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TRUE BILL

THE NEWSLETTER OF THE PROSECUTOR COUNCIL
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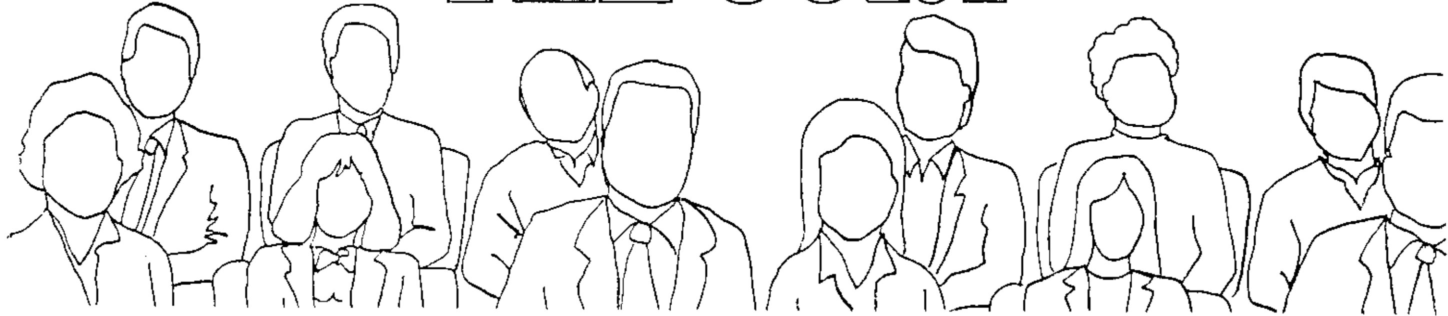
THE JURY



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The Director's Corner

by Andy Shuval

By the time you read this column, you will know whether or not the Council has been renewed by the Legislature. I believe the answer will be that it has.

Since my last report to you several good things have happened. Speaker Gib Lewis has been persuaded that the Council should be renewed and the Senate has passed the Council renewal bill by a vote of 26 to 2.

If the Council is in fact renewed, it will be due in no small part to the willing and enthusiastic efforts of each of you. So many people have come to the aid of the Council!

I have copies of several hundred letters sent by you to your elected representatives. **Your** letter motivated **your** representative to visit with the Speaker about the value of the Council to the public and to prosecutors.

Regardless of how the battle comes out, prosecutors should be proud that their word was heard -- heard because they acted, rather than procrastinated -- and because they acted in concert for a worthwhile cause.

There is a rumor rampant in Austin that the fat lady is in critical condition and may be unable to sing!

Andy

COUNCIL PROVIDES SUPPORT IN PROSECUTION OF WHITE COLLAR CRIME

Through its technical assistance program, the Council assisted with the successful prosecution of a complicated white collar crime in Freestone County, resulting in a conviction of 10 years in T.D.C. and a $10,000 fine.

Robert Gage, County Attorney with Felony Responsibility for Freestone County, requested the assistance because he felt that a possible conflict of interest would be raised by defense counsel.

"I appreciate the assistance of the Council," Mr. Gage said, "and I'm sure I speak for the commissioners and the citizens of Freestone County; it was invaluable, particularly for a one-man prosecutor's office."

The Council obtained the services of Jim Leitner, the former First Assistant District Attorney for Bell County and the former head of the white collar crime division of the Harris County District Attorney's Office. Because of the possible conflict issue, Mr. Gage asked that Mr. Leitner be answerable directly to the Council.

"It was quite an experience," Mr. Leitner said. "I have handled many white collar crimes in the past, and this was at least as complicated as any I have handled.

"I am still a prosecutor at heart, and even though I can make more money in Houston at my private practice I wouldn't trade this opportunity to prosecute for any amount of money. Just to see the defendant squirm during argument [on guilt since he absconded before the punishment phase] made all the work and worry worth it. I feel that Freestone County is pleased with the outcome." □

NEW COUNCIL MEMBER

Ken Epley is the new Lay Member on the Council, appointed by Governor Mark White on March 11. See his profile, p. 51.

SUPREME COURT CLEARS WAY FOR EXECUTION BY INJECTION

In Heckler v. Chaney, 105 S.Ct.______, 36 CrL 3218 (March 20, 1985), the Supreme Court declined to review a refusal of the federal Food and Drug Administration to examine the use of lethal drugs by the states for executing condemned inmates. It ruled that federal agency decisions not to take enforcement action are presumptively unreviewable under §701(a)(2) of the Administrative Procedure Act which precludes judicial review of actions "committed to agency discretion by law."

The Court stated that ". . . when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon area that courts often are called upon to protect . . . [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch."

Only if the substantive statute provides guidelines for the agency to follow in exercising its enforcement powers, may the presumption of unreviewability be rebutted. Such rebuttal was not possible because the federal Food, Drug and Cosmetic Act gave complete discretion to the Secretary of Health and Human Services.

[From Case Commentaries and Briefs, published by the NDAA, May 1985.]

GOOD NEWS TRAVELS FAST

And now it looks like it will travel even faster: That is to say: Thanks to a new procedure used by the Council you should begin to receive your travel reimbursements 3 to 4 days sooner.

By recent arrangement with the State Comptroller's Office, the Council's Financial Department has been processing your reimbursement requests so that the warrant will issue and mail directly from the Comptroller to you, rather than to the Council.

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.

MORE 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 the legislators and copies forwarded to the Council for its files.

[T]he Council and the TDCAA are particularly responsive to the needs of prosecutors, but also are very efficient and frugal in the manner in which the available limited funds are expended. . . In almost every instance where prosecutors are given a choice of technical assistance though, they choose the technical assistance available through the Council because of the considerably greater expertise available in the trial of difficult criminal cases.

Marvin Collins, Assistant
Criminal District Attorney - Tarrant County

The Prosecutor Council is an organization on which prosecutors have depended to conduct training schools, publish informative newsletters, and act as a resource for special prosecution when necessary. . . It provides important services which must be continued.

Ken Oden
Travis County Attorney

[T]he Prosecutor Council has been an important aid in the performance of our functions and a vehicle by which we have been able to aid prosecutors statewide in accomplishing their civil responsibilities. . . The Prosecutor Council has been instrumental in supporting us in developing a Civil Manual for prosecutors with civil jurisdiction statewide. . . Without doubt, The Prosecutor Council serves a valuable function which cannot be replaced by other organizations.

Mike Driscoll
Harris County Attorney

The Prosecutor Council has been an immense help to me and my staff. I feel that we, as well as all prosecutors, would be at a great loss if the Prosecutor Council was eliminated or if its function was limited by legislature.

John C. Dickerson, III
Matagorda County Attorney

[I]n the midst of an important criminal trial, a serious matter came up which could have delayed the trial or caused reversible error. During a short recess, I was able to call the Prosecutor's Council and received immediate technical assistance by telephone which resolved the problem. The savings to the county and state in regard to court expenses were substantial. The trial continued and resulted in a conviction of the defendant. This is only one example of many instances in which I received invaluable help. . . By being able to take advantage of the . . . Council, small prosecutors offices like mine are able to hold their own in order to serve their communities.

Charles M. Cobb
District Attorney, 76th Judicial District

The services provided to me as well as other prosecutors by the Prosecutor Council has been very beneficial and practically indispensable. . . [I]t is the only agency that truly does benefit prosecutors and performs functions that only it can perform as well as it does.

Patrick Morris
Wise County Attorney

ATAC PRESSES FOR CHANGES:

For an End to the Parole Board's Escalated Release Program

Sen. J. E. "Buster" Brown, Chairman of ATAC (Associated Texans Against Crime), noted that a recent Department of Justice study showed that of all the early releases nationwide, nearly one-third are released from Texas prisons. The study also showed that of inmates currently in prison, 61% are repeat offenders, and 46% of them would not have been free to commit therir subsequent crime if they had been made to serve their maximum terms. In Texas today, inmates are only serving an average of 21% of their assessed sentences. "What we must do is stop this wholesale release of prisoners," Brown said.

For a Crime Victim to be Appointed to the Parole Board

At a news conference at the State Capitol and in a letter to Governor Mark White, Sen. Brown called for the appointment of a victim of a serious crime to the Board of Pardons and Paroles.

Noting that "the victim of crime is ignored and excluded from participation in our parole system," Brown said that the appointment of a victim to the Board would be a clear signal to crime victims that their voices will be heard in matters of parole.

"Since we began ATAC one year ago," Brown said, "we have traveled all across the state and talked to not only law enforcement officials, prosecutors and judges, but to crime victims as well. Dissatisfaction with the current early release program was a common theme expressed by both groups."

Parole Board members are appointed by the Governor for six-year terms.

For Anti-Child Molester Legislation

On April 2 citizens from across Texas presented Sen. Brown with petitions asking for stiffer penalties for child molesters. Sen. Brown introduced legislation (S.B. 422) to provide that convicted child molesters cannot become eligible for parole until they have served one-third of their calendar time.

U.S. GOV'T ANNOUNCES JUVENILE RESTITUTION ASSISTANCE

The Restitution, Education, Specialized Training and Technical Assistance Program (RESTTA) is a new program designed to promote restitution in juvenile courts. Funded by the Office of Juvenile Justice and Delinquency Prevention, RESTTA offers services to jurisdictions wishing to implement or refine a juvenile restitution program. Faculty include judges, restitution program administrators, researchers, and legal experts.

RESTTA offers these services, most of them without charge:

National Restitution Resource Center: A clearinghouse for restitution programming information.

National Training Seminars: Covering all aspects of juvenile restitution in lectures, demonstrations, and discussions.

Mini Seminars: Specialized to individual states or jurisdictions.

Conference Presentations Program: RESTTA specialists will serve as speakers and trainers at state and national meetings of juvenile justice organizations.

Host Site Program: Six juvenile restitution programs have been selected to provide intensive on-site training.

Technical Assistance Voucher Program: Provides resources to local jurisdictions and courts to initiate or improve local restitution programs. Vouchers of up to $1,000 are available.

Call the **National Restitution Resource Center toll-free at 800-638-8736** for more information.

RESTTA is a cooperative effort of the National Center for State Courts, the National Association of Counties, the California Youth Authority, the Oklahoma State University Center for Policy Sciences, the Institute of Court Management, the Juvenile Justice Clearinghouse of the National Criminal Justice Reference Service (NCJRS), and the Pacific Institute for Research and Evaluation. □

psychology today

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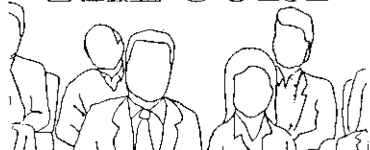
The following articles demonstrate how the psychological aspects of jury trial can help or hinder prosecution. The first, ***Eyewitnesses: Essential But Unreliable,*** *shows how such testimony, despite the best intentions of the witness, can be inaccurate, inconclusive, or even misinterpreted by the jury. The second,* ***Can Psychologists Tip the Scales of Justice?*** *debates the use of such professionals in the courtroom. The last,* ***Exhibit A: Language,*** *shows how prosecutors can affect the outcome not only by what is said but even more by how it is said.*



Eyewitnesses: Essential But Unreliable

By Elizabeth F. Loftus

The ladies and gentlemen of William Bernard Jackson's jury decided that he was guilty of rape. They made a serious mistake, and before it was discovered, Jackson had spent five years in prison. There he suffered numerous indignities and occasional attacks, until the police discovered that another man, who looked very much like Jackson, had committed the rapes.

If you had been on the jury, you would probably have voted for conviction too. Two women had positively identified Jackson as the man who had raped them in September and October of 1977. The October victim was asked on the witness stand, "Is there any doubt in your mind as to whether this man you have identified here is the man who had sexual activity with you on October 3, 1977?" She answered "No doubt." "Could you be mistaken?" the prosecutor asked. "No, I am not mistaken," the victim stated confidently. Jackson and other defense witnesses testified that he was home when the rapes occurred. But the jury didn't believe him or them.

This is just one of the many documented cases of mistaken eyewitness testimony that have had tragic consequences. In 1981, Steve Titus of Seattle was convicted of raping a 17-year-old woman on a secluded road; the following year he was proven to be innocent. Titus was luckier than Jackson; he never went to prison. However, Aaron Lee Owens of Oakland, California, was not as fortunate. He spent nine years in a prison for a double murder that he didn't commit. In these cases, and many others, eyewitnesses testified against the defendants, and jurors believed them.

One reason most of us, as jurors, place so much faith in eyewitness testimony is that we are unaware of how many factors influence its accuracy. To name just a few: what questions witnesses are asked by police and how the questions are phrased; the difficulty people have in distinguishing among people of other races; whether witnesses have seen photos of suspects before viewing the lineup from which they pick out the person they say committed the crime; the size, composition and type (live or photo) of the lineup itself.

I know of seven studies that assess what ordinary citizens believe about eyewitness memory. One common misconception is that police officers make better witnesses than the rest of us. As part of a larger study,

my colleagues and I asked 541 registered voters in Dade County, Florida, "Do you think that the memory of law enforcement agents is better than the memory of the average citizen?" Half said yes, 38 percent said no and the rest had no opinion. When A. Daniel Yarmey of the University of Guelph asked judges, lawyers and policemen a similar question, 63 percent of the legal officials and half the police agreed that "The policeman will be superior to the civilian" in identifying robbers.

This faith in police testimony is not supported by research. Several years ago, psychologists A. H. Tinkner and E. Christopher Poulton showed a film depicting a street scene to 24 police officers and 156 civilians. The subjects were asked to watch for particular people in the film and to report instances of crimes, such as petty theft. The researchers found that the officers reported more alleged thefts than the civilians but when it came to detecting actual crimes, the civilians did just as well.

More recently, British researcher Peter B. Ainsworth showed a 20 minute videotape to police officers and civilians. The tape depicted a number of staged criminal offenses, suspicious circumstances and traffic offenses at an urban street corner. No significant differences were found between the police and civilians in the total number of incidents reported. Apparently neither their initial training nor subsequent experience increases the ability of the police to be accurate witnesses.

Studies by others and myself have uncovered other common misconceptions about eyewitness testimony. They include:

- **Witnesses remember the details of a violent crime better than those of a nonviolent one.** Research shows just the opposite: The added stress that violence creates clouds our perceptions.

- **Witnesses are as likely to underestimate the duration of a crime as to overestimate it.** In fact, witnesses almost invariably think a crime took longer than it did. The more violent and stressful the crime, the more witnesses overestimate its duration.

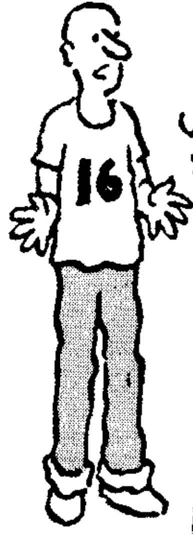
- **The more confident a witness seems, the more accurate the testimony is likely to be.** Research suggests that there may be little or no relationship between confidence and accuracy, especially when viewing conditions are poor.

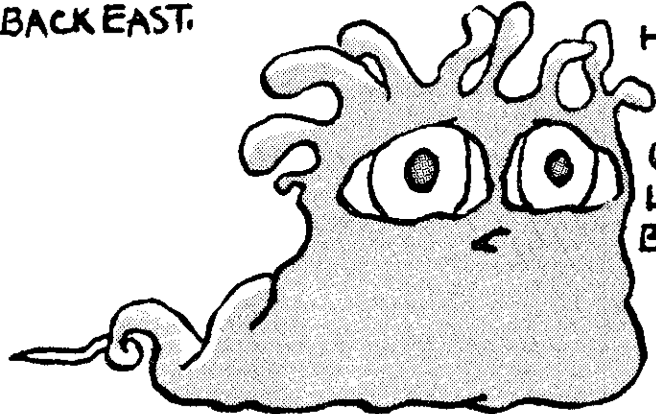
The unreliability of confidence as a guide to accuracy has been demonstrated outside of the courtroom, too; one example is provided by accounts of an aircraft accident that killed nine people several years ago. According to Flying magazine, several people had seen the airplane just before impact, and one of them was certain that "it was heading right toward the ground, straight down." This witness was profoundly wrong, as shown by several photographs taken of the crash site that made it clear that the airplane hit flat and at a low enough angle to skid for almost 1,000 feet.

Despite the inaccuracies of eyewitness testimony, we can't afford to exclude it legally or ignore it as jurors. Sometimes, as in cases of rape, it is the only evidence available, and it is often correct. The question remains, what can we do to give jurors a better understanding of the uses and pitfalls of such testimony? Judges sometimes give the jury a list of instructions on the pitfalls of eyewitness testimony. But this method has not proved satisfactory, probably because, as studies show, jurors either do not listen or do not understand the instructions.

Another solution, when judges permit, is to call a psychologist as an expert witness to explain how the human memory works and describe the experimental findings that apply to the case at hand. How this can affect a case is shown by a murder trial in California two years ago. On April 1, 1981, two young men were walking along Polk Street in San Francisco at about 5:30 in the evening. A car stopped near them, and the driver, a man in his 40s, motioned one of the men to get in, which he did. The car drove off. Up to this point, nothing appeared unusual. The area was known as a place where prostitutes hang out; in fact, the young man who got in the car was there hustling for "tricks." Three days later, he was found strangled in a wooded area some 75 miles south of San Francisco.

THE INVESTIGATION





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Five weeks later, the victim's friend was shown a six person photo lineup and picked out a 47 year old I'll call D. The quick selection of D's photograph, along with the strong emotional reaction that accompanied it (the friend became ill when he saw the photo), convinced the police that they had their man. D was tried for murder.

ONE REASON MOST OF US, AS JURORS, PLACE SO MUCH FAITH IN EYEWITNESS TESTIMONY IS THAT WE HAVE NO IDEA HOW MANY FACTORS INFLUENCE ITS ACCURACY.

At his trial, the defense lawyer introduced expert testimony by a psychologist on the factors that made accurate perception and memory difficult. For example, in the late afternoon of April 1, the witness had been using marijuana, a substance likely to blur his initial perceptions and his memory of them. Furthermore, just before viewing the lineup, the witness had seen a photograph of D on a desk in the police station, an incident that could have influenced his selection. During the five weeks between April 1 and the time he saw the photographs, the witness had talked about and been questioned repeatedly about the crime, circumstances that often contaminate memory.

In the end, the jury was unable to reach a verdict. It is difficult to assess the impact of any one bit of testimony on a particular verdict. We can only speculate that the psychologist's testimony may have made the jury more cautious about accepting the eyewitness testimony. This idea is supported by recent studies showing that such expert testimony generally increases the deliberation time jurors devote to eyewitness aspects of a case.

Expert testimony on eyewitness reliability is controversial. It has its advocates and enemies in both the legal and psychological professions. For example, several judicial arguments are used routinely to exclude the testimony. One is that it "invades the province of the jury," meaning that it is the jury's job, not an expert's, to decide whether a particular witness was in a position to see, hear and remember what is being claimed in court. Another reason judges sometimes exclude such testimony is that the question of eyewitness reliability is "not beyond the knowledge and experience of a juror" and thus is not a proper subject matter for expert testimony.

In virtually all the cases in which a judge has prohibited the jury from hearing expert testimony, the higher courts have upheld the decision, and in some cases have driven home the point with negative comments about the use of psychologists. In a recent case in California, People v. Plasencia, Nick Plasencia Jr. was found guilty of robbery and other crimes in Los Angeles County. He had tried to introduce the testimony of a psychologist on eyewitness reliability, but the judge refused to admit it, saying that "the subject matter about which (the expert) sought to testify was too conjectural and too speculative to support any opinion he would offer." The appellate court upheld Plasencia's conviction and made known its strong feelings about the psychological testimony.

"Since our society has not reached the point where all human conduct is videotaped for later replay, resolution of disputes in our court system depends almost entirely on the testimony of witnesses who recount their observations of a myriad of events.

"These events include matters in both the criminal and civil areas of the law. The accuracy of a witness's testimony of course depends on factors which are as variable and complex as human nature itself....The cornerstone of our system remains our belief in the wisdom and integrity of the jury system and the ability of 12 jurors to determine the accuracy of witnesses' testimony. The system has served us well....

"It takes no expert to tell us that for various reasons, people can be mistaken about identity, or even the exact details of an observed event. Yet to present these commonly accepted and known facts in the form of an expert opinion, which opinion does nothing more than generally question the validity of one form of traditionally

accepted evidence, would exaggerate the significance of that testimony and give a 'scientific aura' to a very unscientific matter.

"The fact remains, in spite of the universally recognized fallibility of human beings, persons do, on many occasions, correctly identify individuals. Evidence that under contrived test conditions, or even in real-life situations, certain persons totally unconnected with this case have been mistaken in their identification of individuals is no more relevant than evidence that in other cases, witnesses totally unconnected with this event have lied.

"It seems beyond question that the identifications in this case were correct. We find no abuse of discretion in the trial court's rejecting the proffered testimony."

Quite the opposite view was expressed by the Arizona Supreme Court in State v. Chapple. At the original trial, defendant Dolan Chapple had been convicted of three counts of murder and two drug-trafficking charges, chiefly on the testimony of two witnesses who identified him at the trial. Earlier they had selected him from photographs shown them by the police more than a year after the crime.

DESPITE THE INACCURACY OF EYEWITNESS TESTIMONY, WE CAN'T AFFORD TO EXCLUDE IT LEGALLY.

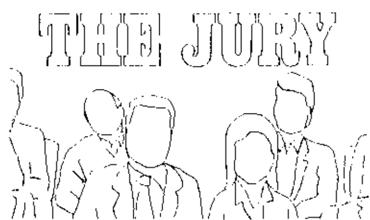
Chapple's lawyer tried to introduce expert psychological testimony on the accuracy of such identification. The judge refused to permit it on the grounds that the testimony would pertain only to matters "within the common experience" of jurors. The high court disagreed, maintaining that expert testimony would have provided scientific data on such pertinent matters as the accuracy of delayed identification, the effect of stress on perception and the relationship between witness confidence and accuracy. "We cannot assume," the court added, "that the average juror would be aware of the variables concerning identification and memory" about which the expert would have testified. Chapple's conviction was reversed, and he has been granted a new trial.

MANY BELIEVE THAT BOTH THE LAW AND PSYCHOLOGY GAIN FROM MUTUAL INTERACTION.

Like lawyers and judges, psychologists disagree on whether expert testimony is a good solution to the eyewitness problem. Two of the most outspoken critics are Michael McCloskey and Howard Egeth of The John Hopkins University. These experimental psychologists offer four reasons why they believe that expert testimony on eyewitness reliability is a poor idea. They say that there is no evidence that such testimony is needed; that there is no evidence that it does any good or that it can provide much beyond the intuitions of ordinary experience; that the data base on which the expert must rely is not sufficiently well-developed; and that conflicting public testimony between experts would tarnish the profession's image. Given this sorry state of affairs, they argue, psychologists may do more harm than good by intruding into judicial proceedings.

Obviously, many psychologists disagree with this assessment and believe that both the law and psychology gain from mutual interaction. In the area of eyewitness testimony, information supplied by psychologists to lawyers has stimulated responses that have suggested a number of important ideas for future research.

For example, psychologists need to learn more about the ideas that the rest of us have about the operation of human perception and memory. When these ideas are wrong, psychologists need to devise ways to educate us so that the judgments we make as jurors will be more fully informed and more fair. Only through this give-and-take, and occasional biting controversy, will progress be made. It is too late to help William Jackson, or Steve Titus, or Aaron Lee Owens, but it is not yet too late for the rest of us.□



Can Psychologists Tip The Scales of Justice?

By James J. Gobert

In the third week of a controversial murder trial, the defense calls to the stand an expert medical witness for a lengthy, highly technical examination. The prosecutor counters with a searching cross-examination. Defense counsel objects to his adversary's line of questioning, tempers flare and the judge chastises both attorneys for their outbursts. While the jury rivets its attention on the lawyers, they in turn speculate about the jurors. Are they offended by the bickering? Have they lost or gained sympathy for the defendant? The answers to these questions cannot be obtained directly, for lawyers are expressly forbidden to contact jurors.

But one of the attorneys has a better insight into what the jurors are thinking. Unknown to the judge, jury or opposing counsel, she has placed in the courtroom a "shadow jury," made up of persons whose demographic, economic and personality profiles approximate those of the real jurors. Each evening she meets this shadow jury, ascertains its reactions to the day's developments and plots the next day's strategy.

Shadow juries are a recent development in an emerging trend: use by lawyers of behavioral scientists and behavioral-science theory to improve their chances in a trial. From a psychological perspective, these developments constitute a breakthrough in the application of theory to practice. From a legal perspective, they may threaten one of our most precious institutions, trial by jury.

The involvement of psychologists and other behavioral scientists usually begins at the jury selection stage, when a trial is often won or lost. Attorneys are well aware that a jury with strong psychological predispositions toward one side may be far more important than the weight of the evidence in deciding a case and strive to select those whose predispositions favor their clients. The trick is to discover these persons without letting the opposing lawyer realize it, for overtly biased jurors will be excused from serving.

At the outset of a trial, the attorneys or the judge question prospective jurors to discover prejudices that would prevent them from fairly deciding the case, a process known as voir dire. Jurors who are clearly biased can be challenged for cause and removed from the panel. In addition, each attorney has a limited number of peremptory challenges to eliminate jurors without having to prove partiality.

In questioning jurors and making peremptory challenges, lawyers have traditionally relied on their experience and intuition to empanel a jury that is unbiased or, better yet, biased toward their client. Clarence Darrow, for example, reputedly advised defense attorneys against selecting Germans because "they are bullheaded;" Swedes because "they are stubborn;" Presbyterians because "they know right from wrong but seldom find anything right;" and Lutherans, prohibitionists and the wealthy because they are prone to convict. Conversely, Darrow favored Irishmen and Jews, because "they are easiest to move to emotional sympathy;" old men, because "they are generally more charitable and kindly disposed than young men;" and persons who laugh, because they hate to find anyone guilty.

In the past decade, lawyers have increasingly turned to psychologists and other behavioral scientists to help them with jury selection and trial strategy. Psychologists can teach lawyers how to spot persons with authoritarian personalities or low esteem, and tell them how such individuals will likely react to different kinds of evidence and presentations. Psychologists can also explain how different personalities interact in groups. The latter information is particularly critical since a jury verdict is ultimately a group decision-making process.

More specifically, psychologists can conduct demographic and attitude surveys of people in the various areas and neighborhoods from which the jury is to be empaneled. Based on their findings, they can tell the lawyers what characteristics (such as age, sex, occupation, education and recreational preferences) are typical of people whose attitudes are the most likely to favor the client's case.

In addition to providing general information, psychologists can, as the lawyers or judge conduct voir dire, scrutinize the reactions of jurors for behavioral clues to their feelings toward the attorney and the attorney's client. A juror's verbal response may not be nearly as revealing as the fact that his hands are clenched, that his legs are crossed or that he seems unwilling to look the lawyer in the eye. Armed with these insights, lawyers can shape voir dire more effectively and use peremptory challenges more accurately.

Once a trial starts, psychologists can help lawyers assess the jury's reaction to various lines of questioning, arguments and overall trial strategy. They can create a shadow jury to work as a sounding board. Tactics the shadow jury views unfavorably will likely be looked upon with equal skepticism by the real jury. New lines of argument can be tried out on the shadow jurors for their reaction, much as a Broadway bound show polishes its production out of town before braving the audiences of Manhattan.

This interjection of behavioral-science theory into the legal process raises important questions. One involves money. Professional psychological services can be costly, which is why they have generally been employed only by wealthy defendants and in the trials of well-publicized political activists such as Angela Davis, the Harrisburg 7, Joanne Little and the Wounded Knee defendants, for whom volunteers donated their time. The result may be a differential quality of jury justice dependent upon the thickness of one's wallet or the appeal of one's socio-political beliefs.

Of course, rich defendants have always been able to retain the best attorneys, to seek out the most articulate and well-informed experts, to hire skilled investigators to locate all potential witnesses and to do whatever else is necessary to win a favorable verdict. But, once the case was in the jury room the rich and poor were supposedly equal, as jurors weighed the evidence and returned their verdict. Psychological screening of jurors and the use of shadow juries upset this fine balance and put the side that cannot afford them at a disadvantage.

On an even more fundamental level, inherent in the constitutional provision guaranteeing the right to a jury trial is the concept of an impartial jury. This doesn't mean that jurors are to ignore their experiences, training or values—that would be neither realistic nor desirable—but it does mean that jurors should approach each case with open minds and base their verdict on the evidence. The more subtle, internalized biases produced by each juror's background and upbringing can be expected to cancel each other out in a jury that represents a cross-section of the community, as the Constitution contemplates. The psychological screening of jurors, however, is aimed precisely at avoiding this cancellation. Its goal is a jury with a shared bias. To the extent that behavioral scientists succeed in their efforts, they are defeating the constitutional objective of impartiality.

In a sense, this is nothing new. Lawyers have always striven for a jury partial to their client. But because they relied on intuition rather than scientific study, their efforts have posed relatively little threat to the jury system. The introduction of behavioral science into the process raises the ante. Modern psychological techniques, although they come with no guarantees, increase the probability of empaneling a biased jury. And as techniques are further refined, the results may be disastrous. In a criminal trial, a jury psychologically stacked to acquit may loose a dangerous defendant on society; one predisposed to convict may send an innocent person to prison. In either case, society's interest in seeing justice done will be frustrated and confidence in the fairness of jury trials eroded.

The answer is not necessarily to bar social scientists from the courtroom, nor to abolish the jury system, even if these were constitutionally possible. More modest solutions are feasible. Restricting the availabil-

ity of background information about prospective jurors by not disclosing their names until immediately before trial, or, more directly, by prohibiting attorneys or their employees from running background checks on them, would sharply lessen the ability to create a shadow jury. The legal system could also limit the scope of voir dire and reduce the number of peremptory challenges, thus diminishing the lawyer's opportunity to choose a biased jury. Unfortunately, these solutions would also lessen the chances of discovering truly prejudiced jurors.

A better option might be to preserve present jury selection methods but require attorneys to share information gathered by their behavioral scientists, much as pre-trial discovery rules now require them to share evidence. This approach would lessen the advantage of the rich defendant and would also decrease the incentive to invade the jurors' privacy. The change might even advance the law's goal of jury impartiality by making attorneys on both sides, and the judge, more aware of the biases held by potential jurors.☐

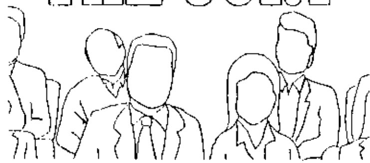


Exhibit A: Language

By Lori B. Andrews

More than two centuries ago, Jonathan Swift satirized lawyers, describing them as "a society of men among us, bred up from their youth in the art of proving by words multiplied for that purpose that white is black and black is white."

Perhaps today's lawyer does not deserve so scathing a criticism, but at its heart is one undeniable fact: Far from being a straightforward fact-finding mission, a trial is a labyrinth of language, with the words of the judge, lawyers and witnesses creating numerous obstacles that prevent juries from making accurate decisions.

Since at least 1975, social scientists have fervently studied our trials, approaching the courtroom interchanges with the careful scholarship previously saved for studies of rare languages in distant lands. They have found the psychology of language in the courtroom to be more intricate and influential than they had ever imagined.

During a trial, the judge, attorneys, plaintiffs, defendants and witnesses may all be using different styles of speech, each with its own psychological force. Some of the effects of the language used are intentional, while others are inadvertent.

The judge refers to himself in the third person in order to underscore his authority. He turns himself from mere human to neutral decision-maker by using phrases like "approach the bench" instead of "Come up here and talk to me."

The language used by attorneys is also chosen for its influence. In rape cases, prosecutors may refer to the incident in language that accentuates force and aggression, while defense attorneys may use terms suggesting romance to subtly convey the victim's consent to and responsibility for the alleged rape.

A lawyer's linguistic style can mean the difference between winning and losing a case. One study of 38 criminal cases found that the prosecutors who won cases made significantly different use of language than those who lost them. Winning prosecutors asked more questions referring to the witness, spoke longer and made more assertive statements than did losing prosecutors.

Successful defense attorneys also had a distinct speech pattern. They used more abstract language, more legal jargon and more ambiguous words than losers did. Another key tactic of good defense attorneys was to distance the accused from the crime by using confusing or abstract terms so that the jurors would not focus clearly on what activities had taken place.

Brenda Danet, a Hebrew University sociologist, studied the contrasting language

used by the prosecution and defense in the trial of Kenneth Edelin, a Boston physician accused of manslaughter in connection with a late abortion. She found that the defense used passive verbs and nominalizations (using verb forms as nouns) to distance Edelin from the incident (for example, "after two unsuccessful attempts"), while the prosecutor employed the active tense with identifying nouns and pronouns ("They tried twice....They were unsuccessful") to focus blame on the defendant.

In that same trial, the semantics of referring to the abortus—either as fetus or baby—was so psychologically powerful that negotiation between the prosecution and defense was necessary to agree on neutral terms. Defense counsel William Homan submitted a motion to prevent the prosecutor from using the terms "baby boy" and "human being" to refer to the fetus and "suffocate," "smother" and "murder" to refer to Edelin's actions. Homans argued that "certain words have connotations above and beyond their meaning, when they are used in the presence of laymen, especially in a case in which there are undoubtedly emotional considerations." The judge agreed to censor the courtroom language, forbidding the use of "baby boy," as well as "smother" and "murder."

The term "fetus," according to Danet, "mitigates the connotation of aliveness for the 'baby/fetus' in question, thereby distancing the defendant from wrongdoing."

"Although the Edelin case was the only one in which I filed a formal motion about the language," Homans says, "I've frequently asked judges during the course of a trial to prohibit the prosecutor from using certain terms or characterizations."

Beyond the words and emphasis a lawyer uses, the forms of questions he employs can shape the facts in the jury's mind, cause a witness to "remember" things that did not in fact happen and even inadvertently reveal the lawyer's feeling about the truthfulness of his client.

Danet has classified typical courtroom questions according to how much they coerce or constrain an answer. The most coercive questions either tell more than they ask ("You didn't return home that night, did you?") or require yes or no answers ("Did you return home that night?") or multiple-choice responses ("...at 9 or at 10 o'clock?"). The least coercive questions request information indirectly ("Can you tell us what happened?"). In between are typical who-what-where-when questions ("What did you do that night?").

IN RAPE CASES, PROSECUTORS MAY USE LANGUAGE EMPHASIZING FORCE AND AGGRESSION, WHILE DEFENSE ATTORNEYS MAY USE TERMS SUGGESTING ROMANCE.

In a study of six criminal trials in Boston's Superior Court, Danet found, understandably, that coercive questions were used more often on cross-examination than on direct examination: Eighty-seven percent of the questions on cross-examination were from the most coercive category, compared to 47 percent on direct. Danet also found that the more serious the offense charged in a case, the greater the coerciveness of the prosecutor's cross-examination.

The importance of coercive (or "leading") questions has been demonstrated by researchers studying not the frequency of such questions but their effects. Leading questions allow lawyers to tell their versions of the facts and, for many jurors, this is the version that is remembered.

In a study by psychologist Elizabeth Loftus and colleagues at the University of Washington, mock jurors read transcripts from a murder trial in which the prosecutor either used questions containing words associated with violence and words intended to evoke emotion, or questions that were neutral. Witnesses' responses were identical in both styles of questioning. Jurors who read leading questions like "How much of the **fight** did you see?" were more likely to find a defendant guilty than those who heard neutral versions of the same questions ("How much of the **incident** did you see?").

Loftus also has found that when a lawyer uses an aggravating, aggressive, active manner to ask about an incident, a witness is more apt to describe it as noisier and more violent than when the lawyer uses a neutral form of questioning.

Even the simple choice between an indefinite and a definite article in a question can influence the witness's response. In another study, adults were shown a short film of an auto accident and later asked what they saw. When a definite article was used in the question ("Did you see **the** broken headlight?" rather than "Did you see **a** broken headlight?"), witnesses responded with more certainty—but also were twice as likely to "remember" a broken headlight even when there was none.

A large body of general linguistic research can also be applied to courtroom language. For example, studies have shown that people who speak rapidly or in a standard accent are perceived as more competent than people who speak slowly or with an unusual accent. Analysis of actual criminal trials in which the defendant's native tongue was not English suggests that language constraints leave the jury with an unwarranted poor impression of the defendant.

WHEN A LAWYER ALLOWS A WITNESS TO TESTIFY WITH FEW INTERRRUPTIONS, JURORS BELIEVE THE LAWYER HAS MORE TRUST IN THE WITNESS.

William O'Barr, a Duke University anthropologist, has conducted numerous studies regarding the language used by lawyers and witnesses. He concludes that "seemingly minor differences in phraseology, tempo and length of answers, by the covert messages they convey, can have a major effect on the jurors."

O'Barr and his colleagues taped 10 weeks of criminal trials in North Carolina to identify patterns of courtroom communication and uncover previously unstudied aspects of legal language. Listening to the tapes, O'Barr noticed that a number of the witnesses spoke in a tentative style, using hedges ("I think. . .", "It seems like. . .", "Perhaps. . ."), intensifiers (saying "very close friends," instead of "close friends" or just "friends") and rising intonation in declarative statements (such as an answer to a lawyer's question about a car's speed, "Thirty, 35?" in a questioning tone, as if seeking approval for the answer). He termed the style "powerless" language.

O'Barr chose a 10-minute segment of an actual trial in which a witness spoke in powerless language and rewrote the testimony, removing the hedges and rising intonations and minimizing the intensifiers. Using both scripts, he created four tapes of the testimony—of a man and a woman speaking in the powerless mode and of a man and a woman speaking in the powerful mode. The tapes were identical in substance but differed in style as does the following:

Question: What was the nature of your acquaintance with her?

Powerless answer: We were, uh, very close friends. Uh, she was even sort of like a mother to me.

Powerful answer: We were close friends. She was like a mother to me.

Mock jurors who listened to the tapes rated the powerful speaker—whether male or female—more convincing, intelligent and trustworthy than the powerless speaker.

O'Barr says that speech has these effects because it provides "clues about the status, trustworthiness and believability of the speaker. Listeners may see the use of a powerful style as reflecting high status and may tend to think favorably of such individuals. In contrast, the use of hedges, like 'uh,' diminishes the significance of what the speaker says. It's interpreted as though the person was warning you not to trust him."

Analyzing the original trial tapes, O'Barr also discovered that some witnesses, possibly intimidated by the formality of the courtroom, tried to speak in a more

grandiose style than usual. These witnesses often sounded like Alexander Haig, since their "hypercorrect" style tended to be stilted and unnatural and sometimes led to errors in word choice. As he had done in the powerless-speech experiment, O'Barr rewrote a section of hypercorrect testimony in a less formal style. In substance, the two versions were the same but differed along the lines of the following example:

Question: Immediately after the collision, what happened to you?

Hypercorrect answer: . . .directly after the implosion, I vaguely remember being hurled in some direction. I know not where . . . .

Less formal answer: . . .directly after the collision, I vaguely remember being hurled in some direction. I don't know where . . .

Mock jurors perceived witnesses who used hypercorrect speech as less convincing, competent and intelligent than those who testified in a more informal style.

O'Barr has also tested various beliefs that trial lawyers have about language in the courtroom. Trial tactics texts, for example, advise lawyers that a witness will be more credible on direct examination if he testifies in a narrative style, rather than in a fragmented style, interrupted by numerous questions from the lawyer. So O'Barr devised a comparison of narrative and fragmented styles, as follows:

Question: Now, calling your attention to the 21st day of November, a Saturday, what were your working hours?

Narrative answer: Well, I was working from, uh, 7 a.m. to 3 p.m. I arrived at the store at 6:30 and opened the store at 7.

Fragmented answers: Well, I was working from 7 to 3.
Q: Was that 7 a.m.?
A: Yes.
Q: And what time that day did you arrive at the store?
A: 6:30.
Q: 6:30. And did, uh, you open the store at 7 o'clock?
A: Yes, it has to be opened.

Neither style, O'Barr found, affected listeners' evaluation of the witness as much as it did their evaluation of the questioning lawyer. When a lawyer allowed a witness to testify in a narrative, listeners believed that the lawyer thought his witness was more intelligent, more competent and more assertive, and in turn tended to judge the witness the same way.

WITNESSES ASKED ABOUT AN INCIDENT IN AN AGGRESSIVE, AGGRAVATING TONE ARE LIKELY TO DESCRIBE IT AS NOISIER AND MORE VIOLENT THAN WITNESSES QUESTIONED CALMLY.

Despite the fact that lawyers' gut feelings and experience could have predicted some of O'Barr's findings, O'Barr believes that the legal system has not given sufficient consideration to the effects of language. In fact, the courts may be unwittingly encouraging linguistic biases. A typical California jury instruction advises jurors that they may determine the truthfulness of a witness's testimony based on his "demeanor while testifying and the manner in which he testifies."

"Sometimes these presentational effects may serve the cause of justice, as when stylistic differences are actually related to whether a witness is telling the truth, or when a juror or judge uses stylistic clues to infer credibility," O'Barr and colleagues write in the Duke Law Journal. "Sometimes, however, style effects may have less desirable consequences. For example, lower social-status witnesses, **by virtue of the way they speak,** may have less credibility and thus a lesser chance of a fair hearing than do higher-status witnesses. This, of course, is not congruent with the ideals of American justice."

Once jurors have been subjected to the semantic and stylistic eccentricities of

various lawyers and witnesses, they are asked to weave these confusing stories into a tapestry of facts in order to reach a verdict. No matter how many dozens of witnesses are called or how many months jurors sit for a single trial, there are no guideposts. Notetaking is not allowed in the courtroom, and the jurors may not ask the judge, witnesses or lawyers to clarify a point.

In John Hinckley's trial for the attempted assassination of the President, for example, jurors seized on a particular word, poetry, as in important clue in how they should vote in the case. A defense attorney pointed to Hinckley's "bizarre poetry" as evidence of insanity, while a prosecution psychiatrist said Hinckley was a sane man whose poetry was "eccentric fiction."

SERVING ON A JURY IS STRANGE. IN VERY FEW OTHER INSTANCES ARE PEOPLE TRYING TO MAKE INTELLIGENT DECISIONS WITHOUT ASKING QUESTIONS.

Was all poetry fiction? If so, the prosecution witness must have been correct and Hinckley was sane. The jurors sent a note to the judge requesting a dictionary. The judge denied the request, and the jurors apparently were forced to decide the case on some other basis.

"The court is a strange institution," O'Barr says. "In very few other instances in life do you have people trying to make relevant decisions without asking questions."

Instead of explaining to jurors at the beginning of the trial what law they should apply (so that they may weigh the facts in that light), judges wait until the end of the trial to render their instructions to the jury. And even then the language of the jury instructions is often incomprehensible.

According to Bruce Sales, professor of psychology and director of the Law-Psychology Program at the University of Arizona, the current method of presenting evidence and jury instructions is "psychologically suspect." He argues that jurors should be given instructions orally before the trial begins and again after all the evidence is presented and should be allowed to take a written copy of the instructions into the deliberation room.

"When jurors are not told the law before they begin listening to the evidence, they may not pay attention and remember the relevant facts. At the end of the trial, when the judge tells the jurors they must consider X, Y and Z, a juror may think 'I didn't think X was going to be important' and have a hard time remembering anything to do with X."

"It is much better if the jurors have some idea of the instructions at the beginning of the case," says Justice Charles Weltner of the Georgia Supreme Court, who experimented with giving instructions at the beginning of trials during his five-year stint as a trial judge.

"Jurors are picked by and large for their ignorance of legal matters, yet when it's all over, the judge tells them the law they should have understood from the beginning," he says.

As if the legal complexity and timing of jury instructions aren't enough, they are often presented in a hard-to-understand form. Law professor Robert Charrow and his wife, Veda Charrow, a linguist at the American Institutes for Research in Washington, D.C., used 35 prospective jurors in Prince George's County, Maryland, to show just how incomprehensible these instructions can be. The Charrows read 14 widely used California jury instructions to the jurors, asking them to paraphrase each instruction after they heard it. Overall, only 32 percent of the instructions were understood correctly.

Analyzing the juror's paraphrases, the Charrows were able to pinpoint some of the confusing aspects of the instructions. The phrase "as to" confounded jurors; it was correctly paraphrased only 25 percent of the time. Yet "as to's" are common in jury instructions, as in one instruction the Charrows tested: "As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection."

The use of multiple negatives, in phrases like "innocent misrecollection is not uncommon," produced correct paraphrases only one-quarter of the time.

Confusion about words also can lead jurors to apply an erroneous version of the law. For a person to be held liable for negligence, for example, his actions must have proximately (directly) caused the injury at issue. Yet, Robert Charrow says, "25 percent of the jurors thought they were being asked to determine the 'approximate cause,'" a term that is conceptually the opposite of proximate cause.

When the Charrows rewrote the jury instructions and tested the new version on other Prince George's County jurors, they found comprehension had improved somewhat, but only to a disappointing 40 percent.

Sales and his colleagues analyzed another aspect of jury instructions--their effect on the verdict. They found that in more than 40 states, judges didn't create their own jury instructions but chose from particular standardized jury instructions that applied to that state. Even though the instructions had been drafted by blue-ribbon panels of lawyers and judges, they were often linguistically deficient and showed little regard for the effects of the words used.

When Sales and colleagues compared the effect on the verdict of the standardized instructions, no instructions and instructions that had been rewritten to be comprehensible, they found that "Reading the standard jury instructions had the same effect as reading no instructions at all, whereas understandable instructions led to different verdicts and, in civil cases, different awards of money.

"The urgent need for improvement in jury instructions cannot be overstated," Sales says. "Where jurors do not understand the rules they should be applying to the evidence, they instead apply whim, sympathy or prejudice in their decisions."

Even though the problems of language in the courtroom have been identified by social scientists, Justice Weltner is pessimistic about how much judges can do to improve or even change the situation.

"On at least one side of each lawsuit, there's a lawyer who wants to confuse, not clarify," he says. "So even if a judge wants to try to help jurors understand, at least one side will resist the change."

Weltner's concerns echo those of Thomas More who, writing in the 1500s, opined that in Utopia "they have no lawyers among them, for they consider them as a sort of people whose profession is to disguise matters."

"Lawyers have always been conscious of the psychological effect of how they dress the defendant," O'Barr says, "but now some clever attorneys are using speech by themselves and the defendants to do subliminal things."

Yet Danet, in an article in Law and Society Review, questions the ethics of applying psycholinguistics to the courtroom. "Should social scientists be helping lawyers win cases?" she asks. "Expertise about how to manipulate eyewitness testimony, for instance, like all other resources marshalled in the adversary confrontation, is differentially distributed....It is essential to ponder how linguists can help to make the legal system more just and humane."

As an anthropologist, O'Barr has studied the ways in which other societies resolve disputes--for example, the Eskimo head-butting contests or song duels.

"Based on our cultural values, it seems terribly unfair that how hard your head is or how well you sing, rather than what the facts are, that determines if you prevail in a dispute," O'Barr says. "But there may be more similarities to our system than we would like to think. Just as settling disputes on physical means favors the physically strong and powerful, settlements based on verbal means favor people who are most able to manipulate words."☐

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Texas Correctional System

Growth and Policy Alternatives

In the last ***True Bill*** *was an excerpt from the Report of the Commission on Sentencing Practices and Procedures, which was presented to the Criminal Justice Policy Council for consideration by the Legislature. The following is the Executive Summary from a March 1985 report of CJPC entitled* *Texas Correctional System - Growth and Policy Alternatives.*

The Texas inmate population, after one year of population decrease, has returned to a period of growth. The state presently does not have the facilities necessary to house the expected population.

This report was divided into three chapters: Chapter 1: TDC Population Growth and Trends; Chapter 2: TDC Population Projections 1985-1995; and Chapter 3: Policy Alternatives. The following are the major findings of this report.

(1) The TDC new admissions peaked in 1983 and have stabilized in 1984.

(2) Probation revocations constitute about 50.0 percent of TDC new admissions.

(3) New cases added to probation peaked in 1983 and seem to have stabilized in 1984 with a slight decline expected in the future.

(4) New admissions of violent offenders (homicide, sexual assault, robbery, assault and arson) have experienced a significant decrease since 1979.

(5) Admissions due to the revocation of the release conditions have increased in number but this is not due to an increase in the failure rate of releases but to a larger number of offenders released and subject to revocation (e.g., shock probation, mandatory supervision release). The revocation or failure rate has remained relatively constant.

(6) Time served in prison has declined as it reached its lowest level in 1984 with an average length of stay of 19 months. This is expected to increase during 1985 to approximately 21 months.

(7) The TDC on-hand population on average is getting older.

(8) The proportion of TDC on-hand population who committed violent offenses is decreasing.

(9) In only two years since 1974 (1977 and 1984) did TDC releases equal or exceed admissions. As a result, only in those two years did TDC experience a decrease in population.

(10) Shock probation releases constitute between 7 to 9 percent of those released from TDC.

(11) Discharges from TDC are expected to continue to decline and become an insignificant percentage of releases. The discharge mode will eventually disappear as a type of release.

(12) Mandatory release/discharge (combined) comprised 31.7 percent of all TDC releases in 1977 and 48.9 of all releases in 1984.

(13) Parole releases, which comprised 62.0 percent of all releases in 1977, comprised 41.5 percent in 1984 (its lowest level in an 11-year period).

(14) The TDC population, after 10 years of growth, experienced a decline in FY 1984. However, during the first six months of fiscal year 1985, TDC has grown by close to 1,500 offenders. If no action is taken to curb the growth, the TDC population is expected to climb close to 39,000 before August 31, 1985.

In Chapter 2, the TDC population projections, it was found that if there are no legislative efforts to curb the growth of the TDC population or the Prison Management Act of 1983 is not invoked, the prison population will continue to increase to a peak of 46,531 in 1991 and then begin a slow downward trend to a population of slightly over 43,000 in 1995.

New admissions to TDC are expected to remain stable and decline toward the second part of the 1985-1995 decade. Admissions due to revocations, after a slight decline in 1985, are expected to continue to increase and reach a peak in 1992. The average length of stay in TDC is expected to increase from the low of 19 months in 1984 to around 24 months by 1988.

Release on parole is a major element of the projected population. It is expected that parole will constitute around 41.0 percent of all releases. If the expected number of offenders released on parole falls significantly below the expected level, the TDC population will increase beyond the levels projected by a number equal to the difference between the number actually paroled and the projected number.

In Chapter 3, Policy Alternatives, several scenarios are discussed. It is suggested that for 1986-87, decisions have to be made now to avoid two years of correctional crisis. If appropriations were to be made to build new prison facilities, such facilities will not be ready to house the expected TDC population of this biennium. The problem is much more acute when the implications of the facility study of the HDR group are taken into consideration. The study suggested that even the present capacity of TDC may be too optimistic since the system is deficient in providing services for the population it presently holds.

It seems, therefore, that the state may have to cap the TDC population at 38,000 and allocate funds to upgrade the present facilities in such a manner that by the end of fiscal year 1986 the TDC capacity will be increased to 39,555 and by the end of fiscal year 1984 the capacity can be increased to 41,000. Using cost estimates from the HDR ten-year facility study of TDC, the state would have to appropriate $70 million for each of the next five bienniums (including the present one) to upgrade facilities to acceptable constitutional standards. The state may be able to lessen the cost by examining what the most cost effective procedures are to upgrade the facilities.

To deal with the excess population during the next biennium, several options were discussed including the use of intensive supervision probation with prison admission quotas for the major metropolitan areas in Texas, and expedited release from prison through the increased use of shock probation, parole and early mandatory release.

The second period, 1988 and beyond, suggests that considering the socio-political climate of the state new prisons are needed to house the expected population. It was estimated that housing facilities for an additional 6,000 offenders are needed within the next five years. If the state is to build these prisons (as opposed to private contract), it would have to allocate between 124 to 200 million dollars during this legislative session for them to be ready by the beginning of fiscal year 1988. The total investment that the state must make to provide housing for the expected TDC population is between 194 to 270 million dollars for the 1986-87 biennium and $70 additional million for each of the next four bienniums to upgrade facilities for a total investment of $550 million by 1995. The highest figure ($550 million) arrived at in this study compares to $872 million recommended by the HDR study. The difference consists of:

(a) The HDR study assumes a linear growth of the TDC population through 1995.

Our population projections are based on the demographic composition of the state which are used to project TDC admissions; the expected time served is used to project releases. If the time served increases the population projections will be higher. However, under the worse and least likely conditions if the state takes no action to reduce the influx of new admissions and the average length of stay in TDC increases significantly the maximum population expected in TDC will be about 53,000.

The scenario presented here (status quo) projects a 46,531 population by 1991, and then the population is expected to stabilize and decrease somewhat through 1995.

(b) The cost estimates by HDR recommend a comprehensive plan to upgrade facilities for a cost of $503 million. It is suggested here that the state must first concentrate on the Ruiz related issues and invest the $364 million suggested by HDR that would be needed for those improvements. The state could also save some money be examining cost effective methods to upgrade the facilities.

The State also has available other alternatives beside building prisons. It seems that taking into consideration the fact that the Texas criminal justice system will be recycling recidivists for the next ten years (the aging of the baby boomers), diversionary programs will have difficulty stopping the prison population from rising. Expedited release through the use of parole is likely to be more effective than alternatives to incarceration but, again, the recidivist is less "parolable" than the first offender and unless the state sets a policy for the Board of Pardons and Paroles to control the prison population, the regular parole reviews will not meet the quotas needed to keep the prison population from rising.

It is the purpose of this report to be a blueprint for action. The Texas correctional system is facing most difficult times ahead. If decisions are not made soon regarding avenues to follow for the next five years, the Texas criminal justice system will be subject to a rollercoaster of crises during the remainder of this decade. The initiation of the crisis is expected to begin during the month of April 1985, when, for the first time since the Texas Prison Management Act was passed, it will have to be implemented to alter the continuous growth of the state prison population. The Prison Management Act can be used to prevent the population of TDC from exceeding defined capacity levels. However, its continuous use will not only create chaos throughout the Texas criminal justice system but perhaps will jeopardize public safety by releasing large number of offenders in a short period of time.

If the population growth of TDC has to be controlled by expediting releases, it is suggested that a systematic release approach be established to deal with the problems of the correctional system.□

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Off the Record: The Judges Speak Out

**A REPORT ON
THE UT LAW SCHOOL SEMINAR FEATURING
THE JUDGES OF THE COURT OF CRIMINAL APPEALS**

by The Confidential Correspondent

*Ours is a community governed by laws, yet it is the men of the Court of Criminal Appeals who finally determine the meaning of the laws. This article is designed to give brief writers a "feel" for the thinking of the judges. The correspondent's name has been kept confidential so that the correspondent could be completely frank, but **True Bill** will say that the correspondent is not a member of the Council staff and is well-respected by prosecutors.*

On March 8th, the University of Texas Law School sponsored a criminal law seminar featuring the nine judges of the Court of Criminal Appeals. Each spoke for 10 minutes on one or two recent cases which he thought were especially significant. Then the audience broke into three groups for panel discussions, each group led by three judges and two UT law professors. Rotations allowed each group to meet with each panel. The judges invited comments and questions, which occasionally led to an exchange that simply would never occur in the courtroom. This article reveals which cases the judges thought were important and what they emphasized in the discussions.

Judge John F. Onion, Jr.

Presiding Judge Onion spoke on Almanza v. State, which redefines fundamental error in the jury charge. He said the most important change brought by Almanza was that claims of fundamental error were now assessed by looking at the entire case record. Since the presiding judge chose this case even though he did not author it, this indicates Almanza is recognized as the Court's most significant recent decision.

Judge Tom G. Davis

Judge Tom Dav:s limited his remarks to last year's decision in Green v. State, #60,133 (7-11-84), the capital murder case holding that the law of parties does not apply at the punishment phase of the trial. The judge emphasized footnote 4, which says that on request the accused is entitled to a specific instruction in the punishment charge saying that the law of parties no longer can be used by the jury. Judge Davis lamented the fact that years after Enmund v. Florida, 458 U.S. 782 (1982), many lawyers still think that the death penalty can never be inflicted against non-triggermen. However, Enmund said only that the death penalty can't be given unless the defendant at least intended or contemplated that deadly force be used.

Judge W. C. Davis

Judge W.C. Davis picked Woodward v. State, 668 S.W.2d 337, which held that probable cause to arrest could be determined based on the information known to "cooperating" police agencies, rather than just on what the requesting officer or agency knew. A question not directly answered, the judge noted, is how much cooperation must be shown before this rule can be invoked. He also remarked generally about the lack of unanimity in the Court's recent decisions. (Thanks to the presiding judge, we now know that the judge is affectionately known around the court as "Dr. Davis" because he's always on the golf course on Wednesday afternoons.)

Judge Sam Houston Clinton

Judge Clinton emphasized the importance of his recent decision (March 6) in Morgan v.

State. That's the case saying that if the defendant meets all the other requirements for taking an appeal after a plea-bargained plea of guilty, he won't be deprived of his appeal just because he also made a judicial confession to the crime. The judge also emphasized that to take advantage of the right to appeal on issues raised in written pre-trial motions, the defendant must make sure the record shows he got a ruling on the motion. (Judge Onion added that Morgan, along with Almanza, are the Court's most important recent decisions.)

Judge Marvin O. Teague

Judge Teague gave the most interesting presentation. At the seminar last year he spoke on obscenity cases, illustrating his talk with various sex devices he had liberated from the Court's records. He recalled that after last year's talk he turned those objects over to Judge Campbell for return to the Court, Judge Teague having to go elsewhere on business. Evidently while walking across the UT campus Judge Campbell tripped and spilled the sack, forcing him to retrieve the dildoes and other goodies in front of some rather surprised students.

The opinion Judge Teague chose to note was Booth v. State, 679 S.W. 2d 498, the case holding that an accused is entitled to a jury instruction on every defensive theory raised by the evidence, even if some of those theories are inconsistent and contradicted by his own sworn testimony. Judge Teague also made a separate and somewhat enigmatic remark that it can sometimes be profitable to look for authority outside the Penal Code and Code of Criminal Procedure. Without elaboration, he noted that §41 of the Probate Code contains a general provision prohibiting the corruption of blood or the forfeiture of property.

Judge Michael J. McCormick

Judge McCormick spoke on Lerma v. State, 679 S.W.2d 488, in which a conflict of interest arose when the same attorney represented more than one defendant. The judge noted that a motion raising the issue of a conflict can be timely even if filed on the day of trial, or even sometimes if filed during a trial. He mentioned the importance of the trial judge's careful investigation of the facts behind the motion since reversal is automatic if an appellate court finds there was an unwaived conflict.

Judge Chuck Miller

Like Judge Teague, Judge Chuck Miller mentioned cases recognizing that the accused is entitled to an instruction on every defensive theory raised by the evidence, even if the theories are conflicting. The judge says this rule follows from the Court's adoption of a "selective believability" theory—i.e., the jury is entitled to pick and choose from what they hear, believing some things and disbelieving others. Thus the accused is entitled to instructions on conflicting theories because the jury can believe what they want to. He mentioned that Lugo v. State, 667 S.W.2d 144, emphasizes that either State's or defendant's evidence can entitle the accused to a defensive instruction. However, he also noted that Aguilar v. State, 682 S.W.2d 556, makes clear that affirmative evidence is required for an instruction.

Judge Charles F. Campbell

Judge Chuck Campbell warned defense attorneys to be more careful about the advice they give to clients who plead guilty. He mentioned recent cases in which pleas were overturned where the defense attorney gave incorrect advice about parole eligibility, e.g., Ex parte Kelly, 676 S.W. 2d 132. This usually occurs when the attorney is ignorant about the flat time provisions of art. 42.12, §3(f)(a) and 15(b). [The Supreme Court has granted certiorari on a similar issue: Hill v. Lockhart, #84-1103, cert. granted 3/18/85.] He also warned all parties not to promise a defendant that his time on a Texas conviction will run concurrently with that from another jurisdiction. All Texas judges can do is refrain from stacking sentences; they have no power to insure that multiple sentences in fact are drawing credit at the same time. E.g., Ex Parte Huerta, #69,352 (1/30/85). (Judge Campbell also expressed deep embarrassment about last year's accident with the obscene devices.)

Judge Bill White

Newly-elected Judge Bill White was almost deprived of time by his long-winded

colleagues. He noted only that under the recent decision in Ex parte Ormsby, 676 S.W. 2d 130, the Court has taken a broad view of what constitutes "restraint" for purposes of an art. 11.07 writ. Mootness will seldom bar an attack on a prior conviction.

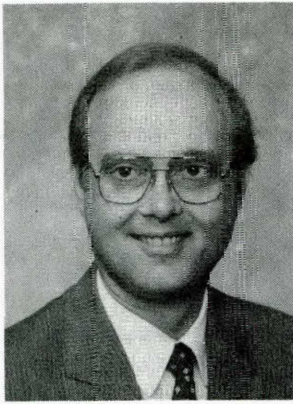
PANEL DISCUSSIONS

The panel discussions were very interesting, although the judges kept a low profile. The law professors and the audience did most of the talking. The judges got to hear frank discussions of criminal law issues that they would probably never get in the confines of an appellate brief or argument.

Judges McCormick, Clinton, and White were on the panel discussing the proposed evidence code for criminal cases. The judges were especially restrained in their comments, which is understandable since someday they may have to vote on or construe the proposals and they don't want to take strong public positions. Judge Clinton remarked that the proposals are merely recommendations which may or may not be followed and that many of the recommendations represented the majority vote of a sharply divided committee. The audience comments were predictable. Most of the defense attorneys opposed any change seen as prosecution-oriented and felt that even more needed to be done to help the defense. I may be prejudiced, but I thought the prosecutors were much more objective about the proposals. As is also often the case, many people were complaining about things which (unknown to them) were simply codifications of existing law.

Presiding Judge Onion and Judge Tom Davis participated in the panel discussion on indictment law. The two law professors on the panel, both of whom are generally defense-oriented, made a polite but withering attack on Texas law in this area. Their opinion was that the law—as it applies to what constitutes fundamental defects and defects assailable only by a motion to quash—rests on an unsound theoretical foundation and is inconsistently applied in practice. One professor candidly conceded that he feels obligated under current law to tell his law students not to object to fundamentally defective indictments when they see them, though he admits that he is very uncomfortable about this from the perspective of a private citizen. He noted that when his students get probation for a client on an indictment they know to be fundamentally defective, they advise the client that this will be a "pretend probation" because they know they can get the conviction set aside if and when revocation is sought. The judges' reaction to this was fairly restrained. Judge Onion pointed out that the law surrounding fundamentally defective indictments was not recently created by the Court. He's right. Cases holding an indictment defective for the omission of a single element of the crime can be found at least as far back as the 1850's. Judge Davis also noted that the Court is seeing fewer and fewer defective indictments, indicating that most prosecution offices are now properly pleading their cases. This too is no doubt true, but at a minimum we'll always be seeing defendants get their convictions overturned when they prove that a prior conviction used for enhancement was based on a defective indictment.

Judges Teague, Miller, and Campbell spoke on culpable mental states. The problem centered on the Penal Code's failure to say whether each element of the crime (conduct and surrounding circumstances) had to be accompanied by a culpable mental state on the part of the defendant. For example, in Lugo-Lugo v. State, 650 S.W.2d 72, the court ultimately held that an indictment for murder under Penal Code §19.02(a)(2) need allege as a culpable mental state only the "intent to cause serious bodily injury." No culpable mental state had to modify the element "commit an act dangerous to human life." As originally proposed, the new penal code had a §6.06 which would have taken care of this problem and normally would have required a mental state to accompany each element, but that provision was deleted by the legislature. According to the judges, this has left the Court in the position of not knowing what the legislature really wanted regarding culpable mental states. They have the uneasy feeling that the current code could allow convictions where the accused did not have the culpable mental state one would really think was necessary. The judges all expressed the hope that at some point the legislature might do something to remedy this problem.☐



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.

The Court of Criminal Appeals has been very busy. Significant decisions have come out on fundamental error in the jury charge, joinder of offenses, and appeals following plea-bargained guilty pleas. First is the quiz, which involves some U.S. Supreme Court decisions.

QUIZ

(Answers, p. 31 .)

1. The Alcoholic Beverage Code makes it an offense for a retail dealer to sell or serve beer to a person "showing evidence of intoxication." Is that provision void for vagueness?
   ______ Yes ______ No

2. Does a felony information have to be supported by a complaint?
   ______ Yes ______ No

3. Does the state or federal constitutional provisions granting the right to bear arms prevent the legislature from enacting the UCW statute to regulate weaponry?
   ______ Yes ______ No

4. The accused was arrested by a private citizen. He made no claim of innocence, and the State used this silence against him at trial. Was the accused's silence admissible?
   ______ Yes ______ No

5. Will the accused's judicial confession to the crime at the punishment stage save the conviction even if the evidence was insufficient at the guilt stage?
   ______ Yes ______ No

6. Is the accused's testimony standing alone enough to prove that he was indigent and was deprived of counsel at a prior conviction?
   ______ Yes ______ No

7. Officers having only reasonable suspicion that the person was involved in a crime detained the suspect for 20 minutes for further investigation. Was an investigatory detention for that period of time per se unreasonable?
   ______ Yes ______ No

8. The suspect gave a confession while in custody but without Miranda warnings having been given. He later received his warnings and gave another confession. Did the first confession unavoidably taint the second?
   ______ Yes ______ No

9. The suspect was transported to the police station for fingerprinting without his consent, without probable cause, and without prior judicial authorization. Was this an illegal detention?
   ______ Yes ______ No

10. Can a suspect be forced to undergo surgery for the removal of a bullet which might tie him to a robbery?
    ______ Yes ______ No
    ______ Depends on the circumstances

Fundamental Error in the Jury Charge is Redefined. Focus is on Whether Serious Harm Befell the Accused in Light of the Entire Record

Cubie v. State, 578 S.W.2d 732, catalogued certain errors in the applications paragraph of the jury charge which were per se fundamental error. Totally reversing its approach, the Court now holds that claims of fundamental error will be determined by looking at the entire record—the state of the evidence, the contested issues, the jury arguments, the complete charge, etc.

The Court also explains how the test for fundamental error fits in with art. 36.19, C.C.P. One part of that statute talks of errors in the jury charge which are "calculated to injure" the accused. That phrase refers to the standard for ordinary reversible error--the type of error which must be objected to at trial and which requires no more than some showing of harm for reversal. Errors properly objected to at trial will call for reversal as long as the error is not harmless. ("Calculated to injure" does not imply some sort of malicious motive on the part of the trial judge or opposing party.)

Another part of art. 36.19 speaks of errors which deprive the accused of a "fair and impartial trial." This refers to the test for fundamental errors—errors which are so harmful that a reversal will be required even if no objection was made at trial. To emphasize that a very high degree of harm must be shown for fundamental error, the Court says that fundamental error will be present only if "egregious" harm can be shown. (The Court did not apply the new test in Almanza, but only remanded it to the court of appeals.) Almanza v. State, #242-83; decided 2/27/85.

Almanza Applied to Uphold a Jury Charge that Previously Would have Presented per se Fundamental Error

The jury charge in this aggravated rape case enlarged on the indictment by submitting both the theory of the crime that was pled (death threats) and a theory that was not pled (actual infliction of serious bodily injury). Prior to Almanza the inclusion of this additional theory of liability in the applications paragraph would have been per se fundamental error.

The Court finds that this error did not deprive the accused of a fair trial because no one presented evidence or made jury arguments concerning the added theory in the charge. Instead the whole focus of the trial was on the theory that threats of death compelled submission to the intercourse, and proof of those threats was overwhelming. Bonfanti v. State, #64-086; decided 3/6/85.

Almanza Applied to Save a Conviction in which the Punishment Charge was Flawed

The jury charge told the jury what range of punishment was applicable if the jury found the prior convictions proven, but it did not give a range of punishment if the priors were not proven, nor did the verdict form include a way for the jury to say if it found the prior convictions proven or not. Having failed to object at trial, the defendant claimed fundamental error.

Applying Almanza, the Court finds no egregious harm. It notes that the State proved up the priors overwhelmingly, the defense offered nothing to contest the proof, and in final arguments defense counsel made no claim that the prior convictions were not proven. Since both sides in reality took the existence of the priors as givens, no real harm resulted. Kucha v. State, #201-82; decided 3/6/85.

(1) Almanza Applied to Uphold Conviction Even Where Charge was Properly Objected to; (2) Alleged Error in Jury Argument Must be Viewed in Context of the Entire Argument

The accused was charged with aggravated robbery based on a threat of imminent bodily injury. The proof showed he pulled a gun on the victim. He claimed error because the trial judge refused his request to give the jury the statutory definition of "bodily injury" in the charge. HELD: Since the term had a specific statutory definition and was an aspect of an element of the crime charged, it was error to refuse the request. However, in light of

the undisputed fact that a gun was used in the offense and that there appeared to be no dispute over the meaning of "bodily injury," this error did not even rise to the "some harm" level that Almanza requires for a reversal on error that was properly objected to at trial.

In punishment argument the prosecutor mentioned that the accused had not called his mother, father, sister, or brother to give favorable testimony. The accused said this was manufacturing witnesses and speculating on what they might or might not say, which is generally condemned under McKenzie v. State, 617 S.W.2d 211.

However, the Court said that challenged arguments must be viewed in light of the entire argument. Few, if any, arguments present reversible error standing alone. In context the prosecutor was not asserting that these witnesses actually existed, but merely emphasizing (properly) that the accused had called no one to testify in his behalf on punishment. Mosley v. State, #159-83; decided 3/6/85.

Availability of Mandamus and Prohibition is Restricted; Petitioner's Right to the Writ Must Be Clear

The Dallas County District Attorney sought a writ of prohibition to prevent a judge from dismissing a case under the Speedy Trial Act. The State argued that the act was void due to a defective caption in the original statute and, alternatively, that the dismissal was incorrect under the statute itself. The Court avoided reaching the merits by holding that the issue was not appropriate for the issuance of an extraordinary writ. The Court emphasizes that a party's right to an extraordinary writ must be clear and that such writs will not be used to enforce duties that are subject to debate.

The full breadth of the Court's decision may not be apparent for some time, but it is obvious that the Court wants to cut back the availability of mandamus and prohibition. Read most broadly, the Court could be saying that it will not grant an extraordinary writ if the challenged ruling required the trial judge to make a number of legal decisions as he moved through each step of the arguments presented to him at the trial level. (Trial judges ought to see this as a slap in the face if the Court is saying they can't be expected or required to correctly undertake complex legal analysis.)

At a minimum the Court seems to be saying that it won't (or at least normally won't) use mandamus to settle difficult and previously unresolved legal issues. Questions of first impression are not likely to be settled by mandamus. State ex rel. Wade v. Mays, #69,329; decided 2/6/85.

Investigatory Stop Upheld

This would be a fairly routine case upholding an investigatory detention, but the Court had originally reversed this case by a 5-4 vote on July 18, 1984.

An officer saw an individual slouched over the steering wheel of his car late at night. The car was in the parking area of an apartment complex; the lights were on and the motor running. The officer lived in the complex and knew there had been a recent crime problem there. As the officer approached, the driver rolled down his window and said he was there to see a certain tenant. The officer knew that tenant had received threats recently, so he asked the driver to step out of the car. When the driver opened the door, the officer saw a pistol in the car, which he seized. Under a totality of circumstances test, this provided reasonable suspicion for an investigatory stop, and this seizure was proper under the plain view doctrine. Gearing v. State, #906-83; decided 2/13/85.

Meaning of "On or About the Person" in a UCW Prosecution; Sufficiency of the Evidence

The accused was found behind the wheel of an automobile which was sitting off the roadway with its motor running. A set of nun-chucks was sticking out from under the seat occupied by the accused. This was sufficient evidence to show the accused was carrying the weapon on or about his person even though the car belonged to someone else.

The Court had previously held that "carry" under the UCW statute denoted more than mere possession; it involved an asportation element. In this case "carrying" could be inferred from the fact that the accused was found behind the wheel of a car which, though parked, had its motor running.

"On or about the person" means within such distance that the suspect could get his hands on the weapon without materially changing his position. This was established since the nun-chucks were directly underneath where the suspect was sitting. His knowledge that the weapon was there could be inferred from the fact that it was in plain view. Christian v. State, #436-84; decided 2/13/85.

Testimony That the Accused Has Had a Bad Reputation Cannot Be Based Purely on Knowledge of Specific Acts of the Accused; Some Discussion of Actual Reputation Must Have Occurred

A police officer testified that the accused had a bad reputation for being peaceful and law-abiding. On voir dire the defense established that the officer's statement was based solely on a conversation with one of the accused's victims in which the victim related a prior terroristic threat made by the accused. The officer had never discussed the accused's reputation per se. The Court holds this to be improper reputation testimony, though it ultimately finds it harmless error on the facts.

Overruling Romo v. State, 593 S.W.2d 690, to the extent of any conflict, the Court says that reputation testimony cannot be based solely on knowledge or discussion of specific acts of misconduct by the accused. The witness must actually have discussed or heard discussed the reputation of the accused.

While knowledge of specific misconduct will not infect valid reputation testimony from the witness, the witness cannot simply infer what the reputation is from the specific misconduct he has heard discussed. The Court quotes the Dallas Court of Appeals in Moore v. State, 663 S.W.2d at 500, for why this is bad. Wagner v. State, #61-601; decided 2/13/85.

Necessity of Alleging the Location of Real Property Mentioned in an Indictment when a Motion to Quash is Filed

Article 21.09, C.C.P., talks of alleging the general location of real property in the county, along with its owner, occupant, or claimant. A conflict had arisen in the cases concerning when it was necessary to allege anything more than the county in which the property was located. This case is supposed to clear up that confusion.

If the real property is merely the location (situs) of the offense (such as in a burglary with intent to commit rape), then no more than the county need be alleged. If the real property is not only the situs of the offense but also its object (such as in arson or criminal mischief committed against a structure), then a more specific allegation of location may be compelled by filing a motion to quash. It's not clear how specific the allegation of general location must be. Query: If the offense is criminal trespass, is the real property the object of the offense or merely its situs? Franks v. State, #879-83; decided 2/27/85.

Relationship of "Sudden Passion" to the Elements of Murder

In Braudrick v. State, 572 S.W.2d 709, the Court had said that sudden passion, when raised by the evidence in a murder case, was in the nature of a defense to murder which reduced the crime to manslaughter.

The Court overrules Braudrick and says that when the evidence raises the issue, the negation of sudden passion becomes an implied element of murder. Sudden passion is a circumstance surrounding the forbidden conduct, the existence of which the State must refute beyond a reasonable doubt in a murder case.

In this case the accused was charged with murder but convicted of voluntary manslaughter. He had objected to submitting to manslaughter because he said sudden passion was not raised by the evidence. The problem was that he was correct.

The State sought to uphold the conviction on the theory that proof of the

greater offense would support proof of the lesser. However, the Court says this rule comes into play only if one offense is truly a lesser-included offense of another. Manslaughter is not automatically a lesser-included offense of murder; sudden passion must be raised by the evidence.

Since the accused had objected to submitting voluntary manslaughter and since there was no evidence of sudden passion (a statutory element of voluntary manslaughter), he was entitled to an acquittal based on insufficient evidence even though everyone agreed there would have been sufficient evidence to support a conviction for murder.

This anomalous result prompted the Court to ask the legislature to redefine manslaughter so that the sudden passion issue is relevant only to the punishment phase of a murder case.

(Note that if the accused had not objected to the submission of manslaughter, his acquiescence in the charge would have estopped him from disputing that the evidence raised the lesser charge.) Bradley v. State, #899-83; decided 2/27/85.

Joinder of Offenses Re-Examined in Light of the Demise of the Carving Doctrine; Different Offenses Occurring in the Same Transaction Generally Cannot be Joined in a Single Indictment

With the demise of the carving doctrine in Ex parte McWilliams, 634 S.W.2d 815, the State obtained the right to obtain convictions for more than one offense that was committed within the same transaction. Many prosecutors (of which I was one) hoped that those multiple convictions could be obtained in a single trial joining all the offenses which were part of that one transaction. Meeks v. State, 653 S.W.2d 6, seemed to lend support to that hope through its interpretation of the joinder provisions of the Penal Code and Code of Criminal Procedure.

The Court has now re-examined this area of the law, Drake being the leading case, and sharply limited the right to join multiple offenses in a single indictment. In effect, Meeks is overruled.

The relevant statutory provisions are Chapter 3 of the Penal Code and art. 21.24 of the Code of Criminal Procedure. As I understand these decisions, the only time the State can properly join distinct offenses in a single indictment is when the separate offenses are property crimes meeting the definition of a "criminal episode" under Chapter 3.

In all other situations joinder of distinct offenses is improper, meaning that at some point the defense can object and force an election (or perhaps a quashing of the indictment). For example, if the accused raped and robbed the same victim, the State could not properly join both offenses in the same indictment. At some point we could be forced to elect, but I'm not sure if the election could be forced prior to trial, or at the close of the evidence, or if the jury could simply be instructed that out of the multiple crimes submitted they could return only one conviction.

The only thing that is clear is that the carving doctrine's concept of what constituted separate transactions has now been revived under the heading of joinder of offenses. The only sure way to obtain multiple convictions and punishments in these situations is to indict and try the offenses separately. However, the defendant can always agree to joint trials, and his failure to object to improper joinder will waive the error.

In Drake two offenses of attempted capital murder were joined based on attempts to kill two police officers in a single incident. Two convictions were obtained, but since no objection was made about this until appeal, both convictions were allowed to stand.

On the other hand, in Siller the accused was tried on one indictment for both rape of a child and indecency with a child. Only one of these convictions was upheld, presumably because of a timely objection was made.

(Amazingly, one cannot tell from the face of Siller opinion that there was an objection, but the assumption that an objection was made appears to be the only way to reconcile Drake and Siller.)

Also keep in mind that if we believe the accused committed only one crime, but are not sure what that one crime is, we can properly plead multiple counts to meet possible variations in proof. For example, if we think the accused committed burglary or theft by receiving stolen property (but not both), then we should be able to plead both and have both submitted to the jury, with an instruction that only one conviction is possible. Drake v. State, #148-84, and Ex parte Siller, #69,353, both decided 2/27/85.

Appeals After Plea-Bargained Guilty Pleas; New Rules to Prevent Reversals for Involuntary Pleas

Under art. 44.02, C.C.P., when a defendant pleads guilty pursuant to a plea bargain, he can appeal only if the judge grants permission or if the issue he wants to appeal was raised by written pre-trial motion.

However, defendants often came to grief by inadvertently waiving the point they wanted to appeal on. This often occurred when the accused made a judicial confession, which standing alone was enough to support the plea and could waive a search question, for example. Although this waived the error on appeal, the courts often had to turn right around and reverse the conviction on the ground that the plea had been involuntary or conditional—the guilty plea was made only because the accused understood he could appeal certain issues.

To get around this problem the Court now holds that a judicial confession will not waive the appeal as long as the accused otherwise meets the requirements of art. 44.02. The court does not address whether this new rule might in any way be applied to situations where the accused appeals after making an open plea of guilty (i.e., no plea bargain). That type of plea normally waives all nonjurisdictional defects. Morgan v. State, #770-83; decided 3/6/85.

Female Witness Cannot Be Asked If She Is a Common Prostitute

An old line of Texas cases held that a female witness could always be asked if she were a common prostitute, as long as the questioner in good faith expected an affirmative reply. The Court now overrules those cases.

The Court recognizes that as a general rule a questioner can ask witnesses their occupations on the theory that the answer helps place the witnesses in the proper context and aids the jury in judging the weight to be given the witnesses' testimony.

However, where the nature of the occupation would necessarily indicate prior acts of misconduct which had not resulted in a final conviction (such as where the witness is a prostitute or bookmaker), the right to ask about occupation gives way to the legislative prohibition against showing such misconduct. See art. 38.29, C.C.P. Cravens v. State, #366-84; decided 3/27/85.

Indictment Alleging Non-Consensual Entry into a Trailer, with the Intent to Commit Theft, Can Support Conviction for Burglary of a Habitation, Building, or Vehicle

The indictment alleged that the accused "...with intent to commit theft, [did] break and enter a trailer owned by [complainant] without the effective consent of the Complainant." He was convicted and punished for burglary of a building. The accused claimed the indictment was fundamentally defective.

In a unanimous opinion by Judge Clinton, the Court holds that this indictment is not only sufficient to allege a felony; it is sufficient to support proof that the trailer at issue was a habitation, a building, or merely a vehicle, depending on the facts of the particular case. The Court saw no problem in the fact that one could not tell from the face of the indictment whether the accused was facing punishment for a first, second, or third degree felony. It didn't even mention the question. The only problem the Court could foresee would occur if the proof showed in some odd fashion that this trailer was actually a coin-operated machine. The problem would be that that would constitute proof of only a misdemeanor, but the Court did not suggest what the resolution of that problem would be. Ex parte Raleigh, #69,407; decided 3/27/85.

ANSWERS

1. Yes. Cotton v. State, #035-84; decided 2/6/85.

2. No. Ex parte Alexander, #69-278; decided 2/13/85.

3. No. Masters v. State, #773-83; decided 2/20/85.

4. No. Samuel v. State, #1064-83; decided 2/20/85. The Court wasn't directly deciding this question, but it strongly indicates the lower court was correct. I think this turns on a common law rule of evidence and not on art. 38.23, C.C.P.

5. Yes. DeGarmo v. State, #69,027; decided 3/13/85.

6. No. Disheroon v. State, #64,827; decided 3/27/85.

7. No. There is no absolute cut-off on the length of an investigatory detention, though at some point the stop will become an arrest requiring probable cause. U.S. v. Sharpe, 105 S.Ct. ____ (decided 3/20/85).

8. No. Oregon v. Elstad, 105 S.Ct. ____ (decided 3/4/85).

9. Yes. Hayes v. Florida, 105 S.Ct. ____ (decided 3/20/85).

10. Depends on the circumstances; a balancing test is required. Winston v. Lee, 105 S.Ct. ____ (decided 3/20/85). □

THANKS FOR THE MEMORIES

Q: Is that right or not? That's right, isn't it?

A: That's true.

Q: Yeah. You kind of remember what you want to and forget what you want to; right?

A: Always just come natural.

(From a hearing to revoke probation.
Cross-exam by Julius Whittier,
Asst. D.A., Dallas County)

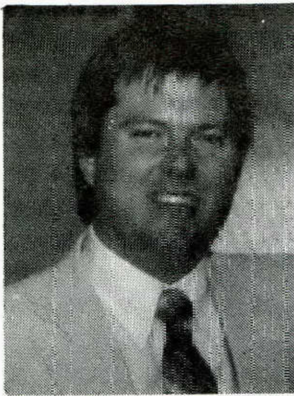
LAWYERS' ASSISTANCE PROGRAM

The Lawyers' Assistance Program was approved by the Board of Directors of the State Bar of Texas in 1983 "to provide for identification, peer intervention and rehabilitation of any attorney licensed to practice law in Texas whose professional performance is impaired because of physical or mental illness, including deterioration through the aging process, or abuse of drugs, including alcohol, so that such attorney may resume the competent practice of law." The Program is administered by a Committee of 18 lawyers committed to helping impaired colleagues. Confidentiality is maintained to the greatest extent permitted under the law. Also, all records are destroyed when the work with a particular lawyer is completed.

Any interested person can notify the Committee of conduct which indicates impairment of an attorney's professional ability. Reasons for the notification must be stated and the person must identify him/herself, but all information remains confidential. After review, the Committee may appoint a contact group of three volunteers from the county in which the referred lawyer is practicing. This group agrees to contact the lawyer informally to discuss the alleged impairment. If the group feels the notification was unfounded, they so report to the Committee Chairman. If, however, they find that the attorney probably suffers from an impairment, they attempt to persuade him/her to get assistance. The group can arrange for the lawyer's evaluation and referral, as well as give personal support and encouragement during rehabilitation. When the group is satisfied that the impairment has been alleviated, it notifies the Chairman. The Committee may then vote to close the file and destroy the records.

The Program is not designed to practice law, lend money, or in any way assist an impaired lawyer in continuing to function in an impaired condition. The Committee is not part of the State Bar disciplinary system, although it will work with lawyers who have disciplinary proceedings pending.

For more information, contact: Lawyers' Assistance Program, State Bar of Texas, P.O. Box 12487, Austin, TX 78711. □



From Your Fellow Prosecutor:

Preparing An Arson Case

By Patrick Simmons

Patrick H. Simmons is the County Attorney with Felony Responsibility for Limestone County. He has successfully prosecuted several arson cases.

The crime of arson has historically been one of the most difficult crimes to prove. Under prior law, in order to show the commission of the offense of arson, the evidence had to show an actual burning, regardless of whether a fire was actually started, and regardless of any smoke or scorching damage. Honey v. State, 17 S.W.2d 50 (Tex. Cr. App. 1929). Through the years the legislature has refined the law, making it more practical to effectively prosecute arson cases. The present law (last revised in 1979) provides that a person commits arson if he starts a fire or causes an explosion with intent to destroy or damage any building, habitation or vehicle:

(1) knowing that it is within the limits of an incorporated city or town; or
(2) knowing that it is insured against damage or destruction; or
(3) knowing that it is subject to a mortgage or other security interest; or
(4) knowing that it is located on property belonging to another; or
(5) knowing that it has located within it property belonging to another; or
(6) when he is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

It appears that the present law has a two-fold culpability requirement:

(1) A specific intent to destroy or damage a building, habitation, or vehicle, and
(2) Knowledge of one of any of the five sets of circumstances set out in Section 28.02 (a), or recklessness about whether the burning or explosion will endanger a life or property.

Many prosecutors (as well as form books) are adding a mental state to their indictments by alleging that the defendant intentionally and knowingly started a fire (or caused an explosion). Although the statute does not seem to require this mens rea, I generally include this in my indictments because it requires no more proof to prove the fire was intentionally started if it has already been shown that the fire was started with intent to destroy or damage.

Indictment

Include every conceivable way the offense could have been committed. Remember you can plead everything and prove in the disjunctive. Plead intent to damage and destroy, and show the intent to do either. Plead that the defendant knew the property was within the city limits, that he knew there was a mortgage, that he knew the building, habitation, or vehicle was located on property belonging to another, and that he was reckless about whether the burning or explosion would endanger a life or property of another. Then prove any one of these. I have found that I could always prove at least two. If it is an owner burning his own property it will be for insurance and generally he will have a mortgage, and unless the structure or vehicle is in the heart of nowhere he will be

reckless about endangering a life or the property of another. If the defendant is a pyromaniac he knows the structure or vehicle is on property belonging to another. He may not know who owns it but if he doesn't own it, he knows another does. Remember Section 1.07 (a) (4) of the Texas Penal Code states that "another" means a person other than the actor. Also, the showing of recklessness can be proved in almost any fire by a pyromaniac. Furthermore, if it is a case of malice (i.e., one person trying to burn out another), it can usually be shown that the defendant knew that the structure or vehicle was located on property belonging to another or that the structure or vehicle had within it property belonging to another and that the defendant was reckless.

Whenever recklessness is alleged in a charging instrument, Article 21.15 of the Texas Code of Criminal Procedure requires that the acts relied upon to constitute recklessness be alleged. So when reckless endangerment is plead, be sure to allege the acts constituting recklessness, as defined in Section 6.03 (c) of the Texas Penal Code. Also, remember to describe the type of property, i.e., building, habitation, or vehicle. Be aware that the term "building" as defined in Section 28.01 of the Texas Penal Code covers any structure or enclosure, and thus is broader than the term "building" as defined in Section 30.01 which applies only to enclosed structures.

Furthermore, the indictment should allege the name of the owner of the property if the circumstances show a burning on another's property, or on property containing another's property.

In cases of arson within a city or town, state the name of the municipality.

Finally, remember to plead bodily injury if suffered by anyone, including firefighters, peace officers, or passers-by, in order to enhance the case to a first degree felony.

Corpus Delicti

The first step is to show that a fire was of incendiary origin. The mere occurrence of a fire is not sufficient to establish the corpus delicti in an arson case. Zepeda v. State, 139 S.W.2d 820 (Tex. Cr. App. 1940); Adrian v. State, 587 S.W.2d 733 (Tex. Cr. App. 1979). In the Adrian case **the defendant confessed** to setting the fire, and the extra-judicial confession was admitted at trial. However, there was no testimony aside from the defendant's confession on the cause of the fire. The Court of Criminal Appeals reversed the case, stating that the confession must be corroborated by evidence that a crime has been committed. To establish the corpus delicti of arson, the State must show that the structure was purposely set on fire by someone.

Gathering Evidence

It is critical that the State have a capable arson investigator. Being from a small county, I realize it can be difficult to get a knowledgeable and experienced expert. If you have only one city in your county that can support a Fire Chief who can double as an arson investigator, try and arrange to help supplement his salary from the County or other cities in the county. He is certainly worth his salary in an arson case. The other alternative is to seek help from the State Fire Marshal. I have found these people to be qualified and helpful, but they are stretched very thin. It may be several days before one of them can visit the fire scene, and by that time much of the available evidence may be gone, particularly if the owner is suspected of starting the fire. However, even days later, the arson specialist can generally tell if the fire was incendiary, and negate possibilities of bad wiring or spontaneous combustion, although by then he may not be able to link the fire affirmatively to a specific cause.

Make sure the arson investigator is aware that unlawful searches and seizures apply to him. An investigator should be very careful in going through burned premises, especially where it is suspected that the owner may have burned his own house. In Michigan v. Tyler, 436 U.S. 499 (1978), firemen left a house after putting out a fire and later returned without a search warrant to search the premises for evidence of arson. The Supreme Court declared the search illegal in the absence of probable cause and an emergency. However, the Court also stated than an entry to fight a fire requires no warrant, and that once in a building, officials may remain there for a

reasonable time to investigate the cause of the fire, and evidence may be gathered at that time. It is the additional entries that must be made with a warrant. Any evidence obtained from a later entry without a warrant is subject to exclusion.

As soon as possible the investigator should question all witnesses and prospective defendants to pin down their stories before they find out what evidence the State has.

Presenting Investigation

In presenting testimony, have the arson investigator negate all the usual reasons a fire could have started, describe the scorching characteristics, and give his opinion of incendiary origin. Hopefully, his opinion will be positive and unequivocal. With an overly equivocating investigator you can watch your case go down the drain with opinions like "it could be" or "possibly is" arson. That doesn't remove reasonable doubt; it creates it. But even this is better than no arson investigator at all, because without one, it is virtually impossible to show incendiary origin, unless you have an eyewitness to the setting of the fire.

Proving Motive, Intent and Knowledge

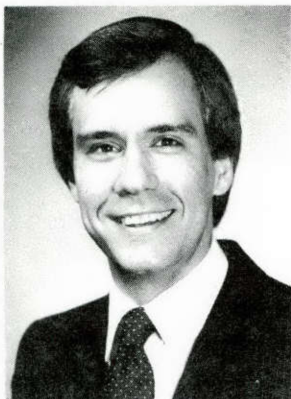
Once it is shown that the fire was of incendiary origin then proving the case is much like proving one for any other crime. First, evidence must be presented of a specific intent to damage or destroy. Intent can be inferred from the acts, words and conduct of the accused, though it cannot be inferred from the mere act of burning. Circumstances showing intent include evidence that the defendant used accelerants to enlarge a fire, that there were multiple origins of fire, or that the defendant set the fire in an area that would cause such damage. The crime is complete when the fire is started with requisite culpable mental state, whether or not damage of any kind actually occurs. Beltran v. State, 593 S.W.2d 688 (Tex. Cr. App. 1980).

Any facts showing a motive can help prove intent. Evidence of heavy insurance coverage, large debts, disposing of furniture, threats, and grudges all help show intent to damage or destroy. Although motive is not an element of the crime, it is nevertheless critical to show a motive. Strong evidentiary cases can be lost if a jury is not given some reason the fire was set.

Remember that circumstantial evidence may be enough to prove the requisite intent and knowledge. Although proof of a fire and strong motive are themselves not sufficient to warrant a conviction, evidence that the defendant was present shortly before the fire, that he tried to tell people that the building would be closed the day of the fire, that he left the scene in a hurried manner, that he tried to cover up his presence at the scene of the fire, and that a highly volatile substance was present in the carpet and the attic was together sufficient to sustain a conviction in Miller v. State, 566 S.W.2d 614 (Tex. Cr. App. 1978).

Once it has been shown that the defendant started the fire and had the specific intent to damage or destroy property, it should not be difficult to prove a reckless disregard or one of the five "knowledge of circumstances" set out in Section 28.02.□

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-295

Re: Whether a commissioners court may create a road district which has two or more noncontiguous segments.

The question was two-fold: (1) Can the commissioners court create a noncontiguous road district if the interests and purposes of the segments are the same?; and (2) May bond funds be spent on roads needed for ingress and egress to the area encompassed by the district?

The A.G. traced the authority of the commissioners court through article III, §52(b) of the Texas Constitution and article 6702-1, V.T.C.S., (the County Road and Bridge Act) to establish road districts. The Act does not establish that a road district may be noncontiguous; furthermore, the A.G. concluded that the usual concept of a district implies a single set of boundaries, and that if the legislative intent had been otherwise, it would have been so expressed in the Act. Thus the A.G. concluded that a commissioners court may not establish a road district composed of noncontiguous segments.

The A.G. further noted that, besides a hearing of a petition to order a bond election and make a finding that the proposed improvements will benefit all taxable property in the district, the Act requires that the proposition to be submitted at the election shall specify the purpose for which the bonds will be issued—in this instance, that they will be used for roads needed for ingress and egress to the area encompassed by the district. The A.G. concluded that the proceeds from the issuance of the bonds may be used for improvements outside the boundaries of the road district if the commissioners have found that such improvements will benefit all taxable property in the district.

Attorney General Opinion JM-307

Re: Whether a judge may require a probationer to make a one-time contribution to a crime stoppers program as a condition of probation.

The relevant law includes article IV, section 11a of the Texas Constitution and articles 42.12, 42.13, and 45.54, C.C.P. The A.G. noted that it is well-established that a trial court is not limited to setting only the types of probation conditions set out in 42.12, but neither are there Texas cases which require the probationer to donate money to a private charity.

The A.G. concluded that the trial court may only require a probationer to pay money to a particular private charity "where that condition has a reasonable relationship to his treatment and rehabilitation and to the protection of the public."

(The A.G. further concluded that it is permissible in a felony case for the payment to be for reimbursement to a crime stoppers organization for funds expended in connection with the probationer's case.)

However, article 45.54 governs judges of municipal courts and judges of the peace. Since article 45.54 specifically sets conditions for and limitations of amounts of payments by the defendant and yet does not mention payments to a charitable organization, the A.G. reasoned that these judges may not impose this type of probation condition.

Attorney General Opinion JM-310

Re: Whether a county clerk may purchase an interest in a title company and serve as its part-time manager.

Article 988b covers local conflicts of interest. The article penalizes a "local public official" if he "participates in a vote or decision on a matter involving a business entity in which the local public official has a substantial interest if it is reasonably foreseeable that an action on the matter would confer an economic benefit to the business entity involved. . ." The county clerk is a "local public official" under the article, but is not a member of the county's governing body and cannot contract or vote on a matter pertaining to county business. Thus, the A.G. concluded, the clerk may purchase an interest in a title company without violating article 988b.

However, other law requires that the clerk deal with the title company at total arm's length. See articles 1945 and 3930 (records-keeping), 5970 and 5973 (legal duties), V.T.C.S.; and 39.01 of the Penal Code (misconduct). As long as the clerk performs his duties and keeps his private activities separate, there should be no problem.

Attorney General Opinion JM-312

Re: Whether a court-appointed attorney must be provided for an indigent in every misdemeanor case.

The A.G. concluded that neither the U.S. Constitution nor article 26.04, C.C.P., require that the state provide an indigent with an attorney in a case which does not involve loss of liberty as a possible punishment.

Attorney Opinion JM-313

Re: Use of the "hot check fund" by a district attorney, county attorney, or criminal district attorney.

This opinion covers a general discussion of the "hot check" fee law, article 53.08, C.C.P. The request for this opinion came from the Hon. Oscar Mauzy, Chairman of the Senate Committee on Jurisprudence, seeking answers to many questions regarding what are proper expenditures by a prosecutor from the hot check fund.

Relevant to the questions, the A.G. made the following points:

The approval of the commissioner's court is not needed prior to making payments from the fund for valid expenditures.

Expenditures do not have to be only for the expenses incurred in processing and collecting hot checks.

The surplus of the fund may be carried over into the next fiscal year, but a surplus must remain in the fund. It need not be turned over to the general fund of the County.

The A.G. then analyzed the expenditures on two points: (1) whether the expenditure is related to the official business of the office, and (2) whether any other constitutional or statutory provisions prohibit the expenditure. The questions presented were grouped into these categories:

1) **Hiring of new personnel.** The prosecutor may do so without commissioner court approval. See Article 332a, V.T.C.S.

2) **Payment of salaries and salary supplements or bonuses.** Again, the prosecutor may do so without commissioner court approval, but not retroactively (i.e., after the services to be paid for or supplemented have been rendered). See Texas Constitution, Article III, §53. The commissioners court may not reduce a salary amount already authorized in an effort to interfere with the prosecutor's "sole discretion" in giving a supplement. See AG H-922 (1977).

3) **Payment of "in-kind" bonuses.** These are not allowed if not directly related to salaries or if given after the rendering of services. [Note that distinction must be made between these kinds of bonuses and payments to an employee for expenses incurred in the performance of official duties, which are always reimbursable if valid. See Article 332a, §6.]

   Examples:

   Paid-for parking is a legitimate compensation, but a cash parking allowance is not.

   Automobile allowances are valid as necessary travel expenses (under Article 332a, §6), but the actual cost must be paid, not a flat rate.

   State Bar dues are deemed an expense related to the individual's profession rather than an "office expense" and are not allowed.

   Continuing legal education costs are allowed if the programs are directly and substantially related to the performance of the office's governmental functions.

   College tuition (of a secretary) is allowable only if the education trains the attendee for additional duties related to the performance of the office's governmental functions.

   Management retreats (to a dude ranch) are allowable if they include legitimate training or continuing legal education, but not if simply to promote productivity or increase morale.

4) **Expenditures for equipment and supplies** (new carpet and computerized office security system). These are allowable if reasonably necessary to the performance of the duties and function of the office.

5) **Expenditures for members of the grand jury** (coffee, donuts, lunch, & photos of the grand jury). These are not expenses of the prosecutor's office and would not be allowed.

For a copy of JM-313, contact the Council.

Open Records Decisions

Open Records Decision No. 427

Re: Whether a police academy is an educational institution under section 3(a)(14) of the Open Records Act."

A reporter asked the city of Houston for two letters concerning the academy status of two named Police Department academy recruits. In denying the request the City claimed the letters were exempt from disclosure under §§3(a)(2) and 3(a)(14).

Section 3(a)(14) exempts "student records at educational institutions funded wholly, or in part, by state revenue." The A.G. noted that the Act does not define "educational institution." Taking its ordinary and popular meaning, the A.G. determined that the Police Academy was indeed an educational institution within the meaning of the Act and the letters would be exempt. (Having resolved the issue, the A.G. did not address the 3(a)(2) claim.)

Open Records Decision No. 428

Re: Whether mail logs of the TDC which reflect inmates' correspondents are available to the public.

TDC contended that the logs contain "confidential inmate information" exempted from disclosure by §3(a)(1) of the Act.

Open Records Decision No. 185 (1878) concluded that the right of an inmate's correspondents to maintain correspondence with the inmate free from the threat of public exposure (a right grounded in the First Amendment) outweighed the public's interest in a list of those correspondents.

In the present case the A.G. said that the interest of inmates in corresponding with outsiders free from the threat of harrassment by other inmates (also a right with First amendment overtones) outweighs the inmate/requestor's interest in the logs. Also, TDC's interest in enforcing its correspondence rules and maintaining order in its prisons is another reason justifying non-disclosure.□

SEARCH AND SEIZURE

by Alan Levy

Supreme Court Review Pt. I

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.

For Fourth Amendment analysis, police-citizen encounters are divided into three categories:

(1) purely consensual contacts involving no restriction on the individuals' freedom of movements;

(2) "Terry stops"—brief investigative stops that must be supported by a reasonable suspicion of criminal activity; and

(3) arrests which must be supported by probable cause.

W. LA FAVE, SEARCH & SEIZURE §9.1. The apparent lucidity of this structure is deceptive and its outlines quickly blur whenever its framework is applied to a particular police-citizen encounter.

United States v. Sharpe

In United States v. Sharpe, 53 U.S.L.W. 4346 (March 19, 1985), the Court considered whether the police detention of an individual for approximately twenty minutes on the basis of a reasonable suspicion, in order to investigate possible transportation of marijuana constituted an arrest, or a "Terry stop." The defendants were driving two motor vehicles in tandem along a coastal highway. When law enforcement agents attempted to stop the automobiles, the defendants attempted to evade the police. As a result of their maneuvers, motor vehicles were stopped some distance from one another causing the twenty-minute detention on the highway before probable cause developed to make arrests of both suspects.

In Terry v. Ohio, 392 U.S. 1 (1968), Adams V. Williams, 407 U.S.143 (1972), and United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Court recognized the authority of police officers to briefly detain an individual whenever there is a reasonable suspicion of criminal activity.

However, Terry and its progeny originally represented only a relatively narrow exception to the general rule that seizures must be supported by probable cause. Dunaway v. New York reaffirmed the principle that probable cause is required whenever the intrusiveness of any seizure approximates an arrest, regardless of the label applied to that seizure by law enforcement authorities.

The immediate difficulty is how to recognize when a seizure has crossed the boundary separating investigative stops from arrests. The Supreme Court has rejected the "bright-line" approach supported by the ALI which would have limited "Terry stops" to twenty minutes. The Sharpe opinion notes that "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on Terry stops."

Although the Court states that the duration of a stop is "an important factor in determining whether the seizure is so

minimally intrusive as to be justifiable on reasonable suspicion," the opinion ends the primacy of time as the focal point for distinguishing "Terry stops" from arrests.

Instead, the Court substitutes a balancing-of-interests approach which encourages the courts to balance the law enforcement agents' purpose in making a stop, and whether the police diligently pursue a method of investigation that will confirm or dispel suspicion in a short time.

The elimination of time as the focus for determining the propriety of an investigative stop in favor of the balancing approach will certainly expand the boundaries of "Terry stops" to include some encounters now considered arrests.

Florida v. Hayes

For the second time, the Supreme Court has held that the police cannot transport a suspect to the police station for fingerprinting without consent and absent probable cause or judicial authorization. The facts of Florida v. Hayes are remarkably similar to Davis v. Mississippi an earlier decision reaching the same result. Hayes was suspected in a series of burglary-rapes. Detectives, seeking his fingerprints for comparison, went to Hayes' residence and forced him to accompany them to the police station where they took his fingerprints. The Court, relying on Dunaway v. New York, noted that the non-consensual removal of a suspect from his residence to the police station for investigative purposes, whether for identification procedures or interrogation, is so intrusive that the seizure triggers the full protection of the Fourth Amendment.

The narrow holding simply confirms the view of numerous state and federal courts which forbid the use of fingerprints, photographs, handwriting exemplars and similar identification evidence obtained without probable cause or warrants.

The remarkable feature of the Hayes decision is the majority's suggestion that the Fourth Amendment does permit a brief detention in the field for the purpose of fingerprinting, if there is a reasonable suspicion that the suspect had committed a crime. In addition, the Court appeared to endorse the procedures by several states that allow magistrates to issue a "warrant" based on reasonable suspicion to seize a person for the purpose of fingerprinting.

This dicta constitutes the significant component of the opinion. Investigative detentions are permissible when necessary to perform an identification procedure.

United States v. Hensley

On December 4, 1981 an armed robbery occurred in St. Bernard, Ohio, a suburb of Cincinnati. Several days later, the police received information from an informant implicating Hensley in the robbery. Based upon this and other leads, the St. Bernard police had a reasonable suspicion that Hensley was a participant in the robbery and issued a bulletin to area law enforcement agencies stating in pertinent part:

> "Wanted for investigation of Aggravated Robbery . . . is one Thomas James Hensley . . . If suspect is located pick-up and hold for St. Bernard Police . . ."The police did not seek an arrest warrant nor did the information received establish probable cause.

Several days later, Covington police saw Hensley in an automobile. Based upon the bulletin, they stopped the car and in the course of detaining Hensley until they could determine if a warrant had issued, they observed a concealed weapon in plain view and effectuated an arrest.

For the first time, the Court, In United States v. Hensley, 105 S.Ct. 675 (1985), has held that the police may make a "Terry stop" to investigate past criminal activities. The majority applied its now familiar Terry balancing approach, weighing the persons' privacy interest against the state's interest in using a particular investigative procedure to promote effective enforcement of the criminal laws. The Court found that, where police have been unable to locate a person suspected of a past crime, the public interest in detaining that person, checking identification, or addressing questions to the suspect outweighed the minimal intrusion

incurred during the investigative stop - at least where the person is suspected or wanted in connection with a felony.

In the second part of its opinion, the majority held that if a bulletin has been issued based upon articulable facts supporting a reasonable suspicion that the suspect has committed an offense, then reliance on the bulletin justifies a stop to check briefly while seeking additional information. Most lower courts have held that an officer may make an investigative stop in reliance on a bulletin or radio broadcast even though the detaining officer has no knowledge of the factual basis for the bulletin. Since Whitely v. Warden, 401 U.S.560 (1971), it has been generally recognized that police who receive a bulletin have the same right to make an arrest as the issuing authorities. In such a case, the legality of the arrest, search, or detention is determined by whether the issuing authority had individually or collectively probable cause or, in this instance, reasonable suspicion that the individual had committed a crime.

The Court was careful to note that it was not condoning the specific instructions in this bulletin to "pick-up and hold" a suspect. "Given the distance involved and the time required to identify and communicate with the department that issued the flyer, such a detention might be so lengthy or intrusive as to exceed the permissible limits of a Terry stop."

Winston v. Lee

In Winston v. Lee, 53 U.S.L.W. 4367 (March 19, 1985), the Court considered whether a defendant could be compelled to undergo minor surgery requiring general anesthetic to recover a bullet from muscles in his chest for use as evidence by the State.

The Court found that the Fourth Amendment does not, per se, prohibit all surgical intrusion into the body. Instead, the Court applied the approach developed in Schmerber v. California, 384 U.S. 757 (1966). In that case, the Court upheld the warrantless taking of a blood sample from a suspect charged with D.W.I., holding that the State's interest in obtaining the blood sample outweighed an individual privacy interest to be free from the minimal intrusion of a routine blood test procedure. The reasonableness under the Fourth Amendment of surgical intrusions depends upon several factors:

(1) A crucial factor is the extent to which the procedure may threaten the health of the individual. Since Schmerber, the courts generally allow a surgical procedure only when medical experts classify the procedure as minor, the bullet can be readily and easily removed, and there is very little likelihood of injury. In most instances, the bullet is located just beneath the surface of the skin, so any intrusion into the body is minimal.

(2) Another factor is the evidentiary value of the item sought.

Whether the court could compel a subject to undergo even a minor surgical procedure to recover an item depends upon the necessity of using the object as evidence. The Court notes that the reasonableness under the Fourth Amendment of a surgical procedure in a particular case depends upon whether the prosecution has demonstrated a compelling need for the object as evidence. When the item is cumulative of other evidence already in the possession of the State, or is otherwise unnecessary for a successful prosecution, the Court should not compel the suspect to undergo the surgery.

The Court held that the proposed search in this case was unreasonable because: (a) even without the bullet, the State had overwhelming evidence proving that Rudolph Lee committed the armed robbery without the bullet, and (b) the surgery would require general anesthesia, which together with the location of the bullet, raised a small but not insignificant risk of injury to the defendant.

The Court, without deciding whether it is required, noted with approval that the trial court held an adversary hearing before deciding whether to allow the surgery and that the defendant was afforded an opportunity for appellate review of the decision.□

TRAVEL FUNDS FOR PROFESSIONAL DEVELOPMENT

As the fiscal year closes, travel funds are dwindling. In fact, as the table below shows, anticipated reimbursements will produce a deficit of $9,200.

The Council approves reimbursement for its courses and for relevant ones put on by the State Bar, the National College of District Attorneys, and TDCAA. Continuing with **full reimbursement** could mean that fewer courses will be approved. **Partial reimbursement** could mean that the same courses will be approved, but attendees would have to bear some cost. For example, the Council is considering limiting reimbursement to: (1) The least expensive coach airfare **OR** 23¢ per mile (from the Official State Mileage Guide), whichever is cheaper; **—OR—** (2) 10¢ (or 15¢) per mile plus a $40.00 per diem ($15.00 for meals, $25.00 for room).

The Council asks that you do your best to limit travel through the following:

(1) Send only those who need the training.
(2) Travel as cheaply as possible. Keep in mind Council policy limiting amounts of reimbursement for hotel, meals, etc. (See Appendix O, 1984 Annual Report.)
(3) Pursue other sources of reimbursement, such as hot check fee funds.

If followed, these considerations could mean that the Council's further limitations will be minimal. Your help is appreciated.

Bold figures represent estimated future claims for reimbursement.

Summary

Budget	140,000	140,000
Spent	$120,800	$ 73,200
Estimated Future Claims	-0-	**76,000**
Total	120,800	149,200
Deficit/Surplus	+ 19,200	- 9,200

Breakdown by Course

Course	Sponsor	1984	1985	
Law Enforcement Workshop	Council	$ 700	$ 2,100	
Criminal Law Update (Annual Meeting)	TDCAA	41,000	51,600	
Sexual Assault Seminars	Council	2,100	—	
DWI Seminars	Council	—	**3,000**	
Investigators School	Council-TDCAA	10,400	7,100	**+ 3,000**
Civil Law Course	TDCAA	10,100	**10,500**	
Basic Prosecution	Council-TDCAA	31,000	**32,000**	
Executive Prosecutor	National College	2,700	**3,000**	
Career Prosecutor	National College	400	**1,000**	
Advanced Criminal Law	State Bar	3,900	**5,000**	
Capital Murder	Council-TDCAA	16,700	—	
Child Abuse	Council-TDCAA	—	**17,000**	
Other		1,700	2,100	**+ 1,500**
Elected Prosecutor	TDCAA	—	10,300	

Calendar

PLEASE NOTE: Only courses printed in **dark type** are Council-approved professional development courses and are thus reimbursable for travel expenses. All others require prior Council approval by request of the attendee. **The Council does not approve reimbursement of travel expenses for out-of-state courses or for any course registration fees.**

MAY

3	Criminal Defense Institute: Rules of Evidence (CDLP)	Odessa
12-15	Abuse and Exploitation of Children (NCDA)	Chicago
31	**Prosecution of D.W.I. (TPC; limited reimbursement, see below)**	**Houston**
31-June 7	**Executive Prosecutor Course (NCDA)**	**Houston**

JUNE

2-8	Sexual Assault Awareness Week (see p. 43)	[Statewide]
7	**Prosecution of D.W.I. (TPC; limited reimbursement, see below)**	**Ft. Worth**
7-8	**Criminal Law Institute (SBT)**	**Dallas**
13-28	**Career Prosecutor Course (NCDA)**	**Houston**
14	**Prosecution of D.W.I. (TPC; limited reimbursement, see below)**	**Lubbock**
23-27	**Basic Prosecution Course (TPC/TDCAA)**	**Austin**
28	Criminal Defense Institute: Sex Crimes (CDLP)	Houston

JULY

21-26	World Prosecutor Section [Take a vacation! — Ed.]	West Berlin

AUGUST

5-9	**Advanced Criminal Law (SBT)**	**Fort Worth**
11-15	Annual Summer Conference (NDAA)	Seattle
TBA	**Prosecution of Child Abuse (TPC)**	**TBA**

CDLP-Criminal Defense Lawyers Project
NCDA-Nat'l College of District Attorneys
NDAA-Nat'l District Attorneys Association
SBT-State Bar of Texas
TDCAA-Tex. Dist. & County Attorneys Assoc.
TPC-The Prosecutor Council

LIMITED TRAVEL EXPENSES REIMBURSEMENT

Because limited funds are available, the Council will NOT reimburse travel expenses for any of the D.W.I. courses UNLESS your home base is located more than 150 miles from the nearest course location. In that event, reimbursement will be for a 24-hour period only (1 night's stay and up to 4 meals). See Appendix O, 1984 Annual Report for reimbursement policy.

NEW: A CIVIL MANUAL

At the TDCAA Civil Seminar in May the Council handed out new publications: a Contracts and a Real Estate section to the Council's developing Civil Manual, designed to cover prosecutorial civil responsibilities. Both sections were edited by Ella Tyler, Assistant Harris County Attorney. Copies are $5.00 for each section (see Council Publications, p. 49, to order).

PROSECUTION OF D.W.I. COURSE

The Council and the Texas Department of Public Safety are cosponsoring a course entitled **Prosecution of D.W.I.**

The course will include the techniques used by DPS to help prosecutors get convictions and will cover **Harnessing Community Support, Preparation of the Case, Trial, Meeting Common Defenses,** and **Final Argument.** (See Calendar, p. 42, for more information.)

The Houston presentation of the course was held May 31st. There will still be course presentations in:

FORT WORTH - June 7
RAMADA INN CENTRAL, 2000 Beach Street
817/534-4801
and

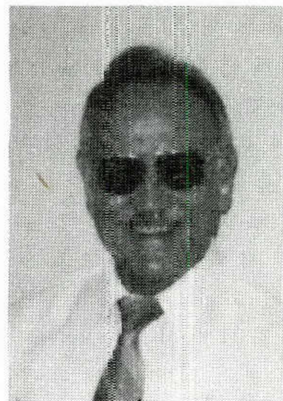
LUBBOCK - June 14
HILTON INN, 505 Avenue Q. 806/747-0171.

If you have not registered for the course you wish to attend, contact the Council by phone as soon as possible.

WORLD PROSECUTORS SECTION

The next World Prosecutors Section meeting (held every two years) will be in West Berlin, Germany, from July 21 to July 26, 1985. For more information, contact:

HARRY B. SONDHEIM, President
World Prosecutors Section
c/o Office of the District Attorney
849 South Broadway, 11th Floor
Los Angeles, California 90014-3570
Telephone: (213) 974-5911



Oscar Says

From Lee Iacocca's book, Iacocca: An Autobiography: "When you give a guy a raise, that's the time to increase his responsibilities. While he's in a good frame of mind, you reward him for what he's done and, at the same time, you motivate him to do even more. Always hit him with more while he's up, and never be tough on him when he's down. When he's upset over his own failure, you run the risk of hurting him badly and taking away his incentive to improve. Or, as Charlie Beacham [a mentor of Iacocca's at Ford Motor Company] used to say, 'If you want to give a man credit, put it in writing. If you want to give him hell, do it on the phone.'"

SEXUAL ASSAULT AWARENESS WEEK

The Texas Department of Health and the Texas Association Against Sexual Assault (TAASA) co-sponsor Sexual Assault Awareness Week June 2-8, 1985 to promote awareness, to emphasize citizen involvement and community support, and to publicize services.

TDH provides technical assistance and grant funds to rape crisis programs. Contact the Program Specialist, Sexual Assault Prevention and Crisis Services, Texas Department of Health, 1100 West 49th Street, Austin, TX 78756 (512/465-2601).

TAASA is an organization of rape crisis centers and others joined to provide Texas and its citizens with an authoritative source of sexaul assault information. Contact Vice-President of TAASA, c/o Rape & Suicide Crisis of Southeast Texas, P.O. Box 5011, Beaumont, TX 77706 (409/832-6530). □

Personnel Management:

Disciplinary Actions in a District Attorney's Office

By Patricia McNair

Patricia McNair, Bexar County Assistant Criminal District Attorney, Civil Section, is "guest" writer this issue. Licensed in Texas and New York, she has worked with the Bexar County Sheriff's Office to develop personnel policies and has handled TEC and EEOC litigation.

Under Article 326k-1 et seg., District Attorneys in Texas can hire assistants and others who are "removable at the will" of the D.A. However, at-will termination has been limited by the courts and by statutes. Courts outside of Texas have found an implied contract theory of good faith or fair dealing. This has led to damages for firings with bad faith or malice and for retaliation for refusal to commit an unlawful act or for whistle-blowing. Courts have also held employers conferred implied rights to employment by oral assurances or statements which mentioned a "permanent" status with dismissals only for good cause.

As recently as April, the Texas Supreme Court for the first time recognized a narrow exception to the at-will termination right. In Sabine Pilots Service Inc. v. Hauck (#C-3312) the Court overturned a summary judgment for the employer, allowing the employee to proceed to prove he was dismissed for refusal to perform an illegal act.

The statutes in this area which most affect a District Attorney's office are Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seg., the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seg., and Texas Employment Commission Rules, Art. 5221b, V.A.C.S. The District Attorney can defeat claims under these statutes **only** by production of written materials showing how the complained-of decision was reached.

Document any action (even counseling) fully and objectively in writing **at the time.** Have a **written** procedure, so you can show application of it is fair and uniform. If possible, have the employee sign and date the document to verify receipt of a copy.

In any employee policy or handbook, include disclaimers to protect the at-will termination right, such as: "Employment is for an indefinite period and is at-will for both employer and employee. Employer may discharge for any reason not prohibited by law. These policies do not constitute an employment contract and the employer reserves the right to amend these policies unilaterally and without notice." Do not refer to a non-probationary employee as a "permanent" or "tenured" employee.

In any disciplinary notice, state that any future violation may result in severe action, even dismissal. TEC examiners look for this to see if the employee received notice. Exit interviews and properly-worded resignations show the employee left voluntarily.

In short, your disciplinary process may need overhauling. Be aware of the limitations on at-will dismissals and the absolute need for documents to show equal treatment.

The Hot Check Fee Law

The sheet opposite is an addition to the Council's Hot Check Manual as pages II-4a & b. It comes from the manual editor, Kerry Armstrong.

CUT HERE

CC Art. 23.04 Capias in Misdemeanor Case

MAIN OFFICE

(1) The review clerk/investigator in preparing the case also prepares (fills in the blanks) an Affidavit for Probable Cause for Issuance of Capias (PCA) and an Order for Issuance of Capias, (Order) and forwards them to the investigator.

(2) The investigator verifies information in the Affidavit so that he may swear to it as having received the information from the I.P.'s Affidavit.

(3) The forms and all other instruments are given to the filing clerk for entering on computer. The case is filed; the case number is entered upon the Order.

(4) The PCA and the Affidavit of Complaint is signed and sworn to by the investigator and signed by the Assistant D.A.

(5) All filing papers and the PCA are taken to one of the County Criminal Judges for signing of the Order.

(6) The Order, the PCA, the Complaint and the Information are filed with the county clerk. The Capias is issued normally as a result of the Judge's Order.

(7) The Capias is taken to the Sheriff's Office. Normal procedures follow.

SUB-OFFICES

(1)-(3) Same as steps (1)-(3) for the Main Office.

(4) The APC is signed and sworn to by the on-site investigator and Asst. D.A.

(5) The investigator brings all papers, checks, etc. to the main office and waits for the filing clerk to print out cases on the computer terminal.

(6) The investigator signs and swears to the complaint affidavit and it is signed by the Asst. D.A.

(7)-(9) Same as steps (5)-(7) for the Main Office.

* * * * *

STATE OF TEXAS *
                                   * ORDER FOR ISSUANCE OF CAPIAS
COUNTY OF TARRANT *

TO THE COUNTY CLERK OF TARRANT COUNTY:

The undersigned County Criminal Court Judge of Tarrant County, Texas, having been presented the attached "Affidavit of Probable Cause for Issuance of Capias", which is incorporated herein by reference for all purposes, and having found from said affidavit that probable cause exists for the issuance of a Capias pursuant to the Texas Code of Criminal Procedure, Articles 23.01-23.04, hereby orders the issuance of a Capias pursuant to said Articles for the arrest of ________________, hereinafter referred to as "Suspect", to answer the State of Texas for an offense against the penal laws of said State, to wit: ________________; of which offense said suspect stands accused by said affidavit and by cause number ______ filed in the Tarrant County Criminal Court Number _____.

WITNESS my official signature this the _____ day of __________, A.D. 19 ___.

____
Presiding Judge

STATE OF TEXAS *
*
COUNTY OF TARRANT *

AFFIDAVIT OF PROBABLE CAUSE
FOR ISSUANCE OF CAPIAS

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who after being by me duly sworn on oath deposes and says: My name is ___(Name and Agency)___ and I have good reason to believe and do believe that on or about the _______ day of __________, 19 ___, in Tarrant County, Texas, __________ did then and there commit the offense of __________, a Misdemeanor.

My belief is based upon the following facts and information:

______________________, did on the _____ day of _____________, 19 ___, advised this affiant by sworn affidavit of the following:

(1) That on the ______ day of __________, 19 ___, ___(Suspect)___ passed to ___(Victim)___, hereinafter referred to as Injured Party, a check for the payment of money in the amount of $ for ______.

(2) That said injured party duly presented said check to suspect's bank within 30 days after it was issued and said check was dishonored as ___(Account Closed; Insufficient Funds, etc.)___ by the bank.

(3) That said suspect has never paid the injured party in full for said check.

(4) That said injured party did not consent to the suspect's obtaining the above property or services without receiving payment for same.

(5) (Other)

WHEREFORE, I request that a capias be issued for the suspect hereinafter designated according to the laws of this State.

WITNESS my signature this the day of , 19 .

____
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this the _____ day of _______, 19 _.

____
Assistant District Attorney
Tarrant County, Texas

CUT HERE

TPC-HM 5/85 (TB)

Investigative Techniques:

Terrorist Incidents

By Arthur E. Gerringer

Arthur E. Gerringer, Criminal Investigator for the 35th Judicial District Attorney's Office, is also Director of the Institute for Strategic Studies on Terrorism. He has authored two books and numerous articles on terrorism and is the founder and President of Inter-Sec, a security firm specializing in executive protection and counter-terrorist risk assessments and surveys.

Without a doubt, Texas has its share of terrorism. No less than twenty organizations are active within the state. In fact, there are more members of the Palestinian Liberation Organization (PLO) in Texas than in any other part of the nation. There are also large numbers of Iranian and Syrian Shi'ite Moslems in this state. Explosive materials contained in a detonated device in New York were stolen by a hispanic group in Texas. The A.M.E.R.I.C.A.N. Army has carried out attacks against rail transport and utility corporations in North Central Texas. Other organizations such as the Posse Comitatus, Ku Klux Klan, and Aryan Nations are active here, to mention only a few.

Who are terrorists? How do they organize and what type of training do they undergo? How do they select targets?

Based on interviews and police reports, a profile has emerged. Years ago the majority of terrorists were male but now more and more participants are female. The typical terrorist is a college graduate between 22 and 27 years of age and from an upper-middle- to upper-class family. This individual is very concerned with "where we are going," but due to the nature of his/her views, the person feels compelled to take assertive, radical steps to effect change.

The types of attacks most utilized are bombings, assassinations, kidnappings for ransom, bank robberies, and aircraft hijackings. The preferred target is one having the lowest degree of risk and the highest degree of impact. Aircraft hijackings are used to gain massive news coverage or the release of imprisoned comrades. Kidnappings and robberies are used to obtain funds; in the past twenty years terrorists have collected over $100,000,000 in ransoms. Assassinations are used for the target's impact upon military, government, or corporate structures. Bombings show the power of the terrorist group and the vulnerabilities of society. Phases of the operation (material acquisition, intelligence, and the actual attack) will often be carried out by separate "cells" of the organization to maintain security. Overall, terrorism is intended to generate massive fear, cause governmental overreaction, and demonstrate that government is impotent to protect the public.

Unlike many other nations, the United States does not have specific statutes to deal with terroristic criminal acts. Consequently, statutes covering crimes such as aggravated kidnapping, extortion, weapons violations, and others must be applied.

The Pre-Incident Investigation

Pre-incident activity must be devoted to collection of information and interdictive counter operations. Surveillance may reveal the identities of members, sources of funds, and front organizations. Through the group's publications and other documents the ideology and goals of the group can be established as well as providing leads to other support organizations. Surveillance

may identify safe houses, automobiles employed, weapon storage, and other cells of the organization. This could reveal prior actions, methods of operation, or future targets. The examination of reports of weapon thefts, explosives, and other crimes could also provide valuable information.

The Precipitation of an Incident

When the police or sheriff's department is notified of an incident in progress, the collecting and analyzing intelligence should begin. This information will deal with the physical location of the incident, the civilians, the terrorist group involved, and the particular members of the group involved in the execution of the incident.

Whenever possible the scene of the incident or at least the associative areas should be processed for physical evidence, to prevent contamination or loss. For example, prior to the incident being contained, certain events may have taken place at other locations en route to the final location.

Frequently, the investigator will be able to interview persons (including police) who were for a length of time within the control of the terrorists or in the incident area. They may provide information about the location, number of and/or mental states of actors, weapons, civilians, and other particulars.

If possible, an investigator should still photograph the scene, individuals involved, equipment positioned, etc. Photographs can tie a particular actor to a specific action or counteraction. Ideally, video equipment should be used to record the events. A good videotape is a great help to investigation and prosecution, as well as a highly effective training aid. Equipment to record telephone and radio conversations and negotiation conversations would also be useful. Lastly, a chronological log of activity would be of immense value.

Since such a volatile and newsworthy event will attract significant attention, the agency in command will have to deal with reporters while maintaining tight security. Needless to say, media coverage can be a boon or a bane to the law enforcement agency, personnel, and the profession.

Post-Incident Procedures

Prosecution may transfer to the Federal arena. Even if it does, local investigators must finish their final report, since criminal charges will still be available to the State. On the other hand, Federal authorities may decline prosecution in favor of the State.

There should be comparative analysis of weapons, bullets, empty shell casing, documents, and writing samples. Weapons, explosive materials and the like should be traced even though there is a strong possibility of no results, as the materials were likely purchased on the black market.

With perpetrators in custody the prosecutors may wish to approach the court for a gag order. This precludes the release of information and possible tainting of proceedings. The investigators will return to participants and obtain in-depth statements and talk with prospective witnesses as to their testimony. The process of identifying the actors and tracing their movements, prior actions, and associations continues. Evidence submitted for laboratory examination should be processed and securely stored for trial. The investigators must construct a witness and knowledge list so that the prosecutor can organize his trial presentation. Finally, videotapes, photos, recordings, statements, physical evidence, and time logs should be compiled into a detailed and chronological report.

Granted, these procedures are similar to those carried out on any felony investigation. But many factors make terrorist incidents unique: the rapidity of the incident; the number of perpetrators and law enforcement personnel; the number of hostages and witnesses; weaponry; the clandestine nature of associations, acquirements, and movements; and the massive pressure and public attention. It is guaranteed that ninety-nine percent of all investigators who do get involved never have been confronted with the enormity of a terrorist action.

Of course, no amount of reading is a substitute for the learning experience of an actual confrontation. The real keys are calm mental processing, assignment of responsibilities, and professional execution of duties. □

Council Publications

NEW!

TECHNICAL MANUALS

CIVIL MANUAL - Contracts and Real Estate. Each section on civil responsibilities includes sample forms. Contracts covers a county's authority to contract, constitutional and statutory provisions, competitive bidding, and much more. Real Estate discusses the county as Buyer, Seller, Lessee, and Lessor, including mineral leasing, notices, orders, and more. Edited by Ella Tyler, Assistant Harris County Attorney. $5.00 each section.

ELEMENTS MANUAL - The elements the prosecutor must prove to get a conviction. $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 - **Newly Updated!** 300 pgs. on informations & indictments. Black letter law with annotations, forms, & checklist of recurring problems. Edited by Marvin Collins, Assistant Criminal District Attorney of Tarrant County. $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 & handling.

Technical Manuals	Quantity	Price
[ ] Civil Manual - Contracts	_____	_____
[ ] Civil Manual - Real Estate	_____	_____
[ ] Elements Manual	_____	_____
[ ] Grand Jury Packet	_____	_____
[ ] Guide to Report Writing	_____	_____
[ ] Hot Check Manual	_____	_____
[ ] Indictment Manual	_____	_____
[ ] Investigators Desk Manual	_____	_____
[ ] Reciprocal Child Support	_____	_____

Public Information Pamphlets	Quantity	Price
[ ] Assistance for Victims of Violent Crime	_____	_____
[ ] D.W.I.	_____	_____
[ ] Guide to the Prevention of Sexual Assault	_____	_____
[ ] Hot Checks	_____	_____
[ ] Information for Victims and Witnesses	_____	_____

TOTAL (PAYMENT ENCLOSED): _____

Name ______________________ Office ______________________

Address ______________________ City __________ State ____ Zip ________

Audio Visual Loan Library

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

Professional Development Training

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

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

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

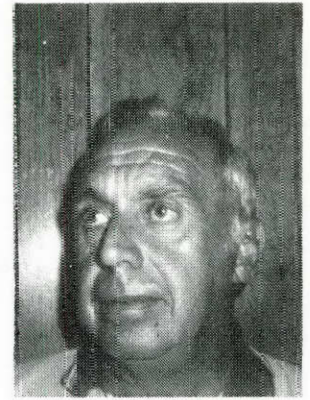
BEATING THE BURGLAR - Crime prevention techniques to use at home. Useful for all age groups. 12 minutes. Color slides and audio cassette.

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

KENNETH R. EPLEY



Ken Epley is the new Lay Member on the Council, appointed by Governor Mark White on March 11. A San Angelo resident, Mr. Epley is the President and owner of Epley Enterprises, Inc., a drilling tools company with world-wide distribution. He also owns Epley Oil Well and Machinery Company.

Mr. Epley grew up in Tennessee, earning his B.B.A. from East Tennessee State University in Johnson City. He has completed various other management training, including a special President Short Course Financial Planning M.B.A. at Harvard. He served 4 years in the Air Force, reaching the rank of Lieutenant.

A long-time servant of his community, Mr. Epley belongs to the Board of Directors of the Texas Association of Businesses. He is the Vice-President of the San Angelo Manufacturer's Association and the Chairman of the San Angelo Lake Board. In addition, he has served on numerous committees concerned with bettering the business climate in Texas, including serving as a director on the board of the Texas Association of Business and as Chairman of its West Texas Chapter.

An active member of the Park Heights Baptist Church, he has served as Chairman of three different Committees: Finance, Budget, and Insurance.

Children are obviously close to his heart. He has worked closely with the Children's Emergency Shelter and the San Angelo City Board of Development. A supporter of the Boy Scouts, he and his wife Virginia have two sons: John, 20, and Mike, 17.

The Sherlockers

J. R. "JIMMY" JONES

J. R. "Jimmy" Jones, Brazoria County District Attorney's Investigator, has been a difficult man to get for this column. Seems he's not one for publicity. But he sure is for law enforcement: he's spent all but six months of the last 30 years working in it.

A 1954 graduate of Angleton High School, he began his career with the Angleton Police Dept. on Sept. 15, 1955, as a parking meter inspector. After two months he was moved to night patrol duties.

In the early years he worked as a dispatcher for the Sheriff, then left for a time for a lucrative job in a local welding company. But that job did nothing to satisfy his fascination with law enforcement, and six months later he resigned to become a patrolman with the Clute Police Department. He worked up to sergeant, and became acting police chief when the chief resigned.

He rejoined the Brazoria County Sheriff's Office as a patrolman for the Brazosport area, then soon transferred to the Identification Division, where he worked as an assistant. He was promoted in 1959 to investigator in the sheriff's Criminal Investigation Division.

Congratulations are in order. J. R. was recently named Brazoria County Peace Officers Association Officer of the Year for 1984. (That's the plaque he received.) Keep it up, J. R.!

NTSU LIBRARY

Classifieds

Smith County has an immediate opening for a **Chief Misdemeanor Prosecutor** with at least 1 year 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.

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.

National District Attorneys Association: Project Director, Victim Assistance Grant. Responsible for managing technical assistance teams and preparing final team reports. Also responsible for preparing publications to assist prosecutors who have victim units and for increasing the awareness of those who have not developed such units. Successful candidates must have a minimum of three years experience in prosecution and have worked closely with a prosecutor-based victims program. Excellent writing and oral communication skills are a must. Salary: Up to $40,000 depending upon experience. Resume with salary history and references to: Jack Yelverton, NDAA, 1033 N. Fairfax Street, Suite 200, Alexandria, VA 22314.

National District Attorneys Association: Research Assistant, Victim Assistance Grant. Works under the direct supervision of the Project Director (see above). Prepares monographs and victims publications, writes news articles on victim assistance, compiles and updates directory of prosecutor-based victim assistance units, and assists in the planning and managing of victim-oriented training conferences. Successful candidate must be experienced in the delivery of victim services, have a good working knowledge of prosecutor offices, and possess excellent writing skills. Salary: Up to $27,500 depending upon experience. Resume with salary history and references to: Jack Yelverton, NDAA, 1033 N. Fairfax Street, Suite 200, Alexandria, VA 22314.

The Prosecutor Council
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