TRUE BILL

THE NEWSLETTER OF THE PROSECUTOR COUNCIL
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☑ ELECTION RESULTS

BARBER, CURRY WIN COUNCIL POSTS

The Honorable Tim Curry, Criminal District Attorney for Tarrant County, was re-elected to the Place 4 position on the Prosecutor Council. The Honorable Patrick D. Barber, Mitchell County Attorney, was elected to a first term in Place 1 (see related profile, p. 28).

On October 31, 1983, 318 ballots were mailed to the state's incumbent elected prosecutors. By the deadline of November 20, 156 were returned. The results were as follows:

Place 1	# Votes	Write-ins
Patrick D. Barber	99	
	53	Tom Wells
	1	Terrell Mullins
Blanks	3	

Place 4	# Votes	Write-ins
Tim Curry	146	
	1	Tom Wells
	1	Paul Finley
Blanks	8	

In This Issue

The Director's Corner

by Andy Shuval

This issue contains articles on the National Sentencing Conference and on the Criminal Justice Councils (Policy and Coordinating). Being involved in both areas, I want to keep you prosecutors informed on what is going on.

Too often prosecutors find out the policy in an area too late to affect its making. It is said that two things you never want to see is the making of sausage and the making of policy. Like sausage, policy is difficult to change after it is mixed and stuffed into a casing.

For this reason, it is important that you communicate your views on various policy issues in the criminal justice system. TRUE BILL will keep you abreast of the areas under discussion.

I, in turn, promise that I will be frank with you about the truth. Each of you is a practical politician who has successfully met the challenge of addressing the world as it is, rather than as you would like it to be.

In my reports to you on the work of the bodies on which I will be serving, I will inform you of the issues and the feelings of the organization. In that way, you will be able to make intelligent decisions when you take policy positions.

But please, in order to inform my fellow members of your view I need to hear from **you.** Call or write. Let me know your feelings on judge sentencing vs. jury sentencing and the right of the defendant to choose which -- as well as other issues as they come up.

Together we can be an effective source of information to the criminal justice system, but it takes both of us. Jump on me if I don't hold up my part.

Happy New Year!

Andy

Criminal Justice Policy Council and Coordinating Council Organized

These two state bodies were recently appointed and the Coordinating Council held its first meeting in December.

As reported in The Texas Prosecutor, Cappy Eads, District Attorney for the 53rd Judicial District (Belton) was appointed by Mark White to the Policy Council and Anita Ashton to the Coordinating Council. In addition, Andy Shuval, is a member of the Coordinating Council as Executive Director of the Council. It is the duty of the Policy Council which is composed of appointees of the Governor, Lieutenant Governor and Speaker of the House to set the Criminal Justice Policy for the State. It is the job of the Coordinating Council to be a resource for the Policy Council providing information, staff resources, and suggestions. It is hoped that in this way, the State can come up with a unified and effective criminal justice program.

One of the first tasks of the Policy Council will be to appoint a sentencing commission to review state sentencing policy and make recommendations.

Prosecutors Represented at National Sentencing Conference

A National Conference on Sentencing will be held in Baltimore, Maryland on January 18-20, 1984. The purpose of the conference, which is under the auspices of the United States Department of Justice and its National Institute of Justice, is to share the results of sentencing reform efforts undertaken by the various states in the last ten years.

The Texas delegates are:

Tom Davis, Judge, Court of Criminal Appeals
Ray Farabee, State Senator
Larry Gist, Chief Judge, District Court of Jefferson County
Gilbert Pena, Executive Director, Criminal Justice Division, Governor's Office
Charles Shandera, Executive Director, Criminal Justice Policy Council
Andy Shuval, Executive Director, The Prosecutor Council

This conference is important, as Texas is just beginning to review its sentencing procedures. You'll remember that in 1982 Governor Clement's Blue Ribbon Commission recommended judge sentencing. There are presently two bodies looking into sentencing policy and procedure. One is a joint house-senate committee and the other is a sentencing commission to be appointed by the Criminal Justice Policy Council (see article in this issue).

Obviously, any suggested changes are important. TRUE BILL will keep prosecutors advised of the work of these groups.

HAVE YOU RETURNED YOUR QUESTIONNAIRE?

In December each elected prosecutor, assistant prosecutor and investigator should have received an Education Needs Questionnaire, designed to get your thoughts on improving the Council's professional training, including the Basic Prosecution Course, the Investigators' School, and other courses. No postage is required on the self-addressed envelope.

If you haven't responded, please take a few minutes to do so today. Let us know what would serve your office's needs and help you do your job more effectively.

DEADLINE FOR TRAVEL REIMBURSEMENT EXTENDED

In September, the Council approved a new travel reimbursement policy. (See TRUE BILL, Oct.-Nov. 1983, p. 1). According to policy, all reimbursement requests should be received within 60 days of the date of the course attended. Because this policy is relatively new, **the deadline** for receiving reimbursement requests for expenses incurred in attending the TDCAA Annual Criminal Law Update in Fort Worth last September **has been extended to TUESDAY, JANUARY 17, 1984.**

Note also that this is the deadline for reimbursement requests in regard to the Council Seminar "How to Win Adult Sexual Assault Cases" held November 17th in San Antonio.

Don't Forget: A late request will not receive consideration until the end of the fiscal year. Reimbursement will be contingent at that time upon the availability of funds—if any!

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

Diet and Criminal Behavior

by Barbara Reed, PhD

Barbara Reed, PhD., is a former Chief Probation Officer of the Municipal Court of Cuyahoga Falls, Ohio. She authored the books Food, Teens and Behavior and Nutritional Guidelines for Correcting Behavior, both available from Natural Press. She and her husband, Paul Stitt, M.S., conduct seminars and training sessions for prosecutors, corrections workers, judges, and lawyers. Contact them through Natural Press, P. O. Box 2107, Manitowoc, WI 54220, (414) 682-0738.

Editor's Note: The release of Dan White, former San Francisco Supervisor (city councilman) makes this article newsworthy. White, you recall, killed Mayor Moscone and Henry Milk, an avowed homosexual. His defense, later known as "the Twinkie Defense," was that junk food created a chemical imbalance in his system, resulting in a diminished mental capacity. This article introduces you to the scientific basis for this defense.

Through the ages, criminal behavior has been ascribed to many factors: demonic possession, poverty, a bad home life, genetic inheritance, and so on. But recent advances in neurochemical research, along with clinical experience spanning decades, are bringing about a new understanding of such behavior—an understanding which focuses on the chemical composition of the brain and how it can be adversely impacted by poor diet.

William Walsh, an analytical chemist at Argonne National Laboratory, spent 17 years collecting data on prison inmates through analysis of the composition of their hair. He discovered that inmates with certain violent behavior patterns show imbalances of essential minerals. He found he can distinguish between violent and nonviolent subjects with a high degree of accuracy simply by referring to their hair anaylsis data.

Judith and Richard Wurtman of the Massachusetts Institute of Technology demonstrated that a single meal can change the chemical composition of the brain. Richard Wurtman told USA Today, "Ultimately, we will see some food chemicals being used as drugs to treat mental and physical illness."

Diet therapy was dramatically demonstrated by Stephen J. Schoenthaler, Ph.D., Director of Social Justice Professions at California State College-Stanislaus. He found that antisocial behavior resulting in formal disciplinary actions was reduced 48% among a sample of 276 incarcerated juveniles—a reduction achieved by lowering the amount of sugar in the juveniles' diet.

My experience with the link between diet and behavior stems from my work as Chief Probation Officer of the Municipal Court of Cuyahoga Falls, Ohio. A number of my probationers exhibited serious physical symptoms as well as emotional disturbances. For instance, many first-time shoplifters suffered from anemia, thyroid problems, early menopause, etc. Since my health at age 33 had been very poor and had responded well to an improved diet, I suspected that improper nutrition might be a problem with these offenders as well.

In 1972 my department began administering to probationers a written test for hypoglycemia — low blood sugar, which can produce severe emotional and physical symptoms in certain individuals. Of the first 106 tested, 82% indicated 15 or more symptioms of hypoglycemia, and 33% checked more than 25 symptoms. The more out-of-touch with reality the person seemed to be, the higher the number of symptoms that person checked. Those reporting a high number of symptoms tended to be abusers of

alcohol, drugs, sweets, coffee, tobacco, and/or soda pop.

Persons complaining of physical symptoms were evaluated for hypoglycemia, allergies, toxicities, etc. Those diagnosed with problems were placed on a diet balanced in fresh lean proteins, fresh vegetables, whole grains, fresh fruits and low in refined carbohydrates. The diet forbid stimulants such as caffeine and depressants such as alcohol; exercise and nutritional supplements were recommended.

The results were encouraging. Judge James Bierce told CBS News: "I have seen the improvement in the people who come before me after being put on a nutritional diet. Their demeanor and appearance changed and they became law-abiding citizens. Many of them probably would not have been in court the first time if they had been on a proper diet."

Judge William B. Pike wrote: "She brought me cases. . .where I saw almost miraculous, dramatic changes in these people, not only in their habits, not only in their attitude, but in their appearance. . .We need to find some type of solution to increased criminal activity and I think we have found a part of it."

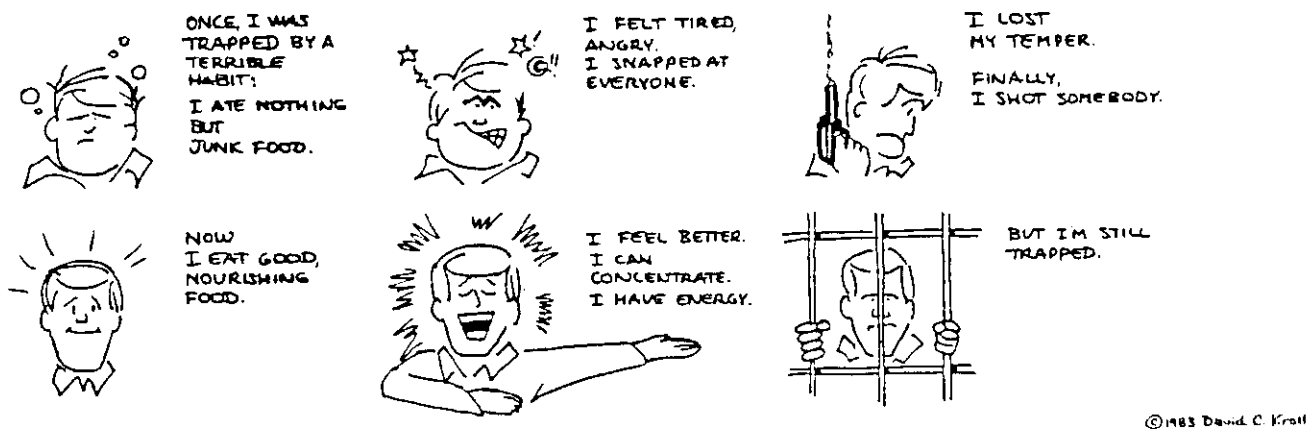
I must stress that my use of dietary correction was part of a probationary program, not a scientific study. Nevertheless, I know of no probationer who stayed with the program who got in trouble with the law again.

The dietary approach has also been successfully used by others. In one study, criminologist Alexander Schauss supplemented the standard counseling given to a group of probationers with nutritional counseling, and compared their recidivism rate with that of a control group which received only standard probation counseling. The experimental group was told to eat less sugar and white flour and to eat foods higher in vitamins and complex carbohydrates. Schauss found the probationers who got nutritional counseling to be only half as likely to be rearrested as those who did not.

What does this mean for the field of criminal justice? It means a new insight into what causes persons to commit antisocial acts. Certainly we cannot ignore other factors—bad home life, an unhappy childhood—but a person's diet can have a critical impact on the health of his central nervous system and his ability to cope with environmental stresses.

It has been argued that affirming a link between diet and behavior is dangerous because it removes responsibility from the individual. I find it difficult to fathom this criticism. Since the quality of behavior depends in part on the brain and central nervous system, then we can no more expect a person with a diet-related imbalance to behave normally than we can expect someone with advanced muscular dystrophy to run normally. We do not neglect to treat muscle disease on the premise that we don't wish to absolve a person of the responsibility for running; why should we neglect the treatment of any possilbe brain imbalances and simply urge an offender to be more "responsible?"

Most importantly, I feel this approach gives the means to reform an individual. Previous "medical models" often did little more than pigeonhole offenders into diagnostic categories and administer incapacitating drugs. Diet therapy, however, can help return an individual's metabolism to a normal state. While the approach may not work for all, and while it cannot supplant other forms of therapy, the successes indicate we may be on the threshold of a breakthrough in criminal corrections. □



the Grand Jury was a part of the judiciary and thus not subject to the Open Records Act (Art. 6252-17a, §2(G) V.T.C.S.). Secondly, irrespective of whether the Grand Jury is subject to the Open Records Act, Section 3(a)(1) would exempt such reports and testimony, since under the Code of Criminal Procedure, Grand Jury proceedings are secret.

Open Records Decision 399

Re: Attorney's Fees

A request to see vouchers, expense sheets and the like for attorneys' fees incurred by a municipality was denied pursuant to Section 3(a) (information deemed confidential by law) as being protected from public disclosure by the attorney-client privilege.

Open Records Decision 400

Re: Investigation into Public Employee Misconduct; "False Light" Privacy

This decision involved whether an investigation into possible illegal and improper activity by a city employee should be made public. At the outset, the Attorney General noted that Section 14(a) applied, providing that if material is voluntarily released to anyone, it becomes public information. Thus, when the city made the report informally available to one requestor, it waived any right it might have to exempt the material as inter or intra agency memorandum (Sec. 3(a)(11)). More importantly, the Attorney General again discussed the "false light" privacy exception of Sec 3(a)(1). (See ORD 372 as reported in TRUE BILL, June July, 1983 and ORD 308.)

The "false light" privacy exception comes into play when (1) there is good reason to believe the information is not true, (2) the information must be highly offensive to a reasonable person, and (3) the public interest in disclosure must be minimal. This opinion points out that the latter two prongs must both be met; it is not a balancing test. The Attorney General found that the public had a "compelling interest" in knowing of allegations about the manner in which public officials do their jobs. The fact that the allegations were proven to be unfounded should be part of the public record which is released.

Sidenotes

Re: Admissibility of Breath Test Refusal

As all of you are aware, the new D.W.I. law which takes effect on January 1, 1984, allows for the introduction of a defendant's refusal to take a breath test (in this TRUE BILL see the warnings required by VTL 6701L-5). There have been two Court of Appeals cases in the past several months (State v. Gressett, 05-82-00493-CR, decided 7/14/83, 5th Ct. of App.; State v. Ashford, 06-82-063-CR, decided 8/30/83, 6th Ct. of App.) which held that in view of the U.S. Supreme Court's holding in South Dakota v. Neville, 103 S.Ct. 916 (1983), a refusal to take a breath test is admissible. The rationale for these holdings was that the Texas Court of Criminal Appeals cases which held to the contrary (Dudley v. State, 548 S.W.2d 706, Tex.Crim.App. 1977; Sutton v. State 548 S.W.2d 720, Tex.Crim.App. 1977; Birdwell v. State 510 S.W.2d 347, Tex.Crim. App. 1974) were based upon the premise that the introduction of such a refusal violated a defendant's Fifth Amendment rights, an assertion which Neville decides to the contrary. It is unclear whether the Texas Court of Criminal Appeals will now find there are independent state grounds (founded on the Texas Constitution's right against self incrimination) for holding such refusals inadmissible is anybody's guess. However, all prosecutors should be aware of the Gressett and Ashford decisions and avail themselves of both when appropriate. □

New DWI Forms

The forms opposite are based on documents drafted by Legal Services of the Department of Public Safety. They are designed to help law enforcement officers comply with the new DWI law requiring certain warnings to be given to intoxicated drivers at the time that a request is made for a breath or blood specimen (Art. 6701L-5, V.T.C.S.). Local prosecutors may wish to provide copies to those law enforcement agencies requesting assistance in this new area of law.

DWI STATUTORY WARNING

Date _____

Time _____

Place _____

_____, _____, _____

Full Name of Suspect (print or type) | Drivers Lic./I.D. No. or None | Date of Birth

You are under arrest for the offense of Driving While Intoxicated. I request that you submit to the taking of a specimen of your **Breath/Blood** (strike one) for the purpose of analysis to determine the alcohol concentration or the presence of a controlled substance or drug in your body.

If you refuse to give the specimen, that refusal may be admissible in a subsequent prosecution. Your drivers license, permit, or privilege to operate a motor vehicle will be automatically suspended for 90 days after notice and a hearing, if requested, whether or not you are subsequently prosecuted as a result of this arrest. If you do not possess a license or permit to operate a motor vehicle, you may not be issued a license or permit to operate a motor vehicle for a period of ninety (90) days after notice and a hearing, if requested. Further you have the right within twenty (20) days after receiving written notice of a suspension or a denial of a license or permit to request in writing a hearing on the suspension or the denial.

I certify that I have orally informed you of the consequences of a refusal and have provided you with a complete and true copy of this statutory warning.

Signed _____
(Officer)

I have requested that you give a specimen of your **Breath/Blood** (strike one). I have informed you of the consequences of not giving a specimen. You have refused to give a specimen. I request that you sign this statement indicating your refusal.

Signed _____
(Suspect)

I certify that the above named individual was duly admonished as to the consequences of his/her refusal to give a specimen of **Breath/Blood** (strike one). He/She refused to give a specimen and he/she further **signed/refused to sign** (strike one) the statement set out above when requested to do so by this officer.

Signed _____
(Officer) Badge No. or ID.

Department _____

Address _____
Street (P. O. Box) City State Zip Code

(This form must be attached to **REPORT OF REFUSAL TO GIVE SPECIMEN.**) TPC 12/83

Adapted from forms prepared by the staff of Legal Services, Dept. of Public Safety

CUT HERE

REPORT OF REFUSAL TO GIVE SPECIMEN

STATE OF TEXAS
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____ to me well known and known to me to be a credible person, who having been by me duly sworn, deposed and said:

My name is _____, and I am a duly constituted Law Enforcement Officer.
(Print or Type)

This is to certify that I arrested _____

Home address _____
Street City State Zip Code

Drivers License/
I.D. No. or None _____, Date of Birth _____, on the _____ day of _____

19 ___, at _____, _____ County, Texas. Upon making the arrest, I duly requested this person to give a specimen of his/her breath or blood for the purpose of analysis to determine the alcohol concentration or the presence in his/her body of a controlled substance or drug. This person was informed both orally and in writing as to the consequences of his/her refusal to give a specimen as set out in detail in the attached document, **DWI Statutory Warning** which is hereby specifically incorporated by reference for all purposes, as if written and copied herein. Subsequent to and immediately after said request this person refused to submit to such test.

It is further certified that prior to the arrest I had reasonable grounds to believe, and do believe, that this person was driving or in actual physical control of a motor vehicle upon the public highways or upon a public beach in this State while intoxicated. Facts in support of this belief are:

_____
Name Badge or I.D. No. Department

_____
Street or P. O. Box City State Zip Code

Sworn to and subscribed before me this _____ day of _____, A.D., 19 _____.

_____
Notary Public in and for _____
My Commission Expires _____ County, Texas

(**DWI STATUTORY WARNING** completed at time of refusal must be attached.) TPC 12/83

Adapted from forms prepared by the staff of Legal Services, Dept. of Public Safety

CUT HERE

Significant Decision

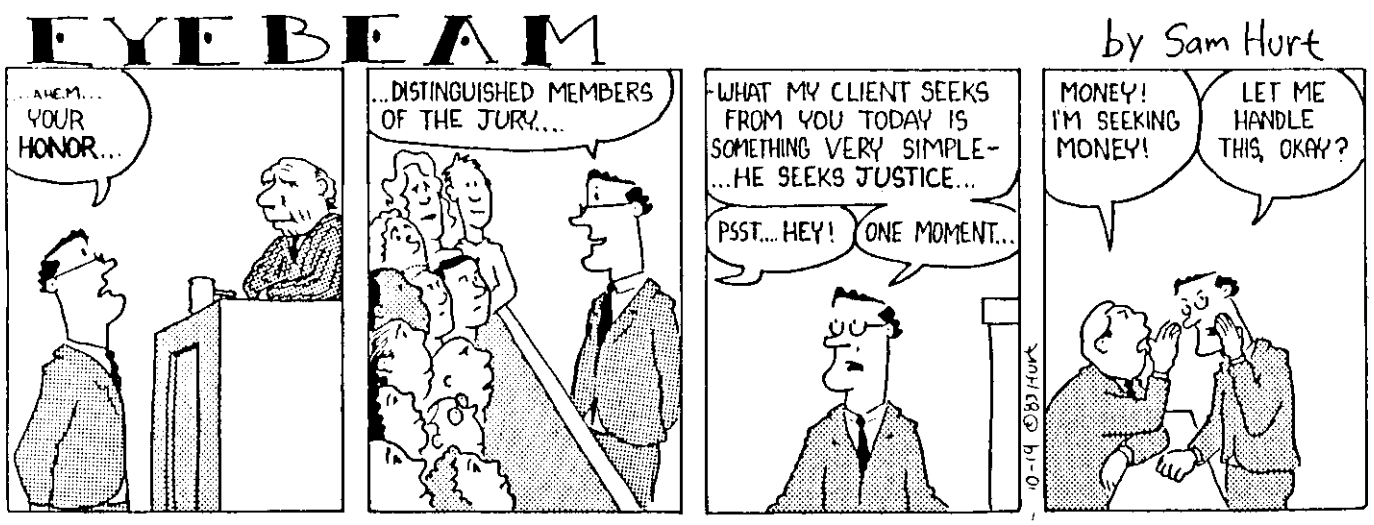
On December 14th, as TRUE BILL went to press, the Court of Criminal Appeals issued a decision in regard to the judicial role in plea bargaining:

THE STATE OF TEXAS EX REL. TRAVIS B. BRYAN, III
v.
THE HONORABLE W. T. MCDONALD, JR.
No. 69,137

Travis Bryan, then District Attorney of Brazos County, sought an application for a writ of mandamus and a writ of prohibition to prevent Judge McDonald from examining pre-sentence reports and sending out his court's "offer" before the judge had determined the guilt or innocence of the defendant.

The Court said in its decision:

> "In addition to the lack of statutory authority for the inspection of pre-sentence investigation reports prior to a determination of guilt, it is well to note, as we have in the past, Canon 3(A)(4) of the Code of Judicial Conduct of the Judiciary of the State of Texas which provides:
>
> 'A judge should neither initiate nor consider ex parte or other private communications concerning a pending or impending proceeding.'
>
> See Ex Parte Shuflin, 528 S.W.2d 610, 617 n.2 (Tex.Cr.App. 1975).
>
> The inspection of the pre-sentence reports prior to determinations of guilt is also violative of due process. See Art. 1, Sec. 19, Texas Constitution and the Fourteenth Amendment to the United States Constitution. Wholesale evidence, almost always of a hearsay nature, not sworn to and not subject to the rigors of cross-examination, is obviously considered by the trial court under the system in question as a matter of course before a plea is even entered."



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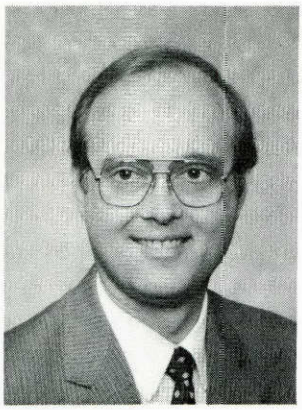

As The Judges Saw It:

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

This column covers the Courts' cases for October and November of 1983. First, a short quiz. (Answers, pg. 19.)

1. In order to rely on the co-conspirator exception to the hearsay rule, must the State have a conspiracy count in its pleading?
_____ Yes _____ No

2. An exception to the "four corners rule" for reviewing affidavits appears in Franks v. Delaware, 438 U.S. 154. If the affiant (usually the police officer) either intentionally, knowingly, or recklessly makes false statements in the affidavit, those false statements will be disregarded in assessing probable cause. What if the police officer accurately places in the affidavit what his informant told him, but the informant has lied to the officer? Are the false statements of the informant to be disregarded?
_____ Yes _____ No

3. If the accused does not testify at either guilt/innocence or punishment, may the prosecutor properly argue that a person isn't a fit candidate for probation unless he accepts his responsibility for the crime and admits his guilt?
_____ Yes _____ No

4. Suppose the accused files a formal bill of exceptions in order to show what occurred at trial and preserve his error for appeal. If the trial judge takes no action on the bill, are the statements in the bill taken as true or are they taken as false?
_____ True _____ False

5. If the accused files a motion for new trial alleging jury misconduct, does the motion itself always have to be sworn to?
_____ Yes _____ No

6. Suppose the accused has filed a proper motion for new trial which would entitle him to a hearing. The State has not filed any controverting pleading. May the State still offer evidence at the hearing in opposition to the accused's proof?
_____ Yes _____ No

RECENT DECISIONS

The Court decided a trio of Speedy Trial Act cases in October. One case is significant for its holding, which is very helpful for the State. All of them contain dicta which, if followed, could drastically change what we thought was settled procedure under the Act.

Canada v. State,
#018-83; decided 10/5/83.
Smith v. State,
#63,984; decided 10/19/83.
Stokes v. State,
#68,526; decided 10/26/83.

In Canada the State sought continuances twice because a witness was in the hospital and once because a witness was out of town. The defense argued there was no competent evidence in the record to show whether these delays fell within excludable time periods since the only "evidence" was the prosecutor's unsworn oral statements to the judge.

Judge Campbell's opinion holds that these statements were sufficient to place the State within an exception because the prosecutor's comments were taken down by the reporter for the record and were **never challenged** by the defense. The Court analogized to Hicks v. State, 525 S.W.2d 177 (Tex. Crim. App. 1975), in which defense counsel preserved error concerning jury argument by making the unchallenged statement into the record that the prosecutor stood just behind the accused as he argued, "We haven't heard from somebody in this court." (Although Judge Campbell's opinion was joined in by only three other judges, this nevertheless appears to be a majority holding since Judge Miller concurs in the right of the trial judge to rely on unchallenged statements of counsel. The real split on the Court concerned whether the State placing itself within the "exceptional circumstances" exception of the Speedy Trial Act or the "continuance" exception, but this appears to be an academic distinction only.) While the decision in this case helps the State, remember that the general rule about relying on counsel's unchallenged statements will help the defense also. Prosecutors should object anytime defense counsel makes statements for the record which are at odds with what actually occurred at trial or which are otherwise inaccurate. Depending on the circumstances the State may need to call the defense attorney for cross-examination about his statements or put on controverting evidence of its own.

Judge Campbell makes a disturbing statement about the procedural effect of the accused's motion to dismiss under the Speedy Trial Act. While recognizing that the State's announcement of ready (which was made within 120 days of arrest) was prima facie evidence of compliance, he says: "However, the motion [to dismiss] was sufficient to rebut the presumption of readiness. Nevertheless, in the instant case the motion was not sufficient to **overcome** the State's rebuttal." The emphasis was in the original, and the "rebuttal" presumably refers to the prosecutor's oral statement concerning the need for a continuance. This could be taken to mean that once the defense files a motion to dismiss, the burden shifts to the State to show evidence of readiness even though it had made a proper announcement of ready. Yet I had understood that if the State made the proper announcement, the burden was on the defense to offer evidence of a lack of readiness.

Smith would be a relatively unremarkable decision were it not for some dicta in Judge Teague's opinion. The case was called for trial many months after arrest, and the State announced ready. The defense then urged its previously-filed motion to dismiss under the Speedy Trial Act, which was summarily overruled without any evidence being heard or any further statements from the prosecution.

As I understood the rule (and as the dissent restated it), if the State makes no announcement at all until after the Speedy Trial Act time period would have otherwise elapsed, it must announce both that it is ready at the time of announcement **and** that it was ready within the initial time period (120 days for a felony). In other words, a dual announcement must be made once 120 days have passed. This case could have been disposed of by holding simply that the State did not make the right kind of announcement since it made no assertion of prior readiness for trial. (However, as the dissent points out, even that approach would have been unfair to the State. At the time the State said it was ready for trial, no motion to dismiss had been urged. The announcement could have been seen as a normal docket call announcement, and not one being made with the Speedy Trial Act in mind. When the defense urged its motion, the State had no opportunity to make a formal announcement concerning whether it had been ready for trial in the past. Consequently the dissent would have reversed and remanded for a hearing on the motion to dismiss, rather than reversing and dismissing.)

Yet at several points Judge Teague says that in such situations the State must not just **announce** that it was ready in the past; the State must also "establish" or "demonstrate" that it had indeed been ready. Like the dicta in Judge Campbell's Canada opinion, this language would, if taken at face value, signal a shift in the placement of the evidentiary burdens under the Speedy Trial Act.

I suppose (and hope) that all we have here are unfortunate examples of loose language. I can't believe that the Court would really be changing the rules so casually. Even if the evidentiary burdens were being shifted, that might in practice sabotage the State's position in only a small number of cases. From trial attorneys I get the impression that the State normally puts on evidence of its readiness anytime the defense seems to be serious about its speedy trial motion, so that in most cases

the placement of the burden of producing evidence makes little real difference. But prosecutors should keep in mind the language in these two opinions.

In Stokes it is hard to discern what the Court's reasoning was. At the time of trial and in response to the motion to dismiss, the prosecutor made statements concerning the prior settings in the case and the crowded docket. The trial judge recited much the same, and referred to many times in which the accused had been brought from T.D.C. for settings. The Court paid no attention to this, for reasons which are not clear. (Perhaps this is because at the trial setting the State made no claim of prior readiness.) The Court did focus on a docket entry, made within 120 days of arrest, reciting that the State had announced ready. While recognizing that this announcement would have been prima facie evidence of readiness, the Court says the announcement was undercut because the same docket entry recited that the accused was in custody in Arkansas. This apparently is taken as prima facie rebuttal of readiness; the Court, citing to the cases saying that securing the presence of the accused is part of the State's burden, reverses because there is no evidence in the record of due diligence by the State to secure the accused's presence.

The State's attorney is upset because at the time of the docket entry there was a considerable part of the 120-day period remaining, and the Court is reversing on a silent record without considering the possibility that the accused was in fact brought back to the jurisdiction before the 120 days expired. Maybe this case turned on the inadequacy of the State's announcement, or on the inadequacy of the State's proof, but your guess is as good as mine. Note that in the opening paragraphs the Court says that "...a felony should be **brought to trial** within 120 days of commencement of the criminal action." (emphasis added). It has never been the law that the case has to be brought to trial within any specific period of time; the State just has to be ready for trial. Presumably this also is just a poor choice of words.

Schmidt v. State,
#67,924; decided 10/5/83.

If illegally seized evidence is improperly admitted, that is trial error only. Since the evidence was admitted before the trier of fact, it should be considered in assessing the sufficiency of the evidence. The most the accused can get is a retrial, not an acquittal on appeal for insufficient evidence. (The search warrant affidavit was defective for not showing clearly when the affiant received his information, so there was no probable cause to believe the drugs were still at the location given in the affidavit. This was a marginal decision on the facts, but it does point up the need for officers to be careful in setting out the times and dates of their observations and those of their informants.)

Crume v. State,
#62,626; decided 10/19/83.

The accused claimed the involuntary manslaughter indictment was fundamentally defective for failing to specify the "accident and mistake" which is included in the statute and carried forward in the indictment. The Court holds there is nothing to specify because the phrase doesn't refer to any act of the accused, but is simply another way of stating that the death was "unintentional." (In light of this explanation of "accident and mistake," there presumably would be nothing to specify even if a motion to quash were filed.)

The accused also attacked the indictment because it alleged the same acts (failure to keep a lookout and failure to guide the vehicle away from the victim) as both criminal negligence and recklessness. The Court held that these acts could be either recklessness or criminal negligence, depending on the state of mind accompanying the accused's disregard of the risk of death, so this alternative pleading was proper.

Santana v. State,
#63,817; decided 10/19/83.

The precedential value of this opinion is in doubt since four judges dissented and three concurred only in the judgment, but it does point out a problem that no doubt will arise again.

The controversy was over whether the State must, in the face of a motion to quash, allege the location of the burglarized premises more specifically than by setting out the county in which the crime occurred. The plurality, citing Nevarez v. State, 503 S.W.2d 767 (Tex. Crim. App. 1974), says no further specification

of the locale is needed. It purports to overrule Lane v. State, 621 S.W.2d 172 (Tex. Crim. App. 1981), to the extent of any conflict. Lane had required such specification in an arson case, relying on art. 21.09, C.C.P., which talks of alleging the "general locality" of real estate within the county. The dissent thinks Lane is good law and accuses the plurality of ignoring the distinction between alleging the location of the offense (i.e., the county) and the description of the actual property involved (which 21.09 addresses).

The opinion also addresses a speedy trial claim. The State may make a valid announcement of ready by filing one with the clerk. An announcement in open court is not required.

Kutner v. Russell
#69,136; decided 10/19/83.

On July 6, 1983, the Court held that at the county court level, on a trial de novo following the appeal of a traffic conviction, the trial judge could no longer give the accused the option of taking a defensive driving course. (See TRUE BILL, vol. 4, no. 4, Aug.-Sept. 1983.) In a per curiam opinion the Court now says that it meant only that the judge on the trial de novo does not have to allow defensive driving under the **mandatory** provision of art. 6701d, sec 143A(a)(2), V.A.C.S. It says the original opinion does not address whether on the trial de novo the accused can invoke the **discretionary** defensive driving option under sec. 143A(a)(1).

Harris v. State,
#030-82; decided 10/26/83.

The State was properly allowed to introduce an autopsy photo into evidence. The injury causing the victim's death was not visible on the outer surfaces of the body. The skull fracture became apparent only when the scalp was pulled back during the autopsy. The photo showed the fracture with the scalp retracted. While such photos may be gruesome, they still fall within the rule allowing their admission, within the trial judge's discretion, as long as they are otherwise competent, material, and relevant and as long as a verbal description of the injury would have been admissible. Autopsy photos likely would be inadmissible if they actually obscured the results of the crime or if they emphasized only the mutilation to the body caused by the autopsy.

Ortega v. State,
#63,607; decided 10/26/83.

In order to impeach one's own witness, you must show: (1) the witness testified to facts injurious to your case, and (2) you were surprised by such testimony. It is not enough that the witness fails to remember facts favorable to your case or otherwise fails to testify as expected. The harmful testimony must be more affirmatively in favor of the defendant. To show surprise, one must do more than make a mere claim of surprise. Outside the jury's presence you must show the prior statements by or prior conversations with the witness that led you to expect different testimony. (These aren't new rules; I restate them here merely because they are rather peculiar.)

Johnson v. State,
#68,565; decided 10/26/83.

The Court found that an illegal search and seizure occurred because the officer lacked reasonable suspicion for an investigatory stop. The case was close factually, but I mention the decision because of the analysis used by the Court. The Court invalidated the stop because it said what the officer observed was as consistent with legal activity as it was with illegal activity. I assume this means the officer could have made the stop legally only if what he observed was at least more likely than not associated with illegal activity. Yet the Supreme Court has this past term said in both Texas v. Brown and Illinois v. Gates that even probable cause does not require a more-likely-than-not standard. So how can such a standard be required where simple "reasonable suspicion" is the criterion? My guess is that the Court is unwilling to disavow some language in its prior cases.

If you as a prosecutor get reversed on a strong set of facts by an opinion couched in "as consistent with legal as illegal activity" language, you might consider petitioning for certiorari because the Court is clearly using incorrect analysis under federal constitutional law.

Rosebury v. State,
#806-82; decided 11/8/83.

The accused was first convicted of possession of tetrahydrocannabinols (THC). He was

granted a new trial and re-indicted for possession of THC, other than marihuana. Speedy trial waivers had been filed concerning both of these indictments.

The State then learned from a six-month old lab report that the substance was actually marihuana. The accused claimed that the State had not been ready on the final indictment, and the State conceded lack of readiness. The Court saw the question as whether the waivers under the first two indictments carried over to the third.

The waiver was phrased in terms of "this case," and not in terms of all offenses arising out of the same transaction. The Court held that this prosecution did in fact involve only a single case -- the possession of one controlled substance. The State had never claimed that the accused possessed more than one substance, though it had incorrectly pled what that one substance was.

Consequently the Court said that this possession offense was only a single case within the meaning of the language used in the waiver form, so that the waiver applied also to the last re-indictment. It implies that the result would have been different if the accused had actually committed more than one offense, such as possessing two different drugs or committing both burglary and theft. Compare Richardson v. State, 629 S.W.2d 164 (Tex. App. -- Dallas 1983) (announcement of ready in one case did not apply to another case arising out of the same transaction).

Judge Clinton has a concurring opinion which makes several good points. First, he argues that the majority is wrong in talking about "cases" under the Speedy Trial Act since that statute talks of being ready to try a "criminal action." He believes that as soon as an action commences the State has an obligation to sort through the facts, allege as many or as few distinct offenses as it needs to under the facts, and then be ready for trial on those offenses within the applicable time limit. Re-indictments would not ordinarily extend the time limits for the State. In this case it would have been enough to say that by signing waivers under the first two indictments the accused had relieved the State of its obligation to be ready on those pleadings, so that the first time the State pled any offense on which it had to be ready for trial was when the last indictment was returned, and the State was in fact ready for trial on that indictment.

Second, Judge Clinton notes that when the Speedy Trial Act talks of the commencement of a criminal action upon the filing of a pleading in court, it is talking of the type of pleading (a complaint) upon which trial can be had. This may be important since some defense attorneys are noting that art. 15.04, C.C.P., uses the word "complaint" to describe the affidavit for an arrest warrant. They then argue that the Speedy Trial Act time limits start running when the police file these arrest warrant affidavits (or complaints) with the justices of the peace or municipal court judges who issue the warrants. One can see the mischief that would result if our time limits started running before the prosecutor even knew that a case existed. Judge Clinton's statement should help the State head off that argument, which I don't think has yet been written on directly by an appellate court. There is similar helpful language in Jernigan v. State, #68,919; decided 4/27/83, which is still pending on rehearing.

Finally, Judge Clinton says the accused was mistaken in arguing that the State was not ready for trial just because it had a lab report saying that the substance involved was simple marihuana at the same time it had an indictment alleging the substance to be THC other than marihuana. The Speedy Trial Act does not require that the State be ready to win its case; only that it be ready to **try** its case. The State could have been ready for trial even though hindsight shows it would have lost because of a variance between pleading and proof.

Burkholder v. State,
#63,901; decided 11/8/83.

This case deals with the procedures to be used when Penal Code §12.44 is invoked to allow the judge to assess class-A misdemeanor punishment for third-degree felonies. The proper procedure is to find the accused guilty of the felony, set aside the verdict, and convict and punish as a class-A misdemeanor. In this case there was no showing that there was an initial guilty verdict on the felony, nor was there any statement to the effect that the trial judge found that a conviction for a misdemeanor would "best serve the ends of justice." Consequently the Court found that the trial court did not actually invoke §12.44, and it looks at the sufficiency of the evidence to support a conviction for the misdemeanor

offense of Assault with Bodily Injury, a lesser-included offense of the aggravated assault alleged in the indictment. Since it could find no evidence of bodily injury (the accused shot at, but missed, the injured party), it reversed and acquitted for insufficient evidence. Moral: Make sure the record clearly reflects that the judge is relying on §12.44 when class-A punishment is assessed for a third-degree felony.

Rochester v. State,
#281-83; decided 11/16/83.

A witness for the defense testified that the accused had a good reputation for truth and veracity. This permitted the State to ask "Have-you-heard?" questions concerning the following matters which dealt directly with the accused's reputation for truthfulness: prior arrests for swindling, larceny by fraud, and theft by false pretext.

Doyle v. State,
#63,771; decided 11/16/83.

Appellant was charged with Retaliation because in a conversation with a police officer he threatened to kill a judge and a county commissioner unless the judge made a favorable ruling in the accused's divorce case and unless he received publicity about the injustice he thought the judge had done him in that case.

The Court made several points about retaliation cases. First, a threat of death is not required for such a prosecution, but if a death threat is alleged, it must be proven. Second, the injured party need not receive the threat first-hand; the statute can be violated if the threat is conveyed to or through a third person. Third, although a conditional threat normally will not violate the statute, the threat will be treated as an unconditional one if the person making the threat had no right to require the condition. Here the accused had no right to demand any particular action from the divorce judge, nor did he have any right to publicity about his case. Consequently his threat was treated as an unqualified one which violated the retaliation statute. Fourth, in the face of a motion to quash the State must allege to whom the threat was communicated and how it was made (e.g., face to face, over the phone, through the mail, through a third party, etc.).

Fancher v. State,
#68,737; decided 11/16/83.

The accused wanted to introduce the results of an experiment which allegedly would show that, given the amount of alcohol he claimed to have consumed, his blood alcohol level would have been below the legal limit if he had been tested at the time of arrest, rather than 50 minutes later. The trial judge summarily rejected the offer without hearing anything about the circumstances surrounding this particular experiment.

The Court acknowledges the general rule which gives the trial judge discretion on admitting or rejecting such experiments. If the conditions under which the test was conducted were reasonably similar to the conditions at the time of the event to which the experiment relates, the dissimilarity in conditions goes to the weight, not the admissibility, of the results. The Court reverses, holding that the broad discretion accorded the trial judge in this area does not go so far as to permit him to reject the evidence without hearing anything about the circumstances surrounding the experiment. It does not hold the experiment admissible, but only reverses and remands so that at the retrial the judge can make an informed exercise of his discretion.

Apparently this is meant to chasten judges who become too arbitrary in their evidentiary rulings. The Court also implicitly criticizes the prosecutor for repeatedly objecting to the experiment without giving any legal basis for objection.

Queen v. State,
#123-83; decided 11/23/83.

If the accused moves to quash an indictment for delivery of a controlled substance under Ferguson v. State, 622 S.W.2d 846 (Tex. Crim. App. 1983), he is entitled to know the type or types of delivery on which the State intends to rely -- i.e., actual transfer, constructive transfer, or offer to sell. The State may show the types of delivery it is relying on by its general factual allegations; it need not use the phrases "actual transfer," "constructive transfer," etc. The indictment does not have to allege the precise manner by which these three types of deliveries were accomplished.

Citing to Rasmussen v. State, 608 S.W.2d 205 (Tex. Crim. App. 1981), the majority gives examples of constructive transfers. The dissent argues that the majority confuses the issue because it fails to distinguish between conduct of the accused which causes delivery to take place (that conduct may result in an actual or a constructive transfer) and the receipt of the drugs (which may be to either the actual or constructive custody of the recipient). See the opinion for details if you need to decide whether a particular delivery is actual or constructive.

Bogany v. State,
#317-83; decided 11/23/83.

The Court of Criminal Appeals, agreeing with the court of appeals, finds that the range of punishment for a first-degree felony enhanced by proof of one prior felony conviction includes pen time only; no fine is authorized. The reasoning apparently is that Penal Code §12.42(c) does not expressly refer back to the basic penalty provision of §12.32(b), which authorizes a fine for an unenhanced first-degree felony, and therefore the Court concludes that the fine drops by the wayside if punishment is enhanced. Judge McCormick has an excellent dissent.

The Court adds insult to injury by concluding that the court of appeals was without authority to reform the judgment to delete the fine. It says reformation is limited to making the judgment reflect the verdict actually rendered; it cannot be used to correct an unauthorized verdict. Therefore it reverses the entire conviction.

Ex parte Binder,
#69,209; decided 11/23/83.

Post-conviction habeas corpus is not the proper remedy to raise claims of newly-discovered evidence. Such claims are the subject of petitions for executive clemency. (The accused had presented credible evidence that another person who closely resembled him had actually committed the crime.) Habeas corpus probably would still be the remedy if the claim was that the defense had discovered that the prosecution suppressed favorable testimony or knowingly put on perjured testimony since that would involve an unfair, as opposed to an erroneous, conviction.

Ex parte Emmons,
#69,218; decided 11/23/83.

The Court faced the problem of writ-writers who fabricate habeas corpus claims for their fellow inmates just so the latter can receive trips out of T.D.C. for evidentiary hearings. The accused, with help from inmate Johnny J.E. Meadows, received a hearing on a writ which on its face stated a claim for relief. At the hearing Emmons admitted that almost everything in the writ was false. Besides citing Emmons for abuse, the Court strongly suggests that the applicant and the assisting inmate be prosecuted for aggravated perjury.

ANSWERS

1. No. Roy v. State, 608 S.W.2d 645 (Tex. Crim. App. 1980).
2. No. Hennessey v. State, #63,270; decided 10/12/83.
3. No, it would be a comment on the failure to testify. Mercer v. State, #64,367; decided 10/12/83. But if the accused takes the stand at punishment, the State can ask if he is remorseful for the crime. Wills v. State, 501 S.W.2d 925 (Tex. Crim. App. 1973).
4. True. This is one of those few times where a party can improve his position as a result of inaction by the trial judge. Prosecutors must be alert for formal bills and make sure the judge refuses or corrects them if they are inaccurate. See art. 40.09, §6(a), C.C.P.
5. No. Bearden v. State, 648 S.W.2d 688 (Tex. Crim. App. 1983). A proper affidavit attached to the motion dispenses with the need for the motion itself to be sworn to. There may be rare cases where the facts concerning misconduct were developed on the record at trial, in which event no sworn motion or affidavit would be required at all.
6. Yes. Rios v. State, 510 S.W.2d 326 (Tex. Crim. App. 1974). □

Trial Reference Series

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

QUESTIONS REGARDING LINEUP IDENTIFICATION ASKED TO POLICE OFFICERS

CUT HERE

Questions Pertaining to the Particular Lineup

1. Did you have occasion to conduct a lineup in this case, State vs. _____?
2. On what date did you do so?
3. At approximately what time?
4. Where did the lineup take place?
5. How long after the date of the crime was this?
6. What, if anything, were the witnesses to the lineup told before seeing the lineup?
7. What are the names of the persons who viewed the lineup?
8. Did they all view it at the same time or did they view it separately?
9. How many persons were in the lineup?
10. How were they dressed?
11. Did anyone wear distinctive clothing unlike the clothing worn by the others?
12. Were the persons in the lineup similar in physical description?
    (Question as to the age range/height/weight/build/hairstyle/race/facial features/etc.)
13. How was the lineup conducted?
    (Have the officer explain how it was held, where the witnesses waited, what precautions prevented them from seeing the defendant or stand-ins prior to lineup, etc.)
14. Did you or any person in your presence influence or suggest to the witness which person to select?
15. Did you display photographs of any of the participants of the lineup individually to the witnesses prior to the lineup?
16. After the witness viewed the lineup did he communicate to any other witnesses to the lineup before that witness viewed the lineup?

Questions Pertaining to the Admission of the Photos of the Lineup

1. Officer, I show you what has been marked for purposes of identification as State's composite exhibit #_____.
2. Do you recognize the contents of that exhibit?
3. Is it a fair and accurate representation of the way the lineup appeared when it was viewed by the witnesses?
4. Are there any material alterations or deletions in the contents of that composite exhibit?
5. Offer the photographs into evidence. (After jury views them, pass the witness).

QUESTIONS REGARDING LINEUP IDENTIFICATION ASKED TO EYEWITNESSES

Questions Pertaining to the Particular Lineup

1. Did you have occasion to view a lineup in this case, State vs. _____?
2. On what date did you do so?
3. At approximately what time?
4. Where did the lineup take place?
5. Who conducted the lineup?
6. What, if anything, were you told before seeing the lineup?
   (This is not hearsay; it is being admitted for the fact it was said, not for the truth of the statement.)
7. Did anyone else view the lineup at the same time as you?
8. How many persons were in the lineup?
9. Describe the lineup you viewed.

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10. Were the persons in the lineup all similar in physical description?

    (Question as to age range/height/weight/build/hairstyle/race/facial features/etc.)

11. How were they dressed?

12. How was he lineup conducted?

    (Have the victim/witness explain how it was conducted, where he waited before seeing the lineup, where he went after seeing the lineup, etc.)

13. Did the officer or anyone else present suggest to you who to select?

14. Did you view any people in the line-up individually before seeing them in the lineup?

15. Were the photographs of any of the persons in the lineup individually shown to you prior to the lineup?

16. Did you select a person at the lineup?

17. Who was that person? (e.g., "the person who robbed me")

18. Do you see that person in court today? Point him out.

Questions for Identifying the Photographs of the Lineup

1. I show you what has been marked for purposes of identification (or admitted into evidence) as State's composite exhibit #_____.

2. Do you recognize the contents of that exhibit?

3. How are you able to do so?

4. Do the scenes portrayed in these exhibits accurately and fairly depict the lineup as it appeared when you identified the defendant?

5. Have the witness point out the defendant in the photographs. (Introduce the photographs if it hasn't been done previously.)

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Questions Further Removing Any Hint of Suggestibility

1. After you identified the defendant in the lineup did you communicate your identification of the defendant to any other witnesses viewing the line-up?
2. Did you ever select another person as being the one who committed this crime?
3. Did you ever pick another person at another lineup as the one responsible for this crime?
4. Was your identification of the defendant based on your observation of him at the time of the commission of the crime?
5. Was your identification of the defendant based on anything else other than your observation of him at the time of the commission of the crime?

Tender the Victim/Witness for Cross-Examination.

RELEVANT CASES

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

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

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

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

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

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Public Reprimand

NO. 51-83-43

IN RE: BEFORE THE

ROBERT D. MILLER PROSECUTOR COUNCIL

DECISION OF THE COUNCIL

BE IT REMEMBERED that on the 2nd day of November, 1983, The Prosecutor Council was legally and duly called into session for the purpose of conducting a hearing on the above entitled and numbered cause. The Chairman determined that a quorum was present, the following Council members being present:

Tim Curry
Dick W. Hicks
Claude J. Kelley, Jr.
William M. Rugeley
Howard C. Derrick
John R. Hollums
Margaret Moore

The prosecutor and his attorney were asked to come in and the Chairman informed the prosecutor of the nature of the allegations against him before proceeding to hear evidence and argument in the matter. After the conclusion of the evidence and after deliberations, the Council made the following findings:

1. Since January 1, 1981, the County Attorney's office has collected over $315,000 in restitution through its hot check program. This program has generated over $72,000 in fees paid by the check writers. The Council has examined the expenditures made from the hot check fee fund which were complained of and finds that $1,849.98 of the amount expended was not proper.

2. Expenditure of hot check fee funds for political purposes violates Article 53.08 of the Code of Criminal Procedure. Specifically, the Council finds that the following expenditures are not authorized by law:

   $ 14.03 for supplies for a political reception
   $ 112.00 for tickets for inaugural functions
   $ 132.84 for travel by the County Attorney from the inauguration.

3. Expenditure of hot check fee funds for gifts to his public and private employees violates Article III of the Texas Constitution.

   Specifically, the following expenditures were not authorized by law:

   $ 380.10 for jewelry for his public and private employees
   $ 89.11 for a luncheon for those employees and others
   $ 94.50 for secretaries' baskets for the same employees
   $ 92.77 for luggage for a former employee
   $ 15.75 for flowers for an employee who was sick
   $ 28.88 for flowers for the County Judge who was sick

4. Expenditure of hot check fee funds for private purposes violates Article III of the Constitution and Article 53.08 of the Code of Criminal Procedure.

   Specifically, the Council finds the following expenditures were not proper under the facts presented to the Council:

   $ 645.00 for tuition for a Dale Carnegie Course for the County Attorney
   $ 10.00 for a newspaper ad sending Christmas greetings to the public from the County Attorney.
   $ 90.00 for space in a theatre program given by the high school.
   $ 145.00 for registrations for a public employee of the County Attorney's office to attend two courses unrelated to the business of the office

5. The Council finds that there is no evidence of criminal intent on the part of the County Attorney.

6. The County Attorney owes the hot check fee fund $1,849.98.

Based on the evidence and information presented to the Council and based on the agreement of the County Attorney to make restitution in the amount of $1,849.98 before December 1, 1983, it is the opinion of the Council that the prosecutor should be publicly reprimanded.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COUNCIL that Robert D. Miller be, and is hereby, publicly reprimanded by the Council for the conduct specified in this decision.

Signed this 18th day of November 1983.

Tim Curry, Chairman
The Prosecutor Council

For Your Information

What follows is a letter sent to a prosecutor at the direction of the Council as a result of a disciplinary investigation. The Council asked the staff to print the letter in TRUE BILL so that prosecutors would be aware of its decision in this case.

THE PROSECUTOR COUNCIL

P. O. Box 13555 • Austin, Texas 78711 • (512) 475-6825

Andy Shuval
Executive Director

1983

The Honorable

P. O. Box

RE: File #51-82-

Dear

The Council has reviewed the complaint against you and has determined that a prosecutor should not recommend a fine in excess of the maximum allowable by law. The Council was aware that these recommendations were made only at the request of a defendant's attorney.

The Council feels that a prosecutor is bound to uphold the law. Recommending a fine not allowed by law does not meet that standard. The Council was also concerned that the law is not being fairly applied as this option was only open to a defendant who retained an attorney.

The Council realizes that "the prosecutor only proposes, which the judge disposes". As the Council has no authority in regards to judges, it has voted to turn over its findings to the Commission on Judicial Conduct.

Finally the Council asked me to make sure that you knew that the Council is aware of your good reputation among members of the legal profession and the community in general.

For all of these reasons, the Council felt that a warning was sufficient in this case.

Sincerely yours,

Andy Shuval

AS:kg

Addressing the Ethical Issues

by Stephen F. Cross

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

Due to the importance of the issue and the depth of discussion, the article will be presented in two parts. Part I focuses on the requirements of the Code of Professional Responsibility. Part II, appearing in the next TRUE BILL, deals with the response of the Texas courts.

One question presented in the Ethics part of the Basic Prosecution Course sponsored by the Council last June dealt with Brady material.

Your eyewitness is in a 7-11 buying a pack of cigarettes. It is 2 a.m. and he has just come from a bar where he had 7 or 8 beers over a 4 hour period. He feels the effect of the alcohol, but in his opinion is not drunk. The defendant enters the store, pulls out a gun and robs the cashier of the contents of the cash register and the eyewitness of his wallet. The defendant is arrested 30 minutes later when the police stop him, because the car matches the description given by the witnesses. The defendant is taken to the police station and is identified by both witnesses who are there looking through the mug books.

The witness told you in your office that he had 7 or 8 beers in the bar over a 4-hour period. He testifies in court he only had 1 or 2 beers over a 2-hour period at the bar. He told you before going into court that he wasn't going to admit to drinking all those beers. What do you do now in court after he testifies he only drank 1 or 2 beers? Could this problem have been avoided, and how?

Suppose your witness tells you he was knee-walking drunk and he will say that on the stand, but is still 100% sure of his ID. Do you have any obligation to the defendant's attorney before this witness testifies?

Suppose two weeks after the robbery the clerk comes into your office with another witness. This witness was in the parking lot when the robbery came down and verifies the entire story. You show him a photo spread. He studies it and tells you the man who robbed the store is not in the photo array.

Do you have to let the defense attorney know of the photo array? Suppose the witness said he didn't recognize anyone in the photo array. Same or different result?

Let's go back to the original problem with only two witnesses. You just picked your jury and that night you discover that the store clerk was killed during a hold-up that day, leaving you with one knee-walking drunk who the jury will never believe. The next day in court you go up to the defendant's attorney and make him an offer he can't refuse. It's obvious to you that he has no idea that your main witness is dead. Any problem in taking the plea?

Suppose the defendant's attorney initially approached you that morning regarding a plea. Suppose you found out that your drunk drank himself into a catatonic state. You now will have to move to dismiss the case when you are supposed to call your first witness. Can you plea bargain under these circumstances without telling the defense attorney about your missing witnesses?

As prosecutors, we are mindful that our primary objectives, those which transcend our duty to be vigorous advocates for the state, are to insure that the accused receives a fair trial and that justice is done. It is for these reasons that ethical obligations exist requiring prosecutors to disclose evidence favorable to the accused and to correct testimony known to be false. The purpose of this article is to emphasize and to define these obligations .

Most questions concerning a prosecutor's ethical obligation to disclose evidence are answered by DR 7-103(B) and EC 7-13. DR 7-103 (B) requires disclosure of evidence known

Audio Visual Loan Library

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

Professional Development Training

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

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

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

HIGHLIGHT

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

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

Public Information Programs

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

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

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

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

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

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

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

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

Council Publications

HIGHLIGHT

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

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

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

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

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

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

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

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

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

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

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

Name_____ Office_____

Address_____ City_____ State_____ Zip_____

BILL MY OFFICE

BILL: _____

Calendar

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

JANUARY

9-13	Motor Vehicle Theft Investigators' School (DPS)	Austin
13	Special Criminal Law Institute: DWI Defense (CDLP)	Houston
16-20	Criminal Investigators' School (DPS)	Austin
22-26	Trial Advocacy for Prosecutors (NCDA)	Denver, Colorado
29-Feb. 2	Office Administrator Course (NCDA)	New Orleans, Lousiana
30-Feb. 3	Burglary & Theft Investigators' School (DPS)	Austin

FEBRUARY

1	Sexual Exploitation of Children (SHSU)	Huntsville
2	Legal Liabilities of Police Officers (SHSU)	Huntsville
6-10	Crime Scene Search School (DPS)	Austin
12-16	**Experienced Prosecutor Course (NCDA)**	**North Padre Island**
26-Mar. 2	Criminal Trial Advocacy Institute (CDLP)	Huntsville

MARCH

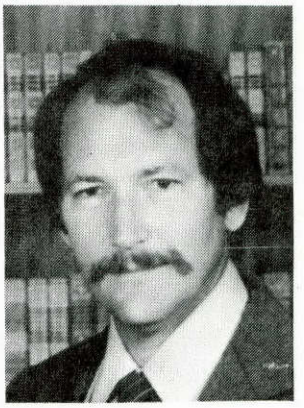
11-15	11th National Conference on Juvenile Justice	Las Vegas, Nevada
12-16	Investigation of Assault & Death School (DPS)	Austin
13-15	Narcotics Investigation School (DPS)	Austin
18-22	Forensic Evidence (NCDA)	Orlando, Florida
19-23	Burglary & Theft Investigators' School (DPS)	Austin
25-30	**Investigators' School (TPC)**	**Austin**

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

Features

Council Member Profile

PATRICK D. BARBER



Pat Barber is the newest face among the members of the Prosecutor Council, having been elected in November to the County Attorney position (see page 1 for related story on election results). His six year term began on January 1st of this year.

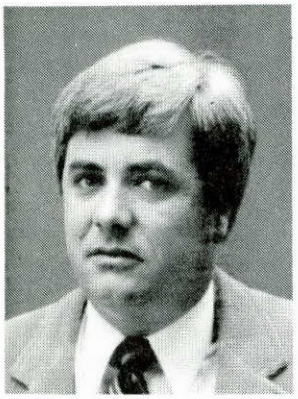
Pat has been Mitchell County Attorney since 1976 after attending the University of Texas at Austin and earning his law degree from Baylor University. He has served on the Legislative Committee for TDCAA and is currently its Regional Director for the West Central Region.

"I appreciate the confidence the prosecutors of this state have indicated by electing me to The Prosecutor Council and I will endeavor to fulfill my duties to the best of my ability," Pat says.

Pat comes from a long-time Mitchell County family. His father is a lawyer and is still in active practice in Colorado City.

Pat recently built a new house on his ranch. He lives there with his wife Sharon and their two children, Rhonda, 15, and Austin, 9. Sharon is from a ranch family in Montana and helps Pat around the place. Pat loves fishing and is teaching his son, Austin, the art of angling.

Prosecutor Profile



JERRY COBB

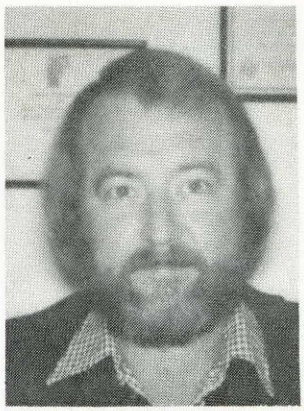
Jerry Cobb has served as the elected prosecutor for Denton County for over six years. His office handles some 10,000 misdemeanors and 1,100 felonies each year.

A Californian by birth, Jerry earned his BBA degree from North Texas State University in 1965 and his LLB from The University of Texas in 1968. He practiced law in Louisville until his election as County Attorney with Felony responsibility in 1976. In 1981 the title of the office was changed to Criminal District Attorney.

Jerry is the Secretary-Treasurer of the Texas District and County Attorney's Association having previously served as a member of the Board. He also serves on TDCAA's Legislative Committee and is a founding (and current) member of the Prosecutor Council's Advisory Committee. He serves on the Technical Assistance Subcommittee and has previously worked with the committee that prepared the Hot Check Manual. He has also served his fellow lawyers and prosecutors on the State Bar's interim committee to examine the law of insanity. Finally, he has served on a committee for the American Bar Association which studied judicial reaction to surveillance technology and the law of privacy with particular attention to the area of criminal law.

Jerry has also served as past president of the Denton County Bar Association, is presently a member of the National District Attorney's Association, and has been a Certified Criminal Law Specialist since 1978.

The Sherlockers



JAMES HONEA

Believe it or not, James is shy.[1] Publicity-shy, anyway: he admits to the editor regarding this profile: "I'm still not sure how you finally got this much out of me."

For 5 years James has been a Criminal Investigator for the Collin County CDA. Before that he worked nearly 8 years with the McKinney Police Dept. as a uniformed patrol officer, a uniformed patrol sergeant, and finally as a plainclothes detective sergeant.

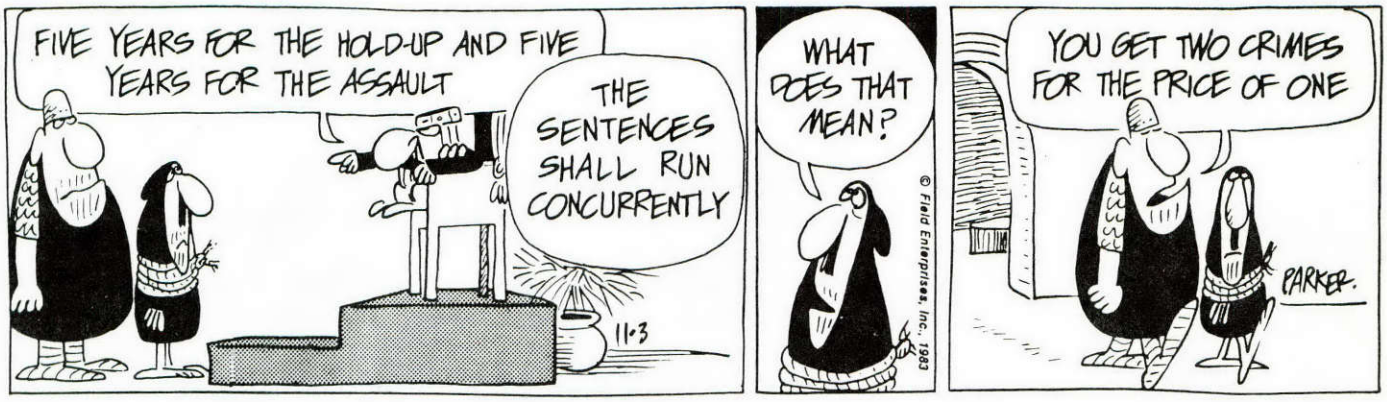
His education didn't stop with his Police Science Degree from Grayson College. His professional training includes breathalyzer use, combat shooting, crime scene photography, fingerprinting, juvenile procedures, hypnosis, and analytical investigations. Holding Basic, Intermediate, and Advanced TCLEOSE Certification, James is an enthusiastic faculty member for the Council's Law Enforcement and Instructors Workshops. He has taught police academy, police reserve, and in-service training courses.

James is Vice-Chairman of the Board of the Investigator Section of TDCAA and is on the Investigator's Advisory Committee to the Council. He belongs to the National and the California District Attorneys Associations.

Princeton, Texas, knows James well. He's active in the Masonic Lodge, the First Baptist Church, the Soccer and the Softball Associations, the 4-H Chapter, and the Parent-Teachers Organization. A member of Dallas' Scottish Rite Temple, James belongs to the Texas Police Association, the Texas Narcotics Officers Association, and the Texas and National Rifle Associations. His interests include softball, hunting, and fishing. James and his wife Brenda have three daughters: Shelley 16; Wendy, 14; and Laura, 12.

[1] The Prosecutor Council accepts no responsibility for the accuracy or veracity of this article.

THE WIZARD OF ID **by Brant parker and Johnny hart**



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