TRUE BILL

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PROSECUTION OF D.W.I.

Plus WHAT HAPPENED to the Council

The Director's Corner

by Andy Shuval

The other night I was sitting at home with Betty (the American version of "She Who Must Be Obeyed") reminiscing about the last seven years, recalling:

The lonely days in Hidalgo County when nobody, not even the first FBI agent assigned, wanted to be seen with me in public;

The mandamus action to enforce the Council's right to provide technical assistance when the Supreme Court took the unusual action of explaining why it would not take jurisdiction, thus telegraphing its opinion that the Council in fact had the authority;

The loss 9 to 0 before the same court of the McInnis appeal; the sweet victory (of course) when the court reversed itself 5 to 4 on rehearing;

The first advisory committee meeting and the last. There were many good times with many good people.

While in this blissful state She Who Must Be Obeyed remarked that before I got carried away I ought to consider rereading Don Quixote. I might learn the advantages of going with the flow at times. She quoted the following bromide:

"God grant me the serenity to accept the things I cannot change and the courage to change the things I can and the wisdom to know the difference."

Of course, she's right. But I can't help wondering: how does a fellow know which is which until he tries?

What a wonderful seven years!

As I sat down to write this last column, I was struck by the quality of the people I've served. Prosecutors are a special lot. Last month while watching "the youngsters" at the Basic school, it occurred to me that they resembled doughboys on the way to the French front in 1917. Idealistic youth, all too soon to be matured beyond their years.

You prosecutors should be very proud of what you do. The fair and impartial administration of criminal justice is essential to the proper functioning of a free society. I am honored to have been associated with you. KEEP THE FAITH!

Postscript: Several folks have asked what I'll be doing after August 31st. On September 1, 1965, I started a practice in Hereford. On September 1st this year I'll do it again in Austin. Twenty years ago I had a set of used Reporters, $200 in the bank, and a lot of faith. Today I have twenty years experience, the friendship of many prosecutors, and a lot of faith. Unfortunately, you are not the criminal type, but I may have occasion to use my certification as a criminal law specialist when a special prosecutor. If the occasion arises in your jurisdiction, please remember me. **Have gun. . . Will travel!**

WHERE DO WE GO FROM HERE?

Well, the Council staff is going its separate ways. For the concerned, the interested, or the merely curious, here are some of our plans:

Andy is going into private law practice (see his column, opposite).

Kathy Givens, Andy's Administrative Assistant, will finish up her degree in Computer Science and also work part-time for Covington Information Systems, the company for our computer system.

Oscar Sherrell is retiring (for the **second** time; he tried to retire as Financial Officer, and Andy drafted him again, this time as Director of Administration.) Oscar has always been an entrepreneur; I don't think he'll ever **really** retire.

Mary Hees, our Mailroom Manager (and our resident excellent cook!—just ask anyone here) is still looking for employment. Mmmm. . . will I miss her carrot cake.

E. K. Murray, our Investigator, will go to work on September 1st for (how can I put this delicately?) -- well, it's the defense firm of Kazen & Ray in Austin.

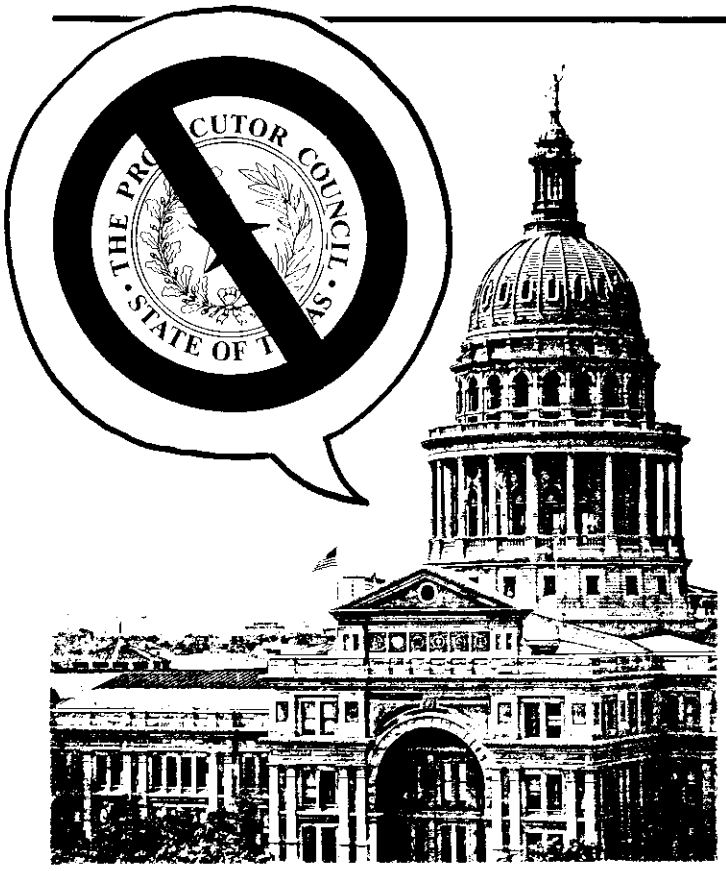
Bill Weston, our Financial Officer, took a position effective August 5th with the State Board of Pharmacy.

Victoria Bazeley, Administrative Assistant to both Bill and David, has not secured a position as of this writing. But I'll make bets she has by the time you're reading it. (Small plug coming:) She was a major help, particularly since she took over publication orders. She has great orgainizational ability, works fast, and likes challenges. Employers, take note!

Yours truly, David Kroll, finished up this issue and on August 1 began with the State Bar Professional Development Program as the Director of Video Education. (Give me a call if I can help you: 512/475-6734.)

My thanks to the staff, the prosecutors, and the others who helped make my job interesting and enjoyable. I'll miss you, and I wish you all the best.

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



How the Council Died

Two top-notch investigative reporters shed light on the Council's demise. The first article is by Karen Hastings for the Fort Worth Star-Telegram. The second, by Ken Herman, is an Associated Press release.

ERROR DEALT FINAL BLOW TO PROSECUTOR COUNCIL
by Karen Hastings, Fort Worth Star-Telegram

It was the kind of tight-fisted legislative session that had every sacred cow, every ivory tower and every sacrosanct state agency quaking. When the dust had cleared, however, only a few had been felled by the budget ax.

One was an intensely controversial agency that many believed had misused its authority to regulate hospital construction. Another was a marine and coastal research agency that hadn't studied much of anything in four years.

And another was a small 7-year-old agency supported by virtually every major district attorney in the state, with the kind of name that should have found favor with law-and-order legislators: the Texas Prosecutors [sic] Council. It died in one of the final days of the session, brought down not by a vote of the majority but by the kind of technical printing error that usually is ignored.

Rep. Charles Evans of Hurst, who was shepherding a group of bills that included the Prosecutors [sic] Council, remembers being shocked when a "point of order" was called on the error. "I was shocked when it went down on a point of order, because I thought it was all worked out," said Evans, adding that there was no time later to correct the error and bring the bill back up for a vote.

"We got sabotaged, no question about it," said Tarrant County District Attorney Tim Curry, chairman of the council. "But I just can't tell you by whom."

Why the Prosecutors [sic] Council died, when other agencies survived, has turned into a political whodunit, with plenty of suspects.

Was it an enemy in high places--House Speaker Gib Lewis--who pulled the lethal strings? Was it the agency's controversial director, who clashed with legislators and failed to make a persuasive case for continued funding? Or was it the agency itself—created to police, train and help provide technical assistance to prosecutors around the state--which just didn't meet the tough budget squeeze test?

In the end it was all of the above, plus the bad luck of coming up for sunset review before the Texas Legislature of 1985.

The Prosecutors [sic] Council was created in 1977 after an ornery Wichita Falls district attorney was disbarred but refused to resign his elected office.

Council Director Andy Shuval, himself a former district attorney from Deaf Smith County, said the state needed a way to investigate complaints against elected prosecutors and--when necessary--take steps to remove them from office.

Since its creation, the council had grown to a $600,000 a year agency with a $54,500 per year director. Shuvall [sic] says the

agency had dramatically improved the quality of prosecution in the state through its seminars and grievance investigations. The council's critics say it had grown by taking over duties that already were being performed by other agencies.

"It pretty well insinuated itself into a system that was already working," said Rep. Jim Parker of Comanche County, who voted on several occasions to get rid of the agency and raised the point of order that killed it. "I couldn't see a great number of things the Prosecutors [sic] Council did that were unique. Pretty well all of its functions were things that somebody was already charged with doing."

In 1984, the council docketed 119 formal complaints against prosecutors. That same year, 75 complaints were dismissed, and one resulted in a private reprimand, two in public reprimands and one in a removal lawsuit.

The council's critics say the State Bar, with its network of local grievance committees that review complaints against attorneys can take back those disciplinary duties. But prosecutors see problems.

"I think local (State Bar) grievance committees are reluctant to take on a prosecutor with a lot of stroke. He has the power to retaliate," said Curry.

Steve Capelle, director of the private Texas District and County Attorneys Association, agreed: "This power was little used historically by the bar since the time of the state constitution so there's no reason to believe it will be any better used now."

In Tarrant County, for instance, one of Curry's top assistants is chairman of the local State Bar Association grievance committee.

Over the years, the Prosecutors [sic] Council also became a clearinghouse for district attorneys who need technical assistance in prosecuting cases or who require an outside prosecutor when a conflict of interest arises.

In Tarrant County, for instance, the council has arranged for outside prosecutors to handle grand jury investigations against Commissioner B.D. Griffin, County Judge Mike Moncrief and one of Curry's assistants. "When it's good for somebody as big as we are, you can imagine how useful it is to little-bitty small counties," Curry said.

Curry and other prosecutors say help from the Texas attorney general's office, which has its own assistance program, often is not appreciated so much.

"Prosecutors wanted some agency that would provide technical assistance, but let them make the political decisions," Shuval said. "Needless to say that's not possible with the attorney general's office. Today, to get help from the A.G., you have to give up the case."

But even friends of the council agree that an independent technical assistance network worked before and should continue to work even without the council's help.

Prosecutors say the council's most important job is helping small county district attorneys—and even big city prosecutors—keep up with the latest legal developments.

Using grant money and its own budget, the council sponsors continuing education courses for prosecutors and reimburses prosecutors for travel costs to other educational events. Prosecutors are concerned that those programs may end. "We're going to have judges that know what the new laws are and police that know what they are, but not prosecutors," lamented Capelle. "There's going to be people who can't go to educational courses 'cause they don't have the money to send themselves. "

Parker, however, sees this service, too, as unnecessary. "They appear pretty educated if they're putting 40,000 people in prison. There doesn't appear to be a crying need to educate prosecutors because they're already doing a good job."

Prosecutors who support the council are angry that it got the ax and are suspicious of the reasons.

"I think unequivocably it was sabotage," said a dispirited Arthur "Cappie" Eads, district attorney in Bell County. "The

Legislature goes in session over there and waves the law and order flag, but they proceed to pass the most destructive legislation," he said. "When you have every major district attorney in the state supporting the Prosecutors [sic] Council and it didn't have a prayer, that ought to tell you something."

Early in the session, council supporters knew they were in trouble. There was no problem in the Senate, but the House Criminal Jurisprudence Committee and the powerful House Appropriations Committee—with the support of Speaker Lewis—voted to cut the agency's budget completely.

Later, after changes were made to satisfy critics, the council was resurrected by way of a sunset bill that provided independent funding—and an attractive extra million dollars for the state—with a 50-cent court charge levied against criminal defendants.

At one point early on—when the agency appeared in deep trouble—Eads and Curry went to see Lewis to ask him to reconsider his opposition. "When we first got the word that the speaker was going to sunset it, we went down to talk to him," Curry said. "The only thing he would tell me is, 'Let me see what I can do.' He never told me he would support it."

"I'm not going to sit still for Gib Lewis calling himself a friend to prosecutors," Eads said. "Gib Lewis told me face to face there wasn't going to be any money for the Prosecutors [sic] Council."

Even without the firm support of the speaker, the council's friends were confident that they had all problems worked out by the time the sunset bill reached the House floor for a final vote. The technical assistance program, which some legislators from larger counties opposed, had been cut back, and education and grievance functions were retained.

But Rep. Jim Parker came to Austin to cut "frivolous" spending, and he had other ideas. Parker said he was angry to see the bill he'd voted to zero budget was back up for a vote. A missing date near the end of the bill gave him the weapon he needed. "I think that probably was the nail that sealed the coffin of the Texas Prosecutors [sic] Council—and I feel good about that," Parker said of the point of order that killed the agency. "It saved the state of Texas some money."

Although some supporters are convinced that the council never would have fallen without a push from Lewis, the speaker's top assistant insists that the will of the Legislature was at work.

Shuval, who is now out of a job, acknowledges that some felt he hurt the council. But he said he offered to resign if that would help, and he rejects the role of scapegoat. "If you don't make your case a year in advance with the legislators they don't have time during the 140 days of the session," Shuvall [sic] said. "We were an afterthought. When they ran out of money they started looking around saying, 'Who can we sunset?'

"One thing that happens in politics is you can serve your constituency at the expense of pleasing the powerful people. I've failed to explain the agency to the powers that be, but the council definitely has the support of prosecutors. I have a stack of letters this thick to prove it." □

"FRIDAY NIGHT AMBUSH"
by Ken Herman, Associated Press

AUSTIN AP - The state agency set up to check allegations of prosecutor misconduct has been killed by a typographical error. Director Andy Shuval of the Texas Prosecutor Council is convinced his agency was the victim of a legislative hit, a quick, calculated, killing blow. The "Friday Night Ambush," Shuval calls it.

The bill needed to keep the council alive came to the House floor on the final night it could have been considered. Missing in the measure was a needed reference to 1985, the year the agency would die if not renewed.

A point of order was raised and sustained, barring a House vote on the measure. Here's Shuval's version of how the

hit was plotted: The Legislative Council, which drafts and checks bills, discovered the error. The council notified Speaker Gib Lewis' office, where someone told the council not to correct the error.

When the Senate-approved bill came to the House floor, just before the deadline, Rep. Jim Parker, D-Commanche, pointed out the error and had the bill killed.

"The only person that didn't like us was Jim Parker," said Shuval. Moments after he shot down the $600,000-a-year agency, Parker said, "Obviously, this was an agency that really did nothing unique." Of the kill he said, "I had some help from the people in the Legislative Council."

Some, including Rep. Terral Smith, R-Austin, point to Lewis' aide Neal T. "Buddy" Jones as the probable hit man. "It's my understanding that the Legislative Council saw the error, somehow notified Buddy Jones or somebody in the speaker's office and was told to leave the point of order in the bill," Smith said. "Buddy Jones has not liked them for years. I do know this, Jim Parker did not find that point of order on his own."

Jones, a former legislator and prosecutor, said it was "not true" that he helped orchestrate the kill.

"I didn't have any personal feelings about it either way, good, bad or indifferent. Frankly, I didn't know a whole lot about it," Jones said of the prosecutor's council [sic]. "I certainly didn't have any role in killing it."

Shuval's agency was one of six "sunsetted" by the 1985 Legislature. It was created in 1977 and coordinated continuing education courses for prosecutors. There has been talk that the State Bar or attorney general's office could take over some of the council's functions.

The council also went after prosecutors who erred, gaining the most attention for its work against former Hidalgo County District Attorney Oscar McInnis in 1978. McInnis had been named in federal indictments alleging he plotted to have the ex-husband of a young female friend taken to Mexico and killed.

The council pushed the case to have McInnis thrown out of office. In 1984, the council field 119 complaints against prosecutors. One private and two public reprimands were issued. One removal suit was filed, sparking a Central Texas district attorney to resign.

Despite the investigations of district attorneys, most prosecutors like the council, according to Smith, who pushed the bill to continue the agency.

"The criminal law these days has become so technical. It has gotten where you have to be a specialist. Prosecutors are still mostly young lawyers coming out of law school. It is important they have continuing legal education," said Smith.

At the start of the session, Smith was for killing the agency. But at the end, he was persuaded it was probably a good thing to keep around. "We can do without it in Texas, but we didn't have to kill it to make the budget," he said.

Shuval himself might have been part of the problem, Smith added. The former Deaf Smith County district attorney, now earning $54,500 a year, has been director since the start. "There are just a lot of people who did not like him," said Smith. "They felt he was trying to build an empire, that it was an inefficient agency, that he was overpaid for what he did."

"There's some validity to those arguments," Smith added.

Shuval said of his agency, which will die Aug. 31, "We have increased the quality of law enforcement generally." The Texans most likely to notice the agency's death are the ones with pending complaints against prosecutors. "There are 10 or 15 complainants that we have to tell the Legislature didn't see fit to recreate this agency," he said.

Smith said, "The common man on the street will never know" the agency is gone.

Indeed, the Prosecutor Council is so little-known that the sign outside the agency office near the Capitol identifies the council as a "state agency." □

LETTERS to the COUNCIL

The Positive Comments

In June the Council asked prosecutors and several other persons involved in the criminal justice system for their appraisal of the Council's performance and whether the Council should be resurrected. What follows are some of the comments, highlighted by ***True Bill.***

It was with deep regret that I learned that the Prosecutor Council had been sunsetted. From my perspective, **the council was particularly valuable to prosecutors in rural counties with small offices.** As a County Attorney with felony responsibility, I am the felony division, the misdemeanor division and the civil division all combined. I unfortunately do not have the luxury of specialization which is enjoyed by many of the larger offices. **The council, through seminars and educational material provided invaluable assistance in keeping prosecutors, such as myself, current.** With all of the pork-barreling and boondoggling in the legislature, I think it is a sad comment on the present session of the legislature that they cared so little for excellence in prosecution.

The Council may be at rest, but it will not rest in peace.

John L. Barnhill
Crosby County Attorney

I truly never thought I would be writing this letter, and I'm sure there's no one in this State more surprised and disheartened at the elimination of the Prosecutor Council by the last Legislature.

I want to thank you for your diligent efforts to assist prosecutors across this State in providing the best service to all of Texas' taxpayers. I know without the Council the criminal justice system in this State would be severely weakened. I want to commend you and your staff in the **professional manner in which you handled complaints against prosecutors** throughout this State and provided all citizens with a platform to air their complaints and have something done about them. In my case, **I know Navarro County would have been at a loss had not you and your staff on numerous occasions provided us with technical assistance** that we would have been unable to get elsewhere and even if we could have obtained such assistance, it would have been after much searching and lost time before we could have acquired same. You have provided my office with films on various aspects of crime that I have shown to numerous groups of people in my jurisdiction and I'm sure it has aided those groups to help themselves in prevention of crimes. **The technical manuals produced by the Council have been an immense help** in my office and we use them daily. For me personally the numerous continuing legal education seminars conducted by the Council will be severely missed, and at this time **I don't know where prosecutors will be able to obtain the high level of education that the Council has brought us. You have provided this office with special prosecutors when we have been faced with a conflict that would not allow us to handle a particular case and for this we will be forever indebted.** For all these things I want to again say thank you, even though I still can't believe it's over.

I sincerely hope and pray that the powers that be in the Legislature will soon reconsider this disastrous move and find some way to reinstate the Prosecutor Council. I feel that the services provided by the Prosecutor Council in criminal prosecutions across this State are invaluable to all our citizens. I am firmly committed to good, professional prosecution in this State as I know you are and without the Prosecutor Council I fear that I am severely limited in providing that service to my constituents. I know my representatives in Austin are aware of the need for the Prosecutor Council and are committed as we are to good criminal prosecution in this State. If I can be of any help in getting the Prosecutor Council resurrected, please let me know what I can do.

Patrick C. Batchelor
Criminal District Attorney
Navarro County

I am disappointed that the Prosecutor Council has been sunsetted.

The seminars and publications of the Council have been invaluable to me since I was installed as County Attorney Pro Tempore in March 1984. The lack of objectivity demonstrated in the Defense seminars points out the need for prosecution oriented seminars and publications which explore creative and proven methods to fairly prosecute persons charged with criminal offenses. I will not be surprised if crime rates again rise as experienced prosecutors leave their offices and inexperienced prosecutors are left without the benefits and services of the Prosecutor Council.

Consequently, I believe that the Prosecutor Council should be re-enacted.

J. C. Adams, Jr.
Cochran County Attorney

As you know, virtually all the State's prosecutors are gravely concerned about the loss of the Prosecutor Council. During its seven years in existence, starting from ground zero, it developed into a valuable aid to prosecution on a statewide basis.

I have no doubt that many spurious complaints against prosecutors were handled expeditiously, and without the time and trouble that would have been involved if those complaints had gone to the grievance committee.

The publication, TRUE BILL, has grown into a valuable source of information concerning recent important decisions.

Additionally, I have personally consulted the Council on numerous occasions when dealing with a problem that was new to me. On all such occasions, **the Council has been able to find a prosecutor who can help me.**

All of us are concerned about "organized crime," particularly in the field of dope dealing. It has always seemed to me that the best way to fight "organized crime," is with ORGANIZED PROSECUTION. **The Prosecutor Council was the State's only attempt to ORGANIZE prosecution on a statewide basis,** and it is difficult for me to understand how they could reasonably abandon this effort. It is my opinion that **the Council should be reinstated at the earliest opportunity.**

Thank you for all the help you have given prosecutors, and I give you every good wish for the future.

Charles D. Houston
District Attorney, 155th J.D.

It was with great shock and dismay that I learned that the Prosecutor Council had been sunsetted by the tactics of one of the legislators in preventing the matter from being voted on by all of the members. **The Prosecutor Council has been very helpful in the past to prosecutors such as I, in supplying much needed information in its publication, the "True Bill." Also the Indictment Manual, and other publications have been especially helpful** in offices such as mine where we do not have the needed staff and manpower or latest publications and libraries to keep up to date on all the latest case law.

The help you and your staff have given in providing special prosecutors over the state, and in particular for several cases in my district has been greatly appreciated and I just hope that your special prosecutor will be permitted to complete the trial of the cases which he presented to the Grand Jury in DeWitt County recently.

Only the criminal element in the State of Texas can benefit by the sunsetting of the Prosecutor Council and the honest, law abiding citizens will most certainly suffer as a result of the action which was taken. **I certainly hope that at the next session of the legislature the Prosecutor Council will be brought back to life** so that the prosecutors over the State can benefit from the Council's help in their fight against the criminal element.

Wiley L. Cheatham
District Attorney, 24th J.D.

I have spent a great deal of time in the past few months thinking about the Prosecutor Council and its accomplishments. Because I was in Austin a lot during the legislative session and kept up with the progress of the Legislature to keep the Council, I thought about the reasons for its existence.

I would like to share with you and the other prosecutors across the state some of my thoughts. **First, I believe that the Council performed a service to both the public and prosecutors by serving as an agency to handle the complaints against prosecutors.** Although at times I felt that I should not have been required to reply to complaints filed against my assistants, I also felt that both my assistants and I were treated fairly and professionally. **I do not believe that there is another state agency which can give prosecutors as fair decisions on complaints involving prosecution.** If you are not a prosecutor, you do not and cannot understand how prosecution works. I believe that in a time when we, as prosecutors, and the public are trying to bring about professionalism in prosecution, the Council would have assisted greatly by setting standards for prosecutors to follow.

The second area I found to be of great assistance was the educational programs put on for prosecutors. Not only were the schools good, they were relatively inexpensive compared to the State Bar courses and courses sponsored by the National College. Unless the Texas District and County Attorneys Association can increase its grant funds we will have no statewide vehicle for funding education programs. Again, I believe this will greatly affect the degree of professionalism we can expect in prosecution.

The third area of endeavor was in the area of technical assistance. As you know, I have been a recipient of, as well as a person who would give, technical assistance. I believe that **the demise of the technical assistance function is the one thing that is going to hurt prosecutors the most. There is no alternative place to go for technical assistance other than the Attorney General.** As you are aware, I have always fought to keep any prosecutor from asking the Attorney General's office for technical assistance. This has been my position since I took office in 1977 and still is my position because **I am afraid that if prosecutors rely on the Attorney General for assistance, ultimately we might find ourselves in the same situation as other states where the Attorney General handles all criminal prosecution.** Also, upon reflection, I believe that this particular area probably led to the demise of the Council because it made a lot of enemies for the Council which we would not have had otherwise. Even the bill that came out

of the House committee took away the ability to perform technical assistance and, had it passed, the Council would have been unable to give technical assistance.

It is my personal opinion that the prosecutors in this state should band together during the next year and push for the re-creation of the Council in 1987. **If we are going to effectively serve the people each of us was elected to serve, we need an agency such as the Prosecutor Council to serve the needs of prosecutors.** Judges are entitled to request visiting judges when they perceive a conflict to serving as judge in a particular case or when they do not understand a particular area of the law. I believe prosecutors should have the same right.

I very much regret that we were unable to keep the Council in some form and am willing to make the re-creation of the Council the number one priority for the 1987 legislative session. I also believe that the public should be made aware of the members of the legislature who worked to sunset the Council and their reasons for doing so (if those reasons can ever be determined). **I believe that to kill an agency which was sponsored by every District and County Attorney in this state is an irresponsible act** by the legislators involved and that the public should understand our feelings in this regard.

I also want to thank you for your service to the Council during its tenure and wish you the best of luck in the future.

Jerry Cobb
Criminal District Attorney
Denton County

This short note of thanks is for the excellent help the Council has provided my office on numerous occasions. **Without the assistance of your agency this office could have possibly have been confronted with some major conflict dilemmas.** Hopefully, the Council will be renewed in the near future so prosecutors can have technical and professional assistance when needed. Your achievements in the past have been appreciated.

S. Dorbandt Carroll
Anderson County Attorney

The loss of the Prosecutor Council is a completely dismaying blow. The Council was vital to the continued good health of prosperity in Texas. **Not only did the Council provide assistance, manuals, training guides, but a source of information from all over the State that is beyond price.**

The disciplinary matters of the Council will not be taken up by any other group or agency. **It was the untiring effort of the Council, through its Executive Director, that brought about the removal of a District Attorney who had plotted the death of another person.** What agency can devote the hours to another such occurrence should, God forbid, one occur?

The Council should be reinstated by the Texas Legislature at its next opportunity for the benefit of the people of Texas.

Richard W. Brainerd
Oldham County Attorney

The Prosecutor Council has been very, very helpful to myself and my office. Since I head up a small office with limited funds, **the Prosecutor Council was particularly helpful to me in the area of financial assistance and training. The True Bill will be missed more than I can say.** I really looked forward to it and read it from cover to cover. **I definitely feel that the Council**

should be resurrected as soon as possible. As a side note, I feel that each prosecutor in our state has a duty to our profession to inquire as to whether or not his or her local representative and senator supported The Prosecutor Council. As for those legislators who did not support the Council, in the "interest of justice," I feel that we should help end their legislative career. It is my personal opinion that the sunsetting of The Prosecutor Council heads up a long list of dismal failures which resulted from our last legislative session. Thank you.

Michael R. Little
District Attorney
75th, 253rd and 344th J.D.'s

As I have expressed before, I am deeply sorry and concerned about the discontinuance of the Council. **You and your staff have been a tremendous help** to my office and I appreciated that very much. I wish you and your staff the very best.

William A. Meitzen
Criminal District Attorney
Fort Bend County

As a frequent user of the Prosecutor Council's many services I was sorry to see the action taken by the sunset committee. Each prosecutor in my office has taken advantage of training seminars and publications provided by the Council.

I want to specifically thank you for providing much needed guidance in matters which required immediate attention. I always felt confident that if I needed an aid in resolving a problem I would get help directly from your office or from a resource you provided. **The Council's ability to act as a clearinghouse for aid to prosecutors is a much needed service that should continue.**

In summary, I felt the Prosecutor Council provided my office with much needed training and assistance. **As a result of its work we were able to provide better prosecution for the citizens of this county. We will sorely miss the Council and hope that one day we will again have the opportunity to work together.**

Bill Turner
District Attorney
Brazos County

I continue to wonder what makes the Legislators tick. I feel that termination of the Council was a mistake, and if at all possible that it should be resurrected. I well remember its establishment and the many questions about its function. Some were for it and some weren't, and some thought that it would weaken the Texas District and County Attorneys Association. The Council started with some confusion, but during its seven years of existence it and T.D.C.A.A. complemented each other very well. **As a prosecutor it was a relief to know that the Council was there to assist when needed, and it came to my rescue when I needed it on one of the worst cases I've ever handled.**

I've never had a grievance filed against me and don't anticipate any, but certainly I realize this possibility. **I would much rather be judged by the Prosecutor Council where there are fellow prosecutors who are members than by a group of non-prosecutors. I know that the Council has acted appropriately and fairly in handling these grievances.**

I feel that the Council was a victim of the times. I'm sure that all prosecutors are aware that our criminal justice system is in a hell of a mess. It has become a political football, and it's my opinion that because of the current overcrowding problems at T.D.C., prosecutors are not

going to be favored by the Legislators any time soon. We prosecutors enjoyed some success in past legislatures, and law and order was of top priority. This is not the case now, and it appears that prosecutors are doing too good of a job. T.D.C. is full and the cost to the taxpayer is tremendous. There is no way that prosecutors are going to be favored, and while there is much lip service by higher officials that they are in favor of law and order they are afraid to build the necessary prisons to house prisoners at today's cost. The Council renders assistance to prosecutors and prosecutors have overcrowded prisons and it appears that there will be darker days ahead of us.

Today's prosecutors as a whole are further advanced than they were ten years ago, and in great part this has been because of training furnished by the Council. I feel we will all miss the valuable training and technical assistance rendered by the Council. Thanks for what I consider a job well done.

Gerald A. Goodwin
District Attorney
159th and 217th J.D.'s

When I first became involved in the field of prosecution, I was a new young attorney fresh from experiences as a Briefing Attorney for a Federal District Judge. As a result of my experience with the judiciary of the Federal Government, I knew where the courthouse was, but did not know the practical applications for prosecution per se. **I found that the Prosecutor Council in conjunction with the Texas District and County Attorneys Association served as a valuable educational tool to further my professionalism in high standards for execution of the duties of my office.** By attending the schools put on by the Association and sponsored by the Council, I not only learned a great amount of information that was useful in the application of prosecution, but also outside of these lectures, I made many friendship and contacts that proved beneficial. Obviously, any lecture cannot cover all of the angles, nor can it answer all of the questions that any prosecutor would have; however, through the budding friendships and contacts made, I was provided with a network of communications that would permit me to call a more experienced prosecutor and ask the pressing questions that I had that needed immediate answers.

My involvement with the Prosecutor Council was increased when I was appointed to the advisory committee, where again I was able to cultivate new friendships and new experiences.. From my experience on the advisory council, I also learned some of the inner workings of the Council and the services it rendered to the prosecutors. All in all, my assessment would be that **the Prosecutor Council served a very valuable function not only in providing the citizens of the State of Texas with a viable prosecution and protection of honest and innocent citizens from criminals, but also by providing the prosecutors information relevant to budgetary operations, assistance in relationships with the Commissioner's Court and how other prosecutors handle similar administrative problems.**

Having reviewed my contacts with the Prosecutor Council, I am unable to find any shortcomings of the Council during its existence. My experience reveals only positive findings as to the competency and the service provided by the Council. As a personal note, I know that in certain situations when the horizons looked the darkest in my personal career, I was able to call the Council and receive a pat on the back, a pep talk and more courage to continue on in my diligent service to the public. For this, I owe a specific thanks to the Council as a whole and to Andy Shuval, individually.

I do feel that the Prosecutor Council should be resurrected because of the reasons I have set forth hereinabove. I believe that the Council was held hostage by an administration that plays only political ball and does not have the best interest of the people at heart. The entire legislative process during the sunset activities indicated "big boy politics" that I shall not forget for a long time. I think that most prosecutors fail to perceive the authority and power that we may have over our legislature. In the sunset battle, it was my perception that we were playing

in the ballpark of the State power structure. We were like a bunch of country boys at a Debutante Ball in New York City—out powered and over classed. **I think that in order to resurrect the Prosecutor Council a grass roots movement by local prosecution involving local citizens is the proper format** in which to reinstate the Prosecutor Council. The reason I state this is that we have a much closer contact with our constituents than the Representatives and Senators who attempt to handle our state's policy. I do believe that our chances may have been better during our sunset process had we contacted the local citizens and local media and requested local pressure than attempt to use our own personal contacts and chats with our legislators in Austin; however, in the ruse, we were always lead to believe that the opportunities were good for passage and continuance of the Prosecutor Council thereby keeping us "off step" and unable to organize a grass roots movement.

Drew T. Durham
Sterling County Attorney

I am somewhat saddened and dismayed over the fact that the Legislature did not extend the Prosecutor Council. I appreciate your help and kindness toward my office during your tenure as Executive Director of The Prosecutor Council. **I feel that the Council has been able to assist and pull together Prosecutors from all over the State and to make us better equipped and qualified to handle our respective offices.** I enclose a copy of letters I wrote to Mr. John Montford and Mr. Jim Rudd earlier in the last legislative session, which expresses my views. Again, I thank you for your friendship and courtesies extended to this "old country prosecutor."

G. Dwayne Pruitt
Terry County Attorney

I was truly disappointed and saddened to learn from your recent newsletter that the Texas Legislature has brought down the curtain on your Prosecutor Council. It is indeed unfortunate that your efforts to improve the professionalism of Texas prosecutors have received such a negative response from your state legislature. I assure you that **your efforts over the past several years have not gone unnoticed by your colleagues, and I for one have enjoyed reading the newsletter and of the many activities conducted by your office.** In addition, I truly enjoyed our brief encounter during your sojourn to Washington, D.C. a few years ago. **Hopefully, your state legislature will reconsider its action** and bring the Council back for an encore performance. In the meantime, please accept my sincere best wishes for success in whatever career you pursue following the Council's demise.

David H. Hugel
Maryland State's Attorneys' Coordinator

First, I have been a prosecutor for almost all the time the Prosecutor Council has been in existence. I have enjoyed and benefited from the programs and conferences the Prosecutor Council has organized and sponsored. I have used the Council's video tape library many times, not only for my education, but also for the education of law enforcement officers in Hill County. I hosted a law enforcement workshop, "Making A Winning Case" and I found that very rewarding and appreciated being asked. I have posed various questions to the Council over the years and have been satisfied with the results. Unfortunately, I found the annual conference in Galveston the best function I have participated in that was done by the Council and the T.D.C.A.A. both professionally and socially. **I do hope the Council will be resurrected because I believe it will be sorely missed by most prosecutors.**

Dan V. Dent
District Attorney
Hill County

In response to referenced letter and your invitation contained in it to reflect on my prospective of its achievements and shortcomings (if any), I just want to say that the seminars and continuing education programs put on by the Council are without equal. In conjunction with this, may I say that **the DPS-Prosecutor Council DWI Seminar in Houston on May 31 certainly can not be equaled anywhere.**

As for True Bill, what can I say! It was informative, it kept us prosecutor's aware of what other professional prosecutors are doing with new and innovative techniques--not only in Texas but across the United States--it had humor, and it had sample questions as to the mechanics of laying predicates, qualifying witnesses. What more could one ask for.

As to re-instituting the Prosecutor Council there can only be one answer: an unqualified"yes" and at the next session of the Texas Legislature.

James W. Smith, Jr.
Frio County Attorney

Please accept my gratitude for a job well done to you and to your staff of the Prosecutor Council. You have provided my office with help and assistance over the past seven years making my work much easier. **The Prosecutor Council has been a wealth of resources** — from "Hot Check" pamphlets, to the updates on important court decisions, to the Crimebiter Program, which was so successful in Bell County.

I sincerely believe that the past legislature should have renewed the Council, but we must now focus on enhancing the possibility of passing future legislation creating a new Council. I am willing to work toward that goal and I know many others are committed to do so, along with me, because prosecutors throughout Texas realize the importance of your agency to our work. Please call on me if I can be of any service to you or your staff.

Patrick J. Ridley
Bell County Attorney

I believe that **the Council is and has been an extremely important part of the law enforcement network.** In my own case, it is of course primarily responsible for me getting into office seven months before I was ready — a mixed blessing at best. **Not only was the Council instrumental in removing my predecessor from office but what success my early administration had was in part a reflection of the effort that you and the Prosecutor Council made on my behalf.**

As you will recall, shortly after my appointment, I was on the telephone to you or to people to whom you referred me several times a week, asking questions and getting advice. Additionally, you were very helpful in helping me secure additional funding from the four commissioner's courts with whom I work. If the Prosecutor Council had not been available to assist me, I probably would not have accepted the governor's appointment early, because I was going to take office on January 1st anyway, and the counties of this district would have had a significant additional expense to set up an interim District Attorney's office. It is my opinion that the efforts of the Prosecutors Council and their executive director saved the counties that money, although I suspect they don't know it.

In any event, **I will actively work for the reinstitution of the Prosecutor Council. My own experience has demonstrated how important it is to have reliable disciplinary procedures and investigative agencies available to oversee prosecutors.** In my opinion, there is no job more fraught with temptation than that of a District Attorney. Thanks for all your help.

W. C. Kirkendall
District Attorney, 25th J.D.

This letter is to express my appreciation for The Prosecutor Council and the good work that you have done these past several years on behalf of the prosecutors in the State of Texas, and especially on behalf of my office.

The services that helped me the most were of course the True Bill Magazine, the Indictment Manual, the Press Releases and of course all Legislative update material. These things saved countless hours and improved my skill and ability immensely.

I would of course hope that The Prosecutor Council would be resurrected in the future, but if not, some form of service should be provided by the Legislature.

If there is anything else I can do on your behalf and on behalf of the Council, please let me know. Thanking you, I am

Warren New
Yoakum County Attorney

First let me say that I was very disappointed to learn that The Prosecutor Council had received such bad treatment by the legislature, as **I felt that it served a very worthwhile purpose for the Citizens of Texas as well as the Prosecutors in this State.**

Your help to my office in providing Special Prosecutors has been greatly appreciated as well as your handling of complaints.

I feel that there is a definite need for The Prosecutor Council and I think every effort should be made to obtain funding for it.

If I can be of any assistance in any way, please let me know. I hope that this letter will be of some help.

Charles D. Penick
Criminal District Attorney
Bastrop County

Please add this letter to the many that I am sure you have received in support of the Council's activities on behalf of prosecutors.

As you recall, it was little more than two years ago when I was suddenly thrust into the position of District Attorney for a multi-county district, and **it was only through your personal assistance, along with the resources of the Council, that allowed me to get through the first few months on the job with some confidence that the office was being adequately handled.** I know that you have provided similar support for other new district attorneys, and that service will be sorely missed in the future.

I strongly urge that the Prosecutor Council be re-established at the first available opportunity and that it be allowed to provide the technical and moral support for the "small office" prosecutor. Otherwise, it gets lonesome sometimes.

I appreciate the fine work you have done in support of the prosecutors of the past and hope that the opportunity will again present itself.

Dan B. Grissom
District Attorney
Hood County

On several occasions in the last few years I have had need for the Council. I have enjoyed the educational opportunities available through the Council as well as your personal advice and the advice of your staff. The Council coordinates news and events from all prosecutors across the state and is **an excellent way for all of us to stay in communication and to exchange information. I found the Council to be of great help to me and would support its resurrection.**

Carter Beckworth
Criminal District Attorney
Gregg County

On behalf of my office and myself, I would like to take this opportunity to express our appreciation to the Prosecutor Council for a job well done. **We have found you and your staff to be invaluable** in providing information and assistance to us when we needed it. As a former county attorney and current district attorney, it has been reassuring on many occasions to receive direction and input on problems and situations concerning prosecutions in our district.

It is our hope that the Prosecutor Council will be resurrected in the near future to continue its service to prosecutors.

J. W. Johnson, Jr.
District Attorney
Pecos, Sutton, Reagan and Crockett Counties

It is difficult to say goodbye to an organization that you assisted in bringing into existence and actively participated in for so many eyars. Apparently only prosecutors realize the full import of the agency and the good works it did.

The Council has more than adquately performed the dictated responsibilities. The people closely involved with this organization be they prosecutors who have gained by the educational programs or the assistance in particular cases provided by the Council or the lay people who have become more familiar of the trials and tribulations of those of us in prosecution, all know that the job has been performed well.

It should be obvious to any of those who have watched the Council, perform, be they friend or foe, that **this organization should be resurrected by another legislature. No one single state agency can perform the myriad of functions so ably done by the staff and board of directors.** Hopefully there will be enough response and enough realization in the legislature of the work previously done that the Council will again rise from the ashes.

The State and its people will suffer because the sun has set on the Council.

Timothy D. Eyssen
District Attorney
Stephens and Young Counties

For the last publication of True Bill, please find enclosed a true and accurate transcript of a recent proceeding in one of our District Courts involving a defendant by the name of. . . [His] opinion of the Judge in this case closely parallels my attitude. Enough said. Good luck and YES! The Council should be reborn. **[see next page for the transcript. —Ed.]**

Jim Mapel
Criminal District Attorney
Brazoria County

Speaking His Mind

OFFICIAL DISTRICT COURT TRANSCRIPT, BRAZORIA COUNTY

[I've taken the liberty of editing the piece for the —ah— whole family to enjoy! —Ed.]

The Court: Now, you are the attorney, Counsel.

Defendant: He's not my lawyer.

The Court: You shut up, [Defendant].

Defendant: You can't tell me to shut up, mother f—er.

The Court: [Defendant] just got six months contempt of court jail time. I want it stacked on top of his present time. [Court Clerk], draw me the Order.

Defendant: F— you, mother f—er.

The Court: You just got six more months.

Defendant: S— my d—, son of a b—.

The Court: Just a minute.

Defendant: F— you, mother f—er.

The Court: That is six more months. [Court Clerk], he has got a year and a half stacked.

Defendant: F— you in your a—. Yeah.

The Court: Counsel, you are going to represent him. We are going to try his case. Now —

Defendant: He's not going to represent me.

The Court: I take it there is no pre-trial orders.

Defendant: He's not going to represent me. You s— my d— again. Give me five more years, mother f—er.

The Court: We will gag [Defendant], sit him out there and try his case.

Defendant: He ain't going to represent me. You're a g—d—ed liar, mother f—er.

The Court: I think I will stack six more months. That is two years stacked for four separate acts of contempt. Stack them on his sentence. Notify the Parole Board.

Defendant: I wouldn't give a g—d—. Notify the president, son of a b—. Stack some more, mother f—er.

The Court: Anything else?

Defense: May I present my Motion, Judge?

The Court: Sure. Take him and just hold him in the holding cell.

Defendant: Kiss my a— on top of that, mother f—er. P—rwood, punk, mother f—er.

Defense: Your Honor, my name is Xxxxx Xxxxxxxxx.

The Court: [Court Clerk], that is four separate acts of contempt. Six months on each one.

Clerk: I will get it.

The Court: I do not want it as a two-year contempt. I want it as to four separate acts. And he is to serve four 6-month jail terms, each stacked upon the preceding one.

The Critical Comments

Below is a copy of a letter sent to and the response from the Honorable Jim Parker, Representative for Brown, Coleman, Comanche, Eastland, McCulloch and Runnels Counties. Mr. Parker is the representative who raised the point of order which prevented the Council's bill for renewal from reaching the House floor for a vote, thus ensuring the Council's demise.

JUL 5 1985

THE PROSECUTOR COUNCIL

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

Andy Shuval
Executive Director

June 25, 1985

The Honorable Jim Perker
P. O. Box 762
Comanche, Texas 76442

Dear Jim:

The Council will be publishing the last issue of its bi-monthly publication True Bill in August. One of the sections will be an examination of the Council's history and activities.

Should you wish to explain your position on the renewal of the Council, you are cordially invited to submit an article or letter for publication in True Bill which has a circulation of over 1,500 prosecutors, investigators, and key personnel.

If you decide to accept the Council's offer to publish your comments, your remarks need to be in the office by Friday, July 19th so that the staff can meet the publication deadline. A full page (600 words) has been allotted to you.

If you have any questions, please call me. Thank you for your consideration.

Sincerely yours,

Andy Shuval

AS:kg

Why not just cancel the last issue and save the money? There are other good uses for it.

Jim Parker

LOOKING BACK

A SUMMARY OF THE PROGRAMS OF THE COUNCIL 1978 - 1985

FUNCTIONS

The Council was created by the 65th Legislature in 1977 as the Texas Prosecutors Coordinating Council. The Council's broad objectives were as follows:

(1) To receive, investigate, and take action on complaints of prosecutorial misconduct and incompetency; to set up minimum standards for prosecutor's offices; to assist the public in understanding the duties and responsibilities of prosecutors;

(2) To provide technical assistance to prosecutors' offices; including, on site assistance, resource and form manuals, telephone advice, and bulletins on new cases and new laws.

(3) To provide professional development and training of prosecutors, their assistants and staff by providing technical manuals, courses and funds for their attendance to approved courses presented by other organizations;

(4) To provide non-legal assistance to prosecutors through information on what other prosecutors are doing, techniques to improve office efficiency and productivity; to provide information to other state agencies on the duties and responsibilities of prosecutors as well as on the needs and status of prosecution.

DISCIPLINE/ETHICS

A major impetus behind the forming of the Council was the need for a means of disciplining prosecutors when they violated the laws or the code of professional conduct. Several gross examples were listed by a study committee headed by Ben Grant, Chairman of the House Judiciary Committee. During its seven year existence, the Council handled over 2,200 inquiries about prosecutorial conduct which were reduced to 440 formal complaints.

These 440 formal complaints resulted in the voting of three removal suits and seven reprimands, three public and four private. Also, at least three prosecutors resigned when faced with a Council investigation.

Besides providing a place to which complaints could be referred, the Council developed among prosecutors a greater awareness of the need for public confidence in the operation of the office. The Council printed articles dealing with ethics in **True Bill**, kept prosecutors aware of the latest decisions on the subject and presented a four-hour ethics segment at the Basic Prosecution Course each year.

TECHNICAL ASSISTANCE

The second major function of the Council was to provide technical assistance to prosecutors. Texas is the only state whose attorney general has no criminal jurisdiction. With 333 elected and independent prosecutors, Texas has more than 3 times the number of any other state. Consequently many offices are small and unable to provide various essential services for themselves.

The Council filled the void by providing up-to-date and accurate forms and manuals such as the Indictment Manual and the Hot Check Manual (see **Professional Development** following) as well as keeping prosecutors informed on the latest court decisions through **True Bill** and the advisory bulletins when needed.

Another important, if not the most important function, is to provide on-site assistance. The Council has given first consideration to the following types of on-site assistance:

1. Where the prosecutor requires special expertise that is not available on his staff to meet a particular criminal matter.

2. Where the case is of such magnitude that the regular staff of the prosecutor's office is unable to handle it.

3. Where the prosecutor feels that the public confidence would be better served by the assistance of an outside prosecutor.

The Council has met this need by utilizing the 1400 prosecutors and investigators already on a government payroll before hiring outside help, thereby cutting down on the number of government employees as well as the overall cost. This system is in contrast to the Attorney General's Prosecution Assistance Program, which, according to the Austin American Statesman, includes more than eight full-time employees. The cost effectiveness of the two programs is striking. The Sunset Advisory Staff Report showed the following comparisons between the two programs:

Technical Assistance Provided to Prosecutors in Fiscal Year 1984

		Attorney General	Prosecutor Council
a.	Number of technical assistance inquiries received	500 (regular phone line) 300 (crime prevention watts line)	638
b.	Number of cases receiving on-site technical assistance	34	35

During fiscal 1984, each agency was budgeted for these functions as follows:

Cost of Technical Assistance Provided in Fiscal Year 1984

		Attorney General	Prosecutor Council
a.	General Revenue Budget	125,200	73,215*
b.	CJD Grant	84,841	
	TOTAL	$211,041	$73,215

*actually spent $68,800

The Council provided the assistance for less than $2,000 per case while the Attorney General required more than $6,000 per case.

The Council also provided telephone advice, acting as a clearinghouse by putting people in touch with others who have the necessary expertise to answer their questions. The Council also provided in-house research and assistance.

The Council is proud of its accomplishments in the area of technical assistance. It is also proud that it has always defended a prosecutor when his jurisdiction or authority was endangered.

PROFESSIONAL DEVELOPMENT TRAINING

To some, this function of the Council was the most important. It provided training seminars, manuals, and a magazine, **True Bill**, for prosecutors and their staffs.

In developing professional development courses the Council, through the Advisory Committee, sought the advice and assistance of prosecutors throughout the state (for an explanation of the committee see **Services** following). The Council produced three annual courses through contract with TDCAA because the Council felt that contracting saved funds and reduced bureaucracy.

The contents of each course was developed and regulated by the Council. The most popular one was the **Basic Prosecution Course.** Originally given by Henry Wade's office in Dallas, it was transferred to TDCAA in 1978. Starting in 1979, the Council sponsored and paid for it. After review of the results of a questionnaire to get prosecutor's opinions, the Education Subcommittee, under Chairman Ed Walsh and members such as Ted Busch, completely revamped the course. The committee developed a syllabus for an **Investigator's School,** again using input from the field. Finally, the committee scheduled an annual course on a specialized subject. In 1984 it was the **Prosecution of Capital Murder.** Audio cassettes made of the presentations at that school were made part of the audio-visual loan library and have been in great demand (see **Services** following).

In addition to these, the Council itself put on several other courses. **Prosecution of D.W.I.,** co-sponsored with the Department of Public Safety, was presented in Houston, Ft. Worth and Lubbock (see the articles in this issue). Another seminar which the Council took on the road was **How to Win Adult Sexual Assault Cases.** Given in Ft. Worth and San Antonio, it brought together rape crisis workers, police, medical personnel and prosecutors to coordinate the activities of each and gave a fuller understanding of the problems of the others.

Another very successful program was the one-day **Law Enforcement Workshops** developed in 1980, following a study of prosecution conducted by the Council for the Senate Jurisprudence Committee. The workshop was to improve the skills of police officers in report writing, enlighten the officer regarding the use of his report in the prosecutor's office, and assist him in dealing with courtroom appearances. Over 4,400 persons were trained at 37 workshops. These workshops gave officers a better understanding of the needs of prosecutors.

The Council developed technical publications to assist prosecutors and law enforcement personnel. The **Investigator's Desk Manual,** revamped in 1982, was the Council's first manual and one of its most successful. The **Elements Manual,** used at Law Enforcement Workshops and included in Grand Jury folders, outlines what elements are needed to be proven for a conviction. Over 5,000 were distributed in 2-1/2 years. **A Guide to Report Writing** assists officers in preparing reports by detailing the information necessary for the more common crimes. The **Reciprocal Child Support Manual** emphasizes "how-to" skills with legal forms, office forms, and suggested letters. Updated in 1984, the **Hot Check Manual** provides law and forms for collecting hot checks and trying the case, as well as a section on the hot check fee. It has been a most useful tool in standardizing and upgrading the handling of hot checks for

prosecutors. The **Indictment Manual** assists prosecutors in drawing valid indictments and informations. The last manual developed by the Council was the **Civil Manual** dealing with a prosecutor's civil responsibilities. Two sections were published in 1985, dealing with contracts and real estate transactions.

In September 1980, the bi-monthly newsletter was born. Over the years it expanded, diversified, and became the bi-monthly magazine, **True Bill**. "General News" covered Council activities and state news. Under "Technical Assistance," regular columns discussed recent decisions of the Court of Criminal Appeals, the latest Attorney General Opinions and Open Records Decisions, and developments in search and seizure law. Also, "From Your Fellow Prosecutor" shared forms and procedures. The section on "Ethics" had articles by prosecutors on ethical questions and responsibilities and Council action on disciplinary matters. "Professional Development" covered information on courses offered by other organizations and reimbursement information. "Management" dealt with topics such as stress and burnout. It also included a regular column on the proper expenditures and handling of Hot Check Fee funds. Another column addressed personnel management in a prosecutor's office, and "Oscar Says" shared the insights of Sherrell, our Director of Administration. "Investigation" discussed proper investigative techniques. Finally, "Services" featured Council publications, audio-visual materials, travel information, profiles on prosecutors and investigators, and classified ads.

SERVICES

The Council developed and provided many services for prosecutors, the legislature and the public. Some of them are below.

Budget and Staffing Information. In 1979 at the request of the Senate Jurisprudence Committee a study was prepared on the budget and staffing of prosecutors' offices. From the study the Council developed a data base on prosecutor funding and staffing, updated in 1982 and again in 1984. For the first time, the legislature had the necessary tools on which to base its funding decisions for prosecutors. Unfortunately the budget crunch prevented the legislature from meeting the needs of prosecution.

Advisory Committee. Another benefit of the study was the establishment of the advisory committee composed of prosecutors from throughout the state. Subcommittees were set up to advise the Council on each of its four functions. Despite criticism from the Sunset Commission on the size of the committee (32 members), there is no doubt that this state agency is in touch and responsive to its constituency. No other agency even approaches the Council in its awareness of the needs of those it services. The Council is proud of this accomplishment.

Regional Concept. A third benefit of the study was the development of regions. By dividing the state into eight regions, the Council kept in touch with prosecutors through regional representatives and annual regional meetings. The turnout at this year's eight meetings (some in excess of 100) should win over those who doubt the value of this structure.

Audio-Visual Library. A library of films, videotapes and audio cassettes was made available for loan to prosecutors. Divided into instructional materials to improve prosecutorial skills and informational materials to inform the public, these materials were either bought from other organizations or produced by the Council. Two of the most successful in-house productions were the audio cassettes of the Capital Murder Course and a slide presentation on Hot Checks which the prosecutor could use in talks before merchant groups and other organizations.

Pamphlets. The Council produced five brochures which prosecutors distributed to inform the public: Assistance to Victims of Violent Crime, outlining the procedures for applying for aid under the Texas Crime Victims Compensation Act; Information for Victims and Witnesses, answering frequently-asked questions about the criminal justice system; Guide to the Prevention of Sexual Assault, listing precautions and steps to take if assaulted; D.W.I., on the

consequences of being convicted of Driving While Intoxicated and the effects of the offense on society; and Hot Checks, containing pointers for detecting bad checks and procedures to follow when taking a check or when a bad check has been received. Over 8,000 pamphlets were distributed **at no cost to the state.** Pamphlets were sold to those requesting them at cost.

Grand Jury Folders. In 1982, the Council made available to prosecutors a packet they could distribute to new grand juries. It contains a booklet describing their duties and responsibilities as well as other materials that explain some of the problems of the criminal justice system and assist grand jurors in their task. Over 3,000 of these have been distributed to prosecutors.

Crime Biters. In fiscal 1983 the Council designed and put on pilot "Crime Biters" programs. One program educates youth and the other older citizens in crime prevention by motivating them to assist law enforcement personnel. It also informs them how the criminal justice system works. With the assistance of the Hon. Pat Ridley, County Attorney of Bell County, and his chief investigator, Dan Smith, now Sheriff of Bell County, the Council put on pilot presentations which became the prototypes for statewide programs.

Victim/Witness Assistance. One of the major complaints that the public has had with prosecutors is the treatment of victims and witnesses. To meet this need, the Council developed the sexual assault seminars previously described. In addition, the Council sent out a special issue of the **True Bill** on the subject and utilized the services of the Governor's Texas Crime Victims Clearinghouse to prepare and present a victim-witness assistance portion of the 1984 Regional Meetings. In addition, the Council provided pamphlets previously described to assist prosecutors in their victim/witness programs.

CONCLUSION

The Council was born in 1978 when LEAA funds were ending and lived through a time when public funds were at a premium. While it had the near-unanimous support of prosecutors, it did not have any "protectors" among legislators who were willing to spend their political capital to protect it when it came under attack. This was partly due to the short time that the Council was in existence, partly because prosecutors' interest in criminal justice legislation sometimes comes into conflict with the interests of "defense oriented" legislators, and partly, unfortunately, because of rivalry between the Council and TDCAA.

With the passing of the Council new questions are raised:

1. Will the return of prosecutorial discipline to the State Bar and the method for removing of prosecutors reverting to Articles 5970 et seq. result in the same problems that required the creation of the Council in the first place?

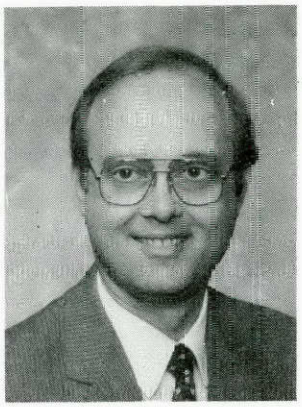
2. Will the ending of federal funding for state grants scheduled in 1986 reduce or eliminate the CJD programs on which TDCAA will rely on for funding of professional development, services, and technical assistance programs?

3. Will the fact that TDCAA will now receive $500,000 in state funds prevent it from being an effective spokesman for the needs of prosecution in the area of funding, staffing, and training as well as limit its activities in behalf of legislation to improve the criminal justice system?

4. Will the erosion of the authority of prosecutors to handle criminal cases begin again after a seven-year hiatus?

Will the Council be missed?

Time will tell. □



As The Judges Saw It

Significant Decisions of the Court of Criminal Appeals

by C. Chris Marshall

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

QUIZ

(See answers, p. 30.)

1. The police stop a car, and as the officer walks up to it, the occupant throws out a packet containing drugs. Does that constitute an abandonment, meaning that the police did not obtain the contraband as the result of an illegal stop?
   _____ Yes _____ No

2. The accused pled guilty pursuant to a plea bargain with the understanding that no finding of a deadly weapon would be made. The judge agreed to this, but his judgment recited that the accused was convicted of "escape with a deadly weapon." Was the plea bargain broken?
   _____ Yes _____ No

3. When the judge heard objections to the jury charge, the defense attorney said his written requested charge was similar to the one the judge was giving, when in fact it was substantially different. Did this misrepresentation mean any error in the charge was waived?
   _____ Yes _____ No

4. The accused pleads guilty without a plea bargain. Does this waive his Speedy Trial Act claim?
   _____ Yes _____ No

5. The first trial ends in a hung jury. In the appeal from the conviction at the second trial, can the defendant attack the sufficiency of evidence at the first trial?
   _____ Yes _____ No

6. The State wants to use the accused's confession solely to impeach him. Does he have a right to a hearing outside the jury's presence to determine whether the statement was voluntary?
   _____ Yes _____ No

7. The prosecutor asked the arresting officer if the accused, after being arrested, refused to give his correct name. Should the objection to the question be sustained on the grounds that it seeks to admit an inadmissible oral confession?
   _____ Yes _____ No

8. Reputation witnesses are usually asked about the accused's reputation for being peaceful and law-abiding. Is it permissible instead to ask about his reputation for being dangerous and violent?
   _____ Yes _____ No

Indictment—Arson

In the face of a motion to quash an arson indictment, the State must allege the manner and means of starting the fire (or that the precise manner and means were unknown to the grand jury). The ownership of the structure must also be alleged in the face of a motion to quash. The indictment in this case was probably fundamentally defective because it did not allege that the structure was located in an incorporated town, under Penal Code §28.02(a)(1). Castillo v. State, #014-84; decided 4/3/85.

Theft—A New Analysis of the Statute

Ever since Casey v. State, 633 S.W.2d 885, the Court of Criminal Appeals has adhered to the view that there are two separate and distinct ways in which the offense of theft can be committed under Penal Code §31.03: (1)theft by appropriating the property and (2)theft by receiving stolen property knowing it was stolen by another.

The Court now overrules Casey and holds that there is a single way of committing theft: by unlawfully appropriating property with the intent to deprive the owner of the property. Exercising control over the property without the owner's effective consent is the all-encompassing method of unlawful appropriation. The language in §31.03(b)(2) about receiving stolen property knowing that it was stolen actually was a redundancy which the legislature added as a precautionary measure.

The Court notes that the bench and bar have often misunderstood the term "appropriation" in the theft statute, thinking that it connotes some taking or transfer of property. In fact the term refers to any exercise of control over the property and is more akin to the concept of possession. This "exercise of control" feature dispenses with any necessity of a receipt of the property, so there is no absolute requirement that a receiver of stolen property know that it was stolen. The focus of the theft statute is not on the manner of acquisition, but on whether the true owner was deprived of the use or benefit of his property without his consent.

This means that fences can now be prosecuted under what was previously called the "appropriation branch" of §31.03. In this particular case an undercover police officer checked some items out of the police property room and sold them to a fence, representing the items to be stolen. Such a procedure wouldn't fly under the so-called "receiving" branch of §31.03 because the items weren't actually "stolen" at the time the fence received them. This may not matter where the focus is simply on the accused's unlawful appropriation, and the case is remanded to the court of appeals for consideration of the accused's claim that on these facts his exercise of control over the property was not made without the owner's effective consent. McClain & Navarro v. State, 687 S.W.2d 350 (Tex. Crim. App. 1985).

Appellate Consequences of Pleading Guilty Without a Plea Bargain

In Morgan v. State, decided 3/6/85, the Court expanded the defendant's ability to obtain appellate review following a guilty plea pursuant to a plea-bargain. The Court makes clear that the decision in Morgan does not alter the so-called Helms rule which states that a plea of guilty, not part of a plea-bargain, waives all nonjurisdictional defects. Thus King's open plea of guilty waived the alleged non-fundamental defects in the indictment which he attacked by a motion to quash. King v. State, 687 S.W.2d 762 (Tex. Crim. App. 1985).

Deadline for Filing a Motion for New Trial; Petitions for Review of an Abatement Order

The Houston court of appeals abated the appeal for a hearing on the accused's motion for new trial. The Court of Criminal Appeals, without any comment by the majority, accepted jurisdiction despite its earlier statements that it likely would not review interlocutory abatement orders. Judge Teague concurs, stating the Court of Criminal Appeals had jurisdiction because the abatement order was final on its face. Had the order mandated the automatic reinstatement of the appeal when the trial court hearing was concluded, Judge Teague would hold the abatement was unreviewable until the appeal was finally resolved.

On the merits, the Court holds that the appeal should not have been abated because the motion for new trial was filed late and any hearing would be a nullity. The Court holds that under the current version of art. 40.05, C.C.P., the motion for new trial, including any amendments, must be filed by the 30th day after sentencing or suspension of sentence). No extensions may be granted, even for good cause.

The Court also notes that a trial judge has the power to deny a motion for new

trial merely because it was not "presented" to him within 10 days of filing, though he also has the discretion to hear a timely motion even if it was presented to him more than 10 days after filing. Dugard v. State, #611-83; decided 4/17/85.

Open Plea of Guilty Subject to Attack if Involuntary

Although King v. State holds that a defendant waives all nonjurisdictional defects by pleading guilty without a plea bargain, such defendants can still attack their plea as being involuntary. If the record establishes that the accused made his open plea with the understanding that he would be able to obtain appellate review of an issue that in fact was waived by his plea, then the plea is involuntary and must be set aside.

Anytime the accused is making an open plea of guilty, prosecutors would be wise to correct anyone—defendant, defense counsel, or judge—who represents to the accused that he can obtain appellate determination of these nonjurisdictional issues. If these misunderstandings are apparent in the record, the plea will be overturned. Christal v. State, #67,410; decided 4/17/85.

Fundamental Error in the Jury Charge May Be Raised in a Post-Conviction Writ

Under Ex parte Coleman, 599 S.W.2d 305, the Court had said that errors in the jury charge which would have been "fundamental" if raised on direct appeal nevertheless could not be raised in a post-conviction writ. Since fundamental error was redefined in Almanza v. State, 686 S.W.2d 157, to mean egregiously harmful error that deprives the accused of a fair trial (essentially a violation of due process), it will now be possible to raise such claims in a writ.

However, the Court warns inmates that they have the burden in a writ and must allege the precise nature of the alleged fundamental error, including a thorough statement of how the error caused egregious harm under the facts of their case. A conclusory claim of fundamental error will not be enough, nor will it be enough to merely attach a copy of the jury charge showing the error. Ex parte Maldonado, 688 S.W.2d 114 (Tex. Crim. App. 1985).

Alibi Does Not Always Place Identity in Issue for Extraneous Offense Purposes

The general rule is that an accused puts his identity in issue whenever he asserts an alibi defense, and the State may then use extraneous offenses to defeat the alibi theory. However, an odd set of facts illustrates that this rule cannot be rigidly applied; relevancy and materiality are always the ultimate tests.

Here the accused and the victims knew each other, so there could be no claim that the victims had identified the accused by innocent mistake. The defendant's claim of alibi was actually just an aspect of his overall defense that the victims were not credible and were fabricating their charges against him. Therefore extraneous offenses committed on dates far removed from the date charged logically did nothing to rebut the defensive claim of which the alibi was part. Boutwell v. State, #711-83; decided 4/24/85.

"Law of the Case" Doctrine; Court of Criminal Appeals Will Not Review Civil Court's Decision Regarding Juvenile Certification

Under the doctrine of the law of the case, where a determination of a question of law has already been made on a prior appeal to a court of last resort, those determinations will normally govern the case throughout all its subsequent stages.

In this case, a juvenile was convicted in adult court under a certification order that a court of civil appeals later invalidated. The Court of Criminal Appeals refused to review that decision since the arguments made by the State were the same ones the civil court rejected.

Also, the Court held that the validity of the criminal trial was not saved by the fact that a valid certification order was later made. Calvin v. State, #'s 67,723 & 67,724; decided 5/8/85.

Extraneous Offense Rules Discussed

This case demonstrates that extraneous matter need not rise to the level of completed offense for the so-called extraneous offense rules to apply. Actually it is more correct to refer to an "extraneous transaction rule," and the question is always whether the evidence is relevant to a material issue and whether the probative value of the evidence outweighs its inflammatory effect.

The defendant was a janitor at a high school and was accused of murdering a female student. At an earlier time he had mentioned to a co-worker that he "didn't know what he might do if he got one of those high school girls alone" with him. The Court held this admissible on motive and to show his attitude toward a relevant group of people—female high school students. Brandley v. State, #68,850; decided 5/8/85.

Writ Denied Where Appellate Process Intentionally Bypassed

The accused was given a probated prison sentence, with 30 days in jail ordered as a condition of probation. The accused thought the judge had nc power to order the jail time, but rather than raise the issue in a motion for new trial and, if need be, in an appeal, he immediately sought to file an original writ in the Court of Criminal Appeals. The Court said this exhibited an intentional bypass of the appellate process, and it dismissed the writ. Ex parte Clore, #69,180; decided 5/8/85.

Effect of Prosecutor's and Judge's Failure to Sign Form Waiving Jury and Agreeing to Stipulate Testimony

On direct appeal, if it appears the prosecutor did not sign the form agreeing to waive a jury, or the judge did not sign the form agreeing to stipulate testimony, the conviction will be reversed.

However, if the absence of the signatures is raised for the first time in a post-conviction writ, the conviction will be upheld as long as there is credible evidence that the prosecutor and judge intended, respectively, to waive a jury and to approve the agreement to stipulate, but merely failed to sign the forms. Ex parte Aaron, #69,408; decided 5/8/85.

Rules Governing "Deadly Weapon Findings" Pursuant to art. 42.12., C.C.P.

The Court will no longer be in the business of deciding if an implied finding was made regarding the use of a deadly weapon. Such findings must be express, and the finding can occur in any one of three ways:

(1) the indictment alleges "deadly weapon," and the jury returns a guilty verdict on that part of the indictment;
(2) the indictment alleges the use or exhibition of a weapon which is "deadly per se" (such as a pistol, handgun, or firearm) and the jury returns a guilty verdict on that part of the indictment; or
(3) the trier of fact, in answer to a special issue, finds that a deadly weapon was used or exhibited.

This is explained in detail in Polk v. State, #294-84; decided 5/22/85.

If the special issue route is going to be used, the special issue normally will be submitted at the punishment stage of the trial. See Polk.

If the jury decides guilt but the court assesses punishment, then the trial judge, as trier of fact on punishment, could make a deadly weapon finding. See Polk and Flores v. State, #581-84; decided 5/29/85.

Although it did not explicitly decide the issue, the Court strongly implied in Polk that a deadly weapon special issue could be submitted even without a pleading alleging use of such a weapon.

The phrase "defendant used or exhibited a deadly weapon," as used in art. 42.12, §3f(a)(2), C.C.P., refers to the fact that the defendant himself used or exhibited the weapon. The law of parties is inapplicable to such a finding; the use of the deadly weapon must be by the accused personally. Flores and Travelstead v. State, #405-84; decided 5/22/85. If the case is submitted only on a "parties" theory at guilt/innocence,

or if both a parties and "acting alone" theory is submitted and the verdict does not reflect which theory the jury convicted on, then the verdict of guilt cannot by itself amount to a deadly weapon finding even if the use of a deadly weapon was alleged in the charging part of the indictment. No finding has been made that the defendant himself used the weapon. Id. However, the jury could still answer a special issue on punishment regarding use of a deadly weapon, and the judge could make the finding if he assessed punishment. Flores.

If the jury decides both guilt and punishment but makes no valid finding that the defendant used a deadly weapon, then the judge has no power to make such a finding himself. Polk.

(Listed here for your reference: Polk v. State, #294-84; decided 5/22/85. Travelstead v. State, #405-84; decided 5/22/85. Flores v. State, #581-84; decided 5/29/85. Also see Ex parte Lara, #69-373; decided 5/22/85.)

Jury Charge on Temporary Insanity by Reason of Intoxication. Remoteness of Reputation Testimony

When the jury is given a punishment charge on temporary insanity by reason of intoxication, the charge must tie together both §§8.04 and 8.01 of the Penal Code. The judge can't stop with §8.04 by telling the jury that "intoxication" means a disturbance of the mental or physical capacity resulting from the introduction of any substance into the body. He must also tie that in to §8.01 by charging the circumstances which give rise to insanity if caused by intoxication as defined in §8.04. See Hart v. State, 537 S.W.2d 21.

The State called a former acquaintance of the accused who grew up with him in another state but who had not seen him for several years prior to the offense. The witness testified that the accused had a bad reputation on the peaceful-and-law-abiding issue. The accused claimed the witness' knowledge of his reputation was too remote, but the Court holds the decision on remoteness is committed to the sound discretion of the trial judge. Nethery v. State, #68,849; decided 5/22/85.

Parole Board Does Not Have Authority to Revoke Parole, Based on New Conviction, Without Affording the Parolee a Hearing

On February 4, 1982, Parole Board rule §145.41(b)(5) went into effect. It purported to allow the Board to revoke parole, without a hearing, where the parolee had been convicted of a felony offense which occurred during parole.

The Court holds that the language in art. 42.12, §22, C.C.P., gives the parolee the right to a hearing prior to revocation and that the Board cannot take away that right by administrative rule. Although the Board would not have to relitigate the fact that the new offense occurred once there had been a conviction in court, the parolee still has the right to a hearing to argue against revocation.

The right to this statutory hearing is not dependent on a request by the parolee. The hearing must be held unless the record contains an affirmative waiver by the parolee, knowingly and intelligently made. (By basing its decision on the statute, the Court avoids answering the due process question of whether the revocation hearing could be dispensed with where there had been a conviction in court.) Ex parte Glenn, #69,056; Ex parte Maycera, #69,163; and Ex parte Johnson, #69,395; all decided 5/22/85.

Defense Counsel's Bad Advice Regarding Parole Eligibility Will Not Automatically Invalidate a Guilty Plea

In Young v. State, 644 S.W.2d 3, the Court indicated that an attorney's incorrect advice on parole eligibility (e.g., incorrect advice that the inmate could have good time credits considered for parole eligibility) would render the plea involuntary.

The Court now backs off on that and says the defense attorney's erroneous advice, standing alone, will not taint the plea. What does render the plea involuntary is the showing in the record that the judge or prosecutor confirmed the defense attorney's bad advice. If that happens, the Court will say this amounts to a plea bargain that can't be fulfilled, and the plea will be set aside. Ex parte Evans, #69, 364; decided 5/22/85.

District Court Has Exclusive Jurisdiction Over Prosecutions for Official Oppression

Article V, section 8 of the Texas Constitution and art. 4.05, C.C.P., provide that the district court has original jurisdiction of "all misdemeanors involving official misconduct." The majority decides that the meaning of "official misconduct" in these provisions is broader than the official misconduct which is proscribed as an offense in Penal Code §39.01. It holds that offenses described as official oppression in §39.02 fall within the definition of official misconduct in the constitution, and such cases must be tried in the district courts. Gallagher v. State, #59-677; decided 5/29/85.

ANSWERS

1. Yes. Rodriguez v. State, #67,774; decided 4/17/85.

2. Yes. Ex parte Hopson, #69,310; decided 4/17/85. But the problem could be remedied here by reforming the judgment so that the offense was listed only as "escape."

3. No. Frank v. State, #268-84; decided 5/1/85.

4. Yes. Harrelson v. State, #494-84; decided 5/8/85. The claim is nonjurisdictional. However, the issue can be raised if properly preserved where there is a plea-bargained plea.

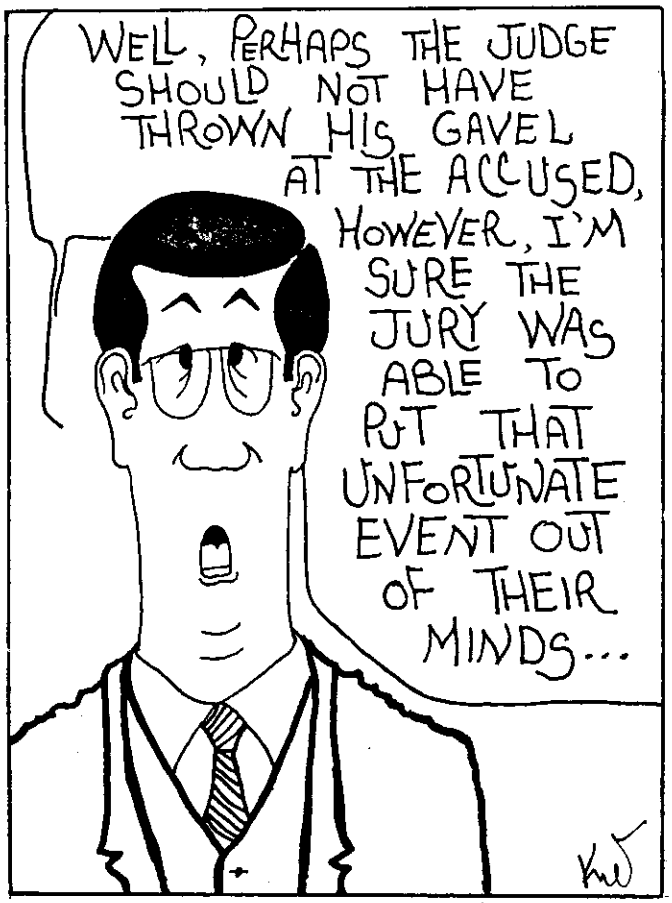
5. No. Brandley v. State, #68,850; decided 5/8/85.

6. Yes. Madden v. State, #63,776; decided 5/22/85.

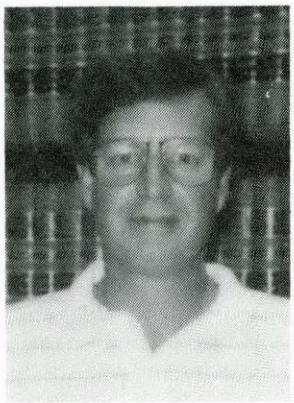
7. Yes. Nethery v. State, #68,849; decided 5/22/85.

8. Yes. Nethery v. State.

Ever since its appearance over two years ago, Chris' column has received many positive comments. It will be missed. Thanks, Chris, for your hard work! —Ed.



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



From Your Fellow Prosecutor:

Videotaped Interviews with Child Abuse Victims

by Steve Chaney

Steve Chaney is the Senior Staff Attorney with the Tarrant County Criminal District Attorney's Office.

The videotape statute in Texas, Section 38.071 Texas Code of Criminal Procedure went into effect August 29, 1983. Its purpose was to provide a balance between the defendant's right to be tried on reliable, credible evidence and the abused child's right to receive protection from the State and a right to be heard in a setting that does not produce additional trauma to the child.

Texas procedure provides three methods of obtaining the child's testimony. Section 2 allows the videotaping of a pretrial interview with the child not attended by an attorney for either the defendant or the state. Section 3 provides for remote live broadcast of the child's testimony into the courtroom. Section 4 provides for a deposition of the child to be videotaped. In Section 2 the child must be available to be called for cross-examination. Section 3 and 4 prohibit the child from being called into the courtroom if these Sections are used.

A. Making a Section 2 Tape:

Since the effective date of the Texas videotape procedure thousands of videotapes have been made. Most of the larger counties quickly assembled the necessary equipment and began taping abused children. In Tarrant County videotaping had been done for a couple of years before the effective date of the statute and this experience was shared with other agencies and within the Department of Human Resources. †

The equipment (a video camera and recorder) is not expensive -- less than $2000. Some agencies have purchased the equipment and many have had equipment donated by civic or charitable organizations. The real problem has been to find or to train qualified child interviewers. Many counties have yet to make their first videotape because of this limitation.

1. The Interviewer: Who makes the tape depends more on who possesses the interviewing skills than on any other factor. Most often the tapes have been made by the Department of Human Resource's sexual abuse investigators. (Note that the tape's use is not limited to sexual abuse cases but can be used in cases of physical abuse or any offense in which a child is a victim.) Tapes have also been made by Rape Crisis agencies, police departments, District Attorneys' Child Abuse investigators and child psychologists and pyschiatrists. To allow this flexibility there was no requirement put in the Texas procedure as to who must make the tape.

Since the tape cannot be made by two people the interviewer has to have both the skills of interviewing children and the knowledge of what is required to make the case in court.

2. Setting: The videotaping should occur in a sterile setting, which is purposely devoid of stimulation. A room should be

† There is no central repository in this State for information on the use and success of the procedures for videotaping an abused child. This paper is based on the knowledge of the author, who helped to write the new procedure and interviewed prosecutors and judges in Texas.

dedicated for this purpose where the equipment is always set up. It is helpful to have a one-way mirror to an adjoining room so the interviews can be monitored by a police detective, a child's relative, or other appropriate person. Above all, the room should be isolated from distracting noises.

3. Preparation: The interviewer should obtain as much information as possible about the alleged event. This is done in a variety of ways, such as talking to the person who reported to the police or DHR, to the non-abusive parent or to siblings. No information should be elicited from the child victim about the abuse before the on-tape interview. This prevents the argument that the child was rehearsed by the interviewer. Generally a child who is able to talk about the abusive event will be most spontaneous during the first interview and that is the one that should be captured on tape.

Props may be used for the interview, particularly the anatomically correct dolls. These dolls are most helpful in identifying body parts by children of all ages and for demonstration by children age 6 and up as to what happened to the child. Children younger than age 6 may be comfortable using the dolls for demonstration, but will frequently use their own body for demonstration as the use of the dolls requires some abstract thinking.

The interviewer may prefer to have the child seated on the floor, a school-type chair or a couch. The child should be made comfortable but his or her ability to move off-camera should be limited. The camera needs to be focused to frame all of the child as close up as possible, to capture body language as well as facial expression. The interviewer does not need to be in the picture. The interviewer should also operate the equipment to limit who is in the room to the interviewer and the child. Therefore, the camera is preset to a particular location.

4. Interview: The interviewer is trying to obtain everything the child knows about the incident without contaminating that information in the process. The interviewer needs to be familiar with what conduct is required to constitute a criminal offense. Questions such as where the event occurred are important not only to provide the context in which the abuse occurred but to establish venue for the legal system. The idea is that this tape will answer all the questions that might likely be asked in court so the child may not have to testify later.

Since the abusive event is not something the child may discuss on his own or in a direct manner, it is up to the interviewer to seek this information. But herein lies a delicate balance and a point of frequent court and prosecutor frustration. How do you lead or direct the child to discuss the traumatic and embarrassing specifics of the event without asking a question "calculated to lead the child to make a particular statement" as used in the Texas Statute?

All witnesses are permitted to be lead to some extent and children even more so. What is prohibited by the statute could be called "gross leading," i.e., putting the words and maybe the ideas in the child's mouth and mind. First, the child's testimony is not very convincing if the interviewer is making all the statements and the child is merely answering yes or no. The problem with children as witnesses is that they are likely to want to agree with an authority figure; they want to please. Second, that part of the tape or maybe all of the tape will be held inadmissible by the court depending on how the judge interprets the statute. Some judges have deleted only the leading questions and answers, while in some cases the whole tape was suppressed, generally because of many leading questions.

There is a solution. If you are lucky to have a child that begins to talk on his own about the abuse, quit asking questions and just listen. If you do have to ask questions, always give the child an option on how to answer. For example, to ask a child "Did John pull your pants down?" is leading but better than "John pulled your pants down, didn't he?" The best question, however, is "Did John pull your pants down or did you pull them down - what happened?"

Ask the questions as if you don't really know the answer, because you may really not know until the child tells you himself.

The interviewer should have a composed flat response to the child's answers. There is a tendency to want to show empathy and

support for the child. Statements such as "What John did to you was wrong," "We want to protect you," "You did the right thing by reporting this," etc. are appropriate statements to make to the child after the tape has been made but are not appropriate on a tape to be played at the defendant's trial.

B. Once the Tape is Made - How is it Used

1. Prevent Reinterview: It is difficult for the child to talk about abuse. Repeatedly having to talk about the abuse can frustrate and even traumatize the child.

Repeated tellings are also less reliable: the child may begin to suppress or embellish information, or to answer the way he thinks the interviewer wants him to answer. A well-conducted first interview tape is probably more reliable to a judicial fact-finder than a child whose testimony has been rehearsed by repeated interviews and preparation for trial.

The tape should be made available to police investigators, family courts, District Attorneys, Grand Juries, the defendant and his attorney during plea bargaining and any other use that can prevent the child from having to undergo the interview again. The child may feel that simply by having to repeat the story so many times that no one believes him. This is the wrong message to send to abuse victims who will probably feel internal and external pressure to recant anyway.

2. Plea Bargaining: Plea negotiations may take place either before or after indictment. The videotape's most frequent use and benefit is at this stage.

The tape may have been played for the defendant when first arrested. It may be an aid in obtaining confessions. If he hasn't seen the tape before, a tape of a communicative child professionally interviewed will convince most defendants and their attorney that a trial might not be in their best interest. This, of course, completely prevents the child from having to be called to court and generally results in a quicker disposition of the case than without the tape. However, if the tape is of poor quality, it may have the opposite effect. The case will appear weak and the prosecutor may feel compelled to prepare and call the child as a witness during trial and the tape may be used to impeach the child by the defense. This is particularly true if the child was not communicative on tape but was later reinforced by therapy and can now tell about the abuse.

3. Trial: Each of the major counties (Texas has 254) has used the tape in trial before a jury on a number of occasions. Most prosecutors still prefer to call the child as a witness if the child can handle the experience and it doesn't do additional damage to the child. Reportedly, most juries would rather have the child as a witness than just the tape. That is understandable, but in some cases the reason for the tape would deny the jury any testimony.

Most of the trial cases where the tape has been used have resulted in a conviction but several have resulted in a finding of not guilty. The tape is a valuable tool to protect the child victim and enhance the prospect of successful prosecution but it does not overwhelm juries and stampede them in a rush to judgment. The state wins most of the cases tried to a jury and the videotape will probably not affect the percentage won. It will make some cases prosecutable that would otherwise be dismissed.

I am not aware of any trial judge that has ruled the tapes inadmissible on constitutional grounds but a number of tapes have been ruled inadmissible in whole or in part because the questions were too leading. One judge suggested the state should call the child as a witness and only use the tape if the child became unresponsive in the courtroom. The Statute does not require this procedure nor was it required by the court but it is a good practical suggestion. The Judge also stated that if the child was able to give live testimony, that portion of the tape that covered the same information would not be admissible on direct as it would be bolstering the child's testimony. It still could be used to rehabilitate if the child's testimony that was impeached - as a prior consistent statement.

Surprisingly, in a number of cases where the tape was used and the child made available to the defense for cross-

examination the defendant chose not to the question the child. This was true in the one case to have been decided by an appellate court Jolly v. State, 681 S.W.2 689 (Tex. App. 14th Dist. 1984).

Even though Section 2 requires that the child be made available as a witness for cross-examination, the child does not necessarily have to be called into the courtroom. The court may utilize the provisions of Sections 3 or 4 to comply with this provision of Section 2. In other words, the court may require or allow the defense attorney and the state's attorney to videotape a deposition of the child to comply with the child being "made available."

4. Recanting: Recanting is a major problem for the legal system. It is not generally understood to be an expected reaction of an abused child who has reported the abuse. Only an enlightened legal system, when confronted with a recanting child, ask the next question "why is the child recanting" and seeks an answer to that question. Most prosecutors believe that the videotape has a major benefit in this area. If the child late recants, even at the time of trial, the case can still be prosecuted by using a good tape and psychological experts to explain the recanting symptoms. The fact finder is confronted with two opposing statements from the child and often the tape statement containing sufficient detail elicited by non-leading questions is the more compelling evidence.

5. Unsworn testimony: The child's testimony on a Section 2 tape will be unsworn. An oath is no guarantee of trustworthiness by any witness - a good percent of sworn witnesses lie anyway. Children of tender years who cannot reason abstractly and can not qualify to take an oath should still be allowed to relate how they were abused - what factually happened - an ability they may possess. Since the Texas procedure does not require the child to be sworn when making a Section 2 tape, the general requirement that all witnesses be sworn may not be applicable.

Interviewers are taught to first establish the young child's level of development at the beginning of the interview. In fact, a form of oath, although not official, will often be given on the tape - i.e., are you going to tell or have you told what really happened.

6. Support of Child to Family: The tape once made has many uses, one of which is to convince the child's family that abuse has really occurred. The non-offending parent may have difficulty in accepting the fact that abuse has occurred. In cases of inter-family abuse, the child will often provide more information to the trained interviewer than to a family member. The tape can allow the child to speak to family members just as it allows the child to speak to the judge or jury in the courtroom. The result should be an increased support for the child from the family when the abused child is in great need of that support. The abused child's family as well as the greater society needs to face the reality of child abuse.

7. Therapy of Defendant: Before a child abuser can begin a successful treatment program, they must recognize and accept what they have done. Of course, not all child abusers are susceptible to treatment. Most child abusers who are treatable will initially deny the abuse to others and sometimes to themselves. The tapes have been successfully used in therapy to force the abuser to confront this issue.

C. Sections 3 & 4 of 38.071

Section 3 and 4 tapes have not been used very often. I found two uses of Section 4 tape and none of Section 3. I would suspect that this is because the Section 2 tape has so many applications and is being routinely made in each child abuse investigation and because a much more elaborate set-up is required for a Section 3 or 4 tape.

Conclusion:

The Texas Videotape procedure will not solve all child abuse cases. It is a tool to aid in the protection of children and to minimize their trauma in our efforts to prosecute child abusers. It is better evidence than some other evidence that is admitted as an exception to the hearsay rule. The taping of what the child has said will provide more reliable evidence to both clear as well as convict the accused. It is a valuable social, as well as legal, tool. □

SEARCH AND SEIZURE

by Alan Levy

Supreme Court Review Pt. II

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

Tennessee vs. Garner

On the night of October 3, 1974, Memphis police officers, responding to a burglary-in-progress call, arrived at a residence. They observed signs of forcible entry and began to walk around the house in an attempt to locate a suspect. At that point, one of the police officers saw a person, he believed to be unarmed, fleeing from the residence and ordered him to halt. The suspect disregarded the command and the police officer fatally shot him as the suspect attempted to escape over a nearby fence.

The decedent's father brought a civil rights action against the police alleging inter alia that the police violated the suspect's fourth amendment rights by using deadly force to apprehend him.

The Supreme Court accepted certiorari to decide whether the use of deadly force by a police officer to apprehend a fleeing felony suspect violates the Fourth Amendment.

Tennessee statutes authorized the police to use deadly force when necessary as a last resort to apprehend a suspect police have probable cause to believe has committed a felony. TENN. CODE ANN. § 40-7-108 (1982). The law did not require the police to feel threatened before using deadly force; it only required the police believe that the suspect committed a felony, to inform the suspect that he was being arrested, and to reasonably believe that deadly force was necessary to prevent an escape. Note, 18 L.Rev. 137 (1983). In this respect, the Tennessee statute is a codification of the common law rule with respect to the use of deadly force to arrest.

At common law, a peace officer in making an arrest for a felony could use such force as necessary to effect an arrest or to overcome resistance to the arrest, even to the extent of taking the life of the escaping felon if the arrest could not otherwise be accomplished, and even though the officer was not threatened with serious physical harm. E.g. E. FISHER, LAWS OF ARREST, § 135 p. 299 (1967); 1 WHARTON'S CRIMINAL PROCEDURE § 81 p. 198 (1974); Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R.-C.L. L.Rev. 361 (1974); Comment, Use of Deadly Force in the Arrest Process, 31 La.L.Rev. 131 (1970); Note, Legalized Murder of a Fleeing Felon, 15 Va.L.Rev. 582 (1929).

The common law rule was based on the theory that all felons were highly dangerous to the public since all felonies were punishable by death. It made little difference if a suspected felon was killed in the process of capture, since he had already forfeited his life by committing the felony. The killing was merely a premature execution of the inevitable sentence. 1 WHARTON'S CRIMINAL PROCEDURE § 81, p. 198 (1974); Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R.-C.L. L.Rev. 361 (1874); Note Legalized Murder of a Fleeing Felon, 15 Va.L.Rev. 582 (1929).

The common law rule came under virtually universal criticism by commentators who noted that modern conditions and the evolution of criminal law had resulted in the disappearance of many of the premises upon which the common law rule was founded. Almost all crimes formerly punishable by death no longer are, and while in earlier times the distinction between felonies and misdemeanors was significant, today the distinction is minor and often arbitrary. Tennessee v. Garner, 105 S.Ct. 1694 (1985). Not surprisingly, most modern commentators supported a restriction on the use of deadly force. For example, the Model Penal Code permits use of deadly force only where the crime for which the arrest is made is a felony—involving the actual or threatened use of deadly force or when there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed. MODEL PENAL CODE § 3.07 (1962). See Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976). Despite widespread condemnation of the common law rule, it survived in various forms in nearly half of the states. Against this background, the Supreme Court decided Tennessee v. Garner.

The Court first decided that the infliction of death on a fleeing felony suspect is a seizure subject to the reasonableness requirements of the Fourth Amendment.

The Court, employing its now familiar balancing test, considered the reasonableness of the police seizure balancing the magnitude of the intrusion on the individual's Fourth Amendment interests against the interests asserted by the government to justify its actions. See, e.g., United States v. Place, 462 U.S. 696 (1983); Florida v. Poyer, 460 U.S. 491 (1983) (plurality opinion); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) [A few of the recent cases where the balancing test has been used].

The Court decided that deadly force may not be used to prevent the escape of a fleeing felon unless the police officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others. If the suspect threatens the officer with a weapon or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. Tennessee v. Garner, 105 S.Ct. 1694 (1985).

The significance of the Garner decision in those states which adhered to the common law rule is obvious. However, historically Texas did not follow the common law rule on the use of deadly force to arrest. The impact of the Garner decision in Texas can only be assessed by examining our present Penal Code provisions against the background of Texas history.

Prior to the adoption of the present penal code, Texas statutes provided that a peace officer was not justified in using deadly force against a fleeing offender unless the officer was threatened with serious bodily injury or death. G. PASCHAL, LAWS OF TEXAS, arts. 2213, 2215 (1870); S. WILLSON, REVISED PENAL CODE AND CODE OF CRIMINAL PROCEDURE, arts. 557, 559 (1891). Note, Justifiable Use of Deadly Force by the Police: A Statutory Survey, 12 Wm & Mary L.Rev. 67 (1970) [Concluding that Texas limited the use of deadly force in apprehending a fleeing felon to instances of self-defense.] The Texas courts recognized that under the express provisions of these statutes, a peace officer was not warranted in killing a suspect because he attempted to flee or resisted arrest, unless the officer reasonably feared that his life was threatened or he would suffer great bodily injury. E.g., Grohoske v. State, 124 Tex.Crim. 338, 61 S.W.2d 847 (1933); McDonald v. State. 22 S.W.2d 670 (1929); Fagan v. State, 112 Tex.Crim. 107, 14 S.W.2d 838 (1929); Roe v. State, 55 Tex.Crim. 128, 115 S.W. 593 (1909); Gliebel v. State, 12 S.W. 591 (1889).

In Caldwell v. State, 41 Tex. 86 (1874), the rule in Texas was explained:

> The law places too high an estimate upon a man's life though he be a poor, friendless prisoner to permit an officer to kill him ... simply to prevent an escape.

Since Texas had always severely restricted the right of peace officers to use deadly

force to apprehend a felon, the adoption of the Model Penal Code approach in the present Texas Penal Code merely reaffirmed the traditional rule. Our law presently permits the police to use deadly force only when the offense for which arrest is authorized included the use or attempted use of deadly force or the officer reasonably believes that there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the officer or another if the arrest is delayed. TEX. PENAL CODE ANN. § 9.51 (Vernon 1974).

Tennessee v. Garner, which essentially adopts the Model Penal Code provisions with respect to deadly force, does not affect the validity of Texas law with respect to the power of deadly force to effect an arrest. Section 9.51 is consistent with the Supreme Court's decision.

A problem does exist in those provisions permitting the use of deadly force to protect property.

Again, an examination of earlier Texas statutes is helpful in analyzing the issue. Texas law excused a homicide committed upon a person who was in the act of committing certain enumerated felonies. Specifically, with respect to burglary or theft at night, a homicide was justifiable at any time while the offender was in the building, or at the place where the theft was committed, or within reach of gunshot from such place or thing. G. PASCHAL, LAW OF TEXAS, art. 2226 (1870); S. WILLSON, REVISED PENAL CODE & CODE OF CRIMINAL PROCEDURE (1891); E.g., Fread v. State, 26 Tex.Crim. 121, 210 S.W. 695 (1919); Laws v. State, 26 Tex.App. 643, 10 S.W. 220 (1888). Texas created an exception to the common law rule that the homicide must take place while the person killed was in the act of committing the offense and before it was completed. Under Texas law, it made no difference whether the offender abandoned the property and was fleeing from the scene. If the person was within gunshot of the place, the homicide was justified. Whitten v. State, 29 Tex.App. 504, 16 S.W. 296 (1891); Moreland, The Use of Force In Effecting Arrest, 33 Neb.L.Rev. 408 (1953). Under Texas law, deadly force has traditionally been viewed as an acceptable method for the defense of property. The early Texas statutes and case law demonstrate that the use of deadly force to protect property extended even when the suspect was fleeing from the scene. In this respect, the Texas law was more lenient in excusing the exercise of deadly force than jurisdictions that followed the common law rule.

While Texas adopted the Model Penal Code approach which prohibits the use of deadly force to arrest for non-violent felonies, the Texas Penal Code also allows deadly force for the protection of property. Comment, Deadly Force to Arrest: Triggering Consitutional Review, 11 Harv. C.R.-C.L. L.Rev. 361 (1974). Texas permits the use of deadly force when a person reasonably believes that deadly force is immediately necessary:

> (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or
>
> (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; .... TEX. PENAL CODE § 9.42 (Vernon 1974).

The current code departs significantly from the equivalent provisions in the Model Penal Code in that it allows the use of deadly force not only to prevent the commission of various offenses, but also to prevent a suspect, in immediate flight, from escaping with the property. Compare TEX. PENAL CODE ANN., § 9.42 (Vernon 1974) and MODEL PENAL CODE, § 3.06 (1962).

The Texas Penal Code modified the earlier rule—excusing a homicide committed when the offender was within gunshot range of the crime scene—by restricting the use of deadly force to prevent suspects from escaping with the stolen property. It is difficult to reconcile this provision with the decision in Tennessee v. Garner. The Supreme Court has declared that the state's interest in the successful arrest of nonviolent

felony suspects does not justify their seizure by deadly force. Whether an unarmed suspect is fleeing with stolen property or empty-handed is hardly likely to alter the balance struck by the Court. When Garner was shot to death, he had possession of stolen property from the burglary.

If the recovery of property might be a significant factor in determining the reasonableness of using deadly force to "seize" a suspect under the Fourth Amendment, the Court would have commented on it.

Tennessee v. Garner should eliminate defense of property as a justification for using deadly force against a non-dangerous fleeing felon. Otherwise, the decision does not change Texas law concerning the use of force to effect an arrest.

The problem with the majority opinion is its peculiar view that residential burglary, especially at night, does not pose sufficient risk to the community to warrant the conclusion that deadly force should be employed as a last resort to apprehend the suspect. The majority blithely asserts that "the available statistics demonstrate that burglaries only rarely involve physical violence." Tennesseee v. Garner, 105 S.Ct. 1694 (1985). The statement is deceptive as well as true. While it may be that only a small percentage of burglaries involve physical injury, as the dissent notes, burglars were responsible for 3/5 of all rapes in the home, 3/5 of all home robberies, etc. This would seem to be a more meaningful statistic. Moreover, common sense suggests that a burglar willing to enter a residence at night is inherently dangerous to its occupants.

Not only does the opinion rely upon the dubious conclusion that nighttime burglars are non-dangerous, it also ignores the practical consequences of its decision. Police arriving at a burglary-in-progress scene often will not know whether the suspect fleeing into the darkness has committed a sexual assault, murder, or some other form of physical violence. We cannot assume, any longer, that a person who commits a burglary-at-night is so intrinsically dangerous to the community that deadly force, if necessary, should be used to apprehend him. □

ALAN'S FAREWELL

Dear Andy:

Enclosed you will find my last article for the True Bill. Since your agency and my career as a columnist have both been sunset by the legislature, I would like to take this opportunity to thank both you and David for your thoughtfulness and courtesy during my writing career. I would also like to take this opportunity to categorically deny that my search and seizure articles had anything to do with the legislature terminating your organization.

I look forward to working with you in the future.

Sincerely,

Alan Levy

For the past year we have enjoyed Alan's informative and well-written articles. Our thanks, Alan, for your commitment to keeping prosecutors informed. —Ed.

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

PROSECUTION OF D.W.I.

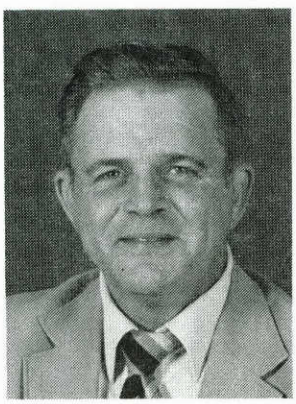
A JOINT COURSE SPONSORED BY

THE PROSECUTOR COUNCIL

AND THE

TEXAS DEPARTMENT OF PUBLIC SAFETY

Prosecutors and D.P.S. personnel helped develop **Prosecution of D.W.I.**, presented in Houston, Fort Worth, and Lubbock. Attended by over 200 prosecutors, it taught effective prosecution methods and D.P.S. techniques for gathering evidence. Following are reprints of course handouts; see Table, next page. Our thanks to all those who helped. Not pictured: **Richard Baxter**, Tech. Supervisor, D.P.S.; **Alice Brown**, Asst. D.A., Harris County; **The Hon. George Dowlen**, 181st Dist. Court Judge; **Davis Gray McCown** and **David Montague**, Asst. C.D.A.s, Tarrant County; **Sgt. Charles Seale**, D.P.S.; and **Alvin Weathermon**, Tech. Supervisor, D.P.S.



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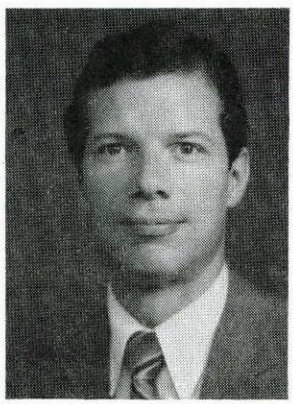

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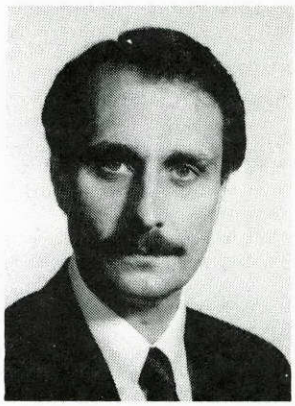

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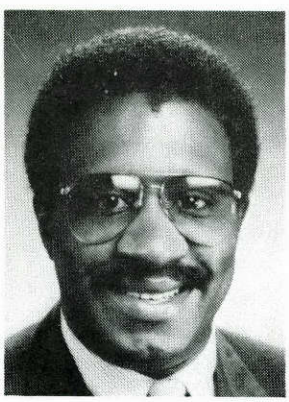

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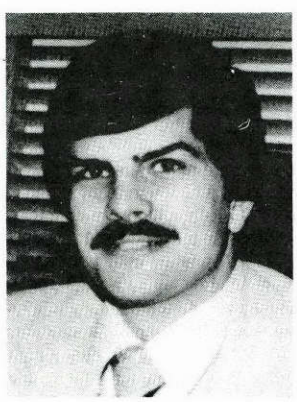

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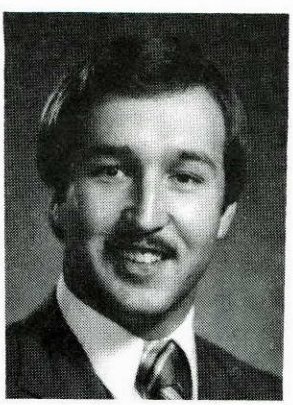

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Capt.
Dudley Thomas
D.P.S.

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ACKNOWLEDGEMENT
by Joe Parker, Jr.
Asst. Travis County Attorney

Much of this material came from other prosecutors whose names, unfortunately, have been lost as information circulated. Credit belongs to those "unsung heroes." I trust these will prove helpful to you.

D.W.I. VOIR DIRE: THE RIGHT QUESTIONS

Voir dire is the prosecutor's opportunity to "partner" with the jurors and sell his side of the case. It has been said that the real purpose of voir dire is to select a prejudiced and biased jury—prejudiced against your opponent and biased in your favor.

In voir dire one should:

A. Explain the legal principles involved.
B. Explain your theory of the case.
C. Personally attract the prospective jurors so they will have confidence in your ability and integrity.
   1. A properly -selected jury will still be frustrated if they have to decide the issues without benefit of what you have to say in final argument.
D. Get prospective jurors to talk so you can discover prejudices and sympathies and then either get the juror for cause or wisely exercise peremptory challenges.

Texas statutes allow only three peremptory challenges in a misdemeanor case. Because these challenges are precious you must challenge for cause those who indicate directly or indirectly that they could not and would not be suitable jurors to the state, i.e., prejudiced and biased jurors. Once a prospective juror indicates through words, actions or mannerisms that he could not be acceptable the entire approach shifts. At that point, cross-examine the prospective juror to show that he is not acceptable and then challenge him for cause. Often the defense can rehabilitate the prospective juror and if the court denies the challenge for cause you must again carefully cross-examine in an attempt to renew the challenge. A challenge for cause granted is a precious peremptory challenge saved.

Police Testimony

(Meet this inquiry head-on. DWI trials typically involve a swearing contest between the police officer, the defendant and those who last saw him. The case therefore will turn upon the strength of the officer.)

- Have any of you ever had any trouble or bad experience with a police officer?
- Do any of you have any problem with believing the testimony of a police officer?
- Will you find the defendant guilty of DWI solely on the testimony of one police officer if you believe beyond a reasonable doubt that he was telling the truth and capable of recognizing it?
- Do you believe that a police officer is less believable than a non-police officer?

Burden of Proof

• The State's burden of proof goes only to the elements of the offense. Please understand the State does not have to prove:
1) the defendant's motive for getting intoxicated
2) the day of the week
3) what type of weather there was
4) how many drinks the defendant had before being stopped (we're concerned with intoxication not consumption)

These may be interesting, but the State does not have to present any evidence on such matters. You understand that, don't you?

• Is there anyone here who would require the State to prove exactly how much alcohol the defendant drank before you could vote guilty, regardless of how much evidence of intoxication was presented?

Definition of Intoxication

(In most DWI trials the only contested issue is whether the defendant was intoxicated.)

At the end of the trial I expect the court will instruct you regarding the definition of "intoxication" as follows:

> "A person is intoxicated when he or she does not have the normal use of his mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug or a combination of two or more of those substances in the body; OR having an alcohol concentration of .10 or more."

There are two very important words in that definition: 1) intoxication and 2) normal.

Let us consider the word "INTOXICATION":

There are 3 stages that can result from consuming alcohol or a controlled substance or drug:
(1) Sober - Right after the very first swallow of alcohol or use of a controlled substance or drug.
(2) Intoxicated - The body has absorbed the alcohol, controlled substance or drug and is affected by it.
(3) Drunk - falling down, walking into walls.

The DWI law places the stopping point for drinking and driving **between** the first stage (sober) and the second stage (intoxication).

• Have you ever seen persons act or talk as if they were intoxicated from alcohol or drugs? Confused as to where they had been or where they were going? Giving the wrong home address? Unsteady on their feet? Disoriented? Slurred speech? Smell of alcohol or controlled substance? Fumbling for Driver's License? Forget the alphabet?

• Have you ever seen a car which you thought was being driven by a person who was intoxicated?

(Adapt to case and its facts.) Examples: Wide turns, straddling lane, barely missing another car or object, weaving, driving on shoulder or driving slowly, stopping without cause, following too closely, drifting, braking erratically, driving into oncoming traffic, turning abruptly or illegally, accelerating or decelerating rapidly, headlights off, turning signal light on left to right and right to left where there was no intersecting street.

• Without seeing the driver actually drink or use any drug or controlled substance, you still believed he was intoxicated, didn't you?

Now, let us consider the word "NORMAL":

• After you hear all evidence regarding the acts of the defendant, ask yourself if you believe what was described is the way (defendant's name) normally acts or talks.

• Do you believe an intoxicated person is the best judge as to what extent his normal physical/mental faculties have been affected? (To drinkers) Alcohol affects you, won't it?

Scientific Evidence

• Is there anyone here who would require the State to produce scientific evidence before you could vote guilty? For example, assuming the evidence of witnesses is strong and you believe it beyond a reasonable doubt, would you still require scientific evidence before you could vote guilty?

• Has anyone heard of the intoxilyzer?

• Has anyone served as a juror in a case where evidence was introduced with respect to the intoxilyzer? If so, do you have an opinion as to what it is or how it works?

• Do you believe it is a scientific and reasonably accurate instrument for the

purpose of determining degrees of intoxication? (If there is a negative feeling, ask whether it would require evidence to the contrary to overcome that feeling.)

- Does anyone have a problem accepting the result of a breath test from the intoxilyzer, assuming the test was performed properly?

Videotape

- Would anyone require the State to produce a videotape made after the arrest in addition to witness testimony before you could vote guilty? Who would want to see a videotape?

Ability to Follow the Law

- Does anyone believe the DWI law is not a good law and should not be enforced?
- If you are selected to sit on the jury, will you follow the law as it is given to you in the court's charge?

(NOTE: If the driving is not very bad, consider using the following example from Defense of Drunk Driving Cases, Vol. 1, p. 6-11, 12, by Erwin:)

- Let us assume, that upon retiring to the jury room, you are convinced beyond a reasonable doubt that the defendant was driving a vehicle [in a public place while intoxicated].

However, there has been no showing that he drove his car in a manner other than that of a reasonable person. In other words, no showing of erratic driving.

Even though you are convinced that the defendant was driving while [intoxicated], would you vote to acquit him because he wasn't shown to have been weaving or otherwise driving erratically?

Do you understand that the law does not require us to show that the defendant was driving erratically, or that he ran a red light, or that he had an accident?

The law only requires us to prove the three elements that I have mentioned before, driving: [in a public place]; while [intoxicated]. If we establish those three simple elements beyond a reasonable doubt, then you should find the defendant guilty. Do you understand that?

Now, the fact is that the legislature has determined that it is sufficiently dangerous for a person [who is intoxicated] to be driving that they have made that in and of itself a crime. They know that when a person is [intoxicated] his nerves, muscles and reflexes are affected so that he cannot respond as a normal, reasonable and prudent person] in full possession of his faculties. Do you understand that?

And do you understand that though a person who is [intoxicated] may appear to drive a vehicle in a normal manner, other evidence may show that his nerves, muscles and reflexes may have been so affected that he couldn't react in the manner of an ordinary, prudent person if an emergency situation should arise?

You have seen people in a drunken condition who were not driving an automobile and who were not even walking around, who you recognized as being drunk, haven't you? You know from observation that if such a person were to drive an automobile he would not be a safe driver. You understand that this is what we are talking about in this case—that is, the defendant's condition, whether or not he was in a condition we call being ["intoxicated"]. Do you understand that?

Assuming that we actually can produce evidence that the defendant did not drive his car in a normal manner, will you consider that along with all the other evidence in determining whether or not he was so affected by alcohol that he could not operate his vehicle in the manner of a normal reasonable and prudent driver operating under like driving conditions?

General Questions/Inquiries

- Do you understand that the issue is not whether the defendant is a good or bad person, only whether his mental or physical faculties were affected when he drove?
- Has anyone ever been an accused, complainant or witness in a criminal case?
- Has anyone studied or read materials (other than newspapers) about the effects of alcohol on the body and driving a car?
- Has anyone ever taken a defensive driving course? Did the instruction include how to identify a car driven by a person believed to be intoxicated?
- (Where there is erratic driving, determine familiarity with location, particularly when dangerous.)

HOW TO PROVE INTOXICATION THROUGH...

Manner of Driving

- Have the officer draw a diagram.
- Testimony of traffic violation. Morgan 395 S.W.2d 644; Woosley 376 S.W.2d 572.
- The worst thing you can do is ask about driving facts which didn't exist; such as "Did the car weave?" - "No"; "Was the driving erratic?" - "No." This suggests to the jury that the driving wasn't so bad after all.
- Develop the officer's or witness' testimony so that the jury can visualize the flow of traffic, type of intersection, number of people and cars in the vicinity, specifics as to what the car did and how it affected traffic. Did the driving threaten others?
- Get witness to testify to the abnormal and dangerous driving. How did this car look to the witness who saw it?
- How did the car stop (abruptly, etc.)? Length of pursuit? Was a siren/light used? What type? How long after siren/light did it take for the driver to stop the car?
- Did the defendant appear intoxicated from his driving? Consider the following:
  - -Tightly gripping the steering wheel
  - -Face close to the windshield
  - -Eye fixation
  - -Slouching in the seat
  - -Gesturing erratically or obscenely
  - -Drinking in the vehicle
  - -Driver's head protruding from vehicle
  - -Turning with wide radius
  - -Straddling center or lane marker
  - -Appearing to be drunk
  - -Almost striking object or vehicle
  - -Weaving
  - -Driving on other than designated road
  - -Swerving
  - -Slow speed (over 10 mph below limit)
  - -Following too closely
  - -Drifting
  - -Tires on center or lane marker
  - -Braking erratically
  - -Driving into opposing or crossing traffic
  - -Signalling inconsistent with actions
  - -Slow response to traffic signals
  - -Stopping inappropriately
  - -Turning abruptly or illegally
  - -Accelerating or decelerating rapidly
  - -Headlights off
- Ask the officer who drove the defendant's car whether it was in normal operating condition.

At the Scene Behavior

- When and how did the defendant get out of his car (if he did)?
- What was his appearance? (Face, eyes, clothing, alcohol odor/intensity, balance, walk, speech, eye-hand coordination, fumble getting wallet/driver's license. **Compare appearance in court.)**
- Draw out actions which indicate lack of judgment or an impaired order of priorities. (Cursing, vulgar language, crying, laughing, fighting, vomiting, belching, need to urinate.)
- Did the defendant assault anyone?

Field Sobriety Tests (FST)

- What is the purpose of these tests? Inquire as to what tests were administered. Were they demonstrated and how well did the defendant perform them?

(NOTE: Some officers have said to me, "Don't ask me to demonstrate.")

Examples of FST:

- -Walk the line
- -Finger to nose
- -Head tilt
- -Alphabet recitation
- -Reverse counting
- -Horizontal Gaze Nystagmus (HGN).

HGN is the involuntary jerking of the eye when the eye is deviated to the side. (Utilize only as a field sobriety test and not as a substitute for chemical testing or estimate as to what the intoxilyzer would indicate.) Be aware that juries and judges may find HGN confusing. Also note there is a difference between an expert and a regular officer. See People v. Loomis, from San Diego, Calif., 4/27/84: DWI conviction reversed, based in part on officer's misapplication of estimate of blood alcohol concentration through use of HGN (officer was a nonexpert). See also a discussion of HGN in Erwin's Defense of the Drunk Driving Cases.

- Have the officer define nystagmus and HGN, and its purpose, and state at what angle HGN begins.
- Have the officer explain and demonstrate the test. Find out what he looks for while it is being administered.
- Was this test performed on the defendant? With what result?
- When all tests were performed, did the officer form an opinion as to intoxication? What was that opinion?

Intoxilyzer

Use it to bolster the officer's testimony. The law now defines intoxication at 0.10 (excluding the percent). In cases filed under the so-called unconstitutional statute, the intoxilyzer result is only helpful as to loss of faculties and must be shown to be relevant. Make it relevant by having the Technical Supervisor testify as to what result the scientific community recognizes as intoxication for the task of driving; most will say 0.08.

Operator

(Be sure that refusal warnings were given.)

- Do you have a valid certificate issued by the Texas Department of Public Safety?
- Was a test administered to defendant on (date)?
- Were you certified on the date of the test?
- After marking color photograph of intoxilyzer as demonstrative evidence, have the officer give the steps followed in administering the test in this case.
- Did you observe the defendant for any period of time before administering this test? How long and why? How close were you to the defendant during this time?
- Did the defendant do anything that could have possibly affected the test outcome?
- What happens if a person does not blow hard enough?
- How do you know if there was an error?
- Were there errors in the test given to this defendant?

SHOW INTOXILYZER TEST RECORD AND HAVE IDENTIFIED AND EXPLAINED.

- Ask test result (unless result is only helpful evidence, in which case judge will not allow the operator to testify in this regard: it is best to leave testimony to Technical Supervisor to explain relevance).
- Note that officer is not qualified to testify about the chemistry or electronics of the test, nor can he interpret the result.
- Did you form an opinion as to the intoxication of the defendant, based on any observations?
- Was this test administered in accordance with rules of the Texas DPS?
- Do you have an opinion as to intoxication before breath test? (Be careful; this may conflict with videotape.)

Technical Supervisor

- Establish educational qualifications re: toxicology/chemistry and experience re: toxicology and alcohol.
- Define toxicology.
- Certified as a Technical Supervisor of intoxilyzer? By whom? How long certified? Requirements for certification?
- Duties as Technical Supervisor?

OFFER AS AN EXPERT ON TOXICOLOGY.

- What is your definition of intoxication?
- Is there a generally recognized alcohol concentration at which most people are intoxicated? What is it? Can a person be intoxicated at a lower level?
- Who is charged with supervision of intoxilyzers of (agency)?
- How often do you check the intoxilyzer instruments of (agency)?
- Familiar with instrument: serial #____ certified by DPS?

Direct attention to (date of test).

- On what dates, before and after (date of test), did you check the intoxilyzer instrument with serial #_____?
- On those dates, what was the operational condition of that instrument?
- Based on your qualifications and experience do you have an opinion as to the proper operational condition of the instrument on (date of test)? State opinion.
- What is the purpose of the intoxilyzer?
- Ask if the photograph is a fair and accurate representation of the intoxilyzer used in this case.
- In terms of collection and analysis of breath how does the intoxilyzer operate?

SHOW INTOXILYZER RECORD.

-Identify
-Name of subject, operator and officer for whom test was run
-Serial # on this instrument

- Does it appear from this record whether the test was administered properly and in accordance with rules of the Texas Department of Public Safety?
- Does the test indicate the #of grams of alcohol per 210 liters of breath? What does it indicate?
- Is that an alcohol concentration of 0.10 or more?

MOVE to introduce INTOXILYZER RECORD.

- In your opinion should a person with an alcohol concentration of ____ be driving a car? Is such a person intoxicated?
- How does intoxication affect loss of

faculties? Is the loss progressive? Explain. (Mental faculties go first, then physical faculties.)

Blood Test

(Be certain that DWI warnings were given. This test should be used simply bolster officer's testimony.)

- Be certain that the blood specimen used in the test was the same specimen taken from the suspect. Absence of testimony of analyst goes to weight not admissibility. Norris v. State, 507 S.W.2d 796. Records of blood test result can be admitted as a business or official record where indicia of reliability can be shown. Id., Bryan v. State, 252 S.W.2d 184 (Tex. Crim. App. 1952); Jackson v. State, 262 S.W.2d 499 (Tex. Crim. App. 1953); Trujilla v. State, 313 S.W.2d 871 (Tex. Crim. App. 1958); Dagley v. State, 394 S.W.2d 179 (Tex. Crim. App. 1965); Coulter v. State, 494 S.W.2d 876; Hines v. State, 515 S.W.2d 670. But also see Lumpkin v. State, 524 S.W.2d 302, which suggests introduction of records.

Proving Up the Records Made by a Subordinate

- How are you employed?
- As chief chemist and toxicologist, are you in charge of the DPS Crime Lab?
- Do you have any special qualifications or education to qualify you for your job?
- Would you state those to the jury?
- Do you feel qualified, given your background and training to run tests and analysis to determine the content of various substances, and give an opinion on it?
- I will show you what has been marked as State's Exhibit No. ____ and ask you whether or not you can identify that.
- Who turned that over to the laboratory?
- Then was the envelope labeled for identification in any way ?
- Being the chief chemist and toxicologist, do you have the care, custody, and control over all the records in your laboratory?
- At the time the test was run on these items in this envelope, did you have working under your direction one (name)?
- Is he the person who ran the chemical tests? If applicable: What are (name)'s qualifications for drawing blood? What are the general procedures employed in the hospital for taking blood samples?
- Is it your testimony that everything that (name), who ran these chemical tests, did was done under your supervision and control?
- And the records from which you are testifying were made in the regular course of business?
- And it was in the regular course of the business of operating the crime lab for the chemist who conducts and has personal knowledge of the test and its result who made the memorandum or report from which you are testifying?
- Were the memoranda from which you are testifying made at or near the time of these tests by your employee? If applicable: Were you present? Did you observe the tests?
- After the vial was received by your laboratory, what was done with it?
- Was a chemical analysis run upon the substance contained in the vial?
- Describe for the jury the type test run upon the substance contained in the vial.
- After the test was completed, what was done with the vial and its content?

Predicate for Admissibility Under D.W.I. Law [art. 6701l-5, §§1, 3(c)]

- Test administered at direction of the arresting peace officer;
- Test was consented to by the defendant;
- Proper person (physician, qualified technician, chemist, registered professional nurse or licensed vocational nurse under the supervision or direction of a licensed physician) withdrew the blood;
- If specimen was not taken by physician, it must at least be taken in a physician's office or in a hospital licensed by the Texas Department of Health.

Extractor of Blood Specimen

- Occupation, length of employment, and basic duties?
- Education, including license, certification, and registration?
- Employed and on duty on date of test?
- Is the hospital licensed by the Texas Department of Health? (or was it taken in a physician's office?)
- On (date of test) were you requested to

take a blood specimen from (defendant)?
- Describe procedure. Time of taking of specimen.
- Identify vial in which specimen was placed (be sure to identify markings).
- To whom was the vial given after specimen was taken?
- In extractor's care, custody and control until it was given to (name)?

Blood Specimen Analyst

(Statute does not provide requirements.)

- Name, place of employment, and how long employed.
- How were you employed on (date of analysis)? On duty?
- What are your duties there?
- What are your educational qualifications in the analysis of blood for alcohol concentration?
- Have your performed tests on blood samples to determine alcohol concentration? How many times?
- Have you testified before in court as an expert witness in a case where the amount of alcohol in a person's blood was one of the issues? How many times?

OFFER ANALYST AS AN EXPERT.

- Is there a generally recognized alcohol concentration at which most people are intoxicated? What is it?
- Based on your training and experience how would you describe the condition of a person who is intoxicated?
- Let me direct your attention to (date of receiving sample). Did you receive in the normal course of business a blood sample of (defendant's name)? How did it come into your custody?
- I show you what has been marked for identification as State's Exhibit ____ (vial)
- Do you recognize it? How?
- Is it the vial in which the blood specimen of the defendant was found? Was it sealed? Did it appear to have been tampered with?

MOVE TO ADMIT VIAL.

- Were you asked for an analysis of this blood specimen for alcohol content?
- At your first contact with the vial, what do you do if there is something that appears to be wrong such as an improper seal or something of that nature?
- With regard to your entries in this case did it appear that anything was abnormal?
- What happens next? (Description of test) In laymen terms.
- In performing the tests was there anything abnormal about the blood specimen in this particular case?
- What were your findings with respect to the defendant's blood and the alcohol concentration therein found?
- Does the test indicate the # of grams of alcohol per 100 milliliters of blood? What?
- Is that an alcohol concentration of 0.10 or more?
- After your analysis what did you do with the specimen?

MOVE TO INTRODUCE BLOOD SPECIMEN.

- In your opinion should a person with an alcohol concentration of ____ be driving a car? Is such a person intoxicated?
- How does intoxication affect loss of faculties? Is the loss progressive? Explain. (Mental faculties go first, then physical faculties.)

Before admission judge may want to know:

- How a blood specimen is preserved before analysis.
- Length of time specimen will stay preserved.
- Whether preservative increases alcohol concentration.
- Whether a blood specimen will "spoil" and affect alcohol concentration.
- Whether the blood specimen in this case gave any indication of being "spoiled."

Videotape [Predicate--Art. 38.22, §3(a)]

- To give yourself a good perspective, view other videotapes.
- Don't ever appear ashamed of videotape.
- Argue to jury the difference in time, and shock and sobering effect of the arrest.
- Tell jury to look at videotape when they retire—pick it apart.
- Depending on design of videotape room, consider pointing out things such as swaying when looking at background/wall lines.
- Show tape to defense witnesses who claim to know defendant and inquire as to whether defendant appears normal.
- If defendant takes the stand, ask him to explain away his behavior and admit to his mistakes. □

SAMPLE JURY VOIR DIRE QUESTIONS

1. Is there anyone who feels that Driving While Intoxicated should not be considered a crime?
2. Have any of you ever been stopped because you were suspected of driving under the influence of intoxicating liquor or drugs?
   a. Do you feel you were treated fairly?
3. Have any members of your family ever been stopped for driving under the influence?
   a. Are you familiar with that case? Do you feel he or she was dealt with fairly?
4. Does anyone have any close friends who were stopped for driving under the influence?
   a. Are you familiar with that case? Do you feel he or she was dealt with fairly?
5. Has anyone ever gone to court for a traffic citation?
   a. Did you have a court trial or a jury trial?
   b. Did you feel the result was fair?
   c. Were you unhappy about your experience in the courts?
6. Do any of you, or any members of your family, have any connection with the liquor industry or with any place of business where liquor is served or sold? (If so, get specifics.)
7. Does anyone have relatives or friends connected with the liquor business? (Get specifics.)
8. Is there anyone here who does not drive?
9. Do any of you have someone in your family who has an alcoholic problem?
   a. Does that person drive a car?
   b. After drinking?
   c. Have you ever been a passenger in the vehicle on such an occasion?
   d. Did you feel that person's driving ability was affected by alcohol?
10. The guilt of the defendant must be proven beyond a reasonable doubt. That is a doubt based on common sense and for which there is a reason arising from the evidence or the lack of evidence. Do you disagree with this principle?
11. If the evidence convinces you beyond a reasonable doubt that the defendant was driving a vehicle while under the influence of intoxicating liquor, could you convict even though you are convinced that the defendant was not actually drunk? Even though there was no accident? (Even though the defendant was not driving erratically?)
12. Is there any member of the panel who feels that a driver who is slightly under the influence of intoxicating liquor is not more dangerous than a sober driver?
13. Is there anyone on the panel who has never seen a person who had too much to drink?
14. Is there anyone here who believes that it is not possible to tell if someone is under the influence of alcohol by observing them?
15. Refusal cases only: Would any of you require chemical evidence before you could return a verdict of guilty in this case? (Be sure to get an audible commitment from everyone.)
16. Mr./Mrs./Miss/Ms _____, do you ever have a drink with dinner?
17. Do you ever take a social drink or a drink to relax?
18. Have you ever had several drinks at one occasion?
19. Did you feel the effects of the drinks?
20. Do you feel the drinks affected your ability to drive a car?

21. Only if defendant appears to have a high tolerance for alcohol: Do all of you understand that people have different tolerance levels with respect to feeling the effects of alcohol?

    Mr./Mrs./Miss/Ms _____, is it your experience that people have different reactions to alcohol, that some people will be under the influence after two or three drinks, and others can consume much more before they feel the effects?

    Do you believe that after a certain number of drinks anyone would be under the influence of alcohol?

22. Has anyone ever participated in a field sobriety test?

23. Has anyone ever observed someone else undergoing a field sobriety test?

    a. Would that experience in any way affect your ability to serve as a fair and impartial juror in this case?

    b. Would you be able to put aside your memory of that experience and judge this case solely on the evidence presented in this courtroom?

24. Is there any member of the panel who feels that the opinion of a police officer that a driver is under the influence is not sufficient for conviction?

25. Is there any member of the panel who would give more or less weight to the testimony of a police officer than he or she would give to the testimony of any other witness?

26. At the close of the case, the Court will instruct you on the legal meaning of DWI. Is there anyone on the panel who could not put aside his own notions of that term and follow the Court's instructions?

27. The State is not required to prove where, what, how much, and with whom the defendant drank and probably will not do so. Is there anyone on the panel who would be unwilling to find the defendant guilty without these additional facts?

28. Without explaining why, is there anyone on the panel who, for any reason, would prefer not to serve on this jury today?

(Note: The remaining questions apply only to cases with chemical evidence.)

29. Does anyone feel it is unfair or unconstitutional to require a driver who is suspected of driving under the influence of alcohol to take a blood alcohol test?

30. Do any of you think it is unfair to presume that a person is under the influence based on the results of a blood alcohol test?

31. Do any of you distrust scientific methods or scientific instruments?

32. Have any of you ever had a chemical test to analyze the alcohol content of your blood?

33. Does anyone know someone who has been given such a test?

34. Have any of you heard of (the gas chromatograph intoximeter, or G.C.I.) which is used to measure the amount of alcohol in a person's blood?

    a. Where have you heard of this instrument?

    b. Do you have any preconceived ideas about the accuracy of such an instrument?

35. Is there anyone here who does not believe that a scientific instrument (like the G.C.I.) which is properly maintained and properly operated will give an accurate result?

36. Only if there are problems with the G.C.I. instrument: Do any of you work with machines? Do they ever break down? Are they repaired? Do you use the machines and rely on them after they've been repaired?

37. How many of you have had a course in chemistry in high school? Junior college? College?

38. Does anyone feel they may not be able to understand evidence of a technical, scientific nature?

PREDICATE QUESTIONS FOR ARRESTING OFFICER

1. What is your name, address and occupation, please?
2. How long have you been so employed?
3. Were you employed on (date of offense) of this year?
4. Calling your attention to that day (or night) and specifically at about (time of offense) where were you?
5. Were you on duty, in uniform?
6. Were you in a squad car?
7. Describe your squad car, please.
8. Did you observe anything out of the ordinary at this time?
9. Will you describe the car which you observed at that time?
10. Where did you observe this car?
11. Is this location in ____ County?
12. What drew your attention to this vehicle?
13. Do you recognize the driver of the vehicle in this court room now?
14. Would you point him out, please?
15. Will you relate the incident to the folks on the jury, please, with particular description and attention to the defendant's driving?
16. Where was your vehicle in relation to his?
17. Was there any other traffic present?
18. Would you describe what else, if anything, regarding the defendant's driving?
19. What was the speed of his driving?
20. Was the defendant driving in a normal manner? (weaving?)
21. Did he cross the center line?
22. How many times did he cross it?
23. Where was your vehicle at this time?
24. How much distance did he cover?
25. Was he weaving during this time?
26. Were you able to get his vehicle stopped?
27. How long did it take you to get the vehicle stopped?
28. What did you do to get the vehicle stopped?
29. Describe the position of the vehicle when it was stopped.
30. How much distance was covered between the time you first attempted to get the defendant to stop his vehicle until that was finally accomplished?
31. After the defendant was finally stopped did you ask him to produce his license?
32. Describe the defendant's actions as he attempted to produce his license.
33. Did you ask him to get out of the car?
34. Will you describe his exit from the car?

35. How far from the defendant were you at the scene?
36. Did you smell any odor that you could identify?
37. What was the odor?
38. Where did it appear to be coming from?
39. How strong was the odor?
40. Did you have an occasion to talk with the defendant at the scene?
41. Did you question him?
42. Did you advise him of his rights?
43. Will you describe his speech for us, please?
44. Will you describe his choice of words?
45. Did you observe the defendant walk?
46. For what distance?
47. Would you describe the way he walked, please?
48. Would you describe the defendant's balance?
49. As you observed him there, did he appear injured in any way?
50. Did you ask him if he was hurt?
51. What did he reply?
52. Will you describe his appearance, please?
53. Could you describe his eyes?
54. How did his face appear?
55. What was the state of his clothing?
56. Was there anyone else at the scene besides yourself and the defendant?
57. Who else was present?
58. Did you search the defendant's car? What did you find?
59. Was there any evidence of consumption of liquor around the defendant's car?
60. Did you ask the defendant to get into your squad car?
61. Describe his entry into the car, please.
62. Did you escort the defendant to the county jail?
63. What was his attitude at this time?
64. Will you describe the defendant's exit from the squad car when you arrived at the county jail?
65. Did you have an occasion to observe the defendant walk at this time?
66. For what distance?
67. Would you describe, please, the way he walked?
68. Would you describe his balance at this time?
69. Did you assist him in any way in walking from the squad car to the jail?
70. How much physical effort went into this assistance on your part?
71. Did you give the defendant a series of tests on this occasion?

NOTE: THIS IS A STRICT YES OR NO ANSWER. (IF NO TESTS WERE GIVEN, THEN STOP THE TEST QUESTIONS RIGHT HERE.)

72. What kind of tests were these?
73. What did you ask the defendant with regard to the taking of these tests?
74. What did he answer?
75. What, if anything, did you tell him with regard to his rights respecting the tests? (Miranda)
76. What did you tell him about the purpose of these tests?
77. What did you tell him with respect to the results of these tests? (That they could be used as evidence against him.)
78. Did you ask him any other questions before giving him the tests?
79. What did you ask? (Ask if he had been drinking recently)
80. What did he answer?
81. How many times did you pose the question before you got an answer?
82. Describe his answer, please.
83. What else did you ask him?
84. What did he reply?
85. Describe his reply for us, please.
86. Did you ask him how much he had drunk?
87. And what was his answer to this?
88. What else did you ask him? (Where he had drunk the liquor)
89. And what was his answer?
90. What other questions did you ask him?
91. If he had been hurt or received a bump on the head in the collision?
92. If he had been taking insulin, had diabetes or recently used a mouthwash?
93. What did he answer to each of these questions?
94. How many times did you pose the questions before you got an answer?
95. Describe the choice of words the defendant used to answer these questions.
96. Did you ask any other questions? (Medicine)
97. Did you ask him what time it was?
98. And what did he answer?
99. What time was it?
100. After asking him questions what did you do? (Administered tests)
101. What time was it when you administered these tests?

    a. Balance and walking tests
    Did you give him a balance test?
    Will you step down please and describe for the jury this test please?
    What was his reaction to the test?
    Did you administer a walking and turning test?
    Will you describe that for us, please?
    How did he perform on this test?

b. Finger to nose test
Did you give him a finger to nose test?
Will you describe this test for the jury, please?
Show them what it is.
What were the results of this test?
What did he touch with his right index finger?

c. Coin Test
Did you give a coin test?
Will you describe that for the jury, please?
How did he perform this test?

d. Speech Test
Did you give him a speech test?
Will you describe that for us, please?
What did you ask him to say?
How did he perform on this test?
Did you notice any odor on his breath at this time?
Could you identify the odor?
What was it in your opinion?

102. Have you in your occupation as a (Highway patrolman) (Police officer) had occasion to observe persons driving under the influence of intoxicating liquor? How often have you had this experience?

103. Based upon this experience and from what you observed of the defendant's driving, speech, actions, and the odor of his breath do you have an opinion as to whether or not the defendant was under the influence of alcohol to the extent his normal faculties were impaired? What is that opinion?

104. Did all of the driving events and testing which you have described earlier occur in _____ County, Texas?

105. Will you point out, please, the person who participated in the driving events which you have described?

106. During the time which you talked with the defendant at the jail, would you describe his speech, please?

107. Will you describe his choice of words?

108. Were the various questions about which you have told us repeated at all?

109. About how many times were they repeated?

110. Did the defendant appear to comprehend immediately your requests?

111. Would you describe the defendant's position as he sat in the jail?

112. At this time did you form an opinion as to whether or not the defendant was under the influence of alcohol? What was that opinion?

PREDICATE QUESTIONS FOR OPERATOR OF INTOXILYZER

1. State your name.
2. How are you employed?
3. How long have you been so employed?
4. To what bureau or division are you assigned?
5. How long have you been so assigned?
6. What do your duties include?

7. Have you successfully completed a course of instruction in the operation of the Intoxilyzer instrument?
8. Where was that course of instruction?
9. By whom is this course given? (Scientific Director of Texas Department of Public Safety)
10. Are you certified as an Intoxilyzer Operator upon completion of this course?
11. Do you presently hold a certificate from the Texas Department of Public Safety as a qualified operator of the Intoxilyzer instrument?
12. How often must you be certified to maintain your certification as a qualified operator?
13. When were you last certified?
14. Were you so certified on the ____ day of _____, 19__?
15. Furthermore, were you on duty that day?
16. What shift were you working?
17. Let me direct your attention to approximately ____ o'clock (PM-AM) on that day, and I'll ask you whether or not you had an occasion to administer an intoxilyzer test to Defendant's name?
18. Do you see that person in the courtroom today?
19. Please point him out, describing the clothes he is wearing. (Let the record reflect that the witness has identified the defendant.)

*20. Tell the jury how the intoxilyzer test is performed. (Steps on instrument)

21. Did you get a result for the subject (Defendant)?
22. What was the result of the test?

**23. What did you do next? (simulator test - Alcohol Reference Test)

24. What was the predicted outcome of the simulator test? (Alcohol Reference Test)
25. What was the actual outcome of the simulator test? (Alcohol Reference Test)
26. Did your check test come within the prescribed tolerance?
27. Which instrument did you use to conduct this test? _____
28. (Predicate for intoxication i.e. few or many, personal observations of defendant)
29. Based on your experience and observations did you form an opinion as to whether or not the defendant was intoxicated?
30. What is that opinion?
31. Officer _____, you're not telling this jury that you are qualified to testify about the chemistry or electronics behind the operation of this instrument, are you?

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* NOTE: Mark and have operator identify Intoxilyzer test record.

** NOTE: The Simulator and the Alcohol Reference Test are one and the same. Operators may tend to interchange the words. In reality the simulator is a trade name for the glass container to the left of the instrument. The contents are made up by the chemist as to a known percentage and will be used for approximately 32 tests. (25 Tests DPS)

By David Douglas, Assistant General Counsel, Texas Department of Public Safety

The following materials are designed to address defense tactics regarding the intoxilyzer, D.P.S records, and test results.

VOIR DIRE QUESTIONS FOR DEFENSE "EXPERT" on the Intoxilyer

1. Is the individual a "certified" Intoxilyzer Operator? (certified by Scientific Director)
2. Is the individual a "certified" Technical Supervisor? (same as #1)
3. Has the individual attended or been certified as a factory "expert" or factory representative to calibrate, linearize or work on the Intoxilyzer?
4. Has he ever linearized an Intoxilyzer 4011AS-A?
5. Has he ever calibrated an Intoxilyzer 4011AS-A?
6. Has he had training and/or experience in repairing an instrument (4011AS-A)?
7. How many, if any, courses has he had dealing with the effects of alcohol on the body?
8. How many drinking/driving studies has he personally been involved in?
9. How many of his publications (if any) deal with the: a) Intoxilyzer, b) effects of alcohol on the human body, c) breath alcohol testing program in the state?
10. How much practical experience has he had in the field of alcohol testing?

The Texas Department of Public Safety is, of course, interested in protecting the integrity of intoxilyzer instruments. The following points should be kept in mind as possible effects of allowing the defense expert (particularly if non-certified) to tamper with the intoxilyer.

POTENTIAL FOR HARM TO INTOXILYZER DUE TO TAMPERING BY NON-CERTIFIED INDIVIDUAL

1. If any of the various variable potentiometers are manipulated the entire system can be thrown out of linearity and/or calibration.
2. Electrical or static discharges from improper handling or manipulation of testing equipment will cause short circuits in the integrated circuitry.
3. Improper placement of testing probes will cause electrical shorts that damage the circuitry.
4. Removing the cabinet tops and bottoms may cause electrical damage due to vibration or twisting of body of instrument.
5. Manipulation of variable potentiometers in the linearizer board will change the accuracy and precision of results.
6. Improper sampling & analyses of such can cause the seal of the quartz windows to blow-out.

7. Improper analyses using standards in a reference sample device may result in short circuits and damage to the reference sample device, the sample chamber mirrors and components.

8. Improper handling of or a lack of understanding of how the interference detection system works or the basic chemistry of acetone will give data that can be interpreted erroneously.

9. Improper sequencing of analytical procedure will cause erroneous results.

10. Unless the temperature gradients are constant while doing work on the instrument, results will not be constant and by an untrained individual would be interpreted as erroneous.

DISCOVERY-RELATED CASES

DENIAL OF SUBPOENA OF INTOXILYZER; D.P.S. AUTHORITY TO SET TESTING METHODS.
Langford v. State, 532 S.W.2d 91 (Cr.App. 1976)

Defendant was not denied the right of effective cross-examination by trial court's refusal to allow him to subpoena breathalyzer and bring it into court. The delegation of power to D.P.S. to approve methods of breath testing and to ascertain the qualifications and competence of individuals who conduct the breath testing is constitutional.

DISALLOWANCE OF INDEPENDENT EXAMINATION OF PARAPHERNALIA.
Montes v. State, 503 S.W.2d 241 (Cr.App. 1974)

Where police chemist, before any motion for discovery or request for appointment of an independent chemist, tested alleged narcotic paraphernalia for heroin residues by using alcohol to rinse out the items to determine not only the nature of the residue but the amount thereof, and his testimony revealed that after the analysis was completed, there was no trace of heroin remaining on the paraphernalia, there was no error in overruling defendant's motion to examine and have chemical analysis of the paraphernalia or in not allocating funds for independent examination of the paraphernalia.

NARCOTICS REPORT IS "WORK PRODUCT."
Alba v. State, 492 S.W.2d 555 (Cr.App. 1973)

An analysis report of narcotics is the work product of the prosecution and is excepted from discovery. Art. 39.14, C.C.P. (See Art. 6701 - 5, V.T.C.S., Sec. 3.)

MOTIONS

The motions on the following four pages are used by D.P.S. to meet defense motions to access the intoxilyzer or D.P.S. records.

The first, **MOTION FOR PROTECTIVE ORDER,** asks the Court to enjoin Defendant or his expert from inspecting or dismantling the intoxilyer in any way which would substantially affect its condition. Instead, the Movant offers to allow the Defendant to conduct sample tests on the instrument through a certified D.P.S. agent.

The second, **MOTION TO QUASH OR MODIFY SUBPOENAS DUCES TECUM, AND MOTION FOR PROTECTIVE ORDER,** seeks to protect D.P.S records from requests for documents which would prove burdensome to produce, irrelevant to the case, or are solely internal communications.

NO.

STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
V.	§	AT LAW NO.
	§	
	§	COUNTY, TEXAS

MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Movant herein, the Texas Department of Public Safety, by and through the _____, and respectfully requests of the Court a protective order, showing as follows:

I.

Movant has been informed that the Court has entered a discovery order herein pursuant to Rule 39.14, Texas Code of Criminal Procedure, pertaining to the inspection of the intoxilyzer used by the Texas Department of Public Safety in testing Defendant's blood-alcohol level in connection with the above-stated cause. Movant has been further informed that the Court thereby ordered that said intoxilyzer should be not only made available for inspection but that, moreover, Defendant's expert may be granted the prerogative of tampering with the normal good operating condition of the intoxilyzer or altering the physical integrity of the instrument.

II.

Movant represents to the court that it is wholly agreeable to the conducting of sample tests in the presence of and along with the Defendant and his expert at the direction of a DPS agent certified by statute[1] to operate such intoxilyzer, so long as any such sample testing does not involve materially affecting the instrument's normal good operating condition or altering its physical integrity.

III.

Movant represents to the Court that if the said intoxilyzer is so tampered with and thereby rendered inoperable in any respect, Movant will suffer irreparable prejudice and damage in the following respects:

(a) The intoxilyzer will be rendered inoperable for necessary law enforcement purposes indefinitely, even assuming it can be made operable again at all.

[1] Art. 67011-5, R.C.S.

(b) Tampering with the instrument will in effect remove or destroy evidence that its physical integrity has been maintained, which evidence necessarily relates to each and every pending DWI-related case involving the use of this intoxilyzer.

IV.

Movant would further represent to the Court that there is no subordinating interest of Defendant herein in so tampering with said intoxilyzer, especially in light of the fact that any inspection of the present operating condition of said intoxilyzer cannot in all likelihood discover significant material and relevant evidence of its operating condition at the time of its use in connection with the testing of Defendants' blood alcohol level at the time of arrest. See Langford v. State, 532 S.W.2d 91 (Cr.App., 1976); Montes v. State, 503 S.W.2d 241 (Cr.App., 1974).

V.

Movant would further show that Defendant's intoxilyzer "expert" fails to qualify as an expert in fact and law in the use of the intoxilyzer. Movant would point out that under the authority of Article 67011-5, Movant is given the exclusive responsibility and authority to promulgate rules and regulations for the use of the intoxilyzer. Movant's Breath Alcohol Testing Regulations, §19.1 - 19.6, state that all breath testing to be used for evidentiary purposes must meet the strict instrument and operator certification standards set out therein, and accordingly meet the approval of the Texas Department of Public Safety's Scientific Director.

Moreover, Defendant's "expert" has not met these qualification standards, is not a certified operator, does not in fact know how to competently use the instrument much less tamper with its normal good operating condition, and should not be allowed to breach the instrument's physical integrity. See Rule §19.6(0), attached hereto.

Movant specifically requests an opportunity to exercise a voir dire challenge to such "expert's" qualifications prior to any examination or use by such person of the intoxilyzer.

VI.

Movant therefore requests a protective order herein enjoining and preventing Defendant or any expert or other agent of Defendant in its inspection of the said intoxilyzer from dismantling, tampering with, or using the intoxilyzer in any respect whatsoever which would substantially or materially affect the present or future normal, good operating condition of such intoxilyzer or alter in any respect the physical integrity of the instrument.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court grant this motion in all respect as requested herein above and for such other relief as Movant may be hereby entitled.

Respectfully submitted,

NO.

THE STATE OF TEXAS	§	IN THE COUNTY COURT AT LAW
VS.	§	OF
	§	COUNTY, TEXAS

MOTION TO QUASH OR MODIFY SUBPOENAS DUCES TECUM, AND MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

THE STATE OF TEXAS, Movant, asks this Court for an order quashing and/or modifying certain subpoenas duces tecum, and for a protective order, and as grounds therefor shows:

I.

Subpoenas duces tecum were issued by the clerk of this Court on or about _____, at the request of Defendant _____ in the above-styled and numbered cause. Said subpoenas were issued to _____. The subpoenas duces tecum issued require the attendance of those persons at this Court on _____, and the production by those persons of the items listed therein.

II.

The subpoenas duces tecum issued to _____ are vague, indefinite, and fail to give a reasonably accurate description of the items sought, and are overbroad and unduly oppressive and burdensome, as to the following items which the said subpoena requests the above-named individuals to produce:

> "Any and all documents, including, without limitation, . . . brochures, pamphlets, books, catalogs, . . . letters, correspondence memorandums or other information in possession of Texas Department of Public Safety, relating to the INTOXILYZER breath alcohol analysis instrument, model number 4011ASA, manufactured by CMI, Inc., a subsidiary of Federal Signal Corporation."

The subpoenas duces tecum is unduly oppressive and burdensome and is overbroad and would require the production of existing documents and items which are not material to the above-styled and numbered cause.

III.

Said subpoenas duces tecum would require the above-named individuals to produce materials which were generated solely for the internal use of law enforcement officers and personnel of

such agencies. In Article 39.14, Texas Code of Criminal Procedure, it is provided that discovery rights "shall not extend to written communications between the State or any of its agents or representatives or employees." The effect of Defendant's subpoenas duces tecum is to attempt to extend and broaden the Order of this Court dated _____, which said Order partially granted Defendant's Motion for Discovery.

IV.

Wherefore, the State requests that this Court enter an order quashing said subpoenas duces tecum issued to _____ together with such other relief which the Court may find appropriate. Alternatively, the State requests this Court to enter an order modifying the subpoenas duces tecum mentioned in this motion as follows: by limiting the production of items subpoenaed so as to exclude those items which are intended solely for the internal use of law enforcement officers and law enforcement agencies; to exclude those items which it is unduly burdensome or oppressive for the subpoenaed witnesses to produce; to exclude those items which are already within the possession, custody or control of the Defendant, or to which the Defendant otherwise has access; to exclude those items which are not material to the above-styled and numbered cause; and to exclude those items which are not in the possession, custody and control of the person who has been subpoenaed to produce them.

In the alternative, the State requests that this Court enter a protective order permitting the State to produce said items for an in-camera inspection, which would allow the court to make an independent determination as to the materiality of such items and whether they are subject to subpoena or discovery process.

The State furthermore requests that the Court enter an order setting a reasonable time and place for the production of any items which it orders produced and that the Court enter an order requiring the Defendant to pay the reasonable costs of production of said items which the Court orders produced. The State furthermore requests the Court to enter an order for any other and further relief to which the State has shown itself entitled.

Respectfully submitted,

Texas Department of Public Safety Testing Regulations §19.6(o):

Security. Refers to the safeguard of all certified instruments and allied equipment and location of testing. As stated in "The Regulations," only certified operators and Technical Supervisors will have access to certified breath alcohol testing instruments and certain allied equipment. After certification is obtained, no modification of equipment can be made without the written consent of the Scientific Director obtained through the Technical Supervisor. The Technical Supervisor has the responsibility and authority to see that security is maintained at all times.

CROSS-EXAMINATION OF DEFENDANT

The easiest method used to prove identity is by the certified driving record of the accused. Lay the foundation at the time the arresting officer is testifying. At the time of the arrest, the officer should have obtained a driver's license from the accused. He should have recorded the number of the license, the address, date of birth, and the physical description shown thereon, including height, weight, and color of hair and eyes. Elicit all of this information from the officer. Thereafter, properly authenticated copies of the prior complaint, information, and judgment should be introduced. Finally, the certified copy of the defendant's drivers license record from DPS is introduced. This record will identify the defendant's number and description as obtained by the arresting officer from the defendant's license, and it will identify the prior judgment attributable to the defendant. See Allison v. State, 423 S.W.2d 326, and Chamblee v. State, 376 S.W.2d 757.

Another method to prove the prior conviction is the testimony of a prosecutor (or other court official) who participated in or observed the prior misdemeanor trial. After introducing certified copies of the complaint, information and judgment of conviction in the misdemeanor, the testimony of the prosecutor who tried the prior case can be used to identify the defendant in that case as the same person being tried for the felony. Garner v. State, 446 S.W.2d 867. This is so even though the witness does not positively identify the defendant, as the proof may be made circumstantially. Usener v. State, 274 S.W.2d 710.

A DWI defendant frequently testifies in his own behalf. First, cross-examine the defendant about his drinking habits: how much, how often, what brand he buys, in what quantity he buys it, how many years he has been drinking, etc. These details will generally give the jury a bad impression of the defendant. If the defendant brings other witnesses, cross-examine them about the same matters. Any discrepancies will persuade the jury that someone is covering something up.

In many cases, the defendant will have testified on direct examination that he had only one or two drinks. Ask this defendant how sober and normal he would have appeared if he had only a couple of drinks, or how little two drinks should have affected him. Then, ask him "why would the officer arrest and jail you if you actually appeared as normal as you usually are after one or two drinks?" (This approach would also be effective jury argument.) Ask the defendant if he believes that there is a conspiracy between the police and District Attorney to harass and persecute him. There is no good answer he can give the jury.

Again, most DWI defendants will admit to several drinks but maintain that they were not drunk. One can pursue several approaches for cross-examination:

(1) Ask the defendant if he was intoxicated. If he indicates that he does not know the distinction between intoxication and drunkenness, his plea of not guilty will appear groundless. Give him the opportunity to define the term "drunk". Most will answer that it means unable to walk, talk, or think.

(2) Ask if he was normal when arrested. Then ask if he could feel any physical effects of the alcohol he consumed (tingle, buzz, lightheadedness, warm feeling). If he admits to any physical sensation, make clear to the jury that if he were normal, he would not have been aware of it. If he denies any sensation, ask him to explain why alcohol has some effect on everyone else (would he give his son a drink rather than a glass of milk since a few drinks gave no physical sensation?).

(3) Ask the defendant just how much alcohol it takes to get him intoxicated, or to the point where his judgment or coordination is slightly diminished, or for him to lose normal use of his physical and mental faculties. If the defendant does not fully understand Article 67011-1, he may inadvertently admit his guilt.

(4) Ask the defendant what symptoms he has when he is in fact intoxicated. Then ask: "Do you think that a person who is intoxicated is the best judge as to what extent his influence affects his abilities?" Then, stress that the officer observed what the defendant said were his symptoms when he is intoxicated.

(5) If the defendant denies having ever been drunk or intoxicated, one can impeach him with any past arrest or conviction for DWI, D&D, or minor in possession.

(6) Ask the defendant if he is personally able to detect when a person is intoxicated. The point to be made is that there is no mystery about recognizing intoxication, and that the arresting officer recognized the defendant as intoxicated.

(7) In response to (3) above, some defendants maintain that they can drink "X" number of drinks without becoming intoxicated. Ask him whether he would enter a rifle match, an automobile race or any other contest of skill with money at stake after that many drinks. Also ask whether he would make an important decision after that number of drinks. These questions will have a good effect on the jury.

Always attempt on cross-examination to create the feeling for the jury that the story the defendant is telling is incredible and that the defendant is fabricating. Ask the defendant to recall specific facts about where he drove and what he did prior to his arrest. These questions test his memory and weaken his credibility if not answered confidently. Ask about the distinctive features of the police station or jail. If the defendant fails to remember any of these things, one should attribute this failure to his intoxication.

JURY ARGUMENT

Obviously, in a close case, a good argument by either attorney can sway a jury toward a verdict. As a result, jury argument is important and preparation should be spent on it; if nothing else, it may save one from losing a good case.

Rules to Follow:

(1) Spend sufficient time studying the special facts developed in the case in order to determine which arguments will better persuade the jury.

(2) Argue naturally rather than attempt to copy another's style.

(3) Keep the argument simple. A jury does not know much about the law; thus, they will not be able to understand, nor be swayed by, a complicated argument. Remember this when summarizing technical issues (intoxilyzer) or problem issues (intoxication of accused).

(4) Make the case important to the jury. Involve them by looking at them.

(5) Anticipate defense arguments. Either lay back and attack the defense counsel's points in closing argument, or dismember them in opening argument before defense has an opportunity to speak. This is a judgment that must be made after a careful evaluation of each case.

(6) Anticipate weaknesses in your own case. When the hole in the case is large or the defense counsel is competent, one may be better off to cover the issue in opening argument and hope to take a little wind out of the defense's sails.

(7) Make the most of your right to open argument and then close after the defense has argued. Most veterans agree the better method is to take full advantage of the right to open. This can put the defense attorney on the defensive, instead of allowing him to make his own points. If the defense still makes offensive thrusts, parry them in closing argument.

What the Prosecutor Can Say in Argument. Generally, the prosecutor must make statements that are supported by the evidence (established by witnesses) or reasonably related to it. The general rule is that if there is no objection made to an error in the argument, error is waived and thus no grounds for reversal. This rule puts the burden on the objecting party to object and ask for an instruction to disregard. In order to get review of the trial court's rulings in this area, the objecting party must pursue the matter to an adverse ruling (if an instruction to disregard is given, the objecting party must ask for a mistrial). Note that the curable-incurable dichotomy that applies in civil cases has never been adopted by the Court of Criminal Appeals. In a flagrant case, an exception is allowed to the general rule, i.e., no objection is necessary for reversible error. However, the Court of Criminal Appeals has held that only "obviously prejudicial" jury argument is enough to qualify for reversible error. This would include an argument that the defendant failed to testify, a comment of racial prejudice, or a statement that is not a plea for law enforcement. Thus, an argument by the State that every man ever tried in court for DWI had contended that he was sick rather than intoxicated, as defendant testified, would be improper because it was not supported by, or reasonably related to, the evidence of record. Defense's objection would be sustained, and defendant would be entitled to an instruction to disregard. However, the error is not flagrant or obviously prejudicial; thus, a mistrial would correctly be denied. Cases cited in the following paragraph will further explain this rule in regard to how far a prosecutor can go without risking reversible error.

Suggestions on Issues to Cover. In opening argument, forcefully remind jurors of their pledges to follow the law and disregard sympathy and other issues. Remind the jury of their promises during voir dire to follow the law ("I believed you then and I believe you will follow the law now").

Explain to the jury at the beginning that you may unintentionally misstate evidence or law when addressing them. By preparing them for this, if the mistake is made, they will realize it was inadvertent. Explain that if the judge instructs them differently on the law from what you have stated, they should ignore what you have said and follow what the judge has said. This identifies you as honest and hopefully prevents the jury from attaching malice to an innocent mistake.

Narrow the issues. The less the jury has to interpret, the better chances of a guilty verdict. For example, there are seven elements of proof in a DWI case. In most cases, the first six elements will be conceded and one can concentrate on the question of intoxication. Thus, you should clearly focus the jury's attention to this issue. (On voir dire, the groundwork can already have been laid). Demand that the jury agree that the defendant need not have been "drunk", only "intoxicated".

Should prosecution cover the judge's instruction in argument? Note here that an objection can be made that the prosecutor is infringing on the domain of the court. Some judges jealously protect this power and not allow the prosecutor to reinstruct. Nevertheless, you can state the law and apply the facts to it, providing your statement of law is correct. In argument (as is done on voir dire) you should summarize the instructions given by the court: what is drunken driving, when is a person intoxicated, the presumption of intoxication (.10), and that one does not have to show any obnoxious of driving in order to substantiate the offense. Then, remind the jurors that they promised to follow these instructions to the letter.

Correlate the facts of the case to the issue presented. Again, the probable controversy will be whether the defendant was intoxicated. In argument, then, recount all the facts upon which the officers based their judgments of intoxication. If chemical evidence was presented, describe the case and precautions used in the test which verified the officer's beliefs. Use the intoxilyzer as corroboration of other symptoms that the evidence showed defendant exhibited (weaving, field sobriety test, etc.). Try to avoid relying on only one issue. In this regard, note that you would have a weak case if you had only chemical evidence of intoxication, without any evidence of erratic driving, etc.

The State cannot comment on the defendant's failure to testify. However, if the defendant does testify, the State can argue that the defendant "has got to come down here and try to disprove those things" without arguing with obvious prejudice. Johnson v. State, 366 S.W.2d 560. As stated in Yates v. State, 488 S.W.2d 463, for there to be reversible error because of a comment on the failure of the accused to testify, the language used must be looked to from the standpoint of the jury, and the implication that the language used had reference to the accused's failure to testify must be a necessary one. See Griffin v. California, 380 US 609. Therefore, prosecutors cannot present argument that the evidence offered by the State is "undenied and undisputed" if the connotation refers to defendant's failure to testify. In Hayes v. State, 172 S.W.2d 98, the district attorney argued that defendant dared not call his companion as a witness because defendant knew that he would testify similar to the arresting officers. The Court of Criminal Appeals held this argument not obviously prejudicial. Even though it was error for the district attorney to speculate in argument as to what the testimony of defendant's companion would be, defendant's failure to object effectively waived the error. (Defendant could have received an instruction to disregard from the trial judge). Note here that the district attorney could have commented on defendant's failure to call his companion as a witness without objection if he had not referred to what such testimony might have been. Therefore, always comment on defense's failure to call logical and material witnesses (persons with whom he was drinking, or not drinking, who could testify as to defendant's condition), when such argument would not necessarily refer to the defendant's failure to testify. Miller v. State, 458 S.W.2d 680; Rodgers v. State, 486 S.W.2d 794. Where one of the logical witnesses is the defendant's wife, defendant will contend that the prosecutor is commenting on privileged relations. In Texas, the State can comment on the wife's failure to testify since the privilege belongs to the wife and her testimony would indicate that she was testifying for defendant (her privilege only extends to testimony against her husband). Fisher v. State, 511 S.W.2d 506. In cases where you do not call logical State witnesses, offer a reasonable explanation if possible.)

If the defense counsel refers in argument to the failure of the State to call witnesses, it is not error for the prosecution to make answering argument with regard to defendant's right to subpoena even though such argument could not have been raised by the State due to the rule restricting argument to that supported by the evidence. In Radoseovich v. State, 350 S.W.2d 198, the defense attorney argued that there was no evidence of chemical tests to support intoxication. Instead of objecting to the statement on the ground that it was not supported by the evidence (which would result in an instruction to disregard), the prosecution referred in closing argument to the defendant's refusal to submit to a chemical intoxication test. The Court of Criminal Appeals held that the State's argument was acceptable under the theory of invited argument. Likewise, where defense counsel argued that the State failed to call a nurse who observed defendant at the hospital and a jailer who admitted defendant to jail, it was not error for the prosecutor to make answering argument with regard to defendant's right was acceptable under the theory of invited argument. But where a defense witness on direct examination merely states that "(I)f he (an officer) was going to ruin him on the breathalyzer it was going to be close," it did not imply that a breath test had been offered or offered and refused, and did not open the door for testimony by State on cross-examination of an offer or offer and refusal of a breath test. Sutton v. State, 548 S.W.2d 720. Where defense counsel argued that the State failed to call a nurse who observed defendant at the hospital and a jailer who admitted defendant to jail, it was not error for the prosecutor to make answering argument with regard to defendant's right to subpoena such witnesses. Minor v. State, 320 S.W.2d 347. Realize that you have definite power to wield when deciding whether to merely object to defense counsel's improper argument or attack it in closing argument under the rule of invited argument. A frequent defense argument that all drunk driving cases sound alike, and that the police officer always give the same testimony on the intoxication issue (implying that the officer really did not know whether defendant was intoxicated). Even though this argument is objectionable since not based on the evidence, a prosecutor may decide that an objection and ensuing instruction to disregard is not sufficient. One would rather "fight fire with fire", so to speak. Therefore, the State can, under invited argument theory, attack the defense in closing argument by explaining that the testimony is similar because drunk drivers tend to act the same.

In the closing argument, reemphasize the juror's solemn oaths to uphold the law. Point out that several officers agreed the defendant was intoxicated before they jailed him. Also explain that no officer would have any reason to falsely accuse this defendant. If the defense has accused the arresting officers of overdoing their testimony, point out that if any officer was going to lie, he would have said the defendant was falling down drunk.

You have the right, as prosecutor, to state your views and belief as to what the evidence establishes, and to urge that the evidence convinces you of the defendant's guilt. In other words, you may say, "I believe this man is guilty based on the evidence" (it is improper to say merely, "I believe this man is guilty"). This may be helpful if the jury respects you and believes that you are honest. In Brummett v. State, 384 S.W.2d 708, argument that the prosecution had never seen a better case was not improper as obviously prejudicial; in fact, the argument was allowable as the prosecutor's opinion based on the evidence.

A prosecutor may make a plea for law enforcement, i.e., that people who do these things will be put on notice not to. Luna v. State, 461 S.W.2d 600. However, note the distinction drawn in Cox v. State, 247 S.W.2d 262, where argument that "the people of De Soto County are demanding a conviction" was held to be obviously prejudicial error and not a plea for law enforcement. As a result, it is improper to suggest to a jury that neighbors, friends, or the public will criticize its members if a verdict of acquittal is given, but proper to inform jurors that crime, due to lax administration of justice, is on the increase that it is the jury's duty to stop it. Arguments held to be properly within a plea for law enforcement on DWI cases include (a) Johnson v. State, 147 S.W.2d 811, where the district attorney argued that if the jury did not do something about DWI cases, "it might be your wife and children the next time that will be run over", (b) Rodgers v. State, 328 S.W.2d 301, remarks of prosecutor that the jury by their verdict would tell the officers and people of the county whether they wanted the law enforced or not, and (c) Spradlin v. State, 368 S.W.2d 210, where prosecution remarked that the public had to be told that it cannot go into a beer joint and come through the county drunk.

Attempt to rebut innuendos made by defense counsel that seek sympathy for the defendant. Defense counsel will argue lack of accident, saying that the defendant could not have been intoxicated since there was no collision. He will hint that the purpose of the law is to avoid accidents. He will attempt to get the jury to feel that the fact that a man has been arrested, had to be bailed out, spent time in custody, and now has to stand trial, is punishment enough. You can effectively deal with this implication by first explaining to the jury that the State should not wait until there is an accident to prosecute since that would defeat the purpose of the law (safe streets). Second, point out that everyone knows a drunk is the last person to recognize his condition ("We've all seen them at parties, staggering around insisting that they are all right"). Finally, remind the jury that the issue is whether defendant was intoxicated. Any consideration of leniency or recommendation for probation should be left until the punishment hearing after all the additional evidence is before the jury.

Offer further rebuttal that the machine used to measure intoxication is impartial. Emphasis can be made that defendant, for whatever reason, might have been mistaken on the number of drinks he had had, but that the machine had no means or motive to give an inaccurate reading.

At the end of closing argument, you might want to quote Judge Learned Hand. (Give it in closing so that the defense attorney cannot retort with something said by someone else.) Since the name will not mean anything to the jury, just tell them a very famous judge once said:

> "Under our procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose even the barest outline of his defense. He may not be convicted when there is the least fair doubt in the mind of even one juror. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime." □

VIDEOTAPED EVIDENCE IN DWI CASES

By the Hon. Margaret Moore, former Travis County Attorney
October 1983

I. PREDICATE FOR ADMISSIBILITY - MINIMUM STANDARDS

The proper predicate for admissibility of electronically recorded evidence will depend on the following factors:

a) What type of activity is being recorded (sobriety testing or custodial interrogation); and
b) What type of taped evidence is being offered (audio or video or both).

In Travis County, for example, the audio-video cassette contains two separate types of activity: (1) sobriety testing, and (2) interrogation, and the taped evidence is an audio as well as video record of the activity. It is very important to be mindful of these distinctions when assessing whether or not any portion of a particular tape will be admissible at trial. The predicate for some taped evidence is less difficult to establish. Furthermore, even if the tape is imperfect it may still contain parts which are admissible. If properly made, these tapes can provide persuasive evidence of the defendant's intoxication for the trier of fact.

Sobriety Testing

Since the portion of an audio video tape showing only sobriety testing is in the nature of an exemplar, the only predicate for admissibility of this portion of the tape is the predicate for authenticity and accuracy found in Edward v. State, 551 S.W. 2d 731 (Tex. Crim. App. 1977). As long as this portion contains no custodial interrogation it should be admissible regardless of whether or not Article 38.22 of the Code of Criminal Procedure is complied with. This is important because it allows for admissibilty of the recorded sobriety testing whether or not the accused was afforded his Miranda rights as codified in Art. 38.22 V.A.C.C.P. Because the officer is simply performing tests and offering the accused the opportunity to show his sobriety by performing the same tests, the accused has no right to consult with an attorney and no right to terminate the testing. U.S. v. Wade, 87 S. Ct. 1926, 388 U.S. 218, 18 L. Ed. 2d 1149. Schmerber v. State of Calif., 86 S. Ct, 1926, 384 U.S. 757. This should be true for the audio and video portions of the tape where it contains only sobriety testing.

Custodial Interrogation

A) **Audio portion** - The portion of a video tape containing custodial interrogation must meet the following predicate before the audio portion can be admitted into evidence:

1) That the accused was told **prior** to the statement but **during** the recording that a recording was being made;

2) That the accused was given the following warnings prior to the statement but during the recording:

   a. he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
   b. any statement he makes may be used as evidence against him in court;
   c. he has the right to have a lawyer present to advise him prior to and during any questioning;
   d. if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning;
   e. he has the right to terminate the interview at any time;

3) That the accused knowingly, intelligently and voluntarily waived any of his rights as set out in the above warning;

4) That the recording device was capable of making an accurate recording;

5) That the operator was competent;

6) That the recording was accurate;

7) That the recording was not altered;

8) That the statement was witnessed by at least two persons;

9) That all of the voices on the recording were identified.

Roy v. State, 608 S.W. 2d 645 (Tex. Crim. App. 1980); Edwards; Article 38.22 V.A.C.C.P. Some of the requisites may be inferred from the testimony and need not be shown with the particularity required for the admission of other mechanically acquired evidence. Roy; Edwards.

B) Video Portion - Even if the portion of the tape containing custodial interrogation does not comply with Article 38.22, V.A.C.C.P., the video portion of the interrogation segment should still be admissible under the same theory as a photo taken at or near the time of the offense. Wade, Schmerber, supra. Trussel v. State, 354 S.W. 2d 548 (Tex. Crim. App. 1962); Clay v. State, 518 S.W. 2d 550 (Tex. Crim. App. 1975); Laws v. State, 549 S.W. 2d 738 (Tex. Crim. App. 1977).

II. SUGGESTED PRACTICE

The foregoing material should be useful in persuading a court as to the minimum requirements for admissibility of certain portions of an electronically recorded tape. However, in order to maximize the chances for using the audio and video record of all portions (sobriety testing and custodial interrogation) of the recorded activity, the prudent course of action would be to attempt to comply with the strictest standards for admissibility of any type of taped evidence. The foregoing distinctions should be used as justification for admitting those portions that fail to comply with the strictest standards but which meet the minimum standards for that type of evidence. The strictest requirements, of course, are those established for the use of an audio recording of custodial interrogation found in Art. 38.22 C.C.P. asset out above. The prudent course of action would be to begin each audio-video tape with the necessary warnings. This is true even though the first segment should contain only sobriety testing for which the predicate for admissibility does not require compliance with Art. 38.22 C.C.P. This use of extreme caution in administering the recording will pay off later.

Below is set out the basic steps used in Travis County in administering an audio-video tape in DWI cases:

(1) Accused enters video room.

The tape should be running when the accused enters and the room should be enclosed with no chance for outside interference or unidentified voices being recorded. Accused should be accompanied into the room by at least two officers. One officer may administer the sobriety tests while the other runs the recording device.

(2) Officers comply with Art. 38.22.

This requires the defendant to identify himself and the officers to do the same for all persons in the room. The accused should receive all warnings in order to maximize use of all portions of the tape (audio and video) later.

NOTE: The most common problem with administering the warnings at this point is that the accused will frequently say "Okay, I want to terminate this now." It is important to train all

officers administering the recordings that the response to this should be to explain that these warnings apply prior to or during any questioning. The officer should explain that when he gets to the interview segment he will allow the accused to terminate it if the accused desires to remain silent. Do not allow the accused to terminate the sobriety testing simply by saying he wants to exercise his Miranda rights. In Travis County the video room contains a phone and the accused is allowed to call a lawyer at this time if he requests to. This serves the dual function of making the officer appear to be very fair to the accused and forces the accused to attempt to use the phone and the phone book while being taped. This can be sobriety testing in itself.

(3) Officer affords accused opportunity to perform certain sobriety tests.

The officer should explain that the accused may perform the same tests after the officer illustrates each one. The accused, of course, can not be forced to attempt the tests but he can be recorded while he refuses. The important point here is that the officers be trained to refrain from asking any questions during the sobriety testing. If, however, the officer's exchange with the accused is determined later by a judge to have risen to the level of custodial interrogation and the accused has not made a knowing and voluntary waiver at this point, the arguments outlined in Section I. above should suffice to at least save the video portion of the sobriety testing segment.

(4) Officer asks DWI information questions.

The officer should remind the accused of his rights and ask him if he wants to answer a few questions. Often, the accused will be unsure and ask what kind of questions will be asked. At this point it is usually very effective for the officer to offer to read the questions one at a time and let the accused decide if he wants to answer each one. Most people will answer the questions if it is handled in that manner.

(5) Officer offers the accused a chance to take the intoxilyzer.

The officer should give the accused a copy of the intoxilyzer warning and read it out loud to him. If the accused refuses to take the intoxilyzer, the officer should have the accused sign the warning form or sign it himself if the accused refuses to sign while the camera is still running.

NOTE: The officer giving the sobriety tests should be the intoxilyzer operator. If the intoxilyzer is turned on before the accused is taken into the video room, the video tape time can count toward the required 15 minute observation period. It is important that the intoxilyzer question be the last thing on the tape in case the Court of Criminal Appeal decides refusals are not admissible under the Texas Constitution. If this were to occur, that portion of the tape could be excised easily.

III. RELATED ISSUES

(A) Public Record.

In an opinion issued by the Attorney General of Texas these video tapes were determined to not be public record and not subject to the Open Records provisions controlling disclosure to the public. TEX. ATTY. GEN. ORD. - 364 (1983).

(B) Training Films.

A training film is available for any prosecutor's office or law enforcement agency on the proper methods for administering a DWI video tape and its use at trial. (There will be a charge to cover the cost of the cassette tape.) To obtain a copy of this film send a request to: Travis County Attorney's Office, P.O. Box 1748, Austin, Texas 78767. □

INTRODUCTION TO D.W.I. LAW
Case Cites
By Davis McCown, Assistant Tarrant County Criminal District Attorney

D.W.I. Elements:

Basic D.W.I. statute: Art. 6701-l VACS.
Probation law: Art. 41.13 C.C.P.

Driving:

1) Putting defendant behind the wheel.
Compare:
Thomas v. State, 283 S.W.2d 933 (1955) [sufficient].
Avants v. State, 340 S.W.2d 817 (1960) [insufficient].

2) Defendant's statements can be used against him.
Berkemer v. McCarty, 104 S.Ct. 3138 (1984).
Miranda warnings not required for traffic stops until and unless defendant is arrested.
Goodney v. State, 501 S.W.2d 311 (1973).

Public Place:

1) Defined: 1.07(29) Penal Code.

While Intoxicated:

1) Can allege only alcohol if drugs reduce defendant's tolerance to alcohol.
Heard v. State, 665 S.W.2d 488 (1984) (en banc).

2) .10 is definition; not presumption or per se standard.
Forte v. State, 686 S.W.2d 744 (Fort Worth, 1985).
Scherlie v. State, (Houston-14th, April 4th, 1985). Austin case - unknown cite.

3) Need not allege type/measure of alcohol.
Perryman v. State, 687 S.W.2d 371 (Houston-14, 1985).

Other Elements:

1) Need not prove culpable mental state.
Ex Parte Ross, 522 S.W.2d 214 (1975).
Sorg v. State, 688 S.W.2d 133 (1985).

Sources of Evidence:

1) Video-tape admissiblity:
Housewright v. State, 225 S.W.2d 417 (1949).
Perez v. State, 653 S.W.2d 878 (1983 CC) [foundation].
Delgado v. State, (San Antonio, March 27, 1985).

2) Use interview for impeachment purposes.
Girndt v. State, 623 S.W.2d 930 (1981).
Bice v. State, 642 S.W.2d 263 (1982 Houston 14).

Alcohol Testing Law:

1) Blood samples can be taken from unconscious defendant. Art. 67011-5 sec. 3(h)
Pesina v. State, 676 S.W.2d 122 (1984) (en banc).

2) Blood samples can be forced when victim is dead or may die.
Aliff v. State, 627 S.W.2d 166 (1982).

3) Blood test taken for medical purposes is privileged. Comply with Article 4495b. sec. 5.08 to obtain such records.
Must prove chain of custody to admit:
Lynch v. State, 687 S.W.2d 76 (Amarillo, 1985).

4) Alcohol test need not use chemicals to be a "chemical test." [Ex.: Infra-red test.]
Gandara v. State, 661 S.W.2d 749 (8th 19__).

5) Defendant is not entitled to attorney before alcohol test.
Growe v. State, 675 S.W.2d 564, (Houston-14th, 1984).
Compare to Forte above.

Refusals:

Refusals are admissible. 67011-5 sec. 3(g)
South Dakota v. Neville, 103 S.Ct. 916 (1983).
Old law: Ashford v. State, 658 S.W.2d 216 (1983) (Texarkana).

Victim:

Crime victim act has been amended to define "crime of violence" so that it includes injury or death which results from a D.W.I. accident. Article 8309-1 VACS.

Punishment:

1) Admissibility of discharged probations:
Moon v. State, 509 S.W.2d 849 (1974).

2) The fact that the name on a prior conviction is the same as defendant's is not sufficient to prove that it is defendant.
White v. State, 634 S.W.2d 81 (Austin, 1982).

Other:

That defendant is seen drinking and driving is insufficient to stop him without more.
Jackson v. State, 681 S.W.2d 910 (1984). □

CASE LAW

A. ELEMENTS

1. Drive or Operate

a. What Constitutes

"Drive" and "operate" are synonymous. Galan v. State, 301 S.W.2d 141 (Tex. Crim. App. 1957).

Proof is not required that the defendant committed the act either intentionally, knowingly, recklessly, or with criminal negligence. Owen v. State, 525 S.W.2d 164 (Tex. Crim. App. 1975).

Defendant's steering of a car on a highway while it was being pushed by another car, with its engine off, constituted "driving and operating". Chamberlain v. State, 294 S.W.2d 719 (Tex. Crim. App. 1956).

Examples of "driving" or "operating": backing one car into another (Collins v. State, 104 S.W.2d 860 (Tex. Crim. App. 1937)); turning a car around (Wimberly v. State, 6 S.W.2d 120 (Tex. Crim. App. 1928); and backing a car onto a street though only half of the car enters the street (Headley v. State, 386 S.W.2d 290 (Tex. Crim. App. 1965).

It is no defense that the accused drove to seek medical treatment. Butterfield v. State, 317 S.W.2d 943 (Tex. Crim. App. 1958).

Assertion of defendant that he realized he was under the influence of liquor while riding as a passenger and that he took wheel of car solely for purpose of stopping car in obedience to officer's signal is not a valid defense. Sansom v. State, 390 S.W.2d 279 (Tex. Crim. App. 1965.)

b. Proof

Proof that the defendant was the driver may come from a person who can identify him as such and witnessed his driving. Williams v. State, 372 S.W.2d 326 (Tex. Crim. App. 1963). Duncan v. State, 357 S.W.2d 752 (Tex. Crim. App. 1962).

For example, the testimony of a witness who saw the collision, went to the car and found the defendant as the only occupant (and no one else got out of the car) is sufficient to establish the defendant as the driver. Eason v. State, 423 S.W.2d 315 (Tex. Crim. App. 1968).

2. Motor Vehicle

A "motor vehicle" includes an automobile (Spears v. State, 20 S.W.2d 1063 (Tex. Crim. App. 1929)); a truck (Nichols v. State, 242 S.W.2d 396 (Tex. Crim. App. 1951)); and a pickup (Lee v. State, 327 S.W.2d 582 (Tex. Crim. App. 1959).

3. Public Place

a. What Constitutes

A "public place" is one to which the public or a significant segment of the public has access. Art. 6701l-1(a)(4), V.A.C.S.; §1.07(a)(29), P.C.

b. Proof

Testimony from a witness who saw the defendant driving is sufficient to prove same. Riley v. State, 406 S.W.2d 438 (Tex. Crim. App. 1966).

Where witness went to scene of accident as soon as he heard crash and found defendant lying in front seat, with his feet near steering wheel and his head toward passenger side, and nobody else in the car, these facts were sufficient to support a finding that defendant was the driver. Green v. State, 640 S.W.2d 645 (Tex. App.-Houston 14th 1982).

4. While Intoxicated

a. Proof - In General

Testimony of a patrolman that defendant was intoxicated was not objectionable as not a statement of fact but was a mere opinion of the witness. Rice v. State, 275 S.W.2d 105 (Tex. Crim. App. 1954).

Witnesses who observed defendant's acts and conduct are qualified to express opinion with regard to intoxication of defendant while intoxicated. Harris v. State, 450 S.W.2d 629 (Tex. Crim. App. 1970).

To show his ability to determine whether a person is intoxicated, an officer may testify as to whether he has had occasion to see intoxicated persons walk and talk. Sligar v. State, 313 S.W.2d 613 (Tex. Crim. App. 1958).

A witness may testify that defendant looked sleepy and dreamy and that his hair was all down in his face. Bedwell v. State, 305 S.W.2d 372 (Tex. Crim. App. 1957).

An officer may testify that defendant had soiled his trousers and had a strong odor of alcohol, urine, and defecation on and about him. DeLaPaz v. State, 424 S.W.2d 230 (Tex. Crim. App. 1968).

A witness may testify that from manner in which defendant was driving, language he used, and way he staggered, that he was drunk. Spencer v. State, 42 S.W.2d 259 (Tex. Crim. App. 1930).

Highway patrolmen may testify that when they saw defendant some hour and a half after a collision in which he was involved, he was intoxicated. Bryant v. State, 261 S.W.2d 728 (Tex. Crim. App. 1953).

Where the defendant was arrested after 5pm and the jailer had seen defendant in jail between 6:30 and 7pm, the jailer could testify to the defendant's intoxication as against the claim that the time was too remote. Bell v. State, 288 S.W.2d 87 (Tex. Crim. App. 1956).

Sheriff's testimony that the defendant was drunk was not too remote though 3 hours had elapsed since arrest. Howard v. State, 230 S.W.2d 213 (Tex. Crim. App. 1950).

A physician's testimony that he could smell alcohol on defendant's breath but could not identify the type, was admissible. Johnson v. State, 147 S.W.2d 811 (Tex. Crim. App. 1941).

A highway patrolman may testify as to movements of car, defendant's conduct, and her efforts to manage car. Nichols v. State, 49 S.W.2d 783 (Tex. Crim. App. 1932).

Testimony of witness that defendant was driving on wrong side of read was admissible. It may also be proved that the motorist had a collision with a car driven by another person, on grounds that the manner in which motorist handled his car might throw light on whether he was intoxicated. Testimony of witness riding in a car with which motorist collided, that as a result she sustained specified injuries, was admissible to indicate force with which defendant's car struck the one occupied by the witness and to shed light on the manner in which motorist's car was operated. Allen v. State, 299 S.W.2d 1013 (Tex. Crim. App. 1946).

Testimony as to death of occupant of car struck by defendant is admissible. Stewart v. State, 299 S.W.2d 646 (Tex. Crim. App. 1927).

c. Proof - Particular Evidence

(1) Liquor on Accused's Person or in Vehicle

Introduction into evidence of bottle of whiskey found in defendant's coat was proper. Watkins v. State, 302 S.W.2d 435 (Tex. Crim. App. 1957).

Testimony of highway patrolman relative to finding partially filled beer and whiskey bottles in defendant's car was properly admitted. Simmons v. State, 233 S.W.2d 150 (Tex. Crim. App. 1950).

The presence of a whiskey bottle in defendant's car, whether empty or party filled, was a circumstance to be considered by the jury, along with other proofs, on issue of intoxication. Cornelius v. State, 252 S.W.2d 163 (Tex. Crim. App. 1952).

Testimony as to the finding of an unopened one fifth of whiskey in defendant's car was admissible. Lacy v. State, 325 S.W.2d 392 (Tex. Crim. App. 1959).

Testimony showing a whiskey bottle in defendant's car was admissible as a circumstance to be considered, even though defendant's possession of it was not unlawful. Chamberlain v. State, 294 S.W.2d 719 (Tex. Crim. App. 1956).

A jug of wine found in defendant's pickup was admissible, even though there was a passenger in the truck. Johnson v. State, 446 S.W.2d 324 (Tex. Crim. App. 1969).

Testimony as to finding of liquor in defendant's car was admissible even though contents of bottle were not shown to be liquor and bottle was not produced in court. Bedwell v. State, 305 S.W.2d 372 (Tex. Crim. App. 1957).

(2) Intoxication of Passenger

Testimony concerning intoxication of passenger in car with defendant was admissible as part of res gestae. McClain v. State, 372 S.W.2d 341 (Tex. Crim. App. 1963).

(3) Photographs and Motion Pictures

Photograph showing condition of station wagon after defendant had collided with it was admissible to show the force with which motorist's car struck the station wagon and to show that the station wagon was on the proper side of the road at time of the collision. Allen v. State, 197 S.W.2d 1013 (Tex. Crim. App. 1946).

Moving pictures being but a succession of photographs are admissible under the same rules for introduction of a still photo. Housewright v. State, 225 S.W.2d 417 (Tex. Crim. App. 1950).

Where the movie is a fair and accurate representation of the events it is admissible. Williams v. State, 461 S.W.2d 614 (Tex. Crim. App. 1970).

(4) Res Gestae Statements

Defendant's statements in nature of a confession, which are part of res gestae, are admissible though defendant was under arrest. Fowler v. State, 287 S.W.2d 665 (Tex. Crim. App. 1956).

Statements of defendant appearing to have been made spontaneously incident to arrest and while he was still excited from events which had transpired at scene of arrest were properly admissible as part of res gestae. Waites v. State, 401 S.W.2d 243 (Tex. Crim. App. 1966).

5. Blood, Urine, Co-ordination and Breath Tests

a. Blood and Breath

(1) Implied Consent - Art. 6701l-5, § 1, V.A.C.S., as amended.

(2) Warning to Subject

Taking of breathalyzer test is not testimonial communication that 5th Amendment seeks to protect and thus failure to give Miranda warnings or statutory warnings does not preclude evidence of breath test and its results, absent any evidence that defendant refused to take breath test. Rodriguez v. State, 631 S.W.2d 515 (Tex. Crim. App. 1982).

(3) Dead or Unconscious Subject

The taking of a blood sample to determine alcoholic content of suspect's blood where suspect was semi-conscious at time of taking and did not give his consent to the taking was not unreasonable search and seizure, since exigency of rapidly dissipating alcohol justified the search. Aliff v. State, 627 S.W.2d 166 (Tex. Crim. App. 1982).

(4) Breath Test

An officer may administer a breath test even though he is not otherwise qualified to interpret the test results. French v. State, 484 S.W.2d 716 (Tex. Crim. App. 1972).

Testimony of an expert that infrared analysis was an established, reliable method, supported the admission of intoxilyzer test results achieved with infrared light in lieu of reactive chemicals. Gandara v. State, 661 S.W.2d 417 (Tex. App. - El Paso 1983).

It is not necessary that breathalyzer test be administered precisely at moment alleged offense occurred to apply presumption that driver was under influence of intoxicating liquor, provided test is given close enough in time that, together with scientific evidence of absorption and metabolization rates, a reasonable finding that blood content was over 0.10 at time of offense can be made. Mullan v. State, 668 S.W.2d 427 (Tex. App. - Texarkana 1984).

b. Urine

Consent is required for the taking of a urine specimen, but only if the person is under arrest for an offense related to his alleged DWI. Aliff v. State, 627 S.W.2d 166 (Tex. Crim. App. 1982).

Taking of breath test is not testimonial communication that 5th Amendment protects; thus, failure to give Miranda warnings does not preclude evidence of breath test, absent any evidence that defendant refused to take test. Rodriguez v. State, 631 S.W.2d 515 (Tex. Crim. App. 1982).

Failure to take prisoner before magistrate who shall inform prisoner of his rights did not render inadmissible evidence pertaining to blood alcohol test. Hearn v. State, 411 S.W.2d 543 (Tex. Crim. App. 1976).

c. Co-ordination

Compelling a handwriting exemplar or sample does not constitute compelling an accused to "give evidence against himself" in violation of Texas constitutional self-incrimination privilege. Olson v. State, 484 S.W.2d 756 (Tex. Crim. App. reh. den. 1972).

B. PUNISHMENTS

1. First Offense: Fine ($100 - $2,000) and jail (72 hours - 2 years).

2. Subsequent Offenses

   a. Second Offense: Fine ($300 - $2,000) and jail (15 days - 2 years).

   b. Third Offense: Fine ($500 - $2,000) and jail (30 days - 2 years) or state penitentiary time (60 days - 5 years).

   c. Prior Convictions

      (1) Must Be Final

      Evidence that defendant had been previously convicted but had been granted probation, without showing that probation had been revoked, was insufficient to support conviction as second offender. Clopton v. State, 408 S.W.2d 112 (Tex. Crim. App. 1966).

      Indictment which charged felonious offense of DWI after having previously been convicted of same, which alleged the prior conviction, gave date of judgment and alleged that conviction was final prior to commission of subsequent offense was sufficient to give defendant notice of prior conviction, and, upon proof of same, shifted burden to accused to refute finality of the conviction. Malone v. State, 466 S.W.2d 310 (Tex. Crim. App. 1971).

      (2) Must be Valid

      Where defendant, with respect to prior misdemeanor conviction used for enhancement of the instant felony offense of DWI, testified that he had pled guilty, that he was not advised of his right to counsel, that he could not afford an attorney, and that he would have retained counsel had he had the money, the evidence failed to show that defendant made a knowing and intelligent waiver of counsel and thus it was improper to use the prior misdemeanor conviction at the guilty stage and for increased punishment. Walker v. State, 486 S.W.2d 330 (Tex. Crim. App. 1972).

      (3) Proving Accused Is Same Person Previously Convicted

      In prosecution for DWI, subsequent offense, the accused must be identified as same person previously convicted; prior judgment alone, containing same name as accused's, is insufficient. White v. State, 634 S.W.2d 81 (Tex. Crim. App. 1982).

      The accused may be identified by someone who was present when he was convicted, such as the attorney who prosecuted. Garner v. State, 446 S.W.2d 867 (Tex. Crim. App. 1969).

      The conviction notice, certified by the clerk of the convicting court, may be admitted and the defendant's signature thereon compared with his signature on his appearance bond or other paper. Vestal v. State, 402 S.W.2d 195 (Tex. Crim. App. 1966).

      The conviction notice carries thumb prints which may be compared to defendant's known prints. Marley v. State, 392 S.W.2d 516 (Tex. Crim. App. 1965). Cain v. State, 468 S.W.2d 856 (Tex. Crim. App. 1971).

3. Offense Causing Serious Bodily Injury: Increase mimimun and maximum fines by $500 and increase minimum confinement by 60 days.

D. FORFEITURE OF VEHICLE - Art. 67011-7(b), V.A.C.S. □

The Hot Check Fee Law: Ask the Committee

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

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

Well, to all Caped Crimefighters doing never-ending battle against the forces of the dreaded Hot Check Writer, I have bad news and good news (which, like all else in this world, depends on your point of view). First, the bad news: This is my last column (please, no tears). The Legislature chose to kill my legacy of lofty legalese by discontinuing the Council. Et tu Brute. This may seem like throwing out the baby with the bathwater, but you know how great literary minds have always been persecuted. Still, I refuse to be silenced. I will go underground! If I can help you, call my headquarters in Ft. Worth at 817-334-1603.

Now, the good news: after nearly six years some quasi-official, clear-cut (well, almost clear), guidelines for dealing with the hot check fund have surfaced. On May 1, (Law Day), the Attorney General released Opinion No. JM-313. Fourteen pages long, the opinion is a "must-read" for every Texas prosecutor. Overall, it is an opinion we can live with. However, there are a few gray areas which leave room for interpretation.

First, the opinion impliedly creates a new form of authority by saying that elected prosecutors have a "limited-sole discretion" over the expenditures of the fund. The effect is that the prosecutors have sole discretion authority in limited areas. The rest of the opinion deals with just what some of those limited areas are.

The first limited (and gray) area deals with the authority of the elected prosecutor to expend the funds: "The attorney must administer the fund within the confines of laws applicable to the use of county funds." It suggests that while applicable expenditures are not subject to the bidding laws as administered by the commissioners' court, they may still be subject to the bidding process, just eliminating the commissioners from the process.

The main reason for the bidding laws is to prevent abuses in purchasing and to assure the public the best buy. It would seem that the same rationale would apply to the expenditure of the check fee funds and that, pursuant to the applicable bidding law, all check fee expenditures should be made under a modified form of the bidding process without involvement of the commissioner's court (but with the utilization of the offices of the county purchasing agent if possible).

This leaves the door open as to just what other areas of the law might also apply to the administration of the fund, notwithstanding that the laws might require commissioners' court action. In short, the opinion indicates that all laws dealing with similar county funds are applicable to the check fee funds, merely eliminating any references to actions required by the commissioners' court, and in most cases substituting the elected prosecutor for same.

The opinion enumerates several "do's and don't's" regarding check fee expenditures, pointing out that expenditures are not limited to only areas directly involving hot

check prosecution but may be used for any portion of the office. The prosecutor can hire personnel to be paid entirely from the fund, or raise an existing employee's salary with a supplement from the fund, all without obtaining approval of the commissioners' court. Significantly, the Attorney General states that the commissioners' court may not then cut the salary of the employee so supplemented to lower it back to what it was before the fee-funded increase.

The key test for all expenditures is that they must reasonably relate to the execution of the official duties of the office. In addition to this threshold test several other important tests must be met.

First, no compensation may be paid for work already done by an employee and for which the employee has already been paid (i.e., no retroactive salary bonuses!!).

Secondly, payments of allowances and expenses for employees must reasonably relate to the performance of the employee's official duties (i.e., payment for parking expenses to come to work is not allowable as same is not an expense incurred in performance of the employee's duties, it is merely a perquisite of employment).

And thirdly, if the fees are used to pay for employee training, such training must reasonably relate to the performance of the employee's duties. Furthermore, if such training might result in substantial private benefit to the employee, conditions must be attached to the funding of the training that assure that the training inures substantially to the office. For example, payments from the fund for an employee to attend the State Bar Advanced Criminal Law Course, while improving the value of the employee to the office would also result in a private benefit to the employee. The elected prosecutor should have the employee acknowledge in writing that the employee will remain with the office for a sufficient period of time to assure that the public receives benefit for the funded training.

The opinion points out situations for which the funds can and can not be used. For example, it notes that the funds can not be used to pay an employee's State Bar dues. The rationale is that an attorney must be a State Bar member prior to being hired as an assistant and as such dues are a perquisite of employment and not an expense incurred in the performance of official duties.

In my opinion, many of the expenditures which the A.G.'s office says cannot be made can in fact be made if those items are made a part of the employee's initial employment contract. (Of course these may result in "compensation" to the employee for income tax purposes.) For instance, I believe that you could enter into a contract with an employee to provide parking and/or pay the employee's State Bar dues, and use hot check funds for those purposes. Similarly, I feel that the contract could provide that if "additional hours are worked beyond normal business hours, and if those hours are recorded, if there is surplus money in the fund at the end of the fiscal year, then a taxable lump sum deferred compensation settlement will be paid to the employee or compensatory time granted." Simply put, things which may not be legitimate expense items in one category may very well be legitimate contractual-salary items.

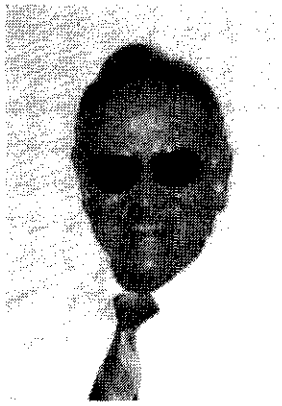
Obviously the opinion does not answer all our questions, but elected prosecutors should feel reasonably comfortable in using the funds under these guidelines.

Sadly, I close this final column with the expiration of the Council. **True Bill** has been a sorely-needed forum for the exchange of information. There are many publications available for the criminal defense bar, but meaningful ones for the prosecutor are rare. I thank the Hot Check Subcommittee, Andy Shuval, and the publication staff, for allowing me to work with them in sharing information with you on hot check law.

Now I bid you farewell, to return to my underground headquarters to await my next chance to spring forth to do battle with the evils of H O T C H E C K S!!!! □

(Who was that masked man?)

Kerry, you've been fun to work with. Thanks for your expertise, enthusiasm, and good humor. Go get 'em, Caped Crusader! —Ed.



Oscar Says

ON DEPOSIT
Contributed by a disciple of Zoroaster

If you had a bank that credited your account each morning with $86,400, that carried over no balance from day to day, and allowed you to keep no cash in your account, and every evening cancelled whatever part of the amount you had failed to use during the day, what would you do? Draw out every cent, of course.

Well, you have such a bank, and its name is "Time."

Every morning it credits you with 86,400 seconds.

Every night it rules off, as lost, whatever of this you have failed to invest to good purpose.

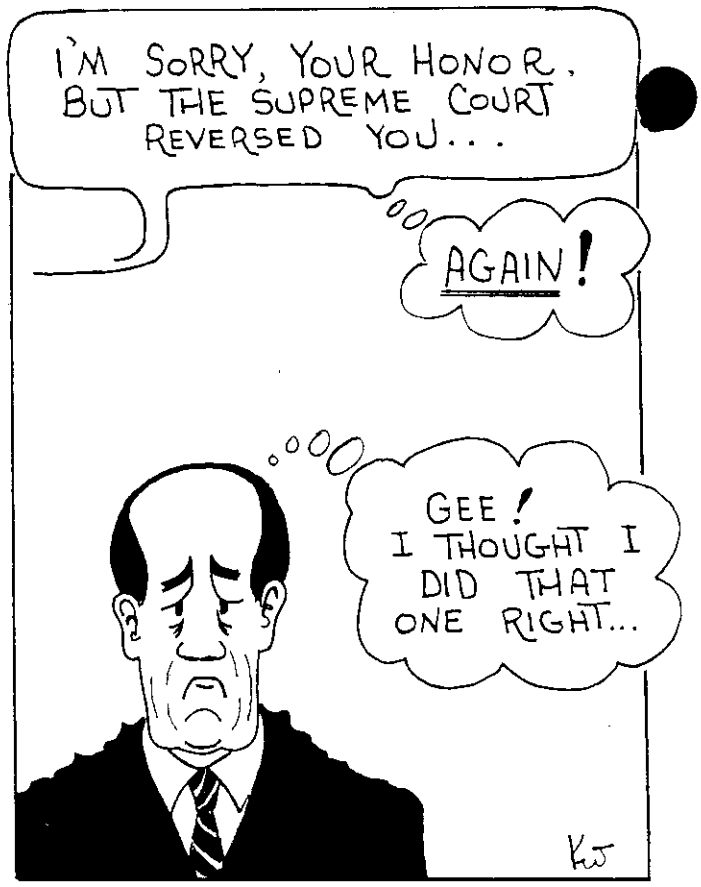
It carries over no balances.

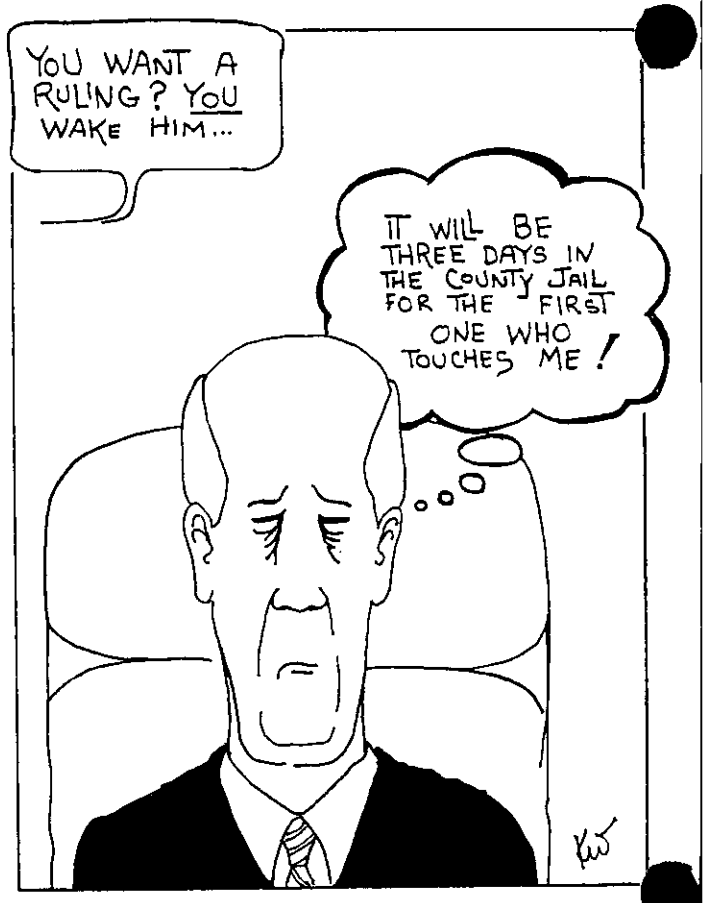
It allows no overdrafts.

Each day it opens a new account with you.

Each night it burns the records of the day.

If you fail to use the day's deposits, the loss is yours. There is no going back. There is no drawing against the "tomorrow." You must live in the present — on today's deposits. Invest it so as to get from it the utmost in health, happiness and success!





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

Council Publications

PLEASE NOTE

In early August the remaining inventory of Council publications was turned over to the Texas District and County Attorneys Association, 1210 Nueces, Suite 200, Austin, Texas 78701 (512/474-2436). Contact T.D.C.A.A for prices and availability.

TECHNICAL MANUALS

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

ELEMENTS MANUAL - 4th Edition of the breakdown of the elements to be proven to establish a conviction. Current through the 1983 Regular Legislative Session.

THE GRAND JURY PACKET - Acquaints grand jurors with their duties and the problems of law enforcement. Includes the Handbook for Grand Jurors, and Elements Manual, "Crime in Texas," and articles on plea bargaining and the politics of crime.

GUIDE TO REPORT WRITING - Designed for peace officers to ensure that reports better meet the require-ments of prosecutors.

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

INDICTMENT MANUAL - 300 pgs. on informations & indictments. Black letter law with annotations, forms, & checklist of recurring problems. Edited by Marvin Collins, Assistant Criminal District Attorney of Tarrant County.

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

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

PUBLIC INFORMATION PAMPHLETS

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

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

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

HOT CHECKS contains clues for detecting bad checks and procedures to follow when taking a check or when a bad check has been received.

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

Audio Visual Loan Library

PLEASE NOTE

In early August the Council's Audio-Visual Loan Library programs were transferred to the Texas District and County Attorneys Association, 1210 Nueces, Suite 200, Austin, TX 78701 (512/474-2436). Contact T.D.C.A.A. for more information.

Professional Development Training

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

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

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

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

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

CAPITAL MURDER PROSECUTION - Produced by the Council in August 1984. Audio cassettes.

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

Public Information Programs

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

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

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

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

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

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

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

JOHN R. SANDS

John R. Sands was a Commerce police officer, but turned in his badge to start a private detective agency. And it's paid off.

John has more than a decade of law enforcement experience, as a patrolman and detective with the Commerce Police and as an investigator with the District Attorney's Offices for the 196th Judicial District (Hunt County) and for the 8th Judicial District (Hopkins, Rain, Franklin and Delta Counties). He has a degree from East Texas State University in sociology with an emphasis in criminal justice and has attended an FBI course in fingerprinting. An avid instructor, John served on the Council committee that planned the Law Enforcement Workshops in 1980. Over the years he has suggested improvements and taught several workshops.

Since 1980, he and his partner, Larry G. Vandiver, County Attorney's Investigator for Hopkins County, have run Sandiver Investigations. The two thus joined the ranks of other former lawmen who have turned to the lucrative field of private investigation. "I made more in three days on a case in Oklahoma than I made in a month as a Commerce detective," John said. "It took us five years of hanging-in-there to establish our business, but now we have major clients such as General Motors and the Attorney General of Texas. Now we get $30 to $50 an hour plus expenses. In Dallas, I hear some of the PI's get $1,000 to $1,500 a day."

Sandiver Investigations handles many types of cases, including divorces, child custody, products liability insurance cases, workmen's compensation, and location of witnesses and even lost heirs. John worked on a well-publicized case a few years ago in the Houston area. "In 1972, a young girl died in a private school for troubled children. The circumstances of how she died were strange, and we were employed by then-Attorney General Mark White's office to reopen the investigation in 1982 after the state was sued for the closing of the school."

Sands and Vandiver were employed to track down and interview 250 people who had graduated from the school ten years earlier. The two managed to locate most of them. "We had a captive audience with some who were now in prison," John said. At the end of the court battle, the State of Texas was not found negligent in the closing of the school.

What was his most dangerous case? "In early 1984, I was employed to work on a murder case down in East Texas around Hawkins and Big Sandy," John said. "I was working for the attorney of a man being tried for murdering another man. Our client admitted to killing the other man but said it was in self-defense. I was trying to find out information about the character of the man killed to support my client's case."

John had a hard time getting anyone to talk to him because of racial barriers and the attitudes of small-town people toward strangers asking questions. John hired a known, local man who accompanied him to a bar where friends of the murdered man hung out. He felt out of place. "I was nervous, but asked some of the murdered man's friends what kind of guy he was. I did not identify myself as a private investigator. I really got a cold reception at first, but after a few beers, the men really opened up. Later, our client was acquitted of the crime."

Does he ever use disguises? In a manner of speaking, yes. "There are a number of business cards around the office here with different occupations and different names," John said. "At times we have been a freelance writer and photographer working for a big Dallas magazine, a real estate agent and a traffic survey team, among other things."

(Could it be that "among other things" might include posing as a vacationer? We have to wonder, because John says the above photo was taken on the Spirit of Vicksburg, a paddle wheeler floating lazily down the Mississippi River. As he puts it, it was tough work "but someone's got to do it.")

Classifieds

Smith County District Attorney's Office has an immediate opening for a **Misdemeanor Prosecutor.** Must have license to practice in Texas. Salary $25,000. Contact Jack Skeen, Jr., District Attorney, Smith County Courthouse, Tyler, TX 75702. 214/597-7263.

Assistant C.D.A for Wood County. Primarily misdemeanor, but felony work also. Experience desired. $22,000 - $26,000 depending on experience. Contact Marcus D. Taylor, Criminal District Attorney, P. O. Box 689, Quitman, TX 75783.

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