VOICE

FOR THE DEFENSE

Official Journal of the Texas Criminal Defense Lawyers Association

OCTOBER 1990

Mike DeGeurin
Outstanding Criminal Defense Lawyer
1989-1990

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All articles, contributions and advertising inquiries should be addressed to the editor, Kerry P. FitzGerald, Attorney at Law, 3500 Maple Ave., Suite 1350, Dallas, Texas 75219, (214)528-6030

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The Legislature's Coming! The Legislature's Coming!

by Tim Evans

Like it or not, the Texas Legislature meets every two years (at least). Even though the 72nd Session does not begin until January, 1991, pre-filing of bills may begin as early as November 1, 1990. While we've been busy with our law practices various bureaucratic entities have been working through the summer and fall "building the perfect beast" (apologies to Don Henley). I suppose undaunted by the fact that every legislature before them, at least since the 1921 "Crime Eradication Act," has tried, and failed to stamp out crime by the passage of laws. I write to inform you of what's on the horizon and to encourage your assistance in providing a measure of reality to the political rhetoric.

Sentencing

The Criminal Justice Policy Council of the Governor's Office is working under a legislative mandate from the last session to develop and propose a sentencing practices study. This is to be submitted to the legislature for approval and funding. The staff of this project has been conducting a survey. Originally only prosecutors, judges and probation personnel were being polled but a fair minded person among the prosecutors suggested that they contact our Executive Director, John Boston. John has been successful in getting them to call TCDLA members for a more balanced survey. Their questionnaire is very lengthy and it will take 30 to 45 minutes to talk with them. However it is time well spent and if you have not returned their call, please do so at once.

From their questions, it appears that there is serious consideration to implementing a guideline system of sentencing. As we have seen, those who take the easy way out simply copy someone else's work and you know that that means the federal sentencing guidelines. It is therefore our duty to speak to every person we know and warn

them of the hazards of this draconian system. We must tell them that the federal guidelines were rushed through Congress without study or consideration and passed as a "war on crime" measure. They should know that even the federal judges are adamantly opposed to them. They do not achieve the stated result of uniformity of sentencing but rather result in gross disparity brought on by the prosecutors' manipulation of indictment counts. Our state judges need to know that in practice they would be abandoning their sentencing authority to probation officers and prosecutors. The people need to know that their right to participate as juries in sentencing would be abolished. They also should know that the system would be extremely expensive to implement.

Prosecutorial Wish List

The prosecutors' legislative appetite remains voracious. Unsatisfied by the feast they have been served, they still demand dessert. On their agenda is, of course, the continued quest for unlimited oral confessions. They refer to them as voluntary but we all know who gets to say whether or not they are voluntary—the police. Also on the wish list is:

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EDITOR'S COLUMN

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The Marion Barry Voir Dire
Part 2

by Kerry P. FitzGerald

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	
OF AMERICA	:	Criminal Case
V.	:	No. 90-0068
MARION S. BARRY, JR.	:	(TPJ)

PROSPECTIVE JUROR QUESTIONNAIRE

Instructions

You are now a prospective juror in a criminal case known as *United States v. Marion S. Barry, Jr.* Trial is expected to begin immediately after selection of a jury.

The purpose of this questionnaire is to assist the Court and attorneys to select a fair and impartial jury to hear and decide this case. The defendant, Marion S. Barry, Jr., has been charged with violating certain federal laws relating to possession of a controlled substance, cocaine, and making false statements to the grand jury while under oath. Mr. Barry has denied the charges and entered a plea of not guilty.

Please answer each question below as completely and accurately as you can. Complete candor is expected of you. Truthful and non-evasive answers are necessary to ensure that both the government and the defense have a meaningful opportunity to satisfy themselves that a fair and impartial jury has been seated. Your answers should enable the Court and the lawyers to determine whether you will be able to act as an objective and unbiased decision-maker. By fully answering each question you will save a great deal of time later on for the Court and the attorneys, as well as yourself and fellow prospective jurors.

You are required to sign your questionnaire, and your answers are considered to be statements given to the Court under oath. If the space provided for you is not sufficient for a full answer to any question, you may simply continue that answer on one of the blank pages at the end. Be sure to write the question number next to the remainder of your answer to make clear which question you are continuing to answer. Please write legibly.

You will be asked follow-up questions in open court regarding your answers on this questionnaire at the time you are separately examined outside of the presence of other prospective jurors. If there is any deeply personal or confidential information called for by these questions that you believe you have a legitimate reason to keep out of the public domain, and you wish to discuss those matters privately with the Court and counsel, you may be permitted to do so, but you must make a request for privacy known to the Court in you answer to Question No. 69 or at the time you are being questioned individually.

Now that you are a prospective juror it is important that, except as part of these proceedings, you are not exposed to any outside information about this case. For this reason, you are not to read, watch or listen to press reports relating to this case or the trial. You are also instructed not to discuss the case with anyone, including another juror, or to let anyone talk to you about the case.

Thomas Penfield Jackson
U.S. District Judge

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IN AND AROUND TEXAS

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by John Boston

Advanced Federal Criminal Law Short Course

If you attended, you are aware that, substantively and academically, the federal course in Houston was outstanding. To assist federal practitioners who did not attend the course, TCDLA is offering the course book for sale at $150.00 tax included, plus shipping and handling.

As TCDLA President Elect **Richard Anderson** noted in his letter to this writer regarding the course book and the Federal Short Course, the program and book were produced, "with emphasis on representing the 'white collar' defendant (and to provide) the practitioner with an outstanding set of articles that presents an invaluable resource for any individual who finds himself in a position of representing the white collar accused in a federal investigation . . . . Without qualification, I recommend this manual to you and anyone else who represents the criminally accused."

A summary of Anderson's comments follow: some of the highlights of the manual are **Dan Gerson's** *Federal Forfeiture,* includes the new and evolving law on criminal forfeiture as well as the *Forfeiture of Attorneys' Fees.* **Albert Ratliff,** Assistant United States Attorney for the Southern District of Texas, furnishes an outline that gives updated information concerning the prosecution in government programs of *Procurement Fraud.* **F. R. "Buck" Files, Jr.** provides an update of the Court of Appeals for the Fifth Circuit Opinions of the past year, especially as they impact upon current federal investigations. Of particular interest is the article by **Marjorie Meyers,** Assistant Federal Public Defender for the Southern District of Texas. Her article delineates *Sentencing Guidelines,* giving the most recent case law decisions on the interpretations of the guidelines, as well as providing a look into the future for the guidelines (relating to bank fraud) that go into effect November, 1990. **Richard Beckler,** Washington, D.C., (lead counsel for Admiral **Poindexter** of

Iran-Contra fame) submits an article on *Bank Fraud* providing not only the current status of the law in that area, but also listing the prosecutions that have been brought by the *Bank Fraud Task Force in Texas.* The results of those investigations are included, and the practitioner is shown the extent and types of prosecutions that are used in this area. Large amounts of government resources are currently being poured into specialized investigations.

Articles on *Parallel Investigations, Criminal Liability of Corporate Officers and Employees,* and the current law on *Grand Jury Investigations* make this a handbook that will be indispensable to the practitioner who is representing a federal client.

•••

Continuing Legal Education, Meetings and Trips

Tyler is the town for November, where, on the 29th and 30th, the Criminal Defense Lawyers Project will conduct a skills course—i.e., trial practice oriented as opposed to "advanced," which is more academic; the program will include state and some federal practice, with some emphasis on drug prosecutions. Speaker line-up and hotel will have been announced by brochure by the time you are reading this. December is the month for Fort Worth,

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In and Around Texas

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where President **Tim Evans** will conduct a Board Meeting at the Worthington Hotel on Saturday, the 15th (all TCDLA members are urged to attend). CDLP will produce a two-day state law skills course on the 13th and 14th, same venue.

TCDLA will hold its winter seminar at Harrah's Tahoe Resort. That's at Lake Tahoe, Nevada. There will be skiing and gambling before and after the seminar (not during, we got to be serious some time). Then on the 24th and 25th CDLP goes to El Paso, for another skills course with emphasis on defending sex crimes. In February TCDLA and NACDL will sponsor their second annual drug seminar in Houston. **Kent Schaffer**, who did a bang-up job on last year's drug course, is course coordinator again. Then in March CDLP will hold its sixteenth annual Criminal Trial Advocacy Institute at the Criminal Justice Center of Sam Houston State University in Huntsville. Dates are 17 through 22 March. We're hoping **Bill White**, who has been an outstanding course coordinator in recent years, will do his magic once again.

In April CDLP will conduct a homicide defense practice seminar at a site to be announced. If you feel like your community would be a good venue for a homicide seminar, and a hundred or more lawyers would attend, call the home office with your suggestion, but hurry, time is of the essence. We'd like to hold more courses in the small and medium-sized Texas cities.

The Merry Month of May will see TCDLA in South Padre with an advanced federal criminal law course. June is State Bar Convention month and more importantly, at least to the criminal bar, the month for TCDLA's annual Hon. Rusty Duncan Advanced Criminal Law Short Course in San Antonio on 27 through 29 June.

With the amount of criminal law CLE TCDLA and CDLP produce during each year, no member of the criminal bar should be forced to attend a "Last Chance Video Show" in order to meet annual Minimum Continuing Legal Education requirements, but just in case, we'll keep reminding you of these and other programs throughout the year.

***

Committees, Et Cetera

The 72nd Legislature begins its regular session in January 1991. **Betty Blackwell** of Austin, with whom I had the pleasure of working during the 71st Session, is the Legislative Committee Chair. I will be the TCDLA representative along with other members of the Committee. We need your help in Austin, so let us know at the home office whether you are willing to contact legislators that you know personally regarding legislation, which I will try to keep you posted on by letter of memorandum as the session progresses; or if you will make calls or write letters; or, best of all, if you will come to Austin and testify before the various Legislative committees. The TCDLA Legislative Committee will have key points outlined for or against legislation as it is filed and scheduled for committee hearing at the capitol.

The TCDLA Strike Force, more formally known as the Lawyers Assistance Committee, is preparing internal guidelines for the guidance of the members of the committee. This committee is ably chaired by **Gerry Goldstein**, who, as you probably know, was in need of help from his own committee when an Assistant U.S. Attorney wrongly accused him of being involved in a criminal enterprise with a client. The end result was that TCDLA and other amici were asked to withdraw from the case in exchange for a full and public apology by the loose-lipped AUSA, which apology Chairman Goldstein accepted with remarkable good grace. As I've written in the column before, the Strike Force is among the strongest of services available to members (and prospective members) of TCDLA.

The big three of TCDLA's services are the *Voice for the Defense*, the Strike Force, and outstanding and inexpensive Continuing Legal Education. Another growing service TCDLA is beginning to provide is a service not just to the membership, but to the public as well. President Evans has asked that each Director and Associate

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President's Column

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1. State's right to a jury trial at all stages of all cases.
2. Unlimited joinder of all offenses arising from the same transaction (to deal with their perceived problems under *Grady v. Corbin).*
3. Legislation to comply with *Penry v. Lynaugh.*
4. A re-write of the law of warrantless arrest. (We don't yet know what this means but I doubt it will safeguard citizens).

I am quite sure there will be additional efforts to insure that the state never loses. I've notice with increasing frequency that when prosecutors lose a case for some reason they blame it on the law and run to the legislature to bail them out. I wonder why they can't be satisfied with a 97% conviction rate.

Pretrial Release

Senator Bob Glasgow, Chairman of the Jurisprudence Committee, is proposing reform in many areas of pretrial law, namely: release conditions; bail and its forfeiture; speedy trial; discovery, and a "summary judgment-type" procedure for disposing of certain cases. (Whatever this means.) To Senator Glasgow's credit he is interested in the opinion of TCDLA and has asked John Boston to serve on an advisory committee. Fortunately for TCDLA John has earned credibility around the capital and is frequently asked for his views. Unfortunately he is usually outnumbered and we need volunteers to help him in these areas. Please call one of us if you can help.

Again we witness the easy way syndrome in that the only thing that has been reduced to writing at this time is a modified draft of the federal pretrial statutes. For now, pretrial detention has been omitted out of a recognition of the Texas Constitutional prohibition in Article I, Section 11a. There are those who proposed amending the Constitution to allow for pretrial detention and we must be on guard lest this idea gather steam.

The time to defend against shortsighted legislation is while it is being drafted. It is remarkable what success we have had in adding a phrase here and there, but we must do it now. Please help.■

Mike DeGeurin: Outstanding Criminal Defense Lawyer 1989-90

by Tim Evans

On the cover of this month's *Voice for the Defense* is the increasingly familiar face of Houston's Mike DeGeurin. Mike has been selected as the Outstanding Criminal Defense Lawyer for 1989-90 by the Criminal Justice Section of the State Bar of Texas. He was presented this award at the State Bar Convention in Dallas.

After graduating from Texas Tech Law School, Mike clerked for former Justice Wendall Odom at the Texas Court of Criminal Appeals. He then moved to Houston where he served as clerk for United States District Judge John Singleton. Mike began his trial practice as one of Houston's first federal public defenders. He was constantly in trial and it was there that his hard work and natural potential was recognized by his eventual mentor, Percy Foreman. In 1977, Foreman hired Mike as an associate and today he heads the firm of Foreman, DeGeurin, and Nugent. Mike has earned his own reputation at the top of the profession but he is quick to credit the tutelage of 11 years with Percy Foreman. "Nobody can be Percy Foreman, or replace him," he says, "but I do have the benefit of his 60 years of experience."

One does not become a great trial lawyer by osmosis. Compassion and hard work were the recurring terms used by colleagues to describe Mike's more concrete qualities. Former Foreman and DeGeurin partner, Lewis Dickson, who now practices with Mike's brother Dick, sums it up thusly, "Mike is very thorough, he is aggressive without being offensive and though he has a brilliant mind, he tries the case with his heart. Jurors relate to his sincerity and often acquit Mike and coincidentally, his client."

The most recent example of his hard work and tenacity has resulted in the dismissal of capital murder charges that had held Clarence Lee Brandley in a single cell on death row since 1980. Mike was hired in 1981 and a decade later, after the original appellate brief, two stays of execution, three 11.07 Writs (eventually resulting in an evidentiary hearing), another brief to the Court of Criminal Appeals and finally a brief in opposition to the State's Petition for Writ of Certiorari to the Supreme Court, his tenacity paid off and Brandley was freed.

Partner Paul Nugent attributes this success to Mike's energy and total commitment to his client. "He treats his clients like family members. It was Mike's willingness to roll up his sleeves and work into the night when things looked bleak that saved Brandley's life," Nugent said. Nugent also laughingly related the story of how Mike sacrificed his body to make a point to the jury. After a vigorous cross-examination of a police officer, Mike asked him to demonstrate how he "subdued" the defendant. The exasperated officer twisted Mike's arm behind his back and rammed him into the jury rail, breaking a rib. The jury got the point and found excessive force.

Mike DeGeurin is a stand up lawyer. He showed his courage most recently when he challenged a federal grand jury subpoena seeking information as to the source of fee payment. Ably represented by brother Dick and assisted by the TCDLA, HCLA, ATLA, and the NACDL Lawyers Assistance Committees the subpoena was quashed by U.S. District Judge David Hittner. Judge Hittner issued a written opinion showing his recognition and sensitivity to Sixth Amendment right to counsel and Rule 17c oppression issues. (See, *In Re Grand Jury Subpoena For Attorney Representing Criminal Defendant Jose Evaristo Reves-Requena,* 724 F.Supp. 458 (S.D. Tex. 1989). Unfortunately the Fifth Circuit has overruled Judge Hittner but as of this writing they had not published the written opinion. The defendant in the case has since been tried and convicted and TCDLA is optimistic that the Court will write on mootness and timing and not destroy Judge Hittner's reasoning.

Mike's list of accomplishments overwhelms the space for this article. Two of his cases have appeared on CBS's "60 Minutes." In addition to the the Brandley case, the show featured a case of outrageous psychological coercion by the police in obtaining a statement from a young girl accuse of murder. We all know this happens, Mike was able to prove it.

Lewis Dickson summed it up when he said "Mike practices law as a profession, not a business." TCDLA congratulates fellow member, Mike DeGeurin, and we thank him for serving as an example to us all.■

In and Around Texas

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Director volunteer to make a public relations speech before a civic, church or school group on the importance of the Bill of Rights, the criminal Justice system or related topic. (Yours truly is scheduled for a church group in November). It is essential that the public be made aware of the erosion of everyone's rights by laws contemplated or already passed by Congress, decisions handed down by the U.S. Supreme Court and lower courts, and the general attitude that more laws will solve the crime problem. Citizens, we're not enforcing the laws we have already. There is a need to counter the concept that taking away individual freedoms will make our society more free from crime.

Every member get a member. Semper Fi to the old Recruiter.■

D.U.I.D. Defense Technics:

D.U.I.D. Comes To Life In Texas

by Roy T. Rogers, Jr.

DRIVING UNDER THE INFLUENCE OF DRUGS (D.U.I.D.) has come upon our legal scene quietly and unnoticed. It is prosecuted under the same statute as D.W.I. (alcohol) but D.U.I.D. is a separate means of becoming intoxicated. Further a combination of the 2 substances is lurking in the statute and no doubt will also soon make its presence known to all. This article will attempt to give Defense Practitioners in this area a general overview of the situation now existing and suggest some means of defending against it.

The Scenario

A suspect is stopped by police, videotaped on the roadside and then arrested for D.W.I. with the standard observations supporting probable cause to arrest. Suspect is then taken to jail and given standard Implied Consent Warnings. He then takes the breath test on an Intoxilyzer #5000 Machine and LO AND BEHOLD his test result is below .10! He passed the breath test as most lay persons understand it. The arresting officer's opinion of intoxication has been called into serious question. The arresting officer now consults with another officer called THE DRUG RECOGNITION EXPERT (D.R.E.). The suspect is then taken to another room and "urged" to participate in a new series of tests called "PARA-MEDICAL TESTS." When these are completed the suspect is requested to give a blood/urine sample for testing. The specimen is sent to a toxicologist together with a recommendation from the D.R.E. for qualitative analysis only. The suspect is charged with D.U.I.D. prior to the final analysis based upon the D.R.E.'s opinion that the suspect was using 1 of the 7 classes of drugs the D.R.E. was trained to identify. Later the test result is returned from the toxicologist showing "positive."

The New Players

Two (2) new players have come forth in our D.U.I.D. case:

THE DRUG RECOGNITION EXPERT: This is usually a police officer who did not see the suspect at driving time. He is not medically qualified for any diagnosis. He received minimal training in administration of para-medical tests and the identification of major symptoms of 7 classes of drugs.

THE TOXICOLOGIST: His qualifications will be assumed for this article. He will analyze a blood/urine specimen QUALITATIVELY and not quantitatively. He has no experience in conducting tests on persons to determine the effects of drugs on their driving abilities and no way to relate his analysis back to the time of driving. No amount of drugs determining an intoxication level is prescribed as in the case of intoxication for alcohol.

The Applicable Statutes

ARTICLE 6701-L-1 (2) (A) VATCS

Intoxicated means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug or a combination of two or more of these substances into the body;

ARTICLE 6701-L-5 Sec. 1

Any person who operates a motor vehicle upon the public highways or upon a public beach in this state shall be deemed to have given consent subject to the provisions of this act, to submit *to the taking of one or more specimens of his breath or blood* for the purpose of analysis to determine the alcohol concentration or the presence in his body of a controlled substance or drug, if arrested for any offense arising out of acts alleged to have been committed while a person was driving or in actual physical control of a motor vehicle while intoxicated..... *The specimen or specimens* shall be taken at the request of a peace officer *having reasonable grounds to believe* the person to have been driving or in actual physical control of a motor vehicle upon the public highways or upon a public beach in this state while intoxicated.

ARTICLE 6701-L-1 (b)

The fact that any person charged with a violation of this section is or has been entitled to use a controlled substance or drug under the laws of this state is not a defense.

HEALTH & SAFETY CODE #481.002 (16)

"DRUG" means a substance other than a device or component part of or accessory of a device that is:

(A) recognized as a drug in the official U.S. Pharmacopeia; official Homeopathic Pharmacopeia of the U.S., Official National Formulary or a supplement to either

(B) intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals

(C) intended to affect the structure or function of the body of man or animals, but is not food or

(D) intended for use as a component of a substance described above.

The Failure Of The "Great Machine" Starts It All

Our DWI suspect voluntarily participated in the testing of his breath sample and "passed." This created a serious problem for the arresting officer in many respects.

The arresting officer now calls a time-out and has a conference with the D.R.E. relative to the situation.

The arresting officer then refers the suspect to the D.R.E. for testing.

Note carefully, that a rational basis (reasonable grounds) for the referral to the D.R.E. is required by the statute. Merely passing the breath test would not be held sufficient grounds for a referral. Absent a rational basis for a referral, it seems that *Arizona v. Youngblood,* 109 Sup.Ct. 333 (1988), would mandate dismissal of the case based on bad faith of the arresting officer.

The Para-Medical Tests

First note that these para-medical tests cannot be compelled by the police. However, the police have a way of obtaining cooperation from such suspects.

These para-medical tests consist of: Medical History; Eye Examination, Skin

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The Legality Of The Prosecution's Theory In State v. Mattox

by W. Robert Gray

The indictment, prosecution, and trial of Texas Attorney General Jim Mattox on charges of commercial bribery[1] occupied the attention of the legal community and the general public in Texas from the summer of 1983 until Mattox's acquittal on the charges by a jury on March 14, 1985.[2] The factual basis of the prosecution's case against Mattox was highly complex. It essentially consisted of the allegation that Mattox, as Attorney General, had threatened a senior partner of a large Houston law firm with denial of the legally required official approval of municipal bonds of certain clients of the firm, unless another partner of the firm took action desired by Mattox in unrelated litigation between the state, represented by the Attorney General, and Mobil Oil Corporation.

The author, who served as co-counsel to Mattox during the last stages of the criminal litigation against him, is thoroughly familiar with the factual evidence adduced at the trial. The purpose of this article is not, however, to develop the factual side of the case and the events surrounding it; the jury's verdict of not guilty speaks for itself on the legal significance of the evidence.[3] Rather, my purpose is to analyze a crucial dimension of the case which has not yet been fully exposed to general and public examination: the adequacy and validity of the legal theory under which Attorney General Mattox was charged and tried.

The issue for analysis here is whether the prosecution's theory of the crime, as developed in the indictment, violated one of the most fundamental principles of Anglo-American jurisprudence—the principle of legality. That principle, according to Professor Packer in his book *The Limits of the Criminal Sanction,* "is summed up by the maxims *nullum crimen sine lege* and *nulla poena sine lege:* no one may be convicted of or punished for an offense unless the conduct constituting that offense has been authoritatively defined by an institution having the duly allocated competence to do so."[4] "This definitional role is assigned primarily and broadly to the legislature, secondarily and interstitially to the courts, and to no one else."[5] The devices worked out by the courts to uphold the principle of legality include the prohibition of ex post facto lawmaking, the void-for-vagueness doctrine, and the doctrine requiring strict construction of penal statutes.[6] Though the most frequent rationale given for the principle of legality is to provide "fair notice,"[7] Professor Packer argues that "the real importance of the principle of legality in the criminal law today [is] primarily to control the discretion of the police and of prosecutors."[8] In controlling prosecutorial discretion "the single most important device is the requirement . . . that the police and prosecutors confine their attention to the catalogue of what has already been defined as criminal."[9]

Texas criminal procedure requires that "everything . . . which is necessary to be proved" should be stated in the indictment.[10] The case law further indicates that failure to allege all the elements of the offense in the indictment or information is a fundamental defect in alleging the offense requiring reversal of a conviction obtained on the basis of the defective charging instrument.[11] The failure to allege in the indictment all the essential elements—as defined by the legislature and construed in the courts—of the crime of commercial bribery is thus a violation of these precepts of Texas procedure, which are in turn an embodiment of the principle of legality.[12] This procedural requirement prevents the prosecution from creating crimes *ex nihilo,* by making the courts the final authority on whether a particular indictment validly defines the crime being charged in terms of the established legislative and judicial elements. It is by this standard of whether the indictment fairly and validly incorporated the legislatively and judicially designated elements of the offense that the legality of the prosecution will be judged here.

This case presents some apparent paradoxes. The crime of commercial bribery, which was first adopted in Texas in 1974 as part of the new Penal Code, is not expressly designed to apply either to the use of threats or to misconduct in public office, which constituted the real gravamen of the charges against Mattox. In jurisdictions with such a prohibition against commercial bribery prior to 1974, that prohibition has been essentially designed to protect the interest of a principal, primarily an employer, from illicit outside interference—in the form of favors, gratuities, or similar inducements—with the performance of duties owed him by an agent, primarily an employee.[13] The practice commentary to the Texas commercial bribery statute, section 32.43 of the Penal Code, states simply: "[t]he section is aimed principally at kickbacks."[14] In the absence of any authoritative construction of section 32.43 by the Texas courts,[15] these indications that the statute is directed to bribery in essentially a commercial setting—not threats in a political context—should be compelling. The extension by prosecutors and courts of criminal statutes designed to proscribe essentially crimes of property[16] in commercial or private sector dealings, to putative crimes involving alleged public corruption, has been a general and common practice in recent years.[17] Whether that practice should continue, through the prosecutorial extension of commercial bribery to reach the essentially political conduct of public officials, is an issue implicit in this article.

The second apparent paradox about the *Mattox* case is that, aside from the defendant's innocence, it settled nothing legally. The great expense in time, money, and judicial resources established no legal principles of precedential value by which section 32.43 might be construed or—in the larger sense—by which prosecutorial discretion might be better defined and controlled.[18] This article, within its inherent limitations,

will attempt to fill this vacuum through its analysis and criticism of the legal theory on which the case was based.

In reviewing the prosecution's legal theory, the article will take the following approach: First, it will set out the relevant portions of the statute and the indictment, together with some additional facts and interpretation, to establish essentially what the prosecution's theory was. Then it will establish three major respects in which the State's theory did not comport with the principle of legality, and specifically with the requirement that every necessary element of the crime be alleged. It will show (1) that the alleged scheme did not involve a bribe, (2) that the concept of fiduciary duty upon which the indictment was based was faulty by not following the express statutory requirement that the putative recipient of the bribe be "acting as a lawyer", and (3) that the theory failed to take proper account of the fact the crime charged was inchoate, and thus in the process alleged a crime whose commission was legally impossible. The article concludes that the prosecution's theory violated the principle of legality because it charged a crime not based primarily on legislative enactment or, secondarily, on judicial construction—the only legitimate sources of law in our system of criminal jurisprudence.[1]

". . . McDade deposed Mattox . . . dissatisfied with the results, subsequently published a notice to depose Janice Mattox, the Attorney General's sister, for the asserted purpose of discovering any improper entanglements by Jim Mattox with Manges and/or the judge."

I. The Prosecution's Theory of the Case

To understand the prosecution's theory under which Jim Mattox was charged with commercial bribery, it is necessary to quote at some length from the indictment returned against him, for in the absence of judicial opinions or other authoritative sources of that theory, the indictment is its essential source. The indictment charged

"that James Mattox . . . did . . . intentionally and knowingly offer a benefit to a fiduciary, to wit, Wiley Caldwell, as consideration for the said Wiley Caldwell's violation of his duty to a beneficiary for whom the said Wiley Caldwell was acting as a lawyer, said duty being the said Wiley Caldwell's duty as a lawyer to exercise independent professional judgment on behalf of his client, Mobil Oil Corporation, in that the said James Mattox did . . . in the course of a conversation over a telephone between the said James Mattox and the said Wiley Caldwell, threaten to delay approval and deny approval of certain bonds then pending approval by the said James Mattox as Attorney General of the State of Texas, said bonds being those of certain beneficiaries for whom the said Wiley Caldwell was acting as a lawyer to wit: [seventeen named political entities and subdivisions of the state]; but that he, the said James Mattox, as Attorney General of the State of Texas, would not delay approval and would not deny approval of said bonds then pending approval . . . for and in return for the said Wiley Caldwell's violation of his duty as a lawyer to his beneficiary, Mobil Oil Corporation, in that he, the said Wiley Caldwell, would order and require that Thomas R. McDade, a lawyer and the partner of the said Wiley Caldwell, cease and desist from his efforts to question and depose Janice Mattox [the defendant's sister] in the course of a certain law suit pending in . . . Webb County [Laredo], Texas . . . styled Clinton Manges, Individually, and Duval County Ranch Company versus Mobil Producing Texas and New Mexico, Inc."[2]

The indictment shows that the defendant, who it alleges "offer[ed] a benefit" as a bribe, was charged under subsection (c) of section 32.43, which states that

(c) A person commits an offense if he *offers*, confers, or agrees to confer any benefit the acceptance of which is an offense under Subsection (b) of this section.

Subsection (b) describes the conduct which Mattox's offer putatively induced from Wiley Caldwell:

(b) A person who is a fiduciary commits an offense if he . . . agrees to accept any benefit *as consideration for:*

(1) violating a duty to a beneficiary.

Subsection (a) in turn supplies two critical definitions:

(a) For purposes of this section:

(1) "Beneficiary" means a person for whom a fiduciary is *acting.*

(2) "Fiduciary" means:

• • •

(c) a *lawyer.*"

These excerpts from the indictment and the relevant portions of the statute, together with some additional facts, provide the basic contours of the prosecution's theory of the case.

Wiley Caldwell and Thomas R. McDade were partners in the multi-member Houston law firm of Fulbright & Jaworski. Caldwell for many years had represented as clients a large number of political entities in connection with their issuance of bonds. A major element of this issuance was the necessity to secure the legally required approval of the Attorney General. McDade's client was Mobil Oil Corporation,[3] whose subsidiary Mobil Producing Texas and New Mexico, Inc., had been since 1982 embroiled in litigation with South Texas rancher-businessman Clinton Manges over the validity of certain of its oil and gas leases on Manges's property, leases under which Manges was lessor as the successor-in-interest to the original lessor. In late 1982, the State of Texas intervened in this litigation, through then Attorney General Mark White, to protect its interest in the leases and underlying mineral rights.[4]

The incoming Mattox administration pursued the Mobil litigation because of its obvious importance for the Permanent School Fund.[5] During the spring of 1983, McDade, acting as co-counsel with a disparate group of lawyers from several law firms, filed a motion to recuse the trial judge in Webb County on the grounds of the judge's bias in favor of Manges. McDade soon extended this litigation tactic to include the Attorney General, charging possible improper influence by Mattox on the trial judge. To the ostensible end of discovering evidence of such improper influence, McDade deposed Mattox in the Attorney General's office on May 16, 1983, and evidently dissatisfied with the results, subsequently published a notice to depose Janice Mattox, the Attorney General's sister, for the asserted purpose of discovering any improper entanglements by Jim Mattox with Manges and/or the judge. Mattox vigorously objected to this maneuver as being unrelated to any material issue in

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Objections

Part 3

by Justice Linda Thomas and Professor Malinda Seymore

VII. Ruling on Objection

A trial court should rule on an objection as soon as it is made and no assignment of error can be made unless there is a ruling on the objection. Thus, **merely making the objection is not sufficient.** Counsel should not permit the trial judge to remove error from the record by avoiding a specific ruling on the objection. If the trial court fails to rule, counsel should request a ruling. If the court refuses to rule, an objection to this refusal is sufficient to preserve the point for appeal. TEX. R. APP. P. 52(a). Be wary of responses from the court in the nature of: "let's move on;" "the jury will recall the evidence;" or "stay within the record." Do not forget when the court calls for a response from your adversary, and a discussion ensues to ultimately press for a ruling — it is easy to lose the ruling in the midst of a lengthy colloquy.

A. Civil Cases

In *M Bank Dallas, N.A. v. Sunbelt Mfg. Co.*, 710 S.W.2d 633 (Tex. App.—Dallas 1988, no writ), a witness was called in rebuttal, and when asked a certain question, the opponent objected. The jury was removed, and after a hearing outside the jury's presence, the trial court gave the witness certain instructions but did not further rule on the previous objection. When the witness testified before the jury, no objection was interposed. Because there was no ruling after the hearing outside the presence of the jury, and because no objection was made before the jury, the appellate court held that the error was waived.

All reasonable presumptions will be indulged in favor of the correctness of the trial court's ruling on objections to the admissibility of evidence. The court's rulings will not be disturbed on appeal unless there is a clear abuse of discretion from which injury or prejudice has resulted.

B. Criminal Cases

In addition to making a timely and specific objection, a defendant must secure a specific ruling on the objection in order to preserve error for appeal. *Darty v. State*, 709 S.W.2d 652 (Tex. Crim. App. 1986). The objecting party must press the court to an adverse ruling. Thus, if the objection is sustained, counsel must request an instruction to the jury to disregard, and if such request is granted, must move for mistrial. *Perry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986). **NOTE:** if a mistrial is offered in response to this request, error is waived if counsel refuses the offer of a mistrial. *See Salinas v. State*, 625 S.W.2d 397 (Tex. App.—San Antonio 1981, no pet.).

C. Excluded Testimony

Where the trial court's ruling is to sustain an objection to tendered evidence and thereby exclude it, the proponent must preserve error by way of a bill of exceptions.

1. Civil cases

Where no bill is made, there can be no reversible error. *Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Huckaby v. Henderson*, 635 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). The reason for this rule is explained in *Anderson v. Higdon*, 695 S.W.2d 320 (Tex. App.—Waco 1985, writ ref'd n.r.e.), which states that:

When tendered evidence is excluded, whether testimony of one's own witness on direct examination or testimony of the opponent's witness on cross examination, in order to later complain it is necessary for the complainant to make an offer of proof on a bill of exception to show what the witness' testimony would have been. Otherwise, there is nothing before the appellate court to show reversible error in the trial court's ruling.

Rule 103(a)(2) and 103(b) of the Texas Rules of Civil Evidence provide the ground rules for making offers of proof. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and in case the ruling is one of excluding evidence, the substance of the evidence was made known to the court by offer. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it is offered, the objection made, and the ruling thereon.

Rule 52(b) of the Texas Rules of Appellate Procedure contains virtually identical language and specifically adds that no further offer need be made. No formal bills of exception shall be needed to secure appellate review as to whether the trial court erred in excluding the evidence.

Thus, to preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show:
1. the substance of evidence sought to be admitted was made known to the court; and
2. the court either adversely ruled or after timely request affirmatively refused to rule.

Remember, however, that the offer of proof or the objection to the trial court's refusal to rule must be made prior to the court's charge being read to the jury, or it is waived. *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264 (Tex. App.--Amarillo 1988, writ denied).

2. Criminal cases

If the court excludes evidence, it is usually necessary to make an offer of proof to preserve any error in refusing to admit the evidence. *Johnson v. State*, 773 S.W.2d 721 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd). However, no

offer of proof is necessary if the substance of the evidence is apparent from the context within which the questions were asked. TEX. R. CRIM. EVID. 103(a)(2).

In *Hurd v. State*, 725 S.W.2d 249 (Tex. Crim. App. 1987), the court held that a defendant's offer of proof satisfied the requirements of rule 52 of the Texas Rules of Appellate Procedure because it included:

1. the questions defendant would have asked the witness;
2. the answers he might have received; and
3. the purpose of the testimony.

Note that the right to make an offer of proof or perfect a bill of exception is absolute and the trial court commits error if he refuses the opportunity to do so. *Spence v. State*, 758 S.W.2d 597 (Tex. Crim. App. 1988).

VIII. Motion To Strike Or Exclude

A motion to strike or exclude should be made when evidence has already been admitted. A motion to strike may become necessary in the following instances, as noted by both Jordan, *Texas Trial Handbook 2d*, § 243 (Exclusion of Evidence) and Pope and Hampton, *Presenting and Excluding Evidence*, 9 Tex. Tech L. Rev. 403 (1978).

1. To exclude an answer of a witness made before an objection could be made.
2. To exclude volunteer statements of the witness.
3. To exclude non-responsive answers.
4. To exclude prior testimony admitted conditionally upon counsel's promise to connect up the testimony or to lay a foundation.
5. To exclude testimony which later turns out to be improper, such as hearsay, or in violation of the best evidence rule.
6. To exclude testimony of a witness, who by reason of sickness, death, or refusal, fails to submit to cross examination.

A. Civil Cases

Where testimony appears to be admissible and is admitted and it subsequently appears that testimony was inadmissible, a motion to strike should be made to exclude the improper evidence. *Home Indemnity Co. v. Draper*, 504 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

When testimony is admitted subject to an objection, with a promise that its admissibility will be established by connecting that testimony to other proper testimony in the case, and the promised connection is not made, the testimony previously received should be stricken on motion. The grounds for the motion should be definitely and plainly stated and should point out the particular parts of the testimony that are improper. The trial court cannot be expected to sort the evidence, striking the objectionable items. A motion to strike out testimony will be denied if a portion of the testimony at which it is directed is proper.

The trial judge has the duty to rule on motions to strike or exclude evidence. The court's ruling will not be disturbed on appeal unless an abuse of discretion is shown.

When an objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless they are instructed to disregard it. If an objection to an answer is made but there is no ruling and no motion to strike is urged, there is no error. *Prudential Insurance Co. of America v. Uribe*, 595 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.). Where objection is made to expert testimony after the testimony is admitted, any error in admitting the testimony over the objection is waived if no motion to strike was made. *City of Denton v. Mathes*, 528 S.W.2d 625 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

If the objection is made after the evidence is admitted, there are three steps to the objection:

1. An objection must be made;
2. The party must ask the trial court to strike the evidence; and
3. The party must ask the trial court to instruct the jury to disregard the evidence.

Basically speaking, since untimely objections are frowned upon, a motion to strike will be of little assistance in preserving error where an objection could have been made at the time the evidence was offered but none was forthcoming. Further, a motion made after motion for instructed verdict and mistrial is too late. *Monsanto Co. v. Milam*, 480 S.W.2d 259 (Tex. Civ. App.—Houston [14th Dist.] 1972), *aff'd*, 494 S.W.2d 534 (Tex. 1973).

B. Criminal Cases

Although there is some older case law on motions to strike or exclude, *see, e.g., Kennedy v. State*, 150 Tex. Crim. 215, 200 S.W.2d 500 (1947); *Huff v. State*, 145 Tex. Crim. 82, 165 S.W.2d 717 (1942); *Jamar v. State*, 142 Tex. Crim. 91, 150 S.W.2d 1031 (1941), its functional equivalent is now a request that the jury disregard the evidence.

When an objection is sustained, counsel must request an instruction to disregard and, if given, must move for mistrial. *Perry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986). An instruction to disregard cures error unless the evidence is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing its impression on the jury. *Crawford v. State*, 603 S.W.2d 874 (Tex. Crim. App. 1980).

The Court of Criminal Appeals has explained its policy as follows:

> In the vast majority of cases in which . . . testimony comes in, deliberately or inadvertently, which has no relevance to any material issue in the case and carries with it some definite potential for prejudice to the accused, the Court has relied upon what amounts to an appellate presumption that an instruction to disregard the evidence will be obeyed by the jury . . . . In essence this Court puts its faith in the jury's ability, upon instruction, consciously to recognize the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations.
>
> *Gardner v. State*, 730 S.W.2d 675 (Tex. Crim. App. 1987).

While some judges have scoffed at the concept that an instruction to disregard can remove the stench after the skunk has been thrown in the jury box, *Logan v. State*, 698 S.W.2d 680 (Tex. Crim. App. 1985); *Walker v. State*, 610 S.W.2d 181 (Tex. Crim. App. 1980), the court adheres to the requirement that an instruction must be requested in order to preserve error. Note, however, that the failure to request an instruction may be excused if the evidence was not susceptible to cure by instruction. *Abbott v. State*, 726 S.W.2d 644 (Tex. App.—Amarillo 1987, no pet.).

IX. Checklists For Objections

Included as checklists are source materials which may be utilized as quick references. As noted by John

Nichols in his 1986 article for the Advanced Family Law Seminar, *Making and Meeting Objections*, the first is a checklist for possible objections to evidence which was supplied by Professor Matt Dawson of Baylor Law School and incorporated in Jordan, *Texas Trial Handbook 2d* at section 239.

The second contains objections that may be made to various types of evidence offered and which appears in Keeton, *Trial Tactics and Methods 2d* at pages 210-215. Because rule changes have occurred since these original articles were published, some editing of the original articles has occurred. Nevertheless, a review of the Texas Rules of Civil Evidence is recommended.

X. Conclusion

There is no greater weapon in an attorney's trial arsenal than a thorough and complete working knowledge of the Rules of Evidence. All trial preparation should begin with a re-reading of the rules which may be called upon in any given trial. At that point, the practitioner will be able to appropriately introduce evidence essential to the case as well as properly exclude the adversary's evidence or at least preserve error in the event of its admission.

Checklist of Objections to Evidence

Question is: -Repetitious -Leading and suggestive -Argumentative -Misleading -Too general -Indefinite -Multifarious -Inflammatory or prejudicial

Question Calls for Matters Which Are: -Not supported by pleadings -At variance with pleadings -Hearsay -Collateral matters -Irrelevant, incompetent, prejudicial and immaterial -Repetitious -No predicate -No best evidence -Self-serving -Violative of Dead Man's Statute -Violative of parol evidence rule -Calls for an opinion the witness is not qualified to give -Calls for factual or legal conclusion

Answer Gives Matters Which Are: -Not supported by pleadings -At variance with pleadings -Hearsay -Collateral matters -Violative of Dead Man's Statute -Attempt to vary written instrument by parol evidence -Matters on which witness is incompetent to testify -Opinion and conclusion of witness -Repetitious -Not best evidence -Self-serving

Question calls for matters which are: -Privileged communication -Tendered document or evidence is not property authenticated -Fact assumed, not in evidence and not judicially noticeable -Violative of some rule of exclusion -Attempt to impeach of a matter too remote -Attempt to impeach his own witness -Improper test, such as value -Witness is disqualified to testify -Objection to hypothetical question

Conduct of Counsel: -Prompting the witness -Attempt to intimidate or badger the witness -Side bar remarks -Arguing with witness -Testifying -Abusive language -Failure to maintain proper place at bar

Answer is: -Nonresponsive -Argumentative -Evasive -Rambling -Narrative

Acknowledgements

The acknowledgement on the document is irregular on its face because of: -want of a seal or other evidence of the authority of the person purportedly taking the acknowledgement.
-want of evidence of the authority of the person who took the acknowledgement, it being purportedly taken outside this jurisdiction by one whose authority must be affirmatively shown.
-failure to comply with the statutory requirements.

Affidavits

The affidavit is mere hearsay, the affiant not being a witness at the trial (or hearing) when it was made.

Ambiguity (see Uncertainty)

Ancient Instruments

The instrument is not shown to be an

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Justice Linda Thomas sits on the Fifth District Court in Dallas. Previously she was Judge of the 256th District Court in Dallas.

Justice Thomas received her B.A. degree from the University of Texas in Arlington and her J.D. degree from Southern Methodist University School of Law. She is a Fellow in the Texas Bar Foundation.

Justice Thomas is Board Certified in Family Law and was course director for the the 1985 Advanced Family Law course. She has served as chairman of the Texas Supreme Court Education Committee and a member of the Supreme Court Executive Education Committee and was dean and faculty member for the Texas College for new judges and for the Texas Regional Judicial Conferences. She is a member of the Board of Directors of the Texas Center for the Judiciary and is a member of the State Bar of Texas Committee on Legal Assistance.

Justice Thomas is a frequent speaker and author for continuing legal education programs sponsored by the State Bar of Texas, TCDLA, the Dallas Bar Association, the Texas Center of Judiciary, Inc., SMU, South Texas College of Law and the University of Houston School of Law. Most recently Justice Thomas appeared on the State Bar of Texas program entitled "The Ultimate Trial Notebook, June 1990," at the Bar Convention.

Professor Malinda Seymore is an assistant professor at the Dallas/Fort Worth School of Law. Previously, she was staff attorney for the Fifth District Court of Appeals in Dallas, research attorney for Justices Annette Stewart and Linda Thomas of the Fifth District Court, and briefing attorney for Justice John L. McCraw, Jr. of the Fifth District Court of Appeals.

She obtained her Bachelor of Arts degree from Rice University and the Juris Doctorate, cum laude, degree from Baylor University of Law.

She has published numerous articles, including subjects involving sufficiency of the evidence, the Batson decision, an analysis of appellate decisions involving narcotic cases, and contempt.

The Law of Search and Seizure

A Brief Overview—Part 3

by Catherine Greene Burnett

E. Destruction of Evidence Emergency

Occasionally a warrantless search may be justified when there is an emergency creating a risk that evidence of a crime will be lost or destroyed. A leading case in this area is *Schmerber v. California*, 384 U.S. 757 (1966), upholding the warrantless taking of a blood sample to determine alcohol content — the delay which would be caused by obtaining a warrant — could have resulted in loss of evidence. However, it is more difficult to justify the search of a house under the concept of destruction of evidence emergency. Several times the Supreme Court has considered the prosecution's claim of an emergency destruction of evidence exception that has found the facts of the cases did not fit the requirements. *See Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale* officers had set up surveillance of defendant's house because they had two warrants for his arrest. However, he was arrested on his front steps after officers saw him conduct what they thought was a drug transaction. Police officers took the defendant inside and conducted a cursory search of the house. A few moments later, the defendant's mother and brother entered the house, at which point the police searched the house and found drugs. Prosecution tried to justify search of house under claim that brother or mother could be destroying contraband. Under the facts, the search could not be condoned as incident to arrest (the defendant had not been arrested inside the house). Moreover, because the facts did not show officers could *not* have obtained a search warrant, the search was declared invalid. Based on *Vale*, commentators suggest the emergency destruction of evidence exception will probably apply *only* where evidence is in the *process* of destruction. 2 W. La Fave, *Search and Seizure*, Sec. 6.5(a) (1987).

Texas prosecutors have not placed much reliance on the emergency destruction of evidence exception. It is fair to anticipate Texas courts will follow the federal lead in this area.

F. Automobile Exception

If there is **probable cause** to search an automobile which is subject to being moved, officers may search without a warrant. *Chambers v. Maroney*, 399 U.S. 42 (1970). The Supreme Court has premised this "automobile exception" on two theories: (1) automobiles are readily mobile; (2) people enjoy a reduced expectation of privacy in their vehicles because they are heavily regulated. *California v. Carney*, 471 U.S. 386 (1985). For an exhaustive treatment of the development of the automobile exception and the scope of automobile searches, *see United States v. Ross*, 456 U.S. 798 (1982). In general, the scope of an automobile search will be defined by the *object* of the search and the places where the thing sought to be found might be located. **Bottom Line:** If officers have probable cause to believe drugs will be found in a car, they may search any part of that car — including any containers within the car — which might contain drugs. For a list of Supreme Court decisions concerning warrantless searches of vehicles and personal effects found in vehicles, see Appendix C.

Texas follows the federal rule. In *Osban v. State*, 726 S.W.2d 107 (Tex. Crim. App. 1986), Court of Criminal Appeals adopted *Ross*, holding that if officers discover even a small amount of contraband in a car, then all parts of the car may be searched where additional contraband could likely be concealed. *See also Delgado v. State*, 718 S.W.2d 718 (Tex. Crim. App. 1986).

G. Border Searches

Neither the probable cause requirement nor a reasonable suspicion is required for a search of persons or property at the border. The theory is that the United States has sovereign power to protect itself at its borders — to prevent both contraband and illegal aliens from entering the country. *See*, for example, *United States v. Ramsey*, 431 U.S. 606 (1977).

Customs officials may stop vehicles at fixed checkpoints inside the border to question occupants about residency. However, probable cause is required (or consent) to *search* the occupants or car. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In contrast, when there is no fixed checkpoint inside the border, officers must base their stop on reasonable suspicion. *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

H. Adminstrative Search

Warrantless administrative searches are justified when reasonable. *New York v. Burger*, 107 S.Ct. 2636 (1987) (administrative search of auto junkyard). The Supreme Court has justified these warrantless administrative searches on the theory that when a business is considered "closely or persuasively regulated," then the expectation of privacy has been diminished. To support a warrantless administrative search, three criteria must be met: (1) there must be a (substantial) government interest giving rise to the regulatory scheme under which the prosecution seeks to justify the search; (2) the search must be necessary to further the regulatory scheme; (3) the "certainty and regularity" of applying the regulatory scheme must act as an adequate substitute for a warrant. If these criteria are met, then it makes no difference that the administrative search was conducted by law enforcement officers rather than administrative agencies. Examples of closely regulated industries include firearm and liquor establishments.

Texas follows the federal rule for administrative searches. A good recent example is found in *Crosby v. State*, 750 S.W.2d 768 (Tex. Crim. App. 1987), which involved search of a nightclub to conduct a routine inspection for liquor violations under T.A.B.C. Sec. 101.04. Applying the *Burger* test, Court of Criminal Appeals found the Texas regulatory scheme acceptable. However, this case was reversed because the officers extended their search into a performer's dressing room — a search which could

not have been conducted to detect possible liquor violations. *Crosby* was distinguished and administrative searches under the Texas Alcohol Code upheld recently in *McDonald v. State*, __ S.W.2d ___ (Tex. Crim. App. No. 306-88; delivered 10/11/89) (warrantless search of nightclub upheld following tip from confidential informant that nightclub owner was selling cocaine from behind the bar). *See also, Santikos v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 923-88; delivered 12-20-89) (upheld search of locked filing cabinets opened by defendant at T.A.B.C. agents' request during routine general inspection). The Court of Criminal Appeals continues to recognize that DWI roadblocks do *not* fall within the administrative search exception. *Higbie v. State*, 780 S.W.2d 228 (Tex. Crim. App. 1989) (additionally in *Higbie* there was no individual suspicion shown to justify stop).

I. Searches of Minor Students at School

In some instances minor school children may be subjected to warrantless searches at school. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). It has been suggested, however, that *T.L.O.* applies only to searches conducted by school authorities without the inducement or involvement of police. This issue has yet to be litigated. The current test is that the legality of the search must be based on whether it was reasonable under all the circumstances. *T.L.O.* also gives school officials authority to search when violation of school rules or regulations have possibly occurred.

J. Prison and Jail Searches

A prisoner has no reasonable expectation of privacy in his cell. For this reason, random searches of inmates' cells are allowed. For this reason, also, visual body cavity searches following contact visits are considered reasonable. *Bell v. Wolfish*, 441 U.S. 520 (1979) (body cavity search of pre-trail detainee); *Lock v. Rutherford*, 468 U.S. 576 (1984) (random shakedown searches, contact visits).

K. Evidence Seen in Plain View

The plain view exception to the warrant requirement allows an officer to seize evidence of contraband without a warrant if the officer is in a public place and observes the evidence of contraband (public view) *or* if the officer has made a legitimate intrusion on the defendant's privacy right at the time the evidence is discovered (plain view). This exception is grounded on the principle that when the officer has legally observed an object in plain view, then the owner's privacy right concerning the item observed is either nonexistent or vitiated because of the officer's legal intrusion. *Texas v. Brown*, 460 U.S. 430 (1983) (defendant's car stopped at night during routine driver's license check; officer shining flashlight into car sees opaque green party balloon).

Three requirements must be satisfied to justify warrantless seizure of private property under the plain view or public view exceptions: (1) officer must be in a proper position to view the item full face or the initial intrusion must be lawful; (2) officer must discover the incriminating evidence **inadvertently** (i.e., officer must not know in advance the location of the evidence and act with the intent to seize it); (3) it must be "immediately apparent" to officer that item observed may either be the evidence of a crime or contraband.

Brown does not mean there are no limits on the **scope** of a plain view search. In *Arizona v. Hicks*, 107 S.Ct. 1149 (1987), the Court considered the limits of permissible search conducted under the plain view doctrine. There the officers were legitimately in the defendant's apartment — a bullet had been fired through the floor of his apartment, injuring a man below; officers entered to search for the shooter, other victims and weapons. However, in *Hicks*, the scope of the search went too far. Officers permissibly seized three weapons and a stocking cap mask. However, when they noticed two sets of expensive stereo components and moved those components to read and record the serial numbers (acting on the suspicion that the stereo equipment had been stolen), the officers went too far. Merely recording the serial numbers was not a search. However, a search *did* occur when the equipment was moved. That search was separate and distinct from the search permitted under the plain view doctrine when the officers entered the apartment to look for evidence relating to a shooting. Even though officers were where they had a right to be when the equipment was found, because the equipment was not related to the original basis for their entry into the apartment, probable cause was required before the stereo equipment could be properly seized.

Texas follows this rule. *See White v. State*, 729 S.W.2d 737 (Tex. Crim. App. 1987) (officers enter apartment because of disturbance call; backpack, jewelry, and stereo equipment were not "immediately apparent" as stolen property). *Contrast Miller v. State*, 667 S.W.2d 773 (Tex. Crim. App. 1984) (after officer almost ran over the defendant in alley, officer ran to see if he was all right; defendant appeared intoxicated; officer observed baggie protruding from cigarette packet in defendant's pocket; discovery of narcotics upheld under "plain view"). *See also Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App 1989) (defendant forfeited his expectation of privacy when he did not curtain or otherwise obscure the view into his garage offered by the windows).

Catherine Greene Burnett is an assistant professor of Law and Director of Clinical Studies at South Texas College of Law. She obtained her B.A. and J.D. degrees from the University of Texas.

Mrs. Burnett was a briefing attorney for the Texas Court of Criminal Appeals, and Assistant Attorney General for the State of Texas and a former partner in Morrow & Burnett. She is Board Certified in Criminal Law and a member of TCDLA. She continues a limited private practice.

She is the editor of "Significant Decisions Report" of the Voice and has been consistently rated as an excellent author and speaker at TCDLA and State Bar of Texas Legal functions, including the Advanced Criminal Law course. Cathy co-authored the *"State Constitutional Criminal Procedure: Cases and Materials" (DD. ED. 1990) and the* Texas Criminal Appellant Manual.

III. Exclusionary Rule

In the federal system, the exclusionary rule is a judicially created remedy for Fourth Amendment violations. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Texas has its exclusionary rule codified by statute in Art. 38.23, V.A.C.C.P. The terms of this statute are mandatory. *Hernandez v. State*, 600 S.W.2d 793 (Tex. Crim. App. 1980). The statute provides that evidence obtained in violation of any state or federal constitutional provision or law cannot be admitted in evidence against the accused during the trial of any criminal case. Thus, the Texas exclusionary rule is **broader** than its federal counterpart — it serves to require exclusion of evidence obtained in violation of federal and state provisions. *See Cruz v. State*, 586 S.W.2d 861 (Tex. Crim. App. 1979) (evidence obtained in violation of state attorney-client privilege ruled inadmissible). In fact, one Court of Appeals Justice has argued that regardless of the open fields doctrine, entry of officers still amounted to a trespass under V.T.C.A., Penal Code, Section 30.05; thereby any evidence obtained would be in violation of the law and thus excludable under Art. 38.23. *Leal v. State*, 736 S.W.2d 907 (Tex. App. - Corpus Christi 1987) (dissenting opinion), *pet. dismissed*, 773 S.W.2d 296 (Tex. Crim. App. 1989) (issue not appropriate for review because not properly raised before the Court of Appeals).

On the federal level, the exclusionary rule has been substantially modified by the Court's creation of a "good faith exception" for searches conducted in reliance upon defective warrants. *United Stated v. Leon*, 468 U.S. 897 (1984).[2] Under the *Leon* test, the Court recognized that for the exclusionary rule to function as a deterrent to improper police conduct, it must relate to the police conduct — the suppression is only appropriate where officers are negligent or have knowledge of their improper conduct. The Court set out four situations where suppression of evidence would be proper: (1) the magistrate or judge was misled by information the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the officer or judge wholly abandoned his judicial role and no reasonable officer would rely on the subsequent finding of probable cause; (3) the affidavit was so lacking in indicia of reliability that any finding of probable cause based on it was unreasonable; (4) the warrant is facially invalid (i.e., description of items sought or place to be searched utterly lacking).

In 1987 the Texas legislature amended Art. 38.23 to include language directly from *Leon*, finding an exception to the article when evidence was obtained by a law enforcement officer "acting in good faith reliance" upon a warrant issued by a neutral magistrate based on probable cause. However, this description appears to limit the Texas exclusionary rule and good faith exception *only* to cases based on a warrant.

There may be three other areas where Texas diverges from the federal courts in application of the exclusionary rule. The first is when the exclusionary rule is applied to an officer acting in objectively reasonable reliance on a *statute* later declared unconstitutional. The Supreme Court has applied the exclusionary rule's good faith exception in this circumstances. *Illinois v. Krull*, 107 S.Ct. 1160 (1987). However, the Court of Criminal Appeals has expressly rejected such an extension in the past. *See Howard v. State*, 617 S.W.2d 191 (Tex. Crim. App. 1981).

A second point of divergence may occur in the area of pretext arrest. Texas courts have continued to strictly adhere to the concept that a pretext arrest is an illegal arrest, and, absent intervening events, any evidence resulting from such an arrest may not be used at trial. *Black v. State*, 739 S.W.2d 240 (Tex. Crim. App. 1987).

A third point where the Texas exclusionary rule diverges from the federal rule is that under Art. 38.23, the legality of a search of seizure can be submitted to the jury for determination, as well as to the judge. Because application of the statute is mandatory, as long as the defendant meets his burden, he has an absolute right to a jury instruction on the issue. *Brooks v. State*, 642 S.W.2d 791 (Tex. Crim. App. 1982); *Jordan v. State*, 562 S.W.2d 472 (Tex. Crim. App. 1978). Texas is among the few jurisdictions that provide for jury determination of this issue.

IV. Trial Considerations

A defendant seeking to suppress evidence because of a Fourth Amendment violation bears the burden of proof. *Russell v. State*, 717 S.W.2d 7 (Tex. Crim. App. 1986). In reality, this means the defendant need merely show that a search or seizure occurred without a warrant. At that point, the burden of proof shifts to the prosecution:

(1) if state produces evidence of a warrant and its supporting affidavit, burden then shifts back to defendant to show warrant was invalid. *Russell, supra.* Note: State must produce *both* warrant and affidavit at trial court level. *Miller v. State*, 736 S.W.2d 643 (Tex. Crim. App. 1987).

(2) if state **cannot** produce warrant and affidavit, prosecution must show by a **preponderance** of evidence that search and seizure was reasonable. *Russell, supra.* If this issue is later raised before the jury, the state's proof becomes the reasonable doubt standard. *LaLande v. State*, 676 S.W.2d 115 (Tex. Crim. App. 1984).

(3) when the state seeks to justify the search on a theory of consent, state must show, by clear and convincing evidence, that the consent was given freely and voluntarily. *Dickey v. State*, 716 S.W.2d 499 (Tex. Crim. App. 1986).

Once the issue has been raised, the trial judge can determine the matter either before trial or wait until trial. Obviously, defense counsel has tactical reasons for wanting the court to defer hearing a motion to suppress until trial. If the hearing is held before trial, jeopardy does not attach, and the state can appeal an adverse ruling under Art. 44.01, V.A.C.C.P. In contrast, if a motion is heard during trial, the state is precluded from appealing.

Whenever evidence is presented on a motion to suppress, the trial judge determines the credibility of witnesses and acts as a sole factfinder. *Carrasco v. State*, 712 S.W.2d 120 (Tex. Crim. App. 1986).

Generally, when a defendant testifies in support of his motion to suppress, his testimony cannot be admitted against him at trial. *Simmons v. United States*, 390 U.S. 377 (1968). However, if the defendant testifies at trial and his testimony **varies** from the testimony offered during the suppression hearing, he may be impeached. *Franklin v. State*, 606 S.W.2d 218 (Tex. Crim. App. 1978). Additionally, the actual procuring of a warrant does not preclude the use of exigent circumstances should

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Bank Fraud

(Life Before and After FIRREA)—Part 3

by James C. Sabalos and Russell R. Oliver

IV. Federal Statutes

A. Introduction

On August 9, 1989, President Bush signed FIRREA into law. This comprehensive legislation was initiated by the Bush administration in an effort to deal with the collapse of the savings and loan industry. FIRREA has far-reaching impact.

In addition to reorganizing the regulatory agencies which oversee banks and thrifts, FIRREA creates new civil penalties, enhances criminal penalties, amends the Right to Financial Privacy Act, creates a fund to pay confidential informants for certain information leading to criminal or civil judgments against defendants, creates a new bank fraud strike force, amends RICO to include bank fraud as a predicate RICO offense, and extends the statute of limitations. Before addressing significant provisions of FIRREA which relate to the defense of bank fraud cases, this section briefly summarizes the essential elements of criminal statutes upon which federal prosecutors traditionally rely to prosecute bank fraud cases against insiders and customers.[6]

B. Traditional Federal Banking Crimes

1. Conspiracy to Commit Offenses or to Defraud the United States (18 U.S.C. § 371)

a. Essential Elements of the Offense

(1) That two or more persons made an agreement to commit the crime charged in the indictment;

(2) That the defendant knew the purpose of the agreement and joined in it with the intent to further its illegal purpose; and

(3) That one of the conspirators, during the existence of the conspiracy, knowingly committed at least one of the overt acts described in the indictment in order to accomplish some object or purpose of the conspiracy. *See*: Proposed Draft Fifth Circuit Pattern Jury Charges (March 1989) at 73.[6]

b. Conspiracies to Impede Lawful Government Function

The Federal Government is empowered to conduct examinations of each federally insured institution.[7] Both institutions and regulators are charged with making "criminal referrals" to various regulatory agencies, the F.B.I. and their respective U.S. Attorney's Offices.[8] Conspiracy to defraud the United States does not require monetary loss. Any agreement by two or more persons (e.g. bank insiders or insiders and customers) to conceal material facts from the government/agencies or to undermine or obstruct their legitimate official function may violate § 371.[9]

c. Application of "Pinkerton" Rule

A conspirator is responsible for offenses committed by co-conspirators that were "foreseeable consequences" of the conspiracy.[10] This "*Pinkerton* rule" may be utilized by prosecutors to reach "deep-pockets" in order to satisfy criminal fines and/or subsequent civil penalties under FIRREA.

d. Application of Bourjaily to Hearsay Evidence

In *U.S. v. Bourjaily*, 483 U.S. 171 (1987), the Supreme Court effectively abolished *U.S. v. James*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979), which had held that the Government must show a conspiracy and connect the defendant with it before declarations of an alleged co-conspirator are admissible. Under *Bourjaily*, the proffered hearsay statement of an alleged co-conspirator can be considered in determining whether the hearsay declarant was the defendant's co-conspirator.[11] However, a court could ultimately disallow the proffered statement if it found that the Government failed to meet its "preponderance of the evidence" burden requiring a mistrial.[12] The ruling in *Bourjaily* has not disturbed the exception of Rule 801 (d) (2) (E); that is, it is not essential that an indictment include a separate conspiracy charge to utilize the exception.[13] In defending bank fraud cases, it is essential, particularly where a conspiracy is not charged, that counsel anticipate the Government's use of statements from unindicted "co-conspirators."

e. Utilization of Mere Presence Defense

In a prosecution against bank insiders, the Government will seek to use any evidence in order to establish the defendant's "knowing" and "intentional" participation in the offense(s) charged. In a traditional federal bank fraud indictment, the defendants, likely, will be charged with conspiracy and with aiding and abetting in each substantive offense under 18 U.S.C. § 2. If the defendant is a "second-tier" or "third-tier" bank employee, counsel may want to examine the "mere presence" defense, to wit: ". . . a person does not become part of a conspiracy by knowledge that another is about to commit a crime . . ."[14]

"In a prosecution against bank insiders, the Government will seek to use any evidence in order to establish the defendant's 'knowing' and 'intentional' participation in the offense(s) charged."

The language in the "Proposed Draft Fifth Circuit Pattern Jury Charges" (March 1989) states that the ". . . mere fact that certain persons may have associated with each other and may have . . . discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy."[15] This defense is particularly helpful to the "second-tier" bank officer/employee who carries out the instructions of his superiors and, thereby, is charged with a federal crime. The lack of criminal intent by such "second-tier"/"third-tier" employees in conjunction with a "mere presence" charge may be a "first line" defense for certain insiders. Counsel should be prepared, however, to vigorously oppose the Government's efforts to utilize a *"deliberate ignorance"* in-

struction to overcome their lack of evidence upon the elements of knowledge or intent.[76]

2. Receipt of Commissions or Gifts for Procuring Loans (18 U.S.C. § 215(a) (1) (2) [Effective for offenses as of August 4, 1986]

a. Essential Elements of the Offense of (a) (1):

(1) That the defendant gave [gives, offers or promises] something of value to any person; and

(2) That the defendant did so corruptly with the intent to influence [reward] _____ [an officer of a financial institution], in connection with any business or transaction of that institution.

b. Essential Elements of (a) (2):

(1) That the defendant [e.g., officer/director] of said financial institution solicited [requested/demanded] for the benefit of himself [or another] or accepted [agreed to accept] something of value from _____; and

(2) That the defendant did so corruptly, intending to be influenced [rewarded] in connection with any business [transaction] of the financial institution.

c. Statutory Defenses in § 215(c)

Subsection § 215(c) expressly provides that **§ 215(a) (1) and (a) (2) ". . . shall not apply to bona fide salary,** wages, fees or other compensation paid, or expenses paid or reimbursed, *"in the usual course of business."* (Emphasis added).[77] It is unclear what constitutes a "usual course of business."[78]

d. Definitions

(1) "Corruptly." Mr. Villa notes that Congress did not define the term "corruptly" as used in § 215(a) and (b) but suggests that Congress intended "corruptly" to mean ". . .an act done voluntarily and intentionally" and ". . . with bad purpose of accomplishing an unlawful end or result by some unlawful method or means."[79] The Proposed Fifth Circuit Pattern Jury Charges (March 1989) defines "corruptly" as an act ". . . done intentionally and with an unlawful purpose."[80]

(2) "Financial institution." A financial institution includes an insured depository institution (bank or savings and loan), a credit union whose accounts are insured by NCUA, a Federal Home Loan Bank or member, a System institution of the Farm Credit System, a small business investment company, and a depository institution holding company.[81]

(3) "Reward." One author contends that the element "reward" as used in § 215 can be proved by showing that the "payment or promise of payment to a banker" . . . was made because of the action taken by the banker."[82] It is likely that courts will utilize a "common sense" reading of the term "reward" and that an actual payment to a banker, his agent, or close associate will be found to be an offense under the statute.

(4) "To any person/from any person." The language "to any person" under § 215(a) (1) or "from any person" under § 215(a)(2) was intended to reach the recipient of the bribe (e.g. friend, associate, family member of the banker) and the person or entity which paid or promised to pay the bribe (e.g., person which paid or promised to pay the bribe on behalf of the borrower).[83]

Section 215 is a powerful tool for prosecutors: It gives them an expansive reach against brokers of loans or customers of banks who use third-parties or fictitious entities to obtain financing. Both § 371 (conspiracy) and § 2 (aiding and abetting) provisions have been utilized aggressively by prosecutors to punish third-parties who intentionally participate in the conduct proscribed by § 215.[84] An offense under § 215 also may constitute a separate offense under 18 U.S.C. §§ 656-657 (Misapplication and Embezzlement from federally insured institutions, discussed in Section IV.B.6 below). Additionally, federal prosecutors may characterize a § 215 violation as a mail or wire fraud

James Clifford Sabalos is an attorney with the firm of Vinson & Elkins. His practice includes commercial and white collar litigation. He is also a member of the Vinson & Elkins Bank Litigation Group. Prior to joining Vinson & Elkins in 1987, Mr. Sabalos was an Assistant United States Attorney in the Criminal Division, Southern District of Texas. Before joining the United States Attorney's Office in 1984, Mr. Sabalos was a Trial Attorney for the U.S. Department of Justice in Washington, D.C. Mr. Sabalos was recently elected to the Board of Directors of the Texas Criminal Defense Lawyers Association and is a member of the National Association of Criminal Defense Attorneys. Mr. Sabalos has previously lectured on bank fraud topics in Texas and was recently a guest lecturer for the FBI's regional conference on organized crime held in Houston in April, 1990. Mr. Sabalos is completing his thesis in August, 1990 for an LL.M. degree from the National Law Center at George Washington University. His thesis topic is "Bank Fraud: Litigation through the '90s." He is also an adjunct professor at the Jesse Jones Graduate School of Business, Rice University, Houston, Texas, teaching courses on business law.

Russell R. Oliver is Of Counsel in the Austin office of Vinson & Elkins. His practice includes regulatory advice and special counsel investigations for financial institutions. Before joining Vinson & Elkins in 1987, Mr. Oliver served over four years as General Counsel of the Texas Savings and Loan Department, spending the majority of his time on enforcement issues. Previously, Mr. Oliver had served in the General Counsel function at the Texas State Securities Board. Prior to that, Mr. Oliver was in a private practice in Austin, and served three years active duty in the U.S. Navy Judge Advocate General's Corps. He is still active in the U.S. Naval Reserve, having been selected in 1989 for promotion to Captain. Mr. Oliver recently addressed the FBI's regional conference on organized crime in Houston in April, 1990. He has been an adjunct instructor at St. Edward's University in Austin for nine years, tracking business law courses at the graduate and undergraduate levels.

"kickback" scheme.[56] As a practical matter, experienced prosecutors often indict under § 1341/1343 (mail fraud/wire fraud, discussed in Section IV.B.8 below) because of their familiarity with these provisions and because the label "kickback" has a strong, negative appeal to jurors. Because various statutes used in bank fraud cases require proof of different facts to meet the essential elements of each offense charged, a *Blockburger* defense will rarely, if ever, be available.[57]

e. Effective Dates

Under the Comprehensive Crime Control Act of 1984, § 215 was amended. Prior to 1984, § 215 did not expressly cover the "offeror" of the bribe, did not encompass all federally insured institutions nor include all "non-loan transactions" of a financial institution.[58] The statute, as amended, left unclear whether "corrupt intent" or a mere general intent was an essential element of the offense.[59] Subsequently, § 215 was amended to require proof of "corrupt intent" (effective August 4, 1986). As such, regardless of the date of any alleged offense under § 215, counsel should insist upon an instruction requiring proof of "corrupt intent."[60]

3. False Statements (18 U.S.C. § 1001).

a. Essential Elements of the Offense:[61]

(1) That the defendant made a false statement [gave a false document] to _____ [name department or agency of United States Government];

(2) That the defendant made the statement intentionally, knowing that it was false; and

(3) That the defendant made the false statement for the purpose of misleading the ____ [name of department or agency].

b. General Discussion.

This statute would apply to the numerous reports, applications and written submissions (e.g., business plans) that insured financial institutions must file with their regulators. It is not necessary that the prosecution prove that the department or agency was in fact misled.[62] Further, the court, not the jury, determines whether the false statement was material.[63]

c. Intent.

The scienter standard is "knowingly and willfully."[64] However, the Government need not prove that the defendant had actual knowledge of the agency's jurisdiction.[65] One court has stated that the elements of "knowingly and willfully" are met if the defendant knew the statement was false and did not act through accident or honest inadvertence.[66] Further, some courts have held that "reckless disregard" or "reckless indifference" can satisfy scienter when the defendant makes a false material statement and consciously avoids learning the true facts or intends to deceive the government.[67]

4. False Statement/Entries/Omissions in Bank Records (18 U.S.C. § 1005 and § 1006)

a. Three Paragraphs - Three Offenses

Section 1005 contains three separate paragraphs, each constituting a separate offense. Paragraph one (1) makes unlawful the issuance of bank notes by a director, officer or agent or employee of a financial institution[68] without authorization of the Board of Directors with the intent to injure or defraud the bank or company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the bank or company, or the Comptroller of the Currency, or the F.D.I.C., or any agent or examiner appointed to examine the affairs of the bank or company, or the Board of Governors of the Federal Reserve System.[69] Paragraph two (2) makes unlawful the issuance of a bank obligation by a director, officer or agent of a federally insured institution without authorization of the Board of Directors with the intent. Paragraph three (3) proscribes false entries in bank documents.

Section 1006 is nearly identical to § 1005: § 1006 proscribes the same conduct of federally insured savings and loan institutions, credit unions and other financial institutions. In addition, § 1005 and § 1006 are often used in conjunction with offenses under 18 U.S.C. § 656, § 657 Theft, Embezzlement and Misapplication provisions.[70]

b. Essential Elements of the Offense (18 U.S.C. § 1005, Third Paragraph)

(1) That the bank/institution was federally insured;

(2) That the defendant made a false entry in a book (record or statement) of the bank (or omitted a material fact that should have been entered in the bank's books);

(3) That the defendant did so knowing it was false (or omitting a material fact leading to a false record or statement); and

(4) (With respect to paragraph 3 offenses) That the defendant did so intending to cheat or deceive the bank.

c. Relevant Cases

Nearly all of the false statement provisions, (e.g. 18 U.S.C. 1001, discussed above) require "materiality." "Materiality" is not a question for the jury but one for the Court.[71] In one case, the Fifth Circuit upheld a conviction where the false entry was made with "intent to injure or defraud the bank."[72]

". . . some courts have held that "reckless disregard" or "reckless indifference" can satisfy scienter when the defendant makes a false material statement and consciously avoids learning the true facts or intends to deceive the government."

d. Application of 18 U.S.C. § 371 and § 2

The misapplication provisions of § 656 and § 657 and the false entry provisions proscribe conduct of financial institution insiders. For purposes of conspiracy under § 371, a non-insider can be charged with the insider if there was an agreement with the insider to defraud the institution or violate the bank's procedures. For purposes of aiding and abetting under § 2, particularly under § 1341 and 1343 (mail fraud and wire fraud, respectively), it is not necessary to prove that a defendant, charged under § 2, had knowledge of the particular means by which the principal in the crime would carry out the criminal activity.[73]

5. False Statement to F.D.I.C. (18 U.S.C. § 1007)

a. Essential Elements of Offense:

(1) That the defendant knowingly made or invited reliance on a false, forged, or counterfeit statement, document or thing

(2) For the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation.[74]

Interestingly, no reported cases refer to criminal prosecutions under this statute.[75]■

This article will be continued in future issues of Voice.

Bank Fraud

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Footnotes

68. An excellent resource on this subject is an article presented by Mr. William A. White and Ms. Amber McLaughlin at the Criminal Defense Lawyers Project in May, 1989 entitled *"Crime of the '80s — A Primer on Federal Bank Fraud"* (hereinafter the "Primer"). The authors provide an excellent analysis of the statutes and case law on bank fraud. In addition, Mr. John K. Villa's Handbook entitled *"Banking Crimes,"* Clark Boardman Company, Ltd., New York, New York (1987) (hereinafter "Banking Crimes") also is an excellent source document. The authors of this outline have relied, in part, upon the *"Primer"* and *"Banking Crimes."*

69. Relevant cases are *U.S. v. Massey,* 827, F.2d 995, 1001 (5th Cir. 1987) [criminal intent must be related to substantive offenses charged]. *See also U.S. v. Chagra,* 807 F.2d 398, 401 (5th Cir. 1986), *cert. denied,* 108 S.Ct. 106 (1987).

70. See 12 C.F.R., generally.

71. See 12 C.F.R. §§ 21.11, 353.1 and 563.180.

72. *See U.S. v. Everett,* 692 F.2d 596 (9th Cir. 1982). *See also, U.S. v. Sanchez,* 790 F.2d 1561 (11th Cir. 1986) [evading currency reporting requirements by banker]. *U.S. v. Mohr,* 728 F.2d 1132 (8th Cir. 1984) [misleading bank examiners]; *U.S. v. Tickner,* 359 F.Supp. 978 (D.C.S.D. 1973) [false statements by banking officer to mislead S.B.A.]; *U.S. v. Mayr,* 350 F.Supp. 1291 (D.C. Fla. 1972) [concealment of overdrafts to examiners by bank president and customer]; *U.S. v. Duncan,* 598 F.2d 839, 857-62 (4th Cir. 1979) [financial loss not required for misapplication offense under §§ 656-657]; *See also U.S. v. Rickert,* 459 F.2d 352 (5th Cir. 1972).

73. *U.S. v. Pinkerton,* 328 U.S. 640, 647-48 (1946). *See also U.S. v. Basey,* 816 F.2d 980, 998-99 n. 35-36 (5th Cir. 1987).

74. *See U.S. v. Perez,* 823 F.2d 854, 855 (4th Cir. 1987). *See also, U.S. v. Valdez,* 861 F.2d 427, 432 (5th Cir. 1988), *cert. denied,* 109 S.Ct. 1539 (1989).

75. *U.S. v. Lauga,* 762 F.2d 1288 (5th Cir. 1985).

76. *U.S. v. Wilson,* 506 F.2d 1252, 1257 (7th Cir. 1974) *quoting U.S. v. Joyce,* 499 F.2d 9, 16 (7th Cir. 1974). *See also U.S. v. Cagnina,* 697 F.2d 915 (11th Cir. 1983) *citing U.S. v. Peacock,* 654 F.2d 339, 349-50 (5th Cir. 1981).

77. *U.S. v. Johnson,* 334 F.Supp. 982 (W.D. Mo. 1971).

78. "Proposed Draft Fifth Circuit Pattern Jury Charges," March 1989, p. 73.

79. *See Drobny v. U.S.,* 469 U.S. 1158 (1985); *see also U.S. v. DeVeau,* 734 F.2d 1023, 1028 (5th Cir. 1984).

80. See Proposed Fifth Circuit Pattern Jury Charges (March 1989) at 66-67.

81. See *Primer* at 9; *Banking Crimes,* at 5.03 [3] for a discussion of § 215(c) as an affirmative defense.

82. *Banking Crimes,* at Sec. 5.03[1][b].

83. See 18 U.S.C. § 1503, *U.S. v. Partin,* 552 F.2d 621, 641 (5th Cir. 1977).

84. See 18 U.S.C. § 20.

85. *See Banking Crimes,* generally, § 5.03. *See also U.S. v. Brewster,* 506 F.2d 62 (D.C. Cir. 1974) [discussing bribes as they relate to federal employees].

86. *See U.S. v. Schoenhut,* 576 F.2d 1010 (3rd. Cir.), *cert. denied,* 439 U.S. 964 (1978).

87. *See Banking Crimes,* generally, § 5.05.

88. See 18 U.S.C. § 1341/1343.

89. *U.S. v. Blockburger,* 284 U.S. 299, 304 (1932).

90. See Department of Justice, *Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress,* pp. 136 (December, 1984).

91. *See Primer,* at 12-16.

92. *Id.,* at pp. 14-16.

93. Proposed Draft Fifth Circuit Pattern Jury Changes, March, 1989, p. 105.

94. *See U.S. v. Lichenstein,* 610 F.2d 1272, 1278 (5th Cir. 1980), cert. denied, 447 U.S. 907 (1980).

95. *See U.S. v. Hausmann,* 711 F.2d 615, 617 (5th Cir. 1983). *See also Kungys v. U.S.,* ____ U.S.____, 108 S.Ct. 1537, 1547 (1988), *U.S. v. Leuben,* 838 F.2d 751, 753 & n.2 (5th Cir. 1988).

96. *See U.S. v. Yermian,* 468 U.S. 63 (1984).

97. *Id.*

98. *Bryson v. U.S.,* 396 U.S. 64, 69-70 (1969).

99. *E.g., see U.S. v. Schaffer,* 600 F.2d 1120 1122 (5th Cir. 1979).

100. The statute specifically refers to a Federal Reserve Bank, member bank, bank or savings and loan holding company, national bank or insured bank.

101. Prior to its amendment by FIRREA, on August 9, 1989, the statute did not reference holding companies.

102. *Banking Crimes,* at § 3.03[1].

103. *U.S. v. Hausmann,* 711 F.2d 615, 617 (5th Cir. 1983); *Kungys v. U.S.,* 108 S.Ct. 1537, 1547 (1988); *U.S. v. Leuben,* 838 F.2d 751, 753 N.2 (5th Cir. 1988). *See U.S. v. McGuire,* 744 F.2d 1197, 1199 N.2 (6th Cir. 1984) *cert. denied,* 471 U.S. 1004 (1985) [instruction on appeal requiring materiality approved without comment]. *See also Banking Crimes,* § 3.03[4] and Proposed Draft Fifth Circuit Pattern Jury Charges, (March 1989) *at* p. 105.

104. *U.S. v. McCright,* 821 F.2d 226, 233 (5th Cir. 1987), *cert. denied,* ____U.S.____, 108 S.Ct. 697 (1988).

105. *U.S. v. Westbo,* 746 F.2d 1022, 1025-26 (5th Cir. 1984).

106. As rewritten by FIRREA, the statute has been simplified and broadened. Prior to August 9, 1989, the statute prohibited knowingly making a false statement or willfully overvaluing any security

> for the purpose of obtaining any loan from the Federal Deposit Insurance Corporation, or any extension or renewals thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Federal Deposit Insurance Corporation to purchase any assets, or for the purpose of obtaining the payment of any insured deposit or transferred deposit or the allowance, approval, or payment of any claim or for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation
>
> . . .

107. However, a famous civil case, *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676 (1942), cites this statute's predecessor as being designed to protect FDIC from misrepresentations as to the assets of banks. *D'Oench* was a civil case in which the U.S. Supreme Court fashioned a common law rule estopping a borrower from asserting against FDIC defenses based upon secret or unrecorded "side agreements" that attend the terms of facially unqualified obligations. *See Bell & Murphy and Associates, et al. v. Interfirst Bank Gateway N.A., et al.,* 894 F.2d 750 (5th Cir. 1990). Congress enacted 12 U.S.C. § 1823(3) as a codification of *D'Oench.* Section 1823(e) provides that any agreement which would defeat or tend to diminish the right, title or interest of the FDIC in any asset acquired by it by purchase or as security for a loan is invalid unless that agreement is: (1) in writing; (2) has been executed by the bank and person(s) claiming an adverse interest, including the obligor, contemporaneously with the acquisition of the asset by the bank; (3) has been approved by the loan committee or Board of Directors, reflected in the official minutes of that body; and (4) has been an official record of the bank continuously from the time of its execution. The D'Oench doctrine also was applied to cases involving FSLIC. *See e.g., FSLIC v. LaFere,* No. 86-4228 (E.D. La. Feb. 27, 1987). For a very recent case, *see Federal Savings and Loan Insurance Corp. v. Stone-Liberty Land Associates, et al.,* No. 05-88-01325-CV (Tex. App.—Dallas, March 9, 1990) (Westlaw: 1990 WL50745). *Stone-Liberty Land Associates* is an excellent example of how federal statutory civil law is used to guard against collusive reconstruction of agreements and fraud. The *D'Oench* line of cases and § 1823(e) have and will continue to be utilized aggressively by the FDIC, both for failed banks and failed thrifts as statutory successor to the FSLIC (as manager of the FSLIC Resolution Fund) and as manager of the Resolution Trust Corp., to defend against lender liability suits and fraud.

FEDERAL IMPACT DECISIONS

by Charles Blau and Kevin Collins

1. *In Re Grand Jury Proceedings 88-9 (Newton),* _F.2d_, No. 90-5232 (11th Circuit, April 6, 1990).

ISSUE: Whether fee information and/or a client's identity enjoy the protection of the attorney-client privilege.

DISCUSSION: Pursuant to a federal grand jury subpoena, Newton, a lawyer, was to appear and produce documents relating to an unidentified "John Doe" client. The subpoena sought the name of the client, the name of another person who gave the lawyer a cashier's check for fees, and any information the client communicated to Newton concerning payment of the cashier's check. Newton sought to quash the subpoena, by raising the attorney-client privilege. The district court denied the motion, granted him use immunity, and ordered him to testify and produce the documents. When he did not, he was held in contempt.

Ordinarily, the identity of a client and the receipt of fees therefrom are not privileged. In *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975), the court held that the identity of an unknown client is protected by the attorney-client privilege where disclosure of that identity would also reveal the privileged motive of the client in seeking legal advice. Thus, the identity of the client could constitute a "link" that could form a chain of testimony necessary to convict an individual of a federal crime. In essence then, the attorney-client doctrine protects non-privileged information — the identity of a client — when disclosure of such would disclose other privileged communication, such as motive or strategy, and when the incriminating nature of the privileged communication is anticipated by the client, who has a reasonable expectation that information will be kept confidential.

Newton stated his client hired him in connection with the client's indictment in a separate criminal matter. Accordingly, the court stated that the client did not have a reasonable expectation that his name would be kept confidential. Also the fact that disclosure of his identity would reveal prior indictments

Charles W. Blau was born in New Albany, Indiana in 1944. He attended Indiana University (B.A. 1966). Charlie attended the University of Louisville Law School (J.D. 1972) and Georgetown University (LL.M. in Taxation 1987). Charlie was an assistant prosecutor in Indiana for four years. Charlie was an Assistant United States Attorney for three years, ran a joint U.S. Justice Department-Treasury Department money laundering project in South Florida for three years (Operation Greenback), was Chief of the U.S. Justice Department's Narcotics and Dangerous Drug Section for one year, and served for two years as Deputy Associate Attorney General and one year as Associate Deputy Attorney General in the U.S. Department of Justice. Charlie is a member of the Indiana, Florida and Texas Bars. Charlie is currently a partner at Johnson & Gibbs and specializes in white collar crime and criminal tax matters.

Kevin L. Collins began his preparatory education in 1979 in the Bachelor of Arts Honors program at Northwest Missouri State University, Maryville, Missouri, then transferred in 1980 to the University of Missouri-Columbia, where he was also an honors student. Mr. Collins received his Bachelor of Arts degree in 1983 from the University of Missouri-Columbia.

Mr. Collins attended law school at the University of Missouri-Kansas City, receiving his Juris Doctorate in 1986. While at the law school, he was a member of the Board of Editors of the University of Missouri-Kansas City Law Review, and a member of the International Moot Court team. Additionally, Mr. Collin's casenote, Section 1988 Attorney's Fees: Awards Should Be Liberal to Encourage Vindication of Civil Rights, was published at 54 UMKC Law Rev. 662 (1986).

Upon graduation from law school, Mr. Collins clerked for United States District Judge William R. Collinson, Eastern and Western Districts of Missouri. After a one-year clerkship, he entered private practice in Kansas City, Missouri, before moving to Dallas, Texas, to specialize in the practice of criminal law. He is currently an associate in the white collar crime section at Johnson & Gibbs. Mr. Collins has been admitted to the Missouri State Bar, Northern District of Texas Bar and the State Bar of Texas.

or a criminal record is of no consequence because such records are public documents and thus not privileged. Finally, the fact that the client's attorney's fees were paid for by an unidentified third-person does not disclose privileged communications or strategy. Accordingly, based on the facts herein, the disclosure of the client's identity reveals the client's name, and nothing more. Disposing of a final point, the court ruled that disclosure of the information did not violate state bar rules of confidentiality because questions of attorney-client privilege are governed by federal common law.

2. *Employment Division, Oregon Department of Human Resources v. Smith*, _U.S._, No. 88-1213 (April 17, 1990).

ISSUE: Whether the free exercise clause of the First Amendment precludes the enforcement of a generally applicable and otherwise neutral law that regulates criminal activity, but has an incidental effect of burdening religious conduct.

DISCUSSION: Oregon law prohibits the knowing or intentional possession of a controlled substance unless the substance has been prescribed by a medical practitioner. In this case, defendants had been fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes as members of the Native American Church. Defendants then applied to the employment division for unemployment compensation and were determined to be ineligible for benefits due to work related misconduct. On appeal, the Oregon Supreme Court reasoned that the criminality of the conduct was irrelevant to resolution of the constitutional claim. Hence, the misconduct provision under which respondents were disqualified was not to enforce the state criminal laws, but to preserve the financial integrity of the unemployment compensation fund, and that purpose was inadequate to justify the burden that this qualification imposed on defendants' religious practice. The Oregon court concluded that respondents were entitled to payment of unemployment benefits.

In reversing, the Supreme Court noted that the free exercise clause provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Thus, the First Amendment excludes all governmental regulation of religious beliefs as such. The Court then stated that the exercise of religion often involves not only belief and profession, but the performance of (or abstention from) physical acts: assembling with others for a worship service, or participating in sacramental uses of bread and wine, for example. Thus, if a state sought to ban such acts or abstentions when engaged in for religious reasons, or only because of the religious belief that they display, it would violate the Constitution.

However, the Court found that defendants herein sought to extend the meaning of prohibiting the free exercise of religion one large step further because they assert that prohibiting the free exercise of religion includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that their religious belief forbids (or requires). Thus, if prohibiting the exercise of religion is not the object of the statute, but merely an incidental effect of a generally applicable and otherwise valid provision, the First Amendment is offended according to defendants.

The Court rejected this reasoning, and also the *Sherbert v. Verner*, 374 U.S. 398 (1963) test, which requires that governmental action impinging a religious practice must be justified by a compelling governmental interest. Noting that on three occasions state unemployment compensation rules were invalidated by the Court, when they conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion, the Court nonetheless concluded the sounder approach is to hold that test inapplicable to an across-the-board criminal prohibition of a particular form of conduct. Thus the government's ability to enforce generally applicable prohibitions on socially harmful conduct cannot depend on measuring the effect of governmental action on a religious objector's spiritual development. Hence, an individual's obligation to obey such a law is not contingent upon the law conforming with his religious beliefs, unless the state's interest is compelling, because such a requirement contradicts both constitutional tradition and common sense.

3. *Florida v. Wells*, _U.S._, No. 88-1835 (April 18, 1989).

ISSUE: Whether the absence of any highway patrol policy with respect to the opening of closed containers pursuant to an inventory search constitutes sufficient regulation within the meaning of the Fourth Amendment.

DISCUSSION: This decision was based on the precedent of *Colorado v. Bertine*, 479 U.S. 367 (1987) where the Court held that in the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, the search may not be permitted. Thus, the policy or practice governing inventory searches should be designed to produce an inventory, not to allow an individual police officer so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of a crime. However, the Court found that there is no reason to insist that inventory searches be conducted in a totally mechanical all or nothing fashion. The police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, policies requiring the opening of all containers or opening no containers at all are unquestionably permissible. It would be equally permissible to allow the opening of closed containers whose contents the officers determine they are unable to ascertain from examining the container's exterior. Thus, the allowance of the exercise of some judgment based upon the purposes of an inventory search does not violate the Fourth Amendment.

The Court then held that since the Florida highway patrol had no policy whatsoever with respect to the opening of a closed container enclosed in an inventory search, the instant search was not sufficiently regulated to satisfy the Fourth Amendment and the contraband found in the suitcase was properly suppressed by the Supreme Court of Florida.■

GRANTED PETITIONS FOR DISCRETIONARY REVIEW

Since July 17, 1985, the administrative staff attorneys of the Court of Criminal Appeals have compiled, in the normal course of business, a list of cases and legal issues on which the Court has granted petitions for review. Although originally prepared for internal use only, the Court has authorized release of the list for publication and for use by the bench and bar of Texas. The issues listed are summaries as worded by the staff, and do not necessarily reflect either the reasoning or the phraseology used by the parties or by the Court.
The following are the cases and issues on which the Court of Criminal Appeals granted review but which the Court has not yet delivered a written opinion:

PDR 0322-90 *05/30/90, El Paso, (S's PDR), Dearl Flowers, Theft of Equipment:* May a theft indictment be amended to allege a different owner and that the defendant believed the property had been stolen by another under Art. 28.10 (4 grounds)?

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PDR 0347-90 *05/30/90, Dallas, (S's PDR), Michael Lee Hill, Aggravated Robbery:* (1) Whether *Batson* objection was timely when made after venire dismissed but before jury sworn? (2) Whether COA's determination of *Batson* error was correct?

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PDR 0357-90 *05/30/90, Harris, (S's PDR), Sharon Lee Recer, Burglary of Habitation:* Was Counsel ineffective in recommending appellant go to the court for punishment when there was a deadly weapon allegation which if true would preclude the judge from granting probation? Art. 42.12, Sec. 3g(a)(2), VACCP.

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PDR 0430-90 *06/20/90, Nueces, (S's PDR), James Winford Taylor, Keeping a Gambling Place:* Is Penal Code Sec. 47.04(a) unconstitutionally vague?

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PDR 1390-88 *06/13/90, Harris Co., (A's PDR), Kunlay Sodipo, Credit Card Abuse (prior conviction):* (1) Did the Court of Appeals err in finding no error in the trial court's denial of 10 days to prepare following amendment of the indictment? Is harm an issue?

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PDR 0334-90—0334-90/0335-90—0335-90 *06/13/90, Tyler Co., (#1 DA), (#2 SPA), (#1 DA), (2 SPA), William Robert Oliver, Jr., Poss. Methamphetamine, Poss. Phenylacetone over 400 Grams:* (1) Whether failure to object prior to trial that an indictment lacks a culpable mental state waives the right to complain on appeal. Art. 1.14(b), V.A.C.C.P.#, (2) Whether art. 35.261, V.A.C.C.P., gives a white def. the right to challenge the State's peremptory strikes of black venire members.

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PDR 0365-90 *06/13/90, Bexar Co. (S's PDR), Antonio Gonzales, Murder:* (1) Whether the accused's right to confrontation was violated by the witness testifying by two-way closed circuit TV.

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PDR 0382-90 *06/13/90, Dallas Co., (A's PDR), Oscar Emilio Arcila, Poss. of Cocaine:* (1) Whether the taint of D's illegal arrest rendered his confession "involuntary."

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PDR 0429-90 *06/13/90, Brazoria Co., (S's PDR), Mitchell K. Boulden, Robbery & Burglary of a Habitation:* (1) Was the evidence insufficient, as found by the Court of Appeals?#

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PDR 0371-90 *06/13/90, Harris Co. (A's PDR), Wendell Clay Wilson, Injury to a Child:* Whether egregious harm is shown where trial court failed to instruct jury that "intentionally and knowingly" applied only to result of appellant's conduct and not to conduct itself in this injury to a child case?

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PDR 0384-90 *06/13/90, Dallas Co. (A's PDR), Lee Arthur Young, Forgery:* Whether appellant may argue on appeal that his *Batson* claim is valid by presenting a comparison of white venire persons not struck by the State to black venire persons struck by State? Appellant did not use this comparison argument at trial.

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PDR 0433-90, 0434-90 *09/12/90, Dallas Co. (S's PDR), Felix Cantu, Agg. Sex. Assault:* Did the appellate court err by holding it was reversible error to admit the testimony of a DHS investigator as to statements made by defendant?

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PDR 0453-90 *09/12/90, Harris Co. (A's PDR), Gilberto A. Nunfio, Agg. Sex. Assault:* Did the trial court err in barring appellant from asking the venire on voir dire about the issue of complainant being a nun, if that error was preserved even though appellant failed to raise the issue during voir dire?

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PDR 0458-90 *09/12/90, Harris Co. (A's PDR), Charlie Simpson, Del. of Sim. Contr. Substance:* Is there a conflict between the decision of the 1st COA and the decision rendered by the 14th COA in *Boykin v. State*, 779//134?

DWI PRACTICE GEMS

What Every Innocent Person Who Drinks Should Know About DWI—Part 3

by J. Gary Trichter

III. O.K. What if I'm Stopped For DWI? What Advice Do You Have For Me as a Lawyer?

1. Think first, use common sense, and be open minded!

First, don't drink alcohol or use drugs and then drive! No one likes drunk drivers as they are clearly a danger to others and themselves. I don't know of a single sane person who'd be happy to be on the receiving end of a 3,500 pound projectile being piloted by a intoxicated land pilot.

Second, recognize that police officers have a very hard and dangerous job and that we all owe the good officers an extreme debt to gratitude. It should, however, be remembered that all police officers have a great deal of discretion to arrest a person and that experience has proved, time and time again, that a person's lack of manners and overt rudeness is the quickest way to being placed in handcuffs and in the back seat of a patrol car. You should also recognize the reality that DWI, for purposes of an officer making an arrest, is strictly his opinion that the crime has been committed. Like all jobs, some officers are better than others at it. They are all human not only subject to making human mistakes, but also, to unconscious psychological influences which almost always gravitate toward guilt.

It must also be noted that the work of a police officer is very competitive, and as a result thereof, officers like to win their cases. Experience has shown that more than a few have misrepresented facts and told falsehoods to win their case. One should keep an open mind as to other motivations for the arrest than simply that the driver was intoxicated in determining the reason for a DWI arrest. For example, recent evidence has demonstrated that most officers who make numerous traffic and DWI arrests actually receive increased pay as a result of their subsequent court appearances for those arrests. Indeed, in some cases the officer, in addition to receiving benefits of a private patrol car for his use only and to having his days off and work hours fixed, received an amount equal to his regular pay for court appearances.

2. What do I do if the officer signals me to stop by turning on his emergency lights?

Drive to the right lane as cautiously and quickly as you can and continue there until you can either safely park on the shoulder or in a parking lot. Next, take your vehicle out of gear, shut off the engine and radio, and turn on your emergency flashers. Such quick and cautious action on your part will indicate that your normal mental faculties are not impaired. In addition, if the officer just wanted to pass your vehicle, then your actions will allow him to do that in a safe manner.

3. Having drawn the black bean by being stopped, should I get out of the car?

Yes! However, attempt to keep your hands visible and do not make fast movements. Do not place your hands in your pockets. Exit your car and walk to the right rear of your vehicle and wait for the officer. Do not lean on your vehicle or stand between it and the police car. Here, it must be understood that the officer does not know you and your intentions yet. This is an extremely critical time for him as he will be looking for a possible weapon you may have or or for any threat to his safety that you may present. Recognizing the officer's initial apprehension and the ease at which it may be lessened, you can establish an initial positive contact, rather than a negative one, with him.

4. Is there anything I should do before getting out of my vehicle?

Yes, take your driver's license and proof of insurance card out of your wallet and bring them with you to give to the officer. They will usually be the first two things he will ask to see. If you were to hand your wallet to the officer, with the license and insurance card in it, he would not take it for fear of being accused of removing money or something else of value. Accordingly, since he would then ask you to remove the license and insurance card from it, you should do it before you leave the vehicle. These actions on your part will demonstrate your cooperation and will lessen the officer's fear factor as your hands will always be visible to him. They will also evidence that you have not lost the normal use of your mental faculties as the actions were both reasonable and prudent.

5. If asked, should I admit to drinking an alcohol beverage?

This is a tough question but the answer is generally "yes." Since you will likely have an odor of an alcoholic beverage on your breath, it makes no sense to deny that you have had a drink. In fact, with alcoholic beverage odor present and you making a denial, it is only human nature for the officer to find that you are less than credible. This fact to the officer would then likely give rise to a suspicion that you are trying to hide the fact that many drinks were consumed.

6. Do I admit to how many, where and when? Is honesty the best policy?

It depends. Any admission more than "two" will likely result in your arrest. This is especially true where the

officer fails to ask "when?" because, for example, four beers is much different than four beers over eight hours.

As to the second question, it is not whether you tell the truth or fudge on the truth that is important. Rather, the answer really lies in whether or not you tell the truth *or* don't answer at all. In this regard, the truth has resulted in many non-intoxicated drivers being arrested and has subsequently cost them a small fortune for bond, automobile towing, days from work and an attorney to prove their innocence.

7. If I'm not going to answer, what do I do?

Keep in mind that our Federal and State Constitutions guarantee that you do not have to incriminate yourself. Politely ask the officer why he stopped you and if you are presently under arrest. Under our law a person can be under arrest and yet not be told so.

Where the officer indicates that you are under arrest, then you should immediately inform him of your desire to have an attorney present for any further questions. Do not refuse or agree to perform police field sobriety exercises. Rather, tell the officer you want advice from a lawyer to help you decide if you will refuse or agree to perform them.

On the other hand, should the officer say you are not under arrest then a different approach is in order. Politely ask if "I'm going to be written a traffic ticket?" and if so, "Will I be free to leave upon your completion of it?" Where the officer says "yes" to both questions, count your blessings, remain still and non-threatening, be courteous and only speak when spoken to — never volunteer information as that will only serve to prolong your roadside stay. Should he again ask about alcohol consumption inform him of your choice to not answer any questions but those related to the specific traffic offense — and, stick to your right not to incriminate yourself.

Well, what about where the officer says you're not under arrest but you can not leave. This is close to the typical DWI scenario. Here, the safe thing to do is to inform the officer that you would prefer not to answer any more questions and would like to have a lawyer present. Be polite and not talkative! Doing this, you have in effect "punted the ball" to the officer. He must now choose to let you go or to prolong his investigation. Again, if he lets you go, count your blessings and drive safely. Where he prolongs your roadside stay, he must be careful not to violate your federal and state constitutional rights to not be unreasonably seized. Your invocation of your right to remain silent and to any attorney's presence makes it more difficult for the officer to avoid a violation of your constitutional right to not be unreasonably seized.

To further explain, a police officer, absent any belief criminal activity is afoot, has a right to walk up to any person in a public place and talk to them. The person, however, may simply walk away. Indeed, our law is clear that the person's action in walking away cannot be used as evidence that he is guilty of something, i.e., that invocation of a constitutional right cannot be equated to guilt. Where the officer, through use of his police status, either impliedly or expressly detains the person, he violates the individual's right not to be unreasonably seized. To justify a brief detention of a person, the officer must have a specific and articulate reasonable suspicion that the person is involved in criminal activity. This justification cannot be legally made on the basis of a simple hunch or a gut feeling.

This detention must be narrowly limited in both its duration and scope so as to allow the officer to maintain the status quo so that he may dispel or affirm his reasonable suspicions. If the officer waits too long or unreasonably proceeds beyond the purpose for his initial detention, then he again violates the person's constitutional right not to be unreasonably seized.

Lastly, where the officer actually arrests the person he must have a greater quantum of evidence than merely a reasonable and articulate suspicion. Indeed, he must have what is constitutionally termed "probable cause" to believe a crime has occurred. "Probable cause" has been defined by our courts as a measure of evidence that would lead a reasonable person, based on that person's experience and training, to believe that a crime has occurred. This probable cause measure requires a lesser quantum of evidence than is required to convict a person of a crime (proof beyond a reasonable doubt) or to win a civil lawsuit (preponderance of the evidence, i.e., 51%).

In any situation where an officer "detains" a person on less evidence than "a reasonable and articulate suspicion" or arrests a person on less evidence than "probable cause," he violates that person's constitutional rights not to be unreasonably seized. The remedy for this violation is to exclude from the prosecution's case any and all evidence that was derived or stemmed from the violation.

Accordingly, when you find yourself in the typical DWI scenario, i.e., where you're being detained for a DWI investigation but you're not yet arrested, it is best to be polite, to invoke your rights to remain silent and to have an attorney present, to not accidentally incriminate or convict yourself, and to let the officer do the best he can on the evidence he can legally develop.

8. If I'm arrested and transported to the station house, do I perform the sobriety exercises before a video camera recorder, submit to the Intoxilyzer test and answer questions concerning drinking?

J. Gary Trichter is a partner in the Houston/Galveston firm of Trichter & Hirschhorn. He is co-author of the textbook Texas Drunk Driving Law and authors the monthly article, "DWI Practice Gems" for Texas Criminal Defense Lawyers Association's Voice for the Defense. Gary is Co-chairman of the National Association of Criminal Defense Lawyers' Drunk Driving Committee and a member of the Harris County Criminal Lawyers Association's Board of Directors. He is a nationally recognized seminar lecturer and journal author. He is especially noted for his defensive techniques in drug courier profile highway cases.

Maybe, never and maybe! First, however, immediately inform the officer, and all officers thereafter, that you want to remain silent until such time you can contact an attorney and have a private consultation with him as to anything and everything the officer will ask you except for bail. Be careful to tell the officers that you are neither refusing or agreeing to cooperate with them. Rather, tell them that your decision to refuse or agree will be premised upon the advice you receive from your lawyer.

Sometimes officers will say "you can't have a lawyer yet." This often occurs at the alcohol concentration test request and the video exercise test request stage. This police "you can't have a lawyer" statement, depending on the circumstances of your case, may or may not be true, but you will have no way of verifying its truth until you speak to your lawyer. Therefore, the best thing to do is remain polite, but firm, in your requests to speak to an attorney. Simply put, do not take "no" for an answer.

When the police allow you the opportunity to make a telephone call, immediately use it. Make a call to any attorney you know. If you don't know an attorney, ask to use the yellow or business pages to find one or ask to call the telephone company's directory assistance number. A good place to start in the phone book might be under the listing for your local criminal law bar association, e.g., the Harris County Criminal Lawyers Association, or under the heading "board certified criminal law specialists." Make the call even if you don't know or have a lawyer, your lawyer is beyond local distance dialing, or your arrest time is not at regular business hours of most law offices.

Here, you should know that most law offices answer their phone even after closing through use of an answering service. Many of these services can actually connect you directly to an attorney at his home.

Upon reaching an attorney on the telephone be sure to ask the officer for a chance to speak with him in private. Where the police refuse to allow you privacy, they violate your right to an attorney. Absent giving you privacy, the police provide you with only a warm body to talk to on the telephone because the lawyer, in order to maintain the attorney-client privilege, and to protect your right to remain silent, must tell you not to say anything. It is axiomatic that a lawyer can only give you proper advice where you can first tell him what has happened, i.e., he applies the law to the facts and he accordingly advises you what to do.

Always do exactly what your lawyer tells you to do — nothing more and nothing less. If he tells you to perform exercises before a video camera and/or to answer police questions concerning alcohol consumption, then do it.

In regard to the Intoxilyzer breath test, if your lawyer tells you to *simply* take it, I'd recommend changing lawyers. It is, at least in my opinion, wrong to advise a person to take a test on a machine which is incapable of being independently verified as accurate and reliable. It is equally wrong to advise a client to submit to such a test where the police fail to preserve, and there in effect destroy it, the breath specimen they will ostensibly use to prove you guilty. Personally, I'm not going to take a test that can't be rechecked to determine its validity.

To my mind, the best indicator of a person not having lost the normal use of his mental faculties is the fact that he *simply* won't take the breath test. Here, I believe a person would have to be drunk to agree to take a police test that is so surrounded in debate about its non-reliability and inaccuracies and where the police machine's own manufacturer doesn't warrant it fit for any particular purpose — including breath testing. Under such circumstances, only a drunk, insane, uneducated, or coerced person would submit to a breath test where the penalty for failure might result in 2 years confinement, a $2,000.00 fine and a year's driver's license suspension, not to mention other social and automobile insurance consequences, as opposed to a possible ninety-day suspension for test refusal. In other words, in my opinion, knowing the above, a person demonstrates no loss of his normal mental faculties by refusing the test but does by agreeing to take it. Clearly, taking into consideration all the consequences and facts noted, it cannot be reasonable and prudent judgment to take such a non-preserved test. Lastly, let me add one other "believe it or not" fact here — most police officers join in my opinion and would not take the breath test either!

IV. Conclusion

Every year thousands of our brother and sister Americans are killed and maimed in alcohol-related automobile accidents. The financial costs of these accidents and of other alcohol health problems to society is in the billions of dollars. Logically, the remedy is simple — not only do we outlaw the act of drinking, and thereafter driving, but also, we outlaw alcohol altogether. Our legislature, however, clearly lacks the courage to pass this logical law. Nevertheless, from both an academic and historical view, such a law would probably be offensive to our respective notions of a human being's inalienable right to freedom of choice. Accordingly, we are compelled to live in a democratic society where the freedom to drink alcohol and drive is balanced against a law which overrides that freedom at the point where the individual becomes intoxicated.

In a true democracy every citizen has a moral responsibility to respect the life, liberty and property of every other citizen. This ought be especially true for those of us who drink and thereafter drive. Hopefully, in the future, each of us individually will give due honor to our fellow citizens, as well as our moral responsibility, by not mixing drinking and driving. A conscious judgment to stay sober when driving is not only good citizenship, but also a democratic blessing to and from our neighbors.

Our good citizenship democratic blessings are equally applicable to the exercise of another's freedom of choice to drink and invocation of their constitutional rights when they are seized by the government. Our present republic's inheritance of a "presumption of innocence" to every citizen accused of any crime must remain paramount amongst our thoughts. This is especially true for the person charged with DWI because the crime is loosely defined by another's opinion and is one that requires no intent to commit. In a larger sense, however, because we as Americans are a fair people, we ought always remember the "presumption of innocence" in the DWI case because the person arrested might be you someday. Accordingly, please use your common sense, remember your constitutional rights and respect those of your neighbor, support your police, don't drink and drive, but if you do, don't drive intoxicated. ■

FORENSIC DNA PROFILING

Requesting a Reliability Instruction

by Juan Martinez Gonzales

All defense lawyers should always request a reliability instruction in any case where there is scientific evidence.

"For evidence to contribute to the truth-determining function of a trial it must be reliable." Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later,* 80 COLUM. L.REV. 1197, 1200 (1980).

The trial court is mandated to give a defendant a fair trial., Art. I, Sec. 10, TEX.CONST., VI and XIV Amendments of U.S. CONST.; *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965). "The point of the matter is that the opponent of such (scientific) evidence, so likely to be misused against him, is entitled to such protection against its misuse as can be reasonably given him . . . " WIGMORE, EVIDENCE §13 (1940) at 303. "Evidentiary jury instructions set standards or guides for juries to use when considering particular kinds and types of evidence . . . included in this group of instructions are those that admonish or caution the jury as to the limited use of certain kinds of evidence." CIPES, 2 CRIM.DEF.TECHNIQUES §37.03(4) (1982) at 37-12.

The Supreme Court of the United States in *In re Winship,* 397 U.S. 358 (1970), held that the 'beyond a reasonable doubt standard' to be part of the fundamental fairness required in criminal cases by the due process clauses of the United States Constitution.

In *State v. Washington,* 622 P.2d 986, 994 (Kansas 1981), the Supreme Court of Kansas upheld a reliability jury instruction that was given by a trial judge, that they should determine the reliability of the Multi-System analysis before considering the blood analysis testimony.

In *United States v. Williams,* 583 F.2d 1194, 1200, note 13 (2nd Cir. 1978); *United States v. Baller,* 519 F.2d 463, 467 (4th Cir. 1975); *United States v. Love,* 767 F.2d 1052, 1065, note 16 (4th Cir. 1985); *People v. Rogers,* 385 N.Y.S.2d 228, 237

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Nominating Committee of the TCDLA 1991 Board of Directors

The election of the 1991 Board of Directors provides an unprecedented opportunity for individuals who are interested in the Texas Criminal Defense Lawyers Association to become involved in our association. In addition to the officer slate that will be up for nominations, there are twelve (12) slots for associate directors which are one-year appointments open for nominations. Also, in 1991, there is a large number of members of the Board of Directors who are up for re-election who are not eligible to serve again on the Board of the Association. The director slots that are open in 1991 are:

1. William A. Bratton, III—District 3—not eligible for renomination;
2. Charles L. Caperton—District 3—not eligible for renomination;
3. Ronald Guyer—District 7—not eligible for renomination;
4. Mark C. Hall—District 1—not eligible for renomination;
5. Michael B. Heiskell—District 3—eligible for renomination;
6. Jeff Kearney—District 3—not eligible for renomination;
7. Lynn Wade Malone—District 8—not eligible for renomination;
8. E. G. "Gerry" Morris—District 8—eligible for renomination;
9. J. Douglas Tinker—District 6—not eligible for renomination;
10. Stanley I. Weinberg District 3 -not eligible for renomination;
11. William A. White—District 8—eligible for renomination;
12. Jack B. Zimmerman—District 5—not eligible for renomination;

In an effort to broaden the base of the Association, I have appointed two individuals from each district to be on the Nominating Committee. The 1991 Nominating Committee consists of:

District 1—Jeff Blackburn—Amarillo
Chuck Laneheart—Lubbock
District 2—Rod Ponton—El Paso
Martin Underwood—Comstock
District 3—Royce B. West—Dallas
Jack Strickland—Fort Worth
District 4—Web Biard—Paris
John Hannah—Tyler
District 5—J. Gary Trichter—Houston
Jan Woodward Fox—Houston
District 6—J. Douglas Tinker—Corpus Christi
Kyle B. Welch—McAllen
District 7—Mark Stevens—San Antonio
Robert Price—San Antonio
District 8—Gerry Morris—Austin
Randy Leavitt—Austin

The extent of each district for the Texas Criminal Defense Lawyers Association is located in the front of the membership directory. If you would like to become more active in your association, please contact the members of the Nominating Committee and advise them of your interest so we may discuss what you have done for the Association and what you can do for the Association in the future. The Nominating Committee will be meeting in late February and early March to report to the Membership its slate of nominees for the Board of Directors.

—Richard A. Anderson

Forensic DNA Profiling

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(New York Sup.Ct. 1976); *People v. Bain*, 453 N.Y.S.2d 343 (1982) the appellate courts approved the use of the trial court's use of reliability instructions.

Scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen." *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). Also, "an exaggerated popular opinion of the accuracy of a particular technique may make its use prejudicial or likely to mislead the jury." *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975). There is also a danger that the evidence may be given more weight than is warranted. *State v. Spencer*, 216 N.W.2d 131, 134 (1974). For all the above reasons the jurors as triers of fact should be given a reliability instruction, so that they can consider scientific evidence (like forensic DNA Profiling evidence) presented by the state, only in the event, they first find it beyond a reasonable doubt to be reliable.

The scientific evidence offered by the state is their attempt to prove their case beyond a reasonable doubt, in an effort to link the defendant to the alleged crime. Therefore, the scientific evidence that is admitted at a criminal trial is evidence, whose absence or presence are necessary implications of the element of identity that is alleged in the indictment. Thus, scientific evidence is a factor in a criminal case, whose reliability must be established beyond a reasonable doubt.■

Juan Martinez Gonzales received his Doctor of Jurisprudence Degree from the University of Texas in 1976. He has compiled and written the first Forensic DNA Profiling Criminal Defense Manual in the country. Moses "Moe" Sanchez, Tommy Sanchez of Houston, and Gonzales were the first Texas lawyers to vigorously defend against DNA evidence in a criminal case, by the use of an expert witness in the guilt-innocence stage of a DNA case. He has spoken at several criminal defense seminars on Forensic DNA Profiling. He has filed amicus curiae briefs in several cases on appeal in state appellate courts throughout the State, where convictions resulted from the use of forensic DNA evidence. He was defense counsel in a case in Beeville, where there was forensic DNA evidence. Lastly, he has written articles attacking forensic DNA evidence for the National Lawyers Guild Practitioner and for Docket Call (Publication of the Harris County Criminal Lawyers Association).

Search and Seizure

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the warrant fail, i.e., the court can treat as a warrantless case and review to see if it can be upheld under a warrant exception. *Adkins v. State*, 717 S.W.2d 363 (Tex. Crim. App. 1986).

V. Warrantless Arrests

Chapter 14 of the Code of Criminal Procedure

Even if a warrantless arrest is justified under one of the federal exceptions set out in **II**, *supra*, Texas law requires that it be justified under one of the statutory exceptions in Chapter 14 of the Code of Criminal Procedure. Since so many searches take place incident to arrest, and since so many arrests are made without warrant, this section will briefly highlight problem areas.

A. What Facts are Sufficient to Show an Offense was Commited Within the View or Presence of a Policer Officer?

Article 14.01 allows for the warrantless arrest of a person when an offense occurs within a peace officer's presence or view. The **standard** for the legality of such a warrantless arrest is the same as that required for probable cause when an arrest warrant is sought. *Wilson v. State*, 621 S.W.2d 799 (Tex. Crim. App. 1981). **Bottom Line: An officer is justified in arresting someone if the facts and circumstances within his** knowledge or about which he has reasonably trustworthy information would warrant a reasonable and prudent person in the belief that the suspect has committed an offense. If there are specific facts within the officer's view to support a reasonable conclusion an offense is being committed, then the arrest is permissible. *Draggy v. State*, 553 S.W.2d 375 (Tex. Crim. App. 1977). This does not mean, however, that an **actual** offense need be committed. *See Angel v. State*, 740 S.W.2d 727 (Tex. Crim. App. 1987), and cases cited at footnote 11.

A good discussion of the probable cause necessary to make a warrantless arrest is found in the recent decision in *Adkins v. State*, 764 S.W.2d 782 (Tex. Crim. App. 1988). In that case, the Court of Criminal Appeals upheld a warrantless arrest based on information from an informant plus subsequent observations by the police officer. Police officers were told by a confidential and reliable informant that once a week appellant would meet a man known as "Pollock" — they would go to Pollock's house for a short period of time and return to the car, at which time the defendant would give Pollock a package of drugs. An officer waited at the designated time and place and saw the two men. Following them, he saw events unfold as they had been described by the confidential informant. A warrantless arrest was proper because officers had probable cause to believe the defendant was committing an offense in their presence — possession of a controlled substance. The probable cause can *not* be based on what officers saw the day before. *Stull v. State*, 772 S.W.2d 449 (Tex. Crim. App. 1989).

B. What Facts are Sufficient to Support a Warrantless Arrest if Someone Found in "Suspicious Places Under Suspicious Circumstances"?

Article 14.03 authorizes the arrest of persons found in suspicious places and under circumstances which show they have been guilty of some felony or breach of peace — or be threatened or are about to commit some offense against the law. This area is more difficult than the warrantless arrest under Art. 14.01 discussed in **A**, *supra*. Because of the potential for abuse, this is a statute that will be closely watched by reviewing courts. It has been held to require the functional equivalent of

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Search and Seizure

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probable cause. *Johnson v. State*, 722 S.W.2d 714 (Tex. Crim. App. 1986). The following list details cases where places and circumstances **were** sufficiently suspicious to justify a warrantless arrest:

**Johnson v. State*, 722 S.W.2d 714 (Tex. Crim. App. 1986) (officers were investigating murder in an apartment; D arrived and identified himself as maintenance man; however, he seemed nervous and officers thought it was peculiar for him to appear because two apartment security guards were also present; officer noticed what appeared to be blood on defendant's pants; defendant admitted keys found in hall at the front of the unit where murder occurred, one of which fit the door to that unit, belonged to him).

**Carrasco v. State*, 712 S.W.2d 120 (Tex. Crim. App. 1986) (defendant was found on scene of one-vehicle accident; officers concluded she was intoxicated because of her glassy eyes, slurred speech and slow movement; although no odor of alcohol was detected, facts authorized defendant's arrest for public intoxication).

**Meeks v. State*, 653 S.W.2d 6 (Tex. Crim. App. 1983) (officers patrolling high crime area saw defendant walk away from vacant lot where semi-tractor trailer truck and state bed truck were parked; he appeared to be carrying a gun; officer saw the window had been broken on passenger side of truck and wires were dangling from roof where radio had been attached).

In contrast, in the following cases, the places and circumstances **were not** sufficiently suspicious to support a warrantless arrest under Article 14.03:

**Hoag v. State*, 728 S.W.2d 375 (Tex. Crim. App. 1987)(defendant parked vehicle and walked two blocks away into neighborhood; he approached house, knocked on door and looked around suspiciously; defendant then walked to side of house, back yard, and returned and walked back to his car; there were no signs of burglary at the house — warrantless arrest not justified because no indication crime has been committed).

**Anderson v. State*, 612 S.W.2d 564 (Tex. Crim. App. 1981) (not reasonable for officer to believe that person seen walking toward rear of restaurant in early morning hours was committing criminal trespass).

C. When Are Officers Justified in Believing a Suspect is About to Escape?

Under Article 14.04, peace officer can make a warrantless arrest if he has satisfactory proof, based on the representation of a credible person, that a felony has been committed and the offender is about to escape so that there is no time to procure a warrant. For purposes of this statute, if the officer observes facts amounting to satisfactory proof, then that officer is considered a "credible person" — thus, a third party is not necessary. *Dejarnette v. State*, 732 S.W.2d 346 (Tex. Crim. App. 1987).

Generally, it will not be sufficient for the officer merely to assume a magistrate is not available to issue a warrant. *Fry v. State*, 639 S.W.2d 463 (Tex. Crim. App. 1982), *cert. denied*, 103 S.Ct. 1430 (1983). For this reason the state statute is viewed as more stringent than the federal standards, which do not seem to demand proof of "exigent circumstances." 1 Texas Criminal Practice Guide § 10.03[3] (1988). There must be some evidence that attempts to locate a magistrate were unsuccessful. Facts sufficient to show imminent escape are seen in *Tarpley v. State*, 565 S.W.2d 525 (Tex. Crim. App. 1978). There officers received information the defendant was staying at hotel with someone else and had paid for his room with a stolen credit card. Additionally, the license number on his car did not match the number on the room registration card. When officers went to the hotel room, the two men were dressing and their luggage was partially packed. Nothing indicated the men intended to stay in the room long enough for officers to obtain a warrant — thus there were sufficient facts to justify the arrest.

Tarpley should be contrasted with *Stanton v. State*, 743 S.W.2d 233 (Tex. Crim. App. 1988). There five men reported to have committed a robbery sometime after midnight. A short time later, one of the men was arrested and implicated the defendant, giving the officers the defendant's first name, the general location of his house, and a description of his car. A few hours later, an officer saw the car parked outside of a residence; he watched until the defendant walked out of the home and got into the car two hours later. The defendant drove about three blocks before he was stopped and arrested. The Court of Criminal Appeals concluded the arrest was not proper because there was no evidence of escape — defendant's conduct in leaving the house was as consistent with innocent activity as with criminal conduct. Simply going from one place to another does not necessarily show evidence of escape. *See also Green v. State*, 727 S.W.2d 263 (Tex. Crim. App. 1987) (state must present evidence establishing that circumstances precluded obtaining a warrant); *Bell v. State*, 724 S.W.2d 780 (Tex. Crim. App. 1986) (arrest not valid merely because officer did not know where to find defendant at later time).

Appendix A
Checklist in Considering Search and Seizure Claims

First Question:
Does this case involve action by government official?
(Go to next question only if "yes.")
Second Question:
Does the person complaining have standing — is this the proper person to complain?
(Go to next question only if "yes.")
Third Question:
Is there a "search" or "seizure" involved?
"SEARCH" = any government activity that infringes on a person's reasonable expectation of privacy.
TEST: 1) Did person have a subjective expectation of privacy?
2) Is this the type of privacy interest society recognizes as reasonable?

* * * *

"SEIZURE" = significant interference by police of a person's freedom of movement or interference with person's possessory interest in property.
TEST: Would a reasonable person believe his freedom was restricted so that he was not free to leave? (This is an objective test.)
(Go to next question only if "yes.")
Fourth Question:
If a search or seizure did occur, was it reasonable?
TEST: Balance degree of invasion of person's privacy

vs.

Benefits of search or seizure to society.
OR: If a search or seizure did occur, is there an exception to the warrant requirement which applies?

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State v. Mattox

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the litigation and as being designed solely to harass him and his family.

In June of 1983 a series of telephone calls ensued between Mattox and his aide Arthur Mitchell in Austin, and Caldwell and McDade in Houston. Mattox in testimony explained that he initially telephoned Caldwell—who had never played a role in the Mobil litigation—because of his prior association with Caldwell during the campaign for Attorney General. Mattox stated his need to express to someone at Fulbright & Jaworski whom he directly knew both his annoyance with McDade's litigation conduct—which he viewed as unethical—and his concern that McDade's conduct would reflect unfavorably on Fulbright & Jaworski's entire range of relations with the Attorney General's Office, including the bond approval process. Caldwell recalled the exchange quite differently. He testified that during the critical telephone conversation of June 17, 1983:

"I next asked him how we could get our bonds approved. He stated that when McDade 'withdraws all this nonsense [the notice to depose Janice Mattox] and unethical crap then our relationship could straighten out.' . . . He wanted lawyerlike action. Until we got the matter straight, no bond approvals would be had, including the [Lower Colorado River Authority] issue [the largest and most politically sensitive then pending]."[24]

Mattox in testimony insisted, however, that he advised Caldwell only that the bond applications would be carefully reviewed for error and further *insisted* that no threat to block approval of the bonds was ever made.

Thus the State's case was predicated directly on this alleged threat by the Attorney General to hold Fulbright & Jaworski's clients' applications for bond approval hostage until the firm's action in the Mobil case was revised to renounce the objectionable discovery tactic. The denouement of these events—apart form the subsequent criminal litigation based on them—was anticlimatic: all the bond issues pending approval at the time of the putative threat were subsequently approved without any tangible or other cognizable loss to any of the issuers or to Fulbright & Jaworski, and the renewed McDade motion to recuse is believed to have been dismissed in July of 1983. At no time was there any evidence that Mattox sought or received any personal pecuniary gain.

W. Robert Gray is Assistant Professor of Law at the Dallas/Fort Worth School of Law, Inc., in Irving, Texas. A native Texan from Carthage, Texas, he attended the University of Texas at Austin, where he received a M.A. from the Divinity School and his J.D. from the Law School. He was Comment Editor of the Law Review and published his own Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980). He also recently published *Limitations on the FDIC's* D'Oench *Doctrine of Federal Common-Law Estoppel: Congressional Preemption and Authoritative Statutory Construction*, 31 S. Tex. L. Rev 245 (1990), which chronicles a provision of law critical to the savings and loan bailout. He is admitted to practice in the District of Columbia, Texas, and Illinois. During the time that the research for this article was done, he was on leave from the Texas Attorney General's Office serving as private counsel to James A. Mattox in connection with his indictment and trial for commercial bribery.

These materials—the indictment, the statute, and the summary of facts presented here—make it possible to state the prosecution's theory in capsule form: Mattox's alleged conduct generated a potential intrafirm conflict of interest within Fulbright & Jaworski. This conflict, if allowed to mature, would have placed the firm in violation of its fiduciary duty—governed by the ethical standards of the legal profession—to Mobil (by causing the firm to forego a litigation tactic on Mobil's behalf) and possibly to the bond clients as well (by causing the firm to sacrifice their interests in speedy bond approval to the interest of Mobil). His asserted conduct, in short, constituted an inducement to Caldwell and the firm to breach their fiduciary duties to one or more clients, the resolution of whose unrelated legal matters was placed in conflict by his action. Central to this theory were the assumptions that the promise not to execute a threat to withhold the performance of a legal duty could have constituted a benefit to Caldwell within the meaning of the statute, that the nature of Caldwell's asserted fiduciary relation to Mobil was the kind of relation protected from interference by section 32.43, and that the nature of Caldwell's relation to his partner McDade was sufficient for the purpose of investing Caldwell with powers of control over the Mobil litigation.

This construction of the prosecution's theory, of course, is subject to some reasonable variation because the ambiguity in the indictment does not lend itself to unequivocal interpretation. Finally, it needs to be emphasized that this theory is directly based on the uncritical acceptance of the State's factual allegations. Even if each of these allegations were indisputably true, the upshot of this article is that the indictment would have charged no crime. This treatment is, of course, in contrast to the obvious observation, previously stated, that the jury's verdict speaks for itself about the truth of these allegations.

II. The Failure to Allege the Consideration Necessary for the Illicit Contract of Commercial Bribery

The commercial bribery statute requires that one charged with its commission have offered "any benefit as consideration for . . . violating a duty to a beneficiary."[25] The indictment tracks the language of the statute by alleging that Mattox "offer[ed] a benefit to . . . Caldwell . . . as consideration for [his] violation of his duty to a beneficiary." In the context of the indictment this benefit can be nothing other than Mattox's promise not to execute his threat to impede official action on the bond applications. The Penal Code defines "benefit" as "anything reasonably regarded as economic gain or advantage"[26] and this definition has been construed broadly to include anything upon which an economic value could be placed.[27] Whether this economic

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Objections

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ancient instrument within the meaning of that term in law since:
-there is no competent proof of its age.
-there is no competent proof that it comes from proper custody.
-it shows on its face alterations and blemishes.
-it fails to appear on its face to be free from suspicion, and in fact the alterations upon it raise reasonable suspicions regarding its authenticity, if not compelling the conclusion that it is not authentic.

Assuming Facts Not Proved

The question assumes facts not in evidence, namely . . .

Authentication (see also Books and Records)

The instrument has not been properly authenticated because of:
-want of competent proof of its execution.
-want of competent proof of its delivery.
-want of competent proof as to the identity of the person who prepared it and the circumstances under which it was prepared.

Best Evidence Rule

The evidence offered is not the best evidence:
-the original writing has not been accounted for.
-the books offered are not books of original entry.
-the purported explanation for failure to produce the original writing is inadequate and fails to establish any competent excuse for nonproduction of the original.
-the preferred secondary evidence, a carbon copy made at the time of the original writing, has not been accounted for, and it is not shown that the oral evidence offered is the best available under the circumstances.
-the original writing speaks for itself, is the best evidence, and cannot be varied by attempted oral interpretation.

Books and Records (see also Authentication and Best Evidence Rules)

The instruments offered are hearsay:
-neither the requirements of common law nor those of statutes for admissibility of records have been met.
-no witness has testified to personal knowledge of the purported transactions recorded.
-at most the evidence shows that the witnesses produced had incomplete knowledge of the purported transactions, and at least their testimony must be supplemented by testimony of someone knowing other vital facts to support admissibility of the documents.
-the person who furnished the data has not been produced, but only one who recorded matter that was purely hearsay as to him.
-the person who furnished data for record has been produced, but he did not make the record presented here and whether these are records of data he furnished does not appear by competent evidence.
-it is not shown that the entries in these books were made in the regular course of business.
-the entries disclose, by the nature of the subject matter and content, that they were not made in the regular course of business.
-the entries, by their substance, show that they were made for use in litigation and not in regular course of business as that term is used in the law of evidence.
-the recitations identified (by the offer, or by objection) are not the type that may be received from books and records but instead are:
-hearsay.
-opinions and conclusions.

Compromise

The question is improper because it relates to a matter involving an offer to buy peace and compromise a disputed claim.

Conclusions (see Opinions)

Criminal Offenses

The matter is incompetent because
-the person accused was acquitted of the charge.
-it relates not to a conviction, but merely to a charge, which is wholly denied and not proved.
-the charge was only a misdemeanor and had no relation to veracity.
-the date of the conviction is too remote, being (specify number) years before this date.

Dead Man's Act

The question calls upon the witness to testify regarding an oral statement by the decedent, as to which he is disqualified to testify under the Dead Man's Act.

Disqualification by Violation of Order for Separation of Witnesses

We move that the witness be disqualified from testifying (and that his testimony already given be stricken from the record, the jury being instructed not to consider it for any purpose) because the witness has violated the court's order for separation of witnesses by:
-remaining in the courtroom when X and Y were testifying.
-discussing with X the testimony that X gave in trial.

Double Questions (see Uncertainty)

Hearsay

The question invites the witness to state hearsay information rather than restricting him to statement of facts upon personal knowledge.

The question does not limit the witness to stating what he knows from personal observations, and it allows hearsay.

The part of the answer regarding what X told him is hearsay and not within any exception to the hearsay rule. We move that it be stricken and that the jury be instructed not to consider it for any purpose.

Immateriality (see also Irrelevance and Relevance Outweighed)

The matter is immaterial to any issue in this case. Both from the point of view of time and from the point of view of unnecessarily confusing the real issues in the case with evidence on immaterial matters, it is improper to impose upon the court and jury as well as parties by raising such collateral matters.
-Further, the subject is one of an inflammatory and prejudicial nature, designed to invite the jury to reach a verdict on the basis of sympathy of prejudice instead of unbiased findings on the facts.
-(see added statements under RELEVANCE OUTWEIGHED: similar statements might be used with an objection of immateriality).

Interpretation of an Instrument (see Best Evidence Rule and Parol Evidence Rule)

Irrelevance (see also Immateriality and Relevance Outweighed)

The matter asked about is irrelevant to any issue in the case.

Memoranda in Aid of Testimony

The witness is testifying from a memorandum rather than from knowledge and memory, the memorandum being one that is not properly usable for this purpose. (A motion to strike and a request for instructions to disregard answers already given may be added).

Objections

Continued from page 31

Nonresponsive Answers

We move that the answer be stricken and that the jury be instructed not to consider it for any purpose. It is not responsive to the question. (Any other ground of objection might be added—such as, that the answer is a statement of opinion, or hearsay).

Opinions and Conclusions

The question calls for (or the answer is) an opinion and conclusion:
-the witness has not been shown to be an expert.
-it is upon a matter that is not a proper subject of opinion testimony, even if expert qualifications are shown.

Parol Evidence Rule

The evidence offered is incompetent under the parol evidence rule:
-it relates to negotiations before the integration of the agreement in a written contract.
-it is an effort to vary the terms of an unambiguous writing by parol evidence.
-the instrument speaks for itself and cannot be varied by oral interpretation.
-though the evidence relates to alleged negotiations subsequent to the written agreement, there is no evidence of independent consideration to support a modification of the written agreement.

Personal Knowledge (see Hearsay)

Pleadings

The evidence is inadmissible for want of any support in the pleadings, which do not raise any issue as to which the evidence offered is relevant and material.

Prejudice (see Immateriality and Relevance Outweighed)

Privilege

The question invades the field of confidential communications between
-husband and wife
-client and attorney
-patient and doctor

The question is one that the witness cannot be compelled to answer because of the privilege against self-incrimination and that privilege is hereby invoked.

Relevance Outweighed (see also Immateriality and Irrelevance)

Even if this evidence be considered relevant, its probative value is outweighed by the danger of
-unfair prejudice
-confusion of the issues
-misleading the jury
-undue delay and waste of time
-needless presentation of cumulative evidence

Repairs and Other Remedial Measures

The matter asked about relates to subsequent repairs of an instrumentality allegedly involved in the incident on which this suit is based, and is therefore inadmissible.

The matter asked about relates to remedial measures instituted after the incident on which the suit is based and is therefore inadmissible.

Repetition

The question is repetitious. It has been asked and answered (several times) and we object to further repetition (in the interest of time).

Reputation

The matter is incompetent because
-it does not concern reputation for (lack of) veracity.
-there is no competent evidence that the witness knows the reputation of X for truth and veracity in the community in which X resides.
-the witness offers to testify only that he would not believe X, and not that X has a reputation for lack of veracity.

Separation of Witnesses (see Disqualification)

Statuate of Frauds

The question calls for parol evidence of an alleged agreement that must be in writing under the Statute of Frauds, and Section____ of that statute in particular.

Uncertainty

The question is ambiguous and uncertain in its meaning. We ask that it be clarified to avoid misunderstanding.

This is a double (or multiplicitous) question, containing two (or more) distinct parts that should be separated so the witness, and the court and jury, can be certain of counsel's meaning.

The question is confusing; there is doubt as to what is being asked and danger if not probability of misunderstanding.

The question is too indefinite and uncertain to indicate clearly what is being asked and to insure that it is interpreted in the same way by the court and jury as well as the witness and counsel.

The answer indicates that the witness is uncertain. Since he does not know, we move that his answer be stricken and that the jury be instructed not to consider it for any purpose.■

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concept of "benefit" could apply to the defendant's offer not to carry out his threat is problematic; arguably it could apply because there would have been economic value to Fulbright & Jaworski in not having it carried out. This issue, however, need not be resolved, because the statutory context in which this putative "benefit" was offered required it be offered "as consideration." This requirement totally vitiates the capacity of the defendant 's threat or promise to satisfy the language of the statute—regardless of its economic value.

In *McCallum v. State* [29] the Texas Court of Criminal Appeals held that the expression "benefit as consideration for" in the general bribery statute, section 36.02 of the Penal Code,[30] must be construed to require as an element of that crime "a bilateral arrangement—in effect an illegal contract to exchange a benefit as consideration for the performance of [the requested action]."[31] The court's analysis made it plain that consideration must be present in the illicit contract of bribery by analogy to the law of contracts. The expression which it construed—"any benefit as consideration for"—is identical with the crucial expression in section 32.43.[32] Because sections 32.43 and 36.02 may be construed *in pari materia*,[33] the principles governing commercial bribery may also be analogized to contract law and thus to the contractual concept of consideration. Seen in this light, the prosecution's reliance on a promise to forego a threat to perform an official duty must fail, because it is an elemental principle of contract law that

"[n]o sufficient consideration is deemed to be present where there is an agreement to perform something that the promisor is already obligated to perform, either *by law*, or by the provisions of a valid contract."[34]

Numerous statutes impose a duty on the Attorney General to review bond and other public securities issues proposed by governmental entities.[35] If the bonds and other securities described in the indictment were in proper legal form, Mattox as Attorney General had a legal duty to approve the bonds, giving rise to a corresponding legal right in

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Caldwell, acting as attorney for the issuers, to have them approved.[8] This pre-existing legal relation between the defendant and Caldwell precluded as a matter of law the possibility of any offer of "consideration" in the context of the prosecution's allegation. The contract principle that no consideration can consist of a public official's promise to perform duties already legally required of him[9]—a principle firmly reflected in Texas law[10]—thus directly contradicts and destroys the essential averment of consideration in the indictment.

There is another reason, based on contract law, why the indictment failed to allege validly the required element of consideration "used to emphasize the bargaining aspect of bribery."[11] In the context of contract law, duress[12] has been described as "a threat to do something which the party threatening has no right to do . . . [W]here the party making such demand . . . induces a compliance . . . against the will of [the threatened party] through fear of injury to his business or property interests, such threats amount to duress."[13] Mattox's threat "to delay . . . and deny approval of certain bonds" was certainly, if the bonds were in proper form, a threat to take action beyond his lawful rights; and the allegation directly implied, while not expressly so stating, an attempt to induce involuntary assent in Caldwell through fear of injury to his firm and its clients.

The use of duress to reach an agreement or contract renders that contract void or voidable.[14] Moreover, the use of duress "taint[s]" what would otherwise be valid consideration.[15] Indeed, duress and consideration are entirely separate concepts,[16] and thus a threat cannot be a valid substitute for consideration.

Finally, the use of duress has been held to be in the nature of extortion.[17] In *United States v. Addonizio*,[18] the court of appeals held that "while the essence of bribery is voluntariness, the essence of extortion is duress,"[19] thus establishing that bribery and extortion are totally disparate and mutually exclusive crimes. Again the upshot is that the prosecutorial assertion of a threat destroyed any ground that the consideration element of commercial bribery was alleged in the indictment.

On the basis of commonplace principles of contract law, applicable to the crime of bribery by judicial analogy established in *McCallum*, the prosecution's theory failed to allege a crime as set forth in the Penal Code and thus violated the principle of legality. But there were other violations of the principle.

This article will be continued in future issues of Voice.

Footnotes

1. Texas Penal Code Ann. §32.43 (Vernon 1974). Throughout this article it is referred to in places simply as "section 32.43." An amendment to this section became effective on September 1, 1983, and thus did not apply to this cause. See Tex. Penal Code Ann. §32.42 (Vernon 1985 Supp.). Unless otherwise indicated, all statutes, cases and other laws cited were those in effect at the time of Mattox's indictment and trial.
2. The case was styled *The State of Texas v. James Mattox*, No. 73,737 (147th Judicial District, Travis County, Texas).

". . . the prosecutorial assertion of a threat destroyed any ground that the consideration element of commercial bribery was alleged in the indictment."

3. Writing a scholarly article primarily on the facts of the case as adduced in the evidence would be problematic in several respects. For example, significant portions of the statement of facts (trial transcript)—including the defendant's critical testimony on both direct and cross examination—have never been transcribed from the court reporter's notes. The writer of necessity must advert to the facts of the case to explain the legal theories involved, but because they are not the focus of this article, he will rely on his knowledge of the case in presenting them, rather than relying on an incomplete record.
4. H. Packer, *The Limits of the Criminal Sanction* 72 (1968). See also J. Hall, *General Principles of Criminal Law* 28 (2d ed. 1960); J. Rawls, *A Theory of Justice* §38 at 238 (1971); G. Williams, *Criminal Law: The General Part* §§ 184-88 (1961).
5. H. Packer, *supra* note 4, at 73.
6. H. Packer, *supra* note 4, at 72, 80, and 93. Though the Texas Penal Code does not require the strict construction of penal statutes, see Texas Penal Code Ann. §1.05(a) (Vernon 1974), the principle of legality still forbids "the analogical extension of penal statutes." G. Williams, *supra* note 4, §188 at 586. See also H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 511 (Tent. ed 1958).
7. H. Packer, *supra* note 4, at 80, 85.
8. *Id.* at 88. Professor Packer agrees further that it is a less important purpose of the principle to control the discretion of judges, who are amply restrained by the fact that they must justify their decisions through "a process of reasoned elaboration." *Id.* It is arguable whether this reasoning properly applies to Texas trial judges, who are generally not required—and by tradition do not—issue opinions explaining and justifying their rulings.
9. *Id.* at 90.
10. Tex. Code. Crim. Proc. Ann. art. 21.03 (Vernon 1966). See also Tex. Code Crim. Proc. Ann. art. 27.08(1) (Vernon 1966) (permiting an exception to an indictment when "it does not appear therefrom that an offense against the law was committed by the defendant.")
11. See, e.g., *Ex parte Winton*, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977) (collecting cases); *Posey v. State*, 545 S.W.2d 162 (Tex. Crim. App. 1977); *Ex parte Cannon*, 546 S.W.2d 266 (Tex. Crim. App. 1976). See generally, Dix, *Texas Charging Instrument Law: Recent Developments and the Continuing Need for Reform*, 35 Baylor L. Rev. 689, 727-58 (1983).
One element of the fundamental-defect doctrine of these cases, which did not require the defendant to raise the defect at or before trial, see also *Am. Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex Crim. App. 1974), appeal dism'd, 419 U.S. 1098 (1975), was overruled by the Sixty-Ninth Legislature. See Senate Bill No. 169, 69th Legislature, Acts 1965, ch. 577, § 1 (amending arts. 1.14, 28.09 and 28.10 of the Code of Criminal Procedure).
12. *Cf. Williams v. State*, 12 Tex. Crim. 395, 400 (1882) (the requirement that an indictment state the essential elements which constitute the offense charged is a fundamental requirement of the Texas Constitution). See also Dix, *Texas Charging Instrument Law*, *supra* note 10, 35 Baylor L. Rev. at 729 (requirement was regarded at time of its nineteenth-century origin as based on "fundamental justice").
13. See, e.g., *People v. Jacobs*, 309 N.Y. 315, 130 N.E.2d 636, 637 (1955); *Schiff v. Kirby*, 194 N.Y.S.2d 695, 701 (Sup. Ct. 1959) (both construing former New York commercial bribery statute, §439 of the Penal Law, now recodified in part as N.Y. Penal Law §§180.00,—.03,—.05—.08 (McKinney Supp. 1984-85)). See also Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 Minn. L. Rev. 599, 599-600 (1962) (commercial bribery normally occurs when "an agent receives money or other concessions from the briber in return for the agent's effort to further the briber's interests in business dealings between the briber and principal"); Annot., *Validity and Construction of Statutes Punishing Commercial Bribery*, 1 A.L.R.3d 1350, 1359 (1965) (offense occurs when there is payment or offer of payment to an agent or employee with the intent that his relation to the principal or employee be influenced thereby).
14. Practice Commentary, Texas Penal Code Ann. §32.43 (Vernon 1974).
15. Mattox did perfect an interlocutary appeal in his case, *Ex parte Mattox*, 683 S.W.2d 93 (Tex. App.—Austin 1984), pet. ref'd, 685 S.W.2d 53 (Tex. Crim. App. 1985), but except for a brief discussion of the appellant's void-for-vagueness grounds of error, the court of appeals did not reach the merits. It expressly declined to rule on the merits of the claim that the indictment failed to allege the necessary elements of the crime, the very issue in this article.
The author is unaware (as of 1985) of any other Texas cases which substantially reach the merits in a section 32.43 matter. *But cf. Marriott Bros. v. Gage*, 704 F. Supp. 731, 737-38 (N.D. Tex. 1988) (predicate for 18 U.S.C. § 1964 (c)).

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UNITED STATES	)	
OF AMERICA	)	Criminal Case
v.	)	No. 90-0068
MARION S.	)	(TPJ)
BARRY, JR.	)	
	)	

QUESTIONNAIRE

Part I

Juror No._____.

1. Full Name:
2. Place and date of birth:
3. Citizenship:
4. Present Address:
5. Do you have any difficulty in reading, speaking, or understanding the written or spoken English language? If "yes," please explain briefly.
6. Do you have any significant problems with your hearing or your eyesight? If "yes," please explain briefly.
7. How long have you lived at your present address?
8. How long have you lived in the District of Columbia?
9. Are you a registered voter? If so, where are you registered? How are you registered? (i.e., Democrat, Republican, Independent, or other).
10. Are you presently married? If "yes," what is the full name of your spouse? How long have you been married?
11. If your spouse is employed or has been employed, who is (or was) his or her employer?
12. If previously married, please state the full names and occupations of all former spouses.
13. If you have children, please state their full names and ages, and occupations (if working).
14. If you are presently employed, by whom and where are you employed? What is (or was) your principal occupation? What is (or was) the nature of your work? List all places at which you have worked full-time for as long as three consecutive years (including military service). If you are not currently working, are you temporarily unemployed? retired? other?
15. How many years of formal education have you had? What is the name of the last full-time school you attended? When did you last attend school?
16. Do you have any chronic or major health problem(s)? If "yes," please explain briefly.
17. Does any member of your household have any chronic or major health problem(s)? If "yes," please explain briefly.
18. You have been advised that the jury will be sequestered once trial begins, and that the trial is expected to take approximately one month. Is there any reason that has not previously been ruled on by the Court why you would suffer exceptional personal hardship if selected to sit as a juror in this case? If "yes," please explain briefly.

Part II

19. Do you, to your knowledge, have any personal or family connection of any sort with the defendant Marion S. Barry, Jr.? With the United States Attorney for the District of Columbia, Jay P. Stephens, or his staff, including Assistant United States Attorneys Judith Retchin and Richard Roberts? With the defense attorneys R. Kenneth Mundy, Reginald L. Holt, Robert W. Mance, or Karen McDonald? If any answer is "yes," please explain briefly.
20. The following is a partial list of people who may be called as witnesses in this case. Do you, to your knowledge, have any personal, family, or business connection of any sort with any of them? If "yes," please circle the numbers of each of those with whom you may have such a connection.

1. Albert Arrington
2. Samad Arshadi
3. Maandria Askia
4. Maria Barba
5. Albert Benjamin
6. Orlando Berrios
7. Johnann Coleman
8. Doris Crenshaw
9. Carthur Drake
10. Fred Gaskins
11. Marcia Griffin
12. Ronald Harvey
13. Dixie Hedrington
14. Tivia Hoppenstein
15. Carole Jackson
16. Wanda King
17. Charles Lewis
18. Thomas Lynch
19. Roger Martz
20. Charles Mason
21. Zenna Mathis
22. Linda Maynard
23. Rose M. McCarthy
24. James McWilliams
25. David Meyerson
26. Arthur J. Mitchell
27. Hassan Mohammadi
28. Lloyd Moore
29. Mary Moore
30. Merline Moore
31. Rasheeda Moore
32. Sherle Moore
33. John Olsen
34. James Pawlik
35. Lydia Pearson
36. Edward Prichard
37. Marshall Reel
38. Robin Ridgeway
39. Darrel Sabbs
40. Sukhjit Singh
41. Bettye Smith
42. Theresa Southerland
43. Wanda Stansbury
44. James Stays
45. Frank Steele
46. Jonetta Vincent
47. Clifton West
48. Peter Wubbenhorst

21. Do you have any first-hand knowledge of the facts of this case? If "yes," please explain briefly.
22. As you may be aware, this case, and certain events leading up to it, have received considerable publicity, both before and after indictment was filed. Are you aware of the publicity? If "yes," please describe briefly what you remember about it.
23. Have you formed any personal opinions based upon the publicity? If "yes," please explain briefly.
24. Specifically, have you formed any opinions whatsoever, based on information from any source, of Mr. Barry's guilt or innocence of anything? If "yes," please explain briefly.
25. The jury will be instructed that the defendant is presumed to be innocent throughout the trial, and that he cannot be found guilty of any offense until the government has proven each element of that offense beyond a reasonable doubt. Would you find it difficult for any reason to follow that instruction? If "yes," please explain briefly.
26. The jury will be instructed not to read, watch, or listen to any news accounts of this trial whatsoever until it is over, and not to talk to anyone about the case, not even to one another, until it retires to deliberate upon its verdict. Would you find it difficult to follow such an instruction for any reasons? If "yes," please explain briefly.
27. What TV or radio news programs do you watch or listen to fairly regularly?
28. What newspapers or magazines do you read fairly regularly?

Part III

29. Did you vote in the national elections in 1988? 1984? 1980?
30. Did you vote in the local elections in 1986? 1982? 1978?
31. Other than as a voter, are you active politically? If "yes," please explain briefly.
32. Have you been active in the campaign of any candidate(s) for elective office in the District of Columbia? If "yes," please explain briefly.
33. Have you ever held elected or appointed office in the District of Columbia government? If "yes," please explain briefly.
34. Have you ever held elected or appointed office in the federal government or any other state or local government? If "yes," please explain briefly.
35. Have you ever been employed by the District of Columbia government? If "yes," please explain briefly (including each position you have held, the inclusive dates of your employment in that position, and the department(s) or agency(ies) for which you have worked.)
36. Have you had any contracts to supply goods or services to the District of Columbia government in the past four years? If "yes," please explain briefly.
37. Have you received any benefits or services not given to the public-at-large from the District of Columbia government in the past four years? If "yes," please explain briefly.
38. Have you ever contributed money or

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property to any candidate(s) for elective office in the District of Columbia? If "yes," please explain briefly (including the identity(ies) of the candidate(s) and the election year(s).

39. Have you, or any member of your family, contributed to any fund for the benefit of Marion Barry or his family since January 18, 1990? If "yes," please explain briefly.

40. Have you, or any member of your family, attended any fundraisers, rallies, receptions, or other functions in support or in honor of Marion Barry since January 18, 1990? If "yes," please explain briefly.

41. Have you had any major disputes or litigation with the United States government or District of Columbia government in the past four years? If "yes," please explain briefly.

42. Other than what you have stated in answer to a previous question, or the relationships we all have in common with the government, do you, or does any relative or close friend, have any special connection with the District of Columbia government? If "yes," please explain briefly.

Part IV

43. Have you, any member of your immediate family, or a close personal friend ever been employed by any local, state or federal law enforcement agency? If "yes," please explain briefly.

44. Have you, or has any member of your family, ever contributed to an organization sponsored by, or for the benefit of, law

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D.U.I.D. Defense Technics:

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Examination, vital sign readings, muscle tone examination, nasal examination F.S.T.s and interrogation of the suspect.

The testing process takes about 45 minutes and is conducted by the D.R.E. who is a non-medical person (i.e. a cop).

Observations and testing may or may not be video-taped but the D.R.E. will record his findings on the DRUG EVALUATION FORM.

Upon completion, the D.R.E. will then make a guess as to what class of drugs the suspect is or has been using. There are 7 classes to choose from.

Finally the suspect will be asked for a blood/urine sample to be analyzed later by the toxicologist.

The Opinions Of The D.R.E.

The D.R.E. will attempt to give two (2) opinions. The first will be that the suspect is intoxicated at the time of the examination.

The second will be the class of drug that the suspect has been using. This opinion will also be a direction to the toxicologist as to which drug to test for presence in any specimen analyzed.

The Second Refusal

There are really two (2) possible refusals in this area by the suspect.

First there is a refusal to participate in the para-medical testing process. Second there is a refusal to give a specimen of blood/urine. Remember that our suspect has already given a breath sample.

A question arises as to whether or not the police must give a second warning to the suspect.

Further, there is the question of administrative sanctions (i.e. attempted drivers license revocation) in the case of either of these second refusals.

New Items Of Evidence To Consider

1. The Drug Evaluation Form
2. Roadside video-tapes
3. Second refusal evidence
4. New warning forms

Defending the D.U.I.D. Case

MOTIONS TO SUPPRESS will assume a larger role. The possible items to be suppressed are: opinions of the D.R.E.; test results of para-medical tests; test results of specimens of blood/urine; opinions by the toxicologist; second refusal evidence and Probable Cause to arrest, are just a few.

The TIME OF DRIVING is still the critical point at which intoxication must be shown to have occurred.

Rules against EXPLORATORY SEARCHES (fishing expeditions) must be called to the attention of the Court. (*Stanford v. Texas*, 85 Sup.Ct. 506).

LACK OF KNOWLEDGE of drug effects, LACK OF WARNINGS by Physicians AND LACK OF WARNINGS ON PRESCRIPTION LABELS are viable defenses. Intent or "MENS REA" in a limited form may be required proof by the state in a D.U.I.D. prosecution.

The equitable principle of "CLEAN HANDS" applies four-square in this D.U.I.D. scenario.

We also encounter the idea of HOW FAR CAN THE POLICE GO in detecting violations of law. Where is the stopping point? When do they need a search warrant? Where is the probable cause and what is it?

Conclusion

This new area of D.U.I.D. has been opened up for the Defense Bar in Texas. It goes beyond D.W.I. as we have formerly known it. New expertise by defense counsel will be required in the presentation of a credible defense for persons charged with D.U.I.D..

The State is employing these new procedures in an attempt to "CORROBORATE" the arresting officer's opinion of intoxication, which was shown to be in error by their own police machine in the first place.

The police with huge budgets are attempting to acquire scientific-sounding and scientific appearing evidence to support their allegations of wrong doing. However, such evidence has little or no scientific basis and is certainly *not generally accepted* in the scientific community to which it belongs. (and that community is not the police ranks)

It is interesting that the RIGHT-TO COUNSEL, denied in D.W.I. cases prior to breath testing, may now have arisen from the judicial grave in D.U.I.D. cases.■

Roy T. Rogers, Jr. is a solo practitioner in Houston, Texas. He obtained a B.A. Degree in Accounting from the Rice Institute in 1958 and his LLB. from the University of Houston in 1961. He served 2 years in the U.S. Army, Judge Advocate General's Corps and has practiced in Houston since his return from active duty. A long time member of TCDLA and a member of the College of the State Bar of Texas, he concentrates his practice on D.W.I.—D.U.I.D. cases. He was a candidate for County Criminal Court at Law Judge in 1986 in Houston.

Editors Column

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enforcement officers (e.g., the Metropolitan Police Boys and Girls Club, the Fraternal Order of Police, etc.)? If "yes," please explain briefly.
45. Have you or any member of your immediate family ever studied law, practiced law, or been employed by a lawyer or law firm? If "yes," please explain briefly.
46. Have you ever served on a grand jury? If "yes," please explain briefly.
47. Have you ever served on a trial jury? If "yes," were the case(s) criminal? civil? other? Please state where and when you have so served.

Part V

48. Do you attend church or synagogue on a regular basis? If "yes," please explain briefly.
49. Have you, or has any relative or close friend, ever had a drinking problem or suffered from alcoholism? If "yes," please explain briefly.
50. Do you hold any personal opinions about alcoholism? If "yes," please explain briefly.
51. Have you, or has any relative or close friend, ever been addicted to any drug? If "yes," please explain briefly.
52. Have you had any other personal or family experience with substance abuse? if "yes," please explain briefly.
53. Do you have any opinion as to whether certain drugs that are now illegal should be legalized? If "yes,' please explain briefly.
54. Do you have any opinion as to whether a person is ever justified in lying after having taken an oath to tell the truth? If "yes," please explain briefly.
55. Do you hold any personal opinions about the use of undercover, or "sting," operations by law enforcement agencies, in which, for example, friends or associates of a subject cooperate in monitoring the subject's activities? If "yes," please check the response below which most accurately reflects your opinion. __I am opposed to such methods. __I favor the use of such methods. __I have some reservations about the use of such methods, but realize they are sometimes necessary. Please explain briefly, if you wish.
56. Do you have an opinion about the fairness of law enforcement agencies using concealed video and audio recording devices during the course of an undercover investigation? If "yes," please check the response below which most accurately reflects your opinion. __I am opposed to the use of concealed recording devices. __I favor the use of concealed recording devices. __I have some reservations about the use of concealed recording devices, but realize they are sometimes necessary. Please explain briefly, if you wish.
57. Do you hold any personal opinions about persons engaged in the fields of law or law enforcement (e.g. the Metropolitan Police Department, the FBI, or the Drug Enforcement Administration)? If "yes," please explain briefly.
58. Do you have any personal opinions about politicians or high government officials in general? If "yes," please explain briefly.
59. Do you hold any opinions about the District of Columbia's form of government? If "yes," please explain briefly.
60. Do you have an opinion as to whether race or politics played any part in the charges against Mr. Barry? If "yes," please explain briefly.
61. Have you ever believed yourself to be a victim of prejudice of any sort? If so, explain briefly.
62. Have you, or has any relative or close friend, ever been a victim of a crime? Charged with a crime? A witness to a crime? If any answer is "yes," please explain briefly.
63. Have you, or has any relative or close friend, ever been falsely accused of a crime? If "yes," please explain briefly.
64. Have you, or has any relative or close friend, ever participated in a criminal trial in any other capacity (e.g., party, lawyer, witness, juror, investigator, etc.)? If "yes," please explain briefly.

Part VII

65. If, during the course of jury deliberations, a fellow juror should suggest that you disregard the law or the evidence, and decide the case on other grounds, would you, as a juror, be able to reject the suggestion and abide by your oath to the Court to decide the case solely on the evidence and the law as the Court has instructed you, without regard to sympathy, bias or prejudice? If "no," please explain briefly.
66. Do you hold any religious or philosophical beliefs that forbid your rendering judgment upon the innocence or guilt of another person? If "yes," please explain briefly.
67. Would a defendant's religious beliefs, or the fact that a defendant had asked for Divine forgiveness, affect your judgment upon his innocence or guilt of a criminal charge in any way? If "yes," please explain briefly.
68. Is there anything, or any reason at all, however personal or private, that makes you feel you should not serve as a juror on this case, or could not be a fair and impartial juror? If "yes," please explain briefly.
69. Do any of the foregoing questions touch upon matters that you regard as deeply personal and would like to keep private, that is, not released to the press or public generally? If "yes," please identify those questions by question number alone.

I declare under penalty of perjury that the foregoing answers to each question are true and correct, to the best of my knowledge and belief.

_____
Signature

_____
Date

*****

Judge Morris L. Overstreet Challenges Judge Louis E. Sturns for Texas Court of Criminal Appeals Position

In our Summer 1990 issue this column announced the appointment of Judge Sturns to the Texas Court of Criminal Appeals and also ran an extensive biographical article on him. Because of several unavoidable delays, the announcement, previously aimed for a much earlier issue, was included in the Summer issue.

Several members asked me whether, in view of the impending November elections, any mention would be made of Judge Overstreet, who is challenging Judge Sturns. The point is well taken. Fair is fair. What I should have done was contact every single person running for the Texas Court of Criminal Appeals and run their photographs and biographical resumes. However, when all of this came up, there was not time to include it in this issue. Politics has never been my strong suit, but I can see where supporters of these two judges as well as supporters of other candidates would be very sensitive to this kind of magazine exposure. Suffice it to say that the *Voice for the Defense* magazine does not and cannot endorse any candidate for political office for obvious reasons.

Judge Morris Overstreet was born and raised in Amarillo, Texas. He graduated from Angelo State University and Texas Southern University School of Law and was licensed to practice in 1975. He served as an Assistant District Attorney for the 47th Judicial District Attorney's Office from 1975 through 1980. Judge Overstreet was in the private practice of law from 1981 through 1986 and practiced in the area of Criminal, Family, Personal Injury, and Worker's Compensation. In 1986, he was elected Presiding Judge of the Parker County Court of Law #1, a Statutory Court of General Jurisdiction. He has served as Presiding Judge since January 1, 1987, through the present

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Search and Seizure

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Appendix B
Representative Court of Criminal Appeals' Decisions Finding No Reasonable Expectation of Privacy

Voelkel v. State, 717 S.W.2d 314 (Tex. Crim. App. 1986) — no reasonable expectation of privacy in hotel room when officers are summoned at manager's request to evict defendant from room.

Mulder v. State, 707 S.W.2d 908 (Tex. Crim. App. 1986) — no reasonable expectation of privacy in photographs of the defendant, showing his wounds, taken at the jail after his arrest.

Manry v. State, 621 S.W.2d 619 (Tex. Crim. App. 1981) — no reasonable expectation of privacy in public waiting room at doctor's office.

Gellett v. State, 588 S.W.2d 361 (Tex. Crim. App. 1979) — no reasonable expectation of privacy in Foley's dressing room where posted signs indicated dressing room is under surveillance.

Green v. State, 566 S.W.2d 578 (Tex. Crim. App. 1978) — no reasonable expectation of privacy in peep show booth when curtain covering exit to the booth was left partially open. *Contrast, Liedman v. State*, 652 S.W.2d 942 (Tex. Crim. App. 1983) — finding legitimate expectation in "glory hole" booth of adult theater.

Appendix C
"Automobile Exception" Representative Supreme Court Decisions: Warrantless Searches of Vehicles and Effects

•*California v. Carney*, 471 U.S. 386 (1985) (Motor home)

•*U.S. v. Ross*, 456 U.S. 798 (Heroin in paper bag in trunk of car)

•*New York v. Belton*, 453 U.S. 454 (1981) (Interior of automobile following lawful custodial arrest of driver)

•*Carroll v. U.S.*, 267 U.S. 132 (1925) (The original "automobile exception" case)

•*Chambers v. Maroney*, 399 U.S. 42 (1970) (*Carroll* doctrine extended to subsequent search at police station)

•*Cardwell v. Lewis*, 417 U.S. 583 (1974) (Exterior of automobile)

•*Michigan v. Thomas*, 458 U.S. 259 (1982) (Gun in air vent)

•*Michigan v. Long*, 463 U.S. 1032 (1983) (Protective search of car for weapons)

•*United States v. Johns*, 469 U.S. 478 (1985) (Three day delayed search of truck in custody)

•*Arkansas v. Sanders*, 442 U.S. 753 (1979) (Marijuana in suitcase in trunk of car; invalid auto search — officers tried to "bootstrap" probable cause they had to search suitcase by waiting until it was placed in trunk and claiming "automobile exception") *Contrast, Ross.*

•*U.S. v. Chadwick*, 433 U.S. 1 (1977) (Footlocker in trunk of car; invalid auto search — officers had probable cause to search footlocker but waited until it was placed in trunk; then tried to claim "auto exception") *Contrast, Ross.*

•*Preston v. U.S.*, 376 U.S. 364 (1964) (Search not valid as incident to arrest as not contemporaneous)

•*Cooper v. California*, 386 U.S. 58 (1967) (Search of car at police station valid because car held for forfeiture)

•*Duke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (Not valid as incident to arrest because not at same time and place)

•*Texas v. White*, 423 U.S. 67 (1975) (If probable cause plus exigent circumstances exist, search of vehicle at later time and place valid)

•*Cady v. Dombrowski*, 413 U.S. 433 (1973) (Search of car to protect public against persons who might obtain gun of driver valid)

Appendix D
Search Warrants

Both the federal and state systems apply a totality of the circumstances test in determining whether a warrant is supported by an affidavit that contains probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983); *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App. 1989).

The former "rigid" two-pronged tests of *Aguilar-Spinelli* are no longer strictly enforced. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1964). That does not mean, however, that these tests are dead.

Gates did not do away with the two requirements used in the *Aguilar-Spinelli* test (reliability of informant and basis of knowledge). Instead it held that the prongs need not be applied strictly and the entire affidavit should be considered. For example, a defect in one prong could be "cured" by a strong showing in the other. *Ware v. State*, 724 S.W.2d 38 (Tex. Crim. App. 1986). *See also Cassias v. State*, 719 S.W.2d 585 (Tex. Crim. App. 1986) (facts too imprecise and disjointed to satisfy *Gates* test); *Ware v. State*, 724 S.W.2d 38 (Tex. Crim. App. 1986) (*Gates* test not satisfied because no underlying information given; affidavit contains allegation that witness had personal knowledge defendant threatened to kill witness in pending criminal case). The key focus is on the reasonableness of the magistrate's decision in light of all the facts before him.

As seen in *United States v. Leon*, 468 S.W.2d 897 (1984) (modifying the exclusionary rule and creating "good faith" exception), officers relying on a warrant must be acting in objective good faith. Reviewing courts should not conduct a de novo review of the issuing magistrate's determination that probable cause was shown. *Massachusetts v. Upton*, 466 U.S. 727 (1984). Moreover, in making a probable cause determination, the magistrate is limited to the four corners of the affidavit. *Miller v. State*, 736 S.W.2d 643 (Tex. Crim. App. 1987).

However, if there are false statements or misrepresentations made in the affidavit, different rules apply. A defendant may go beyond the four corners of the supporting affidavit to show that a false statement was knowingly or intentionally made, or was made with reckless disregard of the truth. Once a defendant makes a preliminary showing that such a statement was made, he is entitled to a hearing. *Franks v. Delaware*, 438 U.S. 154 (1987). At that hearing the defendant must prove by a preponderance of the evidence that the statement is false. Even then he is not entitled to relief unless when the false statement is excised from the affidavit, what remains is insufficient to show probable cause. *Franks, supra*; *Dancy v. State*, 728 S.W.2d 772 (Tex. Crim. App. 1987). Note that a misstatement in an affidavit that is the result of negligence or inadvertence (rather than one made intentionally or with reckless disregard of the truth) will *not* invalidate the warrant. *Archer v. State*, 607 S.W.2d 539 (Tex. Crim. App. 1980).

Appendix E
Reference Material

W. La Fave, "Search and Seizure" (1988) (multivolume set)

Goldstein, "Search and Seizure," 15th Annual Advanced Criminal Law Course

Continued on page 39

State v. Mattox Footnotes

Continued from page 33

16. The defendant Mattox was never charged, in the indictment or elsewhere, with any illicit pecuniary gain.

17. See, e.g., the author's comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U.Chi.L.Rev. 562 (1980).

18. Tex. Code Crim. Proc. Ann. art. 44.01 (Vernon Supp. 1985) prohibits appeals by the state in a criminal case when a judgment of not guilty is rendered by the trial court. Thus in virtually all cases no appellate review—the only process which in Texas generally produces written opinions—is available when the State loses the case on a verdict and judgment of not guilty in the trial court.

19. H. Packer, *supra* note 4, at 73.

20. Indictment No. 73, 737, filed Feb. 16, 1984 in 147th Judicial Dist. Court of Travis County, Texas (a reindictment of No. 72,163). The full text of the indictment is printed in the appendix to *Ex parte Mattox*, *supra* note 15, 683 S.W.2d at 98-99.

The author is unaware of any requirement in Texas law that indictments must be drafted in the form of a single run-on sentence.

21. Texas Penal Code Ann. §32.43 (1974). See note 1, *supra*. Emphases are supplied for words whose importance will be explained subsequently. The full text of section 32.43 as it existed when this action arose is supplied below:

§ 32.43 Commercial Bribery

(a) For purposes of this section:

(1) "Beneficiary" means a person for whom a fiduciary is acting.

(2) "Fiduciary" means:

(A) an agent or employee;

(B) a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary;

(C) a lawyer, physician, accountant, appraiser, or other professional advisor; or

(D) an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association.

(b) A person who is a fiduciary commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit as consideration for:

(1) violating a duty to a beneficiary; or

(2) otherwise causing harm to a beneficiary by act or omission,

(c) A person commits an offense if he offers, confers, or agrees to confer any benefit the acceptance of which is an offense under Subsection (b) of this section.

(d) An offense under this section is a felony of the third degree. Tex. Ann. Penal Statute (Branch 3d ed. 1974)

22. Throughout the trial the prosecution insisted that McDade's client was equally Caldwell's client in every respect. This description of Mobil Oil Corporation as "McDade's client" is not intended to beg this very important legal question, which will be fully analyzed subsequently.

23. The State had an interest in some of the leases pursuant to the Relinquishment Act of 1919, Tex. Nat. Res. Code Ann. §§52.171-52.186 (Vernon 1978 and 1985 Supp.).

24. See Tex. Const. Art. VI, §§4 and 5; Tex. Nat. Res. Code Ann. §51.011 *et seq.* (Vernon 1978).

25. Memorandum of June 17, 1983 Telephone Conversation between Attorney General Jim Mattox and Wiley Caldwell, prepared by Caldwell for Gibson Gayle, Chairman of the Executive Committee of Fulbright & Jaworski. (Copy in possession of the author.) This memorandum, though not entered in evidence, was read by Caldwell from the witness stand, over the objection of defense counsel, on the grounds that its use in this fashion constituted present recollection refreshed. *See Wood v. State*, 511 S.W.2d 37, 43-44 (Tex. Crim. App. 1974).

26. Tex. Penal Code Ann. §32.43(b), (c) (Vernon 1974).

27. Tex. Penal Code Ann. §1.07(a)(6) (Vernon 1974).

28. *See United States v. Tunnell*, 667 F.2d 1182, 1185-86 (5th Cir. 1982 (construing "benefit" in the general bribery statute, Tex. Penal Code Ann. §36.02, whose commission was alleged as a predicate offense of RICO, 18 U.S.C. §1962). This broad construction of "benefit" should not, however, be regarded as authoritative. The facts cited in the case show that money—the narrowest and most definite form of benefit—was exchanged, 667 F.2d at 1185, obviating any need for a broader construction of "benefit."

29. 686 S.W.2d 132. (Tex. Crim. App. 1985) *Accord, Garrett v. McCotter*, 807 F.2d 482, 485 (5th Cir. 1987).*But cf. Martinez v. State*, 696 S.W.2d 930, 932-33 (Tex. App.—Austin 1985 pet. ref'd.) (dispensing with proof of bilateral arrangement where it is directly alleged that a benefit was offered as consideration for an official act) (decided August 28, 1985, after Mattox indictment and trial).

30. Tex. Penal Code Ann. §36.02 (Vernon Supp. 1985)

31. *McCollum v. State*, *supra* note 29, 686 S.W.2d at 136.

32. The court, *id.*, slightly misquoted the expression from §36.02(a)(2) by substituting "a" for "any."

33. See, e.g., *Ex parte Harrell*, 542 S.W.2d 169, 171-72 (Tex. Crim. App. 1979); 53 Tex. Jur. 2d "Statutes §§186, 188 (1964).

34. 14 Tex. Jur. 3d "Contracts" §123 at 207-08 (emphasis supplied).

35. See, e.g., Tex. Rev. Civ. Stat. Ann. Art. 709 (Vernon 1961) (review of county and municipal bonds); Tex. Rev. Civ. Stat. Ann. Art. 4398 (Vernon 1976) (same); Tex. Rev. Civ. Stat. Ann. Art. 709a (Vernon 1964) (approval of bonds of improvement districts of home rule cities); Tex. Rev. Civ. Stat. Ann. Art. 709d (Vernon Supp. 1985) (procedures for Attorney General's review and approval of validity of bonds of counties, cities, and other governmental entities); Tex. Rev. Civ. Stat. Ann. Art. 2368a.1 §7 (Vernon Supp. 1985) (review of certain public securities not classified as bonds but denominated as certificated of obligation); Tex. Educ. Code. Ann §20.06 (Vernon 1972) (review of school district bonds); Tex. Water Code Ann. §51.417 (Vernon 1972) (review of bonds of water control and improvement districts); Tex. Water Code Ann. §54.513 (Vernon 1972) review of bonds of municipal utility districts).

36. "Right" and "duty" are fundamental legal terms which are correlative to each other in the sense that when one person has a right in relation to another, the other has a duty to the first person corresponding to that right. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30-32 (1913). Consideration is thus the concept encompassing the valid mutual creation of rights and duties by the parties to a contract. Because Mattox allegedly offered to incur no duty to which Wiley Caldwell did not already have a correlative right, no consideration arose as could have arisen from the alleged events.

37. See, e.g., *Restatement (Second) of Contracts* §73, comment b (1979) ("A bargain by a public official . . . for performing his duty is . . . unenforceable as against public policy . . . [P]erformance of the duty is not consideration for a promise."); 1 Williston, A *Treatise on the Law of Contracts*, §132 at 557, 558-59 (Jaeger ed. 1957); 1A *Corbin on Contracts*, §180 (1963).

38. *Chapapas v. Delhi-Taylor Oil Corp.*, 323 S.W.2d 64, 67 (Tex. Civ. App.—San Antonio, writ ref'd n.r.e.) (Pope, J.) (general contract principle that promise to perform pre-existing legal duty is not valid consideration for promise of another). *Accord, McCall v. Texas Dragline Service Co.*, 188 S.W.2d 243, 245, 246 (Tex. Civ. App.—Galveston 1945, writ ref'd w.o.m.); *DePuy v. Lone Star Dredging Co.*, 162 S.W.2d 161, 164-65 (Tex. Civ. App.—San Antonio 1942 writ ref'd w.o.m.); *Witherspoon v. Green*, 274 S.W. 170, 171 (Tex. Civ. App.—Dallas 1925, no writ) (discharge of legal duty to execute release of forfeited oil and gas lease was not sufficient consideration for promise to pay for release); *Johnson v. Johnson*, 272 S.W. 225, 227 (Tex. Civ. App.—Texarkana 1925, no writ). Though these cases do not expressly deal with the duties of a public official, the principle of contract law which they announce plainly applies to the performance of any legally imposed duty, whether created by privately contracting parties or by legislation and statute.

39. *McCallum v. State*, *supra* note 29, 686 S.W.2d at 134 (quoting from the Explanatory Comment to Branch's Ann. P.C. 3d ed., Vol. III, §36.02).

40. Tex. Penal Code Ann. §§8.05 and 36.01 (Vernon 1974 & Supp. 1985) contain definitions of "duress" (as a defense) and "coercion" (as an element of certain crimes), respectively. Nothing in these definitions is inconsistent with the meaning of duress in the context of contractual relations. All have the central meaning of an inducement to produce involuntary assent in another.

Moreover, even were these penal code definitions inconsistent with the civil meaning of duress, it would be appropriate to use the latter meaning here, because the bargaining context of bribery requires it. See Tex. Penal Code Ann. §1.05(b) (Vernon 1974) (terms may be construed differently from code definitions when context requires it).

41. *Dale v. Simon*, 267 S.W. 467, 470 (Tex. Comm'n App. 1924 judgment adopted). See generally 31 Tex. Jur.3d "Duress and Undue Influence" §§1-3 (1981).

42. *Ward v. Scarborough*, 236 S.W. 434, 437-41 (Tex Comm'n App. 1922, judgment adopted.) *Accord, Dale v. Simon*, *supra* note 41, 267 S.W. 467.

43. *Richardson v. City National Bank of Olney*, 61 S.W.2d 137, 138 (Tex. Civ. App.—Fort Worth 1933, writ dism'd).

44. *Id.*

45. *Ward v. Scarborough*, *supra* note 42, 236 S.W. at 437, 439.

46. 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972) (review of convictions under the Hobbs Act, 18 U.S.C. §1951).

47. *Id.* at 72. *But cf.*, e.g. *United States v. Hathaway*, 534 F.2d 386, 393-94 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) ("bribery and extortion as used in the Hobbs Act are not mutually

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Editor's Column

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time. He is a candidate and Democratic nominee for the Texas Court of Criminal Appeals, Place 5. Judge Overstreet is very involved in civic affairs. He has served on the boards of directors including United Way of Amarillo, Big Brothers/Big Sisters, the YMCA, the Rape Crisis Center, the Panhandle Health Systems Agency, and Mental Health/Mental Retardation. He is a sustaining member of the Texas Democratic Party and a charter member of both the North Amarillo Political Action Committee and the Texas Coalition of Black Democrats. He is also very involved in the Mount Zion Baptist Church.

Judge Overstreet, we also wish you luck!

Search and Seizure

Continued from page 37

(State Bar of Texas)
Meeker, "Warrantless Searches and Seizures," *Voice for the Defense* (five part article, Nov. 1988 — Mar. 1989)
2 *Criminal Trial Handbook* (Hanford Press (1989)
1 *Texas Criminal Practice Guide* (1988), Divisions II and IV
Baker, *Texas Criminal Procedure Handbook* (1988)■

Footnotes

2. With the advent of this good faith exception, the area of challenges to searches based on warrants has greatly decreased.

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