VOICE for the DEFENSE

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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IN THIS ISSUE

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Criminal Defense Lawyers

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Editor's Corner

Clif Holmes

It seems to me that an editor ought to *really* editorialize every now and then – I try to keep *personal* editorializing to a minimum, but feel strongly enough to pitch caution to the wind on one current issue which touches us all. It seems there is a move afoot to increase jurisdiction of Justice Courts and Municipal Courts, and to remove or severely limit *de novo* appeals. While this is not an issue that is going to make or break any of us, it will affect *more citizens* than any criminal legislation now pending. I'm not sure what any of your experiences are in these courts, but mine is not such that I would favor increasing their jurisdiction or limiting *de novo* appeals. I ran a survey – I spoke with a plumber, two roughnecks, a title lawyer, a cement mason, an LVN, a ribbon clerk and an endomorphic engineer (which, by the way, is probably as reliable as the one used by our Big Judge in Washington when he determined there was a 50/50 chance each of us were incompetent.) My survey revealed that most folks believe the results obtained in those lesser courts have as much to do with who you are as with what your case is. I can personally testify that to date I have *never* prevailed in any case in those Courts when a Smokey was taking sides · · be it traffic citation, license suspension, or whatever. This is not to say that the justices and judges that fill these positions are consciously favoring some litigants – but it is to say that some litigants are favored by the process in these courts. It would be interesting, for example, to see how many times a J.P. in this State has determined "*no probability of judgment*" in a license suspension case. I've yet to prevail on that issue in any J.P. court. There are also serious problems with "forum shopping" by law enforcement officers who file cases in those justice courts where higher bonds may be expected. Some justice courts expend great energy as pseudo collection agencies, making good I.S.F. checks for merchants who, if following good business practice, would not have taken them in the first place. But, a sold stereo is profit in the bank, even though the purchaser couldn't afford it and payment must come through a justice court.

Having served a short stint as a municipal judge, I can speak from some experience (little though it is) regarding the pressures on these front-line courts. Law enforcement officers press hard for punitive hands; influential citizens seek unconscionable favors; and quickly, the judges become an arm of law enforcement, their role as impartial mediator diluted beyond recognition.

Many factors contribute to this situation – most of which are situational, and not the fault of the incumbents. For one, the constituency of these judges is small and defined, subject to being immediately reached by a disenchanted favor-seeker. Their staffs are woefully inadequate. Their role is not properly presented to the public.

I, for one, believe the system can be changed for the better. More stingent procedural rules governing matters in these courts can be written. Some qualifications can be required of the office holder. Better public information can be disseminated regarding the real purpose for these courts. But until these timbers are put in place, and the walls of these courts shored-up to protect the public, I oppose expanding their jurisdiction in any way. Ed.

Letters to the Editor

Dear Clif:

After receiving the January issue of *Voice*, I felt compelled to write a letter of appreciation for the contributions made by Marvin Teague in his Significant Decisions reports.

He obviously puts much time and effort into this service, and it is of great value to us all. Thanks, Marvin.

Sincerely yours,
Robert T. Baskett

Marvin, you're a stalwart! Ed.

Dear Clif:

I would like to take this opportunity to compliment Joseph Connors for his excellent article about linking the Defendant to the contraband. It is quite commendable that Joseph volunteered to share his research and knowledge on such an important topic with his fellow members in the Association. I am sure the article will prove to be a most worthy contribution to all our libraries.

Joe's article has raised a query as to the possibility of the Defendant's "RIGHT" in a dangerous drug or narcotics case to being entitled to a *"CHARGE"* concerning the State's burden to affirmatively link the Defendant to the contraband, for his mere presence at the place or scene of the offense is insufficient unless it be adequately shown that he had knowledge and control over the contraband through an inference arising from some independent facts and circumstances as cited in said article linking him to the narcotics.

Should any members have thoughts on this matter or sample charges, I believe such would be quite worthy of discussion and publication in our magazine.

I also wish to say that in the January 79 issue brother Toscano mentioned his and brother Sharpe's membership in the Elite Criminal Law Specialists Field as being the only ones in South Texas. Well, I take great pleasure in adding the names of our brothers, the Honorable Knox Jones and Servando H. Gonzales, Jr. both from McAllen as also being certified honorees from South Texas.

Sincerely,
Fidencio Guerra, Jr.
P.O. Box 4227
McAllen, Texas 78501

Good suggestion re: members' thoughts – hope we get a response. Also, congratulations to yet two more "elitists." Ed.

Louis Dugas, Jr., Orange, Texas, announced recently that he is running for State Bar Director. He is a candidate in the Third Bar District.

President's Report

George Luquette

In the very near future–June 28, 1979, as a matter of record–the membership will be called upon to voice their choice for the officers for the coming year (1979-1980).

This organization has been blessed with very capable leadership in its beginning and has had the ability to maintain the quality of leadership in its past.

It is interesting to note that all past officers of the Texas Criminal Defense Lawyers Association have been people who have given freely of their time and their money, all for the sake of the members. They have been regularly present at our Board of Directors meetings and Executive Committee meetings. They have volunteered and made their presence known when the real work had to be done. Some even placed their fortunes on the line when this organization needed to borrow money to maintain its existence. Thank God those debts have been paid. No one of its members or directors is on any note for this organization at the present time, nor are any of its officers.

Our normal procedure has been to have a nominating committee recommend to the membership persons who they feel are at least at that time the ones who are best qualified for the positions available.

The membership is composed of a board member from each one of our eight (8) territorial districts. It is presumed that each member of the nominating committee has made known to the members of the positions available and sought those interested in them. His recommendations should then be taken to the committee meeting and the committee then makes its recommendations. And such recommendations are then given to the general membership at our Annual Meeting for their approval.

Only once in the history of this organization has anyone ever challenged the committee; though unsuccessful, it did allow the members an opportunity for a choice and our by-laws have now been rewritten, where anyone may, if he has such a mind to, make such nomination from the floor; and if successful in obtaining a majority of the votes at the annual meeting, he may secure for himself the position he desires for the next business year of our organization.

It is my understanding that there will be some members seeking various offices at our annual meeting this year. I have further been informed that certain ones will run whether they have been selected by the nominating committee or not. I have instructed Dave Evans of San Antonio, chairman of the nominating committee, to be sure that anyone seeking an elective office of this organization be offered the opportunity to present his case to the nominating committee in like manner. I now advise the membership that they have the right to make their views known and their suggestions are solicited, so that the membership is truly served by the nominating committee.

It is redundant to further state that each and every one of our members is invited to attend our Annual Meeting in San Antonio during the month of June at the Texas State Bar Convention to be held in the San Antonio Convention Center. Your presence is of the utmost importance and does more than any other thing I can state to give us a viable and healthy organization. Your choice of who is going to lead you in the coming year is of great importance. Without strong and capable leadership I feel we will see our way of life, our systems and methods of how we practice criminal law pass into what is affectionately called history.

I know you will continue to support your organization and lend your hand when needed. I charge you to start thinking of who you feel should be one of our leaders for tomorrow. On this point my only advice is to choose a man who gets things done. It has been said that there are only three types of people: "One who makes things happen; one who watches things happen; and one who wonders why things happen." I know you will choose those of you who make things happen.–See you in San Antonio.

George F. Luquette, President

LEGISLATIVE NOTES

David Spencer
TCDLA Legislative Representative

Things have been fairly quiet on the legislative front this past month. Several of our less controversial bills have made it out of committee in one house or the other, but so far the prevailing mood has been to avoid controversy on any matter.

S.B. 216, which provided for change of venue in marijuana cases, was amended in committee, thanks to the good offices of Charles Burton, to require the consent of the defendant before venue could be changed. With that amendment we felt that we had no objections to the bill.

The only major setback we have suffered so far is that bills allowing forfeiture of money derived from drug sales have been reported favorably from committee in both houses. We were successful in convincing the committees to retain the "reasonable doubt" standard on forfeitures (both bills initially would have changed the State's burden of proof to a preponderance of the evidence), but forfeiture of money appears to be an idea whose time has come. If you dislike these bills, you should contact your representatives and senators and let them know how you feel. It is still possible that they could be defeated on the floor. The bills are H.B. 410 and S.B. 168.

The wiretapping and oral confession bills have not come up for hearing. They will probably come with a rush toward the end of the session. With the Governor supporting both ideas, I think we can expect to see a big push on them. I will try to make sure everyone knows about it when it happens.

If you know your local legislators personally, you can do us a big favor simply by letting them know that you are a TCDLA member. If they have some idea who we are, it makes it a little easier to get an appointment, or to get a point across in testimony.

I expect to have a lot more to report in next month's *VOICE*. In the meantime, let me know any particular concerns you have.

BILLS INTRODUCED

HB 833 By Salinas. SAME AS SB 421. Amending Sec. 6, Art. 42.12, C.C.P. Relating to the duration and conditions of probation. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 838 By Nabers. Amending Sec. 32.33 (d), P.C. Relating to the penalties for hindering a secured creditor. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 839 By Nabers. Amending Sec. 8, Art. 40.09, C.C.P. Relating to notice of the trial court's approval of the record in criminal cases. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 841 By Nabers. Amending Secs. 9 and 10, Art. 40.09, C.C.P. Relating to the filing of appellate briefs in criminal cases. REFERRED TO COMMITTEE ON CRI-

Bills Introduced– continued

MINAL JURISPRUDENCE.

HB 875 By Clark of Harris. Amending Sec. 2, Art. 35.27, C.C.P. Relating to the reimbursement paid to a nonresident witness in a criminal case for travel and living expenses. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 879 By Blythe. Relating to state compensation to certain victims of crime.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 896 By Polumbo. Amending Chap. 22, P.C. Relating to a criminal offense for leaving a child unattended in a motor vehicle. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 901 By Green of Harris. Amending Subsecs. (c) and (d), Sec. 22.01, P.C. Relating to the penalties for assault on teachers and other school personnel. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 903 By Berlanga. SAME AS SB 500. Amending Secs. 22.01 and 22.02, P.C. Relating to offenses involving rape, sexual abuse, or assault. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 907 By Polumbo. Amending Art. 4476-15, V.C.S. Relating to the sale of preparations containing butyl nitrite or isobutyl nitrite.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HN 909 By Hendricks. Amending Chap. 31, P.C. Relating to a criminal offense of theft by coin-operated machine.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 924 By Keller. Amending Art. 4476-15, V.C.S. Relating to a practitioner prescribing or dispensing a controlled substance.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 927 By Garcia of Bexar. Amending Chap. 32, C.C.P. Relating to dismissal of criminal actions. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 933 By Lauhoff. Amending Sec. 39.02, P.C. Relating to the penalty for the offense of official oppression.— REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 934 By Lauhoff. Relating to written rules and procedures to govern law enforcement agencies.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 955 By Nabers. Amending Art. 67011-2, R.C.S. Relating to criminal sanctions against a person who drives while intoxicated.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 981 By Hartung. Amending Sec. 3(a), Art. 38.22, C.C.P. Relating to the admissibility in a criminal case of an oral statement made by an accused. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 982 By Hartung. Amending Sec. 8.07(b), P.C. Relating to the prosecution of children for capital felonies and felonies of the first degree. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 996 By Smith. Amending Sec. 22.02 (a), P.C. Relating to assaults on certain public school personnel engaged in the performance of educational duties.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1117 By Messer. Amending Sec. 12.32, P.C. Relating to fines for felonies of the first degree. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1120 By Washington. Amending Art. 16.01, C.C.P. Relating to the right of an accused to an examining trial. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1129 By Thompson of Harris. SAME AS SB 448. Amending Subsec.(b), Sec. 38.03, P.C. Relating to resisting unlawful arrest or search.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1130 By Thompson of Harris. SAME AS SB 449. Amending Sec. 2, Art. 28.01, C.C.P. Relating to the time for notice of a pre-trial hearing in a criminal case and the time for filing motions, pleadings, and exceptions after such notice. REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1135 By Rudd. Amending Art. 33.03, C.C.P. Relating to the presence of the defendant in criminal prosecutions.— REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1136 By Rudd. SAME AS SB 338. Amending Chap. 27, C.C.P. Relating to the requirment for prior written notice when the defendent intends to rely on the defense of an alibi.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1141 By Blanton. Amending Art. 44.02, C.C.P. Relating to the right to appeal certain judgements and sentences of a justice or municipal court.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1246 By Benedict. Amending Art. 23.04, C.C.P. Relating to the issuance of a capias or summons in a misdemeanor case.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

H.B. 1266 By Nowlin. Amending Sec. 15(b), Art. 42.12, C.C.P. Relating to the eligibility for parole of persons convicted of certain offenses. -REFERRED TO COMMITTEE ONCRIMINALJURISPRUDENCE.

HB 1275 By Nabers. Relating to certain evidence of a conviction of driving while intoxicated or driving while under influence of drugs.—REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

HB 1278 By Thompson of Harris. SAME AS SB 548. Amending Arts. 38.30 and 28.01, C.C.P. Relating to providing interpreters and providing for pre-trial hearings on motions for interpreters.-- REFERRED TO COMMITTEE ON CRIMINAL JURISPRUDENCE.

SB 216 Relating to venue for trial of marijuana offenses.—CRIMINAL JURISPRUDENCE.

SB 500 By Jones of Harris. Amending Secs. 22.01 and 22.02, P.C. relating to offenses involving rape, sexual abuse, or assault.—REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 539 By Longoria. Amending Arts. 17.02 and 17.03, C.C.P. Relating to the release pending trial of persons accused of criminal offenses.-- REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 540 By Santiesteban. Amending Sec. 51.15, Family Code. Relating to photographing children in connection with the investigation of criminal offenses.--REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 541 By Santiesteban. Amending Secs. 53.02 and 54.01, Family Code. Relating to the grounds for the detention of a child taken into custody.--REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 605 By Mengden. Amending Sc. 8.06. (a), P.C. Relating to the defense of entrapment.—REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 659 By Schwartz. Relating to an individual's access to personally identifiable information maintained by an agency.—REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 668 By. Ogg. Amending Art. 4671, R.C.S. Relating to the application of the wrongful death statute to injuries inflicted upon unborn children.- -REFERRED TO COMMITTEE ON JURISPRUDENCE.

SB 703 By Doggett. Amending Art. 6252-17a, V.C.S. Relating to access to public and personal information.- -REFERRED TO COMMITTEE ON JURISPRUDENCE.

FEDERAL SENTENCING AND DIVERSION

Knox Jones, McAllen

I. SCOPE OF ARTICLE

The purpose of this article is to present not only the procedural aspects of federal sentencing, but to cover the subtleties involved in securing the most lenient sentence possible for your client.

A. COMMENT.

The caliber of investigation and capabilities of federal prosecutors, coupled with the artful drawing of multiple-count indictments often makes a plea to one count of a federal indictment at least worthy of consideration. In the federal practice, once the defense attorney determines that there are no meritorious defenses on the horizon, an appointment should be made well in advance of arraignment with the federal prosecutor to determine what is available on a plea-basis. F.R.C.P. 11e possibilities should be explored at this initial conference.

If the case is tried and your Defendent is found guilty, the judge alone is going to decide whether your client gets probation. The simple lesson is that it is imperative for you to learn the sentencing propensities of the judge.

The defense attorney must remember that he is operating in a clinical vacuum. The Court has never seen this particular Defendant before and ordinarily will know absolutely nothing about his personality, family, or occupation. The pre-sentence investigation report will almost always be ordered and, if defense counsel does not take the initiative, the only vital information will be supplied by a probation officer. These personnel are usually highly qualified, but they may fail to apprise the Court of salient factors which could benefit your client. Remember, their job is to be "objective." They are not advocates for either side. Your job is to make sure the Court knows every bit of information that is *favorable*. In other words, *supplement the pre-sentence report.*

II. PROJECTING A FAVORABLE IMAGE.

A. COURT'S FIRST IMPRESSION.

Chronologically, defense counsel should be thinking about the sentencing factors from the point of arraignment. Don't allow your client to present himself before the court improperly attired or groomed. A Defendant can be psychologically offensive to certain Courts through appearance alone. The same is true for physiological mannerisms and allocution. The Defendant should stand erect with his hands at his side. When addressing the Court, the Defendant should look directly at the Judge and all replies or statements should be predicated with "Your Honor," "Yes Sir," or "No Sir." Whispering conversations between counsel and the Defendant should he avoided. The Defendant should speak loud enough to be heard easily by the Court and Court Reporter.

B. DURING TRIAL.

During trials, the Defendant should sit erect at the counsel table and avoid offensive or animated gestures. If he takes the stand, he must avoid allowing the Prosecutor to incite discourteous remarks—or to display a "quick temper." It follows, of course, that if the Court suspects perjury, you need not expect leniency if a conviction ensues.

C. AT SENTENCING JUNCTURE.

1. The Right of Allocution.

Under F.R.C.P. 32 (a)(1), both the Defendant and his counsel are afforded the right of allocution. Two scenarios should be avoided: under *no* circumstances should the Defendant waive his right to speak, and secondarily, he should never say, "I'm sorry please give me another chance." Both scenarios are equally ineffective.

2. Speaking through the Client.

Some clients are "naturals" and quite eloquent—their tone of voice and apparent sincerity make them "their own best friend." If you are fortunate enough to have one of these clients, promote and encourage his telling his own story—it is much more effective for the Defendent to speak for himself rather than for defense counsel to do his bidding. The lawyer may sound fantastic to the audience, but there is little originality for the Judge. If the client states his position with clarity and sincerity, it is often the better practice for counsel to forego making any statement. The author usually listens to remarks made by the Court during the sentencing dialogue and attempts to ascertain whether probation is probable. If probation is apparently forthcoming, the author remains silent. Incidentally, counsel should never interrupt the Court to assert his right of allocution, nor should he begin expounding the virtues of a client without leave of Court. The proper and most effective approach is a request along the following line: "Your Honor, may I be allowed to speak?" A simple courtesy, literally.

3. Speaking for the Client.

a. What about the client who does not express himself well? Now you are going to have to "earn your money." It is going to take time—perhaps several hours—but do not allow this type of client to "pass the buck" to you. It is *imperative* that he express himself and project a favorable image to the Court.

b. If the client has a language problem, assure him he will have an interpreter to work through. Do not force him to speak in English unless you are sure he can be effective. If your client speaks Spanish, for example, acquire the services of your own interpreter to make certain the client understands what personality traits you are trying to convey to the court. Sincerity is the most important trait he needs to project. Multiple office conferences with this type of client should eventually accomplish the goal. If the client balks when the Court makes the requisite inquiry ("What do you have to tell me before I pass sentence on you?"), intercede with your own remarks and then advise the Court that the client wishes to make an additional statement. If this suggestion doesn't prod the client, he will have effectively waived his right to allocution under *U.S. vs. Scallion*, 533 F. 2d 903 (5th Cir. 1976).

III. THE PRE-SENTENCE INVESTIGATION.

F.R.C.P. 32 (c)(2)

Unless waived with permission of the court, a pre-sentence report will be ordered. The client and his family, as well as the client's employer, will be visited by the probation officer. The employer should be notified in advance and a letter relating to the client's employment history and potential future employment

should be furnished to the probation officer. Future employability is extremely important and a recommendation letter from the employer seeking leniency often carries great weight.

IV. SUPPLEMENTING THE PRE-SENTENCING REPORT.

A. LETTERS OF RECOMMENDATION.

Instruct the client that he is to personally contact as many "influential persons" as possible and ask them for letters requesting leniency. Obviously, no particular form should be used and the letters should be addressed directly to the court. Friends and relatives are secondary sources, but should be included. A letter from the spouse and/or parents is advisable; however, letters from children of the client should be avoided as they not only will appear melodramatic but their authenticity may be doubted. Letters from members of the clergy are usually beneficial.

B. MILITARY DATA.

Commendation medals, Certificates of Achievement and *Honorable* Discharges. Combat duty and Purple Hearts justifiably arouse some degree of sympathy in the minds of most courts.

C. PHOTOGRAPHS.

Family and residence. If your client lives in a three room house, it is difficult for the Court to believe that he has prospered from criminal endeavors.

D. SERVICE CLUB DATA.

Lions, Jaycees, Kiwanis, etc., including offices held.

E. PSYCHOLOGICAL TESTING NARRATIVES.

Some Courts are amenable to psychological data; these services can be privately obtained "for a nominal fee." (Either psychiatrists or psychologist's).

F. INGENUITY.

I.e., what is there about your client that you feel could be beneficial and how can you best call it to the attention of the Court? For example, if the client has a record, are there mitigating circumstances involved in the prior offenses? If so, apprise the probation officer by letter and request that your letter be attached to the probation *report*.

G. THE FILING DEADLINE.

Fortunately, there is none, but it is poor practice to wait until the last minute and highly presumptious for counsel to present letters, etc. the day of sentencing. Advise the client that you want all letters, documentary evidence, and other relevant data *in your office* at least two weeks in advance of the sentencing date. Either deliver in person to the probation officer assigned to the case or mail via certified mail under cover letter. You now have an available outline of this date to refer to arguendo at time of sentencing. Secondarily, you have made certain the *information will reach the eyes of the Court.*

V. READ THE PRE-SENTENCE REPORT.

A. TIME REQUIREMENTS: COURT MAY ORDER *EVIDENTIARY HEARING.*

Under F.R.C.P. 32 (c)(3)(a), counsel is entitled to read the PSR prior to the date of sentencing. In the Southern District, counsel may examine within three days of the sentence date. *Local Rules should, of course, be checked.* Counsel will often find erroneous information, some based on hearsay twice removed. Under the Rule, the Court must permit counsel to comment on the information contained in the report. *The Court also is authorized* to order an evidentiary hearing if not satisfied that the report is factually accurate. Therefore, if you discover information that is untrue, which is liable to effectively result in penitentiary time, file a motion to delay the sentence, *setting forth specifically the grounds relied on,* and ask for an evidentiary hearing. Cite *U.S. vs. Robin*, 545 F. 2d 775 (2nd Cir. 1976), holding that the Court must allow counsel sufficient time for rebuttal via an evidentiary *hearing.*

B. COMMON SENSE FACTOR.

Do not attack the PSR for minor discrepancies or irrelevant factors which do not substantially prejudice your client. Most Courts are psychologically loyal to their staffs and quibbling over insignificant discrepancies may alienate the Court.

VI. FACTORS WHICH THE COURT MAY CONSIDER.

A. EXTRANEOUS OFFENSES.

Even though your client has not been prosecuted for a particularly extraneous offense, the Court may consider it. *Smith vs. U.S.*, 551 F. 2d 1193 (10th Cir. 1977) *Cert. denied.*

B. PRIOR ARRESTS.

May be considered, but may not equate with prior wrongdoing. *U.S. vs. Bailey* 547 F 2d (8th Cir. 1976)

C. SCOPE OF DEFENDANT'S PARTICIPATION IN CRIME.

E. g., if the Defendant had a "major role" in a narcotics case. *U.S. vs. Seijo*, 537 F. 2d 694 (2nd Cir. 1976).

D. PREGNANCY.

The Ninth Circuit has held, per curiam, that discrimination in sentencing due to pregnancy does not violate the Equal Protection Clause. *U.S. vs. Flores*, 540 F. 2d 432 (9th Cir. 1976).

VII. FACTS WHICH THE COURT MAY NOT CONSIDER.

A. PRIOR CONVICTION WITHOUT COUNSEL, *U.S. vs. Tucker*, 404 U.S. 443 (1972).

B. UNSUBSTANTIATED CRIMINAL CHARGES OR CONVICTIONS.

The PSR must not include these factors unless they can be substantiated by official records. *Baker vs. U.S.*, 388 F. 2d 931 (4th Cir. 1968).

C. SUBSEQUENT OFFENSES.

Caveat! *The Court may consider subsequent* offenses as they relate to character; however, the Defendant may not be specifically penalized for the subsequent offense. *U.S. vs. Eberhardt*, 417 F. 2d 1009 (4th Cir. 1969), *Cert. denied* 397 U.S. 909 (1970).

D. FALSE ASSUMPTION REGARDING FACTS.

Should the Court base its sentence on facts which are materially false, your client has effectively been denied due process. *U.S. vs. Malcolm* F. 2d 809 (2nd Cir. 1970).

E. ILLEGALLY OBTAINED CONFESSIONS.

U.S. Ex Rel Brown vs. *Rundle*, 417 F. 2d 282 (3rd Cir. 1969).

F. ILLEGALLY OBTAINED EVIDENCE.

Vedugo vs. U.S., 402 F. 2d 599 (9th Cir.) *Cert. denied* 397 U.S. 925 (1969).

G. PERJURY BY DEFENDANT.

U.S. vs. Grayson, 550 F. 2d 103 (3rd Cir. 1976) (Per Curiam), holding that Court may consider the impression that Defendant committed perjury at trial.

H. A PLEA OF NOT GUILTY. (5th Circuit Rule)

If a greater punishment is imposed simply because the Defendant pled not guilty, the sentence should be vacated and the case remanded for resentencing under *Thomas vs. U.S.*, 386 F. 2d 941, (5th Cir. 1966).

1. *Comment:*
The Court should not question the Defendant regarding substantive aspects of the case when the Defendant has pled not guilty and has been found guilty by either the Court or a jury. Do not allow a client to be required to admit that he is guilty. Remind the Court (respectfully) that the client may choose to appeal the conviction and that you have advised him that he is not required to answer this type of question. If the Court is insistent, make your objection and state into the record that your client is being denied his 5th and 6th Amendment rights. If the Court persists, allow the client to answer. Then read *Thomas* (*supra*) and *Le Blanc vs. U.S.*, 391 F. 2d 916 (1st Cir. 1961).

As a practical matter, a client should never state to the Court that even though he has been found guilty, he is not guilty. The more tactful approach is for the client to admit that the jury or Court has found against him even though he believed he had a plausible defense. In other words, avoid direct confrontations between the client and the Court who is going to pass sentence at the conclusion of the dialogue.

VIII. THE SENTENCE HEARING. COMMENT.

The following suggestions relate to observations made by the author regarding the "do's" and don'ts" at a typical sentence hearing. The word "observations" should be taken literally because if counsel has never practiced before a particular Court, the best way to find out what you should be anticipating is to attend a sentencing docket prior to the date your client is scheduled for sentencing. If this practice is followed, counsel will be in a much better position to advise the client on what to expect.

A. REVIEW THE PRE-SENTENCE REPORT WITH CLIENT.

Remember you are trying to anticipate what questions the Court will ask the client. Instruct the client to answer forthrightly without hesitation or stuttering. Go over specific questions you believe the Court will ask. Avoid whispering conversations before the bench between client and counsel and impress on the client how important it is for him to "handle" the questions by himself. A successful dialogue between the Court and the client will "humanize" the client and increase his chance for either probation or a more lenient disposition, time-wise.

B. BE ON TIME.

The quickest way to get off on the wrong foot at a sentencing hearing is for you or your client to not be *present in the courtroom* when the case is called. If you are fortunate enough not to be personally held in contempt and/or your client hasn't had his bond revoked and capias issued for his arrest, the hearing will nevertheless initiate with both client and attorney on the defensive. Counsel has enough to worry about without having to speculate what effect this lack of punctuality is going to have on the court. Another negative aspect is that if the Court admonishes either the attorney or the client, and does so emphatically, one or both may be unnerved. This can have a disasterous effect on the ensuing dialogue. If either client or attorney is intimidated at the outset, neither will be effective. Instruct the client to meet you at your office and drive him to the Courthouse.

C. PROPER GROOM AND ATTIRE.

Shoulder length hair, untrimmed beards and Fu-Man-Chu mustaches may be a knockout in the local disco, but probably will not endear either the client or the attorney to the Court. The client projects disrespect for the Court and a subtle indication that his attorney has little influence on him; therefore, he may appear to be a poor candidate for rehabilitation via probation.

Unless you want the client to project poverty, instruct him to wear a dark suit or sportcoat ensemble with a conservative tie and white shirt.

Female Defendants should be attired either in a conservatively styled pantsuit or dress. Make-up and hairstyle should also follow a conservative line.

D. FAMILY PRESENT IN COURTROOM.

The Defendent's spouse, children and parents should be present at sentencing. The Court may receive the impression that a supportive family unit is going to be affected by the sentence.

If the Court sees that others apparently care what happens, some degree of leniency may be forthcoming.

E. COMPLETE CANDOR.

The most important instruction you have hopefully given your client prior to the sentence hearing, is simply to tell the truth. There should be no variance between the information given to the probation officer at the PSR interview and the answers/statements given the Court at the sentence hearing. If the Court feels the client is not being candid about his involvement, the Court may find it difficult to rationalize a probated sentence. Remind the client that he will be placed under oath before the dialogue ensues (if a plea of guilty has been entered) and that he becomes subject to possible indictment for perjury.

1. *Don't allow client to "cover" other co-defendants or unindicted co-conspirators.* (Re: Plea of guilty)
Explain to client that if the Conrt asks questions about actual or possible involvement of third parties, the client should answer truthfully. If the questions are asked, the Court is already aware of the possible or probable involvement of others and in many cases is simply trying to ascertain if the client exhibits rehabilitation potential through open and honest admissions. Of course, counsel cannot force a client to cooperate with the Court; however, the client should be made fully aware that cooperation is definitely in his best interest.
2. *Admit Guilt.* (Re: Plea of guilty)
The client has already pled guilty and should not equivocate about his guilt at the sentencing stage. If this seems too obvious, you need only remember that it is not uncommon for Courts to withdraw pleas of guilty sua sponte at the sentence hearing.
3. *Client should manifest respect and sincerity.*
All remarks addressed to the Court by the client should either be predicated or closed with the words "Your Honor," "Yes Sir" or "No Sir." The tone of the client's voice and voice inflection should manifest respect and sincerity. Eye contact between the client and the Court should be maintained throughout the dialogue. Avoid cute or facetious remarks and project an air of formality.
4. *Maintain composure.*
On occasions when clients do not receive probation, they should be prepared for this contingency. Remember to tell the client that if he does not receive probation, you have 120 days to secure a ruling on a Motion for Reduction under F.R.C.P. 35. If the case is appealed, you still have 120 days after the receipt by the Court of the mandate of affirmance to secure a

(continued on p. 45)

SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

FEBRUARY, 1979
VOLUME V, NO. 6

The following was inadvertently left out of the last S.D.R. It is a continuation of the discussion concerning Wilder and Armour, #57,848, 1/31/79.

4) BUT GET THIS. The trial judge did not charge, in this capital murder case, on the offense of murder.

HELD: No error. "Ds offered no evidence and did not testify." "There is no evidence that they did not intend to kill the deceased while in the course of robbing him." "There is nothing to show Ds would be guilty of only the lesser included offense of murder."

5) ALSO, GET THIS. It is now permissible for the State, at the punishment stage of a capital murder case, to introduce evidence of extraneous offenses. The Court said this type evidence is relevant and sheds light on both deliberateness and D's future criminal tendencies.

NOTE: J. Roberts, in his dissenting opinion, dissented from the Majority's holding concerning the admissibility of the pistol and the television set as, in his opinion, these were obtained as a result of the unlawful custodial interrogation of Wilder and Armour. He also dissented from the holding regarding standing.

Panels for Week of February 7, 1979.

Panel #3, 1st Quarter: Judges Clinton, Dally and W. C. Davis.
Panel #3, 4th Quarter: Judges T. Davis and Douglas.

IT IS NECESSARY FOR PROSECUTORS, TJS AND DEFENSE LAWYERS, WHEN DEALING WITH A MRP, SEE WALKOVAK, #60,085, 2/7/79, J. Dally, Panel #3, 1st Quarter, WHICH ALLEGES FAILING TO REPORT A CHANGE OF RESIDENCE, TO GET OUT THE CONFLICTS OF LAW BOOK. (Reversed). (Dallas County).

COMMENT: As stated in Whitney, 472 (2) 524, "Residence is an elastic term. The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide, at that moment the residence is fixed and determined."

The State's evidence consisted only of the following:

1. Location of D's residence when he got probation.

2. Sheriff hit the computer buttons on T.C.I.C. and N.C.I.C. and it showed a person by that name as being in Colorado, Nevada, Maryland, Kentucky and California.

3. Sheriff brought D back to Falls County from California, which event occurred after the MRP was filed.

4. Two envelopes, with return addresses, from out of State, but postmarked in Texas, were introduced into evidence.

HELD: "Since the evidence is insufficient to show by a preponderance of the evidence that the D had changed his residence and failed to notify the probation officer, the judgment must be reversed."

IF YOU ARE DEALING WITH A POSSIBLE FALSE SEARCH WARRANT AFFIDAVIT CASE, READ RAMSEY, #55,947, 2/7/79, J. T. Davis, Panel #3, 4th Quarter, WHICH CONSTRUED FRANKS V. DELAWARE, 98 S.Ct. 2674. CASE REVERSED FOR FAILURE OF TCT TO ALLOW D A HEARING ON HIS CONTENTION THAT THE AFFIDAVIT WAS BASED ON A FALSEHOOD AND AN OPPORTUNITY TO CALL THE INFORMER AS A WITNESS IN SUPPORT THEREOF. (Reversed). (San Patricio County).

COMMENT: Somehow, the D knew who the informer was. The affidavit stated that the informer had been inside a motel room within the last 24 hours and had observed the D maintaining possession and control of a quantity of heroin.

At a hearing, defense counsel wanted to put the informer on the stand to testify that he had never been in the motel room. However, the TJ refused to allow the witness to testify, but agreed that the statements of defense counsel could be included in the record on appeal as a bill of exception.

J. T. Davis, in discussing the former Texas rule that you cannot go behind the affidavit versus the applicability of Franks v. Delaware, supra, held that Franks was to be applied retroactively.

> "Any affidavit sworn to with knowledge that the information in the affidavit is false, or with reckless disregard to its truth of that information, cannot be said to have been in good faith and in accordance with the law. Thus, we find that the holding in Franks is to be applied retroactively."

It is now mandatory, however, that to get a hearing on this issue that the D must:

1. "Allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false. Allegations of negligence or innocent mistake are insufficient, and the allegations must be more than conclusory.

2. Accompany these allegations with an offer of proof stating the supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished. If not, the absence of written support of the allegations must be satisfactorily explained.

3. Show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant. 98 S.Ct. at 2685."

HELD: "We find that [in light of the facts] that an evidentiary hearing was required." Excising the alleged false portions of the affidavit would render the affidavit invalid.

"By our holding today we find only that the court should have held an evidentiary hearing on the allegations of D that the affidavit contained a falsehood, and this opinion should not be interpreted as holding that the affidavit was bad or that the court must accept the testimony of the informer or any other witness."

COMMENT: Read, also, J., Roberts' dissenting opinion in Etchieson, 574 (2) 753, Opinion on Ds MRH, See Nov., 1978, Vol V. No. 3, S.D.R., p. 5.

THOUGHT: As to divulgence of the informer, if the D testified, for example, in this case, assuming he did not have the informer, that he, the D, had not been in the motel room within the last 24 hours or that he had not possessed, either alone or jointly, heroin, would the D be entitled to have the informer divulged? If so, by bootstrapping, through this case, it would appear you may then be entitled to a hearing on the falsity of the affidavit.

J. ODOM SAYS, CF. MY STATEMENT, April, 1978, Vol. IV, No. 8 (Correction), S.D.R., p. 6, IN EX PARTE MINJARES, #57,136, 2/7/79, En Banc, with J. Douglas dissenting with opinion, THAT D MADE THE RIGHT DECISION IN GOING TO AUSTIN AS HE GETS RELIEF. (Writ Granted).

COMMENT: Originally, a panel of the Court ruled that the 1/3 credit the Sheriff of El Paso County gave the D on his Municipal Court convictions was invalid.

NOTE: The D was ordered to pay the City of El Paso $788.00. City prisoners are kept in the County Jail. The D had been in jail for 62 days before filing this writ. If given $7.50 per day credit, he would then have a credit of $465.00 against the $788.00 owed. He contended, however, that he was entitled to a maximum possible punishment of $200.00 which, with credit, would entitle him to release.

The Majority of the CCA, per J. Odom, rejected this one "sentence" theory for reasons stated in the original opinion.

However, the Majority held that "petitioner is entitled to such good time credits as he had earned while an inmate of the county jail, and the absence of a formal sentence may not be used to deny him that credit." "Petitioner has credits of $465.00 toward discharge of his $788 of fines and costs."

As to the remaining balance of $323, as D is an indigent, "the Muncipal Court was without authority to order D's imprisonment for default in payment of his fines and costs."

HELD: "Both on the constitutional authority of Tate v. Short and on the statutory authority of Art. 43.03(b), petitioner is entitled to discharge from the confinement for default in the payment of fines and costs assessed against him in the Municipal Court cases. He is also entitled to credit for $465 against the $788 total assessed in those cases. On remand the County Court shall (1) determine the cause numbers of the Municipal Court cases, (2) set aside the commitment to custody issued by the Municipal Court, and (3) remand petitioner to the Municipal Court for execution of judgment on the fine and costs remaining due by arrangement in the Municipal Court of a payment schedule or other means authorized by the applicable statutory provisions cited at the close of the preceding paragraph."

COMMENT: J. Douglas chastised the Majority as he felt that it "thinks it bad that the original opinion discussed something not raised in D's brief." "If discussing a matter not raised in the brief is wrong, why does the majority discuss the question of indigency which was not raised in D's brief?" "The writer of the majority opinion has often discussed matters not raised by the brief."

CCA, IN FIVE (5) OPINIONS, DISCUSSES JUVENILES IN DISTRICT COURT AND THEIR RIGHT TO AN EXAMINING TRIAL.

IN EX PARTE LeBLANC, #58,575, 2/7/79, P. J. Onion, En Banc, with J. T. Davis, joined by Judges Douglas and W.C. Davis, dissenting with opinion, the facts showed that the D was accused of committing capital murder and murder and the Juvenile Court entered an order waiving jurisdiction and transferred the case to the Criminal District Court of Jefferson County. That Court, after holding an examining trial hearing, discharged the D as there was a failure to show probable cause. Thereafter, the County Attorney filed a petition alleging the D committed the offense of forgery, although the capital murder and murder cases were within his knowledge. The D was adjudicated a delinquent and he was then committed to T.Y.C. Two months later, the D, who was about to turn 17, was indicted for capital murder and murder.

HELD: Under Menefee, 561 (2) 822, which held that an indictment, having been returned prior to an examining trial, in a juvenile proceedings, is void, the Court also held here: "We find such indictment here to also be void."

"An examining trial, to determine whether there is probable cause to show that the D committed the alleged offense, is a prerequisite to an indictment being returned against a juvenile sought to be tried as an adult and that the discharge of D here at the examining trial terminated criminal proceedings against him."

The Question of double jeopardy was not answered.

(Writ Granted). Jefferson County).

IN JONES, #56,004, 2/7/79, P. J. Onion, En Banc, with Judges Douglas, T. Davis, Dally and W. C. Davis dissenting for reasons stated in White, See Infra, the question was as follows;

Q: Whether, where no examining trial was accorded the D, but none was requested by the D or his attorney, did this constitute a waiver of an examining trial?

A: No. "The indictment is still void." "The indictment is hereby set aside and the cause is reversed and remanded in order that the D may be accorded an examining trial prior to the return of any new indictment." (Reversed). (Jefferson County).

IN WHITE, #56,129-131, 2/7/79, En Banc, J. Roberts, with J. T. Davis, joined by Judges Douglas, Dally and W. C. Davis, dissenting with opinion, with P. J. Onion concurring with opinion, and with J. Clinton concurring with opinion, the question was whether the District Court's jurisdiction over the juvenile was such as to fall within Sec. 13, Art. 40.09, C.C.P., interest of justice error, where the D had plead guilty to offenses committed while a juvenile and received 40 years on each case. The majority of the CCA held it was. (Reversed). (Harris County).

COMMENT: The Majority held: "We require the record to affirmatively reflect that an examining trial has in fact been held in the District Court to which the juvenile is transferred." "We will not presume that a juvenile has been afforded an examining trial in the District Court to which he is transferred." Here, there was nothing anywhere in the Record on Appeal to show that an examining trial had been held. Also, nothing on the docket sheet. Cf. Weingarner, 505 (2) 303, which was expressly overruled.

HELD: "Since the record reflects that no examining trial was held, it is clear that an examining trial could not have been held in the District Court prior to the return of the instant indictments. Under Menefee, supra, it is clear that the indictments are void and that the 183rd District Court had no jurisdiction to proceed on the indictments."

COMMENT: For a good historical discussion, regarding our juvenile laws, concerning charging juveniles with criminal offenses and prosecuting them in District Court, see P. J. Onion's concurring opinion.

The dissenters felt, in my opinion, that the return of an indictment terminates the right of a juvenile to an examining trial when jurisdiction has been accepted in the district court. The Juvenile, in their opinion, by the express terms of Sec. 54.02(h), Family Code, is to be totally and wholly dealt with as an adult.

QUESTION: In light of these holdings, unless there is a showing of waiver of the right to an examining trial, may an adult now complain that this deprives him or her of equal protection under the law? I doubt that the CCA's majority would go this far but, as to a Federal Court, this could be rather interesting.

COMMENT: There is a bill floating in the Legislature that would prohibit the return of an indictment of one who has failed to receive a requested examining trial. Our Legislative Committee should make sure that the members of the committee, which considers this bill, be personally given copies of these opinions to show them the importance of an examining trial.

IN EX PARTE CHATMAN, #57,870, 2/14/79, Commissioner Keith, En Banc, with Judges Douglas, T. Davis, W.C. Davis and Dally dissenting without opinion, it appears that the TJ in that cause simply disagreed with the Majority of the CCA and, in a post-conviction writ hearing, simply did nothing or when ordered to do something did as little as possible. "NOT WITHSTANDING THE SPECIFICITY OF OUR ORDER ON REMAND, THE TRIAL COURT HAS WHOLLY FAILED TO MAKE THE REQUISITE FINDING AS TO WAIVER OF THE EXAMINING TRIAL." (Writ Granted). (Galveston County). This action of the TJ appeared, by the opinion, to upset the Majority of the CCA.

HELD: "Under the record which we review, petitioner is entitled to relief from confinement under the void indictment under the rationale of Menefee, supra. See White v. State, #56,129-31 (2/7/79); Jones v. v. State, #56,004 (2/7/79). See also Davila v. State, 544 S.W.2d 606, 608 (fn. 1); Huggins v. State, 544 S.W.2d 147, 148.

We now order that he be released from further confinement under the void conviction attacked and that he be delivered to the Sheriff of Galveston County, where he will be held for an examining trial under § 54(h), Family Code, and such further proceedings as may be appropriate when conducted in accordance with the applicable statutes and rules, without reference to his earlier conviction which is here and now vacated. It is so ordered."

SEE ALSO EX PARTE HUNTER, #59,192, Panel #1, 1st Quarter, 2/28/79, P. J. Onion, with J. T. Davis, dissenting without opinion, WHERE D WAS ALSO NOT AFFORDED AN EXAMINING TRIAL NOR WAS IT SHOWN HE WAIVED SAME. (Writ Granted). (Denton County).

J. CLINTON REVERSES ALDACO, #57,526, 2/7/79, Panel #3, 1st Quarter, ANOTHER ALLEGATA-CHARGATA FUNDAMENTAL ERROR CASE CONCERNING THE INDICTMENT AND THE CHARGE TO THE JURY IN AN AGGRAVATED ROBBERY CASE. (Reversed). (Harris County). J. Dally concurred in the result.

COMMENT: Here, the Indictment merely alleged that the D threatened and placed the C/W in fear of imminent bodily injury and death but the charge also instructed the jury on causing serious bodily injury to another.

SEE ALSO HILL, #57,531, 2/7/79, J. Dally, Panel #3, 1st Quarter, reversed for same reasons, with J. Dally continuing to voice his objection to reversal although he was the author of this opinion. (Reversed). (Harris County).

J. T. DAVIS SAYS, IN MY WORDS, IN PARKER, #57,037, 2/7/79, Panel #3, 4th Quarter, THAT IF THE POLICE MAKE A LAWFUL ARREST, EVEN THOUGH THE D IS THEREAFTER SEATED IN THE BACK SEAT OF A PATROL CAR, AN AUTOMOBILE IS FAIR GAME FOR THE POLICE TO SEARCH TO THEIR HEARTS CONTENT. (Affirmed). (Dallas County).

HELD: "When the driver of a motor vehicle who has committed a traffic offense appears to be under the influence of an intoxicant the officer has reasonable grounds for searching the car for liquor or drugs." This type search is "incident to an offense for which the officer had probable cause to arrest; i.e., driving while under the influence of drugs or D.W.I., offenses for which there exist means or instruments of commission."

COMMENT: The facts here showed that the police answered a disturbance call to the Painted Duck, a strip joint on Gaston Avenue in Dallas. When the officer pulled into the driveway, he noticed a vehicle leaving or attempting to leave at a high rate of speed. The vehicle was stopped. D, the driver, was arrested at that time for public intoxication and he and his com-

panion were then put into a police car. After the police officer went inside the Painted Duck and came out, a search of the D's motor vehicle was then made, with marijuana being found under the driver's seat and in the console between the two front seats. Held, everything poco weino.

COMMENT: The logic of this holding escapes me at the moment as it is common know=ledge, among defense lawyers, that rarely do persons carry alcoholic beverages in their cars after leaving a place where they have drunk from the grape and it is further common knowledge, among prosecutors, that rarely do persons carry marijuana in their cars after leaving a place where the grape is sold.

D WELCH'S CONVICTION IS AFFIRMED . #57,300, 2/7/79, J. W.C. Davis, Panel #3, 1st Quarter. (Affirmed). (Harris County).

COMMENT: The intersting fact about this case was that the D, shortly before he was arrested, was seen in a certain area of Houston driving a wrecker with a body suspended from the cable normally used to tow cars. As it turned out, the deceased was the body. Needless to say, in Houston at least, this event attracted a lot of attention, both before and after the D's arrest.

The evidence was held sufficient to sustain the conviction:

> "The case against appellant is a circumstantial one. The State showed both motive and opportunity in presenting its case. Appellant was the only person shown to be near the wrecker by the testimony of Fugate and Salvato. The cause of death was a gunshot wound, apparently inflicted by a .38 caliber weapon. Appellant possessed a .38 caliber weapon when arrested and a firearms expert was able to make several definitive comparisons between a bullet found on the floor of the shop and test projectiles fired from appellant's gun. This evidence, viewed in the light most favorable to the verdict, excludes all reasonable hypotheses except the guilt of appellant. The evidence is sufficient."

COMMENT: Judge W. C. Davis also discussed, in this opinion, the evidentiary rule of past recollection recorded.

> "A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded. Wood v. State, 511 S.W.2d 37."

"Mrs. Fugate's memory could not be refreshed by a review of her written statement. She could, however, identify her written statement and vouched for its correctness; therefore, the statement was admissible as Fugate's past recollection. There was no effect by the State to impeach its own witness, merely a proper job of following the rules of evidence."

COMMENT: It would appear that if the D has written out his version of the facts of the case and, during trial, while testifying, he has a memory lapse, his statement should then be admissible, by this case, as a past recollection recorded and would not be subject to the objection that it is bolstering the witness.

Panels for Week of February 14, 1979.

Panel #1, 1st Quarter: Judges T. Davis, Onion and Phillips.
Panel #2, 1st Quarter: Judges Douglas, Roberts and Odom.
Panel #3, 3rd Quarter: Judges Roberts, Douglas and Dally.

J. T. DAVIS WRITES AND WRITES ON OFFENSE OF THEFT OF SERVICES AND FINALLY REVERSES CHANCE, #57,449, 2/14/79, Panel #1, 1st Quarter, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE THEFT OF SERVICES IN EXCESS OF $200.00. (Reversed). (Bexar County).

COMMENT: The facts showed that the D took his automobile into the C/W's place of business to be repaired because it had a collision with another vehicle. The total bill, which matched the estimate, came to $481.86. When the D picked up the car, he gave a check which subsequently bounced because the bank account had been closed. Whether this had to do with the D not having any money or being dissatisfied with the repair work is not shown by the opinion. After failure to collect, this lawsuit followed with the D being tried and convicted for Theft of Services and given 3 years in T.D.C.

Q: "Whether the definition of service is broad enough to include tangible property affixed as part of the service rendered?"

Q: "Can only the labor be properly considered as a service?"

HELD: "We hold that the automobile parts affixed in this case are clearly severable from the labor expended, thus are not such a part of that labor as to render that property a service."

"Our decision today does not place any obstacle to prosecution of offenses such as appellant's however.

Under § 31.09 both the theft of service and the theft of property can be charged in one indictment and prosecuted as a single offense. The value of the services and property could have been aggregated to raise the offense to a third degree felony, even if neither theft amounted to over $200 standing alone. § 31.09, supra; Tucker v. State, 556 S.W.2d 823. Thus, this decision will not impede the prosecution of hybrid "service-property" offenses such as the one in the present case.

"We hold only that the evidence was insufficient to prove the theft of services in excess of $200. This is important in light of the Supreme Court's decisions in Burks v. U.S., 98 S.Ct. 2141, 57 L.Ed.2d 1, and Greene v. Massey, 98 S.Ct. 2151, 57 L.Ed.2d 15, which bar further prosecution when the evidence is found insufficient to support a conviction. It should be noted that the Supreme Court did not reach the issue of whether the defendant could be retried for another offense, but held only that another trial on the same offense was barred by double jeopardy. Greene v. Massey, 98 S.Ct. at 2154, n. 7.

The judgment is reversed and reformed to acquittal insofar as further prosecution for the theft of services under § 31.04 is concerned."

J. PHILLIPS, WRITING FOR PANEL #1, 1ST QUARTER, IN EPPERSON, #57,356, 2/14/79, OVERRULES ALL OF D'S CONTENTIONS BUT ONE, BUT THAT ONE WAS GOOD ENOUGH TO GET A REVERSAL. (Reversed). (Dallas County).

COMMENT: It appears that trial counsel for the D had memorized the case of French, 484 (2) 716, 719, and objected to each and every witness for the State testifying concerning the breathalyzer operation. As best I can tell, from the opinion, when the State was about to get poured out of court, they ran in an area technical supervisor who, apparently, when he left the office, grabbed the wrong file and the machine to which he testified was not the same machine used to examine the D. Thus, under the domino theory, once this witness' testimony was discarded, the other witness' testimony, concerning the breathalyzer, also fell.

HELD: "The trial court's failure to grant D's objection after the testimony of the technical supervisor failed to establish the predicate for Off. Bryan's testimony concerning the results of the breathalyzer examination constitutes error." "The error is reversible since the trial court, in its charge to the jury, instructed them on the presumption of intoxication provided for under Art. 6701L-5, V.A.C.S." (Reversed).

THE REVERSAL IN OWENS, #56,226, 2/14/79, SHOULD STAND ON REHEARING. (Reversed). (Wichita County). Panel #2, 1st Quarter.

The facts of this case showed the following:

An office was burglarized with a gun collection taken with 8 of the guns subsequently returned to the owner.

A Texas Ranger, who participated in the investigation ,noticed muddy prints inside the office and also observed a trail of footprints leading from the door that had been forcibly opened. He followed the footprints until they stopped outside the Rainbow Courts Motel Room 5. The occupant of the motel room testified that on the night in question he observed his brother handing several rifles

to D, who was standing inside the room. The occupant, when he asked, was told that he did not need to know what they were doing. Later that evening, his brother and the D left.

HELD: "In the instant case the State offered proof of a burglary where rifles were taken. Through the footprints they showed that someone had walked from the burglarized office to the motel and through the testimony of Robeson they showed that appellant and Billy Robeson handled some rifles on the night of the burglary. The State offered no proof that the rifles handled by appellant were the same or even similar to the stolen rifles. They offered no proof to connect appellant to the 8 rifles that were returned to Bentley. The evidence does no more than cast a strong suspicion on appellant; it is insufficient.

The State contends that if the cause has to be reversed, it should be remanded for a new trial. That was the rule before the Supreme Court of the United States decided Greene v. Massey, 98 S.Ct. 2151, 57 L.Ed.2d 15. Greene held that retrial of an individual after an appellate court finds the evidence to be insufficient constitutes double jeopardy.

The judgment is reversed and the judgment is reformed to show an acquittal to the charge of burglary of a building."

COMMENT: For those of you who guessed that J. Douglas wrote this opinion, if you will contact our President at the next T.C.D.L.A. cocktail party, he will see that you get one (1) free drink.

TJ'S "TOTAL FAILURE TO ADMONISH D AS TO THE RANGE OF PUNISHMENT ATTACHED TO THE OFFENSE TO WHICH D PLED GUILTY CONSTITUTES REVERSIBLE ERROR" IN FULLER, #56,112, 2/14/79, J. Phillips. (Reversed). (Johnson County).

COMMENT: D on trial for felony D.W.I. After the State rested her case, D then entered a plea of guilty. The jury gave him 1 year imprisonment as punishment. Although the TJ questioned the D, he failed to say anything to the D about the range of punishment. (Reversed).

J. T. DAVIS, IN HUFF, #56,093, 2/14/79, Panel #1, 1st Quarter, HOLDS THAT "ALLOWING THE PROSECUTOR TO PROCEED IN THIS USE OF THE GRAND JURY TESTIMONY [OF THE D'S WIFE] OVER D'S REPEATED OBJECTIONS CONSTITUTES REVERSIBLE ERROR." (Reversed). (Harris County).

COMMENT: It appears, in reading between the lines, that the D's attorney made arrangements for the D's wife to testify before the Grand Jury. The facts called for this type action as it appeared that, from the facts, the deceased probably needed killing. Cf. Infra. Once she got before the Grand Jury, apparently she was confronted by a law and order type prosecutor who felt that even if the deceased needed killing, the D should not have done the killing. The wife's description of the prosecutor at the Grand Jury is revealing: "That man could have gotten me to say anything, because ever time I opened my mouth, he was just screaming and hollering at me." The opinion does not give the name of the prosecutor.

During the trial, the prosecutor had a field day with the Grand Jury transcript as he would ask the witness a question, she would answer, and then he would, regardless of the answer given, probably in a sarcastic vein, then ask her if she remembered what she told the Grand Jury and would then read to her that portion of her Grand Jury testimony.

HELD: "The proper predicate for impeachment by a prior inconsistent statement requires that the witness first be asked if he made the contradictory statement at a certain place and time, and to a certain person. If the witness denies making the contradicting statement, it can then be proved by the prior inconsistent statement. If the witness admits the prior inconsistent statement, however, the prior statement is not admissible.

During the lengthy cross-examination of appellant's wife, the prosecutor repeatedly failed to elicit a denial of the prior statement from the witness before reading the grand jury testimony. Often the prior testimony read by the prosecutor was consistent with the witness' testimony at trial. On at least 14 occasions, much as in the example above, the prosecutor read the testimony to the witness and asked if she remembered making the statement, without first eliciting a denial of the prior statement. This use interjected into evidence a large portion of the grand jury testimony that was inadmissible. When an instrument is read (into the record), it is introduced just as if the prosecutor had the instrument marked and introduced into evidence as an exhibit.

We hold that the prosecutor's reading of the grand jury testimony was inproper impeachment as he failed to lay the proper predicate. Considering the importance of the wife's testimony to the appellant's defense, we cannot say that this impeachment was harmless. We hold that allowing the prosecutor to proceed in this use of the grand jury testimony over appellant's repeated objection constitutes reversible error.

In the event of a retrial of this cause, we express concern regarding other issues raised in this trial. First, in Roberts v. State, 280 S.W.2d 285, this Court held that the State could not compel the defendant's wife to testify in front of the grand jury and then use that testimony to impeach her when she is a witness on behalf of her husband.

We also note that the prosecutor stated to appellant's wife during cross-examination that she had been offered a polygraph test. This Court's prior decisions regarding polygraph tests render such practice highly suspect.

The judgment is reversed and the cause remanded."

J. ROBERTS IN BLEDSOE, #55,048, 2/14/79, RULES IN THIS ATTEMPTED BURGLARY OF A MOTOR VEHICLE CASE THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION AND, ACCORDINGLY, PURSUANT TO THE DICTATES OF BURKS AND GREENE, THE JUDGMENT OF CONVICTION WAS ORDERED SET ASIDE AND REFORMED TO SHOW AN ACQUITTAL. (Reversed and D ordered Acquitted). (Dallas County). Panel #3, 3rd Quarter, with J. Douglas dissenting with opinion. Cf. his Majority Opinion in Owens, supra.

COMMENT: The Majority held that, from the facts, they were unable to conclude that D committed an "act," as that word is defined by Sec. 1.07(a)(1), P.C., that amounted to more than mere preparation to effect the object offense. "He was not seen touching the C/W's car and there were no scratch or pry marks on the car which indicated an attempted entry." "Mere presence at the scene is not alone sufficient to support his conviction." As to the fact that a screwdriver and a clothes hanger were found within the area of D's immediate control, "A person should not be held criminally responsible simply because a vigilant police officer intervenes before he begins to implement his criminal designs."

The facts showed the following:

> "The record reflects that on July 10, 1976, at approximately 9:45 a.m., Dallas Police Officer Fred Sibley received a radio message that an automobile was being burglarized on the parking lot of a nearby doctor's office. Immediately responding to the call, Sibley arrived on the scene and observed appellant near the passenger side door of a 1973 Ford L.T.D. automobile. Sibley then observed appellant duck between the cars as if he were trying to conceal himself.
>
> A search of the immediate area revealed a screwdriver and clothes hanger lying on the ground approximately 3 feet away from appellant. On cross-examination Sibley testified that as he entered the parking lot he observed appellant standing near the complaint's car, but that he could not see the appellant's hands because the appellant was facing away from him.
>
> A close inspection of the complainant's car revealed no scratches or pry marks which would indicate that entry had been attempted; also, there was no evidence of flight by appellant."

HELD: "We conclude that the evidence, when viewed in the light most favorable to the verdict, shows, at very best, that at the moment of his arrest appellant was preparing to commit the offense of burglary of a vehicle, but that his conduct had not yet reached a point where it could be said to amount to more than mere preparation. The evidence to support appellant's conviction was therefore insufficient."

J. T. DAVIS, WRITING FOR A PANEL IN COLE, #59,957, 2/14/79, Panel #1, 1st Quarter, with P. J. Onion dissenting without opinion, OVERRULES ROBERSON, 549 (2) 749, WHICH HELD THAT EVEN THOUGH THE D PLEAD "TRUE", WHEN THE D TESTIFIED AND DENIED ANY INTENT TO COMMIT THEFT, THE TJ SHOULD HAVE WITHDRAWN THE PLEA, BUT AS THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE MRP, IN MY WORDS, THIS WAS HARMLESS ERROR. (Affirmed). (Dallas County).

COMMENT: Here, the D on trial in a MRP proceeding alleging she failed to report as directed in July, August and September, 1975. Although she pled "true" she testified to "circumstances" concerning the reasons for not reporting. Held, TJ not required to withdraw the plea of "true."

COMMENT: Me thinks that many members of the Court have badly strayed in this area from sound principles of law which previously existed as if the D testifies during the proceedings, at any time before the final judgment or order of the Court is entered, and puts into evidence a defense to the accusation, then what is wrong with the TJ being required to withdraw the plea of guilty or "true"? My thinking on this has to do with the fact that in our State courts, where the plea is guilty or "true", not much attention is given to what is occurring; i.e., the D has entered his plea, this constitutes an admission of his guilt to the accusation, and we have several more Ds waiting their turn to get in the dock so let's move along. By the old law, which required the TJ to withdraw the

plea, if defensive type evidence was offered, our TJs appeared to be more cognizant of the proceedings as they were aware they would be reversed if the D put on defensive testimony. As P. J. Onion has remarked on several occasions, this new rule of law will actually encourage everyone to be "sloppy" in this area of the law. But, "Let's move long" does tend to "grind" out more cases than "What did you say?" does.

HERE'S A CUTE ONE WHICH WAS AFFIRMED. D MARTINEZ, #56,044, 2/14/79, Panel #3, 3rd Quarter, J. Roberts, WAS ON TRIAL FOR SEXUAL ABUSE (FORCED ANOTHER INMATE IN THE COUNTY JAIL TO HAVE ANAL INTERCOURSE WITH HIM). (Affirmed). (Lubbock County).

COMMENT: The D complained that the failure of the TJ to comply with Art. 38.07, C.C.P., and charge the jury "that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victum," was fundamental error.

HELD: "We agree with the appellant insofar as he contends that the directives of Art. 38.07, are mandatory; however, we cannot agree that the court's failure to so instruct the jury, in absence of appellant's objection or requested instruction, constitutes fundamental error. See Pitts v. State, 569 S.W.2d 898.

Fundamental error is presented where the error in the court's instructions to the jury goes to the very basis of the case so that the charge fails to apply the law under which the accused is prosecuted.

Accordingly, we cannot conclude that the court's failure to instruct the jury pursuant to Art. 38.07, in absence of appellant's trial objection or request for instruction, constitutes reversible error. Therefore, this contention is overruled."

COMMENT: The reason I thought this was cute was because of the statement that the charge was mandatory but the omission was not fundamental. Just goes to show one that a woman can probably be a little bit pregnant. In Austin if no where else.

J. PHILLIPS REJECTS D WELLS', #56,210, 2/14/79, Panel #1, 1st Quarter, CONTENTION THAT ROBBERY INDICTMENT WAS VOID BECAUSE SEC. 29.02(a) REFERS TO CHAPTER 31 OF THE PENAL CODE AND THIS INTERNAL STATUTORY REFERENCE CREATED AN "INTERPRETATIVE MONSTROSITY." HELD, "WE BELIEVE THAT THIS "INTERPRETATIVE MONSTROSITY" IS OF COUNSEL'S OWN MAKING." (Affirmed). (Jefferson County).

COMMENT: By the opinion, nobody made the coffee that morning. Some other choice comments were: "D's contention[regarding the constitutionality of the statute] is "strained [and] near-frivolous." "D's contention [that the attempt statute controlled] fails of its own weight." "It does not merit further discussion." As to his claim that only attempted robbery should have been submitted to the jury, "the ground of error is multifarious and the arguments made are multifarious."

PANEL OF CCA, PER J. DOUGLAS, Panel #2, 1st Quarter, IN KENNEYBREW, #57,473, 2/14/79, ONCE AGAIN RULES THAT IN HABITUAL CASE, IF THE EVIDENCE IS UNCONTROVERTED AT THE PUNISHMENT STAGE OF THE PROCEEDINGS, THE TJ NEED NOT CHARGE ON ALTERNATIVE PUNISHMENTS. (Affirmed). (Dallas County).

COMMENT: Thus, the jury is given the easy way out to give the D life and need not concern themselves with any other punishment. See and Compare Roper, 558 (2) 482, and the cases cited therein, which was not cited in this opinion. Thus, it appears that whether the D contests the prior convictions by pleading "not true" or does not contest them by pleading "true," by this case and Roper, supra, same end result. Jury can be given only one issue in the charge. Here, the trial judge wanted to go one step beyond and make known if the jury said "not true" to the two priors, then a third hearing would be held to see what punishment should be assessed. Held, "The court did not follow the procedure set out in Art. 37.07 at the punishment phase of the trial." However, "The error in failing to charge on those options was irrelevant considering the facts proved at the punishment stage." (Affirmed).

QUESTION: If the trial judge does submit only the one issue and the jury makes a finding or returns a verdict of "not true," then does this not allow the D to make some sort of plea of jeopardy and, if so, is the D not then entitled to a complete new trial as there can be no verdict regarding the issue of punishment by this jury?

Panels for Week of February 21, 1979.

Panel #1, 1st Quarter: Judges Phillips, Onion and T. Davis.
Panel #2, 1st Quarter: Judges Douglas, Roberts and Odom.
Panel #2, 4th Quarter: Judges Odom, Phillips and Dally.
Panel #3, 1st Quarter: Judges Clinton, Dally and W. C. Davis.
Panel #3, 4th Quarter: Commissioner Cornelius, Judges Douglas and W. C. Davis.

INTRODUCTORY COMMENT: The opinions, for the most part, as will be seen, were fairly interesting and may be the most interesting from the Court in a long time.

ALTHOUGH EX PARTE PEMBERTON, #60,324, 2/21/79, J. Clinton, Panel #3, 1st Quarter, RECEIVED RELIEF IN THIS BOND REDUCTION PROCEEDINGS, IT WOULD BE NICE, SOMEDAY, TO SEE OUR TRIAL JUDGES AND APPELLATE JUDGES EXPERIMENT WITH OUR BAIL BOND LAWS. (Bond for this case where the D received 5 years T.D.C. was reduced from $55,000.00 to $25,000.00). (Denton County).

COMMENT: It is the rare judge who truly understands the financial demands upon a D and his family and friends to make either an appearance bond or an appeal bond. In many instances, a D is put under a high bond and his family and friends then must and they do beg, borrow and mortgage what they have to come up with the bondsman's fee, which then leaves the average defense attorney in the unfortunate position of "sucking hind tit" when it comes to getting his money up front.

For many, many years, in almost all criminal cases, in Federal Court, the average D is released either on a personal recognizance bond or is allowed to deposit 10% of the total amount of the bond in the registry of the court. This usually occurs on the day of the person's arrest. However, in our State courts, usually only after the D languishes in the jail for several days will he be considered for a P.R. Although I can find nothing in the bail bond laws which would prohibit a trial judge or an appellate judge from ordering a D released provided he deposited 10% into the registry of the Court, can you think of a single case where this has occurred in State Court?

It just does not make sense, to me at least, to draw the line between 1) allowing a professional bailbondsman to bond an accused out of jail, regardless of what the person is charged with, by the individual simply paying 10% of the bond and 2) allowing an individual to deposit 10% of the bond into the registry of the court and be his own bondsman with him getting this sum of money back upon completition of the case. If the D is going to run, it won't make any difference if he made his own bond or if some professional bailbondsman made it. However, if he has his own cash up, the chances of him running are probably far less than if some bondsman is on the bond.

AS MENTIONED SEVERAL TIMES, THE CCA TRIES TO KEEP TRIAL JUDGES ON THEIR TOES REGARDING THE ADMISSIBILITY OF EXTRANEOUS OFFENSES. AS SEEN BY THE FOLLOWING, IT IS EXTREMELY IMPORTANT THAT TJS PUT THEIR THINKING CAPS ON WHEN DEALING WITH THE ADMISSIBILITY OF EXTRANEOUS OFFENSES.

IN COLLINS, #55,815, 2/21/79, Commissioner Cornelius, Panel #3, 4th Quarter, THE D COMPLAINED ABOUT THE ADMISSIBILITY OF AN EXTRANEOUS OFFENSE, BUT CASE AFFIRMED. (Harris County).

COMMENT: Facts showed, as to the primary offense, that D, armed with rifle, in open daylight, around 1:30 P.M., at a housing project, robbed two newspaper boys, which robbery was witnessed by 25 or 30 persons.

12 days later, the D, with two others, around 1:30 P.M., in open daylight, at the same housing project, where D lived, robbed a single businessman.

HELD: Evidence of the second robbery admissible.

"Even if the claim of alibi were effectively destroyed, the issue of identity was clearly raised by the defense witnesses who testified, [among other things, that the D was asleep when the robbery occurred and the D's hair was straight rather than natural curly], that D's physical appearance on the date of the robbery was different from that of the person identified by the victums as the robber."

"We think sufficient distinguishing characteristics were shown to make the extraneous offense admissible." "The common characteristic may be proximity in time or place, or the common mode of the commission of the act." "Both are present in this case." "The offenses need not be exactly the same." "That the act did not constitute a criminal offense or result in prosecution does not render it inadmissible, if it possesses the requisite similarities to render it admissible on the issue of identity, intent or scheme or design." (Affirmed).

IN RUIZ, #55,691, 2/21/79, J. Phillips, Panel #3, 4th Quarter, THE D ALSO COMPLAINED ABOUT THE ADMISSIBILITY OF EXTRANEOUS OFFENSES, BUT CASE REVERSED. (Harris County).

COMMENT: D, with 2 others, robbed the Crescent Food Market, which robbery resulted in the killing of a customer, Joseph Picinich.

Another robbery, to show what weapon was used in the Crescent Food Market robbery, was introduced. This robbery aborted due to the arrest of one of the participants in the Crescent robbery. Another robbery, involving the D and the one who was arrested in the above robbery, involving the D and the co-defendant who was arrested, was also introduced into evidence. Another incident, whereby the D, with the arrested co-defendant, and others, assaulted and abducted one Moreno, with Moreno, without the D, then taken out to a dirt road where the arrested co-defendant then drove over him approximately 3 times with a car.

HELD: As to the Crescent Food Robbery, the Panel held this robbery was complete and nothing was lacking to show its commission and the D's involvement therein. "The evidence adduced from these wits would permit any jury to infer that the aggravated robbery was committed as a result of a conspiracy and that a murder should have been anticipated in the carrying out of the conspiracy to commit aggravated robbery."

The reversal concerned the admissibility of the Moreno murder--the running over Moreno with the car extraneous offense.

HELD: "The inflammatory aspects of the murder testified to are great indeed. The facts showed a brutal beating in which the appellant was involved, as well as subsequent brutality against the victim by one of the co-conspirators in the aggravated robbery at the Crescent Food Market, outside the presence of the appellant. The dissimilarity in the modus operandi between the killing of Gilbert Moreno and Joseph Picinich detracts from its probative value on whether an individual present at a brutal beating should anticipate that one of his cohorts would shoot and kill another individual in the course of an aggravated robbery. The overall effect of the testimony concerning the murder of Gilbert Moreno goes more to show appellant to be a brutal criminal in general. This is precisely the reason the general rule against the introduction of extraneous offenses was created.

We conclude that the direct evidence of appellant's participating in an aggravated robbery in concert with other individuals while brandishing a per se deadly weapon was uncontroverted direct evidence on the element of anticipation. There being no disputed or contested factual issue to which the prior extraneous murder offense was relevant, material and admissible, the trial court reversibly erred in admitting this inherently prejudicial and inflammatory evidence before the jury at the guilt and innocence stage of this trial. The trial court's instruction to the jury in its charge limiting their consideration of the extraneous offenses to the essential elements of whether the murder was committed in furtherance of the unlawful purpose of the conspiracy or that the murder should have been anticipated as a result of carrying out the conspiracy did not cure the error. See Walls v. State, 548 S.W.2d 38. We cannot conclude that the evidence of this brutal prior murder did not affect the jury's determination of guilt or innocence." (Reversed).

COMMENT: This is a very convoluted written opinion, as to setting out the facts of the case, and appears, in my opinion, to be one of those predestined cases for reversal. However, if confronted with an extraneous offense case, have this one on top of the reversal stack of opinions to give to the trial judge as 1) it will take him awhile to understand same and 2) if the evidence, as to the D's guilt, concerning the primary offense, is overwhelming, as here, he just might exclude it from the jury.

The intriguing question, which was not answered, is whether the State can re-prosecute the D for capital murder, in light of the reversal, because the jury returned a negative answer to question number 2? See Art. 37.071, C.C.P. It would appear that either collateral estoppel or North Carolina v. Pearce, would prohibit this.

LANDMARK CASE. J. ODOM, IN WILSON, #56,810, 2/21/79, Panel #2, 4th Quarter, RULES THAT TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING THE D'S REQUESTED CHARGE ON THE DEFENSIVE ISSUE OF MISTAKEN IDENTIFICATION. (Reversed). (Harris County).

COMMENT: D on trial for rape of a child. 25 days after the alleged commission of the offense, the D, with 3 others, was put in a lineup. One of those who participated in the lineup testified that the C/W could not identify anybody in the lineup and "she said neither D nor any of the others had committed the rape." This testimony apparently was denied by the C/W and others.

The D's special requested instruction, in part, read as follows:

> "You are instructed that the State has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness be free from doubt as to the correctness of his statement. However, you, the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the Defendant is the person who committed the crime, you must find the Defendant not guilty."

HELD: "Although some cases indicate that the defensive issue of mistaken IDENTIFICATION CAN BE RAISED BY EVIDENCE THAT SOMEONE OTHER THAN THE accused committed the offense, e.g. Florio v. State, 532 S.W.2d 614, that does not mean such evidence is the only way to raise the issue. We hold the defensive issue of mistaken identification is also raised by evidence that someone other than the accused had been identified as the perpetrator of the crime or by evidence that the identifying witness had on a prior occasion failed to identify the accused when given an opportunity to do so. In this case such evidence was presented, and the failure of the trial court to submit an affirmative jury charge on this defensive issue when requested to do so by appellant presents reversible error.

An alibi charge would not dispense with the necessity of an affirmative charge on identity if raised by the evidence."

J. Dally dissented to this reversal as it is his opinion that mistaken identity is not an affirmative defense and further that giving such a charge constitutes a comment on the weight of the evidence.

See also Briscoe v. State, 293 (1) 573, cited and discussed in the opinion.

HOWEVER, IN WALLER, #56,042, 2/21/79, Panel #3, 1st Quarter, J. DALLY MADE KNOWN HIS VIEWS AS HE WROTE THE OPINION AFFIRMING THE CONVICTION AND REJECTED THAT D'S CLAIM THAT THE TCT ERRED IN REFUSING TO GIVE A SPECIAL REQUESTED JURY INSTRUCTION ON MISIDENTIFICATION. (Affirmed). (Lubbock County).

HELD: "The requested instruction generally charged the jury to take into account the credibility of the identification testimony and also charged the jury that the identity of appellant as the offender had to be proved beyond a reasonable doubt before they could convict the appellant. No issue of mistaken identity was raised by the evidence. Even assuming an issue had been raised, it would have been error for the trial court to single out the facts concerning Anderson's identification of appellant and magnify them before the jury. This would constitute a comment on the weight of the evidence. Moreover, misidentification is not an affirmative defense, and appellant was adequately protected by the requirement that the jury find beyond a reasonable doubt that appellant committed the offense. Appellant's requested instruction was properly refused."

COMMENT: I anticipate that the State will file a motion for rehearing in Wilson and the D's attorney will do likewise in Waller. Because of the importance of identification testimony and its inherent unreliability, where strangers are involved, See U.S. v. Wade, 388 U.S. at page 229, and the opinion where that Court discussed, for ten full pages, the dangers inherent in eye-witness identification, it is hoped that J. Odom's views will become the law of the State. As to the objection that such a charge is a comment on the weight of the evidence, where the D requests such a charge, it is difficult to see how the D can complain on appeal because such a charge is given.

STATE BLOWS IT IN DANIEL, #56,063, 2/21/79, J. Clinton, Panel #3, 1st Quarter, with J. Dally dissenting with opinion, BY FAILURE TO SHOW BY INDEPENDENT TESTIMONY THAT D WAS THE IDENTICAL PERSON CONVICTED IN LOUISIANA IN 1972 AND THE ADMISSION OF STATE'S EXHIBIT NO. 41, AN AUTHENTICATED COPY OF RECORDS FROM LOUISIANA PURPORTING TO SHOW A PRIOR CONVICTION OF THE D, WAS ERROR AND BECAUSE OF THE FACTS WAS NOT HARMLESS ERROR. (Reversed). (Dallas County).

COMMENT: The State, in this case, continued, without success, to try and lessen its work in proving that the D on trial is one and the same person who was previously convicted in a prior case.

Here, the State introduced authenticated copies of records from Caddo Parish, Louisiana to show that the D on trial was previously convicted of a criminal offense. A deputy sheriff from Dallas County also testified.

"Cron identified State's Exhibit #45 as being a jail card which reflected that Neil Douglas Daniel had been booked into the Dallas County Jail on January 12, 1973, at 9:30 a.m.; the offense was recorded as "probation check" and the stated reason for release was "probation completed." The date and time of release entered were January 12, 1973, at 9:30 a.m. A space for "remarks" reflected the entry: "Attempted felony theft #92803 Louisiana probationer." According to Cron, the two fingerprints on State's Exhibit #45 were identical to those recently taken by him from the appellant."

HELD: "We accept the truth of the matters asserted in the jail card (Exh. 45) because it was admitted by the trial court as an exception to the prohibition against hearsay evidence; however, we find no matter asserted within the exhibit which supplies verification that the person identified as appellant by Cron's expert testimony--who was both booked in and out of the Dallas County Jail at 9:30 a.m. on January 24, 1973, pursuant to a "probation check" was the same person actually convicted of theft and placed on probation in Caddo Parish, Louisiana, on September 22, 1972, in Cause #92,803. See Rose v. State, 507 S.W.2d 547. Therefore, because of the exhibit's failure to establish appellant's identity, it had no relevance to the proceeding and was inadmissible. Mullins v. State, 492 S.W.2d 277.

The State wholly failed to show by independent testimony that appellant was the identical person convicted in Louisiana in 1972 and the admission of State's Exhibit 41 was error."

COMMENT: Due to the peculiar facts of the D's case, the error was not harmless.

J. Dally, in my opinion, would apply a form of circumstantial evidence rule to the D. "I would hold that the identical cause number, name and offense found in both exhibits were sufficient to show that D was the same person convicted of the offense in Louisiana, and the trial court properly admitted in evidence St's Exh. #41 to prove the prior conviction of the D in Louisiana."

I anticipate, that in the future, in this kind of situation, the jail authorities will be instructed to put on the jail card the name of the deputy who recorded this information and then have him testify at the trial to prove up the prior conviction.

Q: If this occurs, as the D is in custody, must the deputy give the D a Miranda warning before obtaining this information which will go on the jail card before his testimony is admissible?

COMMENT: Of course, the simplest and easiest and best way to prove this up would be to have someone who was familiar with the case testify. However, the simplest and easiest and best way is usually the most difficult as it takes a little work and effort on the part of our officials.

OMISSION OF THE WORDS "INTENTIONALLY AND KNOWINGLY" FROM THE COURT'S CHARGE, IN HOLLOWAY, #56,087, 2/21/79, J. Odom, Panel #2, 4th Quarter, IS FUNDAMENTAL ERROR IN THAT KNOWLEDGE AND INTENT ARE ELEMENTS OF THE CRIME OF CRIMINAL TRESPASS AND MUST BE INCLUDED IN THE CHARGE. (Reversed). (Ellis County). SEE ALSO WEST, 567 (2) 515; 572 (2) 712; and Thompson, 574 (2) 103.

HELD: "This Court determined [in West, supra] that while V.T.C.A., P.C. § 30.05 does not expressly prescribe a culpable mental state, the culpable mental state of intentionally, knowingly, or recklessly was required as an element of the offense by the provisions of V.T.C.A., P.C. § 6.02. The fundamental error in this case occurred when the trial court failed to charge the jury with all the elements of the offense in conformity with the charging document.

The criminal information properly alleged the necessary culpable mental state of the offense but the charge to the jury omitted this element. This constitutes fundamental error."

LIKEWISE, IN MENDOZA, #56,207, 2/21/79, J. Phillips, Panel #1, 1st Quarter, IT WAS HELD, IN THIS DELIVERY OF HEROIN CASE, THAT SECTION 13, FUNDAMENTAL ERROR, RESULTED WHEN THE TRIAL COURT FAILED TO INCLUDE IN THE CHARGE THE REQUIRED CULPABLE MENTAL STATE OF EITHER "KNOWINGLY OR "INTENTIONALLY." "SUCH AN OMISSION IS FATAL." (Reversed). (Caldwell County).

HELD: "To permit the jury to convict the appellant of the offense of delivery of heroin without requiring it to find beyond a reasonable doubt that he delivered the heroin "knowingly" or "intentionally" was to authorize the jury to convict the appellant of a non-existent offense under the laws of this State. Such a procedure is clearly calculated to injure the rights of the appellant."

LIKEWISE, FOR ANOTHER AGGRAVATED ROBBERY CASE WHICH WAS REVERSED BECAUSE THE JURY WAS INSTRUCTED THEY COULD CONVICT FOR THE OFFENSE COMMITTED BY MEANS OTHER THAN THOSE CHARGED IN THE INDICTMENT, SEE WILLIAMS, #56,622, 2/21/79, J. Dally, Panel #2, 4th Quarter. (Reversed). (Harris County).

J. DOUGLAS, IN THESE ATTEMPTED MURDER CONVICTIONS, RULES THAT FERNANDO ORTIZ GETS A NEW TRIAL BECAUSE MERE PRESENCE ALONE IS NOT SUFFICIENT TO SUPPORT A CONVICTION UNDER THE LAW OF PARTIES. HOWEVER, LUIS CARLOS SALAS MUST GO AND DO 17 YEARS T.D.C. (ORTIZ REVERSED. SALAS AFFIRMED). (WEBB COUNTY).

HELD: "Ortiz was convicted as a party to the offense under V.T.C.A., P.C., § 7.02(a)(2). It is well settled that mere presence is not alone sufficient to support a conviction under § 7.02(a)(2), although it is a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant. Ashabranner v. State, 557 S.W.2d 774; Johnson v. State, 537 S.W.2d 16; Coronado v. State, 508 S.W.2d 373.

The only evidence introduced relating to Ortiz' culpability was that he was present with Salas on the night of the shooting, remained 25 feet away from Salas and drove Salas from the scene. There was no evidence of "bad blood" between the victim and Ortiz, and the victim himself testified that Ortiz said hello to him as he entered the Wooden Nickel Lounge.

Viewing the evidence in a light most favorable to the verdict, we find it is insufficient to support Ortiz's conviction under § 7.02(a)(2)."

COMMENT: As to the D Salas, he did not fare too well.

J. Odom, in his concurring opinion, as to the question of one attorney representing multiple Ds, said that "Counsel has the primary responsibility for advising clients of possible conflicts in their positions."

J. Douglas, in his opinion, pointed out: "There is nothing to show [Salas] was not fully apprised of the risks involved in the dual representation."

However, see U.S. v. Garcia, 5th Cir. 1975, 517 F.2d 272, where that Court ruled that "It is appropriate that the district court make this determination since voluntariness must depend on the particular facts and circumstances of each case." See also Holloway v. Arkansas, 23 Cr.L.Rep. 3001.

Because of the thorny problems one attorney will or may face down the road if he represents multiple Ds, as he is trying to wear two (2) hats at the same time, no smart trial judge will ever let this occur unless and until he has conducted a hearing as suggested by U.S. v. Garcia, supra. Here, as D Salas received 17 years, it will be interesting to see what the end result will be as there should be no question post-conviction writs will flow from those cotton fields.

J. DALLY, IN TREVINO, #56,424, 2/21/79, RULES THAT TESTIMONY OF D'S WIFE, IN EFFECT, THAT BECAUSE SHE HAD KNOWN D SINCE HE WAS 10 YEARS OLD (SHE WAS 11 YEARS OLDER THAN D), THAT, TO HER KNOWLEDGE, THE D HAD NEVER BEFORE BEEN CONVICTED OF A FELONY, WAS SUFFICIENT TO REQUIRE THE SUBMISSION ON A CHARGE ON PROBATION. (Reversed). (McLennan County). HELD, "WHEN TESTIMONY REASONABLY SUPPORTS A D'S MOTION FOR PROBATION, THE ISSUE SHOULD BE SUBMITTED TO THE JURY."

COMMENT: The State's argument that because Mrs. Trevino, the D's wife, admitted that the D had been away from home on one occasion for a period of three months, during which he could have been convicted of a felony, that only the D himself could prove up his application was rejected.

It thus appears, by this holding, that if anyone can get up on the stand and testify that the D has not heretofore been convicted of a felony, that this is sufficient to get a charge to the jury on the issue of probation.

J. CLINTON, WRITING FOR PANEL #3, 1ST QUARTER, IN PIERCE, #57,567, 2/21/79, RULES THAT EVID. WAS INSUFFICIENT TO SUSTAIN FINDING THAT D WAS GUILTY OF FELONY POSSESSION OF MARIJUANA. (Reversed). (Bell County).

COMMENT: Here, the only connection of the D to the apartment in question consisted of the following facts:

1. The showing that Approximately 2 months previous to date in question, the D had executed a month to month lease for the apartment in question;

2. A blank personal check was found in the apartment which reflected the name of D;

3. An envelope, addressed to D with the address of the place searched thereon, being dated a little more than a month prior to execution of the search warrant, was found in the apartment.

4. While the apartment was under surveillance, the D rode up in a Yellow Cab, got out, knocked on the door, and, after receiving no answer, got back into the cab which drove away.

HELD: "While this evidence appears sufficient to establish that appellant had occupied the premises some two months preceding the day of the search, there is no evidence that appellant resided at the apartment on the day the contraband was seized or at any time in the recent past. Compare Herrera, supra. Nor was any evidence introduced to show that appellant had access to the contraband; in fact, the testimony of the officers clearly illustrated that appellant did not have a key to the apartment, at least on the day in question. Cf. Hernandez v. State, 538 S.W.2d 127. Both officers testified that they never saw appellant exercise any care, control or management over the marijuana, that for all they knew, it all belonged to Terry Hybeck and appellant had no knowledge of its existence.

Absent an additional showing by the State that appellant either resided at the apartment or had ready access to it, it is reasonable to conclude from the existing evidentiary facts and circumstances that appellant had sublet the apartment to Terry Hubeck within the two preceding months and had stopped by the apartment on February 4 to collect the rent. Being clearly unable to exclude every reasonable hypothesis other than appellant's guilt, the evidence is insufficient to sustain this conviction."

CCA, PER PANEL #3, 1ST QUARTER, IN EX PARTE PLEASANT, #58,181, 2/21/79, J. Clinton, RULES THAT D CAN BE CONVICTED FOR ONLY THE OFFENSE OF MURDER AND CANNOT BE CONVICTED FOR BOTH MURDER AND ROBBERY BY FIREARMS WHICH AROSE OUT OF SAME TRANSACTION AND INVOLVED THE SAME VICTUM. (Writ Granted). (Harris County).

See also EX PARTE WILSON, #60,173, Panel #3, 1st Quarter, 2/28/79, J.W. C. Davis, where D tried for assault to murder and then tried and convicted for robbery by assault.

Held, "The State is barred by the carving doctrine in prosecuting the petitioner for robbery by assault after he has been convicted for the offense of robbery with intent to murder when both offenses arose out of the same transaction involving the same victum." (Writ Granted).

J. PHILLIPS, IN STEINHAUSER, #58,446, 2/21/79, Panel #1, 1st Quarter, SAYS THAT THE EVIDENCE IN THIS CASE CLEARLY DOES NOT EXCLUDE THE REASONABLE HYPOTHESIS THAT SOME OTHER PERSON, BESIDES ANNIE STEINHAUSER, MADE THE PHONE CALLS FROM THE PHONE REGISTERED TO H. H. STEINHAUSER, HER HUSBAND, ON THE DATES ALLEGED IN THE INFORMATION. (Reversed). (Fayette County).

HELD: "There is absolutely no evidence to show the appellant made the phone calls to the Steinhauser household on the dates alleged. Furthermore, the evidence does not show that the times of these calls could constitute unreasonable hours. Finally, the evidence presented by the State shows that there were people other than the appellant present at the household of H.H. Steinhauser where the originating phone for the anonymous phone calls were registered. The State has failed to connect the appellant with the actual calls allegedly made to Otto Steinhauser on the dates alleged." (Reversed).

J. PHILLIPS, WRITING FOR PANEL #2, 4th Quarter, IN EX PARTE COUNTY, #59,768, 2/21/79, RULES THAT THE FOLLOWING INDICTMENT DOES NOT CHARGE THE OFFENSE OF ROBBERY:

"...the Grand Jury of Bexar County... do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment, and on or about the 22ND day of FEBRUARY, A.D., 1974, LESLIE R. COUNTY, hereinafter called defendant, did then and there in-

tentionally and knowingly use and exhibit a deadly weapon, namely; A SHOTGUN, to RAMIRO TREVINO, hereinafter called complainant, while the said defendant was in the act of committing theft of property, namely: LAWFUL MONEY OF THE UNITED STATES OF AMERICA, from said complaintant, the owner of said property, without the effective consent of the said com-complainant, and said acts were committed by the said defendant with the intent then and there to obtain and maintain control of the said property."

HELD: "It is apparent that the indictment sufficiently alleges the aggravating element of aggravated robbery wherein it alleges the petitioner "did then and there intentionally and knowingly use and exhibit a deadly weapon, namely: a shotgun..." However, this indictment fails to allege a robbery, a necessary precondition to a conviction for aggravated robbery, in that it fails to allege that the petitioner "intentionally, knowingly, or recklessly cause[d] bodily injury to another" [V.T.C.A., P.C., § 29.02(a)(1)] or "intentionally or knowingly threaten[ed] or place[d] another in fear of imminent bodily injury or death" [V.T.C.A., P.C., § 29.02(a)(2)]. " (Writ Granted). (Bexar County).

J. CLINTON POINTS OUT IN ROMO, #57,556, 2/21/79, Panel #3, 1st Quarter, THAT THE MERE FILING OF A MOTION IN LIMINE AND OBTAINING A RULING ON SAME IS TOTALLY INSUFFICIENT TO PROTECT THE RECORD ON APPEAL. (Affirmed). (Lubbock County).

HELD: "It is clear that the State failed to prove the necessary predicate for introduction of the breathalyzer test." "However, reliance on a motion in limine will not preserve error." "A D must object on the proper grounds when the evidence is offered at trial." (Affirmed).

COMMENT: Here, it appears that trial counsel did not properly perfect his error prior to trial. Apparently, he was apprised of the fact or could have made a good guess that the prosecution did not have a chemist in this D.W.I. case. However, he put on nothing to support his motion in limine to show that the State did not have sufficient evidence to sustain the admissibility of the evidence concerning the breathalyzer. During the trial he allowed the officer to testify to everything necessary for the admissibility of this evidence.

Thus, if trial counsel had filed such a motion and supported it with proof, including putting the prosecutor on the stand to establish the fact the State did not have sufficient evidence, for the admissibility of the breathalyzer results, then it appears a different question would have been presented. However, here, it appears all that transpired was the filing of the motion and obtaining of a ruling thereon.

Read Writt v. State, 514 (2) 424, See July, 1976, Vol. II, No. 11, S.D.R., p. 3.

In light of this case and several others, it is not wise to use the phrase "Motion in Limine" but you should always use the phrase "Motion to Suppress."

COMMENT: This case also stands for the proposition that, per Sec. 42.08, P.C., a citizen other than a police officer may make an arrest without warrant for public drunkenness as it is an offense for breach of the peace.

Here, the evidence showed that a member of the Buffalo Springs Lake Patrol, while driving to work, encountered a vehicle being driven by D with it being driven erratically and at a high rate of speed, which forced the good citizen's car into the curb. The D's car was also weaving across the center lane and onto the shoulder of the road. Pursuant to instructions from a D.P.S. trooper, good citizen stopped D.

HELD: "We hold that D was committing a breach of the peace and that Weatherfood [good citizen] was authorized to arrest."

SEE ALSO SANCHEZ, #55,657, 2/21/79, Commissioner Cornelius, Panel #3, 4th Quarter, (Affirmed). (Frio County).

COMMENT: Here, the facts showed that D, while driving a car, outran two Border Patrol agents, who have authority, see Art. 2.12, C.C.P., to arrest for felony offenses only. A few minutes later, they came upon the D and, upon inquiry, were informed by D his car quit running because he was having carburetor trouble. They arrested the D for being intoxicated. After D refused to allow them to search, they then called Sheriff's deputies, who came and put D in custody, but, before they arrived, the Border patrolmen allowed the D to sit in the backseat of his car whereupon "a sweet, musty odor" permeated the atmosphere, which odor was not present in the front seat. Later, at the "sheriff's department headquarters", the D's vehicle was searched and marijuana found.

HELD: Everything poco weino. Cf. Davis v. State, Nos. 59,303 & 304, 12/13/78.

COMMENT: This opinion is difficult to follow. The facts simply reek of the odor of a pretextual arrest. My opinion is based on the following:

1. It is totally illogical where one has just outrun 2 Border Patrolmen to want them to assist you if you are having vehicular problems.

2. There is nothing in the opinion to show that when the Border Patrolmen encountered the D, that he was a danger to himself or others.

3. If the D were a danger to himself and others, by what logic would you allow the D to sit in his own automobile?

4. Although the D was charged with a D.W.I., there is nothing in the opinion to show this other than he was traveling at a high rate of speed.

5. If there was a basis to search the vehicle of the D, at the scene where the D was arrested, why was there a delay in doing this?

J. PHILLIPS, IN EX PARTE DANIEL RAMIEREZ, #59,926. 2/21/79, Panel #1, 1st Quarter, See also 483(2) 259, and 543 (2) 631, DISCUSSES "CONSTRUCTIVE NOTICE" AND THE "CONTEMPORANEOUS OBJECTION RULE." (Writ Denied). (Dallas County).

COMMENT: The D claimed that the prosecution wrongfully used evidence when it either knew or should have known of the reversal of his conviction in 483 (2) 259, and introduced into evidence a pen packet containing reference to the prior conviction and reversible error was further committed when the prosecutor argued and emphasized in great detail the prior sentence, which had been set aside.

HELD: "D's failure to object constitutes a waiver of any complaint he might now have against the use of such evidence."

COMMENT: The problem I have with this case is that if this issue was sufficient to rise to the height of post-conviction discussion, then would not trial counsel be ineffective for failure to make the proper objection?

J. DOUGLAS, WITH J. ROBERTS CONCURRING WITH OPINION, IN EX PARTE BURKETT, #60,152, 2/21/79, RULES THAT FOLLOWING INDICTMENT FOR AGGRAVATED PERJURY WAS SUFFICIENT TO STATE AN OFFENSE. (Writ Denied). (Wichita County).

"Burkett did:

"....Personally appear at an official proceeding, to-wit: a trial in the 89th District Court of Wichita County, Texas, styled 'The State of Texas vs. Charles Ray Burkett,' and being Cause #17,158-C on the docket of said Court and in connection with and during said official proceeding and after being duly sworn by the Honorable Temple Driver, Judge of said Court authorized by law to administer oaths, made, under oath, a false statement, to-wit: when the said Charles Ray Burkett was asked Is it true that you have never before been convicted of a felony in this or any other State, he replied Yes, whereas in truth and in fact was convicted of the felony offense of theft of cattle on the 14th day of July, 1969, in the 50th Judicial District Court of Baylor County, Texas, in Cause #3003 styled the State of Texas vs. Charles Ray Burkett, and the said Charles Ray Burkett made said false statement with knowledge of the statement's meaning and with intent to deceive, and said statement was material to the issue under inquiry during said official proceeding as to whether the said Charles Ray Burkett was eligible for probation, and said false statement could have affected the course and outcome of said official proceeding...."

COMMENT: The complaint made by the D was that because the indictment failed to allege that the statement is required or authorized by law to be made under oath" this rendered same fundamentally defective. Held: "An allegation that he took an oath, by someone authorized to give an oath, during an official proceeding necessarily indicates that the statements made under that oath were "authorized by law to be made under oath."

PANEL, PER J. CLINTON, IN EX PARTE MOORE, #60,174, 2/21/79, Panel #3, 1st Quarter, RULES THAT A D'S RIGHT TO CHALLENGE PROBABLE CAUSE, IN AN EXTRADITION CASE, IN THE REQUESTING OR DEMANDING STATE ONLY ARISES IF THE DOCUMENTS SUPPORTING THE GOVERNOR'S WARRANT ARE INSUFFICIENT TO ESTABLISH THAT A JUDICIAL DETERMINATION OF PROBABLE CAUSE HAS BEEN MADE IN THE REQUESTING OR DEMANDING STATE. (Writ Denied). (Tarrant County).

COMMENT: Here, the D got it coming and going and his appeal counsel probably thought he had a gut. The Panel, per J. Clinton, said D could not

complain that the supporting documents for the Governor's warrant were insufficient to show probable cause because these were not included in Record on appeal. Further, the testimony of an investigator established there was probable cause for the D's arrest.

See also Michigan v. Doran, 99 S.Ct. 530, which held that "once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state."

RIVERA, #56,079, 2/21/79, J. Odom, Panel #2, 1st Quarter, GETS SAME RESULT AS HIS CO-D LOPEZ, SEE 535 (2) 643. AFFIRMED. (Lubbock County).

COMMENT: Here, prior to trial, D filed motion for a competency hearing and was examined by a doctor who found nothing wrong with D except "he was trying to fake a psychiatric condition." A jury was empaneled but, after the doctor testified, which was all that was submitted at the competency hearing, the trial judge withdrew the matter from the jury and found the D competent as a matter of law.

HELD: No error.

J. DOUGLAS, WRITING FOR A UNANIMOUS PANEL, Panel #3, 1st Quarter, by the slip opinion I received he was the only member of the panel, IN CLARK, #56,080, 2/21/79, RULES THAT THE PROSECUTION AND CONVICTION FOR OBTAINING A CONTROLLED SUBSTANCE BY USE OF A FORGED PRESCRIPTION UNDER ART. 4476-15, Sec. 4.08(a)(3), V.A.T.C.S., RATHER THAN UNDER THE SPECIFIC OR GENERAL STATUTE OF FORGERY, SEE SEC. 32.21, P.C., WAS PROPER. (Affirmed). (Rusk County).

COMMENT: D relied upon Ex parte Harrell, 542 (2) 169, which held that a D should not have been convicted of violating the general statute prohibiting possession of a criminal instrument with intent to use in the commission of an offense, but should have been charged under the special statute prohibiting possession of a forged writing with intent to utter it.

I'LL BET THE D ARCHER WAS AS SURPRISED AS THE D BAUGH, 402 (2) 768, WAS IN HIS CASE BY THIS OPINION. ARCHER, #57,039, 2/21/79, Commissioner Cornelius, Panel #3, 4th Quarter. (Affirmed). (Dallas County).

COMMENT: In Baugh, supra, the D's wife went to court and got a divorce, apparently, one morning. That evening, the D abducted and raped her. A divorce decree was not entered until six (6) days later. The CCA ruled that the parties were no longer husband and wife and affirmed a 20 year conviction. This case is often characterized as the "What a difference a day makes" case.

Here, the date of the alleged offense occurred on 6/11/75, but the D was not indicted until 5/31/77.

At the time of the offense, the statute of limitations for rape was 1 year. Effective 9/1/75, the limitations period was increased to 3 years.

HELD: "Where a complete defense has accrued under a statute of limitations, it cannot, of course, be taken away by a subsequent repeal or amendment thereof." "But a statute extending a period of limitation applies to

all offenses not barred at the time of the passage of the act, so that a prosecution may be commenced at any time within the newly established period, although the old period of limitations has then expired." (Affirmed).

COMMENT: It thus appears here that the rules of the game were changed after the ball game was played whereas in Baugh the home plate in that case, unknown to the D, had been legally moved.

D LAKE, #57,176, 2/21/79, J. Odom, Panel #2, 4th Quarter, ALSO GETS IT COMING AND GOING. (Affirmed). (Harris County).

COMMENT: The State filed a motion in limine, which was granted, to prohibit the D's attorney from telling the jury, on voir dire, in this habitual case, that if they found the D had twice before been convicted of felonies he would be given life. The prosecutor had voir dired the jury as though the case were a non-enhanced case before the D's voir dire. He then filed the motion in limine which was granted.

HELD: "It would perhaps have been better practice for the prosecutor to submit his motion before voir dire, but there was no harm in the procedure used in this case."

COMMENT: As to the D's second contention that he could not be convicted of possession of heroin since the heroin was destroyed before trial, it was pointed out that after the D was tried and convicted, the trial court ordered the heroin destroyed, with the D thereafter obtaining a new trial.

HELD: "The heroin was destroyed by order of the trial court after the first trial, and the prosecutor did not discover the fact until the day before the trial." "There was no showing of bad faith on the state's part in this case." (Affirmed).

CCA SPLITS IN CORLEY, #58,703, 2/21/79, J. Douglas, En Banc, with J. Odom, joined by Judges Roberts, Phillips and Clinton, dissenting with opinion, OVER THE FOLLOWING INSTRUCTION ON COMPETENCY TO STAND TRIAL, TO-WIT:

"To establish insanity at the present time it must be established by a preponderance of the evidence that the defendant is laboring under such mental disease or defect of the mind as to be rendered incompetent to make a rational defense to the charges against him."

"Before this charge was submitted to the jury appellant requested a charge with this definition:

> "To establish insanity at the present time, it must be established by a preponderance of the evidence that the defendant does not, by reason of mental disease or defeat, have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he does not have a rational or factual understanding of the proceedings against him. In this regard, you are instructed that the term mental defeat may include mental retardation."

HELD: "In the instant case the courx submitted the issue of appellant's competency to the jury. He submitted a definition of present insanity under which appellant must be able "to make a rational defense to the charges against him." If appellant could not understand the charges against him, he would not be able "to make a rational defense to the charges against him." Similarly, if he could not communicate with his attorney, he would not be able "to make a rational defense to the charges against him." The charge given by the court was broad enough to comply with Dusky. The charge provided adequate procedural safe guards to ensure that an incompetent individual would not be convicted. We hold that the charge given in this case did not deny appellant due process."

J. Odom, in writing for the dissenters, said:

"The majority are wrong on both state and federal grounds and the judment should be reversed. (Death Penalty Affirmed). (McLennan County).

Panels for Week of February 28, 1979.

Panel #1, 1st Quarter: Judges Onion, Phillips and T. Davis.
Panel #1, 2nd Quarter: Judges Douglas, Phillips and W. C. Davis.
Panel #3, 1st Quarter: Judges Douglas, Roberts and Odom.
Panel #2, 2nd Quarter: Judges Douglas, Phillips and W. C. Davis.
Panel #2, 4th Quarter: Judges Odom, Phillips and Dally.
Panel #3, 1st Quarter: Judges Dally, W. C. Davis and Clinton.
Panel #3, 3rd Quarter: Judges Douglas, Roberts and Dally.

BURKS AND GREENE ARE NOW IN THE POST-CONVICTION WRIT AREA OF THE LAW. EX PARTE MIXON, #60,318, See also 507 (2) 238, where CCA reversed because evidence insufficient, GETS WRIT GRANTED WHEN EN BANC COURT, PER J. CLINTON, UNANIMOUS, HOLDS THAT BURKS AND GREENE ARE TO BE APPLIED RETROACTIVELY. (Writ Granted). (Deaf Smith County).

ANOTHER DELIVERY OF MARIJUANA INDICTMENT GOES DOWN THE TUBE FOR FAILURE TO ALLEGE THAT THE AMOUNT OF MARIJUANA DELIVERED WAS MORE THAN 1/4 OUNCE OR THAT THE DELIVERY WAS MADE FOR REMUNERATION. EX PARTE BARCELO, #60,379, 2/28/79, J. Dally, En Banc, Unanimous, GETS WRIT GRANTED. (Writ Granted). (Upshur County).

NOTE: State argued that D could not complain because this was a plea bargain agreement.

HELD: "As we construe Art. 44.02, C.C.P., it does not apply to habeas corpus proceedings." "Since the allegations of the indictment were insufficient to allege a felony, the district court did not have jurisdiction and the conviction is subject to collateral attack."

INFORMATION FOR CRIMINAL MISCHIEF, WHICH FAILED TO ALLEGE THAT THE PROPERTY WAS DAMAGED OR DESTROYED "WITHOUT" THE EFFECTIVE CONSENT OF THE OWNER," WAS FATALLY DEFECTIVE RENDERING THE CONVICTION VOID. EX PARTE PARKER, #60,491, 2/28/79, Panel #1, 1st Quarter, P. J. Onion. (Writ Granted). (McLennan County).

P. J. ONION, WRITING FOR UNANIMOUS CCA IN MERRIA, #55,134, 2/28/79, En Banc, RULES THAT A LICENSED PHARMACIST CANNOT BE PROSECUTED FOR DELIVERY OF A CONTROLLED SUBSTANCE BUT CAN BE PROSECUTED FOR UNAUTHORIZED DISPENSING OR DISTRIBUTING A CONTROLLED SUBSTANCE UNLAWFULLY. DUE TO ALLEGATION ONLY OF "DELIVERY" IN INDICTMENT, THERE WAS A FATAL VARIANCE BETWEEN THE OFFENSE ALLEGED AND THE PROOF. (Reversed). (Lampassas County). (On D's MRH).

HAMMETT, SEE SEPT., 1978, VOL. V, NO. 1, S.D.R., P. 10, DOESN'T MAKE IT PAST STATE'S MRH. DEATH PENALTY CASE AFFIRMED. J. T. Davis, En Banc, with J. Odom concurring with opinion. (Affirmed). (Brazoria County).

COMMENT: On the SMRH, the State supplemented the Record on Appeal.

As, from the opinions, it appears to be two (2) different cases, it is necessary to really read the two opinions to see the differences.

Basically, by this opinion, the record reflects there was a first trial which ended in a mistrial. At the first trial, Dr. Henry, pursuant to motion of the D, was appointed to examine and did examine the D, and also testified at the punishment stage of the first trial.

After the jury was selected in this cause, the D then made motion for the appointment of a psychologist of his choice.

HELD: "To have granted D's motion as it was presented and at the time it was filed would have constituted a real threat to the court's control of the trial." "The granting of D's motion under the circumstances here presented would have allowed D to manipulate his asserted rights in such a manner as to obstruct the orderly administration of justice." "We cannot agree that the court erred in denying appellant's motion." (Affirmed).

COMMENT: It appears that, Cf. my statement to the original opinion, it was incumbent upon the D to name a particular psychologist; the cost involved; the efforts made, if any, to locate a psychologist; when the psychologist could make an examination; or when one could testify during trial. "It would be untinkable for a court to give an indigent D an open checkbook to use in selecting the expert of his choice."

COMMENT: As to the D's other contentions, which were rejected, they appear mostly to be a rehash of what was said in other death penalty cases affirmed by the CCA.

A cute contention, which was rejected, was that it is necessary, when an exhibit is given to the court reporter, for the court reporter to also testify as to chain of custody.

A not so cute part of the opinion, concerning the admissibility of extraneous offenses at the punishment stage of the trial, is that the Court held that a D's confession, as to the statements therein, "I am a heroin addict and between April of 1976 and Jan., 1977 I committed approximately 130 burglaries and stole approximately 30 cars." "I committed three armed robberies, one aggravated robbery and committed one murder to support my habit, my heroin habit," are admissible as this is probative evidence that may be brought before a jury at the punishment phase of a capital murder trial."

The Court's holding, as to the admissibility of the pen papers, appears to conflict with Daniel, supra, p. 18 of this S.D.R. , as here the D refused and the State was unsuccessful in getting his fingerprints. A custodian of the records of the Brazoria County Jail was the only person to testify. The person who took the D's prints at the Brazoria County jail did not testify. Held, "The State sufficiently proved that D was the same William J. Hammett whose prior convictions were reflected in St.'s Exhs. 19 & 20."

J. ROBERTS TELLS WOMEN, IN MY WORDS, WHO FEAR GETTING RAPED, ROBBED OR MUGGED, NOT TO BUY A PELLET GUN TO BE USED TO WARD OFF THEIR AGGRESSORS, IN CAMPBELL, #58,656, 2/28/79, Panel #3, 3rd Quarter. (Affirmed). (Dallas County). KIDS WITH B.B. GUNS ALSO BETTER LOOK OUT.

COMMENT: The D entered pleas of nolo contendere to one case of aggravated robbery and one case of unauthorized use of a motor vehicle. The gun used to effectuate the robbery was an "air pistol, commonly known as a pellet gun."

As to admonishments, regarding plea bargaining, J. Roberts said: "Where no recommendation of punishment has been made by the State and the court admonishes the D of that fact, we hold that the court is not further required to literally follow the directives of Art. 26.13(a)(2) because to do so would be, at best, a fuitless act."

As to the pellet gun or air pistol being a deadly weapon, Held, based upon the evidence, "The air pistol in the present case was capable of inflicting death or serious bodily injury and was designed for that purpose." The evidence was sufficient to sustain D's conviction for aggravated robbery. In light of Denham, 574 (2) 139, if anyone testifies that the weapon used was a deadly weapon, that appears to be all that is necessary. Thus, in Mosley, 545 (2) 144, the State apparently boo-booed by failing to put someone on the stand to testify that a B.B. gun is a deadly weapon.

COMMENT: As the newspapers have reported some weird cases in the past such as the owner of the premises in Iowa whose place was burglarized with the burglar getting shot by a trap-gun with the burglar later sueing the man and getting a judgment against him forcing him to sell his farm and that of a woman who shot a rapist being charged with carrying a deadly weapon, in light of this opinion, little old ladies who have purchased air pistols or pellet guns in the past had better throw them away as it would be a shame for a 78 year old woman who had been raped, robbed or mugged by one of our good citizens being charged with carrying a handgun on her person and being prosecuted and convicted and receiving 1 year in the county jail. Likewise, for little Cub Scouts who have B.B. guns.

SCALPERS. LOOK OUT. IT MAY BE AGAINST THE LAW TO SELL TICKETS. ARLINGTON CITY ORDINANCE #76-35 CONSTRUED AND UPHELD IN JOHN, #55,263, 2/28/79, J. W. C. Davis. (Affirmed). (Tarrant County).

HELD: "We hold that the City of Arlington has a legitimate interest in the regulation of the pedestrian traffic flow upon city-owned property."

"We hold that this provision of the ordinance [the exception in the ordinance] is not unreasonable or arbitary, and that the classification created thereby is not violative of equal protection." (Affirmed).

COMMENT: On the following Sunday, after this opinion was handed down, the following was in an article in The Houston Chronicle. "Scalping is completely within the law here and has been since 1975 when the state Legislature repealed a statute forbidding it." I guess the D John, like so many from the North, willnow also come to Houston.

J. ROBERTS DISSENTS WITH VIGOR IN COLEMAN, #55,906, 2/28/79, J. Douglas, Panel #3, 3rd Quarter, TO MAJORITY'S HOLDING THAT CCA HAS JURISDICTION WHERE THE SENTENCE IMPOSED WAS PREMATURELY DONE. However, 2 is better than 1. (Affirmed). (Harris County).

J. ODOM RULES IN REDD, #56,216, 2/28/79, Panel #2, 1st Quarter, with J. Roberts concurring in the result without opinion, THAT TJ EXCUSING PROSPECTIVE JUROR WHO PREVIOUSLY HAD AN EAR PROBLEM IN THE PAST BUT HAD NOT HAD ANY PROBLEM WITH IT FOR 6 MONTHS WAS HONKEY DORKY. (Affirmed). (Dallas County).

COMMENT: The basis for this person's disqualification was Art. 35.19(4) C.C.P. "That he . . . has. . . such bodily. . . defect. . . as to render him unfit for jury service. . ."

This is a good opinion to have handy if you get someone on the panel you just can't get rid of by the usual methods. Delve into that person's past medical history and try to find where he or she had some ailment in the past that incapacitated that person which might act up again during the trial.

COMMENT: The D's attorneys on appeal also made another run on the prosecution to obtain the D.A.'s records concerning past jury service of prospective jurors.

HELD: "In the present case defense counsel was prevented from inquiring into and discovering what verdicts had been reached in cases where those prospective jurors with prior jury service had served." "This was not an abuse of discretion." "Some limitation on voir dire is necessary or many trials would never end."

As to the "Open Records Act," See Art. 6252-17a, V.A.T.C.S., "We do not reach this question because of D's failure to follow the procedures set out in the Act."

COMMENT: It appears the trial attorneys for the D did everything he could to per- his record. However, the opinion does not reflect if he put the prosecutor on the witness stand to see if he had that information regarding the verdict of the jury the prospective juror served on. See, however, Martin, #57,576, 2/28/79, Infra.

J. PHILLIPS, IN ELY, #56,623, 2/28/79, Panel #1, 1st Quarter, UPHOLDS DECEPTIVE BUSINESS PRACTICES ACT, SEE SEC. 32.42, P.C., AS WELL AS FOLLOWING INFORMATION. (Affirmed). (Harris County). Note: D got 180 days and $2,000 fine in this case.

"...in the County of Harris and State of Texas, one ARN ELY aka: ARNOLD MOSS hereinafter referred to as the Defendant, heretofore on or about April 22, 1975, did then and there unlawfully while engaged in the business of providing an advance fee resume service and in the course of the operation thereof, intentionally, knowingly, recklessly and with criminal negligence, commit a deceptive business practice in that Defendant made statements to Keith W. Green in connection with the sale of a service, namely that Defendant would refund the service charge of $250 after one year if Keith W. Green received less than three job offers within the year and if Keith W. Green contacted Defendant in writing once each month for 12 months from the date of the contract, and such statement was materially false and misleading in that Keith W. Green did not receive three or more job offers within the year and Keith W. Green did contact Defendant in writing once each month for 12 months from the date of the contract and Defendant has refused to return the $250 service charge."

COMMENT: D's main attack on the statute had to do with "(12) making a materially false or misleading statement," but the Panel rejected this. The failure to specifically elaborate each "materially false or misleading statement" which, when made in connection with the purchase or sale of property or service, constitutes an offense does not render this statute void for vagueness and indefiniteness." "The phrase "materially false or misleading statement" is not vague or indefinite."

REMEMBER: IF YOU ASK FOR BUT DO NOT RECEIVE A STATEMENT OF A WITNESS, FOR CROSS EXAMINATION PURPOSES, IT IS IMPERATIVE THAT YOU HAVE THIS STATEMENT IN THE RECORD ON APPEAL IN ORDER TO SHOW HARM. MARTIN, #57,576, 2/28/79, J. Douglas, Panel #2, 1st Quarter, with J. Roberts concurring without opinion.

ALSO, AS TO GRAND JURY TESTIMONY, YOU MUST SHOW THAT IT WAS RECORDED AND IN EXISTENCE IF YOU WANT IT FOR CROSS EXAMINATION PURPOSES. (Affirmed). (Potter County).

J. DOUGLAS RULES IN RODRIGUEZ, #57,796, 2/28/79, Panel #2, 1st Quarter, THAT STATEMENT OF D, TO WIT TO MURDER FOR WHICH D CHARGED, "TO DROP THE CHARGE AGAINST HIM," THAT "THESE ARE HARDLY THE ACTIONS OF AN INNOCENT ACCUSED." "THIS EVIDENCE IS EVERY BIT AS PROBATIVE OF GUILT AS WOULD BE FLIGHT BY THE ACCUSED." "THIS EVIDENCE WAS PROPERLY ADMITTED." (Affirmed). (Bexar County).

JEFFERSON COUNTY'S METHODS OF CONTINUING THE D ON PROBATION PASSES MUSTER IN FURRH, #58,399, 2/28/79, J. Douglas, with J. Phillips dissenting with opinion, Panel #1, 2nd Quarter.

COMMENT: This may not stand on MRH, if one is filed, in light of Wallace, See Jan., 1979, Vol. V, No. 5, S.D.R., p. 10. J. Phillips, by his dissent, thinks Traylor, 561 (2) 492, and Sappington, 508 (2) 840, should be in all things overruled. Me thinks a better solution would be to amend the probation law.

TJ'S FAILURE TO APPLY SPECIFIC WORDING OF INDICTMENT TO COURT'S CHARGE RESULTS IN SANDIG, #59,489, Panel #2, 1st Quarter, 2/28/79, J. Odom, with J. Douglas dissenting with opinion, GETTING REVERSAL. (Reversed). (Comal County).

COMMENT: Here, D was charged with indecency with a child; i.e., engaged in sexual conduct with a female younger than 17 years of age by touching the anus of the female with the intent to arouse and gratify the sexual desire of the D.

The charge to the jury, however, instructed the jury they could find the D guilty if they found he engaged in sexual conduct. The "touching the anus" was not stated. The charge defined sexual conduct. See Sec. 43.01(3), P.C.

HELD: "In fact, when the jury charge is read as a whole to determine what was alleged, it appears to have instructed the jury that D was charged with sexual conduct by all means, instead of by the single means actually alleged."

The use of the phrase "as alleged", in the court's charge, did not cure the error; i.e., it did not instruct the jury on what acts were alleged.

This was fundamental error. (Reversed).

THE SAME RATIONALE WAS USED IN THOMPSON, #60,149, Panel #3, 1st Quarter, 2/28/79, J. Clinton, with J. Dally dissenting with opinion, WHERE THE D WAS CHARGED WITH PROSTITUTION. (Reversed). (Bell County).

COMMENT: Here, D charged by Information with offering to engage in sexual conduct, to-wit: sexual intercourse for a fee.

However, the Court's charge did not describe the sexual conduct but merely charged that the jury could find the D guilty if she offered to engage in sexual conduct.

The charge defined "sexual conduct", see Sec. 43.01, P.C., which includes "deviate secual intercourse, sexual contact and sexual intercourse." This probably caused the reversal.

NOTE: If I read the footnote in Thompson correctly, the question, "Do you want to party?" constitutes a suggestion to engage in deviate sexual intercourse or sexual contact. This appears, to me at least, to give too broad a definition to that question as, in itself, it is rather innocuous to say the least and to give it the broader meaning might imply bad things on the part of some of our judges whom I have heard say, "Let's go party." The next time I hear some judge make this statement, or ask the question "Do you want to go and party?", in light of this case, I believe I will turn and walk off.

J. ODOM, IN PHILLIPS, #56,071, Panel #2, 1st Quarter, 2/28/79, with J. Roberts concurring with opinion, DISAGREES WITH J. DOUGLAS OVER WHAT THE PHRASE "14 YEARS OF AGE OR YOUNGER" MEANS. HOWEVER, 2 IS BETTER THAN ONE. (Reversed). (Coryell County).

COMMENT: D on trial for offense of causing serious bodily injury to a child "who is 14 years of age or younger." See Sec. 22.04, P.C.

QUESTION: "What precisely is meant by the phrase "14 years of age or younger?"

ANSWER: "Since the statute covers only those children who are 14 years or younger, the injured boy in this case [who was 14 years, one month, and 5 days old when the injury occurred] did not come within its provisions." (Reversed).

COMMENT: J. Douglas asked: "If a child is not 14 a month and 5 days after he reaches his 14th birthday, how old is he?"

The problem, of course lies in drafting.

For other statutes, concerning this type phaseology, see Sec. 9.61, "a child younger than 18 years"; Sec. 20.01, "a child less than 14 years of age"; Sec. 21.01, "a female 10 years or older"; Sec. 21.09, "she is younger than 17 years"; "14 years or older"; Sec. 21.11, "a child younger than 17 years"; Sec. 25.03, "a child younger than 18 years"; Sec. 25.06, "a child younger than 14 years"; Sec. 43.05, "a person younger than 17 years"; and See also Sec. 43.25.

It seems the Legislative intent is easily reflected by the modifier, "or younger." Of course, if it had said "younger than 14 years" there would be no problem.

J. DALLY, IN GOODMAN, #55,693, 2/28/79, Panel #2, 4th Quarter, RULES THAT EVIDENCE WAS INSUFFICIENT, IN THIS SEC. 22.05, P.C., OFFENSE, RECKLESSLY PLACING ANOTHER IN IMMINENT DANGER OF SERIOUS BODILY INJURY, TO SUSTAIN CONVICTION. (Reversed). (Dallas County).

COMMENT: The facts showed that D pointed a child's toy pistol at a T.V. repairman. The reasons for D going this are not reflected by the opinion. Apparently, the Complainant merely testified that the D pointed a "gun" or a "pistol" at him, but at no time did any one testify that this was a firearm. The "pistol" was not offered into evidence.

HELD: "There is no testimony in this record that the alleged pistol was a firearm." See Sec. 46.01(3), P.C. "The evidence is insufficient to prove that the alleged pistol was a firearm within the meaning of Sec. 46.01(3)."

Thus, without this evidence, there was no presumption as to recklessness and danger. As there was no other evidence to show that the D recklessly engaged in conduct that placed the C/W in imminent danger of serious bodily injury, the evidence was ruled insufficient. (Reversed).

reduction. The same is true for denial of certiorari by the Supreme Court.

Instruct the client that he is to avoid any "scenes" in the event that he receives time. After sentence is pronounced, counsel may properly request a voluntary surrender, whereby the Defendent is allowed a reasonable period of time to "get his affairs in order." If the Court grants this oral motion, the Defendant will be required to furnish his own transportation to the Federal facility designated by the Attorney General. Most Courts will require that the Defendant's bond remain in force until he surrenders himself.

5. *Special Treatment.*
If the client is prone to alcohol or other drug abuse, counsel may orally request the Court to "designate" an institution which has the facilities to treat the particular type of illness. Although the Court's designation is not binding on the Bureau of Prisons, the client's chance for proper treatment is greatly enhanced.

F. QUESTIONS REGARDING FEE ARRANGEMENTS.

In Re: *Grand Jury Proceedings United States vs. Jones, et al*, 517 F. 2d 666 (5th Cir. 1975), should be carefully read by every criminal practitioner. The case involves the area of conflicts that can easily arise in the attorney-client relationship when fees are paid by someone other that the primary client who has been indicted.

In *Jones*, six lawyers were issued subpoenas directed to appear before a Federal Grand Jury with "all records, retainer agreements, books, records, and/or receipts showing payment of attorney's fees." The attorneys asserted an attorney-client privilege for an undisclosed client through respective motions to quash. These motions were overruled and the attorneys were ordered to testify. Each of the attorneys refused to answer the following questions:

1. Did any third party make arrangements for the attorney to represent the named Defendant?
2. If bond was posted for the named Defendant, who furnished the bond money to the attorney-witness for deposit with the United States Magistrate?
3. If attorneys' fees were paid, who paid the attorneys' fees for the named Defendant? If attorneys' fees had not yet been paid, who promised to pay the balance? All attorneys were held in contempt and placed in custody. Recognizance bonds were granted and the matter was appealed.

The Fifth Circuit held that the information sought was privileged and not required to be disclosed because it would have been directly relevant as corroborative of already-existent incriminating evidence about third parties suspected of Federal offenses.

COMMENT.

If the Court asks the *attorney* questions relating to the above topics and if the attorney is of the opinion that the privilege must be asserted, ask the Court to continue the hearing en camera with the Court Reporter present. If the en camera hearing is granted, you may then divulge the information predicated with a request that this part of the record be sealed and remain undisclosed. See also *In re Michaelson*, 511 F. 2d 882 (9th Cir. 1975), *cert. denied* 421 U.S. 978, 95 S. Ct. 1979, 44 L. Ed. 469 (1975); *Baird vs. Koerner*, 279 F 2d 635 (9th Cir. 1960).

IX. MULTIPLE SENTENCES.

A. CONSPIRACY AND SUBSTANTIVE OFFENSES.

Consecutive sentences may be imposed for conviction of conspiracy and the commission of the substantive crime. The rationale is that conspiracy requires proof of agreement to commit crime, but no proof of the attempt; the substantive violation requires proof of attempt but not the agreement. *Curtis vs. U.S.*, 546 F. 2d 1188 (5th Cir. 1977); *U.S. vs. Kelly*, 542 F. 2d 619 (8th Cir. 1976) *cert. denied* 97 S. Ct. 1555 (1977).

B. WHARTON'S RULE.

An agreement between two persons to commit a particular crime cannot be prosecuted under the conspiracy statute if the crime necessarily requires participation of two persons. *Lanelli vs. U.S.*, 420 U.S. 770 (1974).

C. FEDERAL "CARVING" DOCTRINE.

If a Defendant has been convicted and sentenced for both the lesser and greater offense arising out of the same transaction, the conviction and sentence on the lesser count will be vacated. *U.S. vs. Gaddis*, 424 U.S. 549 (1976); *Proffitt vs. U.S.*, 549 F. 2d 910 (4th Cir. 1976), *cert. denied*, 429 U.S. 1076; *U.S. vs. Sellers*, 547 F. 2d 785 (4th Cir. 1976) *cert. denied*, 429 U.S. 1075 (1977); *U.S. vs. Davis*, 544 F. 2d 1056 (10th Cir. 1976).

1. For example, a Defendant cannot be convicted and separately sentenced both for robbing a bank and receiving the proceeds. *U.S. vs. Gaddis* (*supra*).
2. The same rule applies for robbing a postal employee and possessing stolen mail. *U.S. vs. Soals*, 545 F. 2d 26 (7th Cir. 1976).
3. Failure to supply information to I.R.S. is a lesser included offense of failure to file an income tax return. *U.S. vs. Whitesel*, 543 F. 2d 1176 (6th Cir. 1976). *cert. denied* 97 S. Ct. 2924 (1977).
4. Separate sentences for conspiracy to import and conspiracy to possess marijuana cannot be upheld if both charges resulted from a single agreement. *U.S. vs. Diaz*, 538 F. 2d 461 (1st Cir. 1976).
5. The imposition of two sentences when two federal officers are injured by a single act of the Defendant is erroneous. *U.S. vs. Theriault*, 531 F. 2d 281 (5th Cir. 1976).
6. Nor can a Defendant be sentenced for both theft and possession of merchandise stolen from a single interstate shipment. *U.S. vs. Solimine*, 536 F. 2d 703 (6th Cir. 1976) vacated on other grounds.
7. Regarding firearm offenses, three circuits have held that the National Firearms Acts Amendments of 1968 should not be construed to permit multiple punishments for the possession of a single firearm. *U.S. vs. McDaniel*, 550 F. 2d 214 (5th Cir. 1977); *U.S. vs. Kolama*, 549 F. 2d 594 (9th Cir. 1976); *cert. denied* 429 U.S. 1110 (1977); *Rollins vs. U.S.*, 543 F. 2d 574 (5th Cir. 1976) (per curiam); *U.S. vs. Jones*, 533 F. 2d 1387 (6th Cir. 1976) (per curiam).

D. THE CONCURRENT SENTENCE RULE. (5th Circuit).

The Fifth Circuit has held that when a Defendant receives concurrent sentences on a multiple count indictment and one count is affirmed on Appeal, the Court need not consider the validity of the other counts if no reduction at sentencing would result. *Dennis vs. Hopper*, 548 F. 2d 589 (5th Cir. 1977) (per curiam).

E. VIOLATION OF MULTIPLE STATUTES.

If two or more statutes have been violated by the same act or transaction, Multiple Sentencing may be imposed on the grounds that each statute defines a different offense. For example, the 5th Circuit has held that separate sentences for bank robbery and kidnapping may be imposed. *U.S. vs. Dotson*, 546 F. 2d 1151 (5th Cir. 1977).

F. CONSPIRACY COUPLED TO CRIMINAL ENTERPRISE.

The Snpreme Court has ruled that Congress did not intend to permit cumulative punishment for violation of the statute pertaining to conspiracy to distribute narcotics and the statute pertaining to conduct involved in a continuing criminal enterprise. *U.S. vs. Jeffers*, 97 S. Ct. 2207 (1977).

X. CREDIT FOR TIME SPENT IN CUSTODY. (18 U.S.C. 3568)

The Attorney General shall give credit for all time spent in custody in connection with the crime for which sentence was imposed.

A. DEFENDANT IN STATE CUSTODY UNDER FEDERAL DETAINER. (5th Circuit)

These Defendants are entitled to credit for time served if unable to make bond solely because of the Federal detainer. *Brown vs. U.S.*, 489 F. 2d 1036 (5th Cir. 1974).

B. FEDERAL SENTENCE BEGINS WHEN DEFENDANT RELEASED FROM STATE CUSTODY.

If the Defendant is serving a State sentence, the Federal sentence does not begin until the Defendant is placed in Federal custody after his release by State authorities. *Amirr vs. U.S.*, 301 F. 2d 662 (3rd Cir. 1962) *cert. denied* 371 U.S. 822 (1962).

IX. INCREASE IN SENTENCING.

A. DOUBLE JEAPORDY PROHIBITED.

Any increase in a Defendant's sentence *after* he has begun to serve it may violate the Double Jeopardy Clause. *U.S. vs. Durbin*, 542 F. 2d 486 (8th Cir. 1976).

1. However, if a sentencing Court erred in pronouncing sentence, or if the sentence did not conform to State requirements, the Court may re-sentence the Defendant even if a longer term than originally pronounced results. This doctrine includes typographical errors. *U.S. vs. Stevens*, 548 F. 2d 1360 (9th Cir. 1977), *cert. denied* 97 S. Ct. 1666 (1977).

   The doctrine also includes a failure by the Court to proscribe a mandatory special parole term. *Jones vs. U.S.* 538 F. 2d 1346 (8th Cir. 1976) (per curiam).

B. ILLEGAL SENTENCES.

An illegal sentence is considered to be a nullity and therefore subsequent punishment is not construed as an increase. *Burns vs. U.S.* 552F. 2d 828 (8th Cir. 1977).

C. SENTENCING AFTER RE-TRIAL.

The Court may not impose a harsher sentence at re-trial unless there is justification predicated by the Defendant's conduct subsequent to the first conviction. *North Carolina vs. Pearce* 395 U.S. 711 (1969). The *Pearce* case also prohibits prosecutors from charging more severe offenses after reversal.

If the sentencing Judge does impose harsher sentence upon re-trial, he must disclose all pertinent facts upon which he based the sentence and afford counsel an opportunity to rebut the information presented. This rule applies in the Fifth Circuit. *U.S. vs. McDuffie*, 542 F. 2d 236 (5th Cir. 1976)

XII. JUVENILE DEFENDANTS.

A "juvenile" is a person who has not attained his 18th birthday or who is under 21 years of age who violated the applicable statute before he was 18. (18 U.S.C. 5031)

The term "juvenile delinquency" refers to the violation of the applicable statute committed by a person prior to his 18th birthday which would have been violative of a Federal Statute if committed by an adult. (18 U.S.C. 5031).

A. REFERRAL TO STATE AUTHORITIES.

Unless the Attorney General certifies that either the State does not have jurisdiction (or refuses jurisdiction) or does not have available programs or services adequate for the needs of the juvenile, the juvenile shall be referred to state authorities. (18 U.S.C. 5032).

If Federal jurisdiction is retained, a juvenile may elect in writing to be pnnished as an adult. (18 U.S.C. 5032).

B. SPEEDY TRIAL.

If Federal jurisdiction is retained, the juvenile must receive a Speedy Trial, ordinarily within 30 days. (18 U.S.C. 5036)

C. SENTENCING ALTERNATIVES.

The Court may probate or commit a juvenile until the age of 21 if the period of commitment or probation is not longer than the statutory penalty for the offense committed. The Court also has the authority to commit a juvenile for study in the custody of the Attorney General for up to 30 days unless the Court rules that additional time is required. (18 U.S.C. 5037 b-c).

XIII. THE YOUTH CORRECTION ACT (18 U.S.C. 5005 et seq.) AND THE YOUNG ADULT OFFENDERS ACT. (18 U.S.C. 4209).

The Youth Correction Act is generally designed for the treatment and rehabilitation of youthful offenders between eighteen and twenty-two years of age. Under the Youth Adult Offenders Act, a Defendant between twenty-two and twenty-six years of age is eligible for special treatment if the Court does not make an explicit finding that a particular Defendant will receive no benefit thereunder. (U.S.C. 5010-d.

If a Defendant is sentenced under Section 5010 (a), a young offender may be incarcerated for up to six years. At first glance, this type of sentence appears harsh, especially if the offense carries a maximum of five years. Under 18 U.S.C. 5021, however, the Attorney General has the authority to set aside the conviction.

Under 18 U.S.C. 4209, Defendants are eligible hereunder, if they have attained the age of twenty-two, but are not over twenty-six on the day of *conviction*. Defense counsel should ascertain at the earliest possible juncture, whether or not his Defendant is going to have a birthday which may jeopardize his sentencing under both these acts. Sometimes it is possible to move up the day of arraignment.

It should also be noted that under U.S.C. 5017 b, a youthful offender may be unconditionally discharged from probation after he has been supervised for a period of one year. Under 18 U.S.C. 5017 c, a youth must be released *conditionally* on or before expiration of *four* years from the date of his conviction and must be *unconditionally* discharged on or before *six* years from the date of his conviction. However, if the Court finds that six years is not long enough to achieve the goals of the act, the Court may commit for a longer period as authorized by law for the offense. 18 U.S.C. 5010 (c).

In this event, the youth offender must be released *conditionally* not later than *two years* before his term expires and may be *unconditionally* discharged not less than one

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THE DIMINISHED CAPACITY DEFENSE IN TEXAS

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Texas has long been numbered among the *jurisdictions taking the position that* insanity is an "all or nothing" defense and that evidence of mental condition short of legal insanity is admissible only on the issue of *punishment, not on the issue of guilt* of the crime charged. This may no longer be the case. Texas criminal defense lawyers should be aware of the potential for arguing that the so-called "*diminished capacity*" *doctrine is* now a part of the criminal law of Texas, at least that of criminal homicide.

Many jurisdictions in this country allow evidence of the mental condition of an accused to be admitted on the issue of the existence of the specific intent required for a criminal offense whether or not the defense of insanity is raised.[1] This rule of evidence is supplementary to the insanity defense and may be utilized by persons otherwise unable to meet the jurisdiction's definition of "insanity" (mental disease or defect completely excluding criminal liability). It is based on the premise that a mental disorder or abnormality may not amount to insanity but may nevertheless diminish the degree of crime because it affects the capacity of the accused to form the requisite intent. Various labels, such as, "partial insanity," "diminished responsibility," and "partial capacity," are used to describe the rule but perhaps the most accurately descriptive label is "diminished capacity" which will be used herein.[2]

A statutory source for the diminished capacity concept in Texas homicide cases may be found in a comparison of section 19.06 of the new Penal Code with its predecessor, article 1257a of the old code. The bracketed words are those that were removed from the former Article 1257a and the italicized words are those that have been substituted in the new section 19.06:

> In all prosecutions for [felonious homicide] *murder or voluntary manslaughter*, the State or the defendent shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused [in determining the punishment to be assessed] *at the time of the offense.*

Under the old Penal Code, the only degrees of criminal homicide were murder and negligent homicide. The question of the existence or nonexistence of malice was made at the punishment stage of the trial.[3] Under the more sophisticated gradations of homicide in the new code, however, the degree of homicide is determined at the guilt/innocence stage of the trial. In light of this change, the omission in section 19.06 of the express limitation to the punishment stage of "condition of the mind" evidence appears to make such evidence admissible generally on the issue of guilt of murder or voluntary manslaughter. A murder conviction was reversed in a recent panel decision, *McClure v. State*,[4] in part because of the trial court's refusal to admit psychiatric testimony of the accused's "disassociated phenomena" and strong feeling of rejection that may have led to the killing of his wife. The holding was simply that such testimony was admissible under section 19.06 for the purpose of reducing murder to voluntary manslaughter. So in murder cases Texas apparently has a diminished capacity "defense."

Introduction of evidence of the mental condition of an accused could be invaluable to a defense attorney in defending murder cases in Texas, particularly capital murder cases, in which the accused's state of mind at the time of the offense is a critical issue. In a murder prosecution, evidence of the accused's mental condition could be used to challenge the existence of either the conscious purpose (intent) to cause death or serious bodily injury, the awareness to a reasonable certainty (knowledge) that death would result, or the culpable mental state of the underlying felony or its attempt in a felony-murder prosecution.[5]

But is the doctrine applicable to offenses other than murder *in Texas*? Some *language* in a 1974 Texas Court of Criminal Appeals decision suggests that it is. In *Cowles v. State*[6] a rape conviction was upheld over a claim that the testimony of a *psychologist* concerning the accused's mental condition should have been admitted at the guilt-innocence stage of the trial. According to *Cowles*, not only will low I.Q. and emotional disorders be insufficient to raise the issue of insanity, but by the great weight of authority such evidence is not admissible on the issue of guilt at all. But the opinion states that an "exception" to the rule is "where specific intent is an *element of the offense* for which the accused is being tried, as in the different degrees of murder and the 'with intent' crimes." It suggests that the result would have been different if "specific intent" were an element of the crime charged:

> When an expert witness for the defense testifies that the accused was legally sane at the commission of the act, and the offense is not one where specific intent is an element of the crime, an offer of testimony by that witness as to the mental aberration or the emotional problems of the accused should be rejected at the guilt-innocence stage of the trial.[7]

As the language of *Cowles* indicates, the diminished capacity rule usually is applied only to "specific intent" crimes. There is no disagreement that premeditated and deliberate murder is such a crime and little disagreement that an "intentional" killing is. But diminished capacity has seldom been applied to other than homicide offenses,[8] even though the concept logically would apply to any offense which contains a specific mental element. In Texas, "specific intent" has been interpreted to include the culpable mental states of "intentionally" and "knowingly"[9] one or both of which are the required culpable mental states for numerous criminal offenses under the Texas Penal Code. Logic and the *Cowles* dictum support the admissibility of psychological abnormalities on the issue of the culpable mental state for any of these offenses. In other than homicide prosecutions, however, the only explicit vehicle for introduction of that kind of evidence is the insanity defense. Thus, the case for admissibility across the board of evidence of abnormal mental condition may be difficult to make.

Unlike the popular A.L.I.'s "substantial capacity" test of insanity (mental disease or defect),[10] the Texas statute[11] literally requires *complete* impairment of either cognitive or volitional capacity. If the Texas statute does in fact require complete incapacity, a large gap exists between the "normal" person and the person who would qualify as "insane" under section 8.01. This gap would include a wide spectrum of mental abnormalities and disorders that might be admissible, which under a diminished capacity doctrine would be excluded. Judge Darrell Hester has suggested, however, that the classification of insanity is not so absolute as it might appear. He believes that, as a practical matter, a jury will *determine as it does under any* definition of insanity that "if it looks like a donkey, smells like a donkey, and acts like a donkey, undoubtedly it is a donkey."[12] Even if Judge Hester *is right, the diminished* capacity concept still has a place. The insanity defense requires the trier of fact to be convinced by a preponderance of the evidence of *the abstract proposition* that the accused fits into the category of the offender

who is completely nonresponsible for any criminal act. The diminished capacity notion, on the other hand, requires the jury to answer the question whether the accused is criminally liable for committing the particular criminal *offense charged* in that he has satisfied all its essential elements beyond a reasonable doubt. An accused may be unable to prove he is a "donkey" but still raise a reasonable doubt whether he should be treated like one. In any case in which the defendant can produce evidence of youth, emotional instability, behavioral disorder or low intellect, his attorney should consider attempting to introduce it on the issue of culpable mental state. In some cases, perhaps, that evidence may be presented by the state. To have much chance of success, however, the defense attorney will need to present expert testimony that effectively relates the psychological abnormality to the state of mind at issue.[13] This may not be an easy task as mental health experts will have difficulty fitting their observations and characterizations of the dynamics of human behavior into the unfamiliar framework of culpable mental state terminology such as "awareness," "knowledge," and even "conscious purpose." But, the cash value of such testimony will be in how well it relates to the "intent" element. If the condition of mind is admitted, defense counsel should request a special charge to the jury which might read as follows:

> The defense has presented evidence in this case relating to the condition of the mind of the accused at the time of the crime charged. Evidence of the condition of the accused's mind at the time of the crime charged may be considered in determining whether the defendant did or did not have the intent which is an element of the crime charged.[14]

On theoretical grounds, the concept of allowing evidence on any essential element of a crime makes good sense,[15] but it has been opposed on a number of pragmatic grounds. Perhaps the strongest argument is based on the inability of juries to handle psychiatric testimony because of its vague and subjective nature.[16] But it seems that the Texas Court could not consistently reject diminished capacity on the basis of unreliability of psychiatric testimony. It has placed its imprimatur on the use of such evidence by juries in making the difficult determination based on a prediction of future dangerousness whether accused should receive the ultimate penalty of death.[17]

Capital Murder Cases

Evidence of the accused's condition of mind has become an extremely important factor in Texas capital murder cases. A common practice of prosecuting attorneys in capital cases is to present psychiatric evidence tending to show future dangerousness of an accused in an effort to obtain a unanimous vote on Question (2) in the capital case sentencing procedure.[18] Other evidence, including the details of the crime, that was presented at the guilt-innocence stage also may be considered at the punishment stage.[19] The jury must be allowed to consider the defendant's state of mind as a mitigating factor as well as an aggravating factor.[20] A defendent must be allowed to present counter-psychiatric evidence that the accused does *not* have the propensity to commit acts of violence in the future.[21] But the cash value of such evidence from the defendant's perspective may be its effect on Question No. 1. If the State presents evidence, for example, that the accused is "impulse-ridden" or has an impaired ability to control impulses, is it not by its own evidence raising a doubt as to Question No. 1? Question No. 1 requires the jury to determine whether the accused "deliberately" and with a "reasonable expectation" caused the death of the murder victim.[22] "Expectation" implies anticipation, a looking forward to, or thought of beforehand. Although the meaning of the term "deliberately" is unclear, it certainly includes the concept of intent and also implies an additional element of "cold-bloodedness" or "calculated reflection." The State should not be allowed to have its cake and eat it too. If the State seeks to use evidence of the mental condition of the accused to establish that he will not conform his conduct to the requirements of the law, the defendant should argue that the same evidence shows that he did not "deliberately" and with an "expectation" cause the death because his mental condition made him incapable of conforming in this instance.[23]

Whenever evidence of mental condition of the accused is considered at the sentencing of a capital murder trial, the defendant should request a charge similar to that requested at the guilt-innocence stage:

> Evidence relating to the condition of the mind of the accused at the time of the crime has been presented in this case. Evidence of the condition of the accused's mind at the time of the crime charged may be considered by you in determining the issue whether the conduct of the defendent that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result.

FOOTNOTES

1. See Annot., 22 A.L.R.3d 1228 (1968).
2. For instructive discussions of the "doctrine" see *Lefave & Scott, Criminal Law* 325-32 (1972); Arenella, "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage," 77 *Colum. L. Rev.* 827-65 (1978); Dix, "Pshchological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like," 62 *J. Crim. L.C. & P.S.* 313 (1971).
3. *Brazile v. State*, 497 S.W. 2d 302 (Tex. Crim. App. 1973).
4. No. 57,105 (Tex. Crim. App., Jan 1, 1979).
5. These are the three "modes" of committing murder under Tex. Penal Code Ann. § 19.02 (1974).
6. 510 S.W.2d 608 (Tex. Crim. App. 1974).
7. *Id.* at 610.
8. See *Lefave & Scott, supra* note 2. But see cases cited 16 *Duq. L. Rev.* 129 n.17.
9. *Gonzales v. State*, 532 S.W. 2d 343 (Tex. Crim. App. 1976).
10. Model Penal Code § 4.01 (Tent. Draft No. 4, 1955).
11. Tex. Penal Code Ann. § 8.01 (1974).
12. Hester, "Chapter 8 of the Texas Penal Code—Law in Evolution" in *Penal Code Materials* 19, 22 (Texas Penal Code Update Institute—3d ed. 1975). See also R. Simon, *The Jury and the Defense of Insanity* 154-60 (1967).
13. See Dix, *supra* note 2.
14. This charge is based on the instruction requested in *State v. Stockett*, 565 P.2d 739 (Ore. 1977) (en banc).
15. See *LeFave & Scott, supra* note 2, at 331.
16. See *State v. Garrett*, 391 S.W.2d 235, 242-43 (Mo. 1965). Another objection to diminished responsibility is inadequate protection of the public, but if that is our overriding concern, why do we concern ourselves with moral blameworthiness at all? See Bubany, *The Texas Penal Code of 1974*, 28 *S.w. L.J.* 292, 314-15 (1974).
17. See Judge Roberts' stinging opinion in *Fernandez v. State*, 564 S.W.2d 771, 773 (Tex. Crim. App. 1978) in which he questions the logic of admitting psychiatric testimony as reliable on the prediction of dangerousness in capital cases but at the same time not allowing polygraph evidence in criminal trials because it is unreliable.
18. *Tex. Code Crim. Proc.* art. 37.071 (b)(2) (1977).
19. *McMahon v. State*, No. 58,240 (Tex. Crim. App., Nov. 22, 1978).
20. Ex parte Granviel, 561 S.W.2d 503, 516 (Tex. Crim. App. 1978) (en banc). As Judge Douglas puts it, a "good rule of evidence works both ways." *Robinson v. State*, 548 S.W.2d 63, 66 (Tex. Crim. App. 1977).
21. *Hammett v. State*, No. 58,453 (Tex. Crim. App. Sept. 20, 1978), rehearing granted.
22. *Tex. Code Crim. Proc.* art. 37.071(b)(1) (1977).
23. Question No. 2 is a determination of a purportedly objective fact—future

(continued on p. 50)

THE COURT'S CHARGE

Marvin O. Teague, Houston

I. INTRODUCTORY COMMENT.

It has been said that "in preparation for trial in a Federal case, Counsel should begin at the end -the Court's Charge." "Preparation of at least a rough draft of the desired Court's Charge prior to trial offers counsel the guidelines to needed trial preparation, evidence, objections, basic trial strategy, and the platform for argument."

In order to have effective voir dire examination, especially where counsel is given the opportunity to do the voir dire examination, it is absolutely essential that Counsel be familiar with what may eventually be the law of the case.

II. Most Federal judges generally repeat themselves in criminal cases for the applicability of the particular offense and any defense which may be present. Thus, if possible, you should try and find a given charge concerning your particular offense. That way you will easily see what is to come when the trial judge charges the jury after argument. You should familiarize yourself with the two-volume work, *Federal Jury Practice and Instructions*, by Devitt and Blackmar, published by West Publications; See also 33 FRD 523 and 36 FRD 457, 28 FRD 401; Volume 23 *American Jurisprudence Pleading and Practice Forms*; and *Federal Trial Handbook*, by Robert S. Hunter.

Most Federal Judges require Counsel, prior to trial, to file their requested charges. You should do this as you can bet the Government's prosecutor will get his mag card out. You will find there is a great deal of duplication. However, when you get your copy of the Government's proposed charges, you should read them carefully and compare them with your own proposed charges.

III. *RULE 30, F.R.CR.P.*

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

IV. Although most Federal Judges prepare a written charge, there is no written charge, as such, in Federal Court. Thus, when the trial judge orally gives to the jury his charge, you he very attentive and listen carefully to what the judge says as it is not unusual for a judge to inadvertently make an error in his language. You should be very much on guard when a judge does not prepare a written charge and simply reads from a stack of books.

V. Remember that Counsel argues and *then* the trial judge charges the jury, which is the reverse of State practice.

VI. Usually, by the time of argument, you will know what charges you want to be granted or denied. However, you should make the record clearly reflect your objections for failure to give a certain instruction or the giving of an unwanted instruction.

VII. SOME PRINCIPLES TO REMEMBER.

1. A Federal Judge may summarize and comment on the evidence as long as he does it in an impartial, dispassionate and judicial manner, but he must clearly indicate that the jurors may disregard such remarks or they may come to a different conclusion.
2. Whether a jury has been properly instructed is to be determined, not upon consideration of a single paragraph, sentence, phrase or word, but upon consideration of the charge as a whole.
   (a) If a specific instruction departs from standards set by law or if the charge given leaves the jury with the incorrect impression of the case, then reversible error can result.
3. Where *intent* is an essential element of the crime charged, the instructions must contain a clear and unambiguous description of the specific intent as an essential element.
4. The Court must instruct on reasonable doubt. The 5th Circuit has condemned charges which state that "such doubt must be substantial rather than speculative."
5. The jury must be informed that the accused cannot be found guilty until the prosecution has established his guilt beyond a reasonable doubt by the evidence produced at the trial, without consideration of the indictment.
6. The instruction that advises the jury that circumstantial evidence alone can afford a basis for conviction only if the evidence is completely inconsistent with innocence is considered confusing and incorrect, the better rule being merely to instruct on the standards of reasonable doubt.
7. When the Defendant offers evidence of his good character, it is prejudicial error to refuse to instruct the jury that such evidence may, in itself, be sufficient to create a reasonable doubt.
8. The indictment is not evidence of guilt.
9. The Defendant's failure to testify does not create any presumption or adverse inference against him.
10. Commenting on credibility of witnesses, such as the Defendant and law enforcement officials.
11. Impeaching evidence and extraneous offenses.
12. Accomplice Witnesses.
13. Witness who has committed perjury.
14. Confession.
15. Informers.
16. Presumption of Innocence.
17. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. Failure to testify.
18. Lesser Included Offenses.
19. Judicial Notice. The Court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.
20. *U.S. v. Chiantese*, 546 F. 2d 135, laid to rest the Mann charge and the proposed charge should now read:

    "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant

possessed the required criminal intent."

21. Your requested instructions should be absolutely correct as to the facts and the law. You should have your authorities available for the trial court.
22. In making your objection, you can simply say:
    "Your Honor, I respectfully object and except to the Court's charge in reference to—(the portion of the Charge your complaint is directed)—on the following grounds, to-wit: _____ ."
23. Sometimes, the trial judge will give a supplemental instruction to the jury. Usually, if there is a hung jury situation, you will get an "Allen Charge." See *Allen v. U.S.*, 164 U.S. 492.
24. Burden of Proof on the Government.
25. Plain Error. Rule 52(b), F.R.Cr.P.
26. You should watch "Pattern Jury Instructions."
    a) They usually do not fit particular facts of the case.
    b) They are usually prosecutorially oriented.
27. Instruction Conference. Make sure the court reporter is present.
28. Expert Witnesses.
29. Identification Witnesses.
30. Circumstantial Evidence. See *Montoya v. U.S.*, 402 F. 2d 847. "The inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence to sustain a conviction."
    State: "They must exclude, to a moral certainty every other reasonable hypothesis except the defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the defendant not guilty."
31. Entrapment Defense.
32. Insanity.
33. Presumptions.
34. Missing Witness Instruction.
35. Theory of the Case Instruction.
    a) Good Faith

VIII. Conclusion.

FEDERAL SENTENCING from p. 46

year from the date of his *conditional* release. These Defendants must be discharged *unconditionally* on or before the expiration of the maximum sentence imposed. 18 U.S.C. 5017 (d).

XIV. SENTENCING ALTERNATIVES FOR ADULT OFFENDERS AND PAROLE IMPLICATIONS.

There are three different ways in which an adult offender may be sentenced, all with different parole eligibility consequences. First, a prisoner may be sentenced for a definite term and become eligible for parole at the one-third point of that sentenee or after 10 years, whichever is first. 18 U.S.C. 4205 (a).

Secondly, the sentencing judge may designate a minimum period, not exceeding one-third of the sentence, at which time the prisoner becomes eligible for parole. 18 U.S.C. 4205 (b)(1).

Finally, the judge may fix only a maximum sentence and specify that the prisoner may become eligible for parole at the discretion of the Parole Commission. 18 U.S.C. 4205 (b)(2). The indeterminate sentence provisions, 4205 (b)(1) and (2), were designed to give the prisoner the possibility of parole before the one-third point of the sentence.

A prisoner must be given meaningful consideration for parole at the time he becomes eligible. This consideration is given by way of a hearing, but the primary factors considered by the Commission and apparently, the only factors considered in an overwhelming number of cases, are the two policy guidelines established by the parole commission, to-wit: offense severity rating and salient factor score (parole prognosis). 28 C.F.R. § 2.20. The guidelines establish the range of time to be served for various combinations of offense severity (categorized from "low" to "greatest") and salient factor score (ranging from "very good" to "poor").

An initial hearing is granted by the Parole Commission at the time the prisoner first becomes eligible for parole. In the case of "(b)(2)" prisoners, this hearing occurs within 120 days of incarceration. Since this initial "hearing" for (b)(2) prisoners occurs so soon after incarceration, the possibilities for parole being granted at that time are virtually nil. The purpose of this initial hearing is to establish the range of time to be served according to the commission guidelines. Quite often, the application of the guidelines at this initial hearing for "(b)(2)" prisoners defers a further hearing to a point well beyond the one-third point of the sentence. In those cases, a "(b)(2)" prisoner may be worse off than a prisoner who has received a definite sentence.

Although the Fifth Circuit has not directly addressed the question, the operation of these Parole Commission guidelines on "(b)(2)" prisoners has been successfully challenged in several Circuits. By enacting § 4205 (b)(2), Congress intended to provide consideration before the one-third point, but Parole Commission procedure effectively delays consideration beyond that point. *Garafola vs. Benson*, 505 F. 2d 1212 (7th Cir. 1974); *Edwards vs. U.S.*, 574 F. 2d 937 (8th Cir. 1978). This challenge has usually been raised through a petition for habeas corpus relief. 28 U.S.C. § 2255.

XV. FEDERAL PRETRIAL DIVERSION.

The federal pretrial diversion program operates as an Attorney General Policy; there is no federal statute governing its operation. The published guidelines should be consulted, and if your client may qualify for the program, it is obviously a worthwhile alternative to pursue.

The pretrial diversion agreement may he entered into at any time after prosecution has been initiated. Essentially, it is an agreement between the Unites States Attorney and the Defendant that the ease will not be prosecuted for one year, during which time the Defendant will be placed on prohation. The probationary terms are generally the same as those usually imposed subsequent to conviction. If the one year probationary period is successfully completed, the case is then dismissed. Should the probation be violated and prosecution ensue, the Defendant has saerificed only his right to a speedy trial.

DIMINISHED CAPACITY from p. 48

dangerousness. Question No. 1 relates to the subjective state of mind of the actor–his appreciation of the consequences of his acts and his ability to choose between alternatives. The gist of the State's argument often is that the accused is a continuing threat to society because his behavior is not affected by the threat of penal sanctions. Indeed, the Court of Criminal Appeals in affirming some capital murder convictions often has emphasized the "senseless" or "motiveless" nature of the killing. *Quere:* How can a senseless and motiveless killing be "deliberate"? The argument that an accused is dangerous because he cannot be expected to conform his conduct to the requirements of the law is a tacit admission that he does not possess the capacity to make intelligent choices that are required for a "yes" answer to Question No. 1.

In the eyes of the State psychiatrists numerous criminals are sociopaths–not insane–but dangerous because they cannot be treated. Who says we do not condone "mercy killing"?

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