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TRUE BILL

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

Volume 6, Number 2 March - April 1985

UPDATE

Sentencing Practices & Procedures
Death Penalty Legislation

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The Director's Corner

by Andy Shuval

It ain't over 'til the fat lady sings!

The response of prosecutors and their staffs to the possibility of sunsetting the Council has been great! Your letters to your legislators (see p. 17) have clearly demonstrated the need and the benefits of a state agency such as the Council.

When the Council's problem first came to light, there were several informal gatherings, culminating in a meeting of the TDCAA Board of Directors. The Board voted unanimously to work to keep the Council in its present form. A committee of Tim Curry, Randy Hollums, and Mac Smith was named to convey these sentiments to Speaker Gib Lewis. This was done the first week in March. While no commitments were made, the participants, Tim and Mac, came away with a clear message: There's time to do what's needed.

The goal is clear. Through the resolutions of the TDCAA Board and your letters prosecutors want the Council retained in its present form. It is now up to us in Austin to see that your expressed desires become law in the legislature. Your letter and contacts with your legislatures are vital. Keep up the good work!

It is reported that the fat lady has laryngitis; with your help, she will lose her voice and never sing again.

Andy

NEW COUNCIL MEMBER ELECTED

On February 1, 1985, the Council mailed ballots to the 320 incumbent, elected prosecutors to elect a new Council member. The results were as follows (see "New Council Member" profile, p. 47.)

Name	Number of Votes
Richard Brainerd	91
Write-in	3
Late Postmark	4

BASIC PROSECUTION COURSE AGENDA APPROVED

The Council's Advisory Committee recently adopted a tentative agenda for the Basic Prosecution Course, a 4-day course held annually in June in Austin. The course is geared to prosecutors with one to three years' experience (see p. 40 for the agenda).

Registration information will be forthcoming as the dates and location are finalized.

As usual, the Council will reimburse travel expenses in accordance with its policy (see Appendix O of the 1984 Annual Report for the policy). In particular, note that any attendee who misses more than one half-day session will not be reimbursed unless the attendee submits a satisfactory explanation in writing to the Executive Director. Also, be aware that the Council does **not** reimburse registration fees.

THE AUDIO-VISUAL LIBRARY NEEDS YOUR HELP!

Council policy is to allow prosecutors to keep materials from the audio-visual loan library only for **TWO (count 'em, TWO) WEEKS.**

If you have kept something for ages, PLEASE return the materials. Others are probably waiting for the program you borrowed, and they need it as much as you did!

ATAC RECOMMENDS CHANGES IN THE CRIMINAL JUSTICE SYSTEM

Associated Texans Against Crime (ATAC), a grass-roots organization holding public hearings throughout 1984, ended the year with a Conference on Crime held in the Senate Chamber of the State Capitol. Prosecutors and other criminal justice professionals from all over the state participated. From the conference, ATAC has developed a set of recommendations to the Legislature:

- Early release of prisoners from TDC should be curtailed, even if it means more prisons must be constructed.
- Juries should be made aware of existing parole laws so that they can make an informed determination of sentences.
- The Texas Court of Appeals should not reverse a criminal case on the basis of a defective indictment unless that complaint had been raised by the defendant at the time of trial.
- The exclusionary rule of evidence in Texas should be modified as the Supreme Court has modified the federal exclusionary rule: evidence obtained by police acting under a defective search warrant should be admissible if the police are acting in good faith.
- The Texas death penalty should be expanded to cover criminals who commit multiple murders.
- It should be a felony for any inmate in any TDC institution to possess a weapon.
- The sentence for any felony committed by an inmate while in any TDC institution should be "stacked" (imposed after the inmate has completed his current sentence).
- Conversations between rape victims and their counselors should be privileged.
- Texas should adopt measures regarding crime victims, including granting the victim or family of a deceased victim the right to be present in the courtroom during a criminal trial.

THE PROSECUTOR COUNCIL

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

FEATURE

An Excerpt from the Report of the COMMISSION on SENTENCING PRACTICES and PROCEDURES

A year ago ***True Bill*** *featured a report from the Bureau of Justice Statistics on the status of sentencing laws. In this update we feature an excerpt of the final report of the Commission on Sentencing Practices and Procedures, chaired by Sen. Ray Farabee. The Commission was established during the 68th Legislative Session to examine sentencing issues regarding criminal offenders in Texas. Its work was presented to the Criminal Justice Policy Council in January.*

FINDINGS OF THE COMMISSION

Goals of the System:

1. The stated goals of the sentencing system in Texas include: protection of the public through the prevention, suppression, and punishment of crime; rehabilitation, special and general deterrence; and the utilization of resources in the most cost-effective manner possible.

2. Although the system works, its goals are achieved imperfectly and sporadically. Specifically, the goal of punishing the individual offender caught and convicted is often achieved, but in increasingly less cost-effective manners. Doubt remains as to the extent the goals of rehabilitation, deterrence, and public protection are achieved.

3. While Texas is not alone in failing to achieve fully these goals, the Commission on Sentencing Practices and Procedures believes that with effort the system can be made to work more effectively.

4. At least some of the failure to achieve these goals can be traced to the size and complexity of the system, the overlapping responsibilities between numerous state and local officials responsible for administering and enforcing sentencing laws, the lack of information concerning individual offenders in particular and the operation of the system and its components in general, and the absence of cohesion resulting from the above.

5. Sentencing goals can be better achieved if state and local government devotes additional resources to law enforcement and the speedy disposition of criminal trials, clarifies the roles and responsibilities among and between the actors and levels in the system, and widens and deepens the flow of needed information among and between the different levels and actors in the system.

Confidence in the system:

6. There is a significant dissatisfaction with the operation of the criminal justice system. Much of the dissatisfaction stems from the size and complexity of the system, and overlapping responsibilities in the system, and the lack of information about the system.

7. Other sources of dissatisfaction include fear and concern over a crime rate seemingly immune from state policy, helplessness and frustration caused by the inability to affect that rate, alienation and distrust of the individual citizen toward the system, misunderstanding of the public and state and local officials as to who is responsible for what in the system, and unrealistic expectations about what the system can achieve.

8. Debate, discussion, and education should be encouraged concerning the sentencing system and what a sentencing system can realistically be expected to do, and cohesive sentencing policies should be pursued through the Policy Council and the components of the system.

Sentencing disparity:

9. There is substantial variation in sentencing patterns across the State. This may indicate some degree of unjustifiable disparity. The areas where disparity may exist include differences in the utilization of sentencing options, arrest and incarceration rates by race, offenses reported and incarceration rate by county, and average sentence length along both racial and geographic lines.

10. The State must have additional information before it can document that unjustified disparity exists. This includes additional data relating to the quality of evidence, prior criminal records, case-processing factors, decision-making (both structural and individual), and local procedure and practices.

Sentencing guidelines:

11. Although sentencing guidelines have proven to be useful tools in other states for addressing the problems of disparity and sentencing length, the highly local nature of sentencing in Texas militates against adoption here.

12. Sentencing disparity should be studied further and if unjustified disparity exists, methods to correct it should be sought and implemented.

Plea negotiations, jury sentencing, and sentencing information:

13. Current plea negotiation practices do serve the interests of the public and the system, but the judge assessing the sentence often has insufficient information upon which to base the ultimate decision.

14. Jury participation in the assessment of punishment serves the interests of the public and the system. Juries should have additional information upon which to base their decision.

15. The lack of sentencing information also inhibits sound decision making by the other components of the system, including the Board of Pardons and Paroles and the Department of Corrections.

Sentencing alternatives:

16. The State provides a number of alternatives to incarceration, but the statutory scheme providing for the alternatives is confusing, contradictory, and inconsistent.

17. There are no developed policies to insure that alternatives to incarceration are considered in all appropriate cases.

18. Diversion programs initiated by the 68th Legislature have been successful in meeting at least some of the intended goals, but these will be less successful in the future if present statutory and agency restrictions remain in place and policies are not changed to encourage use of such programs.

Sentencing practices and costs of incarceration

19. Current sentencing patterns and policies concerning incarceration and its alternatives are not always realistic in light of the costs of incarceration, the numbers and types of offenders being incarcerated, and the immediate need to comply with the Ruiz orders.

20. Present policies and conditions do not insure that prison space will be available for those most needing incarceration, most especially for those who have committed serious crimes or who represent a risk to the public if released.

21. Internal prison problems have resulted in part from mandatory sentences adopted by legislative policy restricting the availability of parole.

22. Prison cells are, at least for the near future, scarce commodities that must be allocated in the most effective manner possible. The Board of Pardons and Paroles is the agency most responsible for the effective allocation of these spaces.

23. Absent compelling public necessity, proposals to increase the length of time served must be rejected for the present in light of the above.

RECOMMENDATIONS OF THE COMMISSION

Statutory revisions:

The Commission on Sentencing Practices and Procedures should be continued to make legislative recommendations concerning punishment provisions of the Penal Code, Code of Criminal Procedure, and other penal statutes.

Any revision of sentencing statutes must take into consideration the issues of public protection, prison overcrowding, costs of incarceration, further development of alternatives to incarceration, and the possible restructuring of state and local responsibility for various types of offenders.

Issues surrounding the sentencing of juvenile offenders, including the institutionalization of juveniles and jurisdiction of the Texas Youth Commission and juvenile courts, should also be considered in conjunction with any revision of statutes affecting the adult system.

Prison overcrowding; costs of incarceration; alternatives to incarceration:

The State should immediately adopt policies designed to insure the availability of prison space for serious and repeat offenders because of space limitations caused by overcrowding.

State and local governments should immediately adopt policies to insure that alternatives to incarceration are considered in all appropriate cases, and that these alternatives are provided in a cost-effective manner.

Release and rehabilitation of offenders:

The Legislature should adopt such policies and appropriate such funds as are needed to insure that the Department of Corrections fulfills its constitutional and statutory duties to provide safe and humane treatment and opportunities for rehabilitation of inmates by asserting control over its population and providing appropriate services and programs.

The role of the Board of Pardons and Paroles should include controlling levels of prison population and reducing unjustifiable disparity, if any; it should be required by statute to consider the risk of release of individual inmates and seriousness of the offense and prior criminal record in arriving at its release decision; and, it must receive additional information upon which to base its release decisions.

Conditions of the sentence:

Commitment documents should be standardized and provided to the Department of Corrections and the Board of Pardons and Paroles.

Sentencing Investigation Reports (Pre- and Post-Sentence):

The use of Sentencing Investigation Reports should be increased, and such reports should be provided to the judge prior to assessment of punishment, as well as to the Department of Corrections and the Board of Pardons and paroles following incarceration.

Jury assessment of punishment:

Jury participation in the assessment of punishment should be retained. Juries should receive additional information upon which to base their decisions.

Education:

A comprehensive public education program should be undertaken to inform the public about the sentencing system and alternatives to incarceration.

The State should devote additional resources to education programs for the judiciary, prosecutors, law enforcement, and other criminal justice personnel on sentencing issues and statewide criminal justice policy goals.

Sentencing guidelines:

The State should not adopt mandatory sentencing guidelines.

Sentencing research and policy analysis:

Continuing efforts should be made to improve data availability, research and policy analysis of sentencing issues. The Policy Council should pursue research and policies to determine if there is unjustifiable disparity in sentencing.

Crime victims:

Certain rights for victims of crime should be given statutory recognition, including some input in the criminal justice process.

IMPLEMENTATION OF COMMISSION RECOMMENDATIONS

I. This Commission or some other entity should be instructed to study and make legislative recommendations for increasing the classification of offenses and narrowing the ranges of penalties provided for in the Penal Code, Controlled Substances Act, Motor Vehicle Act, and any other penal provision materially affecting the protection of the public, and the population of the Department of Corrections.

It is the sense of the Commission that any entity instructed to undertake this task shall consider the following in making its recommendations:

A. Possible decriminalization of offenses or the substitution of non-criminal responses for certain offenses;

B. Reclassification and downgrading of offenses, where not inconsistent with public protection, to restrict incarceration in the Department of Corrections to more serious crimes;

C. Providing for more direct sentences to county or regionally-based facilities;

D. Possible restructuring of state and local responsibility for various offenses, and the funding of and fiscal impact thereof, including:

1. assessing counties per diem charges for offenders over a certain percentage incarcerated in the Department of Corrections;

2. adoption and funding of a comprehensive community corrections law;

3. providing incentives for counties to retain offenders; and

4. alternative placement of special needs offenders, such as the elderly, pregnant, mentally ill, mentally retarded, and substance abusers, in local or regional, state or private facilities, including those of state human services agencies or entities contracting with such agencies.

E. Possible revisions of law concerning institutionalization of juvenile offenders and jurisdiction of the Texas Youth Commission and juvenile courts; and,

F. Such other directions, parameters, or considerations as may be added by the Policy Council.

II. Article 42.12, Section 3 through 10A, and Article 42.13, Code of Criminal Procedure, should be revised to resolve inconsistencies and contradictions among and between the two articles and to allow sentencing decision-makers greater latitude in assessing punishment alternatives.

The Commission requests that it be authorized to present to the Policy Council and Legislature by February 15, 1985 a proposed revision of these sections, including but not limited to:

A. Incorporating Article 42.13 within the provision of 42.12, and resolving the variances between the two;

B. Expanding the offenses under which deferred adjudication and shock probation may be awarded, and aligning offenders eligible for sentencing under these sections with those eligible for regular probation (Section 3d, e, and f);

C. Expanding the classes of offenses for which judges can award regular probation (§3a);

D. Expanding the statutory scheme relating to pre-trial diversion by providing requisites and requirements for such programs, and such other provisions as may encourage its use (Section 10);

E. Allowing judges to order 60 - 120 days of confinement for offenders sentenced under subsection 3f (b);

F. Allowing judicial discretion to reduce or terminate the time offenders must serve under probation (Section 7);

G. Increasing the amount of probation fees chargeable under Section 6a (a);

H. Revising, deleting or redesignating duplicative sections (Section 4, 6b, 6c, and 10);

I. Encouraging and expanding the use of sentencing reports (Section 4); and

J. Amending subsections restricting admittance to restitution centers (Section 6c).

III. More information should be provided to decision-makers in the sentencing process and applicable sections of the Code of Criminal Procedure should be amended accordingly in order to:

A. Require that:

1. commitment documents accompany each prisoner committed to the Texas Department of Corrections;

2. the Department shall not take a defendant into custody until the director receives the document;

3. the district clerk is responsible for issuing the document; and

4. the document shall contain the following information about the defendant, offense, judgment and sentence:
   - **a.** title and number of the case;
   - **b.** county and court in which tried;
   - **c.** type of offense charged;
   - **d.** date of offense;
   - **e.** date of arraignment;
   - **f.** defendant's plea;
   - **g.** verdict;
   - **h.** sentence imposed;
   - **i.** date judgment and sentence issued;
   - **j.** date sentence begins;
   - **k.** concurrent or consecutive sentences, if any;
   - **l.** plea bargain, if any;
   - **m.** any other orders of the court (e.g., restitution, affirmative findings under Article 42.12(3) (f), fees, etc); and
   - **n.** in probation revocation cases, the original sentence order and order to revoke, including any reformation of sentence.

5. in appealed cases, the district clerk shall provide the following information to the director of T.D.C.:
   - **a.** notice of appeal
   - **b.** date released from custody and returned to confinement, if any; and,
   - **c.** mandate of appeals court.

6. The director shall forward the above information to the Board of Pardons and Paroles upon request.

[Articles 42.01, 42.02 and 42.09, Code of Criminal Procedure]

B. Provide for Sentencing Investigation Reports on all defendants committed to the Department of Corrections as follows:

1. sentencing investigation reports shall contain information relating to the circumstances of the offense with which the defendant is charged, the seriousness of the crime, the criminal and social history of the defendant, impact of the offense on the victim and victim's family, and any available alternatives to incarceration that do not increase the risk of harm to the public;

2. the Court shall direct the preparation of a sentencing investigation report prior to the imposition of sentence in all cases that the court assesses punishment, unless the court finds there is sufficient information to permit the meaningful exercise of sentencing discretion and the court provides this information in the Sentence Order;

3. the Court shall direct the preparation of a sentencing investigation report after the imposition of sentence in all cases wherein the jury assesses punishment; and,

4. copies of the sentencing investigation report shall be forwarded by the probation department to the director of the Department within 30 days after the defendant is committed to the Department, and the director shall forward a copy of the report to the Board of Pardons and Paroles upon request.

5. allow the defendant to review and comment upon the report.

[Art. 37.07, Sec. 3(d); 42.12, Sec. 4; and 42.07, Sec. 7]

C. Amend Article 37.07, V.A.C.C.P., to provide the jury assessing punishment with such information as will enable them to make a more informed decision. In this regard, the Council should develop specific recommendations that are consistent with the effective administration of justice and rights of an accused.

[Art. 37.07, Sec. 3a]

IV. Present laws concerning the Board of Pardons and Paroles should be amended to specify the present role of the Board in the sentencing process, allow the issuance of a presumptive parole date, alter restrictions on parole eligibility under Art. 42.12, Section 3(f) and 15(b), and expand the numbers of prisoners eligible for placement in pre-parole transfer programs, as follows:

A. Amend Article 42.12, Sec. 1, Code of Criminal Procedure to provide that, in addition to the authority and responsibility presently specified therein, the Board is responsible, along with others, for controlling population levels of the Department of Corrections and for reducing any unjustifiable disparity in sentencing.

B. Amend Article 42.12, Section 15(e), to provide that within 120 days after incarceration of a prisoner in the Department of Corrections, the Board shall, in all acceptable cases:

1. secure all pertinent information regarding a prisoner, including but not limited to the Sentence Order and Sentencing Report;

2. issue a presumptive parole date for the prisoner based on the information secured, any objective parole criteria developed and used by the Board in evaluating prisoners for parole, and any individual progress that the Board determines the prisoner must make in order to be released under subsection (f);

3. review its presumptive parole date at such intervals thereafter as it may determine; and

4. define "objective parole criteria" as criteria which have been shown statistically to be good indicators of risk to society of release on parole, including but not limited to seriousness of the offense and prior criminal record of the inmate.

C. Amend Article 42.12, Section 15 (f), to provide that the prisoner shall be paroled on the presumptive date last issued by the Board unless it is found that the release will increase the likelihood of harm to the public or that the prisoner has not made the progress previously determined to be needed by the Board under subsection (e) above. This provision does not create or expand administrative or civil remedies.

D. Amend Article 42.12, Section 15 (b), Code of Criminal Procedure, to change all 3f restrictions in order to provide eligibility for parole when offenders in these categories have served two-thirds of the sentence imposed, including good time, or 20 years,

whichever is less, subject to the provisions of subsection (f) above. In no event shall parole eligibility exceed one-third of the term assessed, or 20 years, whichever is less. This amendment should be retroactive.

E. Amend Article 42.12, Section 15 (m) to delete all restrictions on pre-parole transfer, including:

1. inmates serving sentences under Art. 42.12 3f (a) (1) and (2);

2. inmates previously convicted under Art. 42.12 3f (a) (1) and (2); and

3. inmates previously denied release by the Board.

5. The State should enact policies designed to bring the victim into the sentencing process by providing the victim:

A. The right to provide pertinent information to a probation department conducting a presentence investigation concerning the impact of the offense on the victim and victim's family;

B. The right to provide to the Board of Pardons and Paroles information for inclusion in the defendant's file to be considered at any parole hearing; and

C. The right to be informed of court and Board proceedings concerning the defendant, when requested by the victim.

6. The Policy Council should recommend to the Legislature that the State should provide additional funding and/or policies to:

A. Increase the education of judges, prosecutors, defense lawyers, and the public concerning the use of non-custodial options;

B. Expand the knowledge of local actors in the sentencing process concerning the importance of sentencing reports and sentencing orders;

C. Encourage the judiciary to employ sanctions short of prison incarceration;

D. Research the expansion of sentencing alternatives for special needs offenders, such as the elderly, pregnant, mentally ill, mentally retarded, and substance abusers;

E. Solve the many problems associated with the lack and flow of information in the criminal justice system, most particularly as it relates to the interaction of state and local entities;

F. Fund the McAllister Act for the treatment of substance abuse; and

G. Research the feasibility and use of minimum and medium security prisons and regional pre-release centers. □

The complete report of the Commission was prepared for submission to the 69th Legislature in February 1985. For additional information, contact:

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Guest Viewpoint:

Hot Check Law Proposed Amendments

by Kerry Armstrong

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

Kerry Armstrong is the Chief of the Worthless Check Division of the Tarrant County Criminal District Attorney's Office. He is the editor of the Council's Hot Check Manual and a primary contributor to the ***True Bill*** *column, "The Hot Check Fee Law: Ask the Committee."*

Proposed Article 53.01 Amendments

I have no real objections to that part of the proposed amendment which would increase the Article 53.01 PEACE OFFICER FEES. However, the final proposed amendments do raise some questions. This part of HB 105 would amend the article to include a provision to allow the sheriff to have a ". . .special fund to be administered by the sheriff. Expenditures from this fund shall be at the sole discretion of the sheriff. . ." (a provision exactly like the sole discretion hot check fee fund created for prosecutors under Article 53.08).

This provision is a two-edged sword. On the one edge, it might be argued that creating another "sole discretion fund" might be to the benefit of the prosecutors as that would create an ally in the struggle to maintain this type of fund during each session of the legislature.

On the other edge of the sword are a number of disadvantages. First, this would enlarge the group of agencies having such a fund and hence enlarge the potential for abuses and thus the arguments for having said funds under the full control of the local county government and its procedural safeguards. It is not unforseeable that we all could lose said "sole discretion."

Second, the enactment of another such "sole discretion fund" would probably start a landslide movement on the part of other governmental agencies (i.e., the county clerk's office, the district clerk, the tax collector, etc.) to demand like statutes, thus building the potential group of abusers. Many such funds would completely erode the current financial safeguards provided for by budgeting and expenditure laws, and thus either cause the abolishment of all such funds or the enactment of harsh restrictions which would effectively limit the use and benefits of the funds.

It is interesting to note that the proposed "sole discretion fund" establishes said fund only for the sheriffs and not for constables or other peace officers who may also collect the fees set out in Article 53.01. It can readily be forecast that the constables would seek further amendment for the creation of their own fund.

Therefore, as concerns this portion of HB 105, the fee increase is not really objectionable, but the creation of another "sole discretion fund" is inherently dangerous.

Proposed Article 53.08 Amendments

The proposed rate increase for Article 53.01 is 400%. This same rate of increase is proposed for Article 53.08, the "HOT CHECK FEE LAW" (which would be renumbered as 53.09 by HB 105). Both proposed increases would allow 75% of the collected fees to be retained in a "sole

discretion fund," and the remaining 25% would presumably be paid to the county. (NOTE: HB 105 is unclear on this point, which could create potential confusion and confrontation.) The net result is thus a 300% increase to the prosecutor's office with respect to hot check fees. (Maybe! See discussion below on "officers.") Still, this might not be the "windfall" that it appears.

On the rate increase point alone, there are several issues. First, and perhaps the biggest reason for the current opposition to the hot check fee, is that local county governments see it as a source of revenue which they do not control. With the proposed rate increase this pot could grow even larger, and hence all the more reason for them to seek to gain full control over the fund. I do not personally feel that the 25% contribution will buy off any and all opposition to the fund.

First, assuming that the 25% does go to the county for maintaining the fund, and further assuming that the prosecutor's office would now collect four times what he has collected in the past (i.e., some offices would collect way in excess of a million dollars a year), the county would get from $250,000 to $350,000 just for maintaining a set of books! Is that reasonable?

Secondly, there is an ethical argument to be made against such a fee increase, namely, that it is an excessive punishment for the majority of bad check writers. It does seem a bit unfair to charge a person a hot check fee as much as four times the amount of the check.

Thirdly, there is the potential of a collection problem. Even with the current fee rate many offices have a great deal of difficulty in collecting check fees from time to time. The check fee law makes no provision for the enforcement of collection from the check writer. Even in the event of conviction and probation, it makes no provision for the assessment of a fee as court cost or a probationary requirement. Should it become the law that the check writer could be faced with a fee four times the amount of his bad check, he may well refuse to make any pre-warrant restitution at all and force the prosecutor's office into spending all its time filing check cases or worse, simply setting aside the check as uncollectable, a practice which would certainly not make constituent injured parties very happy.

All this is not to say that a check fee rate increase is not needed, but that it needs to be done responsively and intelligently. Prior to the enactment of the current fee law, many check writers would simply allow their bad checks to come to the prosecutor's office in order to avoid paying the merchant's returned check charge. When the law was enacted, the check writers started paying the merchants for the checks and their returned check charges rather than pay the higher hot check fee at the prosecutor's office. Later, when the banks raised their return check charges, the merchants raised theirs and once again more check fees were paid at the prosecutor's office. Thus, it would be easy to picture what would happen if the prosecutor's fees were quadrupled.

Now, on the other hand, it has always seemed rather incongruent to spend all the time needed to work a very large check and only be able to collect a $75 check fee. (Under the current fee someone with 10 eleven dollar checks totaling $100.00 pays $100 in fees while someone with one $5,000 check only pays a $75 fee). Obviously, fees need to be adjusted to provide a more balanced end result.

Now we turn to the really objectionable portion of the proposed amendments to Article 53.08: that of allowing the sheriffs and constables to not only collect checks but a check fee as well, such fee to be utilized in the same manner as is currently being utilized by the elected prosecutor.

First, this part of HB 105 conflicts with V.T.C.S. Article 6252-24, which prohibits any sheriff or constable or other peace officer in this state from receiving ". . .for collection or undertake(ing) the collection of any claim for debt for others except under and by virtue of the processes of law prescribing the duties of such officers. . ." The law further provides for a potential fine of $200 - $500 and/or removal from office. Said statute has been interpreted to include dishonored checks. See Attorney General Opinion MW-188 (1980) and MW-222 (1980).

Therefore, it would seem that without the repeal of Article 6252-24, or the specific inclusion of check collecting within those statutes prescribing the duties of sheriffs and constables, that this proposed amendment is in direct conflict with Article 6252-24.

Secondly, I would reiterate here the arguments concerning the applicability of enlarging the "sole discretion group."

While the proposed amendment to Article 53.01 only creates a special fund for the sheriff, the proposed amendment to Article 53.08 also creates a special fund for the constables.

The next set of objections are based upon experience factors in the actual handling of worthless checks. At present there is some difficulty in handling checks in counties where there is both a county and district attorney. Certainly checks which fall within the misdemeanor range go to the county attorney and the felonies to the district attorney. But there are problems in dealing with the possibility of aggregating a felony case and the potential enhanced theft-by-check case. The checks are often in the wrong office. (Who would collect the check and fee or even file the case?)

This amendment would presumably allow the sheriffs and constables to collect a check up until a case was filed with the prosecutor's office, but if the check was collected after that point, who gets the fee? If it is probated, who gets the fee? Does this mean that a bad check writer could have checks filed with the county attorney's office, the district attorney's office, the sheriff's office, and a minimum of four constable's offices, all in the same county? Or, can this proposed statute be construed to mean that a sheriff's or constable's office can take a check warrant out on a case filed by a county attorney and collect the check and keep the fee?

Can a merchant give a deputy a couple of checks to collect and the deputy go out, in full uniform, knock on the check writer's door and demand payment for the checks and the check fees? **This is exactly the abuse that Article 6252-24 was enacted to prevent** and now it would seem that HB 105 would make this sort of conduct entirely legal.

The final objections to the proposed amendments to the hot check fee law, and what would appear to be one of the most significant, deals with the technical drafting of the proposed amendment in dealing with the special fund itself (Section 2(e)).

The amendment would delete the designations of "county attorney, district attorney, criminal district attorney, and prosecutor" as those who could have the "sole discretion" fund and substitutes the term "officer." Code of Criminal Procedure Article 3.03, defines "officers" as magistrates and peace officers, **not prosecutors.** If this change doesn't effectively cut off the prosecutors from the "sole discretion" hot check fee fund, then it would certainly raise many arguments and create much litigation to straighten the matter out.

Finally, if there must be some amendments made to the hot check fee law, then it would seem to be an opportune time to clear up many of the difficult questions presented by the law as to what exactly is meant by "sole discretion" and what rights it entails, and exactly what is the "county treasury" (nowhere defined in any statute or the State Constitution), and the new terms as used in the proposed amendment, "custodian of funds of the county" and "officer" should likewise be fully defined.

SUMMARY

The enlargement of the "sole discretion fund" class could certainly forecast the end of all "sole discretion funds."

There are no real objections to a fee increase under Article 53.01.

Sheriffs and constables should not be allowed to collect checks, a direct contravention of Article 6252-24, and all that it was enacted to prevent.

Hot check fees should not be raised by 400% straight across the board, but a more balanced approach to fee increases be taken.

Lastly, if HB 105 is to be passed, Section 2(e) **MUST** be changed to clearly set out that prosecutors continue to have "sole discretion" of their hot check fee funds. □

LETTERS to the COUNCIL

PAROLE BOARD CLARIFIES PROCEDURES FOR PROTESTING INMATE RELEASE

Dear Andy:

As you know, the Board's processing and consideration of trial official's protest of parole has been a concern of many district attorneys and has caused at least some confusion on the part of our Board, as well as trial officials.

Therefore, the Board met on Tuesday, January 29, and took action which resulted in the following policies and procedures, some of which have not been changed, only clarified:

1. All information from trial officials, whether in the form of a protest or not, will be segregated and placed in an inmate's file under a separate tab, so that Commissioners and Board Members voting on parole matters can easily identify and consider the information contained therein.

2. Notice to trial officials (NTO's) will be mailed as soon as an inmate has received one favorable vote for parole (except in those cases where a panel of Board Members voted, then NTO's will be mailed immediately thereafter).

3. In change of venue cases, it is Board policy to send NTO's to the judge of the convicting court, prosecuting attorney and sheriff of the county which originally had venue, if this information has been furnished to the Board (if the wrong office receives such notice, the Board should be notified as soon as possible).

4. Responses to such NTO's which contain adverse information, whether on the prepared form or by separate letter, will be considered as formal protest.

5. Any protest received from a trial official within a reasonable time before an inmate is released, will cause the case to be reconsidered by an administrative panel, consisting of three Board members voting in open meeting, and may cause the parole to be either deferred to a future date or legally set-off for reconsideration when legally required.

6. As always, an inmate is notified if his case is set-off due to a "protest," but it is not disclosed as to who protested, or what information was contained in the protest correspondence.

7. Protests may be withdrawn by letter from the protesting official(s), which would cause the case to be reconsidered for parole by a Board panel.

I believe that the changes in our policies and procedures (namely making information and prior protests available to subsequent decision makers and **reconsidering all cases in which a protest had been received** [emphasis added]) will not only make those who vote in parole matters more aware of protests and the information contained therein, but also will result in additional consideration of protests. However, there remain some problems in the processing of protests and in their being given adequate consideration, which district attorneys should be aware of. If a trial official sends an informal protest prior to the initiation of the parole panel consideration of the case or before receipt of the formal NTO, that protest information will be available to and be considered by Board Members and Commissioners who vote on the case, but will not result in a formal protest reconsideration by a panel of Board Members as outlined above. To obtain such a reconsideration, it will be necessary to respond to the NTO when received. Also, to be considered as a formal protest, it is still necessary for a trial official to respond each year upon receipt of the NTO, although I know many trial officials would like to have their correspondence considered a "permanent protest" of parole consideration.

Despite such limitations, I believe that trial officials will find in the future that their protests are given greater consideration, especially if such protests are made selectively and discriminately, and accompanied with reasons therefore.

Please let me know of any questions or concerns that you or the prosecuting attorneys of this state might have about the policies and procedures of the Board regarding parole protests. Also, let me know if I can be of any help in explaining these or any other Board policies or procedures to the members of your association.

Sincerely,

Neal Pfeiffer
Chairman, Board of Pardons and Paroles

DWI RECORDS

To: Steve Capelle, Exec. Dir., TDCAA
Re: Art. 3833, VACCP
(Records of DWI Convictions)

The above statute was enacted in 1979 for the primary purpose of aiding prosecutors in proving up prior DWI convictions. However, as indicated in the atached memo [excluded here] from H. A. Albert, Chief of Crime Records, very few requests for these records have been received. Consequently, this program has not proven to be cost-effective. (The current cost to DPS averages out to $1,756.84 per certification.)

In view of the current "budget crunch" we are attempting to cut costs wherever practical, and we question whether this program should be continued. We would greatly appreciate your help in polling the prosecutors of Texas in a effort to determine whether Art. 38.33 should be amended or repealed.

Thanks for your assistance in this matter.

Regards,

Gerald C. Carruth
Chief of Legal Services, DPS

cc: Andy Shuval
Prosecutor Council

PROSECUTOR FILES SUBJECT TO OPEN RECORDS ACT

[**Editor's Note:** The following letter was sent to Executive Director Andy Shuval from J. Collier Adams, Jr., Cochran County Attorney, in response to an Advisory Bulletin sent by the Council to elected prosecutors in early February. (It is always good to know that someone is reading our mailouts!) The bulletin included a copy of Attorney General Opinion JM-266 which, in effect, decided that the case files of prosecutors' offices are subject to the Open Records Act after the conclusion of the case.

See p. 30 for a summary of JM-266.

The Harris County District Attorney's Office has filed a supplemental brief challenging the reasoning of the opinion. If the opinion is not modified, prosecutors can expect numerous requests for copies of their files from people they have sent to prison.]

Dear Sir:

The Section 3(a)(3) exception to the Open Records Act V.A.C.S. Art. 6252-17a appears to prohibit public disclosure of the files of the Harris District Attorney's Office for every element of the Section 3(a)(3) exception is met in that:

1) The information gathered clearly relates to criminal litigation, the same litigation which placed the requestors in the penitentiary.

2) The state or political subdivision is necessarily a party in all criminal litigation.

3) The litigation is not merely conjecture, it is reality; it was not only reasonably anticipated, it actually occurred.

I believe that on this basis, Open Records Decisions No. 331 (1982) and No. 328 (1982) can be distinguished, however, I do not have these two Open Records Decisions for inspection.

Yours truly,

J. C. Adams, Jr.

LETTERS TO THE LEGISLATURE IN SUPPORT OF THE COUNCIL

The Council is proud of the comments received and appreciates your support. Here are excerpts of letters sent to legislators and copies forwarded to the Council for its files.

This note is to encourage you to support the continued existence of The Prosecutor Council. This council has been very helpful to me as a county attorney in a rural county with no staff. Without this outfit's manuals and periodic publications on current law changes, I would be at a disadvantage. The Prosecutor Council is a credit to the legal profession in general and a back bone for my job in particular.

Edward Woolery-Price
Colorado County Attorney

The Prosecutor Council serves a valuable and needed role in the coordination of prosecutorial activities in the State of Texas. Over one-half of the Council budget is utilized directly by "in the field" prosecutors. . . Such funding is extremely important for county and district prosecutors who have budget restrictions imposed upon them by county commissioners court.

Bill J. Helwig
Coke County Attorney

I have had the opportunity of working with this Council several times the past few years and I think that it is serving two very important functions. . . It appears to me that the Prosecutor Council is doing for the District and County Attorneys what both the Judicial Qualifications Commission and the Center for the Judiciary are doing for the judges. This results in a bargain for the people of Texas.

Jack B. Miller
District Judge (Retired)

The Prosecutor Council is a very essential support group for prosecutors across the state and attempts to undermine its funding will have a direct effect upon prosecution of crime in the state.

Gary R. Terrell
Scurry County Attorney

As a newly elected prosecutor, I am acutely aware of the need for and services rendered by the Prosecutor Council. The training courses and other vital services provided by the Prosecutor Council are not available from any other known source. . . I am very confident that dollar for dollar, the Prosecutor Cuncil is one of the most cost-efficient and important agencies to come before the Legislature for renewal. The citizens of Texas need the Prosecutor Council. The prosecutors need the Prosecutor Council. Please do not let us down.

Gale Warren
Erath County Attorney

The Prosecutor Council performs many very important functions. . . These programs are of immeasurable assistance to my office and my personnel. . . Every dollar that is funded for the Prosecutor Council is returned many fold through better and more effective prosecution. I urge you to continue the funding of the Prosecutor Council and I believe that this is the feeling of the overwhelming majority of elected prosecutors and their staffs throughout the State of Texas.

J. Frank Long
District Attorney, 8th Judicial District

FEATURE

DEATH PENALTY LEGISLATION

An Update by Terrence Keel, Assistant District Attorney for Travis County

Elmer Branch, the defendant in the Texas case overturned by the U. S. Supreme Court in the cases decided with Furman v. Georgia, 408 U. S. 238 (1972), had been convicted of rape and sentenced under what was then Texas Penal Code article 1189. The Furman decision had the effect of wiping out States' death penalty statutes because, as Justice Stewart posed, the death penalty was "so wantonly and freakishly imposed." Id. at 310.

In Jurek v. State 522 S.W.2d 934 (Tex.Cr.App. 1975), the defendant had been tried for murder, convicted and sentenced to die under the then newly enacted Code of Criminal Procedure art. 37.071. The Texas court reasoned that if discretion in the assessment of punishment under a statute could be shown to be reasonable and controlled, rather than capricious and arbitrary, the test of Furman would be met.

The United States Supreme Court affirmed Jurek, and, along with four other cases decided together, invalidated mandatory death penalty statutes and upheld the "guided discretion" death penalty states. See Gregg v. Georgia, 428 U. S. 153 (1976) [Georgia's new guided discretion statute upheld]; Woodson et al v. North Carolina, 428 U. S. 280 (1976) [mandatory death statute for certain crimes struck down].

The 1985 Texas Legislative session sustained a flurry of proposed death penalty statutes. The majority are aimed at expanding penal code section 19.03 to include additional, arguably heinous murders.

House Bill 1022 and Senate Bill 193 proposed to add murder of a child "under six years of age" to 19.03. This is similar to Senate Bill 99 that would add murder of children "younger than 15," and in addition, would make murder of a person "older than 64" a capital offense.

Senate Bill 23 by Ike Harris and House Bill 8 by Rep. Polumbo offer to amend 19.03 to add defendants who murder more than one person, whether or not the murders occur during the same criminal episode and defendants who have previously been convicted of murder or capital murder.

Senator Farabee's S. B. 122 amends 19.03 where the "person murders more than one person during the same criminal episode or the person murders more than one person as part of a common plan, scheme, design, or objective, whether or not the murders occur during the same criminal episode."

Representative Melton attacks the problem of prison violence with H. B. 638, making it a capital offense for murder if the actor and the person murdered are both incarcerated in a penal institution.

Life "without parole" has also been a subject for debate in Austin. Representative Paul Moreno's House Bill 91 would change the language of P.C. sec. 12.31 to provide: "an individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or life without parole or by death."

Lastly, House Bill 1079, if passed, would mandate a change in C.C.P. art. 43.19 which currently provides that "the execution shall take place at the Department of Corrections at Huntsville, Texas, in a room arranged for that purpose." That would be altered to "in the county jail of the county of the offense for which the condemned person shall be transported from the Texas Department of Corrections to the county jail at a time and in a manner determined by the director of the Department of Corrections.

It will be interesting to see which proposals, if any, become law. Renewed legislative activity in this area represents an attempt to further expand the use of death as a penalty by encompassing an ever greater number of specific types of murders under the P.C. section 19.03 list. The assumption is that the sentencing guidelines under C.C.P. art. 37.071 will insure continued sufficient "discretion" to overcome any hostile appellate interpretation of the 8th amendment and the Furman decision. □

Distribution of Funding

BY POPULATION & ATTORNEY TYPE

The following statistics are based on your responses to the Council's 1984 budget questionnaire. Since the County Attorney offices receive no state funds, the statistics are limited to offices with felony responsibility.

It can be seen that state funds are much more important to the smaller jurisdictions than the larger. For example, among multi-county District Attorneys, jurisdictions in the 10-24,999 population bracket receive almost 90% of their funding from the state, while jurisdictions in the 200-749,999 bracket receive only about 10% of their funding from the state.

Naturally, the bulk of funding for most offices is still the county. The extrapolated grand total response reflects that about 84% of all funding is from the county, 16% from the state.

DISTRICT ATTORNEY
(Multi-County)
(74% Response)

Population Brackets	Average Funding (Per Office) County	Average Funding (Per Office) State	# of DA's in Pop. Bracket	Total Funding Extrapolated County	Total Funding Extrapolated State
1-4,999	-0-	-0-	0	-0-	-0-
5-9,999	-0-	-0-	0	-0-	-0-
10-24,999	8,851	75,760	8	70,808	606,080
25-49,999	46,589	77,474	33	1,537,437	2,556,642
50-99,999	76,932	79,925	10	769,320	799,250
100-199,999	390,460	76,010	5	1,952,300	380,050
200-749,999	802,905	80,760	2	1,605,810	161,520
750,000+	-0-	-0-	0	-0-	-0-
TOTALS	1,325,737	389,929	58	5,935,675	4,503,542

DISTRICT ATTORNEY
(Single-County)
(85% Response)

Population Brackets	Average Funding (Per Office) County	Average Funding (Per Office) State	# of DA's in Pop. Bracket	Total Funding Extrapolated County	Total Funding Extrapolated State
1-4,999	-0-	-0-	0	-0-	-0-
5-9,999	-0-	-0-	0	-0-	-0-
10-24,999	26,238	68,593	3	78,714	205,779
25-49,999	40,950	74,790	8	327,600	598,320
50-99,999	160,585	68,593	6	963,510	411,558
100-199,999	364,123	75,260	2	728,246	150,520
200-749,999	1,422,773	55,260	1	1,422,773	55,260
750,000+	13,134,959	55,260	1	13,134,959	55,260
TOTALS	15,149,628	397,756	21	16,655,802	1,476,697

CRIMINAL DISTRICT ATTORNEY
(85% Response)

Population Brackets	Average Funding (Per Office) County	Average Funding (Per Office) State	# of CDA's in Pop. Bracket	Total Funding Extrapolated County	Total Funding Extrapolated State
1-4,999	-0-	-0-	0	-0-	-0-
5-9,999	-0-	-0-	0	-0-	-0-
10-24,999	74,588	70,292	9	671,292	632,628
25-49,999	86,941	75,260	8	695,528	602,080
50-99,999	312,869	71,260	5	1,564,345	356,300
100-199,999	574,465	70,403	8	4,595,720	563,224
200-749,999	1,264,808	70,593	3	3,794,424	211,779
750,000+	5,966,753	82,247	3	17,900,259	246,741
TOTALS	8,280,424	440,055	36	29,221,568	2,612,752

COUNTY ATTORNEY W/FELONY RESPONSIBILITY
(68% Response)

Population Brackets	Average Funding (Per Office) County	Average Funding (Per Office) State	# of CAFR's in Pop. Bracket	Total Funding Extrapolated County	Total Funding Extrapolated State
1-4,999	30,389	12,483	1	30,389	12,483
5-9,999	35,454	65,260	3	106,362	195,780
10-24,999	28,304	69,568	15	424,560	1,043,520
25-49,999	150,795	75,260	2	301,590	150,520
50-99,999	-0-	-0-	3	-0-	-0-
100-199,999	-0-	-0-	0	-0-	-0-
200-749,999	-0-	-0-	1	-0-	-0-
750,000+	-0-	-0-	0	-0-	-0-
TOTALS	244,942	222,571	25	862,901	1,402,303
Grand Total	25,000,731	1,450,311	140	52,675,946	9,995,294

ONCE IS NOT ENOUGH

True, we've already reminded you **once** in this issue, but it doesn't hurt to try again.

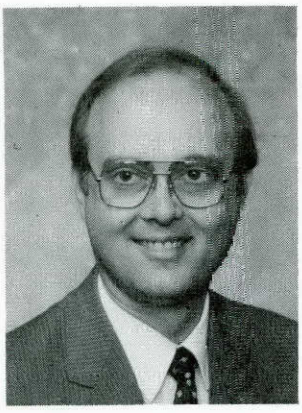
Please return materials borrowed from our Audio-Visual Loan Library (p. 49) within two weeks! We are willing to accommodate longer borrwong periods if you advise us in advance of the loan, or as soon as possible. We receive an ever-increasing number of requests for materials and cannot fill these requests unless you help. We have only one or two copies of most of our programs, so we need each borrower's cooperation in making the library a helpful resource for all prosecutors.

Please search your offices (and your memories) for any program that may be gathering dust, and return it today, insured for $50.00. Thanks!

REIMBURSEMENT DEADLINE

Just a reminder: TRAVEL REIMBURSEMENT APPLICATIONS must be received at the COUNCIL OFFICE within 60 days of the course attended.

The Prosecutors Investigators School DEADLINE IS MAY 1, 1985.



As The Judges Saw It

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

QUIZ
(Answers, p. 27 .)

1. The accused makes no request for counsel, but she is visited by an attorney sent by a family acquaintance. The attorney tells both the suspect and the police that his advice is that she make no statement. Does this unsolicited advice require the police to cease interrogation under Edwards v. Arizona?
_____ Yes _____ No

2. In a plea of guilty to a jury in an attempted murder case, the accused first testifies that the shots were fired accidentally but ultimately admits intentionally shooting the victim. The exculpatory evidence is not withdrawn. Must the judge change the plea to one of not guilty and submit that case to the jury on that basis?
_____ Yes _____ No

3. The defense challenges the competency of a witness. The judge finds the witness competent, but the defendant wants the witness' competency submitted to the jury as a fact question in the charge. Must such a charge be given?
_____ Yes _____ No

4. The voluntariness of the accused's confession was submitted to the jury as a fact issue during the guilt/innocence stage. Does the accused have the right to have that issue resubmitted in the charge at the punishment stage?
_____ Yes _____ No

5. The accused has a relative killed so he can share in the relative's estate sooner than would otherwise be possible. Is that the kind of killing "for remuneration or the promise of remuneration" that makes the crime a capital one?
_____ Yes _____ No

6. Does Witherspoon v. Illinois require that it be "unmistakably clear" that a prospective juror would "automatically" vote against the death penalty before the State can properly challenge that juror?
_____ Yes _____ No

7. Are public school officials required to have probable cause before they conduct searches of students suspected of violating school rules or criminal statutes?
_____ Yes _____ No

8. May the police make an investigatory stop based on reasonable suspicion when the crime has long since been committed and the police are trying to determine if the suspect is the one wanted for further investigation?
_____ Yes _____ No

9. If the police stop a vehicle because they have probable cause to believe it contains contraband, they can make warrantless searches of any containers in the car that might reasonably contain the contraband. Do they lose that right to make warrantless searches of the containers if they wait until several days after the vehicle was seized?
_____ Yes _____ No

Applicability of North Carolina v. Pearce When a Jury Sets Punishment at the First Trial and the Judge Sets Punishment on Retrial

The general rule is that even if a jury assessed punishment at the first trial, a judge who sets punishment on retrial cannot impose a higher punishment than did the jury. This is true whether or not the judge at the retrial was the same one who presided at the first trial. However, a higher sentence can be justified if the record shows that intervening conduct or events support the higher punishment. (See Wasman v. United States, 104 S.Ct. 3217.) McCullough v. State, #351-83; decided 12/5/84.

Dismissal of Indictment on Defendant's Motion Starts Speedy Trial Act Time Limits Running Anew

Relying on the plain language of art. 32A.02, C.C.P., the Court holds that if an indictment or information is dismissed on motion of the accused, a criminal action commences for Speedy Trial Act purposes when a new charging instrument is filed, unless the accused is detained in custody or released on bond with regard to that offense, in which event the time limits recommence when he is detained or released. For someone who is in custody or on bond on the date the indictment is dismissed, the time limits start over again on the date of dismissal. If the time limits start running anew and are not simply tolled. prosecutors might think about not opposing a motion to quash if there might be other speedy trial act problems in the case which can be cleaned up within the new time limits.

Although the discussion is unnecessary to the decision, the Court also notes that a reindictment which only substitutes one prior conviction for another in the enhancement allegations does not increase the State's burden. This would foreshadow a holding that adding or changing enhancement allegations after the Speedy Trial Act time limits have run does not adversely affect the State's readiness. The Court implied the same thing in the recent case of Perez v. State, 678 S.W.2d 85. Teamer v. State, #977-83; decided 12/5/84.

Circumstances Under Which Government Employees Who Are Not Police Officers Become "State Agents" for Miranda Purposes

A Human Resources caseworker questioned the suspect in custody. Police officers were present during the questioning. and the caseworker apparently gave the suspect some sort of Miranda warning.

The Court holds that the mere fact that the person doing the questioning works for the state (i.e., the government in general) does not automatically make that person a state agent for the purposes of Miranda and art. 38.22. Before the rules governing custodial interrogations come into play, the government employee must be acting as an agent of law enforcement pursuant to a police practice.

Whether such a practice existed must be based on a review of the totality of the circumstances, and the accused apparently has the burden of showing that the practice did exist. Here the accused failed to carry his burden because he had not even developed the record concerning the circumstances surrounding the questioning. The mere fact that the caseworker attempted to give some kind of Miranda warning was not enough to show that she was acting in cooperation with the police. Paez v. State, 681 S.W.2d 34.

Trial Court Has Discretion to Allow the Filing of a Motion for Probation After Trial Has Commenced

Although art. 42.12, sec. 31, C.C.P., refers to the filing of a motion for probation prior to trial, the Court concludes that the requirement is not mandatory. The trial judge has discretion to allow a late filing.

Here the judge abused his discretion by not permitting the late filing (actually to allow the previously-filed motion to be sworn to) since the State would not be prejudiced. The prosecution had assumed all along, as had the accused, that probation was an issue in the case, the defendant being eligible. Also, the defense attorney rendered ineffective assistance by not having his client properly swear to the application. May v. State, #113-84; decided 12/5/84.

Requirement of a Voluntary Act by the Accused

The Court reiterates there is no defense of "accident" under the Penal Code. That concept is embodied in the code's requirement that the accused engage in some voluntary act. Conduct is voluntary as long as it includes some voluntary act accompanied by the appropriate mental state. The conduct is not rendered involuntary just because there may have been an involuntary act somewhere in the chain of events. For example, a drunk who involuntarily falls asleep at the wheel and kills someone in a collision can't claim a lack of voluntary acts of becoming intoxicated and assuming control over the car are enough to bring on liability. Similarly, conduct is not rendered involuntary just because one did not intend the ultimate result which his conduct caused.

In this case, the defendant admitted pointing a cocked gun at the victim but claimed that his thumb slipped off the hammer "by accident." The Court of Appeals said this raised the issue of involuntary conduct because the gun may have discharged involuntarily. The Court of Criminal Appeals pointed out that mechanical objects do not have volition and thus cannot act voluntarily or involuntarily. The movement of the pistol's hammer was caused by the accused's lessening of this thumb pressure on the hammer, and that slight movement was a sufficient voluntary act, however unintentional it might have been. George v. State, 681 S.W.2d 43.

Argument That Accused Has Shown No Remorse, Pity, or Shame is a Comment on the Failure to Testify

During punishment argument the prosecutor gestured toward the accused and said "You haven't seen one iota of remorse, one iota of shame....And you didn't see any pity for that nine-year-old retarded girl...." The Court holds that in effect these comments draw the jury's attention to the accused's failure to testify. The argument cannot be justified as a comment on demeanor because there is nothing in the record showing any objective conduct by the accused to which it could refer. Dickinson v. State, #292-84; decided 12/5/84.

Submission of Alternative Offenses Contained in the Indictment May Preclude the Need to Submit Certain Lesser-Included Offenses

The indictment alleged murder and injury to a child, the latter including alternative allegations of intentional and negligent conduct. The murder and injury to a child charges were submitted to the jury, but the accused claimed a right to lesser-included offense submissions on criminally negligent homicide and aggravated assault. The Court holds that the injury-to-a-child submission based on criminal negligence fully protected the accused's rights with regard to a submission of a lesser culpable mental state. If the accused did cause the death by criminal negligence, then she necessarily was guilty of injury to a child (serious bodily injury to a child includes death). Similarly, the aggravated assault charge requested had all its elements included in the injury-to-a-child charge based on intentional conduct (with the exception that the latter included an undisputed element concerning the victim's age). The Court explains this way:

> ...where a charge is requested upon a lesser included offense, and a lesser non-included offense authorized by the indictment is charged which differs from the included offense only by the addition of an uncontested element or elements the proof of which is not in dispute, then the lesser included need not be charged. Montelongo v. State, 681 S.W.2d 47.

State's Agreement to Waive a Jury is Not Jurisdictional

In a previous case involving Judge McDonald (676 S.W.2d 371), the Court held that the accused's right to waive a jury is dependent on the State's consent. However, it now holds that the State's consent is not a jurisdictional matter; it is not essential to the district court's power to decide a case. Hence, if the judge decides to disobey the law and proceed to trial without a jury in the absence of the State's consent and enters judgment, there is nothing the State can do about it since the judgment is not considered void. [Catch-22 is alive and well in Texas criminal jurisprudence.] State ex rel. Bryan v. McDonald, 681 S.W.2d 65.

Speedy Trial Act; Prosecutor's Ignorance of Exact Whereabouts of His Witnesses Didn't Undermine Readiness for Trial

The prosecutor admitted that he would "have to scramble" to assemble his witnesses if the case actually went to trial on a particular setting. He also conceded that he did not know the precise whereabouts of his witnesses at the time. HELD: Such concessions do not establish a lack of readiness for trial under the Speedy Trial Act. Philen v. State, #66,889; decided 12/5/84.

Test for Accomplice Corroboration

The test for determining the sufficiency of the corroboration of accomplice testimony is to eliminate from consideration the accomplice's evidence and examine the remaining evidence to see if there is inculpatory evidence which tends to link the accused with the commission of the offense. Even in a capital case, the test is based on the "tends to link" language. There is no requirement that the non-accomplice evidence tend to connect the accused with the offense beyond a reasonable doubt. Thompson v. State, #68,987; decided 12/5/84.

Entrapment: Informants as "Law Enforcement Agents"

The fact that a person is a police informant does not automatically transform him into a "law enforcement agent" whose improper inducements will establish entrapment. There must be some instruction and control by the police. The first inquiry is whether in the case in question the police gave the informant specific instructions to use improper procedures to make the case. If no specific instructions are proven, the next inquiry is whether the overall relationship between the police and informant circumstantially show police instruction and control over the informant. Relevant factors under the second inquiry include: (1) number of cases in which the informant was involved, (2) disposition of those cases, (3) amount and method of compensating the informant, (4) the working relationship between the police and the informant, and (5) the informant's contacts with the police. The accused has the burden of bringing out sufficient facts to establish that the informant was a law enforcement agent under Penal Code §8.06. Soto failed to carry his burden because he did not go beyond showing that the police had a general objective of using the informant to make some drug buys.

The Court also noted that the question of an illegal inducement is often a fact question. Soto's basic theory was that he was putty in the hands of the female informant, with whom he was having a sexual relationship. But the undercover officer testified that at the time of the buy Soto mentioned he would sell the dope only if he could have some of it. This raised a jury question concerning the true motivation for selling the dope. Soto v. State, #464-83; decided 12/19/84.

Allowing Third Person to Testify About a Witness' Prior Out-of-Court Identifications of the Suspect

While witnesses can always testify to their own previous identifications of the accused, third parties (such as police investigators) may testify that the witness previously identified the accused only if the witness' identification in court has been impeached. However, the Court has often recognized in recent years that any half-way vigorous cross-examination of the witness about the identification will open up the testimony from the third party about the prior ID. See Wilhoit v. State, 638 S.W.2d 489. The Court now tries to rein back in the third party testimony by cautioning that the propriety of such testimony must be reviewed in each case to see if the third party testimony will rehabilitate the witness on the specific point on which he was impeached or attacked.

In this case, the victim identified several people in the courtroom (apparently every black male present) as her assailant, but ultimately settled on the defendant. Neither on direct or cross-examination did she testify about a previous identification of the suspect, though she arguably was impeached on how she had described her attacker to the police. The Court finds that introduction through third parties of the

prior identification did not serve to rehabilitate the victim on the only points on which she was impeached. Query: If the State had brought out through the victim that she had identified the suspect previously, would the State then have been on firm ground in using the third parties for rehabilitation?

The Court also strongly hints that this hesitant and conflicting identification might have presented insufficient evidence, even taking into account the prior identifications. Sledge v. State, #855-83; decided 12/19/84.

Motions to Quash for Lack of Notice

The narrow holding of this case is that even in the face of a motion to quash the State need not allege in an indictment for escape the names of any persons against whom a deadly weapon might have been used or directed during the escape. All of this is evidentiary. The opinion also casts substantial doubt on the continued validity of King v. State, 594 S.W.2d 425, one of the cases requiring the State, in the face of a motion to quash, to allege the name of the victim of an in-the-course-of offense (e.g., the name of the rape victim in a capital murder occurring in the course of a rape).

Read as broadly as possible--and I am probably hoping for too much on this--the opinion may signal that a substantial segment of the Court is moving toward the idea that once the essential elements are alleged, the State never need plead more than alternative "acts or omissions of the defendant" that are contained in statutory definitions of the terms which themselves define the basic offense. (See Thomas v. State, 621 S.W.2d 158.) Beck v. State, #189-83; decided 1/9/85.

Lesser-Included Offenses

The accused fled when an officer saw him, late at night, facing the forcibly-opened door of a closed business establishment. At trial the accused put on no evidence but asked that a lesser-included charge on criminal trespass be submitted on the theory that he might not have been entering with an intent to commit theft.

HELD: Since no affirmative evidence raised the possibility that the accused, if guilty at all, was guilty only of the lesser offense. the accused was not entitled to the charge.

If the accused presents evidence that he was not guilty of the offense or if he presents no evidence at all, he must point to affirmative evidence elsewhere in the record to justify a conclusion that he could have been guilty only of the lesser offense. The mere theoretical possibility that he did not enter with an intent to commit theft is not enough. (The State of course was relying on the so-called presumption of an intent to commit theft based on a non-consensual nighttime entry.) Aguilar v. State, #004-84; decided 1/9/85.

Proving the Circumstances of an Arrest

The general rule is that the State can prove the circumstances surrounding the accused's arrest, with the proviso that the evidence is inadmissible if inherently prejudicial and of no relevance to the case. The issue usually arises only if the circumstances of the arrest will show an extraneous offense, which often involves the possession of drugs or weapons.

The Court canvasses some apparently conflicting cases and finds that the State properly proved up that the accused and his accomplice had a rifle in the car when they were arrested shortly after the drug deal was consummated. (The Court also says that the judge's decision to admit the circumstances of the arrest will be reviewed only for a clear abuse of discretion.) Maddox v. State, #049-84; decided 1/9/85.

Harmless Error--Failure to Apply Law of Parties to Fact on Request

The defense objected to the court's failure to apply the law of parties to the facts in its charge. Although this was error, it was harmless since the evidence was sufficient to support a conviction on the theory that the accused was guilty as the primary actor, that theory having also been submitted to the jury. Govan v. State, #189-84; decided 1/9/85.

Waiver of Psychiatrist's Failure to Warn That Interview Can Be Used Against the Capital Defendant on the Future Dangerousness Issue

Experts were appointed to examine the capital defendant on the issues of competency and sanity. No notice was given that the results of the exam might be used on the future dangerousness issue, nor were Miranda warnings given before the experts interviewed the accused. On guilt/innocence the defense called an expert to testify on the insanity issue, and in rebuttal the State called two experts who had examined the accused. During the punishment phase the defense re-offered its evidence from the first phase of the trial and specifically asked the jury to make use of the insanity testimony in answering the special issues. The State called experts to testify about the defendant's future dangerousness, the same experts who had testified for the State on guilt/innocence and who had not given Miranda warnings prior to interviewing the accused.

Although Smith v. Estelle, 451 U.S.454, would not normally permit the use of medical evidence gathered by interviewing the accused without the appropriate notice and warnings, it did say that the accused could waive his Fifth Amendment rights by putting into evidence his own psychiatric evidence. The Court held that the accused made such a waiver here by putting on the expert testimony on guilt/innocence, re-offering it at punishment, and specifically asking the jury to consider it in answering the special issues. Penry v. State, #68,882; decided 1/9/85.

Tests for Deciding Whether Suspect is "In Custody" for Miranda Purposes

If a suspect is not under formal arrest when questioned, four factors are to be examined to determine if he is nevertheless "in custody" so as to make Miranda and art. 38.22 applicable to the questioning:

(1) whether probable cause for arrest existed;
(2) whether the suspect was the focus of the investigation;
(3) the subjective intent of the police; and
(4) the subjective belief of the suspect.

The ultimate inquiry is whether there is a restraint on freedom of movement equivalent to that associated with a formal arrest. The facts of Turner are unremarkable, but the Court found the defendant was not in custody, primarily because he consented to go to the station after asserting that he wanted to help in the murder investigation. Turner v. State, #69,221; decided 1/16/85.

Absence of Jury Waiver from Appellate Record Will Not Void the Conviction

When the Court first decided these cases on July 11, 1984, it held that a signed jury waiver must be in the appellate record if a felony was tried to the court. Even an affirmative recitation in the judgment that the accused waived a jury was not enough. (See **True Bill**, Aug.-Sept. 1984.)

The Court now takes an about face and unanimously agrees that the appellate court will be satisfied as long as the judgment contained in the record contains a recital that the accused affirmatively waived a jury. (The recital must be that the accused waived a jury. It must not say that no jury was requested. See Samudio v. State, 648 S.W.2d 312.) If the accused takes the position that the judgment recitals are wrong and that a jury was not waived according to statutory procedures, he bears the burden of bringing forward a record to support his claim. Breazeale v. State, #387-83, and Higgs v. State, #604-83; decided 1/23/85.

Absence of "Not Guilty" Verdict Form

In its original opinion of 9/19/84 the Court found that the absence of a form for a verdict of not guilty was not fundamental error. The Court relied greatly on the fact that the accused should not be allowed to complain since his attorney supervised the preparation of the form.

On rehearing the Court notes that the record discloses that the defense counsel actually took no part in the preparation of the verdict forms; the omission was due solely to clerical error. However, it adheres to the finding of no fundamental error. Berghahn v. State, #125-84; decided 1/30/85.

Failure of State and Federal Sentences to Run Concurrently, Contrary to Plea Bargain

In his plea bargain, the accused was promised his state sentences would run concurrently with a certain federal sentence. However, the feds maintained that the federal sentences were not running at all, since the accused had not been taken back under federal custody. Since the plea bargain could not be followed, the Court lets the accused withdraw his plea. To avoid future problems, the dissenters urge the trial judge to advise the defendant in such a case that Texas cannot control the running of the federal sentence. The accused should also understand that the order stating that the Texas sentences run concurrently with the federal sentence does not insure that the sentences will run concurrently in fact. (Texas authorities can, at most, insure that Texas judgments do not affirmatively stack our sentences on top of those from another jurisdiction. They cannot guarantee that Texas sentences will in fact run concurrently with those from another jurisdiction.) Ex parte Huerta, #69,352; decided 1/30/85.

ANSWERS

1. No, unless the accused makes it clear the unsolicited advice is being adopted. Montelongo v. State, 681 S.W.2d 47.

2. Yes. Griffin v. State, #311-84; 12/5/84.

3. No. Thompson v. State, #68,987; 12/5/84.

4. No. Penry v. State, #68,882; 1/9/85.

5. Yes. Duff-Smith v. State, #68,908; 1/16/85.

6. No. Now the test is whether the prospective juror's view on the death penalty would "prevent or substantially impair" his ability to perform his duties. Wainwright v. Witt, 105 S. Ct. ___ (1/21/85).

7. No, "reasonable grounds for suspecting" is enough. New Jersey v. T.L.O., 105 S.Ct. 733.

8. Yes. U.S. v. Hensley, 105 S.Ct. 675.

9. No. U.S. v. Johns, 105 S.Ct. ___ (1/21/85). □

Mistakes!

~~MISTEAKS~~

Just in case you find any mistakes in this issue of **True Bill**, please remember that they were put there for a purpose. Since some people are always looking for mistakes, we try to offer something for everyone.

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

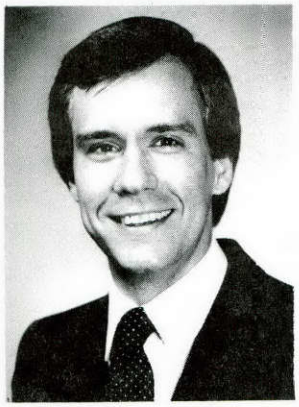
BUT AT LEAST
I'M HONEST ABOUT IT

The Court: There is just no way I can figure you out. Are you just hard-headed or stupid?

Counsel: Stupid.

(Misdemeanor case. Name of County withheld by **True Bill**'s Editor!)

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



FROM THE Legal Counselor's Desk

by David Kroll

David Kroll is the Legal Counselor for the Council and the Editor of ***True Bill.***

Attorney General Opinions

Attorney General Opinion JM-239

Re: Authority of peace officers commissioned by school districts.

Opinion JM-219 (1984) is withdrawn and this opinion substituted therefor.

Two questions were presented:

(1) What are the responsibilities of the Texas Commission on Law Enforcement Officer Standards and Education concerning such peace officers, i.e., campus security personnel?

(2) Do such officers have all the powers, privileges, and immunities of peace officers whenever in the performance of their duties, even when not on school property?

Section 6(c) of article 4413(29aa), V.T.C.S., provides that no person shall be appointed as a "peace officer" unless licensed by T.C.L.E.O.S.E. Furthermore, section 6(h) of the article defines "peace officer," for the purposes of that Act, as only one so designated by Art. 2.12, C.C.P., 1965, or by §51.212 or §51.214 of the Texas Education Code. T.C.L.E.O.S.E. refused to license secutiry personnel commissioned by school districts pursuant to §21.483 of the Education Code because they are not designated "peace officers" within any of the above-stated statutes.

On the first question, the Attorney General concluded that, when all of the statutes are harmonized, the personnel in question are indeed "peace officers," but only in certain instances, i.e., "while on the property under the control and jurisdiction of the district or otherwise in the performance of [their] duties." (Educ. Code §21.483.) However, nothing in these statutes gives T.C.L.E.O.S.E. any licensing responsibilitiy concerning these officers.

On the second question, the A.G. said that the answer is a fact determination, dependent upon the scope of the officers' duties as set by their employing school boards and upon whether they may be said to be "on property under the control and jurisdiction of the district or otherwise in the performance of [their] duties" at the time in question.

Attorney General Opinion JM-243

Re: Whether a sheriff has discretion to refuse to enter a probation revocation warrant in a state computer under article 23.09, Code of Criminal Procedure.

The computer system relevant here is the Texas Crime Information Center (TCIC) maintained by DPS for the collection of outstanding warrants. The A.G. noted that, under the DPS operating manual for the system, any entry into the TCIC by a law enforcement agency must be accompanied by the promise that such agency will retrieve the prisoner from anywhere in the state. The A.G. recognized that a sheriff might not

have the available personnel to follow up on such a promise. Therefore, the A.G. concluded that a sheriff cannot be compelled to enter warrants in the TCIC, if in his reasonable discretion, it is not justified under the circumstances.

Attorney General Opinion JM-249

Re: Whether a commisioners court or a board of district judges may limit the services of a county domestic relations office to persons having a particular income.

Two questions were presented:

(1) Does the Tarrant County Commissioners Court or the board of Tarrant County district judges have the authority to limit the services of the Tarrant County Domestic Relations Office to citizens having an income which does not exceed a figure to be determined by the commissioners court?

(2) Alternatively, may a graduated application fee be implemented, based on the income of persons seeking to utilize the services of the office?

The A.G. concluded that article 5142a-1, V.T.C.S., gives no specific authority to a commissioners court to do either of the above, nor can the authority be implied, as a county has only those powers conferred either expressly or by necessary implication by the constitution and statutes of this state. Canales v. Laughlin, 214 S.W.2d 451, 453 (Tex. 1948).

Attorney General Opinion JM-250

Re: Whether DPS may probate the suspension of a driver's license of a person who has been convicted of DWI as a result of a breath test refusal.

The question has been made two-fold:

(1) May DPS suspend the license of a person convicted of DWI and placed on probation if the person has been found on appeal to have refused a breath test?

(2) May DPS suspend the license of a person convicted of DWI by a jury and such jury recommends that the license not be suspended, despite a finding of a breath test refusal?

Article 67011-5, V.T.C.S., governs the giving of breath tests and the suspension of licenses for refusal to take same. It provides, at the person's request, for an administrative hearing on the suspension to be "set in the same manner as a hearing under Section 22(a)" of article 6687b, V.T.C.S. However, article 6687b also contains provisions for the probation of license suspension. Thus the question arises whether probation by DPS is appropriate. The A.G. concluded that article 67011-5 incorporates **only** the "setting" provision [§22(a)] of article 6687b, and **not** any other provisions of article 6687b. Thus, there are no applicable provisions for probation by DPS of a license suspension for failure to submit to a breath test.

As further evidence for this conclusion, the A.G. noted that article 67011-5 was amended in 1983 to say that suspension will take place automatically, regardless of "whether or not the person is subsequently prosecuted as a result of the arrest," thus making it clear that suspension of a driver's license for refusal to take a breath test is an entirely separate matter from the penalties and procedures of article 6687b. Attorney General Opinion H1201 (1978), which was decided under the old DWI law, concluded contrary to this opinion and is overrruled.

Attorney General Opinion JM-254

Re: Whether the salary of an investigator employed by a county attorney who is a first cousin to a county commissioner may be increased.

Under Article 332a, V.T.C.S., a county attorney may employ such personnel as needed for the office and set the salary of, say, an investigator, subject to the approval of the commissioner's court. Article 3902 prohibits the commissioner's court from attempting to influence the prosecutor's choice of employee. Lastly, Article 5996a (the "nepotism" statute) provides that no commissioner shall appoint, vote for, or confirm the appointment to a public office

of any person related to him or her within the second degree by affinity or within the third degree of consanguinity.

Obviously the investigator's relationship to the particular commissioner brings this case within the definition of the nepotism statute. However, the Attorney General reasoned that since the commissioner's court has no control over the choice of the employee, the court would not violate the nepotism statute by approving a salary increase for the investigator position.

Attorney General Opinion JM-265

Re: Whether charging excessive fees for copies of public documents constitutes a criminal offense under the Open Records Act.

In addressing the above question, the A.G. looked at several sections of the Act. Section 9 provides that the cost of such copies "shall not be excessive." Section 10(b) makes it an offense for a custodian of public records to deny access to, or to fail to provide or permit copying of, public records. Lastly, section 10(e) provides that any person violating section 10(b) shall be guilty of a misdemeanor. The A.G. concluded that section 10(e) was not meant to cover section 9; furthermore, nowhere in the act are "actual" or "excessive" costs defined, thus making the offense, if there were one, unenforceable for vagueness. Lastly, although conceding that excessive fees could be strong evidence of denial of access and thus a violation of 10(b), the A.G. examined the history of the Act and concluded that the legislative intent in section 10 was to punish for wrongful failure to release public information, not for charging excessive fees.

Attorney General Opinion JM-266

Re: Whether a district attorney is subject to the Open Records Act.

Two TDC inmates requested of the office of Harris County District Attorney John Holmes, Jr., copies of their entire files. The District Attorney raised these arguments in defense of not releasing the files:

(1) His office is part of the judicial department of state government created by article V of the Texas Constitution and thus is within the judiciary exception to the definition of "governmental body" in section 2(1) of the Act.

(2) His office is not a "records-generating" agency, and any request for public documents held by it should be directed to an agency that is the legal custodian of such records.

(3) The files are excepted from disclosure under the following sections of the Act [paraphrasing the sections]:

- 3(a)(1): as information deemed confidential by law;
- 3(a)(3): as information relating to litigation;
- 3(a)(7): as matters prohibited from disclosure pursuant to a court order or applicability of the Rules and Canons of Ethics of the State Bar of Texas; and
- 3(a)(8): as records of law enforcement agencies that deal with the detection and investigation of crime, including internal communications.

The Attorney General rejected every argument presented. First, the A.G. held that a district attorney's office is not within the judiciary exception to the Act, reasoning that the office's function is primarily executive, not judicial, in that its duty is to enforce the law.

Secondly, the A.G. noted that, although the request for information might indeed be more appropriately directed to another agency, the district attorney's office cannot dismiss what is otherwise a legitimate request under the Act.

Next the A.G. addressed the §3(a) arguments for exception from disclosure. Under the "confidential by law" and "records of law enforcement agencies" exceptions, the District Atttorney argued that files contain attorney work product and important internal communications. While conceding that these exceptions may indeed apply to some portions of the files, the A.G. emphasized that agencies claiming exceptions to the Act

bear a strong burden of demonstrating how and why the exceptions apply. The A.G. was not satisfied as to what exactly was claimed to be "attorney work product" nor as to exactly how its release would interfere with law enforcement and crime prevention.

Under the litigation exception, the District Attorney argued that the release of files to inmates will almost certainly result in litigation. However, the A.G. concluded that the exception is triggered only when litigation on a specific matter is either pending or reasonably anticipated.

Under the exception for matters prohibited from disclosure by court order or by the Rules and Canons of Ethics, the A.G. conceded that this section, too, might apply, but said that no specific Rules, Canons, or court orders had been cited which would be violated if the files were released.

In summary, the A.G. ruled that the district attorney's office is subject to the Open Records Act.

See "Prosecutor Files Subject to Open Records Act," p. 16, for discussion of JM-266.

Attorney General Opinion JM-270

Re: Whether a constable may sell computers to his county

Article 988b, V.T.C.S., relates to conflicts of interest by local public officials. Section 3(a)(1) provides that a local public official may not participate in a vote or decision affecting a business in which he has a substantial interest, provided that he has the authority to participate in such vote or decision for the governmental entity he serves. After concluding that a constable is indeed a public official under the Act, the A.G. applies the facts: the constable wishes to contract with the county for computers via the commissioners court. Since the constable does not have the authority to vote through the commissioners court on a county decision about its computer service or contracts, there is no conflict of interest in the present situation.

Attorney General Opinion JM-271

Re: Whether a sheriff must accept a bail bond to obtain the release of a person held on a warrant or capias issued in another county.

Article 2372p-3, §14(a), V.T.C.S., provides that a sheriff "**shall accept** and approve a bail bond posted by a licensed bondsman only in accordance with this Act and the rules prescribed by the board, but a sheriff **may not refuse to accept** a bail bond from a licensed bondsman who meets the requirements of Subdivision (4) or (5) of Subsection (a) of Section 6 of this Act" [emphasis added]. After a discussion of the Bail Bondsman Act, the A.G. concluded that 14(a) is mandatory, rather than discretionary; thus, a sheriff must accept such a bond.

Attorney General Opinion JM-281

Re: When a county may charge the optional $5.00 vehicle registration fee.

The question arose because of possible interpretations of article 6675a, V.T.C.S. Section 9a(b) provides that a county may impose the fee only "**to take effect beginning January 1** of a year ending in a '5' or a '0'." Section 3 says that the fee applies to a "**registration period** that begins on or after **the date the fee takes effect.**" [Emphasis added.] After further inspection of article 6675, the A.G. concluded first that "take effect" must mean "to become operative"; secondly, "registration period" must mean the period for renewal of registration, which is two months. Certain other constructions would produce absurd results (i.e., renewal costing more if done at certain times than at others). The A.G. concluded that the fee may be charged beginning January 1, 1985, and only for the renewal of registrations expiring on February 28, 1985.

Attorney General Opinion JM-292

Re: Costs of copies of records under the Administrative Procedure Act and the Open Records Act.

Comptroller Bob Bullock raised these questions:

(1) May a petitioner be charged for the cost and production of records requested in a discovery motion during an administrative hearing?

(2) If so, may the petitioner be required to post a bond or pay in advance?

(3) Is a request for records under the Administrative Procedure Act (article 6252-13a, V.T.C.S.) to be treated differently from a request for records under the Open Records Act (article 6252-17a, V.T.C.S.)? If so, what are the differences?

(4) Under either Act, may we charge for personnel time required to develop a search pattern for and search out the records, to arrange them in a systematic order not maintained in our files, or to expurgate them?

In answering (1) and (2), the A.G. concluded that the Administrative Procedure Act does not specifically put the costs on the petitioner, but does provide that the order for production of records "may prescribe such terms and conditions as are just." [§14a(b)] Furthermore, Rule 186b (now repealed and its subject matter included in Rule 166b) of the Texas Rules of Civil Procedure, incorporated by reference into §14a, authorized the court to make any order to protect a party "from undue. . . expense." Thus, a respondent to a request for records under this Act may seek an order requiring the requestor to pay costs of production, including posting a bond or paying in advance.

In response to (3), the A.G. noted many differences. Section 14a of the Administrative Procedure Act authorizes a relatively narrowly-defined class of persons—any party to an administrative action—to seek discovery of records in another party's possession if the records contain material evidence or information which might lead to such evidence. The request is subject to a showing of good cause, notice to other parties, and other limitations. The Open Records Act, on the other hand, allows "all persons" access to and copies of public records held by governmental bodies. No reason for the request is required, but there are 18 specific categories of information excepted from disclosure. In addition, each Act has its own requirements and procedures for gaining access and for resolving requests.

In answering (4), the A.G. looked to §9 of the Open Records Act and to the cost guidelines of the State Purchasing and General Services Commission. Both sources provide evidence that permissible costs for employee time are built into those set under §9(a) and thus are not chargeable as additional costs. (See Attorney General Opinion JM-114.) However, costs for computer time may be chargeable. The A.G. concluded that Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 391 (1977), requires that the requestor pay the cost of excerpting material to be disclosed under §3(a)(1) of the Open Records Act from information maintained in computer records, including, where necessary, the development of a search pattern.

Open Records Decisions

No specific decisions handed down recently as "Open Records Decisions" are particularly relevant to prosecution; however, see the summaries in this column of Attorney General Opinions JM-265, JM-266, and JM-292.□

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

SEARCH AND SEIZURE

by Alan Levy

Inevitable Discovery & Independent Source

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

The fruits of the poisonous tree doctrine has lately been subject to several limitations. Both the attenuation exception established in Wong Sun v. United States, 371 U.S. 471 (1963), and the "independent source" exception first recognized in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), are the doctrinal foundations for the inevitable discovery doctrine adopted by the Supreme Court in Nix v. Williams, 52 U.S.L. W. 4732 (1984). See United States ex rel Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); United States v. Bienvenue, 632 F.2d 910 (1st Circ. 1980).

The inevitable discovery doctrine can be viewed as a natural extension of the "independent source" exception. The significant difference between the two tests is that under the independent source rule the inquiry is whether the prosecution acquired evidence through an untainted source, while under the inevitable discovery rule, the inquiry is whether the evidence found because of a constitutional violation would have inevitably been discovered lawfully. In re Javier Cabral A, 206 Cal. Rptr. 386 (Cal. Ct. App. 1984); Commonwealth v. Benoit, 382 Mass. 210, 415 N.E.2d 818 (1981); State v. Miller, 67 Or. App. 637, 680 P.2d 676 (1984).

The inevitable discovery doctrine allows illegally obtained evidence to be admitted where the challenged evidence would have eventually been secured through legal means regardless of the improper police conduct, United States v. Apker, 705 F.2d 293 (8th Circ.), cert. denied, 104 S.Ct. 996 (1984); Unger v. State, 640 R.2d 151 (Alaska Ct. App. 1982); People v. Tyr, 206 Cal. Rptr. 813 (Cal. Ct. App. 1984); United States v. Allen, 436 A.2d 1303 (D.C. 1981).

Both the inevitable discovery doctrine and the "independent source" exception complement the premise that the basic function of the exclusionary rule is to deter police misconduct. This deterrent function is fully satisfied by depriving the government of the benefits derived from unconstitutional activities -- evidence. Simply put, an accused who has been subjected to unlawful conduct is entitled to be as well off as he would have been if the police had not committed the unlawful act, but he is not entitled to be better off.

By placing the parties in the position that they would have occupied status quo ante, the deterrence function of the exclusionary rule is served, and is properly balanced with the general public interest in having all the probative evidence available at trial that would have been discovered absent the constitutional violation. Nix v. Williams, 52 U.S.L.W. 4732 (1984); State v. Byrne, 595 S.W.2d 301 (Mo. Ct. App.), cert. denied, 449 U.S. 951 (1980).

The facts of Nix v. Williams (Williams II), provided an irresistible vehicle for the Supreme Court to sanction the "inevitable discovery" exception to the exclusionary rule. On Christmas Eve 1968, a ten-year-old female disappeared in Des Moines, Iowa. Suspicion quickly focused on Williams, an escaped mental patient, who surrendered to

police in Davenport, Iowa. While transporting Williams back to Des Moines, Detective Leaming elicited information from Williams leading to the recovery of the young girl's body from a bar-ditch alongside a public road. The Supreme Court in Brewer v. Williams ruled that Detective Leaming's "Christian burial speech" had violated Williams' Sixth Amendment right to counsel.

During the second trial and throughout the appellate process, the State asserted that the physical evidence consisting of the girl's body and its condition was admissible under the inevitable discovery exception. The evidence amply demonstrated that prior to Leaming's conversations with Williams, Iowa authorities had organized and begun a massive ground search. A large number of volunteers were deployed in a systematic search with the area divided into grids. The lower courts found that even without Williams' assistance, the child's body would have been located within a short time.

Aside from the emotionally evocative facts, the Williams II case presented the Supreme Court with a straightforward and uncomplicated opportunity to endorse the inevitable discovery doctrine. The Court held that if the prosecution can establish by a preponderance of the evidence that information ultimately or inevitably would be discovered by lawful means, then the evidence should be received. Nix v. Williams, 52 U.S.L.W. 4732 (1984).

The Williams II case illustrates a synthesis of the elements that demonstrate that the evidence would have been inevitably discovered:

(1) The investigative process had actually commenced.

It is one thing to speculate on what the police might have done when no actual investigation was underway. Quite another situation is presented where the police, as in Williams, had actually commenced utilization of the procedures that the prosecution asserts would have led to the discovery of the evidence. See United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980) [prosecution demonstrated that the leads which made the discovery inevitable were being actually pursued by the police].

The inevitable discovery doctrine is often applied in instances where the police have actually begun a legal search of the area where the evidence in question is ultimately found, and the police misconduct involves unconstitutional interrogation that simply accelerates the recovery of evidence. Compare People v. Emanuel, 87 Cal. App. 3d 205, 151 Cal. Rptr. 44 (1978), and State v. Poit, 216 Neb. 635, 344 N.W.2d 914 (1984) [police executing a narcotics search warrant would have discovered the drugs without the assistance provided by the defendant's statement], with Stokes v. State, 289 Md. 155, 423 A.2d 552 (1980) [the Court refused to apply the inevitable discovery doctrine where the prosecution failed to show that the police would have searched above a drop-ceiling absent a statement by the defendant directing them to the location], State v. Holler, 123 N.H. 195, 459 A.2d 1143 (1983), and State v. Nagel, 308 N.W.2d 539 (N.D. 1981) [police were already in the process of obtaining warrants when the intervening illegality occurred].

Another nuance is presented where the police are pursuing independent leads which would have led to the discovery of the evidence. In this variation, the prosecution must demonstrate the police were actually pursuing a lawful independent investigation whose procedures would have led to the discovery of the evidence. Here the only difference between the "independent source" analysis and inevitable discovery is that the courts are required to hypothesize that, had the prior illegality not occurred, the evidence would have been discovered as the product of the independent untainted source. See United States v. Fisher, 700 F. 780 (2nd Cir. 1983) [an independent ATF investigation would have routinely uncovered documents incriminating the defendant]; United States v. Bienvenue, 632 F. 2d 910 (1st Cir. 1980) [customs records and normal investigation would have inevitably disclosed the defendant's travel records]; United States ex rel Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974) [defendant in a kidnapping case was not entitled to suppression of his girlfriend's testimony; even though an address book was illegally seized, the girlfriend would have been discovered anyway since both victims knew her address]; Hernandez v. Superior Court, 110 Cal. App. 3d 355, 185 Cal. Rptr. 127 (1980) [even though a credit card

receipt was illegally seized, previous inquiry to the company issuing the card would have disclosed the same information]; State v. Hacker, 51 Or. App. 743, 627 P.2d 11 (1981) [a check forgery case, the identity of the defendant would have been discovered through independent source if a separate investigation had continued.]

(2) Discovery of the evidence would have occurred within a short period of time.

The danger of speculation in applying the inevitable discovery doctrine is diminished where the evidence would have been discovered within a short time. United States v. Romero, 692 F.2d 699 (10th Cir. 1982) [police would have searched a defendant's pockets within a few minutes of when the arguably illegal search took place]; United States v. Roper, 681 F.2d 1354 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983) [search of the defendant's hotel room would have been legally accomplished within a few minutes]. See Fain v. State, 271 Ark. 874, 611 S.W.2d 508 (1981) [statement by defendant bank robber captured by police merely accelerated recovery of evidence which would have been found in a few minutes], Cook v. State, 374 A.2d 264 (Del 1977) [defendants captured in a field would have been identified within a few minutes, so that evidence taken from their pockets would have been recovered], State v. McLaughlin, 454 So.2d 617 (Tla. Dist. Ct. App. 1984) [Inevitable discovery doctrine applied where a container was prematurely opened shortly before its contents would have been inventoried], People v. Pollaci, 68 A.D.2d 72, 416 N.Y.S.2d 34 (N.Y. App. Div. 1979) [evidence illegally seized from an automobile is admissible under inevitable discovery doctrine where the car would have been routinely inventoried].

(3) The probability that a particular item of evidence would be inevitably discovered is influenced by the intrinsic attributes of the evidence and its importance in a particular investigation.

Nix v. Williams is a paradigmatic case for application of this principle. The police had begun an intensive search for the central evidence. the body of a homicide victim.

The obvious difficulties in the successful concealment of a human body coupled with the immediate attention that a body attracts upon discovery leads the courts to the compelling conclusion that when the evidence at issue is human remains, it would have been inevitably discovered. See People v. Foster, 102 Cal. App. 3d 882, 162 Cal. Rptr. 623 (1980) [inevitable that the coroner would have been called, given the offensive smell]; Wayne v. United States, 318 F.2d 205 (D.C. Circ.), cert. denied, 375 U.S. 860 (1963); State v. Miller, 67 Or. App. 637, 680 P.2d 676 (1984) [hotel maid would have discovered body in defendant's room within 24 hours]; Papp v. Jago, 656 F.2d 221 (6th Cir. 1981).

Other types of evidence may have a higher probability of discovery depending upon the nature of the crime. For example, in a violent crime, the police focus on locating the weapon, increasing the probability that the investigation would have continued until the evidence was located. E.g., State v. Holler, 123 N.H. 195, 459 A.2d 1143 (N.H. 1983); State v. Byrne, 595 S.W.2d 301 (Mo. Ct. App. 1978), cert. denied, 449 U.S. 951 (1980). In such a case, the central inquiry is whether or not the weapon was in a location where it was likely to be recovered. Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied, 420 U.S. 909 (1975).

(4) The procedure employed is routine and the results predictable.

A contention that evidence would have been inevitably discovered is supported by proof that the procedures which would have lead to the discovery are clearly routine and their results predictable. For example, the methods used by police in executing a narcotics search warrant usually permit the assumption that any narcotics in the search area would have been discovered. E.g., People v. Emanuel, 87 Cal. App. 3d 205, 151 Cal. Rptr. 44 (1978); State v. Poit, 216 Neb. 635, 344 N.W.2d 914 (1984).

Other examples of routine search procedures with generally predictable results include inventories (see State v. Mclaughlin, 454 So.2d 617 (Fla. Dist. Ct. App. 1984); People v. Pollaci, 68 A.D.2d 71, 416 N.Y.S.2d 34 (1979)), and searches incident to

arrest (see Fain v. State, 271 Ark. 874, 611 S.W.2d 508 (1981); State v. Byrne, 595 S.W.2d 301 (Mo. Ct. App. 1978), cert. denied 449 U.S. 951 (1980)).

Occasionally a defendant seeks to suppress the testimony of a witness who was discovered as the result of unconstitutional police actions. Most courts take the position that the voluntary testimony of such witnesses is admissible under the inevitable discovery doctrine (United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980); People v. Tye, 206 Cal. Rptr. 813 (Cal. Ct. App. 1984); State v. Hacker, 51 Or. App. 743, 627 P.2d 11 (1981)), if the prosecution can show the applicability of the inevitable discovery doctrine by proving that the witness would have voluntarily come forward.

When the identity of the witness was unknown, the prosecution can demonstrate the applicability of the inevitable discovery doctrine by proof that the witness would have voluntarily come forward, or would ultimately have been interviewed in the routine course of the investigation. See In re Javier Cabra A, 206 Cal. Rptr. 386 (Cal. Ct. App. 1984).

In contrast, the inevitable discovery doctrine cannot be applied to avoid exclusion of a confession which is the result of prior police misconduct. A confession cannot normally be considered the type of evidence that will inevitably be discovered by legal, predictable procedures. Unger v. State, 640 P.2d 151 (Alaska Ct. App. 1982); State v. Paz, 31 Or. App. 851, 572 P.2d 1036 (1977).

Even if the facts contained within a statement would have been discovered independently of the illegally obtained statement, the statement itself is not admissible under the inevitable discovery doctrine. State v. McKendall, 36 Or. App. 187, 584 P.2d 316 (1978).

An Issue Avoided

Many courts have refused to apply the inevitable discovery doctrine to excuse a warrantless search on the ground that a search warrant would have been inevitably issued. It is widely accepted that an extension of the inevitable discovery doctrine to allow the introduction of evidence from a warrantless search would "gut the warrant requirement of the Fourth Amendment." People v. Ruggles, 125 Cal. App. 3d 473, 178 Cal. Rptr. 231, vacated on other grounds, 103 S. Ct. 34 (1982); Commonwealth v. Benoit, 382 Mass. 210, 415 N.E.2d 818 (1981); People v. Knapp, 52 N.Y.2d 689, 422 N.E.2d 531, 439 N.Y.S.2d 871 (1981); State v. Johnson, 301 N.W.2d 625 (N.D. 1981); State v. Greene, 30 Or. App. 1019, 568 P.2d 716 (1977) fn.1.; The Supreme Court, 1983 Term, 98 HARV. L. REV. 87, 126.

While the issue was not directly presented by the facts of Nix v. Williams, the primary of the Fourth Amendment's warrant requirement should preclude an extension of the inevitable discovery doctrine to remedy a search undertaken in violation of the warrant requirements. □

Laws You May Have MISSED

Texas Code of Military Justice, Art. 5788, V.T.C.S.

SUBCHAPTER VIII. SENTENCES
Cruel and unusual punishments prohibited

Sec. 55. Punishment by flogging, or by branding, marking or tattoing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this Code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

[**Editor's Note:** "Cruel and unusual"? How about forcing someone to watch reruns of "The Dating Game"?]

A Prosecutor's Office Is Not A Law Firm

No. 83-2522.

Jose CLAUSELL, Petitioner
v.
the STATE of Florida, Respondent

District Court of Appeal of Florida

Third District

455 So.2d 1050 (Fla.App 3 Dist 1984)

This opinion, summarized here, may interest prosecutors. The petitioner sought to disqualify all members of the prosecutor's office from prosecuting his case because two assistants from the office were witnesses for the prosecution. The court in this case decided for the State, in contrast to the decision in Ethics Opinion 399 of the Texas State Bar, published February 1981.

By this petition for writ of certiorari, Jose Clausell asks us to quash an order of the trial court which refused to disqualify the office of the State Attorney from further participation in the prosecution of Clausell for perjury. Clausell contends that because two Assistant State Attorneys will be witnesses for the prosecution, all other members of the State Attorney's office are disqualified from prosecuting him . . .

We reject Clausell's argument that it is unnecessary for him to show prejudice and that he is entitled to have the State Attorney's office disqualified because its further participation in his prosecution would constitute a breach of the Florida Bar Code of Professional Responsibility. His thesis is that the office of the State Attorney is a law firm, and every assistant within the office is a lawyer in the firm, so as to require the automatic disqualification of the firm when, as here, any of its members are to be witnesses in a case being prosecuted by the firm.

First, without any showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidental beneficiary of any violation of its provisions. . . [citations ommitted]

. . .

Second, we perceive no violation of the Code of Professional Responsibility when an Assistant State Attorney appears as a witness for the State in a case being prosecuted by another member of the State Attorney's office.

Concededly, the Code of Professional Responsibility mandates that "[a] lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that. . . a lawyer in his firm ought to be called as a witness." Fla.Bar Code Prof.Resp. D.R. 5-101(B). The code provides that, under like circumstances, the lawyer's law firm shall not continue with the representation. Fla.Bar Code Prof.Resp. D.R. 5-102(A).

In our view, the State Attorney's office is not a law firm, and an Assistant State Attorney is not a lawyer in the firm for the purposes of D.R. 5-101(B) and D.R. 5-102(A). These sections . . .clearly indicate that these expressions were intended to refer to law firms undertaking employment for remuneration and to the attorneys in such firms. . . The definitional section merely states that a law firm "includes a professional legal corporation." We believe that had it been intended that "law firm" should include a multi-assistant State Attorney's office, that inclusion would have been clearly expressed. People ex rel. Younger v. Superior Court, 86 Cal.App.3d 180, 150 Cal.Rptr. 156 (4th Dist.1978).

That the word "firm" as used in D.R. 5-101(B) and D.R. 5-102(A) was intended to refer to a law firm engaged in practice for remuneration is further apparent from Formal Opinion 339 of the American Bar

Association's Committee on Ethics and Professional Responsibility (January 31, 1975) . . [which] concludes:

> "Because a trial advocate clearly possesses such [a financial] interest, his testimony, or that of a lawyer in his firm, is properly subject to inquiry based on such interest, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted and in some cases the effect will be detrimental to the client's cause."
> See also E.C. 5-9.

Thus, faced with the identical question which is now before us, the court in People ex rel. Younger v. Superior Court, 86 Cal.App.3d 180, 150 Cal.Rptr. 156, . . . concluded:

> "The reasons advanced in support of rule 2-111(A)(4) [Fla.D.R. 5-101(B) and D.R. 5-102(A)] . . . reveal . . . certain fundamental assumptions: that there are available a number of competent, qualified attorneys who are unrelated to the attorney-witness and who are willing to undertake the client's case. . . ; that, consequently, the interest of the client in representation by the attorney of choice implicates primarily avoidance of inconvenience and duplicative expense. . . ; that the attorney's interest in continuing to represent the client is mostly or wholly financial in nature; that a trial advocate has or appears to have an interest in the outcome of the case,. . . **However valid these assumptions may be in the case of an attorney or law firm engaged in practice for remuneration and the normal attorney-client relationship, they have virtually no validity in the case of the multi-deputy prosecutorial office of a district attorney. The prosecutorial office of an elected district attorney and the relationship between the district attorney and his sole client, the People, are fundamentally and decisively different from a law firm and the ordinary attorney-client relationship."**
> 86 Cal.App.3d at 203-04, 150 Cal.Rptr. 156 (citations omitted) (emphasis supplied).

Similarly, in United States v. Hubbard, 493 F.Supp. at 208, the court stated:

> "If any member of a law firm has an interest in the outcome of a case, the entire firm is disqualified. See ABA Opinion 296 (1959). However, this rule does not extend to encompass an Office of a United States Attorney. A United States Attorney's Office is unique in that it does not represent ordinary parties but the sovereign whose obligation is to govern impartially. See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629 [633], 79 L.Ed. 1314 (1934). Furthermore, the members of an Office of a United States Attorney have no interest in the success of the litigation of their associates as do members of a private firm. Therefore, the fact that one member of the Office may have a disqualifying interest in the case does not preclude the entire Office from handling the case."

This fundamental and decisive difference between the public prosecutor and the ordinary advocate is expressly recognized by the Code of Professional Responsibility, see E.C. 7-13, D.R. 7-103; by the ABA Model Rules of Professional Conduct, see Rule 3.8, Special Responsibilities of A Prosecutor; and has long been recognized by our case law, . . .[citations omitted]

. . . [T]he petitioner's reliance on disciplinary Rules 5-101(B) and 5-102(A) of the Florida Bar Code of Professional Responsibility as grounds for disqualification is misplaced, since, absent a showing that a violation of these rules will prejudice him the petitioner has no private right to seek their enforcement, and moreover, the State Attorney's office is not a law firm within the meaning of the cited rules.

Accordingly, the petition for writ of certiorari is

Denied.□

Calendar

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

MARCH

24-26	The Mentally Retarded Adult Offender (TCCD)	Austin
24-29	Experienced Prosecutor Course (NCDA)	Pacific Grove, Calif.
28-29	New Frontiers in Forensic and Demonstrative Evidence (SBT)	Austin

APRIL

9-13	Prosecution of Violent Crime (NCDA)	Cambridge, Mass.
14-18	Forensic Evidence (NCDA)	Denver
24-27	TAASA Spring Conference (see below)	South Padre Island
28-May 1	Representing State & Local Governments (NCDA)	Incline Village, Nev.
28-May 2	Trial Strategy & Techniques (NCDA)	Orlando, Fla.

MAY

3	Criminal Defense Institute: Rules of Evidence (CDLP)	Odessa
12-15	Abuse and Exploitation of Children (NCDA)	Chicago
31-June 7	**Executive Prosecutor Course (NCDA)**	**Houston**

JUNE

13-28	**Career Prosecutor Course (NCDA)**	**Houston**
28	Criminal Defense Institute: Sex Crimes (CDLP)	Houston

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

SEXUAL ASSAULT CONFERENCE

The Texas Association Against Sexual Assault Spring Conference will be April 24 - 27 at the South Padre Island Hilton Resort. Topics to be covered include:

- Listening & communication skills.
- Interviewing and videotaping victims.
- Treatment and therapy.
- Case preparation & victim managment.
- Conflict mediation and resolution.
- Investigation of the case.
- New prosecution techniques.
- Child sexual abuse prevention.
- Community politics.
- Medical considerations.
- Cultural considerations.
- Federal funds.
- Interagency cooperation.
- Managment by objective.
- Sexual Assault Awareness Week.
- Sexual assault research and statistics.
- Plus many more topics.

And some fun: a Beach Party on Friday, "moderated" by our own Andy Shuval! Attendance is limited to 300. For more info, call Carole McDaniel at 806/373-8022, or Becky Bryant at 817/665-2873.

TENTATIVE AGENDA FOR THE BASIC PROSECUTION COURSE

MONDAY

WELCOME (8:30 - 8:45)
TDCAA, Prosecutor Council

ROLE OF THE PROSECUTOR IN A DEMOCRATIC SOCIETY (8:45 - 9:05)
The Prosecutor Council

PROSECUTION IN SMALLER JURISDICTIONS (9:05 - 9:30)

THE CHARGING DECISION (9:30 - 10:00) - Intake after arrest; How to maintain good relations with the police; How to treat your complainants and witnesses to keep them satisfied; Use of victim assistance personnel; When to hold examining trials; Law and procedure on conducting examining trials

BREAK (10:00 - 10:15)

CHARGING DECISION (cont'd) (10:15 - 11:00)

GRAND JURY (11:00 - 12:00) - Role; Investigative powers; Reports; Presenting cases; Demonstration; How to orient a Grand Jury; Prosecutor Council packets

LUNCH (12:00 - 1:30)

INDICTMENTS (1:30 - 3:00) - Black letter law; Fundamental defects; Practical tips on drafting; charging defendants with multiple counts; Prosecutor Council Indictment Manual

BREAK (3:00 - 3:15)

WHAT THE INVESTIGATOR WISHED THE ASSISTANT LEARNED IN LAW SCHOOL (3:15 - 3:45) - How to effectively use your investigator and his resources

KNOW THY CASE: Preparation for Trial (3:45 - 5:00) - What to do after Grand Jury presentation; From Grand Jury through announcing ready; The night before you pick your jury; The use of a trial folder

TUESDAY

STATEMENTS (8:30 - 9:15) - Legal Prerequisites and Admissibility

INTERVIEWING AND INTERROGATION TECHNIQUES (9:15 - 10:00)

BREAK (10:00 - 10:15)

PLEA BARGAINING (10:15 - 10:45) - Black letter law to include when an agreement is made; When and how a defendant may enforce an agreement; Threats to re-indict for a higher degree if the defendant refuses an offer; The role of the Judge; how to take a plea in court

PLEA BARGAINING PANEL DISCUSSION (10:45 - 12:00) - Open or closed file; Prosecutors, Defense Attorneys, & Judge

LUNCH (12:00 - 1:30)

BREAKOUT SESSIONS (1:30 - 2:25)
Juveniles/CSA Forfeitures/ Mental Health/ Probation Revocations

BREAK (2:25 - 2:35)

BREAKOUT SESSIONS (cont'd) (2:35 - 3:00)

PANEL DISCUSSION (3:00 - 3:30) - Professor and two prosecutors

BREAK (3:30 - 3:45)

SEARCH AND SEIZURE (3:45 - 5:00) - Black letter law; recent developments; when and how to conduct a suppression hearing; burden of going forward; burden of proof; adequacy of motion papers

WEDNESDAY

VOIR DIRE AND OPENING STATEMENTS (8:30 - 9:30) - Black letter law, tactics, & demonstration

PROSECUTORIAL ETHICS (9:30 - 12:00)
The Prosecutor Council

LUNCH (12:00 - 1:30)

DIRECT AND CROSS-EXAMINATION (1:30 - 2:00) - Black letter law and theory of presentation of witnesses

TRIAL (2:00 - 3:15) - Witness to Accident (independent); Bartender (reluctant witness); Defense Witness (passenger in defendant's car, including inconsistent statement of witness)

BREAK (3:15 - 3:30)

TRIAL (cont'd) (3:30 - 4:30) - Demonstrative Evidence; Arresting Officer; Description of Crime Scene; Introduction of photos of crime scene; Introduction of video of defendant's sobriety tests; Introduction of video confession and written confession

BREATHALIZER EXPERT (4:30 - 5:00)

THURSDAY

JURY CHARGE (8:30 - 9:30) - Black Letter Law; avoiding fundamental error

SENTENCING HEARING (9:30 - 10:30) - Demonstration; Black Letter Law; Pen Packet Introduction; Reputation and Character Witnesses - "Who Opened the Door"; Defendant's Mother

BREAK (10:30 - 10:45)

THEORY OF PUNISHMENT AND FINAL ARGUMENT (10:45 - 11:45) □

The Hot Check Fee Law: Ask the Committee

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

This column contains opinions of prosecutors on problems arising under situations regarding the Hot Check Fee Law. It does not contain official Council postions. Send your questions to the Council, for referral to the Subcommittee. This issue's column is by Kerry Armstrong.

Remember those exhilarating essay questions on law school final exams — especially the ones for which the law professor said there was no "one right answer," because that precise question had no law "on point"? Such questions spurred me to heights of verbose legalese that (I thought) outclassed any judicial rendering of the U.S. Supreme Court. Back in those days my verbosity was just a final exam answer; now it's called a legal opinion. With that in mind, I ask you to forgive my verbosity on this issue's question concerning hot check fee usage. After all, there is no law "on point."

THE QUESTION: A county attorney has a legal secretary who can run his entire office without him. She is that good. But the county attorney is now faced with losing her due to the poor salary paid by the local county commissioners' court, and because the hot-shot criminal defense firm across the street has offered her more money. She wants to stay with the county attorney out of a sense of loyalty, but she does need the extra money. Due to the county's eternal financial crunch, they can not or will not approve a raise in salary for the legal secretary's position. (Besides, if they raised her salary they would have to raise the salaries of all of their secretaries.)

The county attorney wants to use hot check fee money to provide a monthly salary supplement to the secretary. The county auditor will not allow it. (His secretary would want a raise too.) The county auditor further cites V.T.C.S. Article 332a, saying that all salaries must be approved by the commissioners' court. Can the county attorney supplement his secretary's salary with hot check fee funds without the commissioners' court approval?

THE ANSWER (i.e., my legal opinion): Texas Civil Statute Article 332a, "Assistants and Personnel of Prosecuting Attorneys," was passed by the 1973 Texas Legislature and became effective on May 18, 1973. Said act appears to be a general codification and clean-up act dealing with the hiring and payment of all assistants, investigators, secretaries and other personnel employed in prosecutors' offices. Section 9 of the act provided that all laws or parts of laws that were in conflict with the act were thereby repealed to the extent of the conflict. This is important, particularly to those prosecutors' offices which were created or modified by statute prior to 1973.

Section 1 defines the term "prosecuting attorney" to mean a county attorney, district attorney, or criminal district attorney.

Section 5 states, "Salaries of assistant prosecuting attorneys, investigators, secretaries and other office personnel shall be fixed by the prosecuting attorney, subject to the approval of the commissioners' court of the county or counties compassing the district."

Soon after the statute went into effect a major issue arose regarding the meaning of the phrase, "subject to the approval of the

commissioners' court." Did it mean the commissioners could set the salaries?

In 1977, Attorney General Opinion No. H-922 indicated that the elected prosecutor could set the salary. The commissioners were limited to total approval or total rejection of the salary.

It should be noted that Article 332a may not control any statute enacted after 1973, which specifically alters a county or district attorney's office organization, such as the creation of new criminal district attorney's offices. However, most such laws have adopted the same language of "prosecutor-fix/commissioners-approve" in dealing with prosecutor employees.

In 1979, the Texas Legislature enacted Code of Criminal Procedure Article 53.08, "The Hot Check Fee Law." Section (e) provides for a special fund to be administered by the elected prosecutor and that "expenditures from this fund shall be at the sole discretion of the attorney, and may be used only to defray the salaries and expenses of the prosecutors's office . . ." In short, the hot check fee law specifically provides that a permissible use of said fund is for salaries (except the elected prosecutor's salary.)

The usual method of code construction used when two statutes appear to conflict goes something like this: "The latest enacted statute controls over the earlier statute unless the two may be construed in harmony." Thus, construing Articles 332a and 53.08 in harmony, we get (1) elected prosecutors may fix salaries, and (2) they may use check fee funds to help defray those salaries.

The next question is "What about commissioner court approval?" Since the enactment of the hot check fee law, several Attorney General opinions have been issued stating that since the administration and expenditures from this fund are at the sole discretion of the elected prosecutor, the commissioners court has no control over these funds. (See most notably Attorney General Opinion No. MW-439, 1982.)

Therefore, it would appear that if our county attorney in the question above decided to "fix" his legal secretary's salary at a new level above the amount approved by the commissioners' court, with the difference to be paid from the hot check fee fund, the commissioners would be without power to approve or disapprove that supplemental amount. The later law would control over the earlier law.

Furthermore, because the salary supplement from the hot check fee fund was not violative of any law, the auditor could not refuse to sign the check for it. A writ of mandamus would seem to be in order on his continued refusal to sign.

Should our fearless county attorney desire to give this raise from the hot check fee fund, it goes without saying that he should also be prepared to pay from the fund a prorated share of the employer's hidden cost, such as the employer's social security contribution, etc.

The bottom line is that our resourceful county attorney can now legally "fix" his secretary's salary and thus keep her from the clutches of the criminal defense attorneys' office across the street.□

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

YES, BUT HAVE YOU EVER PLANNED AN ACCIDENT?

Q: Have you driven trucks previously to that?

A: Fourteen years.

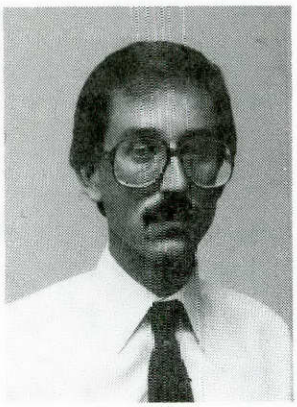
Q: Are you married?

A: Yes.

Q: How many children do you have?

A: None. Fourteen years without an accident!

(Reprinted from The Verdict, September 1984, published by the Oregon District Attorneys Association.)



Media Management:
Learning the Rules

by Don McBeath

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

The subject of this issue is being shifted from office management to media management. Having the best-managed prosecutor's office in the state of Texas will not guarantee a return ticket for you and your staff unless it is accompanied by proper media management. Having associated with media types all my life and having worked professionally in the media for almost ten years before assuming my present position, I believe I have some understanding of the news media's wants and desires.

Take an example: You have just dismissed charges in a high publicity, controversial murder case. The dismissal was signed and filed three days ago at 4:59 P.M. The news media has finally discovered it and is camped in the lobby demanding to speak with you.

You should:

(A) Stay in your office until they go away.
(B) Have two investigators throw them out.
(C) Tell them "No Comment" as you run through the lobby.
(D) Call them in and answer their questions.

All four are possible, but I strongly suggest **(D)**, staying within the bounds of the law, ethics and the Open Records Act.

The elected prosecutor is returned to office only if the public perception of him or her is good. It is not a question of whether your office is clearly open to the media; the issue is whether the media **think** you are being open with them.

The attorneys, investigators, and legal secretaries in your office should understand the Open Records Act, even though release of information may be only through selected prosecutors or the office manager. Also, be familiar with Attorney General Opinion JH-127. It is a good outline on which police-related information should be released.

The media is an animal of unique breed. Do not try to understand the animal, but understand its objectives. Reporters are after all the facts (even though what they want you may not be able to release). Most will try to report accurately. Some are only interested in a story. Some are trying to make a name for themselves. Many are facing deadlines and all are in competition with one another. Lastly, beware of those who interpret and invent news.

Here are some rules for dealing with the media which may keep you out of trouble:

"Off the Record"

Play it safe and tell yourself that there is no such thing. Good reporters know how to take you off the record and then back on without you knowing it. This allows them to print something you did not intend to be printed, yet remain within the bounds of their ethics. If you do go "off the record," know who you are dealing with. And, if burned, consider it a lesson learned.

"The Pen is Mightier Than the Sword" (or the D.A.)

To steal a phrase I read somewhere: "Do not fight with someone who buys ink by the barrel." The news media will always have the last word, right or wrong. Just remember who your friends and enemies are and deal with them accordingly.

Don't Volunteer Information

How often have we told our witnesses that? Still, I have seen many a prosecutor open the beehive that stings him.

"No Comment"

This is **THE** fastest way to get in trouble. If you do not know the answer, say so. If you are not allowed to give the answer, say so. No comment suggests to both the media and the public that you are either covering up or lying.

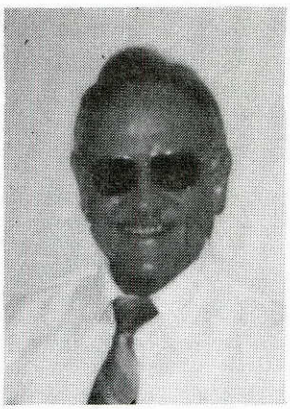
Bad News

Bad news should be released as soon as possible. By taking the offensive, you can release the news in as positive a light as possible. This is significantly better than merely responding to what the media already knows about.

Understand the Type of Media

Hour-long orations from your best final arguments are no good when dealing with radio or television. They need answers and statements of 20 to 40 seconds; that is all the time they have. If your answer fills the bill, it will, more than likely, be used in its entirety. If you talk too long, it is up to them to decide which part of the statement to use. Newspapers have more "time" in the form of space. However, newspaper reporters often take bad notes, especially on quotes. Talk slowly and allow the reporter adequate time to take notes. A misquote may be grounds to talk with the reporter or his editor, but do not expect any retractions or corrections.

The news media can work for you or against you. When properly managed, the relationship can make life and re-election easier. □



Oscar Says

The Commanding Officer of a large aircraft carrier noted for its excellent morale greeted each new officer the same: "See that your men have reason to respect you!" He knew the importance of a good example. People judge leaders more by what they DO than by what they SAY.

It's just as true in running a business. People who supervise others are really salespeople. Their job is selling good attitudes and good work habits. If they don't practice these themselves, sales are hard to make—often impossible. Good executives appreciate that a good example is a powerful tool. They know that people watch them, and that their own example will influence others far more than verbal advice or preaching.

Some people feel that when they have reached a certain level, they are no longer subject to the same standards they expect of others. They think it's their job to tell people what to do, regardless of whether or not they do it themselves. But, if they don't practice it themselves, the telling seldom does much good. If you have difficulty getting your workers to measure up to the standards you set, take a look at yourself. Do you measure up to these standards? Are you practicing them in your own work, or just preaching them to others?

What's sauce for the goose is sauce for the gander. If you want to be an effective leader, you'd better believe it. If you want people to buy something, sell yourself first. □

Council Publications

TECHNICAL MANUALS

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

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

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

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

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

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

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

PUBLIC INFORMATION PAMPHLETS

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

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

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

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

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

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

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

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Audio Visual Loan Library

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

Professional Development Training

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

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

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

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

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

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

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

Public Information Programs

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

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

RURAL CRIME - Minimizing criminal opportunity in sparsely-populated areas; security of home, barn, tools, machinery and tractors. 18 minutes. Color slides and audio cassette.

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

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

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

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

New Council Member

RICHARD W. BRAINERD

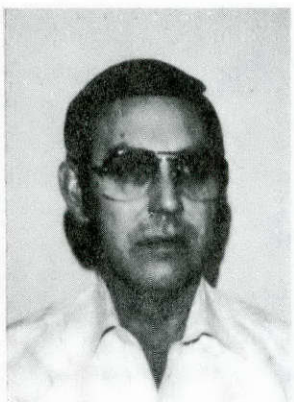
A hearty welcome to Richard W. Brainerd, the newest member of the Council --- and also one of the "oldest." That is to say, he really deserves a "welcome back!", since he has served before: when the Council was first formed, from 1978 to 1981.

Born and raised a Texan, Dick attended West Texas State University and the University of Texas Law School. After graduation he was Assistant County Attorney for Potter County and practiced privately for a while. In 1964 he was elected County Attorney with Felony Responsibility for Oldham County, taking office January 1, 1965, and as he puts it, "They haven't run me off yet."

Dick describes himself as a "has-been." (Pardon me?) Well, besides being a former Council member, he "has been" a Board Director of TDCAA, as well as Secretary, Vice-President, and President. According to him, he constitutes the "entire" Oldham County Bar Association. "I have a helluva time getting motions seconded."

Dick has, by his own description, a "patient, long-suffering" wife, Dorothy, with whom he has enjoyed 29 lovely years of marriage. ("And I think we'll make it to 30!") They have four children: Rebecca, who is married and teaching in Houston; Rick (Richard Jr.), who is serving with the U.S. Army in Germany; Kevin, who is a graduate student at Southern Methodist University; and Stephen, who attends West Texas State University. Looks like the Brainerd family gets around!

Meet Your Council Staff



E. K. MURRAY

E. K. Murray became the Council's investigator in early January. His responsibilities include investigation of complaints of prosecutorial misconduct.

E. K. began in law enforcement in 1960. He has worked for the Angleton Police Department as a patrolman, sergeant, and investigator; for the Sealy Police Department as a sergeant; and for the Brazoria County Sheriff's Department as a Deputy Sheriff. In 1975 he became an investigator with the office of the District Attorney of the 155th Judicial District (Austin, Fayette, and Waller Counties), a postion he held until joining the Council.

A Director of the Board of the TDCAA Investigator Section in 1977, 1981, and 1984, E. K. is the only investigator to be elected three times. He also served as Vice Chairman in 1978.

E. K. attended the first certification school at the College of the Mainland in Texas City. Holding his advanced certification from T.C.L.E.O.S.E., he has numerous schools under his belt, including every one of the Council's Prosecutors' Investigator Schools in Austin. In addition, he is a certified hypnotist.

Listing his hobbies as hunting and fishing, E. K. is a pretty easy-going fellow; experience shows he'll answer to "E. K.," "Murray," or just about anything else you want to call him (within reason!). He also has some interesting case stories to tell, but none of them would have fit in the space we have here; get him to tell you one or two over a beer. And if you want to get a smile out of him, ask him about "the most important person in my life: my ten-year-old daughter, Lee."

NTSU LIBRARY

Classifieds

Budget approved by 33rd Judicial District: Now able to hire a full-time **Assistant District Attorney**, starting salary $24,000 plus benefits. Send picture and resume to Sam Oatman, District Attorney's Office, P. O. Box 725, Llano, TX 78643.

Two Assistant District Attorney Positions Available - Bexar County Special Crimes Section. Prosecution experience desirable. Primary responsibilities: investigation and trial of organized crime, economic crime, and public corruption. Salaries: $42,132 and $39,504. Send resume to: Mike Schill, Assistant District Attorney, 3rd Floor, Bexar County Courthouse, San Antonio, TX 78205. 512/220-2380.

Assistant District Attorney Needed. Felony prosecution only; private practice allowed. Small town lifestyle with Dallas only 45 minutes away. $22,000 plus, depending on experience. Contact F. Duncan Thomas, District Attorney, P. O. Box 441, Greenville, TX 75401. 214/455-2525.

Smith County has an immediate opening for a **Chief Misdemeanor Prosecutor** with at least 2 years criminal prosecution experience required, including extensive DWI jury trials. Duties are prosecution of jury trials in 2 county courts at law, management of dockets, and training and supervision of 3 misdemeanor prosecutors and 2 secretaries. Salary: $32,000. Contact Hon. Jack Skeen, Jr., District Attorney, Smith County Courthouse, Tyler, TX 75702. 214/597-7263.

Position for Recent Graduate: **Assistant District Attorney** in Granbury. Salary $24,000.00. Contact Dan Grissom, District Attorney, at 817/573-5558.

Immediate openings for **2 Assistant District Attorneys** in Williamson County. One position is for a felony trial attorney and requires substantial prosecution experience. For the other position, experience is preferred but not mandatory. Salaries are negotiable, depending on qualifications and experience. Contact Ed Walsh, District Attorney, County Courthouse, Georgetown, TX 78626. 512/869-4332.

Assistant District Attorney Needed for Deaf Smith County. Experience preferred but will consider recent graduates. Salary to mid-$30,000, depending on experience/ability. Send resume to Jo Charest, Office Manager, Criminal District Attorney's Office, Courthouse, Hereford, TX 79045. 806/364-3700.

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

County Attorney Position available immediately for Dawson County. Salary negotiable, depending on qualifications and experience. Send resume to County Judge Glenn R. White, P. O. Drawer 1268, Lamesa, TX 79331. 806/872-7544.

County Attorney Position Open for Jones County. Salary: $19,640. Permitted to have private practice. Receives insurance and will have secretary. Send resume to Roy Thorn, Box 148, Anson, TX 79501.

Assistant County Attorney Needed for Jim Wells County Attorney's Office. Must have license to practice law in Texas. Duties range from criminal prosecution to advising local governmental officials on civil matters. Send resume to Jesus Sanchez-Vera, Jim Wells, County Attorney, P. O. Box 2080, Alice, TX 78333.

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