volume 29, no. 9 • november 2000

VOICE for the Defense

Did you know? Have you heard?

Character Evidence Can Be a Powerful Tool for the Defense

by Judge "Charlie" Baird

page 20

The *Art* of Remaining Silent

by John Stickels

page 25

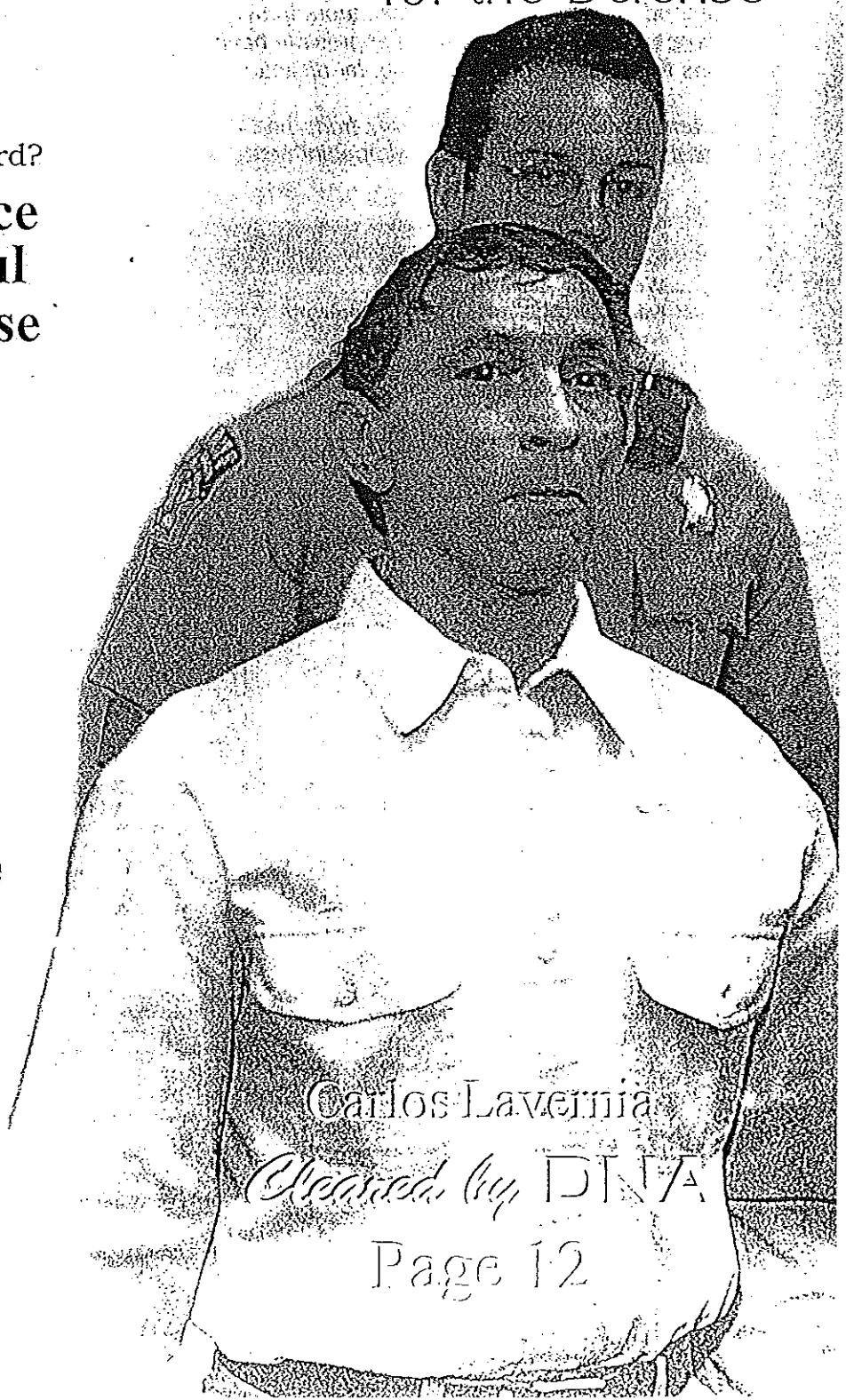
Texas Injustice

The Ronnie Garlepy Story
by Roy E. Greenwood

page 38

Significant Decisions Report

Page 26



Carlos Lavernia Cleared by DNA

Page 12

The Criminal Defense Lawyers Project

The Essential Trial Notebook

December 7-8, 2000

La Posada Hotel ♦ Laredo ♦ 800/444-2099 ♦ Hotel Deadline: November 22nd

Designed by active trial attorneys, the centerpiece of this excellent seminar is a manual with tabs and references that you can use in every trial. Each of the most frequently used rules of evidence will be researched and summarized by volunteers from all over the state. Long after you listen to the excellent speakers on this program, you will appreciate having comprehensive papers on everything from pre-trial motions to punishment, and a computer diskette with all of the newly edited State Forms on hand.

This seminar is sponsored by a grant from the Court of Criminal Appeals. Scholarships are available. Those attorneys accepting criminal appointments are strongly encouraged to apply.

Thursday, December 7, 2000

8:00	**Registration**
8:40	**Welcoming Remarks**
8:45	**Ethics: Zealous Advocacy and Contempt** Ana Lisa Garza *(Invited)*
9:45	**Charging Instruments** "Rick" Hagen, *Denton*
10:45	**Pre-Trial Motions** Craig Jett, *Dallas*
11:30	**Voir Dire** Tyrone Moncriffe, *Houston*
1:30	**Opening Statement** Dan Hurley, *Lubbock*
2:00	**Extraneous Offenses** Lydia Clay-Jackson, *Conroe*
3:30	**Evidentiary Issues** Greg Westfall, *Fort Worth*
4:15	***Appeals*** Larry Warner, *Brownsville*

Friday, December 8, 2000

8:00.	**Recent Significant Decisions (1.0 hour)** Judge Cheryl Johnson, *Austin*
9:00	**Punishment: The Forgotten Phase of Trial** Randy Wilson, *Abilene*
10:00	**Jury Charge** Stan Schneider, *Houston*
10:45	**Final Argument** Bill Harris, *Ft. Worth*
1:15	**Direct and Cross-Examination** Mark Daniel, *Fort Worth*
2:00.	**Ethics: A Review of the Grievance Proces** Robert C. "Bob" Hinton, Jr., *Dallas*
3:00	**Actual Innocence** Mike Charlton, *Houston*
5:00p.m.	***TCDLA Holiday Reception***

Lunches and breaks were omitted from this schedule.

CDLP seminars are sponsored by a grant from the Court of Criminal Appeals.

The Essential Trial Notebook

Please complete and send this registration form by mail to CDLP • 600 West 13th St. • Austin TX 78701-1705 or by fax to (512)469-9107.

Name _____

Bar Card #_____

Address _____

City, State, Zip _____

Phone _____ Fax _____

E-mail _____

☐ Please check here or call the office if you require special assistance. We will be happy to help you in any way we can.

☐ I am applying for a scholarship by November 15th. To apply, send a letter indicating: your need, whether you've received a scholarship before and when and two letters of recommendation, one from a judge and one from a member of TCDLA.

Registration

☐ Current TCDLA Member $175.00

☐ Non-Member $250.00

☐ Judges $ 89.30

Membership Fees

Update your membership or join and get the seminar at the member price! To be eligible for membership, you must be a criminal defense attorney.

☐ New Member $ 75.00
☐ Renew membership $150.00
☐ Public Defender $ 50.00

Early Registration ends November 22nd!! After that date, please add $ 50.00

Can't Attend?

☐ Buy the seminar book! $ 89.30

Your total _____

☐ Check enclosed. *Please make payable to CDLP.*
☐ Charge my Visa
☐ American Express
☐ MasterCard
☐ Discover

Name on Card_____

Card Number _____

Exp. Date _____

For more information:

www.tcdla.com

voice contents

volume 29, no. 9, november 2000

departments

VOICE

for the Defense

Voice for the Defense (ISSN 0364-2232) is published monthly, except for January/February and July/August, which are bimonthly, by the Texas Criminal Defense Lawyers Association Inc., 600 West 13th Street, Austin, Texas 78701. Printed in the USA. Basic subsription rate: $36 per year when received as a benefit of TCDLA membership. Non-member subscriptions: $75 annually. Periodicals Postage Paid at Austin, Texas. POSTMASTER: Send address changes to *Voice for the Defense*, 600 West 13th Street, Austin, Texas 78701. *Voice for the Defense* is published to educate, train and support attorneys in the practice of criminal defense law. Please send all feature articles to Greg Westfall, 500 W. Throckmorton, #1801, Fort Worth, Texas 76102-7414, 817/336-5600. Please send all other materials for publications to John Carroll or D'Ann Johnson at the TCDLA home office, 512/478-2514, fx 512/469-9107 or email at djohnson@tcdla.com. Statements and opinions published in the *Voice* are those of the author and do not necessarily represent the position of TCDLA.

COMMITTEE CHAIRS AND CO-CHAIRS

AMICUS CURIAE
- Ron Goranson 214-651-1121 / 214-953-1366 (fax)
- Bill Harris 817-332-5575 / 817-335-6060 (fax)
- Jeff Blackburn 806-371-8333 / 806-372-4652 fax
- Robert C. Owen 512-320-0334 / 512-320-8072 fax

CONTINUING LEGAL EDUCATION
- Tim Evans 817-332-3822 / 814-332-2763 (fax)
- Gerry Morris 512-479-8600 / 512-479-6035 fax)

DEATH PENALTY
- Cynthia Hujar Orr 210-226-1463 / 210-226-8367 (fax)

DEFENSE INVESTIGATION
- Mike A. Ward 281-348-0884 / 281-736-0562 (fax)
- Philip Wischkaemper 806-763-9900 / 806-763-9904 (fax)

HALL OF FAME
- Frank Jackson 214-871-1122 / 214-880-0443 (fax)
- Clifton "Scrappy" Holmes 903-758-2200 / 903-758-7864 (fax)

IMMIGRATION
- Simon Azar-Farr 210-736-4143
- Robert Lerma 956-546-1910 / 956-546-4013 (fax)

INDIGENT REPRESENTATION
- Paul Looney 281-597-8818 / 281-547-8284 (fax)

LAWYERS ASSISTANCE
- Rick Hagen 940-566-1001 / 940-757-9878 (fax)
- Dan Hurley 806-770-0700 / 806-763-8199 (fax)
- Stanley G. Schneider 713-951-9555 / 713-951-9854 (fax)

LEGISLATIVE
- Keith S. Hampton 512-476-8484 / 512-476-9309 (fax)

MEMBERSHIP
- Randy Wilson 800-588-4678 / 915-677-6129 (fax)
- Bennie House 713-688-3398 / 713-680-0804 (fax)
- Lydia Clay-Jackson 409-760-2889 / 409-756-0901 (fax)
- Versel Rush 940-767-7567 / 940-723-9972 (fax)
- Sheldon Weisfield 956-546-2727 / 956-544-7446 (fax)

MENTOR
- Carolyn Denero 512-472-1353 / 512-472-1316 (fax)

NOMINATING
- Betty Blackwell 512-479-0149 / 512-320-8743 (fax)

PAROLE AND SENTENCING
- Gary Cohen 512-476-6201 / 512-477-5778 (fax)

PUBLIC DEFENDER

Federal
- Marjorie Meyers 713-718-4600
- Patrick Black 903-531-9233

State
- Jane Roden 214-653-3550
- Doug Schropmeyer 214-653-3550

RURAL AND SMALL TOWN
- John Smith 409-598-2744

SPECIAL LIAISON / CORRECTIONS
- Bill Habern 409-594-2123 / 409-594-9100 (fax)

SPECIAL LIAISON / PRISON WATCH
- David O'Neil 936-294-1663 / 409-437-5293 (fax)

WOMEN & MINORITY DEFENDERS

Women
- Katherine Scardino 713-520-5223 / 713-520-5455 (fax)

Minorities
- Lydia Clay-Jackson 409-526-1171 / 409-756-0901 (fax)

30TH ANNIVERSARY
- John Carroll 210-829-7183
- Hon. Frank Maloney 512-476-4306
- Weldon Holcomb 903-597-5595
- George Gilkerson 806-763-7373

VOICE CONTRIBUTORS

MANAGING EDITOR: D'Ann Johnson

FEATURE ARTICLES EDITOR: Greg Westfall
500 W. Throckmorton #1801 • Fort Worth, Texas 76102

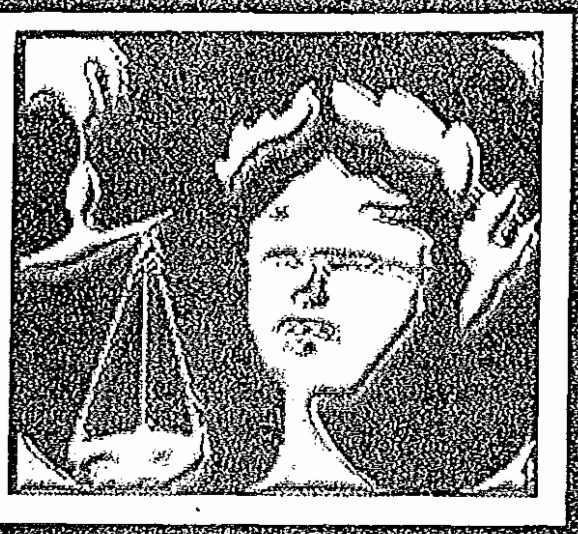
PRODUCTION ASSISTANT: Susan Vela Rice
TCDLA/Home Office 512/478-2514

LAYOUT & DESIGN: Chet Purdy
MPress, Inc. 512/389-0140/512-385-1199 (fax)

ASSISTANT FEATURE ARTICLES EDITORS

Cynthia H. Orr 210/226-1463 • hujaror@aol.com
2900 Tower Life Bldg. • San Antonio, Texas 78205

W. Regan Wynn 817/336-5600
120 W. 3rd Ste. 300 • Fort Worth, Texas 76102



THE PURPOSES OF TCDLA

To protect and ensure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases; to resist the constant efforts which are now being made to curtail such rights; to encourage cooperation between lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance to promote justice and the common good.

VISIT THE TCDLA WEBSITE

www.tcdla.com

PRESIDENT'S MESSAGE

by Robert C. "Bob" Hinton

"Life without parole would not result in a higher murder rate."

Deterrent Effect of Capital Punishment,

And Other Fairy Tales!

In the event we should encounter some half-wit who still harbors the fantasy that the threat of capital punishment is a deterrent, let's once again examine some facts.

According to a recent study conducted by the New York Times, the 12 states without the death penalty do not suffer higher murder rates than those states with it. In fact, in 10 of those states the murder rate is appreciably lower. Since the Supreme Court reinstated the death penalty in 1976, those states which reinstated capital punishment have experienced increased murder rates. While these may be surprising statistics to a few, they certainly are nothing new to those of us who labor in these trenches. Capital punishment simply does not deter.

The truth is that the vast majority of killers are either chemical substance freaks, or are simply convinced they can kill and get away with it. Killers of either ilk are not likely to be deterred by anything! However, if in fact anything could deter, to my way of thinking the threat of life without parole would come closer than the threat of being stuck with a needle. While both methods ultimately achieve the same result, life without parole certainly drags the process out by delivering it naturally, albeit with far less risk of mistake, and at a fraction of the cost to the tax payer.

According to the Times report, Massachusetts, which does not subscribe to the death penalty, has a notably lower murder rate than its less populous and ethnically diverse neighbor, Connecticut, which does. Texas, as we are all so painfully aware, is by far the lead state in executions, with 231 since 1976, the last 144 of which occurring on George W.'s watch. Texas, with its monstorous murder rate of 6.78 per 100,000 residents, is proof positive that the death penalty deters no one. Direct the next yahoo who opines to the contrary to the Sourcebook of Criminal Justice Statistics, maintained by the Justice Department at www.albany.edu/sourcebook. If that doesn't smarten up the chump, then there ain't a cow in Texas!

Life without parole would not result in a higher murder rate. What it would result in, however, is the avoidance of our "occasional" execution of the innocent. How much longer will we tolerate this barbaric process by which we accomplish nothing, yet we run the very real risk of killing innocent people?

The time has never been more appropriate for us to double our efforts to help Keith Hampton and Allen Place be a meaningful voice during this legislative session on important issues such as this. We can make a difference if we set our minds and our hearts to this most important task. In legislative matters of importance, civil lawyers band together and put their money and their efforts where their interests lie. I believe this to be about the only lesson we stand to learn from civil lawyers, but it is a great lesson!

As my dad used to tell me, "Keep your eye on the rabbit!"

"Bob"

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION MENTOR PROGRAM DISCLAIMER AND RELEASE

That I, _____, as a participant in a group sponsored by the Texas Crimial Defense Lawyers Association of Texas, understand that any mentor information and/or advice received in the course of my mentorship is to guide me in my criminal law practice as an educational resource and to discuss issues confronted in the practice of criminal law, including but not limited to attorney/client communications, plea negotiations, trial tactics and techniques, professionalism and legal ethics. I understand that these are general discussions and I can in no way rely upon the advice and/or statements of my mentor or other participants in the mentor program. I understand that although the mentor is engaged in in the practice of criminal law, that the mentor is not redering legal or professional advice to me or to any of my clients through me.

THE INFORMATION I RECEIVE IN THE COURSE OF MY MENTORSHIP WILL NOT BE RELIED UPON BY ME AS A SUBSTITUTE FOR MY OWN JUDGEMENT OR LEGAL OPINIONS, AND I UNDERSTAND THAT THE OPINIONS OR STATEMENTS OF THE MENTOR ARE NOT A SUBSTITUTE FOR MY OWN OPINION OR INDEPENDENT RESEARCH.

I also understand that neither the Texas Criminal Defense Lawyers Association nor any mentor or participant warrants that any information that they share, divulge or give to me is suitable for any area of my practice other than to aid me in improving my criminal law practice skills.

I understand that neither The Texas Criminal Defense Lawyers Association nor the mentor or any participant in the mentor program warrants or represents that any information or advice they may give me can be relied upon by me in my criminal law practice but serves as an aid or guide in assisting me in develolping criminal law practice skills.

Date_____ Participant's Name _____

TCDLA MENTOR COMMITTEE

Carolyn Denero - Chair

DISTRICT 1
Bill Wischkaemper
Chuck Lanehart
Daniel Hurley
Jeff Blackburn

DISTRICT 2
Michael R. Gibson
Dolph Quijano, Jr.
Charles Roberts
David Zavada

DISTRICT 3
Barry Sorrels
Jack Strickland
Randy Wilson
Jeff Kearney
Mark Daniel
Richard Anderson
Craig Jett

DISTRICT 4
Clifton L. Holmes
F.R. "Buck" Files
Barney Sawyer

DISTRICT 5
Stanley Schneider
David Cunningham
M. Bruce Fort
David Walker
Tyrone Moncrife
Marjorie Meyers
Robert Turner
Jim Lavine
Wayne Hill
Robert Jones
Troy McKinney

DISTRICT 6
Sheldon Weisfeld
Bill May

DISTRICT 7
Cynthia Orr
Rusty Guyer
George Scharmen
Alan Brown
John Convery

DISTRICT 8
Bennie Ray
Stuart Kinard
William A. White
Randy Leavitt

EDITOR'S COMMENT

by John Carroll, a San Antonio criminal defense lawyer, is the *Voice* Editor-in-Chief.

"[T]he state of Texas is a national embarrassment in the area of indigent legal services."

INDIGENT DEFENSE REFORM IS BACK

Believe it or not, the Texas Legislature will be back in action next year. One item sure to get a lot of attention will be indigent criminal defense reform. You remember the 1999 Legislature's effort that seemed to win criticism from all interested parties and was vetoed by the governor. The issue has not gone away and many groups, including TCDLA, are preparing to address the legislature on how best to reform the system.

The State Bar of Texas appears to have taken the lead on this issue with its Committee on Legal Services to the Poor in Criminal Matters. On September 22, 2000, the Committee presented its report, entitled "Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas" to the State Bar. The report, which was prepared by Allan K. Butcher and Michael Moore, is based on the results of surveys of three separate groups: lawyers who practice criminal defense, prosecutors, and judges having criminal jurisdiction. It is hard on everyone in the system, including criminal defense lawyers who, according to many of the respondents, including three fourths of defense lawyers, don't work as hard for their court appointed clients as for their retained clients. Note this provocative statement in the report: "[T]he state of Texas is a national embarrassment in the area of indigent legal services." The issue is incredibly important, indigent representation in the criminal defense system, rather than being the exception, is the rule. The report cites a finding that approximately 75% of all felony defendants are found to be indigent.

The report examines the manner of appointing counsel in Texas: public defender systems, contracting with a lawyer or group of lawyers and the most prevalent method, judge assigned counsel. The most striking fact about the manner of appointment is the complete lack of uniformity or even any statewide guidelines for the appointment of counsel.

On the question of the determination of indigency, many jurisdictions have no formal criteria for determining whether someone is indigent. (I know it when I see it?) Only 51.9% of the judges reported that they had formal written criteria for determining indigent status. Interestingly, less than 37% of the prosecutors and defense lawyers were aware of any such criteria for determining indigency. Almost two-thirds of the criminal defense lawyers reported that whether a person is able to post bail is the standard typically used for determining a defendant's eligibility for court appointed counsel.

The rate of compensation of court appointed lawyers is also decried in the report. According to the survey, the average hourly rate for criminal defense work is $135.98 per hour. Overhead expenses consume $71.36 of the hourly rate. Court appointed work pays an average of $39.81 per hour; far less than the amount necessary to keep the office open. The judges reported compensation to attorneys of $71.91 per hour for in court work and $58.41 for out of court work. The report also points out the lack of resources available for defense experts and investigation.

The Report makes several recommendations for reform as follows:

State Level Commitments. Texas is one of only a handful of states that fails to provide any meaningful state level funding. The report suggests the creation of a state level agency to monitor the current system and gather data, state level funding to help counties who currently shoulder the entire bill for indigent legal services, and legal expertise to assist those assigned to represent indigents in criminal matters.

Adopt Professional Standards for Representing Indigent Clients. Standards should be adopted governing the appointment process, the timeliness of the appointment (within a few hours of arrest, rather than days or weeks), attorney qualifications, work load, and professional behavior.

Develop Accurate and Efficient Criteria for Determining Indigent Status. Consistent objective standards should be adopted based on the ability of the defendant

to hire an attorney. The decision should not be based on whether the defendant was able to post bail.

Provide Adequate Compensation and Timely Payments. Compensation should be increased to allow attorneys to cover their overhead expenses and earn a reasonable profit. Defense attorneys should not uniquely subsidize the county's obligation to provide legal representation to indigent criminal defendants.

Guarantee Access to Necessary and Sufficient Support Services. Lawyers should have access to the support services needed to effectively and vigorously defend their indigent clients.

Data Gathering and Monitoring. Counties should be required to report the amount spent on indigent criminal defense, factors related to processing cases, such as timeliness of appointment of counsel, how indigent status was determined, etc., and disposition patterns. Only through such reporting can the system be adequately monitored to determine whether it is working.

Significantly, the report recognizes the need for increased funding of the indigent criminal defense system in Texas. The report concludes,

Gideon's trumpet sounded out the promise that all persons–rich, poor, or otherwise–would have access to the same level of justice in our nation's courts. As matters currently exist in Texas, the sound from Gideon's trumpet has effectively been muted.

What the State Bar Committee will do with the report remains to be seen, but you will be able to get a good idea on December 7-8, 2000, when the State Bar will host a symposium on indigent criminal defense at the Texas Law Center in Austin. It is probable that many of the ideas discussed at the symposium will make their way into proposed legislation on the issue of indigent criminal defense. State Senator Rodney Ellis and State Representatives Senfronia Thompson and Juan Hinojosa are scheduled to participate.

The State Bar Committee is made up of lawyers, judges, prosecutors and academics. Many of the committee members are also members of TCDLA. If you want to find out what the Committee is up to, check out its website: www.uta.edu/pols/moore/indigent/indigentdefense.htm.

DIRECTOR'S PERSPECTIVE

by D'Ann Johnson

"A number of attorneys ... said, 'I saw the signs; I didn't do anything.'"

Death OF A DEFENDER

One week he saved the life of a defendant; the next week he took his own. Don Davis, of Houston tried back-to-back capital cases and was pressured by judges in his other cases. Worn out from the constant battles, he put a sudden end to his own life.

His death prompted a rapid response from the Harris County Criminal Lawyers Association. HCCLA appointed a task force to address the seriousness of the pressures and responsibilities faced by criminal defense attorneys. The task force will examine the courthouse pressures that may have contributed to Don's suicide. They will draft a resolution to be presented to the judges regarding their findings. HCCLA also created a permanent Crisis Intervention Committee chaired by Rob Fickman and an endowment fund for a lawyer's assistance program.

In addition, HCCLA sponsored a free seminar, "Coping with the Practice". The speakers discussed drug and alcohol dependencies, grievances, the Texas Lawyer's Assistance Program, psychological impact of stress, and the crisis intervention strike force.

Dr. Seth Silberman, identified some of the stresses faced by criminal defense attorneys and their psychological and physiological impacts. Stresses include clients who may not like you, don't tell you the truth, and who you do not like. The simple act of meeting with your client, if it takes place in a jail, is stressful. The consequences for your clients are serious. The law and the facts may be against your client. Prosecutors and judges cause stress. Time constraints for trials, motions to be filed, and trying to run a business(which wasn't taught in law school) are a constant source of pressure. Preparing day after day to do battle and lose is difficult. Jury studies have shown that jurors will convict even without the evidence-that's stressful. Four hundred more complaints were filed with the State Bar last year against criminal defense attorneys than family or personal injury lawyers.

Reduction of stress in a criminal practice requires constant effort. The speakers suggested a few recommendations for defense attorneys. .Only accept cases for which you are competent. Accept cases for which you have time to prepare. Allow a cooling off period between difficult trials. Apply time management and case management guidelines. Have a procedure to return phone calls, keep track of phone conversations, and collect payments from clients. Talk to friends. Take time to relax.

Rob Fickman discussed the Crisis Intervention Strike Force. The strike force is designed to help individual attorneys who feel overwhelmed. Rob confided to the group that, after a particularly long and difficult trial, his law partner told him that he wasn't acting like his normal self. Rob wisely sought professional assistance and it helped him understand some of the challenges he faced and make positive changes in his life. Without the urging of his friend, he might not have taken those positive steps. Now Rob is there to help others.

Ann Foster, Director of Texas Lawyers Assistance Program, discussed the confidential help available from her agency. She noted that there is a high incidence of depression and substance abuse among lawyers. Where 8% of the general population suffers from depression, lawyers show a 15-18% depression rate and another 18-20% suffer from chemical dependency and alcohol abuse. TLAP can be reached at (800)343-8527. Lawyers Ethics Hotline for attorneys facing an ethical dilemma can be reached at (800)532-3947.

A number of attorneys had a similar response to Don's death. They said, " I saw the signs; I didn't do anything."

Look around you. Look at yourself. If you see signs of overwork and stress, don't wait until it's too late. There is help available. Reach out to a fellow defender. We owe it to each other.

PAST PRESIDENTS

1999 - 2000 Michael P. Heiskell *Ft. Worth*
1998 - 1999 Kent Alan Schaffer *Houston*
1997 - 1998 E.G. "Gerry" Morris *Austin*
1996 - 1997 David L. Botsford *Austin*
1995 - 1996 Bill Wischkaemper *Lubbock*
1994 - 1995 Ronald L. Goranson *Dallas*
1993 - 1994 David R. Bires *Houston*
1992 - 1993 Gerald H. Goldstein *San Antonio*
1991 - 1992 Richard Alan Anderson *Dallas*
1990 - 1991 Tim Evans *Ft. Worth*
1989 - 1990 Judge J.A. "Jim" Bobo *Odessa*
1988 - 1989 Edward A. Mallett *Houston*
1987 - 1988 Charles D. Butts *San Antonio*
1986 - 1987 Knox Jones *McAllen* *
1985 - 1986 Louis Dugas, Jr. *Orange*
1984 - 1985 Clifton L. Holmes *Longview*
1983 - 1984 Thomas G. Sharpe, Jr. *Brownsville*
1982 - 1983 Clifford W. Brown *Lubbock*
1981 - 1982 Charles M. McDonald *Waco*
1980 - 1981 Judge Robert D. Jones *Austin*
1979 - 1980 Vincent Walker Perini *Dallas*
1978 - 1979 George F. Luquette *Houston* *
1977 - 1978 Emmett Colvin *Fairfield, VA* *
1976 - 1977 Weldon Holcomb *Tyler*
1975 - 1976 C. David Evans *San Antonio* *
1974 - 1975 George E. Gilkerson *Lubbock*
1973 - 1974 Phil Burleson *Dallas* *
1972 - 1973 C. Anthony Friloux, Jr. *Houston* *
1971 - 1972 Judge Frank Maloney *Austin*

* Deceased

TCDLA MEMORIALIZES

Charles Baldwin
Quin Brackett
Jack H. Bryant
Phil Burleson
C. Anthony Friloux, Jr.
Emmett Colvin
Knox Jones
George F. Luquette
David A. Nix
Don R. Wilson, Jr.
George Roland

Please consider a memorial gift to TCDLEI in the name of these or other TCDLA members. Since TCDLEI is a 501(c)(3) organization, your gift is tax-deductible. Send your donation to the TCDLA office at 600 W. 13th Street, Austin, Texas 78701

CAPITOL CORNER

By Keith S. Hampton

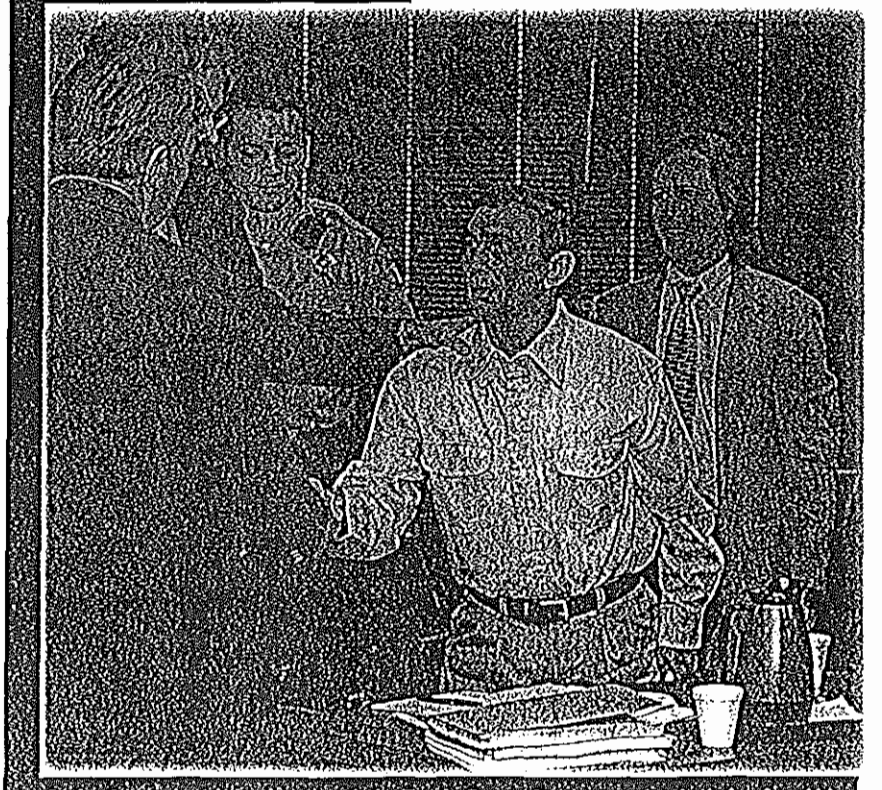
"is it worth it to hurt good people just to get bad ones"

Cleared by DNA

The Travis County District Attorney's office has decided to reexamine the very convictions which that office sought and obtained, and to seek the exoneration of those wrongfully prosecuted and convicted, but cleared by DNA. It is highly commendable that a governmental agency would as a matter of policy second-guess its own apparent successes, and more commendable still when one considers that no other district attorney's office in this state is doing the same. There is no "system" at work here; it is entirely the decision of this one county's office, and those who will have their freedom restored are surely grateful for this unexpected new policy, even if prompted less by the concerns of potentially innocent inmates than by the certainty and potential embarrassment that DNA brings to the process. It is therefore a welcome though rare development that the system — whose overseers so often presume infallibility — would take another look at those it has spirited away to one of this state's many prisons.

But as we celebrate this current rift through which innocent people are delivered from imprisonment to freedom, we should more soberly close those darker doors through which innocent people are purloined from freedom to imprisonment.

A wrongful conviction is nothing less than governmental thievery of something more precious than any object, of greater concern than legal "finality," more enduring and important than even the conviction of the guilty — an innocent citizen's reputation, liberty, life. In no sense is it worth it to hurt good people just to get bad ones. We only hurt ourselves when we subscribe to that odious philosophy which justifies the suffering of the innocent for the sake of punishing the wicked. In the breach of these self-inflicted social wounds lie innocent citizens, helplessly begging the law for help, unaware of its studied obliviousness to their plight. During the next session, we should all remind lawmakers of the current reality of law as well as the values we seek to be honored and the necessity for meaningful legislative action. With the current judiciary, the Legislature may be the only hope for the innocent — for whom there are not even statistics. I know; it scares me, too.



Carlos Lavernia shaking hands with the Travis County Prosecutor after the judge found him innocent because of DNA testing. Also shown are attorneys Bill Allison and Chip Waldron.

TCDLA WELCOMES NEW MEMBERS

MEMBER	CITY	ENDORSED BY
Alex G. Azzo	Houston	J. Gordon Dees
Chad Bull	San Antonio	Fred Garcia, Jr.
Jon Curry	Tyler	Bobby Mims
Stephen E. Dennis	Conroe	Joseph J. LaBella
Joseph A. Esparza	San Antonio	Michael C. Gross
Michael Hammonds	Dallas	W.R. Bill Neil
Dave Howard	Georgetown	Robert Phillips
Robert Luke	Houston	Dick Deguerin
Kurt Noell	Tyler	Bobby Mims
Charles Stanfield	Houston	Danny Easterling
Charles A. Stephens, III	Canyon Lake	Danny Easterling
Mark T. Womack	Houston	John T. Floyd, III

...and, still, there is room for more...

The FEDERAL CORNER

By F.R. "Buck" Files, Jr.

"These infrared cameras can easily be manipulated to make a structure appear to be hot"

GEORGE ORWELL WOULD HAVE LOVED THERMAL IMAGERS

The year 1984 came and went without the government's transformation into the ubiquitous and all-seeing Big Brother of George Orwell's book. (This, at least, is how everyone but dyed-in-the-wool conspiracy devotees would characterize things.) But, on the other hand, the technologies the government has at its disposal to investigate ordinary citizens become more sophisticated by the day.

So began Judge Wood's opinion in United States v. Real Property Located at 15324 County Highway E, Richland Center, Richland County, Wisconsin, 219 F.3d 602 (7th Cir. 2000). The technology to which Judge Wood was referring was the thermal imager which detects energy radiated from the outside surface of objects, and internal heat that has been transmitted to the outside surface of an object, which may create a differential heat pattern. It is a technology which law enforcement officers — especially those investigating drug offenses — have come to love.

This case involved a civil forfeiture proceeding brought under Title 21 U.S.C. § 881(a)(7). During the investigation of the underlying drug offense, an agent of the Wisconsin Department of Narcotic Enforcement went to the property in question and scanned the residence using a SEEKIR Thermal Imager. He determined that large amounts of heat were being vented from two corners of the basement and that there was an unexplained heat source under the porch.

Based on that and other information, the officer obtained a search warrant and found a marijuana growing operation. In the district court, the property owner filed a motion to suppress, arguing that thermal imaging itself was an unconstitutional warrantless search and that the evidence collected under the warrant represented the fruits of that violation.

The motion to suppress was denied; the property owner appealed; and, a panel of the Seventh Circuit affirmed the judgment of the district court. Judge Wood noted that, in criminal cases, the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits had come to the same conclusion about thermal imaging scans — that they were not "searches" within the meaning of the Fourth Amendment; e.g. United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999); and, United States v. Ford, 34 F.3d 992 (11th Cir. 1994).

No surprise? Wrong. On September 26, 2000, the Supreme Court granted the motion of Danny L. Kyllo for leave to proceed *in forma pauperis* and his *petition for a writ of certiorari*. Without regard to its procedural history which is uncommon, Kyllo, supra, at first appears to be just another thermal imager case. An agent of the United States Bureau of Land Management and Oregon law enforcement officers were cooperating in the investigation of a conspiracy to grow and distribute marijuana. At the request of these officers, Sgt. Daniel Haas of the Oregon National Guard examined a triplex of houses where the defendant resided. He used an Agema Thermovision 210 thermal imaging device ("the Agema 210").

Haas concluded that there was a high heat loss coming from the roof of the defendant's house above the garage and from one wall. He also observed that the defendant's house was warmer than the other two houses in the triplex. The officers interpreted these results as evidence of marijuana production because the high levels of heat emission indicated that the defendant might be using high intensity lights to grow marijuana indoors.

The officers presented this information in an affidavit to a United States Magistrate Judge, seeking a search warrant for the defendant's house. The warrant was issued; an indoor marijuana growing operation was found; and marijuana, weapons, and drug paraphernalia were seized. The defendant was indicted for a violation of Title 21 § 841(a)(1). In the district court, he filed a motion to suppress the evidence seized from him alleging that the warrantless thermal imager scan was a violation of his rights under the Fourth Amendment. After his motion was denied, Kyllo entered a conditional guilty plea and was sentenced to a prison term of 63 months. He then appealed the denial of his suppression motion.

A divided panel of the Ninth Circuit affirmed his conviction. The court held, as a matter of first impression in the circuit, that a thermal imaging scan of a house was not a search within the meaning of the Fourth Amendment. What makes the opinion interesting — and what may have caught the Supreme Court's attention — is how two judges of the panel differed in their description of the thermal imaging device.

Writing for the court, Judge Haskins viewed it as being non-invasive:

> In performing its function the Agema 210 passively records thermal emissions rather than sending out intrusive beams or rays--acting much like a camera. A viewfinder then translates and displays the results to the human eye, with the area around an object being shaded darker or lighter, depending on the level of heat being emitted. While at first used primarily by the military, thermal scanners have entered into law enforcement and civilian commercial use.

Dissenting, Judge Noonan viewed it in a different light:

> The Thermovision 210, made and marketed by Agema Infrared Systems, (herein the Agema 210) is described by its maker in the following terms: 'For law enforcement agencies and security organizations it provides a state-of-the-art means of extending operational capabilities and securing hard evidence not possible before. And it does it unobtrusively, noiselessly and immediately, requiring a minimum of operator training and effort.' As to 'Interior Surveillance,' the company's sales brochure that is part of the record on appeal states: 'With a field view of 8 degrees by 16 degrees, the 210, properly positioned, can monitor activity in critical rooms or large facilities, once again providing a permanent time-tagged record when connected to a VCR.'

Judge Noonan also expressed concern as to the reliability of the Agema 210:

> The defendant's expert witness, who had had extensive experience working for the FBI, analyzed its vulnerability in these terms: 'These infrared cameras can easily be manipulated to make a structure appear to be hot, when in reality it is not. This is achieved by increasing the gain and sensitivity buttons on the camera. The procedure is similar to using a 35 mm camera and manually opening the aperture on the lens.' It is this manipulable, not very accurate or reliable but easily usable, surveillance machine which is at issue here.

Should Fifth Circuit lawyers be surprised that the Supreme Court is now considering this issue? No, not if they remember the opinion of then Chief Judge Robert M. Parker of the Eastern District of Texas in United States v. Ishmael, 843 F.Supp. 205 (E.D. Texas 1994). There, Judge Parker granted the defendant's motion to suppress and held, *inter alia*, that the use of a thermal imaging device to detect a concealed underground activity was a search which did not fall within an exception to the warrant requirement of the Fourth Amendment. His opinion is an excellent analysis of the issue which the justices of the Supreme Court will now consider — and is the argument which the circuit courts have all rejected.

Judge Parker did not allude to 1984 but, rather, relied on sound, constitutional authority in voicing his concerns about the use of thermal imaging devices:

> Left unchecked, technology has the potential to restrict, as a practical matter, the right to privacy to the confines of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). We must take care that the war on drugs not count as one of its victims fundamental rights. The benefits to our society of safeguarding the right to privacy is such that the courts must say that there is a limit to the use of technological weapons, even in the war on drugs.

Join Bob Hinton and TCDLA for the 2001 President's Trip to Banff, Canada!!

February 15-19, 2001

Only 70 spots open!!
4 hours of CLE!

Air and hotel arrangements will be handled by Ski Banff / Lake Louise by e-mail or fax.
Contact: Sarah Wulff
sarah@skibanfflakelouise.com -or- fax: 403-762-8185

Trip includes:

- 4 nights of accommodations at the Banff Springs Hotel
- 2 days of area lift passes interchangeable at Lake Louise, Sunshine Village, Banff Mt. Norquay
- Complimentary scheduled ski bus transfers between hotel and ski areas daily
- Complimentary night skiing on Friday Night, Feb. 16th at Banff Mt. Norquay
- Round trip airport transfers from Calgary International Airport including National Park Entrance fee
- Round trip airfare from Austin, Houston or Dallas
- All flights will be on United Airlines

Air cost:

From Dallas: $412 • From Austin: $430 • From Houston: $430

Hotel cost:

(All prices are per person based on double occupancy)

Chateau Deluxe Room	Canadian Pacific Room
$470 pp	$430 pp

Canadian Pacific rooms are comfortable for 2 people, with limited living pace, and will have 1 queen or king bed, or 2 single beds, or 1 queen and 1 single bed.
Chateau Deluxe rooms are larger, comfortable for 2 or 3 people with larger living space, and will have 1 queen or king bed, or 2 single beds, or 1 queen and 1 single bed.

CLE

4 hours of CLE! $75 Register with TCDLA

For more information:
Randy at TCDLA - 512/478-2514 or randym@tcdla.com
All reservations must be finalized by December 28, 2000

Criminal Justice News

SPOOKY NEWS

The Fifth Circuit recently returned a brief to Mark Bennett of Houston to correct the cover. The cover read:

United States of America,
Plaintiff – Appellee
vs.
Edward Dewayne Russell,
Defendant – Appellant

Instead of:

United States of America,
Plaintiff – Appellee
vs.
Edward DeWayne Russell, also known as Spook
Defendant – Appellant

Mark, understandably, did not want to identify his client, who is black, by the name of "Spook" on the cover of the brief. He filed a motion with the clerk to change the title of the case or accept the brief as filed.

ATTORNEY GENERAL OPINION NO. JC-029 (OCTOBER 3, 2000)

Neither the domestic violence protection order sections of the Family Code in the Code of Criminal Procedure explicitly permit or specifically prohibit a judge to include in such an order a provision requiring a police officer to escort a perpetrator of domestic violence to the family home to retrieve personal property. Article 5.045 of the Code of Criminal Procedure is not by its terms applicable in such a situation and accordingly does not provide immunity from liability for a police officer providing such an escort.

ATTORNEY GENERAL OPINION NO. JC-0242 (JUNE 29, 2000)

The state has no right to a jury trial in a juvenile proceeding.

INTERNET ACCESS

Attorney.com offers free Internet access to attorneys. The free service is available by visiting www.attorney.com and downloading the software from their home page.

INCARCERATED VETERANS

According to the U.S. Bureau of Justice Statistics, about 225,700 or 9% of the estimated 25,062,000 military veterans are behind bars. Approximately 56,000 Vietnam vets and 18,500 Gulf War vets are confined in state and federal prisons.

The profile of a typical incarcerated vet, according to the study, is a middle aged, hard-working, literate, alcoholic, first-offender who either killed his wife or girlfriend, or sexually assaulted a young woman or a child.

WOMEN'S LEGISLATIVE DAYS

The 77th Session of the Texas Legislature will be the focus of Women's Legislative Days held on March 5-6, 2001 at the LBJ auditorium in Austin. The conference will provide participants with unique opportunities to learn about critical issues facing Texans.

FAMOUS TRIALS

Professor Douglas Linder has compiled a website of famous trials including the Scopes Monkey Trial (1925), Rosenberg's Trial (1951), Mississippi Burning Trial (1967) and O.J. Simpson Trials (1994-95). The website includes photos, transcript excerpts, appellate court decisions, and other interesting information. The site is www.law.umkc.edu. Click on Faculty, then Projects then Doug Linder Famous Trials. The site also includes profiles of trial heroes. Be careful – you can spend hours here.

FORENSIC EVIDENCE

Another useful website is www.forensic evidence.com. This site includes a link to the Federal Rules of Evidence that will go into effect on December 1, 2000. It also includes recent articles in scientific behavioral evidence, identification, and police procedures.

MEMBER NEWS

Bill Allison has moved his office. His new address and phone are:

Bill Allison
1012 Rio Grande
Austin, Texas 78707
Telephone: (512) 472-2664
Fax: (512) 472-4102

The Houston Press named Richard Burr the Best Lawyer in its Best of Houston Poll.

motion of the month

Cause No. _____

STATE OF TEXAS	§	IN THE _____ COURT
	§	
VS.	§	COURT DESIGNATION
	§	
***	§	_____ COUNTY, TEXAS

DEFENDANT'S MOTION REQUESTING NOTICE OF PROSECUTION'S INTENT TO USE CERTIFIED *COPIES OF OFFICIAL WRITTEN INSTRUMENTS*

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes ***, the Defendant in the above styled and numbered cause, by and through his/her attorney of record, pursuant to the Texas Rules of Evidence *609(f)*, and *Article 39.14*, of the Texas Code of Criminal Procedure and moves the Court to require the Prosecution to give the defense notice of its intent to offer into evidence certified copies of official written instruments, including, but not limited to, certified copies of any prior judgments of convictions of the Defendant which the Prosecution intends to use as direct or impeaching evidence. The Defendant requests that he be provided with copies of any such certified official records at least thirty days prior to trial. Unless the defense is provided with copies of any official written instruments the State intends to offer into evidence, the Defendant will be unduly surprised and disadvantaged, in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 19 of the Texas Constitution, and Articles 1.04, 1.05 and 1.051(a) of the Texas Code of Criminal Procedure.

WHEREFORE, the Defendant prays that the Court grant his/her motion and order the State to give the Defendant written notice of its intent to offer certified copies of official written instruments into evidence and that the Court enter an order requiring the prosecution to provide copies of such documents to the defense at least thirty days prior to trial.

Respectfully Submitted,

_____

Attorney Name
State Bar Number
Address
City, State, Zip
Phone
Fax

Attorney for Defendant
***

Continued on next page...

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Motion Requesting Notice of Prosecution's Intent to use Certified Copies of Official Written Instruments was served upon the attorney for the State on _____, 200___.

_____
Attorney for Defendant

ORDER

BE IT REMEMBERED, that on the _____ day of _____, 200___, came on to be considered the above and foregoing Motion Requesting Notice of Prosecution's Intent to Use Certified Copies of Official Written Instruments. After consideration of the same, it is the opinion of the Court that Defendant's Motion be:

_____(GRANTED, and the State is ordered to provide the defense with written notice of its intent to use in evidence copies of any certified or official documents and are ordered to provide the defense with true and correct copies of such documents, including the certifications thereof, on or before _____, 200___.)

_____(DENIED, to which the Defendant duly excepts.)

SIGNED on _____, 200___.

_____
JUDGE PRESIDING

Did You Know? Have You Heard?

Character Evidence

can be a Powerful Tool for the Defense

by Judge Charles F. (Charlie) Baird

"Be it true or false, what is said about men often has as much influence upon their lives, and especially upon their destinies, as what they do." Victor Hugo (1862).

INTRODUCTION

In my ten-plus years as an appellate judge, I cannot recall a single case where character evidence was an issue or raised as a point of error on appeal. That is not to say there were no such cases, only that the issue of character evidence seems to have diminished from previous years when it was a hot button issue in criminal cases. After considering the diminished role of character evidence in criminal trials, I decided to write this article believing that some practitioners had not considered and/or had forgotten the importance of character evidence in the criminal trial.

Character evidence is a general category of evidence that relates to some character trait that is at issue in the trial. In Texas, character evidence is admissible as it relates to the defendant, witnesses and complainants. This article will focus primarily on the role of character evidence relative to the defendant and later briefly discuss character evidence as it pertains to witnesses and complainants.

I
THE DEFENDANT – GENERALLY

It is important to note at the beginning that the State may never, in the first instance, offer evidence of the defendant's character. Such evidence is specifically precluded by Rule 404(b) of the Texas Rules of Evidence which prohibits the State from proving the defendant acted in conformity with his character. Because of this prohibition, Rule 404(b) requires extraneous matters to be relevant to some issue other than character conformity such as motive or identity.

The defendant, however, may offer character evidence under Rule 405 of the Texas Rules of Evidence, which provides: (a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

While this rule seems simple, it was developed over many years and therefore has a number of interpretations and applications.

The defendant's character trait for being a law-abiding person is automatically at issue because of the accusation against him. After all, there would not be a trial unless the defendant was accused of committing a crime. Additionally, the defendant can introduce evidence of a specific good character trait to show that it is improbable he committed the charged offense. *See Valdez v. State*, 2 S.W.3d 518, 519 (Tex. App.--Houston [14th Dist.] 1999). The character trait must be related to the charged offense. In such a circumstance, the evidence operates as a defense and the defendant is permitted to offer it under the Due Process Clause of the Fourteenth Amendment. *See Washington v. State*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967). The same argument should be made under Article I, § 19 of the Texas Constitution. Consequently, the error in excluding this evidence is constitutional and would require a harm analysis under Rule 44.2(a) of the Texas Rules of Appellate Procedure.

For example, the defendant can offer evidence of the good character trait of sobriety in a DWI prosecution. *See Foley v. State*, 172 Tex. Crim. 261, 356 S.W.2d 686, 686-87 (1962) (opin. on reh'g). However, the defendant could not offer the same good character trait in a robbery trial because sobriety is related to a charge of driving while intoxicated but has no relation to the offense of robbery. There are numerous instances where the courts have allowed the defendant to introduce evidence of

good character traits when the trait is related to the charged offense. *See, e.g., Canto-Deport v. State*, 751 S.W.2d 698, 700 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd) (holding trait of "honest and fair dealing" is admissible in fraud case); *Hamman v. State*, 166 Tex.Cr.R. 349, 314 S.W.2d 301, 305 (Tex. Crim. App. 1958) (holding trait of honesty admissible in embezzlement case); *Thomas v. State*, 669 S.W.2d 420, 423-24 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd) (holding traits of morality and "safe and proper treatment of young children" are admissible in child sexual assault case); *Wade v. State*, 803 S.W.2d 806, 808 (Tex.App.—Fort Worth 1991, no pet.) (holding evidence that appellant had never possessed drugs admissible in prosecution for possession of a controlled substance); *Brazelton v. State*, 947 S.W.2d 644, 650 (Tex.App.—Fort Worth 1997, no pet.) (same).

II
OPINION VS. REPUTATION

Opinion testimony of a character trait requires personal knowledge of that character trait. Based upon this personal knowledge, the witness testifies as to what the defendant is, e.g., he is peaceful, law-abiding, sober, honest, etc.

Reputation testimony, on the other hand, need not be based on personal knowledge. *See Jackson v. State*, 628 S.W.2d 446, 450 (Tex. Crim. App. 1982). Instead, testimony of this nature may be based either on (1) discussions between the witness and others about the defendant; or (2) information overheard by the witness during conversations by others who discussed the defendant's reputation. *See id.* Allowing testimony that is not based on personal knowledge would appear to violated the hearsay rule. *See* Tex. R. Evid. 802. But, as the Dallas Court of Appeals stated in *Moore v. State*, 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983):

> "Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule. For reputation testimony to be an exception to the hearsay rule it must meet two basic criteria: (1) that there is some necessity for the introduction of the testimony; (2) that the testimony has some circumstantial probability of trustworthiness. 5 Wigmore, Evidence § 1580, 1611, & 1612 (Chadbourn rev. 1974); 1A R. Ray, Texas Law at Evidence Civil and Criminal § 1321 (Texas Practice 3d. ed 1980). The trustworthiness of reputation testimony stems from the fact that a person is observed in his day to day activities by other members of his community and that these observations are discussed. Over a period time there is a synthesis of these observations and discussions which results in a conclusion as to the individual's reputation. When reputation is based solely on specific acts, this synthesis is lost, as well as its reliability. When reputation testimony is given by police officers who have investigated an individual's offenses and by victims of an individual act who have spoken only with others who are also victims, it is obvious that the witnesses' conclusions as to the appellant's reputation will be slanted against the individual and will not have the trustworthiness implicit in the exception to the hearsay rule. The conclusion of such witnesses as to the reputation may be vastly different from those who have had the day to day contact within the community envisioned in the traditional exception to the hearsay rule for reputation testimony. What is actually occurring with testimony of this type is that a witness takes the specific acts of the individual and then infers what the reputation of the person would be. In this respect, this evidence could easily be fabricated and, thus, loses its reliability. Consequently, if this were an open question, we would likely hold that such testimony was inadmissible.

For example, you may not know President Clinton personally or have any personal knowledge of his relationship with Monica Lewinsky. Nevertheless, through your observations of the events stemming from that affair and discussions of those events, you would be able to testify as to whether President Clinton had a reputation for being truthful or faithful to his wife.

III
CROSS-EXAMINATION

Once the character witness has testified, the witness may be cross-examined on relevant specific instances of conduct. *See* Tex. R. Evid. 405(a). These questions are not for the purpose of establishing the truth of the conduct or misconduct, but rather to test the credibility of the character witness. *See Brown v. State*, 477 S.W.2d 617, 620 (Tex. Crim. App. 1972). Consequently, the questions cannot be worded to (1) include excessive detail in describing the conduct, or (2) inquire whether the conduct actually occurred. *See Sisson v. State*, 561 S.W.2d 197, 199 (Tex. Crim. App. 1978). Defense counsel should remember to ask for a limiting instruction to the jury so it is aware that the questions asked on cross-examination are not substantive evidence but are being asked for the limited purpose of determining the credibility of the character witnesses. *See Brown v. State*, 477 S.W.2d 617, 620 (Tex. Crim. App. 1972). This instruction should be requested both when the cross-examination occurs and again when the jury is charged. *See* Tex. R. Evid. 1.05(a); *Rankin v. State*, 974 S.W.2d 707, 711-13 (Tex. Crim. App. 1996).

If the cross-examination is of a reputation witness, the question must be in the form of "have you heard" questions. The theory is that if the witness is truly familiar with the reputation of the defendant, he will have also heard of adverse reports which are circulating in the community. In contrast, if the witness testified in the form of an opinion, the cross-examination would test the witness' personal knowledge by asking "did you know" questions. *See Rutledge v. State*, 749 S.W.2d 50, 53 (Tex. Crim. App. 1988). For example, if a reputation witness testified that President Clinton had a good reputation for being truthful, the cross-examiner could ask: "Have you heard the President lied under oath while giving a deposition?" And, using the same example, if the witness testified his opinion was that the President was a truthful

person, the cross-examiner could ask: "Did you know the President lied under oath while giving a deposition?"

The reason for this distinction is clear: because the opinion was based on personal knowledge, it cannot be impeached by asking whether the witness has heard rumors or gossip inconsistent with the character trait. Similarly, because reputation is not based upon personal knowledge, it cannot be impeached with lack of personal knowledge regarding a specific event. *See Ward v. State*, 591 S.W.2d 810, 818 (Tex. Crim. App. 1973)(opin. on State's mot. for reh'g).

The right to cross-examine a character witness on specific instances of a defendant's conduct is subject to two limitations: (1) there must be some factual basis for the incidents inquired about; and (2) those incidents must be relevant to character traits at issue in the trial. *See Lancaster v. State*, 754 S.W.2d 493, 496 (Tex. App.—Dallas 1988, pet. ref'd). The requirement of a factual basis ensures that the question is asked in good faith. For example, in *Murphy v. State*, 4 S.W.3d 926, 931 (Tex. App.—Waco 1999, pet. ref'd), the court found a judgment was a factual basis for a question about a prior conviction. However, the misconduct does not require either an arrest or a conviction to establish good faith. *See Brown v. State*, 477 S.W.2d 617, 620 (Tex. Crim. App. 1972). Regarding the second requirement, in *Kennedy v. State* the Court of Criminal Appeals reversed the defendant's murder conviction because on cross-examination, the prosecutor asked a reputation witness if he had heard the defendant had an illicit relationship with a woman. 150 Tex. Crim. 215, 200 S.W.2d 400, 403-07 (Tex. Crim. App. 1947). The reputation witness had merely testified on direct that the defendant had a good reputation for truth and veracity, and for being quiet, peaceable, inoffensive and law-abiding. *See id.* The court held the question improper because the defendant's reputation as a man of good morals or good moral character was not placed in issue by the testimony of the reputation witness. In other words, having an illicit affair was not inconsistent with the character traits placed in issue. *See id.*

Using our presidential example again, if President Clinton was charged with DWI and you, as his defense attorney, called witnesses who testified the President had a good reputation for sobriety, the State could not ask: "Have you heard the President lied under oath while giving a deposition?" Such a question would be improper because it was neither related to nor inconsistent with the character train placed in issue.

Additionally, Rule 405(a) requires that a character witness be familiar with the reputation or underlying facts or information upon which the opinion is based prior to the date of the offense. Therefore, the State cannot cross-examine a character witness and impeach that witness with the facts of the offense on trial. *See Rodriquez v. State*, 509 S.W.2d 319, 321 (Tex. Crim. App. 1974); *Wright v. State*, 491 S.W.2d 936, 938 (Tex. Crim. App. 1973). The reason for this prohibition is that if the State uses the charge contained in the indictment as a basis for showing that a man's reputation as a law-abiding citizen is bad, then no person who is on trial could successfully show a good reputation as a law-abiding citizen. *See Stephens v. State*, 128 Tex. Crim. 311, 80 S.W.2d 980, 982 (1935).

As a final note, the State cannot place the defendant's character in issue by its own cross-examination and then impeach that character trait. *See Els v. State*, 525 S.W.2d 11, 14 (Tex. Crim. App. 1975). For example, in *Long v. State*, 631 S.W.2d 157 (Tex. Crim. App. 1982), the defendant was charged with aggravated robbery and relied on the defense of alibi. In support of the defense, the defendant offered evidence that he had facial hair at the time of the robbery, which was inconsistent with the State's witnesses who testified that the robber was clean shaven. *See id.* The defendant called his mother to testify. *See id.* After establishing that her son had a mustache on the date of the offense, the defense passed the witness for cross-examination. *See id.* at 158. On cross, the State asked the mother "have you heard" questions. *See id.* This was improper and required reversal. *See id.* at 159.

IV
CHARACTER EVIDENCE AT THE PUNISHMENT PHASE OF TRIAL

Article 37.03, section 3(a) of the Texas Code of Criminal Procedure provides for the admission of evidence of the defendant's reputation and character at the punishment phase of a trial. This article permits the State to offer this evidence in the first instance. This is markedly different from the guilt phase where the State may never, in the first instance, offer evidence of the defendant's character because such evidence is specifically precluded by Rule 404(b).

The State's character witnesses cannot, however, testify as to the defendant's reputation from a specific act. Therefore, a police officer who has done nothing more than investigate the offense for which the defendant has been convicted cannot not testify as a reputation witness. *See Wagner v. State*, 687 S.W.2d 303, 313 (Tex. Crim. App. 1985). In *Hernandez v. State*, 800 S.W.2d 523, 525 (Tex. Crim. App. 1990), the Court of Criminal Appeals held the enactment of Rule 405 did not alter the viability of *Wagner*.

As a caveat, the defense attorney must remember that if the defendant is a candidate for probation and you seek to establish his suitability for probation, this opens the door for questions of specific instances of misconduct that tend to mitigate against the defendant's suitability for probation. *See Griffin v. State*, 787 S.W.2d 63, 67 (Tex. Crim. App. 1990).

V
CHARACTER EVIDENCE AND WITNESSES

Opinion or reputation evidence related to a witness may be offered only to attack or support the witness' character for truthfulness or untruthfulness. *See* Tex. R. Evid. 608(a)(1). Any witness can be attacked for being untruthful. But only after that attack has been mounted, can evidence of a truthful character be admitted. *See* Tex. R. Evid. 608(a)(2). The old objection of "bolstering" a witness who had not been impeached or whose character had not been attacked, however, is no longer recognized as a valid objection. *See Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (Campbell, J., concurring). Therefore, the objection should be lodged under Rule 608(a) and, perhaps, Rule 613(c).

In any event, neither side may introduce specific instances of conduct to attack or support the witness' credibility. *See* Tex. R. Evid. 608(b).

VI
CHARACTER EVIDENCE AND THE COMPLAINANT

Finally, evidence of the character traits of the complainant may be introduced to show the complainant was the aggressor at the time the alleged offense occurred. This is typically limited to murder cases. Evidence of prior bad acts on the part of the decedent are admissible for at least two reasons.

First the evidence is admissible under what is commonly referred to as the "*Dempsey* Rule," after *Dempsey v. State*, 159 Tex.Crim. 602, 266 S.W.2d 875 (Tex. Crim. App.1954). Under this rule, evidence of both the general reputation of the decedent for being of dangerous character, and prior specific acts of violent misconduct, are admissible. *See Lowe v. State*, 612 S.W.2d 579, 580 (Tex. Crim. App. 1981); *Beecham v. State*, 580 S.W.2d 588, 590 (Tex. Crim. App. 1979). These specific acts of misconduct could include both actions and statements (threats) by the deceased. *See Lowe*, 612 S.W.2d at 580.

This type of evidence is admissible to show either the reasonableness of a defendant's claim of apprehension of danger, or to show the decedent was the aggressor at the time of the offense. *See Thompson v. State*, 659 S.W.2d 649, 653 (Tex. Crim. App. 1983). If the evidence is offered to show that the deceased was the aggressor, the defendant does not have to have knowledge of the acts or statements at the time of the homicide. *See Lowe*, 612 S.W.2d at 581; *Beecham*, 580 S.W.2d at 590.

The "*Dempsey* Rule" was recently reaffirmed in *Tate v. State*, 981 S.W.2d 189 (Tex. Crim. App. 1998). In that case, Tate fatally stabbed his girlfriend's father. *See id.* at 190. At trial, Tate testified he acted in self defense and that the girlfriend's father was the aggressor. *See id.* To support his self defense claim, Tate offered evidence of a prior threat by the girlfriend's father. *See id.* The trial judge excluded the evidence because the defendant was not present when the threat was made. *See id.* at 190-91.

The Court of Appeals affirmed but did so, not because Tate did not hear the threat, but because the rules 404 and 405 were promulgated after *Dempsey*, and therefore superceded the *Dempsey* Rule. *See Tate v. State*, 956 S.W.2d 845 (Tex. App.–Austin 1997), rev'd, 981 S.W.2d 191 (Tex. Crim. App. 1998). The Court of Criminal Appeals disagreed. *See Tate*, 981 S.W.2d at 193. Rule 404(b) which governs the admissibility of extraneous conduct, works not just for the State but also for the defendant. *See id.* Therefore, a defendant may offer evidence of prior acts of aggression or threats by the complainant so long as they are not offered to show the complainant was a bad person in general, but to show that the complainant had the intent or motive to cause the defendant harm, that the defendant's apprehension of danger was reasonable, and/or that the complainant was the likely aggressor. *See id.* Under these circumstances, evidence of the complainant's dangerous character, and prior specific acts of violent misconduct, are admissible because such evidence tends to make the existence of a consequential fact more probable and is, therefore, relevant and admissible under Rule 401. *See id.*

Additionally, this type of evidence is admissible under Article 38.36 of the Texas Code of Criminal Procedure, which provides:

Evidence in Prosecutions for Murder

(a) In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

(b) In a prosecution for murder, if a defendant raises as a defense a justification provided by Section 9.31, 9.32, or 9.33, Penal Code, the defendant, in order to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary, shall be permitted to offer:

(1) relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased, as family violence is defined by Section 71.01, Family Code; and

(2) relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to family violence that are the basis of the expert's opinion.

This is the former section 19.06 of the Texas Penal Code which permitted this type of evidence in all homicide cases. Now, apparently, it is admissible only for murder cases.

CONCLUSION

It seems as though character evidence no longer plays an important role in the trials of criminal cases. It can, however, be powerful and persuasive evidence in supporting your theory of the case. To that end, I hope you find this article useful.

Credit and thanks go to Karen Vowell for assistance in editing and cite-checking this article. Ms. Vowell is Senior Staff Attorney with the Fourteenth Court of Appeals.

BIOGRAPHICAL INFORMATION

Judge Charles F. (Charlie) Baird served on the Court of Criminal Appeals from 1990 through 1998 and now sits as a visiting justice on the Fourteenth Court of Appeals. Additionally, he teaches courses in criminal trial advocacy and capital punishment at South Texas College of Law. Judge Baird is co-Chair of the National Committee to Prevent Wrongful Executions and a frequent speaker on criminal justice topics across the nation. This year, he has testified before the United States Senate Judiciary Committee and appeared on ABC, CNN, NBC and PBS. Judge Baird may be contacted through his email address at cbaird@austin.rr.com.

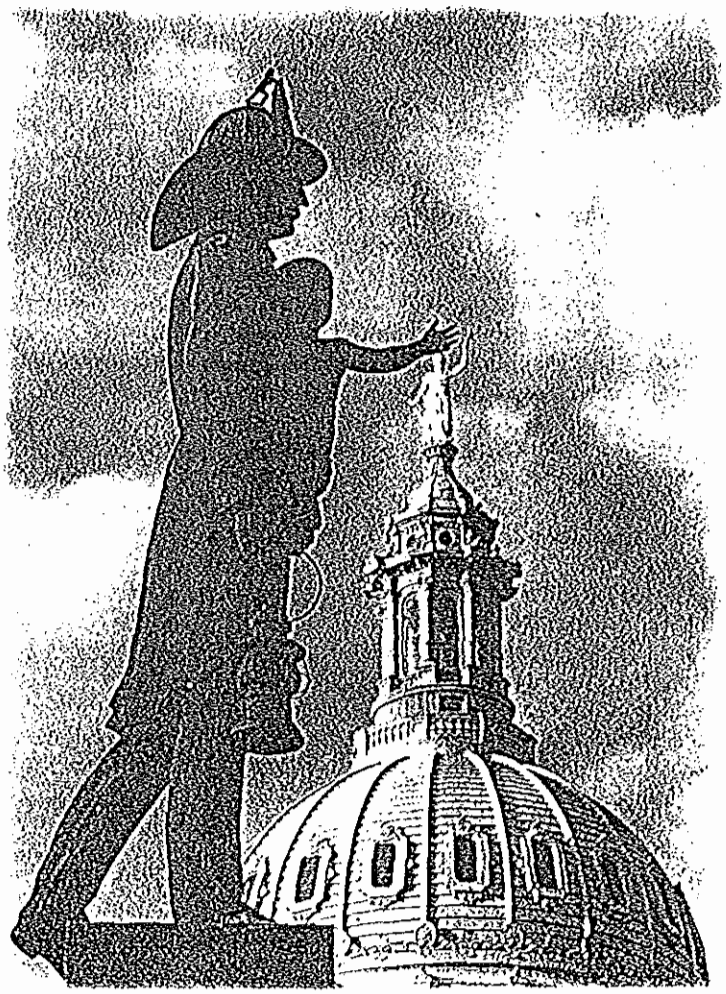
Traffic Stops:

Does Reasonableness Equal Racial Profiling?

Texas Department of Public Safety

In October, the Texas Department of Public Safety published a *Traffic Stop Data Report*, which is available on their website at www.txdps.state.tx.us. The report notes that racial and ethnic profiling, real or imagined, causes breakdown in the public trust. The DPS recognizes that racial profiling is illegal and inconsistent with the principles of policing.

The Executive Summary stated that traffic stops by troopers, broken down by race, are closely related to the percentage of each racial category of the population. Of the stops, 68.12% are white drivers, 9.66% are black drivers, 19.98% are Hispanic and 2.44% are others. The population is 60.69% white, 11.66% black, 25.55% Hispanic and 2.10% other. The population statistics are the entire the population and not the driving age population or the percentage of people with driver's licenses in the State. And, the statistics seem to assume that minorities drive cars equal to their percentage of the population.



Texas Capital and Firefighters Memorial © Alan Pogue

The disparity between the races shows in the searches conducted and drug interdictions. Of the people searched, 51.86% are white, 14.33% black and 32.22% Hispanic.

Drug interdictions show more startling inequities. According to the report, "profiling", as applicable to drug interdiction first appeared as an appropriate identification method in the late 2970's. It was used in conjunction with "Operation Pipeline," a Federal DEA initiative, along the major highway corridors in 1985. DPS started using the technique in 1986. Drug interdiction statistics show that, of these stops, 22% are white, 38% are black, and 39% are Hispanic. The Department has developed a philosophy of "looking beyond the traffic stop" to interdict and apprehend drug traffickers and other criminal offenders. But, DPS requires that the decision to go beyond the traffic stop must be based on articulable reasonable suspicion or probable cause that the occupants of the car may be engaged in criminal activity. The report does not indicate what those factors might have been that resulted in drug interdictions against blacks at more than three times their rate in the general population.

Policies and statutes applicable to traffic stop profiling are included in the report. DPS also maintains an automated information system database for compiling information on all stops. By policy, all troopers are required to video/audio record every traffic violator contact.

City of Austin

In September, The Austin Police Department announced plans to begin collecting data by year's end on the race of people stopped by the police. Austin becomes the second city, after Houston, to voluntarily collect racial statistics. The Department has a policy against racial profiling and hopes that the statistics will prove that it does not engage in such unfair practices. TCDLA President Bob Hinton and President-Elect Betty Blackwell congratulated the city leaders on their initiative.

The *Art* of Remaining Silent

by John W. Stickels

While I was attending law school at Texas Tech University, I was fortunate enough to work for John F. "Buddy" Maner. Buddy was a trial lawyer. During our many conversations, Buddy drilled into me his rules of being a good trial lawyer. According to Buddy, the first rule of being a good trial lawyer was to know when to sit down and shut up. Or, as my friend Rip Collins puts it: the art of knowing when to remain silent.

The art of knowing when to remain silent is difficult for most lawyers to learn because it is contrary to what turns a lawyer into a good trial lawyer. Most lawyers become criminal defense attorneys because they care about people, believe that each person is entitled to a fair trial, and enjoy trying cases. Most of the time, criminal defense attorneys accomplish these goals and protect their client's rights by talking to witnesses, judges, and juries. However, sometimes even trial lawyers do not know when to remain silent and by talking, instead of listening, harm their clients.

The harm resulting from failing to remain silent is usually swift. For example, there was a case recently in district court where the Judge appointed a new defense attorney to file a Motion For New Trial based on ineffective assistance of trial counsel. At the hearing, it became obvious to everyone in the courtroom, except the young assistant district attorney, that the Judge had already decided to grant a new trial. Instead of acquiescing to the inevitable, the ADA pleaded with the Judge to not grant a new trial, vigorously argued with the judge, and finally told him that he couldn't do that because the jury heard the evidence and had decided the case. Obviously this did not work. In fact, the acrimony between the judge and the ADA became so bad that the ADA ended up moving to another county and taking a new job – all because he did not know when to be quiet.

Conversely, knowing when to remain silent can result in resounding success for criminal defendants. For example, there was a recent sentencing hearing in Federal Court where the defendant had plead guilty to the offense of illegal reentry after conviction and was in court for sentencing. The Pre-Sentence Investigation recommended a sentence of 48 months based, for the most part, on the prior conviction. During the sentencing hearing, the judge began talking to the Assistant U. S. Attorney about the effect of a new Supreme Court case on the defendant's sentence and that he did not think he could assess 48 months because of the new case. It seemed like the only two people in the courtroom who knew what the Judge was talking about were the Judge and the Prosecutor. However, the defense attorney practiced the art of remaining silent, did not interfere, and the defendant was ultimately sentenced to only 8 months. Thus, by keeping quiet the defense attorney was able to effectively represent his client and reduce the sentence by 40 months.

In conclusion, the next time you are in the middle of a trial or a hearing remember to practice the art of remaining silent. To help you do this, keep these questions mind.

1. Do I know what I am talking about?
2. Is what I am saying making a difference?
3. Is what I am saying helping my client?

If the answer to any of these questions is "No," then do yourself, the Judge, and your client a favor and practice the art of remaining silent and sit down and shut up.

Significant Decisions Report

SDR for November 2000

FIFTH CIRCUIT

SENTENCING ENHANCEMENTS: *UNITED STATES V. MESHACK*, No. 99-50669 (5th Cir. 8/28/00) amount of drugs involved.1103 (5th Cir. 8/8/00) had an expectation of privacy, and therefore could assert a fourth amendment claim.

EVIDENTIARY HEARINGS: *BROWN V. JOHNSON*, No. 97-40722 (5th Cir. 8/21/00)

In this pre-AEDPA case the Court held an evidentiary hearing was necessary where the state court failed to make any finding on the claim. The defendant claimed his lawyer prevented him from appealing his conviction by convincing him he would be released on parole before the appeal was decided. In denying the claim, the district court relied on an affidavit filed by the lawyer in the federal proceeding, but did not solicit the same type of affidavit from the petitioner. The Court held a district court must make an independent determination as to what evidence is needed to resolve a defendant's claims, which the court did not do here.

CAUSE AND PREJUDICE: *BARRIENTES V. JOHNSON*, No. 98-40348 (5th Cir. 8/7/00)

Petitioner's writ filed in 1995 was granted. On appeal 5th Circuit reversed, and remanded the case to allow the petitioner to exhaust his claims in state court. Petitioner then filed a second writ in state court, which was denied as a successive writ. He filed again in federal court, and the district court again granted relief. On appeal, Court held the district court could not grant relief on a number of claims because the state had determined they had been defaulted. To prevail on those claims, petitioner has to show cause and prejudice, a determination which must be made by the federal court, and any state court finding is not binding. The "cause" was the inability to obtain a sheriff's file, despite numerous discovery requests. The court found that could constitute cause, but the record was incomplete. Accordingly, the case was remanded for an evidentiary hearing to determine whether petitioner can establish cause and prejudice for the defaulted claims.

STANDARD OF REVIEW: *MONTOYA V. JOHNSON*, No. 99-50190 (5th Cir. 9/14/00)

The defendant entered into a plea agreement for his state sentence to run concurrently with a federal sentence that had not yet been imposed. When the defendant was subsequently sentenced in federal court, his sentence was ordered to run consecutive to the state sentence. The defendant filed a state writ application claiming his plea was not voluntary and his lawyer was ineffective, which was denied. He then filed a writ application in federal court, which was granted. On appeal, 5th Circuit reversed the grant of relief, noting that even though Court may not agree with the state court decision, it was not unreasonable. Therefore, Court was precluded from granting relief. Emphasis was placed on the fact that it was not impossible to fulfill the state plea agreement. According to the court, if the defendant were paroled, then the agreement would be effective because he would be getting credit on the state sentence while in federal custody. In reaching that conclusion, Court ignores the difference between parole and imprisonment, and attempts to suggest the defendant would get credit for the time in federal custody. This decision shows how the ability to come up with almost any rationale (even if it was one the lower court may not have thought of) for a decision can make it reasonable.

HABEAS REVIEW: *GOODWIN V. JOHNSON*, No. 99-20976 (5th Cir. 9/22/00).

This case was remanded in 1998 to resolve a factual dispute concerning a Fifth Amendment claim: whether the defendant asserted his right to an attorney when questioned in Iowa. The record was not clear, partly because the questioning occurred in 1987. Goodwin claimed the government could not disprove his claim that he requested an attorney, and there was some evidence which circumstantially supported that argument. Nevertheless, the district court found he had not requested an attorney before questioning. The court reviewed that finding for "clear error", and held that the decision would not be disturbed since there were a number of possible conclusions which could be derived from the evidence, and the court was free to choose the one it thought was most reasonable.

One interesting issue in this case concerned an old rights form which had been recently discovered by the defendant's investigator. The State argued the doctrine of laches set forth in Rule 9 should be applied to exclude the affidavit. The court held laches only applies to claims as a whole, and not individual items of evidence.

The defendant also attempted to have the court revisit his ineffective assistance claim based on the decision in *Williams v. Taylor*. Court held that issue had already been finally decided, and was not before it. Court held the situation was the same as if a mandate had issued, and therefore the claim could not be considered without a showing of miscarriage of justice.

REVIEW OF COMPETENCY - *CALDWELL V. JOHNSON*, No. 00-10934 (5th Cir. 8/30/00).

In this case, the State filed a "Request for Psychiatric Examination and Determination of Competency" pursuant to TCCP, Art. 46.04. Two experts were appointed to examine the defendant, who refused to cooperate with them. The defendant then filed an application for habeas corpus relief in state court, along with a request for funds to hire mental health experts. That writ was declared a subsequent writ by the trial court pursuant to Art. 46.04. The defendant then filed a second writ in the CCA, along with a request for appointment of counsel, and funding for mental health experts. The CCA concluded it only had jurisdiction to review a finding of incompetency, and that there was no provision for appointment of counsel or providing funds for mental health experts. The defendant then filed in federal district court, challenging Art. 46.04. Court holds there is no authority to require appellate review of a state court finding of competency. There also is no authority requiring the appointment of experts for a post-conviction competency determination. Thus, Court finds Art. 46.04 is constitutional both facially and as applied, and refuses to issue a COA or stay the execution.

UNLAWFUL ENTRY - *UNITED STATES V. JUAN MANUEL LOPEZ-VASQUEZ*, No. 99-50918 (5th Cir. 9/15/00).

Defendant was charged with illegal entry after having been previously excluded. The prior exclusion occurred when he attempted to enter the United States and was detained. After falsely claiming he was a U.S. citizen, he was placed in expedited removal proceedings, and removed that day. The defendant argued the prior removal could not be used because he had been denied due process. Court holds defendant must establish procedure was fundamentally unfair, and that he was prejudiced thereby. Defendant could not establish process was unfair, because since he never entered, he was only entitled to the process provided by Congress. He also could not establish prejudice, since he had no basis to contest the removal.

COURT OF CRIMINAL APPEALS

PDR OPINIONS

TRIAL COURT ERRED BY FAILING TO CONSIDER MIDTRIAL SEVERANCE REQUEST: *NILDA AGUILAR v. State*, No. 817-99, Opinion on Appellant's PDR from Nueces County; Reversed, 9/13/00; Offense: Murder; Sentence: 25 yrs; COA: Affirmed (NP — Corpus Christi); Opinion: Johnson (unanimous)

Appellant and her stepdaughter/co-defendant were jointly tried for killing Juan Aguilar, Appellant's husband and the co-defendant's father. Appellant repeatedly filed motions for severance before trial and during the guilt/innocence phase, asserting inconsistent defenses (each accused the other of the murder), which were all denied. COA affirmed, holding Appellant failed to present sufficient evidence at a pretrial hearing that her defense was inconsistent with the co-defendant's, and held her motions to sever filed after trial had begun were untimely. PDR was granted to determine whether her motions filed after trial were timely, and should have been considered on the merits because they were made after evidence was presented that was so prejudicial that a severance was warranted.

Held: <u>A motion to sever on the grounds of unfair prejudice under TCCP art. 36.09 is "timely" if made at the first opportunity or as soon as the grounds for prejudice become apparent or should have become apparent, thus providing the trial court an opportunity to rule on potentially prejudicial evidence at the time it is introduced.</u> Art. 36.09 requires the motion to be made timely, but does not limit "timely" to "prior to trial." Under CCA's prior case law, while a motion to sever is generally untimely if not urged until the close of evidence, there are no cases dealing with motions to sever made or reurged at the time the allegedly prejudicial testimony is admitted. CCA ultimately concludes that the trial court has a continuing duty to order a severance after trial begins upon a showing of sufficient prejudice. When unduly prejudicial evidence first emerges during trial, it is neither logical nor reasonable to mandate that a motion to sever based on prejudicial grounds be presented pre-trial, when the prejudice is neither known nor demonstrable. Hence, "timely" cannot be limited to mean "prior to trial." Here, the co-defendant's testimony contained potentially prejudicial statements that could not have been determined or ruled on prior to trial. Because she made accusations against Appellant for the first time when she testified, Appellant could not have been aware of the potentially prejudicial testimony prior to trial, and could not have presented it to the trial court before trial. The trial court, likewise, could not have considered the effects of the surprise evidence prior to trial, and whether a severance was necessary. COA's judgment is vacated and the cause is remanded to that court "for proceedings consistent with this opinion."

HARMLESS ERROR STANDARD FOR UNOBJECTED-TO CONSTITUTIONAL CHARGE ERROR: *JOHNNY SILVA JIMENEZ v. State*, No. 1090-99, Opinion on State's & Appellant's PDRs from Harris County; Affirmed, 9/13/00; Offense: Aggravated Assault; Sentence: 15 yrs; COA: Affirmed (992//633 — Houston [1st] 1999); Opinion: Womack; Concurring Opinions: McCormick & Keller; Dissent: Meyers & Johnson

Appellant was prosecuted for attempted capital murder, but convicted of aggravated assault. The punishment charge instructed the jury, without objections, according to TCCP, art. 37.07, § 4(a) (the so-called parole law charge), which says that a defendant "may earn time off the period of incarceration imposed through the award of good time." On appeal, Appellant claimed the charge denied him due process and due course of law: any good time award would not count toward his release on mandatory supervision because his offense was listed in TEX. GOV'T CODE § 508.149(a), which precludes release if the defendant was convicted of a felony under TPC § 22.02, and the judgment included a deadly weapon

finding. COA agreed, but held the error harmless under TCCP 36.19 and *Almanza* because Appellant failed to show egregious harm. State's and Appellant's PDRs were granted. Appellant contends that because the error was of constitutional magnitude, COA should have applied the beyond-a-reasonable-doubt standard of TRAP 44.2(a). The State claims COA erred when it held the charge violated Appellant's due course of law and due process rights.

Held: COA did not err because the "beyond-a-reasonable-doubt" standard for constitutional error does not apply if the error was not objected to. Art. 36.19 is the appropriate standard of review for charge error. If the defendant does not object, "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant." If the error is a violation of the U.S. Constitution that was not a structural defect, a COA must be able to declare it harmless beyond a reasonable doubt. However, in order to invoke the protection of the federal rule in a state court, the defendant must have complied with the state's procedural rule for preserving and presenting error. CCA discusses other jurisdictions' treatment of unpreserved, or "plain error," which in Texas is "fundamental error." Art. 36.19 establishes the standard for reviewing fundamental error in a court's charge. If Appellant had objected to the charge, COA would have had to apply a standard which depended on whether the error violated his rights under the federal constitution, among other things. But because he did not preserve those issues, the appropriate standard was the statutory one for fundamental error in the charge, *ergo*, COA used the correct standard. State's PDR, which is now moot, is dismissed.

Concurring Opinions: McCormick's 21-page opinion explains why the State's PDR was not rendered moot, and why the error was not constitutional. Keller simply says that by failing to object, Appellant forfeited his right to have his claim reviewed under TRAP 44.2(a).

ALLEGATION IN INDICTMENT WAS NOT "SURPLUSAGE," THUS STATE MUST PROVE THAT WHICH IT ALLEGED: *STEVEN TROY CURRY v. State*, No. 1521-99, Opinion on Appellant's & State's (DA & SPA) PDRS from Harris County; Affirmed, 9/20/00; Offense: Aggravated Kidnapping; Sentence: (not in opinion); COA: Reversed (966//203 — El Paso 1998); Opinion: Keasler; Dissent: Johnson, joined by Meyers

The indictment charged Appellant with abducting the victim "with intent to prevent his liberation by using and threatening to use deadly force namely, a firearm, on [victim]..." After the State had rested its case on guilt/innocence, trial court granted State's request to delete the phrase "*by using and threatening to use deadly force on [victim]*" over Appellant's objection. COA held that said amendment of the indictment violated TCCP 28:10(b), and the error harmed Appellant. COA also held the evidence was sufficient to support the conviction. (CCA has once before remanded this cause on Appellant's PDR because COA did not apply *Malik*, 953//234 (CCA 1997) in its sufficiency analysis.) State's PDR claims the above phrase was mere surplusage, which the State was permitted to abandon even after trial had begun. Appellant's PDR claims that COA erred in its sufficiency analysis because the "hypothetically correct charge" under *Malik* would have included the phrase.

Held: The above allegation was a "manner and means" of committing an element of the offense, thus trial court erred in allowing State to delete it after trial had begun; also evidence was sufficient. CCA reviews cases dealing with surplusage, distinguishes those relied on by the State, notes it has already ruled contrary to the State's position with regard to this precise statute, and declines State's invitation to overrule said authority. Here, the phrase was not merely descriptive of an essential element — it was a statutory "manner and means" of committing an element of the offense. CCA has never before held that a statutory manner and means is surplusage, and also declines State's invitation to create such a rule. Hence, trial court erred, and COA properly found error.

CCA also analyzes the evidence by applying *Malik*, which requires evidence to be measured against a "hypothetically correct charge." Appellant's "hypothetically correct charge" would have instructed jurors to convict if they found Appellant had intentionally or knowingly abducted the victim with the intent to prevent his liberation by using or threatening to use deadly force namely, a firearm, on the victim, and with intent to inflict bodily injury on the victim, or to terrorize him or to violate or abuse him sexually. CCA rejects Appellant's argument that the above phrase unnecessarily increases the State's burden — because the State is simply required to prove that which it has alleged, its burden of proof stays exactly the same. After analyzing the evidence, CCA holds it is sufficient, and affirms COA's grant of a new a trial.

Dissent: The dissenters believe, consistent with CCA's precedent, that instead of re-analyzing the evidence under the "hypothetically correct charge" the case should have been remanded so that COA could have conducted the sufficiency analysis.

DOG SNIFF AND SEARCH AFTER CONTINUED DETENTION HELD PROPER: *BILLY LEE WALTER v. State*, No. 1321-99, Opinion on State's PDR from Tom Green County; Reversed, 9/20/00; Offense: POCS; Sentence: 10 yrs; COA: Reversed (997//853 — Austin 1999); Opinion: Keasler; Concurring Opinion: Meyers; Johnson Concurred in result w/o opinion

Cop was told by another cop that "narcotics activity" was occurring in a park. At suppression hearing, cop testified that he saw Appellant's truck leaving the park, and stopped him after observing a traffic violation. Finding Appellant's story that he and his passenger were playing basketball in the park "suspicious," cop called the dog squad, which arrived 10 to 15 minutes later. A warrant check came up clear, but only after the dog had arrived. Before the sniff, the dog cop looked inside the truck and saw a bag with a "green leafy substance" inside. (Appellant and his friend were sitting on the tailgate and had left the doors open.) First cop then searches Appellant and finds cocaine in his shirt pocket. The dog alerted on a jacket inside the truck, which contained marijuana. Appellant testified that cop

had asked him to get out of the truck after the warrant check had come back clear. When he refused to consent to a search, cop did a pat-down (finding the coke in his pocket) and then the dog squad was called. Appellant agreed he had left his door open, but said passenger closed his. COA reversed, holding that because cops had no reasonable suspicion when the canine unit was called, search was invalid, and evidence should have been suppressed.

Held: The search was proper under the plain view doctrine. CCA first notes that although trial court made no findings of fact, the motion to suppress was denied, meaning judge implicitly found cop credible. Thus, cop's testimony is taken as true, and CCA reviews evidence in light most favorable to trial court's ruling. Plain view doctrine provides that search is proper if cops are lawfully on the premises searched, and it is immediately apparent that items observed are evidence of a crime, contraband, or otherwise subject to seizure. Here, initial stop was valid, but there was no reasonable suspicion for the canine sniff. Question thus becomes whether an officer who sees drugs in plain view while a warrant check is pending in a routine traffic stop violates 4th Amendment in seizing drugs if he subjectively intends to conduct an unlawful canine sweep. CCA looks to cases abandoning pretext doctrine to answer the question. Viewing facts objectively, as those cases teach, when second cop saw the dope, he was on park property looking into the truck, which had open doors. Cop had a right to be where he was when he saw the dope, and this was true whether or not his subjective intent was to conduct a canine sweep. Cop's act of standing outside the truck and looking into it did not violate any privacy interest of Appellant's. Seizure did not violate 4th Amendment, thus COA's judgment is reversed, and trial court's judgment is affirmed.

"ROUTINE" ALONE DOES NOT JUSTIFY PAT-DOWN: *PHILLIP GEORGE O'HARA v. State*, No. 412-99, Opinion on State's PDR from Jim Wells County; Reversed, 9/20/00; Offense: POCS; Sentence: 2 yrs; COA: Reversed (989//132 — San Antonio 1999); Opinion: Keasler, joined by McCormick, Mansfield, Keller & Womack; Concurring Opinion: Mansfield; Dissent: Johnson, joined by Meyers, Price, and Holland

Appellant was driving his 18-wheeler in a rural area at 3 a.m. when he was pulled over for a traffic violation (malfunctioning clearance lights) by DPS cop. During inspection of the truck, Appellant refused to consent to search of his suitcase. Cop told him to get his "paperwork" and said he could sit in the patrol car while cop wrote his report if Appellant would allow him to conduct a patdown for weapons. Cop told Appellant to leave a belt knife he was wearing in the truck, and Appellant complied. During the patdown, cop found marijuana, after which he arrested Appellant and found cocaine. COA held that cop had no reason to believe Appellant was armed and dangerous, and thus patdown was unlawful. The only basis for the patdown search, COA reasoned, was that it was cop's routine before allowing someone to sit in his patrol car, and routine does not justify a patdown. State's PDR was granted to determine whether patdown is justified even if cop does not say he fears for his safety or safety of others, and whether a patdown is justified as a matter of routine before person is let into a cop car.

Held: Under an objective analysis, it is irrelevant whether cop was afraid or not afraid prior to conducting a patdown; routine alone is insufficient to justify a patdown search under the 4th Amendment. Regardless of whether cop said he was afraid, search's validity must be analyzed by determining whether facts available to him at the time of the search would warrant a reasonably cautious person to believe the action taken was appropriate. CCA also relies on 5th Circuit opinion, *U.S. v. Tharp*, 536 F.2d 1098 (5th Cir. 1976), which says that there is no legal requirement that a cop feel scared by the threat of danger because some cops will never admit fear. (Never mind that cop here affirmatively testified at trial that he was not afraid.)

As to routine, after analyzing state and federal precedent, CCA decides that if it were to accept the State's argument that routine alone is sufficient to justify a patdown, that would completely do away with *Terry* — every traffic stop would be transformed, as a matter of routine, into a *Terry* stop, and there would no longer be any need for cops to have specific articulable facts to justify the search. However, although rejecting the State's routine search argument, CCA holds that cop here did have specific and articulable facts to justify the patdown. He was alone at night in a rural area, and Appellant had a "belt knife" which could have been used as a weapon, regardless of its size. The last two pages of the majority opinion are used to criticize the dissent.

Dissent: If cop had conducted the patdown when he noticed the knife, or when he and Appellant were alone in the cab of the truck, the search would have been proper. But because he waited until after Appellant had willingly removed the knife and was no longer in a confined space with him, cop was no longer justified in patting Appellant down when he did. Because the only justification for the patdown was "routine" the search violated the "narrow scope" of *Terry*.

DEATH-PENALTY HABEAS CORPUS

APPLICANT NEED NOT BE COMPETENT TO ASSIST COUNSEL WITH DEATH PENALTY WRIT: *EX PARTE CHARLES E. MINES*, No. 72,906, from Ellis County; Relief Denied, 9/13/00; Opinion: Womack; Dissent: Johnson, joined by Meyers & Price

Applicant's 1989 conviction for of capital murder was affirmed. *Mines*, 852//941 (CCA 1992), vacated, *Mines v. Texas*, 510 U.S. 802 (1992), aff'd, *Mines*, 888//816 (CCA 1994), *cert. denied*, 514 U.S. 1117 (1995). His writ issue concerns whether a person sentenced to death must be competent to assist his counsel in filing an application for habeas corpus relief.

Held: No justification exists for inferring a statutory requirement that an Applicant must be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent to stand trial.

Applicant claims that: (1) he must be competent to assist counsel with the writ application; (2) counsel is rendered ineffective if Applicant is incompetent; and, (3) Applicant is entitled to a full adversarial trial by jury for incompetency. CCA first notes that there has been no finding that Applicant is incompetent to assist his habeas counsel. The relevant writ statutes do not mention the defendant's competence, or his incompetence to bring habeas corpus proceedings. Applicant argues that because TCCP art. 11.071's requirement to waive counsel in habeas proceedings requires such waiver to be intelligent and knowing, this provision assumes a level of mental competence on par with the standard for self-representation at trial under state and federal constitutions. However, CCA says this does not mean that the legislature intended to incorporate the requirement that an Applicant be competent in retaining the statutory right to counsel for a writ. Moreover, neither the state nor federal constitutions provide any right to counsel in state habeas proceedings. CCA acknowledges the 8th Amendment prohibition against executing a person who is insane, but notes that Applicant does not claim he is incompetent to be executed and does not adequately explain why the requirement of sanity at time the sentence is carried out implies requirement of competence to assist counsel on a writ. In light of the absence of legislative action, the statutory context, and differences in the nature of the rights and procedures at trial and in post-conviction proceedings, there is no justification to infer a statutory requirement that Applicant be mentally competent for habeas corpus proceedings in the way that a defendant be mentally competent for trial. Relief is therefore, denied.

Dissent: Although in some cases an Applicant does not need to be competent, there are times when counsel, in order to comply with the statutory requirement to investigate, must be able to effectively communicate with and be assisted by the Applicant. Other state courts have recognized such an ability to communicate. Dissenters would hold that a habeas court be required to conduct a competency hearing when an Applicant has shown that there are "specific factual matters at issue that require applicant to competently consult with counsel," namely "when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in post conviction proceedings in which factual matters are at issue, the development or resolution of which require [applicant's] input."

MANDAMUS RELIEF CONDITIONALLY GRANTED

DISTRICT CLERK MUST FORWARD 11.07 WRIT TO CCA: *HAROLD EARNEST DOVE, JR., v. Collin County District Clerk*, No. 73,892, from Collin County; Relief Conditionally Granted, 9/13/00; Opinion: Per Curiam (unanimous)

After Relator filed an 11.07 writ in the Collin County District Court, the clerk did not forward the application to CCA in 35 days as the statute requires. CCA issued a show cause order on March 22, 2000, ordering Respondent to respond and explain the reasons for the delay. To this date, Respondent has not complied.

Held: Relief is conditionally granted; Respondent is directed to comply with this opinion. District clerks have a ministerial duty to forward an application and related records to CCA. *Martin v. Hamlin*, __ S.W.2d __ (CCA No. 73,799, delivered May 10, 2000). Respondent has no authority to continue to hold Relator's application, assuming one was filed. Mandamus will issue only if Respondent fails to comply.

DEATH PENALTY OPINIONS

CHRISTOPHER BLACK, SR., v. State, No. 73,197, Direct Appeal from Bell County; Affirmed, 9/13/00; Opinion: Per Curiam; Concurring Opinion: Meyers, joined by Johnson

Facts: Appellant was convicted of killing an infant less than two years old. No other facts are given, and Appellant does not challenge sufficiency of the evidence.

Child capital murder provision is unconstitutional: Appellant contends the statute, TPC § 19.03(a)(8), violates the Equal Protection Clauses of both state and federal constitutions because it does not require the State to allege or prove the defendant knew the victim was under the age of six, and thus requires no additional aggravating circumstance be proved before elevating murder to capital murder.

Held: The child-murder provision does not violate equal protection rights. In *Henderson*, 962//544 (CCA 1997), CCA found the provision was rationally related to government's interest in protecting young children and expressing society's moral outrage against murder of young children. Appellant argues that § 19.08(a)(8) violates equal protection because it creates a capital murder offense which does not require proof of an aggravating element or his knowledge of that element. This he says, treats offenders sentenced under this provision different from those sentenced under other capital murder provisions. However, there is no requirement in the statute that the defendant know or intend that his victim be a child under six. CCA compares the statute to two other capital murder provisions which require police and fireman killers to know their victims were police and firemen. However, in the case of baby-killers, the legislature plainly dispensed with such a knowledge element, and has decided that offenders who intentionally or knowingly kill shall bear the risk of a capital murder conviction if their victim is under the age of six. CCA points to other penal statutes involving child victims which do not require a culpable mental state as to the age of the victim (indecency and sexual assault).

Voir dire error: Appellant complains that the trial court excused a hearing-impaired prospective juror out of the presence of the attorneys and Appellant, which deprived him of the effective assistance of counsel, and violated his right to be present at trial.

Held: The trial court had discretion to *sua sponte* excuse a hearing-impaired prospective juror. Tex. Gov't Code permits a deaf or hard-of-hearing person to be excused if the judge believes she is unfit to serve because of hearing loss. CCA also points to cases which hold TCCP Art. 35.03 gives the trial court authority to excuse prospective jurors for good reason. CCA ultimately concludes that counsel was not

rendered ineffective for not questioning the venire member because Appellant has not shown that he was prejudiced by counsel's absence. Moreover, Appellant's absence from the hearing and granting the excuse did not infringe upon his right to be present.

COY WAYNE WESTBROOK v. State, No. 73,205, Direct Appeal from Harris County; Affirmed, 9/20/00; Opinion: Mansfield, joined by Keasler; Opinion by Meyers concurring in point 2, but otherwise joining majority; Opinion by Keller (joined by McCormick) concurring in point 6, and otherwise joining majority; Dissent; Womack, joined by Price, Holland & Johnson

Facts: Appellant went to the apartment of his estranged wife at 2 a.m., armed with his hunting rifle. There he shot and killed the wife, her female roommate, and three men he thought she was sleeping with. After the killings, Appellant calmly returned to his pickup, put his rifle inside, and waited for the sheriff. Appellant was overheard making comments such as, "I did what I had to do." He continued to make such comments, some of which were audible on the 9-1-1 tapes. Appellant was cooperative with cops, telling them he came there to "get" his ex-wife, showed them where the gun was, and gave them permission to search his truck. Appellant testified that he had gone to the apartment to reconcile with his wife, but found her there with her roommate and 2 male friends. Appellant became humiliated when the wife went into the bedroom with the 2 men, and tried to leave, but was hassled by a 3rd man, who grabbed his keys, and by the roommate, who threw a beer at him when he returned inside the apartment to get the keys. Appellant said he never intended to kill anyone, but shot the roommate as a "response" to the thrown beer, and shot the others when he "lost it" after seeing his wife having sex with one of the men. CCA holds evidence is legally and factually sufficient.

Death penalty statute is unconstitutional: He complains he was denied due process and equal protection and suffered cruel and unusual punishment because the statute prevents him from submitting special jury instructions on the issue of sudden passion, thus it is violative of the 8th and 14th Amendments. Trial court denied his requested instructions at both phases of trial.

Held: <u>The statute is not unconstitutional because the legislature has authority to define elements of capital murder and set out guidelines for determining whether persons can be prosecuted for capital murder</u>. At time of Appellant's trial, sudden passion was a punishment issue only, to be determined after a conviction for murder (not capital murder), and could only have been considered by the jury in his capital murder trial as a mitigating factor under the second special issue. Appellant was not denied due process or equal protection, or subjected to cruel and unusual punishment.

Extraneous Offenses: Appellant was indicted for killing only 2 of the victims, but evidence of the other 3 was introduced as well during guilt/innocence. Appellant sought, but was refused a limiting instruction. He claims harm because the jury was given unfettered discretion to consider the extraneous offenses.

Held: <u>The other 3 murders were "same transaction contextual evidence" and as such, were admissible without a limiting instruction</u>. Thus, no error.

Suppression of Evidence: While awaiting trial in the county jail, Appellant was housed in a cell with inmate Jones. Appellant told Jones that he wanted to hire someone to kill his first wife and her common law husband. (One of the victims in this case was Appellant's second wife.) When Appellant was removed from cell, Jones told police about his conversations with Appellant regarding the murders of the first wife and her husband. In return for getting more information from Appellant regarding these solicitations, the State agreed to provide a "good word" for him on his pending case. The cops arranged to have undercover investigator Johnson pose as a hit-man, who Jones introduced to Appellant. There was no question that cops, through Jones, induced Appellant to give them a list of names of persons he wanted killed. In addition, Appellant told the "hit-man" about his desire to have these people killed. A Harris County detective testified at a suppression hearing that any evidence obtained regarding the solicitation case was always intended to be used during Appellant's capital murder trial. His suppression motion was denied, and the evidence was used during the punishment phase of trial to support future dangerousness.

<u>Held: The trial court erred when it overruled the motion to suppress because the evidence was obtained in violation of Appellant's 6th Amendment right to counsel; however, the error was harmless beyond a reasonable doubt.</u> CCA reviews Supreme Court precedent which precludes surreptitious employment of a cellmate to deliberately elicit information. When the State deliberately created a situation likely to induce Appellant to make incriminating statements without the assistance of counsel that it knew would be used against him at trial, the 6th Amendment right to counsel was violated. Although the State was free to use whatever information the informant had obtained before he had become an agent for the state, evidence Jones obtained after the State had procured his services elicited to help demonstrate Appellant's future dangerousness was inadmissible at the capital murder trial because it was obtained in violation of the 6th Amendment. However, CCA conducts a harm analysis and holds the error harmless, primarily because of the "heinous" facts of the case alone.

Concurring opinion: Keller and McCormick see absolutely nothing wrong with using the above-discussed illegally obtained statements in Appellant's capital murder trial, and believe no error occurred in the first place.

Dissent: Womack, joined by Price, Holland, and Johnson, believe the error in allowing the above statements to be used was harmful to Appellant, and would remand for a new punishment hearing. The dissenters say that review of the error here is controlled by the analysis of harm in *Satterwhite v. Texas*, 486 U.S. 249 (1988). The illegally obtained evidence was important because it corroborated the admissible

testimony of the inmate-informant. Moreover, the State emphasized it during closing statements. Because the illegally-obtained evidence was featured so prominently during trial, the dissent says it is impossible to say beyond a reasonable doubt that the testimony did not influence the sentencing jury.

OPINION OVERRULING MOTION FOR REHEARING: *CHUONG DUONG TONG v. State*, No. 73,058, from Harris County; Opinion: Per Curiam; Womack & Johnson dissent w/o opinion; Original opinion handed down 4/12/2000. (For summary, see June 2000 issue of *VOICE*).

After Appellant's capital murder conviction and death sentence were affirmed on original submission, he filed a motion for rehearing arguing that CCA was wrong when it held his point of error regarding jury selection was inadequately briefed. CCA now addresses the claim, which argues *Sanne*, 609//762 (CCA 1980), supports his argument that trial court's unorthodox voir dire procedure, on which Appellant relied to his detriment, was an abuse of discretion, depriving him of due process, due course of law, and effective assistance.

Held: Appellant erroneously relies on authority pertaining to question of harm rather than error. When briefing an issue on direct appeal, question of error should always be addressed first, followed by discussion of whether or not the alleged error is harmful. The Motion for Rehearing is overruled.

PDRs Granted July through September 2000

** "NP" indicates the Court of Appeals's opinion was not designated for publication.*

0522-00 STEWART, DALTON B. 07/26/00 S Montgomery Theft: 008///832

1. Pursuant to Vernon's Ann. C.C.P. ART.13.08, is venue proper in the county in which the complainant is dispossessed of the property, although the property is actually obtained by the Defendant in another county? The victim to part with her property?

0536-00 HOPKINS, DOUGLAS LEROY 07/26/00 A Harris DWI: (NP)*

1. Whether an information alleging that an offense is committed on the same date that the information is filed is required, under art. 21.21(g), to allege that the offense was anterior to the filing of the information.

0656-00 CHEN, BAILEY LISHIAN 07/26/00 A Dallas Attempted Sexual Performance of a Child: (NP)

1. Whether a 47-year-old male undercover officer posing as a 13-year-old female for the purposes of internet communications established evidence that was sufficient, as a matter of law, to support a conviction for the offense of attempted sexual performance of a child pursuant to § 15.01 and § 43.25, Tex. Penal Code.

0766-00 ROWELL, DAVID LEWIS 08/30/00 S Harris POM: 014///806

1. Did the Court of Appeals err to decide the merits of Appellant's motion to suppress without examining a complete reporter's record?

0596-00 CROSBY, TIFFORD BYRON 08/30/00 A Dallas Murder: (NP)

1. Whether the Court of Appeals properly applied *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998) in holding the trial court had properly denied Appellant an instruction on sudden passion because the evidence had disproved the issue.

0584-00 CATALINA CORRAL 09/13/00 A Dallas Agg. Poss. W/Intent to Deliver: (NP)
0585-00 CIPRANO CORRAL 09/13/00 A Dallas Agg. Poss. W/Intent to Deliver: (NP)

1. Is the Comptroller's levy on a tax lien and seizure of assets a "partial payment" under *Ex Parte Ward*, 962 S.W.2d 617 (Tex. Crim. App. 1998) and *Ex Parte Diaz*, 959 S.W.2d 213 (Tex. Crim. App. 1998)

0610-00 HAYDEN, BOBBY RAY, JR. 09/13/00 S Upshur Indecency with a Child: 013///69

1. In an indecency with a child case which involves more than one act and more than one child, what matters are extraneous and what matters are contextual?

2. What notice is required pursuant to Texas Rules of Criminal Evidence Rule 404(b)?

0707-00 TORRES, TOMAS 09/13/00 A Nueces Murder & Engaging/Org. Crim. Act.: (NP)

1. Was Appellant denied his right to confrontation under the Sixth Amendment by the admission of hearsay statements implicating Appellant in murder?

0722-00 ROQUEMORE, HOWARD EARL, JR. 09/13/00 A Harris Agg. Robbery: 011///395

1. When a juvenile is arrested and offers to direct police to hidden evidence, must that evidence be suppressed if police take the juvenile to the location of the evidence before taking him to the juvenile processing office? See Family Code 52.02.

0756-00 ALLEN, JENNIFER 09/13/00 S Harris Driving While

License Suspended: 011///474

1. Does a person's *failure to pay the statutorily required* license-reinstatement fee after the person's driver's license has been suspended for refusing to give a breath specimen, result in a continuation of the suspension until the fee is paid? Is payment of the fee enforceable by continuing the suspension?

2. Did the Court of Appeals err in weighing and evaluating the intent of the legislature, the consequences of the alternative statutory constructions, and applicable common law under the Code Construction Act so as to void the actions of the Department of Public Safety in collecting the reinstatement fees for suspensions of driver's licenses?

0885-00 NONN, JAIME CHARLES 09/13/00 A Hidalgo Capital Murder: 013///434

1. Whether the court erred in admitting Appellant's written Illinois confession into evidence at his trial.

0897-00 ALCOTT, RONALD 09/13/00 A Freestone Poss. of DW in Penal Institution: (NP)

1. Whether the evidence raise "a bona fide doubt" or merely "some evidence" as to a defendant's competency before a trial court *is required to hold a hearing* under section 2(b), Article 46.02, Code of Criminal procedure.

0951-00 AMIR, RONEN JACK 09/13/00 S Harris Poss of a Controlled Substance: (NP)

1. Does the mere presence of four numbers placed on the interior *door of a business* that is the subject of a valid search warrant create an additional area not covered by the search warrant?

2. Does a lawful search of the fixed premises of a business extend to every part of the premises, including an area used for residential purposes where contraband *may likely be found*?

3. Can cocaine by seized as "mere evidence" when it is found on the premises that are the subject of a valid search warrant even though the cocaine was not named in the search warrant and was not connected to the crime being investigated?

1129/30-00 TUDOR, TONY THOMAS 09/13/00 A Henderson Intoxication Assault: (NP)

1. In prosecution of offenses arising out of the same transaction, the Court of Appeals erred in holding that the trial court properly determined Appellant could be tried for intoxication assault after being acquitted for intoxication manslaughter and *driving while intoxicated in a prior* trial when the elements of driving while intoxicated must be proven in a subsequent trial for intoxication assault.

0693-00 GUTIERREZ, LOUIS ANTONIO 09/20/00 A Harris Poss w/Intent to Deliver: (NP)

1. Whether under TRAP 33.1(a) the Court of Appeals erred in holding that Appellant had not preserved error for review when the record showed that the trial court had implicitly overruled Appellant's motion to suppress.

0818-00 HERNANDEZ, JOHN 09/20/00 S Bexar DWI: 018/// 699

1. The Court of Appeals erred in holding that Appellant's offer to stipulate to his prior DWI convictions was proper because the proposed stipulation *was conditioned on the State's being* barred from mentioning or referring to the prior DWI convictions before the jury.

2. The Court of Appeals erred in holding that the Appellant's offer to stipulate to his prior DWI convictions was proper because the proposed stipulation would prevent the state from reading the two *jurisdictionally required DWI convictions* to the jury in direct contravention of this court's opinion in *Tamez v. State*.

3. The Court of Appeals erred in holding that the Appellant's motion to stipulate to his prior DWI convictions was "proper" because the motion was nothing more than an attempt to hide evidence from the jury, and if granted, the motion would have *prevented the state from reading* the jurisdictionally required two previous DWI convictions to the jury.

0861-00 HERNANDEZ, RICKY 09/20/00 A Lubbock Poss. w/ Intent to Deliver Cocaine: 013///492, 023///122 (dissent)

1. Whether the Court of Appeals correctly determined that the *admission of evidence* obtained in violation of the federal and state constitutions is non-constitutional error.

1017-00 RAMIREZ, MARIO REY 09/20/00 S Jackson possession of Firearm by Felon: 013///482

1. Does an attorney have a conflict of interest merely because she represents a state's witness in an independent criminal action?

2. Does an attorney have a conflict of interest merely because she cannot cross-examine a state's witness using confidential information received from the *witness*?

3. Does an attorney fail to afford her client effective assistance of counsel where she cannot use confidential information in cross-examination of a state's witness, thus placing herself in the same position as an attorney who does not possess the confidential information?

4. Did the Court of Appeals err in applying the test for an actual conflict of interest from *Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996), rather than the test for conflict of interest laid down by this court in *Monreal v. State*, 947 S.W.2d 559 (Tex. Crim. App. 1997)?

5. *Did the Court of Appeals err in concluding that trial counsel* had an actual conflict of interest?

6. Did the Court of Appeals err in concluding that Appellant suffered harm due to a conflict of interest?

7. Did the Court of Appeals err in concluding that the trial court erred in failing to conduct a hearing to determine if Appellant waived any conflict of interest?

0755-00 MCINTOSH, ROBERT 09/27/00 A El Paso Engaging in Organized Criminal Activity: (NP)

1. Whether the Court of Appeals erred in holding that the law of parties, as set out in Penal Code Section 7.02, applies to the engaging in organized criminal activity statute.

1022-00 STEELMAN, LEO 09/27/00 S Taylor Possession of Marijuana: 016///483
1023-00 STEELMAN, IAN 09/27/00 S Taylor Possession of Marijuana: 016///483

1. Whether entry into a residence and seizure of the occupants (including arrest) to prevent destruction of evidence after lawful detection of the odor of burning marijuana is unreasonable per se.

2. Whether probable cause to search, lawfully obtained before entry into a residence and seizure of occupants, is tainted by the entry and seizure, requiring suppression of the fruits of the search in good faith reliance on a search warrant issued by a neutral magistrate based only on that probable cause.

3. Whether entry and seizure of the occupants begins a "search" though all searching is done in good faith reliance on a search warrant, issued by a neutral magistrate, and no evidence was discovered before its execution.

COURTS OF APPEALS

VERY IMPORTANT CASE — LIFE SENTENCE FOR SEXUAL ASSAULT: PRICE V. STATE, Waco, No. 10-99-181-CR, 8/31/20.

Good discussion about a dangerous area for those defendants convicted of sexual assault and with prior convictions for the same or similar offenses. Under TPC § 12.42, the punishment is now an automatic life sentence. Further, a prior deferred adjudication is a prior conviction, sufficient to invoke statute. Must read case.

DUE DILIGENCE — PROBATION REVOCATION: PEACOCK V. STATE, Waco, No. 10-99-245-CR, 8/30/20000.

While COA acknowledges that state, when issue is raised, must establish due diligence in apprehending a probationer after MRP is filed, COA holds that due diligence was satisfied merely by placing the defendant's name in the TCIC because there was no evidence that the probation department or the police knew where the defendant lived. Dissent by J. Vance.

NOTICE OF EXTRANEOUS OFFENSES: SEBALT V. STATE, Corpus Christi, No. 13-99-498-CR, 8/31/20.

COA here, in contradiction to Waco court's decision in *Hernandez*, 914//226, holds that 3 day notice of intent to use extraneous offenses is reasonable in light of demand for notice made 6 weeks before trial. Strong dissent.

EGREGIOUS HARM IN PAROLE CHARGE: HILL V. STATE, Texarkana, No. 06-00-00083-CR, 8/31/00.

COA finds egregious harm in parole charge where jury was both instructed that the defendant, in a 3g offense, not only could accumulate good time credit while incarcerated, something forbidden by statute, but that the usual curative instruction that the jury was not to consider good time credit was deleted.

CORROBORATION OF HEARSAY STATEMENTS: MANLEY V. STATE, Texarkana, No. 06-98-00318-CR, 8/31/00

Generally, a declaration against penal interest must be corroborated. Factors include (1) whether guilt of declarant is inconsistent with guilt of defendant; (2) whether declarant was so situated that he might have committed the offense; (3) timing of the declaration (4) spontaneity of declaration; (5) relationship between declarant and the party to whom statement was made and (6) existence of independent corroborative facts. See *Dewberry*, 4///735 (CCA 1999).

ENTRAPMENT DEFENSE & EXPERT TESTIMONY: MCGANN V. STATE, Fort Worth, No. 2-99-160-CR, 9/14/2000).

The defense tries to call a psychiatrist, in a case of solicitation of capital murder, to prove entrapment by testifying, in response to hypothetical questions, that people in midst of divorce are more susceptible to the inducement required of an entrapment defense. While COA recognizes that in some cases psychiatric testimony is admissible to show susceptibility to inducement, *see e.g. U.S. v. Nunn*, 940 F.2d. 1148 (8th Cir. 1991); *U.S. v Newman*, 849 F.2d. 184 (5th Cir. 1988), such testimony is excludable if it would not shed light on any issue in the case. Here, the jury was capable of deciding the issue of susceptibility on its own; psychiatric evidence would not provide the jury with any information it did not already have. This is especially true because psychiatrist here did not offer specific information to the defendant but spoke only in general terms in response to hypothetical question. Further, COA finds the defense made no showing of scientific reliability, i.e. no showing that this theory and its specific application here was scientifically accepted.

Court also holds that renunciation, a defense specific to solicitation, was not shown merely because the defendant thought the crime would not be committed because he had failed to pay the entire amount. Second, he merely told hit man that he didn't think he wanted to go through with the offense. This is not a complete renunciation of offense.

WAIVER OF APPEAL: LITTLETON V. STATE, Texarkana, No. 06-00-00026-CR, handed down on 9/14/2000.

While waivers of the right to appeal entered into pretrial are not effective, those entered into concurrently with a guilty plea are. See *Blanco*, 18///218 (CCA 2000).

MERGER DOCTRINE: LAWSON V. STATE, Amarillo, No. 07-98-03970-CR, 9/11/2000.

Though CCA limited the viability of the merger doctrine to manslaughter and lesser included offenses of manslaughter, which would normally include aggravated assault, *see Johnson* 4///254 (CCA 1999), here COA concludes that aggravated assault may not be a lesser included offense of an indictment which alleges the aggravated assault to have been committed knowingly and intentionally.

HEARSAY STATEMENTS BY MURDER VICTIM NOT ADMISSIBLE UNDER STATE OF MIND EXCEPTION: DORSEY V. STATE, Beaumont, No. 09-98-501-CR, 9/6/2000.

Statements by the complainant in a murder case to the effect that something happened to her and the defendant was responsible, are not admissible under the state of mind exception to hearsay rule because statements reflect declarant's belief. In a circumstantial evidence case, the evidence was harmful and reversal warranted.

INEFFECTIVE COUNSEL ON APPEAL: JAUBERT V. STATE, Waco, No. 10-99-090-CR, 8/31/2000.

COA finds ineffective assistance of counsel on direct appeal, where trial counsel failed to request notice of extraneous offenses and, therefore, was unprepared to deal with or challenge the extraneous offenses as they came in. The error caused a breakdown in adversarial process and probably caused a more severe sentence. Case reversed. It is interesting to note that issue was resolved without any hearing on the allegation; defense counsel did not testify.

The mentioned above are synopses of opinions of the appeals courts listed.

Significant Decisions Report was reported by:

Cynthia L. Hampton, Editor
Mike Charlton, Assistant Editor

We invite all comments and constructive criticism from our members and *Voice of the Defense* readers.

Please mail or fax to DeAnn Johnson at djohnson@tcdla.com 512-469-9107

or fax comments to VOICE Editor John Carroll 1-210-829-0734

The SDR's printing cost is funded by the Judicial & Court Training Fund and administered by the Texas Court of Criminal Appeals.

PUBLICATIONS FOR SALE

		PRICE	SALE
TCDLA State Forms and "Search Easy Diskettes			
☐ "Search Easy" State Forms in WordPerfect	TCDLA Members	$ 25.00	
Or Microsoft Word	NON-Members	$ 75.00	
TAPES			
☐ Federal Law Short Course, September 2000		$108.25	
☐ Rusty Duncan, June 2000		$125.00	
☐ Capital Murder , March 2000		$108.25	$50.00*
☐ DWI, February 2000		$108.25	$50.00*
☐ Racehorse Haynes (Rusty Duncan – Keynote Speaker)		$ 12.00	
TCDLA PUBLICATIONS			
☐ Federal Law Short Course, September 2000		$ 89.30	
☐ Rusty Duncan ,June 2000		$177.38	
☐ El Paso Skills Course, May 2000		$ 89.30	$35.00*
☐ Advanced Corrections, April 2000		$ 89.30	$35.00*
☐ Capital Murder Trials, March 2000, Houston		$ 89.30	$50.00*
☐ DWI 2000, February 2000		$ 89.30	$50.00*
☐ Federal Law Short Course, September 1999		$ 89.30	$35.00*
☐ Rusty Duncan, June 1999		$125.00	$35.00*
☐ Winning Criminal Trials, March 1998		$ 89.30	$35.00*
☐ Old Problems- New Solutions: Criminal Practice Today, Dec. 1998		$ 89.30	$10.00*
☐ Rusty Duncan Advanced Criminal Law Short Course, June 1998		$ 89.30	$10.00*
☐ The Changing Picture of Habeas, 1997		$ 89.30	$10.00*
☐ Defending Child Abuse Cases, March 1997		$ 89.30	$10.00*
MAGAZINE			
☐ Voice for the Defense	1 yr. Non-member subscription	$ 75.00	
	1 yr. State Prisoner Rate	$ 40.00	
CDLP PUBLICATIONS			
☐ The Essential Trial Notebook, October 2000		$ 89.30	
☐ Step By Step Guide To Representing Indigent Clients In Criminal Matters, 2000		$ 61.63	
☐ 2000 Capital Murder Manual (by Steven Losch)	Members	$ 86.30	
	NON-Members	$150.00	
☐ South Padre – CDLP Hits the Beach, July 2000		$ 89.30	
☐ El Paso Skills Course, May 2000		$ 89.30	$35.00*
☐ Wichita Falls Skills Course, January 2000		$ 89.30	$35.00*
☐ 1999 Capital Murder Manual (by Steven Losch)		$ 86.00	$25.00*
☐ Punishment: The Forgotten Phase of the Trial, December 1999		$ 89.30	$25.00*
☐ CDLP Hits The Beach, July 1999		$ 86.00	$25.00*
☐ Practice Tips From the Plains, January 1999		$ 89.30	$25.00*
☐ 1998 Capital Murder Manual (by Steven Losch)		$ 89.30	$10.00*
☐ Forensics and Habeas Skills Course, 1997		$ 89.30	$15.00*
☐ Minorities & Women's Issues, 1997		$ 89.30	$15.00*

***Sales Tax and Shipping cost need to be added**

NAME:		☐ American Express ☐ VISA ☐ Master Card	
ADDRESS:			
CITY, STATE, ZIP		Sub Total	
PHONE:		Shipping $7.50	
CARD #:	exp. Date	Sales Tax (add 8.25%)	
Name on Card:		Total	
Authorized Signature			

Please add an additional $7.50 ($12.00 for the Rusty Duncan Course Book) Per notebook to defray shipping costs. $3.00 to mail disks. All material will be mailed first class unless otherwise specified; overnight charges extra.

TCDLA & CDLP, 600 West 13th Street, Austin, Texas
512/478-2514 FAX: 512/469-9107

Event Calendar

2000

NOVEMBER 9 CDLP
Ethics Seminar by Telephone
4:00 pm - 6:00 pm

30 Occupational License Seminar
by Telephone
4:00 pm – 6:00 pm

DECEMBER 7-8 CDLP
Essential Trial Notebook
Laredo • La Posada Hotel

9 Board & Committee Meetings

2001

JANUARY 17 Reception for Lawmakers
of the 77th Legislature
Austin • Driskill Hotel
5:30 pm - 7:30 pm

18-19 TCDLA*
DWI 2001
Austin • Driskill Hotel

FEBRUARY 15-19 TCDLA*
President's Trip - Banff, Canada

27 Sex Offender Registration Seminar
by Telephone
4:00 pm – 6:00 pm

MARCH 1-2 CDLP
Essential Trial Notebook
Abilene • Courtyard by Marriott

25-30 CDLP
Criminal Trial Advocacy Institute (CTAI)
Huntsville • Sam Houston State University

APRIL TCDLA*
Arlington • Board and Committee Meetings

JUNE 6-9 TCDLA
14th Annual Rusty Duncan
Advanced Criminal Law Short Course
San Antonio • Marriott Rivercenter
Board & Committee Meetings

28 Legislative Updates Seminar by Telephone
4:00 pm - 6:00 pm

JULY 7-21 Spanish Language Institute
San Miguel, Mexico

12-13 CDLP
Essential Trial Notebook
South Padre Island • Sheraton Fiesta

AUGUST 14 Immigration Consequences Seminar
by Telephone
4:00 pm – 6:00 pm

OCTOBER US Supreme Court Swearing in
United States Supreme Court
Washington, D.C.

* Open only to Criminal Defense Lawyers. Scholarships are available for most seminars.

Texas Injustice

The Ronnie Gariepy Story

by Roy Greenwood

FOREWORD

Because of the necessity of ensuring that innocent persons are not convicted, imprisoned or executed for crimes they did not commit, and because the State of Texas is presently ongoing serious scrutiny about the number of persons in the prison system, or on Death Row, who may be innocent, this story should be told.

THE *ALLEGED* CRIME

In October, 1991, law enforcement officers in Hutchinson County, Borger, Texas, were advised by M.H., Mr. Gariepy's 13 year old step daughter, that he had committed acts of sexual assault against her on the evening of October 5, 1991. Because of the severity of such charges, Mr. Gariepy was arrested for this offense, and subsequently indicted by the Hutchinson County Grand Jury, for the offense of Aggravated Sexual Assault, the case made more serious because of the age of the victim.

The indictment in this case alleged a pseudonym (Jane Doe) for the victim's name, which was permitted under Texas law, to prevent the public from knowing the name of underage sexual assault victim. For the same reasons, this writer will not utilize the name of the complainant in this article.

Mr. Gariepy and his family hired a local attorney and thereafter, Mr. Gariepy advised the prosecution that, because he was completely intoxicated on the evening in question, and had passed out after arriving at home that evening, that he had no recollection at all as to the events of that night. He advised the prosecution that if his stepdaughter indicated that he molested her, he could not challenge that allegation, as he did not wish to put the child victim through the ordeal of a contested trial. Mr. Gariepy did not have any reason to believe that the charges were not true, and that even though he could not understand why he would have committed such an act, he acknowledged that his intoxication and complete lack of memory about the events made it impossible challenge these charges. Thus, he and his attorney worked out a plea bargain arrangement, whereby the prosecutor would reduce the charges against him to the lesser included offense of sexual assault, and he would plead guilty to this crime for an agreed sentence of 12 years confinement in prison.

This arrangement was worked out with the Court and on February 3, 1992, the plea of guilty was entered, Mr. Gariepy was sentenced to 12 years, and no appeal of this conviction was taken. He was thereafter transferred to the Texas Department of Corrections to begin serving his sentence.

NEWLY DISCOVERED EVIDENCE THE VICTIM'S RECANTATION

The complaining witness in this case, M.H., had pursued the allegations of sex abuse against Mr. Gariepy strongly prior to the trial, however, in the months after his conviction, she realized the severity of the outcome in this case, and in an *amazing turn of events*, informed her Mother in 1993 that she had lied, that Mr. Gariepy had not committed any acts of sexual contact against her, and that she had made this complaint because she was angry at Mr. Gariepy for a number of personal reasons. After informing her Mother of her false accusations, M.H. signed an affidavit on July 8, 1993, some 17 months after Mr. Gariepy's conviction, acknowledging that she had lied, recanting her testimony against him, and advising the public that Mr. Gariepy was innocent of this crime.

According to information received from Mr. Gariepy and his family, this affidavit of the complaining witness was turned over to them, and thereafter, the family made a number of efforts to seek some form of redress, in order to seek Mr. Gariepy's release. However, even though various legal sources were contacted by the family to try to take some action with this affidavit, the family was unsuccessful in obtaining legal assistance. As a practical matter, without legal assistance, it is almost impossible in the state of Texas, under the statutes, rules, regulations and guidelines of this system, to properly present any form of claim to governmental of officials where a claim of

innocence is pursued. Such rules, regulations and pitfalls to such an effort will be discussed later in this article.

MR. GARIEPY'S PRO SE PERSONAL EFFORTS AT LITIGATION

Finally, after being unable to find legal representation for almost one year, Mr. Gariepy decided that he had to present these claims to someone, as soon as possible, because he could not stand to be further incarcerated for a crime he did not commit, where this evidence was brought to his attention, for the first time in the June, 1993 affidavit. For the previous two years, Mr. Gariepy had assumed that he was guilty, but after he received the complainant's affidavit exonerating him, his frustration with presenting his claims became a clear obsession, as is understandable.

Being unable to obtain the services of his trial lawyer or the Prison Legal Staff to assist him, Mr. Gariepy, with only a high school education and no legal training at all, decided to file his own "post conviction writ of habeas corpus", a legal remedy authorized under the provisions of Article 11.07, Texas Code Of Criminal Procedure. Some brief explanation of this legal remedy is appropriate at this point.

A writ of habeas corpus is a Constitutional remedy, recognized by the United States and Texas Constitutions, as being a remedy which is recognized as the method of challenging criminal convictions which have been obtained against citizens in violation of their Constitutional Rights. The public has generally come to recognize, over the last four decades, a number of famous decisions from the United States Supreme Court in which the habeas corpus remedy has been successful in ensuring that citizens charged with crimes are guaranteed their Constitutional Right to counsel, freedom from illegal searches and seizures, protection against confessions being illegally coerced from them, and prevention of other unreliable and tainted evidence being used to secure convictions against them.

Since the mid-1960s, the writ of habeas corpus has been a common remedy for most Texas prison inmates to challenge the validity of their convictions, even though only a small percentage of such efforts are successful. Of the more than 5000 writs of habeas corpus filed by Texas prison inmates each year, less than 200 receive any form of favorable habeas corpus relief under the present laws. As noted above, the reasons for this, and the impediments to pursuing habeas corpus, have multiplied over the years, to make it extremely difficult for anyone to receive habeas corpus relief, even when a legitimate claim is made. More about this later.

In any event, Mr. Gariepy prepared a petition for writ of habeas corpus himself, *pro se*, some three pages in length, in which he stated, *in substance:*

> "...the complainant in this case...falsified statements against (Petitioner) by bringing these charges... that resulted in (Petitioner) being falsely convicted...(and)...serving a 12 year sentence in the Texas Penal System for a crime that was never committed."

Mr. Gariepy attached the affidavit from M.H. indicating the June, 1993 recantation to his petition for writ of habeas corpus and the petition was filed with the trial court, as is required under the law, on or about April 29, 1994. On May 12, 1994, the serving District Attorney of Hutchinson County, Texas, filed an Answer to the petition filed by Mr. Gariepy, alleging the following defenses to habeas corpus relief, to wit: (1) that under Article 11.14, the petitioner did not have a copy of the judgment of the Court attached to it, and (2) that the affidavit of M.H., attached to the petition did not reflect that she is one and the same "Jane Doe" name which is listed in the indictment as the complainant in this case, and thus, according to the District Attorney, since it is not shown that the affidavit of M. H. and the actual identity of the victim in the indictment were the same, petitioner's allegations in his habeas corpus petition had "no relevance and are not material" to his confinement."

On the same date this Answer was filed, May 12, 1994, the trial court summarily refused to schedule an evidentiary hearing on the claim and entered an order recommending that relief be denied. Under Texas law, the transcript of this matter was sent to the Texas Court of Criminal Appeals for review, under Article 11.07, supra.

Just as a matter of commentary, the readers are advised that Article 11.07 petitions do not have to have copies of the judgments and sentences attached to them, as Article 11.14 is not applicable to the instant proceeding, therefore, the District Attorney's first defensive response to Mr. Gariepy's first application had no merit. The second defense, contending that M. H. was not, in fact, shown to be one and the same complainant as listed in the "Jane Doe" indictment is even more troublesome. Obviously, the prosecutor had their prosecution files on this case, which contained the original interviews and statements with M. H., the complainant, and obviously, there was a wealth of information within the District Attorney's files to show that M. H. was one and the same victim who had made these allegations which resulted in petitioner Gariepy's conviction. Yet, even though this information was known, or should have been known to the prosecutor's office, the prosecutor's Answer to this petition was at the very least disingenuous, and at most, a pleading containing misleading arguments.

Of course, the trial court could have made its own inquiry, but under Texas practices dealing with post conviction matters, it is very rare that any trial court ever makes inquiry into one of these cases, without the consent or intervention, directly, of the district attorney, or where a private attorney makes a personal appearance before the Court asking for special consideration. Since Mr. Gariepy did not have his own private counsel, the Court took the prosecutor's viewpoint of the case.

However, as we will note in future proceedings, once it was made clear to trial court that Mr. Gariepy was claiming his actual innocence, the trial court did take the appropriate inquiry. Unfortunately, that subsequent correct action by the trial court cost Mr. Gariepy four (4) years in prison.

THE FIRST COURT OF CRIMINAL APPEALS REVIEW

Under Texas law, after a habeas petition is reviewed by the trial court under Article 11.07, the transcript of the case is then automatically transmitted to the Texas Court of Criminal Appeals for review. The case is then assigned to one of a number of Administrative Assistants who are hired by the Court to screen these thousands of habeas petitions, provide legal and factual

research concerning the allegations made therein, and to draft written recommendations for the Judges of the Court, suggesting appropriate disposition of the cases.

Unfortunately, many of these reviews performed by the Court of Criminal Appeals Staff are minimal at best, and even when one of the Staff members makes favorable recommendations in a case, their recommendations are oftentimes not followed by the Judges. When the Court considers these cases, *en mass*, in judicial conferences, they often consider hundreds of habeas corpus petitions all at one time, generally giving only a few seconds, and rarely no more than a minute to each case, before it is ruled upon.

The Court denied Mr. Gariepy his habeas corpus relief in an order placed upon a postcard, dated June 6, 1994, with the order of the Court indicating that habeas corpus relief was "Denied Without Written Order".

According to court records, the Court of Criminal Appeals had received the transcript from the trial court on May 19, 1994, thus indicating that the Court Of Criminal Appeals gave a total of eighteen (18) days consideration of petitioner's first habeas corpus claims.

The Court of Criminal Appeals obviously could review this record to see that the substance of petitioner's claim was that he was innocent because the complaining witness provided false testimony against him which resulted in his conviction, and the prosecutor's Answer to his petition clearly did not show a legitimate legal basis for denial of habeas relief, and the trial court recommended that the claims be denied without a hearing. The Court of Criminal Appeals should have remanded this case to the trial court for further proceedings.

SECOND COURT OF CRIMINAL APPEALS REVIEW

After petitioner's first habeas corpus petition was denied, without further legal assistance, he had no idea where to turn, thus he just continued to serve his prison sentence.

After quietly serving over four years in prison after his first habeas petition was denied by the Court of Criminal Appeals, petitioner's family once again sought to bring efforts to try to help him gain his release from prison. The family contacted the complaining witness again, and once again obtained an affidavit confirming her earlier July, 1993 recantation. Mr. Gariepy's family contacted the new District Attorney, Clay Ballman, who had been elected District Attorney since the 1994 proceedings have occurred, taking over from the original District Attorney who prosecuted and defended Mr. Gariepy's first habeas petition.

Mr. Ballman, in a very courageous and fair manner, reviewed the affidavits and immediately formed the opinion that further inquiry should be made into this matter. The District Attorney then contacted the Presiding Judge of the District Court and advised him that, in the District Attorney's opinion, Mr. Gariepy probably had a meritorious habeas corpus petition.

The judge, with this information being brought to his direct attention by the District Attorney, agreed that further proceedings should take place, so the court appointed a local attorney, to represent Mr. Gariepy for the purposes of filing a writ of habeas corpus. Court appointed counsel then investigated the case and filed an application for writ of habeas corpus with the Court on Aug. 20, 1998.

After this petition was filed, the trial court apparently recommended that relief be granted, without an evidentiary hearing, and transmitted the transcript to the Court of Criminal Appeals for review. The habeas transcript in this matter was received by the Court of Criminal Appeals on September 28, 1998. Approximately two weeks later, the Court of Criminal Appeals dismissed this application as being a "subsequent writ of habeas corpus", which did not comport with the provisions of Section 4, of Article 11.07's requirement that a Subsequent Habeas Petition be based upon "new facts or new law" and impact the guilt-innocence of the petitioner. The trial officials were apparently notified of this dismissal.

Then, according to the court records, counsel for petitioner almost immediately filed another writ of habeas corpus, an exact "mirror image" of the previous application filed in August, 1998 in the trial court.

The District Attorney this time filed an Answer to this petition advising the trial court that "the state believes an evidentiary hearing in this matter will serve the interest of justice". This is, of course, what should have happened in 1994 and during the previous proceedings of August, 1998, but unfortunately did not.

On December 22, 1998, the evidentiary hearing was conducted, during which all the appropriate witnesses testified, including the complaining witness, who formally under oath testified that she had committed perjury during Mr. Gariepy's first trial, and stated unequivocally that he was innocent of this offense.

The trial court made findings of fact and conclusions of law holding that Mr. Gariepy's original plea of guilty was involuntary, because he was induced to plead guilty as a result of "deception", i.e., the perjury committed by the complaint, and the Court recommended that Mr. Gariepy "be granted the relief requested and be discharged from further confinement pursuant to the conviction in Cause No. 7071." This transcript was prepared, and submitted to the Court of Criminal Appeals under Article 11.07 in early January, 1999.

It is important to note that there are a number of statutory and case law decisions in Texas habeas corpus jurisprudence under the September 1,1995 amendments to Article 11.07, Code of Criminal Procedure, which completely change the manner and method in which an attorney, in representing a habeas petitioner, must proceed, especially if the habeas corpus petition being submitted is a second petition, filed after a first petition has been considered and denied by the Texas Court of Criminal Appeals.

Under the 1995 Texas habeas law amendments, when a "Subsequent Writ" of habeas corpus is filed" as was the 1998 habeas petition, the Court of Criminal Appeals must apply the provisions of Section 4(a)(1-2) of the new law, which bars the filing of a writ of habeas corpus on a second occasion, unless the petitioner can allege and show that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

And further, a petitioner must also show that:
(2) by a preponderance of evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

In the first subsequent writ filed, no argument or recognition of the provisions of the current statute were set out within the petition, nor was there any citation to the applicable law of Holmes vs. Third Court of Appeals, 885 S.W.2d 389, indicating the legal basis for this petition was based upon "newly discovered evidence of innocence.

After this writ of habeas corpus in 1998 was dismissed by the Court of Criminal Appeals, the parties apparently believed that a hearing should be conducted, so counsel repeated the habeas corpus filing with the same document previously filed. However, the pleadings were not amended to reflect any arguments in the petition itself claiming an exception to the filing requirements of a Subsequent Writ, this being the third writ now filed on behalf of petitioner. Further, the findings of the trial court, even though favorable to petitioner, did not speak to the legal requirements for the trial court having jurisdiction under Section 4, as required by the Rule on this third writ of habeas corpus.

The court concluded that, because this was a "subsequent petition", it could not review the merits of these claims, because the petitioner had had a previous habeas corpus petition filed and denied (in 1994) unless, the petitioner could show that the "exceptions" mentioned in Section 4 (a) (1 and 2) of the statute were applicable, as set out above. We must now review the provisions of the statute's exceptions to see if they apply in Mr. Gariepy's case.

Statutory Requirements

First, the question is whether or not the previous claim, i.e., that of factual innocence based upon perjured testimony by the complaining witness, could have been properly presented in the first petition filed, and whether or not such claim was based upon an available factual or legal basis.

In other words, if a habeas petitioner can show that he could not have discovered certain "factual circumstances" at an earlier date, before his first habeas corpus petition was filed and considered by the Court of Criminal Appeals, then he may be able to file a second habeas petition raising a new claim based upon this newly discovered evidence.

Further, even if a habeas petitioner knows about certain factual events, the law also permits him to file a subsequent habeas petition later, if the "legal basis for the claim" had not been previously available to him. In other words, in this situation, if there is a change in the law, by either the Legislature or decisions of the Court Of Criminal Appeals, a habeas petitioner may be able to subsequently raise a new claim based upon the change in the law which was not available to him when his first petition was filed and considered.

The Factual Requirements

In this case, the petitioner knew about the recanted testimony of the complaining witness in 1993, prior to the filing of his first application for writ of habeas corpus, so clearly, the "factual basis" for his subsequent habeas corpus claim was available to him in 1994, and he did in fact raise that factual claim in the 1994 petition. Once that factual claim was denied, then, under the provisions of the Act, petitioner cannot again raise that factual claim, unless under Subsection 2 of the exceptions of the Act, there is a change in the law which would permit him to have this factual situation reconsidered. Was there change in the law?

The Legal Requirements

In fact, there was a major change in Texas law after petitioner's first writ of habeas corpus was denied by the Court of Criminal Appeals on June 1, 1994. On June 8, 1994, just one week later, the Court of Criminal Appeals decided the case of Holmes vs. Third Court of Appeals, 885 S.W.2d 389, which was a landmark case with regard to Habeas corpus jurisprudence in the state of Texas. The Court, for the first time, allowed Texas habeas corpus petitioners to present to the courts, in a post-conviction habeas matter, a claim *of* "newly discovered evidence" of factual innocence, thus overruling a long line of Texas case law on that subject. See Ex Parte Binder, 660 S.W.2d.____ Without a doubt, this opinion in Holmes, supra, was a decision by the Court which clearly changed Texas law, and made available certain claims that were not available before. How did it apply to Mr. Gariepy's situation?

According to court records, Mr. Gariepy filed his first post-conviction writ on April 29, 1994, approximately five weeks before the decision in Holmes was handed down. His petition was denied by the Court on June 1, exactly one week before Holmes was decided. While there is no showing that Mr. Gariepy has ever known that Holmes was the law at all, even if he would have known, under Texas procedure, there is no provision for a Motion For Rehearing to challenge post-conviction writs that are denied without being formally submitted to the Court. So, even if Mr. Gariepy would have heard about the Holmes decision coming down one week later, there was nothing he could have done to reinstate consideration of his case.

Thus, it would appear that the Court of Criminal Appeals "dismissal" of Mr. Gariepy's second habeas corpus petition on Oct. 14, 1998 was clearly in violation of any reasonable interpretation of Texas law. As noted above, while Mr. Gariepy did in fact know the "factual circumstances", prior to his 1994 state habeas petition, the "legal basis" for any claim for habeas corpus relief in 1994 did not exist until one week after 1994 petition was denied by the Court, with the Holmes vs. Third Court decision.

Thus, under any reasonable interpretation of Section 4, Mr. Gariepy should have been able to have the Court review the merits in that second habeas petition filed, but the Court of Criminal Appeals dismissed it anyway.

THIRD COURT OF CRIMINAL APPEALS REVIEW

As noted above, after the first dismissal of Oct. 14, 1998, the parties tried again, and an evidentiary hearing was conducted in December, 1998, and once again, the trial court recommended that relief be granted.

According to court records, after the transcript from the trial court had been received by the Court of Criminal Appeals in early January, 1999, the case was once again reviewed by the Administrative Staff of the Court. Then, in a postcard order

entered by the Court on February 10, 1999, the Court of Criminal Appeals held:

"The court has dismissed without written order the subsequent application for writ of habeas corpus. See *Article 11.07, Section 4, V. A. C. C. P.*"

So, for the same reasons that the Court dismissed the second petition, they dismissed the third petition.

The exact same claim had been presented a couple of months before, and since counsel did not argue the exceptions, and evidence was not submitted to support the claim, as no habeas corpus evidentiary hearing was conducted, the court found it to be without merit as a jurisdictional matter. While the prior decision was wrong, the court's decision in February, 1999, was legally correct. However, it was certainly not morally, equitably or ethically correct under any circumstances.

At this point of the story, Mr. Gariepy's dealings with the Judicial System of the State of Texas now came to and an end . We must now look at his dealings with the Executive Branch of the Government of the State of Texas.

THE PAROLE OF MR. GARIEPY

Even though the Court of Criminal Appeals denied habeas corpus relief, shortly thereafter, in March, 1999, the Texas Board of Pardons And Paroles issued a parole to Mr. Gariepy. There is no indication that the Parole Board knew, at that time, about any of the background information concerning Mr. Gariepy's innocence.

After being released, Mr. Gariepy and his family contacted this writer, to determine if there were any steps that could be legally taken to clear his name, and get him off parole, having his conviction set aside. This writer performed an investigation of the background of the case at that time, and advised the family that, because of the prior state habeas corpus history, it was probably impossible for Mr. Gariepy to get any further consideration of his claims considered, on the merits, by the Texas Judiciary.

Furthermore, in 1996, the United States Congress passed the *Antiterrorism And Effective Death Penalty Act*, which substantially changed the federal habeas corpus laws in this country, making it much more difficult for defendants in prison to challenge the validity of their state convictions in the federal courts. One of the provisions of this Act required all habeas corpus petitioners in the United States to file their writ of habeas corpus challenging their conviction in federal court, on or before April 26, 1997, if their criminal convictions had become final one year or more before that date. Since that was the situation concerning Mr. Gariepy, and since he had never previously instituted federal habeas corpus claims, he was now effectively barred from ever pursuing federal habeas corpus relief in the United States Courts.

After advising Mr. Gariepy and his family of this problem, this writer then suggested that counsel would attempt to prepare documents for the trial officials in this case, from Hutchinson County, asking that they recommend to the Texas Board of Pardons and Paroles, and to the Governor of the State of Texas, that Mr. Gariepy's conviction be commuted, and that he be Pardoned Based Upon Innocence, under the Rules of the Board Of Pardons And Paroles.

This is an exceptionally rare proceeding in Texas, having only occurred in five prior occasions over the last eight years. On September 11, 1999, counsel hand carried the original and one copy of the Pardon Request, and supporting documents, to the Parole Board.

THE PAROLE BOARD VOTE

On or about February 11, 2000, counsel for Mr. Gariepy received a telephone call from the staff of the Texas Parole Board, advising that Board had voted, in a favorable manner, voting 11-7 to recommend a pardon to the Governor. Counsel was advised that the materials were being submitted to the Governor's Office immediately.

THE CONCLUSION

On August 15, 2000, the Govenor issued a pardon. In conclusion, Ronnie Gariepy, a Texas citizen, spent a grand total of almost nine years in either actual or constructive custody of the State of Texas, under circumstances where he was shown to be innocent, by the recantation of the complaining witness, in 1993, only 17 months after his conviction. It took almost eight years to secure Justice, and as seen from this story, there were a number of severe injustices encountered by Ronnie Gariepy through these years.

There were also some "heroes" in this story, who acted, in the true interest of the criminal justice system, i.e., The Trial Court Judge, Clay Ballman, the present District Attorney of Hutchinson County, certain members of the Texas Parole Board and the Governor's Office, and the Governor himself, who eventually ensured that justice was done.

However, for this writer, a question still plagues me — — IS JUSTICE DELAYED, JUSTICE DENIED? — as has been stated by the United States Supreme Court on a number of occasions dealing with questions concerning a defendant's right to a "speedy trial"? If in fact delayed justice is a denial of justice, then it is clear that Ronnie Gariepy was, in fact, denied justice in this case.

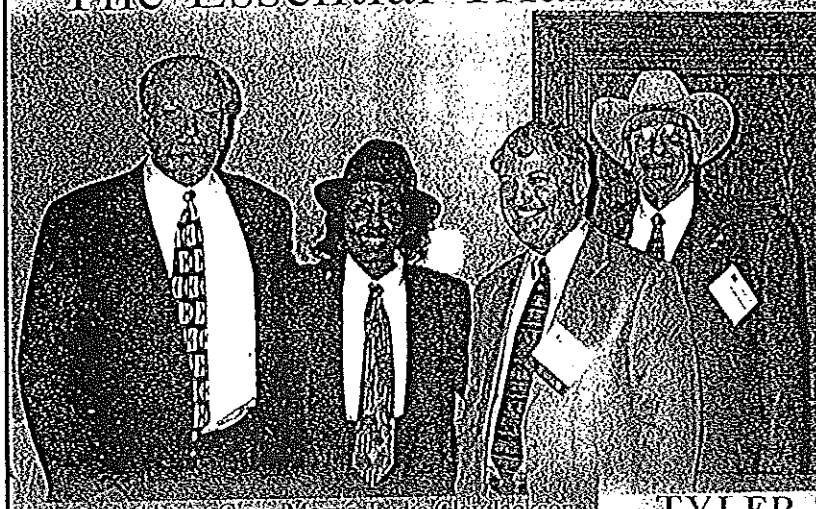
BIOGRAPHICAL INFORMATION

Roy A. Greenwood received his J.D. from the University of Texas in 1970. After working for the Texas Department of Corrections and the Texas Court of Appeals he went into private practice in 1978. For the past twenty-two years Roy has specialized in appellate process, habeas corpus and death penalty litigation. He has been involved with several associations including Texas Criminal Defense Lawyers Association 1978-Present, National Association of Criminal Defense Lawyers 1976-Present, and Austin Criminal Defense Lawyers Association 1992-Present. Roy has written several articles for publication for the *Voice* and *The Champion*. He is co-publisher for the Greenwood/Schulman Report.

The Essential Trial Notebook Seminar in Tyler

October 5-6, 2000

Photos Courtesy of Weldon Holcomb
Below Randy McClammy



Above: Gerry Morris, Lydia Clay-Jackson, Larry Warner, Weldon Holcomb
Below Randy McClammy, Craig Jett, Kellie Barley

TYLER, TEXAS

"The Rose Capitol of the World"

Welcomes the speakers and participants "Essential Trial Notebook Seminar"

Social sponsored by:
Texas Criminal Defense Lawyer's Association
The Law Offices of Bobby D.Mims

Below: Rick Hager

Below: Dan Hurley, D'Ann Johnson, Craig Jett

Criminal Defense Lawyers Project

DEATH PENALTY LAW AND PRACTICE IN TEXAS

FOURTH EDITION • SEPTEMBER 2000

STEVEN C. LOSCH
907 Delia Drive
Longview, TX 756001

903-234-1374

NAME	❑ American Express	
ADDRESS	❑ Master Card	
CITY, ST ZIP	❑ Visa	
PHONE		
CARD #	Sub-Total	
EXP. DATE	Shipping	
NAME ON CARD	Sales Tax (8.25%)	
AUTHORIZED SIGNATURE	TOTAL	

MEMBERS $86.00
NON-MEMBERS $150.00

All members will be mailed first class unless otherwise specified; overnight charges extra.

SPONSORED BY: Criminal Defense Lawyers Project
600 West 13th Street
Austin, Texas
512/478-2514
FAX: 512/469-9107

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION MEMBERSHIP APPLICATION

Some of the best legal minds . . .

. . . in the state already belong to the Texas Criminal Defense Lawyers Association.

We believe we have now the best Criminal Defense Bar in the United States. We maintain that level of excellence by continuously seeking out new minds and new energies. Therefore, we want YOU ... if your legal and personal philosophies are compatible with our purposes and objectives:

- to provide an appropriate state organization representing those lawyers who are actively engaged in the defense of criminal cases.
- to protect and insure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases.
- to resist proposed legislation or rules which would curtail such rights and to promote sound alternatives.
- to promote educational activities to improve the skills and knowledge of lawyers engaged in the defense of criminal cases.
- to improve the judicial system and to urge the selection and appointment to the bench of well-qualified and experienced lawyers.
- to improve the correctional system and to seek more effective rehabilitation opportunities for those convicted of crimes.
- to promote constant improvement in the administration of justice.

ADVANTAGES FOR TCDLA MEMBERS

- The *Voice for the Defense* magazine.
- The "Significant Decisions Report" of important cases decided by the Texas Court of Criminal Appeals and Federal Courts.
- TCDLA Membership directory - referrals to and from criminal defense lawyers in over 100 Texas cities.
- Outstanding educational programs - featuring recognized experts on practical aspects of defense cases.
- Availability of Lawyers Assistance Committee, a ready source of information and assistance to members, and the Amicus Curiae Committee
- Organizational voice through which criminal defense lawyers can formulate and express their position on legislation, court reform, and important defense cases through Amicus Curiae activity.
- Discounts for publications of interest to criminal defense lawyers.

☐ New Member Application ☐ Renewal Application
☐ Yes ☐ No A Certificate is desired.
☐ Currently a member of NACDL.
☐ Mr. ☐ Ms. ☐ Mrs.
Name _____
Law Firm _____
Mailing Address _____
City _____ ST _____ Zip _____
Phone _____ Fax _____
E-mail Address _____
County _____
Bar Card Number _____
Bar Card Date: Month _____ Year _____
Date of Birth _____

Please check correct category:

☐ 2 years or less, new member of TCDLA $75
☐ More than 2 years $150
☐ Student $20
☐ Voluntary sustaining $300
☐ Sustaining $200
☐ Affiliate $50
☐ Public Defender $50
☐ Members in the firm of a sustaining or charter member $50

☐ Yes ☐ No Certified Criminal Law Specialist

☐ Yes ☐ No Have you ever been disbarred or disciplined by any bar association, or are you the subject of disciplinary action now pending?

_____ _____
Date Signature of Applicant

I hereby apply for membership in the Texas Criminal Defense Lawyers Association and enclose $_____ as my annual membership dues for the year _____.

Of the dues amount $36 ($19 if a student member) is for an annual subscription to the *Voice for the Defense* and $39 of regular dues is for TCDLA lobbying.

ENDORSEMENT

I, a current member of TCDLA, believe this applicant to be a person of professional competency, integrity, and good moral character. The applicant is actively engaged in the defense of criminal cases.

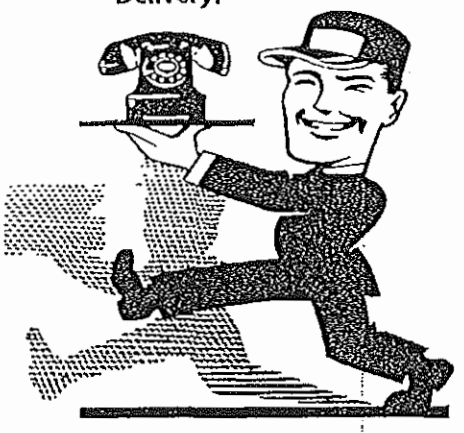
_____ _____
Date Signature of Member

_____
Print or type member's name

Mail to: Texas Criminal Defense Lawyers Association
Attn: Membership Department
600 West 13th Street
Austin, Texas 78701
(512) 478-2514 / (512) 469-9107 (fax)

Amount Enclosed: $_____
☐ AMEX ☐ VISA ☐ MASTERCARD ☐ DISCOVER
Card Number _____
Exp. Date _____ Name on Card _____
Authorized Signature _____

CLE
Delivery!



The Criminal Defense Lawyers Project, a TCDLA program supported by a grant from the Court of Criminal Appeals, is delighted to introduce the first CLE by Telephone Series designed especially for the Criminal Law Bar.

What: Occupational Licenses
You will receive 2 full hours of CLE (Application Pending)

Who: Course Directors:
George Scharmen and Betty Blackwell

Where: At your desk

When: Thursday, November 30, 2000
4:00-6:00 pm

Need a scholarship? Have questions about content? Call Randy at 512/478-2514. Have a technical concern? Call KRM, our service provider at 800-775-7654.

Three Ways to Register/Order:

ALL REGISTRATIONS/ORDERS MUST BE PREPAID. Payment must be made in U.S. dollars.

(1) Mail to: KRM Information Services, Inc.
P.O. Box 1187
Eau Claire, WI 54702-1187
Make check payable to: KRM
(2) Fax (with credit card info) to KRM at 800-676-0734
(3) Call KRM's customer service line with your credit card info: Call 800-775-7654

Can't Attend? You may purchase the audiocassettes for $30 with this form or call 1-800-775-7654 after the conference.

SEMINAR # TCD5888-0
Registration Form

Occupational Licenses

Thursday, November 30, 2000
4:00pm-6:00pm

Check the appropriate boxes:
☐ Registration Fee $80 each site connected PLUS $60 each additional listener (at connected port)

☐ Registration Fee, *after November 23*
$100 each site, PLUS $80 each additional listener (at connected port)

☐ Audiocassette/materials package $40.00

** **One set of materials will be sent to the connecting port attendee. Duplicate materials must be made for additional listeners.**

Attendee 1: (Credit Card Payor)
Bar Card Number _____
Name: _____
Street Address: _____
City: _____ State: _____ Zip: _____
Business Phone: _____ Fax Number: _____
E-Mail Address: _____

Credit Card Registration & Orders: Check type of credit card:
☐ MasterCard (16 digits)
☐ VISA (13-16 digits)
☐ American Express (15 digits)
☐ Discover (16 digits)
Credit Card #: _____
Card Expires: ____/____ Total Payment: _____
Signature: _____

Attendee 2:
Bar Card Number _____
Name: _____

Attendee 3:
Bar Card Number _____
Name: _____

Attendee 4:
Bar Card Number _____
Name: _____

Dialing-in instructions for the program as well as the URL for accessing your conference materials will be e-mailed to you. (You will need the Acrobat Reader, available free at www.adobe.com)

☐ Please check here if you are unable to receive your materials via the Web. We will ship a hard copy to you.

Services Provided by KRM Information Services, Inc.®

The Texas Criminal Defense Lawyers Association

DWI 2001

January 17-19, 2001

Driskill Hotel, 604 Brazos St., Austin, Tx.

Call (800) 252-9367 and ask for the TCDLA rate of $145! Reservations must be made by 12/29!

Wednesday, January 17, 2001
Reception with legislators

Thursday, January 18, 2001

8:15 **Intoxilyzer 5000**
Dr. Ken Smith, *Houston*

9:00 **Understanding the Intoxilyzer 5000**
Mary McMurray, *Blue Mounds, Wisconsin*

10:30 **Break**

10:45 **Cross-Examination of the Technical Witness in the ALR Hearing and the DWI Trial**
Christopher N. Hoover, *Plano*

11:30 **Lunch**

1:00 **Blood Testing**
Troy McKinney, *Houston*

1:45 **Break**

2:00 **Cross Examination of the Arresting Officer**
George Milner, III, *Dallas*

2:45 **"10" Easy Points to Make in Cross Examination in a Blood Test Case**
Mike McCollum, *Dallas*

3:30 **Accident Reconstruction**
Truman Hall, *San Antonio*

4:15 **ALR**
Larry Boyd, *Dallas*

5:15 **Adjourn**

Friday, January 19, 2001

8:00 **Ethics**
Bennie Ray, *Austin*

9:00 **Preparing Your Client to Testify (or Not?)**
Gary Trichter, *Houston*
Chris Samuelson, *Houston*

9:45 **Voir Dire in DWI: Strategy and Technique**
David Burrows, *Dallas*

10:45 **Break**

11:00 **Psychology of Jurors**
Clarence Mock, *Nebraska*

12:00 **Lunch**

1:30 **Ethics**
Andrew Forsythe, *Austin*

2:30 **Legislative Update**
Keith Hampton, *Austin*

3:15 **Break**

3:30 **Final Argument**
William C. "Bubba" Head, *Georgia*

4:30 **Adjourn**

** An MCLE Application for 12.25 hours (2.0 hours ethics and professionalism credit) is pending with the State Bar MCLE office.*

DWI

Please complete and send this registration form by mail to
TCDLA • 600 West 13th St. • Austin TX 78701-1705
or by fax to (512)469-9107.

Name _____
Bar Card # _____
Address _____
City, State, Zip _____
Phone _____ Fax _____
E-mail _____

Note: This seminar is open only to Criminal Defense Attorneys

☐ Current TCDLA Member	$250.00
☐ Non-Member	$325.00

Membership Fees
Update your membership or join and get the seminar at the member price!
To be eligible for membership, you must be a criminal defense attorney.

☐ New Member	$ 75.00
☐ Renew membership and licensed more than 2 years	$150.00
☐ Early Registration ends January 8th After that date, please add	$ 50.00

Can't Attend?

☐ Buy the seminar book!	$ 89.30
☐ Add the Audio Tapes	$108.25

Your total _____

☐ Check enclosed. Make payable to TCDLA.
☐ Charge my Visa American Express MasterCard Discover

Name on Card _____
Card Number _____
Exp. Date _____

I am applying for a scholarship by January 5th. To apply, send a letter indicating: your need, whether you've received a scholarship before and when as well as two letters of recommendation, one from a judge and one from a member of TCDLA.

Please check here or call the office if you require special assistance. We will be happy to help you in any way we can.