 80 Election Code Violations
Jan 81 **Arson**
Sep 81 Protecting Children
Oct 81 Stopping Crime
Nov 81 Protecting the Home
Dec 81 **Holiday Protection**
Jan 82 Texas Crime Statistics
Feb 82 **Plea Bargaining**
Mar 82 **Shoplifting**
Apr 82 L.S.D. for Children
May 82 Home Improvement Fund
Jun 82 **Helping the Student Drug Abuser**
Jul 82 Fireworks and the Law
Aug 82 **Rural Crime**
Sep 82 **Child Abuse**
Oct 82 Rape (3 Part Series)
Nov 82 Victim Compensation
Dec 82 (1) D.W.I.
(2) Fireworks and the Law
Jan 82 **Constitutional Rights of a Defendant**
Feb 82 **Vehicle Titles & Registration**
Mar 82 Firearms in Texas (3 Part Series)
Apr 83 Victim-Witness Assistance
May 83 Citizen Involvement Needed by the Judiciary
Jun 83 Fireworks and the Law (Re-release)
Jul 83 DWI: A Follow-up Report
Sep 83 **Protecting Children (Revised)**
Nov 83 American Justice (3 parts)
Dec 83 (1) DWI: Watch for Clues
(2) Fireworks and the Law (Update)
Jan 84 Crime: Some Good News
Feb 84 **The Jury System**
Mar 84 **How a Case is Handled**

FUTURE INFORMATION RELEASES:

Apr 84 **The Court System**
May 84 The Death Penalty
Jun 84 Fireworks and the Law (Re-release)
Jul 84 **DWI: Changing Attitudes**
Aug 84 1983 Texas Crime Statistics

INDICTMENT MANUAL STILL TO COME

The Council's Indictment Manual -- long-awaited and long-promised -- has been delayed by the printer. However, it is expected to be delivered to the Council no later than March 12th. A free copy will soon thereafter be mailed to each elected prosecutor's office. Additional copies will be available at a cost of $55.00 (which includes the price of the first year's update).

Classifieds

ASST. CRIMINAL DISTRICT ATTORNEY Position Available. Trial Experience, preferably felony prosecution. Salary negotiable, commensurate with experience. Limited private practice allowed. For more information, contact: The Honorable Charles Pennick, Criminal District Attorney, P. O. Box 753, Bastrop, Texas 78602. (512) 321-2244.

PROSECUTOR'S INVESTIGATOR Position desired by Texas-licensed investigator with last 2-1/2 years in his own private investigative firm. Currently also a legal assistant with a major law firm in Midland. B.A. in Criminal Justice from UT Odessa and 16-1/2 years experience (mostly investigative) with Midland P.D. Believes prosecution would be more satisfying than defense work. Willing to relocate. For resume contact James D. McFadden, 4316 Harlowe Drive, Midland, Texas. (915) 683-3851.

EDITOR'S REMINDER: We are happy to print your ads for employment for as many issues as you need. However, be aware that TRUE BILL is published only every other month and thus may not serve your purpose quickly enough. You may wish to consider also placing your ad in the "Positions Available" column of The Texas Prosecutor, which is published every month by the Texas District and County Attorneys Association, 1210 Nueces, Suite 200, Austin, TX 78701. Phone 512/474-2436.

Council Publications

ELEMENTS MANUAL - Recently released 4th Edition of the breakdown of the elements the prosecutor must prove to establish a conviction. Updated through the 1983 Regular Legislative Session, including the changes in DWI and sexual assault laws. An ideal guide for peace officers and grand jurors. Used by D.P.S. and by law enforcement academies throughout the state. $2.00.

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

Highlight

THE GRAND JURY PACKET - Acquaints grand jurors with their duties and the problems facing law enforcement. Includes the newly-revised Handbook for Grand Jurors, as well as an Elements Manual (see listing); "Crime in Texas," an annual report of crime statistics prepared by the Texas Department of Public Safety; and articles on plea bargaining and the politics of crime. Each elected prosecutor's office is entitled to 25 free packets each fiscal year (Sept. - Aug.). Additional packets: $3.00.

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

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

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

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

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

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

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

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

Name_____ Office_____

Address_____ City_____ State_____ Zip_____

BILL MY OFFICE

BILL: _____

REFERENCE MATERIALS ON SENTENCING

These materials were compiled by National Criminal Justice Reference Service in preparation for the National Conference on Sentencing held January 18-20, 1984 in Baltimore, Maryland. **Copies of documents 1-13 below are available on loan from the Council.** Except where otherwise indicated, all materials were sponsored by NIJ/NCJRS. See also Ordering From NIJ (p. 45) to obtain copies or microfiche.

1. **Determinate Penalty Systems in America - An Overview.** Assessments of various approaches to determinate sentencing. By A. von Hirsch and K. Hanrahan, Crime and Delinquency, V 27, N 3 (July 1981), pp. 289-316. NCJ-78603

2. **Implementation of the California Determinate Sentencing Law.** A study of the responses to DSL, case disposition, bargaining and probation. By J.D. Casper et al., Stanford University Department of Political Science, Stanford, Calif. 1983: 266 p.
$4.50 from NIJ (executive summary - NCJ-81431)
$11.50 from NIJ (full report - NCJ-82726)

3. **Incarceration and Its Alternatives in 20th Century America.** A survey of concepts and treatment of the deviant form 1870 to 1940, with an analysis of the progressive reform movement in the criminal justice and mental health fields. By D.J. Rothman. 1979: 80 p. NCJ-59964

4. **Mandatory Sentencing - The Experience of Two States.** NIJ Policy Brief on Massachusetts and New York. By K. Carlson, Abt Associates, Inc., Cambridge, Mass. 1983: 27 p. NLJ-83344

5. **Mandatory Sentencing and the Abolition of Plea Bargaining - The Michigan Felony Firearm Statute.** An examination of the simultaneous attempt to abolish plea bargaining and introduce mandatory sentencing in Wayne County (Detroit), Mich. By M. Heumann and C. Loftin, Law and Society Review, V 13, N 2, Special Issue (Winter 1979), P 393-430. 1979: 38 p. NCJ-59921

6. **Monetary Restitution and Community Service - Annotated Bibliography.** A list of more than 300 works on monetary and community service restitution concepts and programs, legal issues, and evaluations of restitution programming. University of Minnesota School of Social Development, Duluth, Minn. 1980: 157 p. NCJ-84361

7. **Multijurisdictional Sentencing Guidelines Program Test Design.** Steps for examining the applicability of statewide sentencing guideline programs designed to reduce sentencing disparity. National Instutute of Justice, Washington, D.C., 1978: 59 p. NCJ-53479

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

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

10. **Selective Incapacitation.** Strategies based on data from prison and jail inmates, suggesting the significant reductions in crime can be achieved without increasing the number of offenders incarcerated. By P. W. Greenwood and A. Abrahamse, the RAND Corporation, Santa Monica, Calif. 1983: 150 p. Available from the RAND Corporation, 1700 Main St., Santa Monica, CA 90401. ($10.00 from NIJ). NCJ-86888

11. **Sentencing Guidelines - Structuring Judicial Discretion, Volume 3 - Establishing a Sentencing Guidelines System.** Constructing voluntary sentencing guidelines in a court system. By A.M. Gelman et al., Criminal Justice Research Center, Albany, N.Y. 1982: 246 p. NCJ-82360

12. **State Law and the Confidentiality of Juvenile Records.** Summaries of State laws on juvenile fingerprinting and juvenile records; media access to such. Search Group Inc., Sacramento, Calif. Sponsored by the Bureau of Justice Statistics. 1983: 14 p. NCJ-85972

13. **Structured Plea Negotiations.** Text design intended to increase the equity, efficiency, and effectiveness of plea bargaining. 1979: 45 p. NCJ-66847

14. **Felony Prosecution and Sentencing in North Carolina.** Prosecution and sentencing of persons charged with felonies, before the State's new determinate sentencing legislation became effective. By S. H. Clarke et al., University of North Carolina Institute of Government, Chapel Hill, NC. Sponsored by NIJ and the North Carolina Governor's Crime Commission. 1983: 147 p. NCJ-84164

15. **Governmental Responses to Crime - Legislative Responses to Crime - The Changing Content of Criminal Law.** An analysis of enactments to State and city codes in 10 large American cities from 1948 to 1978, measuring trends in criminalization, severity of penalties, and administrative and judicial discretion. By A.M. Heinz, Northwestern University Center for Urban Affairs and Policy Research, Evanston, Ill. 1983: 154 p. $8.50 from NIJ-NCJRS. NCJ-81624

16. **New Model of Parole - A Description of the Model and Guidelines for the Development of District Level Implementation Plans.** California's new model for parole and guidelines for implementation, based on a 3-year examination of the State's Parole and Community Services Division. California Dept. of Corrections, Sacramento, Calif. 1979: 154 p. NCJ-72759

17. **Reducing Prison Crowding - An Overview of Options.** The mechanism (legislative, judicial, private, State, etc.), with brief descriptions of specific programs, currently available for reducing prison crowding. National Institutue of Corrections, Prison Overcrowding Project, Washington, D.C. 1982: 28 p. Free copy available from the Prison Overcrowding Project, 1701 Arch St., Suite 400, Philadelphia, PA 19103. NCJ-82507

ORDERING FROM THE NATIONAL INSTITUTE

Copies of items 7, 8, 9, 11, and 13 may be ordered without charge from the National Institute of Justice/NCJRS, Box 6000, Rockville, MD 20850, Attention Distribution Services. Specify title and NCJ number.

To order items 2 and 15 (either the Executive Summary or the Full Report), send requests with payment to the above address, but send it Attention Department F. MasterCard and VISA orders are accepted. Specify title and NCJ number.

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Audio Visual Loan Library

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

Professional Development Training

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

COURTROOM DEMEANOR - Do's and don'ts of testifying in court and the tactics of cross-examination. By James Barklow, former Assistant District Attorney for Dallas County. 57 minutes. 3/4" U-Matic, 1/2" Beta, or 1/2" VHS videotape.

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

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

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

Public Information Programs

Highlight

HOT CHECK PRESENTATION - Recently edited and revised, this presentation is tailored for showing to merchants and clerks to help them recognize and deter criminal check activity. Topics include personal checks, commercial checks, travelers checks, identification cards, bad checks, instruments often passed off as checks, and check cashing procedures. Excellent orientation for inexperienced tellers, salespeople, managers, and others having to deal with checks. 35 minutes. Color slides and accompanying audio cassette.

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

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

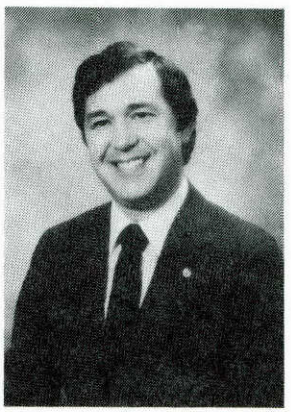
FRAUD AND OTHER CON GAMES - The common street swindles. Especially effective for senior citizens groups. 15 minutes. Color slides and audio cassette.

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

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

Prosecutor Profile

GERALD ANTHONY FOHN



Gerald Fohn's folks probably figured Gerald would be something special: he was born on Christmas Day. He earned his A.A. degree from Southwest Texas Junior College in 1966 and his B.A. from the University of Texas in 1968. He taught civics at Pearsall High School, then returned to UT to earn his J.D. in 1973. He was Assistant District Attorney for the 51st and 119th Judicial Districts until Gov. Briscoe appointed him District Attorney of the 51st in 1975. He has since been elected and re-elected to that position.

"The office has taken on juvenile prosecution, child-protection matters, and child support from out-of-state cases," Gerald points out. "I not only share duties with the 119th, but we share office space and staff. Dick Alcala, the present 119th D.A., and Royal Hart, his predecessor and now my judge, have been a great resource to call on for assistance and ideas. I hope my service as District Attorney out here in West Texas has prepared me to some extent to speak for this region of the state and for prosecutors in smaller offices and in a rural setting."

Gerald is a Director of the Board of TDCAA and a member of the Advisory Committee to the Prosecutor Council. He also serves on the Law Enforcement Coordinating Committee. A member and past director of the West Angels Kiwanis, he belongs to the Tom Green County Bar Association and the Texas Exes Association. He counts among his interests hunting, fishing, scouting, political activities, church choir, raising three sons, and doing club work.

The Sherlockers

GINNY LANTRIP

The Tarrant County District Attorney's Office hasn't been the same since Ginny Lantrip entered it eight years ago. Serving first in the Hot Check Department and then the Intake Section, Ginny then settled into her most satisfying role: as a member of a Child Abuse Investigative Unit called "Operation Hatchet Heart" -- the hatchet of prosecution, tempered by compassion. The two-man, one-woman team is nicknamed the "Mod Squad," after the TV series. They have more than doubled the number of child abuse cases handled by the courts.

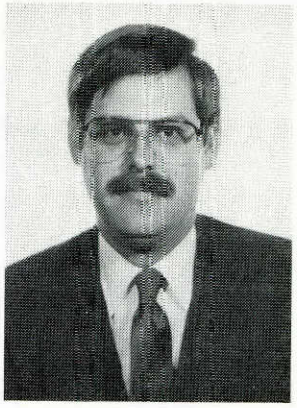
Ginny's daughter, Tessa, 7, and her son, Nicholas Ray, 3, give her a special sensitivity to children. "This work is very satisfying because you're helping the children, but it's also very frustrating when you get children so small they really can't testify."

Ginny, who has a Law Enforcement degree from Tarrant County Junior College, was elected to the Board of Directors for the T.D.C.A.A. Investigator's Section. She is enthusiastic about working on the association's Communications Committee. She encourages all association members with job-related information to contact her by calling 817/335-5171, ext. 226.

Ginny loves raising appaloosas, baking, and above all else: shopping, which her husband, Harvey Lantrip, a Criminal Investigator with the Tarrant County Sheriff's Office, can sadly confirm.

Special Profile: A Lawyer As Cartoonist

R. K. WEAVER



R. K. Weaver may have missed his calling. At least, if he ever gets tired of being a lawyer, he could take up cartooning.

Recently R.K. gifted the Council with some 23 original cartoons. He suggested they would be good for "covering the bottom of a parakeet's cage," but we chose to publish them instead, starting with this issue. His clever drawings will also appear in the next several issues of TRUE BILL.

After earning his B.A. in Government and J.D. from the University of Texas, R. K. worked as an Assistant Attorney General in the Enforcement Division of the Attorney General's Office. A year later he became a senior associate with the trial firm of Wolff & Frankel, specializing in litigation and criminal defense. For the past three years he has served as senior appellate attorney for the Dallas County District Attorney's Ofiice.

Board certified in Criminal Law by the Texas Board of Legal Secialization, R. K. is licensed to practice before numerous courts: the U.S. Supreme Court, the U.S. Court of Military Appeals, the U.S. Courts of Appeal for the Fifth, Eighth, and Eleventh Circuits, the U.S. District Courts for the Northern District of Texas and the Eastern District of Missouri, and the State Courts of Texas and Missouri.

On March 1, 1984, R. K. left his position with the District Atttorney's Office to go into private practie. He will specialize in pre-and post-trial remedies in the area of criminal law. Should a prosecutor require assistance in the prosecution or appeal of a case, particularly a capital case, he would be pleased to serve as a special prosecutor.

R. K.'s inspiration for most of the cartoons comes from real life — an incident in a courtroom or a moment with a defendant. "This is my way of working out my frustrations," he says. "It's a lot less painful than hitting your hand against a brick wall."

And a lot funnier. Thanks, R. K.

The Prosecutor Council
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