. . . AND JUSTICE FOR ALL BEHIND THE WALLS

An Inmate Criminal Defense Primer

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Texas does everything on a grand scale, including leading the nation and the industrialized world in the per capita imprisonment of its population. It follows that Texas would also lead the United States in penal code indictments behind prison walls. It is for that reason a centralized defense function, State Counsel for Offenders-Trial Services (SCFO), was established in 1991 to provide cost-effective counsel for inmates charged with Penal Code violations. Based in Huntsville, SCFO attorneys "ride the circuit" to counties throughout the State where penal institution venues gives rise to violations. *It is the only exclusive Inmate Defense office among the 50 states.* Most states appoint local counsel or assign the county public defender for those unable to retain legal representation.

SCFO, by virtue of its specialized function, has accumulated a number of "tricks of the trade" that are indigenous to inmate defense. This article will share those that are essential to meeting the legal challenges posed by inmate defense. It will also focus on practical tips necessary to understanding the inmate client, the world he lives in, and the rules he lives by.

First, the article will detail the procedures that govern assignment of counsel in inmate cases where SCFO is not involved, the fee schedule in such cases, and the method of payment. Next, the discussion will venture "Behind the Walls" to explore the labyrinth of TDCJ departments and records that hold the key to reasonable doubt in inmate cases. Applying these discovery tools to substantive offenses, the analysis will focus on the "the big three" substantive offenses that comprise the bulk of inmate cases and show with specific examples how to approach complicated inmate defense issues.

Finally, with a series of practical tips, appendices dealing with everything from prison lexicon to a list of TDCJ directives every inmate defense attorney should know about, and a final thought on the defense attorney's best friend, jury nullification, this article will leave you with the firm conviction that in inmate cases you can achieve the noble goal every true trial attorney lives for - TO WIN!

"CONFLICT" CASES

The legislature recognized that cases could arise where it would create a conflict of interest to appoint State Counsel for Offenders to represent an inmate. In cases where the court determines that representation of co-defendants are involved, or that representation by an SCFO attorney creates any conflict of interest under the Texas Disciplinary Rules of the State Bar of Texas; the court must appoint an attorney other than an attorney from SCFO.[1]

In such cases local attorneys are appointed by the court. The legislative scheme for appointment and reimbursement of all trial costs are covered in Articles 26.05 and 26.051, Texas Code of Criminal Procedure. The county is responsible for the first $250.00 of the cost of representation, and the state will pay the remaining expenses certified by the board. The Board certifies the reasonableness of the expenses based upon the fee schedule contained in Board Policy 13.70, Indigent Offender Representation Fee Schedule, September 13, 1996 (BP-13.70), (Appendix).

BP-13.70 establishes a fee schedule for attorneys, investigators, interpreters, medical experts, and travel expenses. All trial expenses must be presented to the appointing court for approval. The court forwards the bills to SCFO for payment. SCFO reviews the expenses under the guidelines of BP-13.70, and forwards all approved bills to the Board which tenders them to the Comptroller of Public Accounts for action. Excessive or erroneous invoices are returned with an explanation. The invoices may be resubmitted with a clarification or correction.

The District Clerk of the appointing court should be familiar with these procedures, and should have all the necessary forms for submitting expenses. SCFO Administrative Services will answer any questions regarding expenses and the status of reimbursement requests. Processing takes 60-90 days. Attorneys have generally found this delay in payment is more than offset by the certainty of payment often lacking with non indigent clients.

ENTERING THE PRISON MAZE: DISCOVERY

One of the most striking features about discovery in an inmate case is the amount of material evidence available within TDCJ. Nearly every facet of an offender's life is documented in TDCJ files: medical, psychiatric, arrests, convictions, disciplinary cases, schools, good conduct, grievances, property, financial, gang affiliation, classification, housing assignments, housing restrictions, work, work restrictions, and a plethora of other matters that can all be relevant to effective representation in any given inmate case. Locating the pertinent information, however, can be more like navigating a maze.

It is not enough to know what information TDCJ possesses. A request to the wrong department can result in wasted time and effort, reliance upon incomplete documentation, or the mistaken belief that the necessary information does not exist. An untimely request may result in the court ordering an attorney to proceed without the information. A poorly worded request often produces the wrong information. Knowing the identity of the records

custodian, the procedures and timelines for obtaining the records, and the basis for entitlement to the records are all critical to obtaining timely relevant information from TDCJ.

Although discovery in Texas is extremely limited,[2] most prosecutors handling inmate cases observe an "open file" policy. As a practical matter this promotes plea bargaining.

Many inmates will enter plea negotiations once they have been confronted with the state's case (typically the TDCJ Internal Affairs Investigative Report with correctional officers' statements, and the inmates "Pen Packets"). Absent this minimal discovery, inmates will often refuse to plea, put off pleading for as long as possible, deluge the court with letters and motions on their case, demand an investigator to investigate their case, or any combination of the above. The "open file" policy facilitates the speedy and cost effective disposition of large numbers of cases.

When other TDCJ records are sought through discovery, prosecutors suggest that the defense obtain them by a request or subpoena to TDCJ. SCFO has found subpoena duces tecum to be the preferred method for obtaining TDCJ records. Laws and policies relating to confidentiality preclude TDCJ's release of most records, without a court order Some exceptions to this general rule exist. For instance, an attorney may receive a copy of their client's medical record by submitting a signed medical release form to TDCJ Health Services Division.

Below are the types of records an attorney may find helpful in defending an inmate. The phraseology suggested for subpoena applications is offered to most clearly identify the relevant and material records. Also included is the name and physical address of the department that holds the records. Subpoenas should include the name of the custodian of those records. Attorneys should call the pertinent department to obtain the name of the current custodian. When requesting the custodian's name, be sure to tell the department that the records will be required for purposes of a court proceeding.

Request records in time for the date of the pretrial hearing. This will allow time to litigate production of the documents, if the state files a motion to quash. If at all possible, do not request records at the last minute. It will typically take at least one week *after the custodian is served with the subpoena* before the documents can be mailed or prepared for pickup. To ensure the documents are received when needed, allow at least two weeks from the date the subpoena is served on the records custodian to the time the documents are needed. Where the record custodian's presence at trial is only necessary to authenticate the records, consider a self-authenticating affidavit.[3]

The department served with the subpoena will generally contact the Office of Legal Affairs, TDCJ. Overly broad subpoenas, or subpoenas for documents not material to the case may prompt a motion to quash the subpoena. TDCJ usually provides the prosecution with a copy of all documents provided to the defense.

A. Internal Affairs Division Records

The Internal Affairs Division of TDCJ may have documents material to an inmate's case, other than those contained in the prosecutor's "open file." Whenever a correctional officer engages in a use of force on an inmate, a report must be made to the Warden. IAD is responsible for reviewing the process of reporting use of force incidents, and investigating allegations of excessive or unnecessary uses of force.[4] This report is *administrative* in nature, and is not made for law enforcement purposes. Use of Force (UOF) procedures, directives, reports, and forms may be found in the TDCJ *Use of Force Review Training Manual*.[5]

Some of the UOF Report is exculpatory in almost every case where an inmate is charged with assaulting a correctional officer. The report includes statements from inmates who witnessed the incident. They typically include inmates' assertions of officer misconduct that provoked the incident, or other evidence supporting a self-defense claim.

The report also requires a list of inmates

who were present at the scene of the incident, but who declined to make a statement. This list usually includes the names of inmates who will support a self-defense claim. They may have witnessed misconduct by the correctional officer that provoked the incident, or they can otherwise impeach correctional officers' written statements and trial testimony.

The importance of these reports will be underscored when talking to a defendant. Inmates frequently do not call each other by name. Nicknames are common, and it may be impossible to locate many witnesses. The UOF Report will list the witness by name and TDCJ number. Furthermore, the defendant, or the witnesses, may have been in a transient status at the time of the incident. TDCJ may have moved them to other units within weeks or days of the incident. Even if not transients at the time of the incident, before investigation, indictment (usually predicated solely on the written statements of the officers as contained in the IAD Investigative Report), and appointment of counsel, even many non-transient witnesses will have been moved by TDCJ.

Major use of force incidents also require that a video camera be brought to the scene of the incident as soon as practicable.[6] This means that, at a minimum, there will be some footage of the correctional officers involved, your client, and inmate witnesses in the vicinity. The video also documents a defendant's cooperation after the alleged assault, the extent of injuries to all parties, the ability to observe the incident from certain vantage points, and any statements made by the defendant while the video camera is recording. These statements will include his recitation of injuries to attending medical personnel, who are required to inquire about and examine the inmate's injuries, and to make a record of the treatment rendered.

Direct subpoenas for use of force reports to the Custodian of Records, Internal Affairs Division, BOT TDCJ Administrative Building, Internal Affairs Division, Spur 59, Off US 75 North, Huntsville, Texas. The subpoena should request that the custodian: "provide original and/or legible reproduction of records and tangible things; to wit all TDCJ Internal Affairs Division records, videotapes, use of force reports and related witness statements involving the above named inmate for any and all incidents occurring on (here insert date of alleged offense)." To avoid duplication of material where the prosecutor has already provided discovery of the IAD Investigative Report under an "open file" policy, you should add: "The IAD Investigative Report for this incident need not be provided."

B. Inmate Classification Records

TDCJ classification records contain a wide range of materials. Arrests, convictions, disciplinary infractions, classification status, administrative requests, housing restrictions, work restrictions, gang affiliations and a host of other matters are documented in an inmate's classification file. The Appendix contains a list of some of the more frequently requested documents. Depending on the nature of the case, these records may be relevant and material in effectively representing an inmate client.

Many inmate cases arise from an inmate's prison gang status - or his unwillingness to join a gang. If the victim in an assault or a homicide case is from a rival gang, the prosecution may seek to use a defendant's gang status to prove motive. The defense may find the victim's gang affiliation relevant to an ongoing gang dispute that supports the defendant's claim of self-defense. An inmate's indictment on charges of possessing a deadly weapon in a penal institution[7] may be explained or even justified by the gang status, habit of gang intimidation, or record of prison violence documented in the TDCJ classification records of another inmate. Letters and inmate request forms complaining of threats by a gang or an individual (contained in your client's TDCJ classification file) may provide the reasonable doubt necessary to win an acquittal.

Other inmate's records of convictions and disciplinary infractions for violent offenses may be admissible to support the reasonableness of a defendant's actions in an assault or possession of a deadly weapon case. The disciplinary reports of an inmate's assaultive behavior in prison will contain names and TDCJ numbers of his previous victims. These are witnesses who can provide opinion or reputation evidence admissible under Tex. R. Evid. 404(a)(2) and 405.

Even records of an inmate's housing restrictions may support a defense. Where a weapon is found in a mattress they can establish who was assigned to which bunk. TDCJ Classification records will also show when an inmate is restricted from the top bunk due to a medical concern. In cases of interracial assaults, classification records will include any previous refusal by an inmate to be housed with inmates of certain races.

The confidential nature of inmate records may cause TDCJ to require specificity in any subpoena for an inmate's classification records. Overly broad subpoenas may also prompt a motion to quash by the prosecutor. Because the exculpatory nature of the items referred to above is obvious, a well tailored subpoena application for them often will not be contested by the prosecution or by TDCJ. When it is, be prepared to show materiality.

Any subpoena duces tecum for TDCJ classification records of an inmate should be sent to Custodian, Inmate Records, BOT Warehouse Complex, TDCJ-ID Administration, Spur 59, off US 75 North, Huntsville, Texas. It should state the name and TDCJ number of the inmate whose records are needed.

TDCJ thoroughly reviews all classification records provided pursuant to a subpoena. They will black out information regarding matters they deem to be confidential or to pose security breaches. Failure to request these classification records prior to final pretrial hearings may foreclose timely litigation of critical discovery issues.

Finally, be aware that *unit* classification records exist on each inmate in a TDCJ-ID prison unit. These records may contain matter not in the TDCJ classification records. When in doubt about whether there may be additional information in the unit classification record, it would be wise to include a similarly specific subpoena duces tecum to the Custodian of Records for the unit of the inmate whose records you need. The Warden is usually the custodian of unit records, but call the unit to confirm the name of the custodian.

C. Medical and Psychiatric Records

Inmate medical and psychiatric records are among the most frequently requested by defense attorneys. This is due to the prevalence of assault cases, the large number of inmates with psychiatric or head trauma histories, and the relatively low IQ of many inmates. In addressing the threshold question of competence to stand trial,[8] the initial client interview can reveal many reasons to obtain the psychiatric record of your client or the victim. Where competency issues are not obvious in the initial interview, the large number of cases that involve assaults almost guarantees that the medical condition of your client, or that of an alleged inmate victim, will be at issue.

Obtaining a client's medical and psychiatric records is relatively easy. They may be obtained by giving TDCJ Health Services a completed copy of the medical release form

HAS-27 (rev. 3/98)(Appendix). It must be signed by your client. A subpoena may be used in lieu of the release form. Subpoena medical or psychiatric records from the Custodian of Inmate Medical Records, TDCJ Administrative Building, I-45 & Hwy. 30, Huntsville, Texas.

A medical release may also be used to obtain the medical or psychiatric records of an alleged victim or witness. Understandably, this may prove more problematic. In cases where a subpoena will be used, tailor the application for specific records. Examples include: records of all complaints and treatment for the injuries allegedly sustained at the hand of the defendant, or records pertaining to preexisting injuries similar to those allegedly inflicted by the defendant.

When requesting medical or psychiatric records, the key is to understand the many and varied records that exist. The Appendix includes a comprehensive list of the types of TDCJ inmate medical and psychiatric records. A request for all medical and psychiatric records on an inmate should reference and attach this list. This will produce voluminous records and should be tailored, where practicable, to state the type of records requested *and* the pertinent time period.

Although most items on the list are self-explanatory, a few are not. PAMIO records refer to the records kept on inmates who attend the Program for the Aggressively Mentally Ill Offender (PAMIO) at the Bill Clements Unit in Amarillo. Medication compliance records are critical in evaluating whether an inmate's behavior may have been affected by medication received, or by the failure to receive prescribed medications. The "Blue" file refers to records of any program in which an offender participated, such as the Substance Abuse Program. The "Brown" files refer to an inmate's overall medical records.

D. Employee Disciplinary Records

Correctional officers who are potential witnesses against an inmate may have a history of disciplinary infractions while working at TDCJ. Request discovery of these disciplines, or subpoena them, when they are material to the case. Depending on the facts, materiality may not be difficult to show.

For example, in a case where the defendant is charged with possession of a controlled substance in a penal institution, evidence of the officer's habit of bringing contraband to inmates may be part of the defense case.[9] Any evidence of the officer's having been disciplined for bringing contraband to inmates in the prison may include the names of other witnesses who can testify to this habit, and perhaps other facts that support your defense.

Where an inmate is charged with assaulting a correctional officer, disciplinary records showing the officer used excessive force against other inmates will contain the names of potential witnesses who can provide character evidence under Tex. R. Evid. 404(a)(2), and 405. The officer's disciplinary will also contain names of witnesses who may support defense claims that the conduct constitutes evidence of the officer's habit of abusing inmates, admissible under Tex. R. Evid. 406. Furthermore, the conduct, as well as the fact that the officer was disciplined, may be admissible to show bias of the officer,[10] pursuant to Tex. R. Evid. 613(b).

These are just some of the ways an officer's disciplinary offenses may be material to an inmate case. Knowledge of an officer's disciplinary record has often been helpful in obtaining favorable plea offers and even dismissals. Defense attorneys should tenaciously pursue a complaining officer's disciplinary records. Subpoenas for TDCJ employee disciplinary records should be sent to, Custodian of Employee Disciplinary Records, Labor Relations, TDCJ-ID Personnel Office, I-45 & Hwy. 30, Huntsville, Texas.

E. Employee Personnel Records

Employee personnel records may also be material in certain cases. Documents relating to worker's compensation claims may be material in assault cases. TDCJ records will also show if a correctional officer has any prior convictions that may be admissible for impeachment. Documents regarding an employee's termination by, or separation from, TDCJ may be material to the officer's bias or motive in an inmate case. Documents relating to an officer's excessive use of force against an inmate may also be material, as discussed above.

Subpoenas for these records should be sent to, Custodian of Records, Master Employee Records, TDCJ Personnel Office, 3009 Hwy. 30 West, Huntsville, Texas. These records can be voluminous and always contain irrelevant and immaterial personal information of a confidential nature. Subpoenas should be tailored to request only records material to your case.

F. Miscellaneous Records

Inmate trust fund records may be subpoenaed from, Custodian, Inmate Trust Fund Records, FM 247 at Byrd Unit (formerly Diagnostic Unit), Huntsville, Texas.

Inmate disciplinary hearing records may be subpoenaed from the warden of the unit on which the inmate is currently assigned. The hearing records will document the inmate's plea to the offense, and any evidence presented at the hearing. They usually include written statements and summaries of oral testimony.

The tape recording of an inmate's disciplinary hearing may be subpoenaed from the warden of the unit on which the disciplinary hearing was conducted. All *major* inmate disciplines must be recorded. The recording must be maintained for two years.[11]

Inmate grievances may be subpoenaed from Custodian, Inmate Grievances, BOT TDCJ Administrative Building, Spur 59 off Hwy. 75 North, Huntsville, Texas. These grievances are filed by inmate name.

TDCJ directives and policies may be subpoenaed from Custodian of Records, Executive Services, BOT Administrative Bldg., Spur 59 off U.S. Hwy. 75N. A subject index of the directives and policies that are most germane to defending inmate cases is in the Appendix. *Virtually every aspect of prison life is governed by a regulation or policy. They can be valuable resources for the defense.* Be sure to subpoena the directive

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that was in effect during the incident in question.

THE BIG THREE: COMMON INMATE INDICTMENTS

Aggravated assaults, and the possession of drugs and weapons provide the basis for a large majority of the indictments returned on inmates. As common as these offenses are, in the prison setting they raise some issues unlikely to have been seen by most "free world" attorneys. The issues these offenses raise provide a perspective that will greatly benefit the defense of any inmate case.

A. The 25 to 99 "Punch in the Nose"

One of the most common prison cases is the 25 to 99 "punch in the nose" case. The offense of assault is contained in Tex. Pen. Code Section 22.01. It is a misdemeanor if a person "(1) intentionally, knowingly, or recklessly causes bodily injury to another...." When an offender commits the offense against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, the offense becomes a third degree felony.[12] The enhancement provision of Tex. Pen. Code Section 12.42(d) further makes this otherwise misdemeanor offense into a felony punishable by a term of imprisonment of not less than 25 years or more than 99 years. This scheme of enhancement lends credibility to the title of Jeffrey Reiman's book "The Rich Get Richer and the Poor Get Prison."

A slap in the face, or a punch in the nose can, and has, bought more than a few inmates an additional 25-99 years. The typical "punch in the nose" case involves cross complaints where both officer and inmate allege cursing, shoving and other provocation. At such time as the inmate threatens, assaults, or defends himself against the correctional officer, the officer is authorized to use the minimal force necessary to control the situation and prevent injury.[13] This frequently results in a "major use of force" where numerous officers respond to the scene, restrain the inmate, and videotape the inmates removal to the dispensary and, subsequently, to pre-hearing detention.

Statements are then collected for inclusion in the required *administrative* major use of force report, wherein the officers involved state their version of how the incident began. If the officers assume blame, they are disciplined, fired, or indicted. If the officers place blame on the inmate, the inmate is disciplined, indicted, or both. Trying not to sound too jaded, the reports are remarkably predictable. An Internal Affairs Division (IAD) Investigative Report is also completed for this and all other incidents that involve alleged criminal activity by an inmate.

Once the IAD report is completed, the prosecutor's office is consulted as to whether the matter warrants presentment to the grand jury. While the injuries to the officer are sometimes serious, and even life threatening, the vast majority of cases involve little more than a "punch in the nose." The inmates are typically not indicted for aggravated assault on a public servant under, Tex. Pen. Code Section 22.02, because that would require proof of the seldom present element of "serious bodily injury" or "use or exhibition of a deadly weapon." In counties that do not include enhancement paragraphs in the initial indictment, they are usually added in a new indictment, if the inmate refuses the state's plea offer.

Based on the IAD Investigative Report, the state's case will usually include anywhere from one to three correctional officers stating that the correctional officer was attacked without provocation while performing duties in strict compliance with TDCJ policy. The reports usually indicate the inmate was in violation of some rule for which the correctional officer was counseling the inmate, or escorting him out of the area to isolate the disruptive behavior. Based on the IAD Report the state will appear to have an open and shut case. However, these cases have been successfully defended with the right discovery, proper investigation, and a creative approach to the jury charge.

Discovery should start with subpoenas or Open Records Act requests for TDCJ's Employee's Rules of Conduct; the TDCJ Use of Force Plan; the Use of Force Report related to the incident in the indictment; all documents relating to your clients administrative disciplinary hearing on the charged offense (including the audio tape required to be made in major disciplinary cases); the TDCJ Offender Orientation Handbook; and any TDCJ directive or policy that has bearing on the case. These policies and directives establish the guidelines for a correctional officer's lawful performance of duties. Using them to raise a reasonable doubt about whether the correctional officer was lawfully discharging his duties at the time of the alleged assault, raises the lesser included Class A misdemeanor assault.[14] Since the misdemeanor cannot be enhanced, the potential imprisonment range can be reduced from 25-99 years in the TDCJ Institutional Division to a maximum of 1 year in jail.[15]

In cases where injuries to the correctional officer are minor, or where the evidence casts the correctional officer as an overbearing bully, the jury may feel a 25 year minimum is grossly disproportionate to the offense. With proper voir dire on the punishment range for a defendant with two prior felonies, and where the defendant testifies (and the jury is therefore aware of the defendant's two prior felonies) the jury may be more inclined to find the lesser offense to avoid the 25-99 year punishment range.

To guide the jury in its determination of whether the correctional officer was in the lawful discharge of his duties, prepare an appropriate jury charge. In cases where the evidence has raised the issue of the lesser included offense of misdemeanor assault, numerous trial courts have accepted the following jury charge, predicated on pertinent parts of the Texas Penal Code relating to Official Oppression,[16] and Violation of the Civil Rights of a Person in Custody:[17]

"You are instructed that a public servant acting under color of his office or employment commits an offense if he intentionally subjects another to mistreatment, knowing his conduct is unlawful.

"Furthermore, an official or employee of a correctional facility commits an offense if he intentionally denies a person in custody in the exercise or enjoyment of any right, privilege, or immunity knowing that his conduct is unlawful."

Cross examination of the correctional officer using hypothetical examples can establish that the officer knows the conduct in dispute would constitute mistreatment or denial of a right or privilege. Defense witnesses can then establish the conduct.

Another proposed instruction that has met with less acceptance from trial courts, but which can present a good appellate issue, focuses on failure to comply with the laws *or TDCJ policies* governing the duties in question.

"For purposes of the offense of Assault on a Public Servant, a public servant is acting in the lawful exercise of official power or lawful discharge of an official duty, if the person is performing their duties in compliance with the laws and official directives governing the performance of those duties."[18]

Where the evidence goes beyond the issue of whether the correctional officer was lawfully discharging his official duty, and any evidence is presented that the correctional

officer was using unlawful force against the defendant, or that the defendant reasonably believed he was in danger from the correctional officer, the defense is also entitled to a self-defense instruction.[19]

The defendant's testimony may raise the evidence necessary for a self-defense instruction, but often his testimony is unnecessary or undesirable. The bulk of assault cases occur in the presence of other inmates. Investigators should obtain cell assignment rosters, medical lay-ins, work rosters, or other rosters pertinent to the locale of the incident.

Where evidence of the alleged victim's violent character will be offered by the defense, the court may require that some act of aggression by the alleged victim be shown before evidence of the alleged victim's violent character is admissible.[20] This should be considered when preparing cross-examination and when determining the order in which to call defense witnesses.

B. The "Shank in the Tank"

Perhaps the most common criminal offense for which inmates are indicted is a violation of Tex. Pen. Code Section 46.10, Deadly Weapon in a Penal Institution, or, as it is more fondly known, the "shank in the tank."

The prevalence of these homemade weapons in a penal institution bears testimony to the reality base of television shows such as HBO's " Oz" (*Oswald State Penitentiary*). Prison is a dangerous place. To know which came first, the shanks or the perils of prison, it might be best to rephrase the issue in more familiar terms: "shanks don't kill, people do." Regardless of how the issue is framed, the reality is that not all inmates possess weapons for the avowed purpose of killing or maiming their fellow inmates. Although that fact appears irrelevant at first blush, a careful analysis of the law proves otherwise.

It is a third degree felony to intentionally, knowingly, or recklessly carry, possess, or conceal a deadly weapon. For most inmates indicted for this offense, that, once again, means a 25-99 year sentence because of the habitual statute. The harshness of this fact may be lost on those who are unfamiliar with the abundance of deadly weapons in the prison, and are oblivious to the number of inmates who possess these weapons out of a determination to ward off sexual attacks and other violent crimes common in prison.

The state often indicts assaults involving deadly weapons under Section 46.10 rather than under Section 22.02, Aggravated Assault. Under the habitual statute, the punishment range is the same (25-99 years), and the elements of proof for Section 46.10 are relatively straightforward and easily proven. It not only avoids the issue of *serious* bodily injury, but also obviates calling often unreliable and easily intimidated inmate victim witnesses. The state instead relies upon correctional officers' testimony that the defendant was found in possession of the weapon when the dust settled.

However, Tex. Pen. Code Section 9.02 provides that it is a defense to prosecution if conduct is justified. Section 9.22, Necessity, further states:

> **Conduct is justified if:**
> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to the ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

In *January v. State*, 811 S.W.2d 631 (Tex. App. Tyler 1991), the court of appeals concluded that the defense of necessity is not available for the offense of Deadly Weapon in a Penal Institution. The court, failing to consider any legislative intent beyond what it construed from the face of the statute, reasoned that the legislative intent of the offense was mutually exclusive of the necessity defense.

January is inconsistent with *Spakes v. State*, 913 S.W.2d 597 (Tex. Crim. App. 1996) wherein the Court of Criminal Appeals addressed the defense of necessity in a prison escape case. The Court concluded that "[t]he plain language codifying the necessity defense evinces a legislative intent that the defense apply to all offenses unless the legislature has specifically excluded it from them."[21]

In *Rivera V. State*, 948 S.W. 2d 365 (Tex. App. Beaumont 1997), the court criticized the holding in *January* and found there was no legislative intent to exclude necessity as a defense to deadly weapons cases. It is clear that *January* was wrongly decided.

Defense attorneys must be careful to properly frame the issue of necessity in prison deadly weapon cases. A generalized fear of harm is not sufficient to raise the issue of imminent harm.[22] Even a defendant's belief that his conduct is immediately necessary to avoid imminent harm may be "unreasonable as a matter of law."[23] In *Rivera*, the defense painted a clear picture of imminent harm. Defendant and a rival gang member were on a prison run when they were showered with weapons by fellow inmates. The undisputed understanding was that Rivera would be attacked, and possibly killed, if he did not pick up one of the weapons and defend himself.[24]

All deadly weapon cases need not be as clear cut as in *Rivera* to entitle the defense to a necessity instruction. However, *Brazelton*, and *Egger* make it clear that not every inmate who possesses a deadly weapon out of fear for his life will be entitled to an instruction on the defense of necessity. If a defendant truly believes his conduct was immediately necessary to avoid imminent harm, he must steadfastly assert that, if he testifies. The defense must also present enough supporting facts to avoid a trial court ruling that the defendant's beliefs were unreasonable as a matter of law.

Those supporting facts may come from a variety of sources. As in *Rivera*, the correctional officer may be able to explain the realities of the situation. A defendant's well documented written or oral expressions of immediate fear for his safety will be important. Other inmates may testify about how an inmate or gang that was terrorizing your client possessed the capability to strike immediately, and had done so in the past. Still other inmates or even correctional officers can testify that TDCJ was helpless to prevent the harm the defendant feared. TDCJ simply lacks the facilities to transfer every inmate who is threatened, to provide them protection, or even to adequately investigate their complaints.

The most powerful evidence, however, may be the inmates who are willing to come forth and testify to their hellish experiences as sexual victims of the gang or inmate your client lived in fear of night and day. Nothing is as compelling as recalling the image of the sympathetic sexual victim who testified about the indignities perpetrated on him - reminding the jury that the defendant's only real choice was to either stand up and defend himself, or to resign himself to the same sexual depravities suffered by those who lacked that courage.

Where the necessity defense is not raised by the evidence, other common shortcomings in deadly weapon cases may be. Three other common reasons for acquittal in these cases include failure to prove possession, failure to prove the weapon is deadly, or failure to prove the item is a weapon.

Not infrequently, the state will charge possession of a weapon when a weapon is found in a cell shared by two inmates. Proof of possession by a particular inmate may be

problematic, particularly where the other inmate will not testify, or where he has a history of possessing weapons. A check of the cell mate's records may sometimes reveal disciplinary cases for possessing weapons *identical* to the one in question. A check of cell assignments may also reveal that the cell was recently occupied by another inmate with a history of weapon possessions. When the weapon was found secreted away inside the cell there is the issue of a knowing possession.

Another common scenario that calls possession into question occurs when the inmates know a shakedown is coming. Cell corridors have been known to become cluttered with contraband thrown out of cells when inmates learn of an impending or ongoing shakedown. Although not common, some inmates have been charged for possessing whatever landed in front of their cell. A cell assignment roster will usually produce numerous witnesses who can testify to the confusion that can exist in such shakedowns. This scenario also tends to raise chain of custody issues. When evidence is piling up fast and deep, it can easily be attributed to the wrong inmate.

Scenarios may also exist where inmates are set up because of lover's feuds, gang rivalries, personal differences, or an inmate's desire to curry favor with an officer, IAD, the warden, or others. These cases are usually apparent from the manner in which the shank was found. In some, the defendant or his cell is searched for no apparent reason, and no other searches are conducted. In others, the officers go right to the location of the weapon.

In many of these cases, the state's file will not refer to an informant, or the basis of the search. Your client, however, will usually know when he has been "snitched on" and even the name of the snitch. The first time the prosecutor is aware of an informant in a routine case may well be when you advise him of it. After confirming that there is an informant, the state will usually rely upon Tex. R. Evid. 508, Identity of Informer, to keep the informant's identity secret.

Because the fourth amendment is virtually nonexistent in prison, it will be impossible to demand the informant's identity under Tex. R. Evid. 508(c)(3) by arguing his unreliability tainted the search. If the necessary showing of materiality on the merits of the case can be made under Tex. R. Evid. 508(c)(2), the state may be required to disclose the informant. In some cases, however, the relationship between the informant and the defendant may be so prejudicial that it will be better not to raise the relationship. Instead, it may be preferable simply to establish there was an inmate informant. Then, in closing, argue reasonable doubt based on the informant's "obvious" suspect motives, and the state's unexplained secretive behavior in not revealing the informant.

To meet their burden in these deadly weapon cases, the state must also prove the item seized is, in the manner of its use or intended use, capable of causing death or serious bodily injury, or that it was manifestly designed made or adapted for the purpose of inflicting death or serious bodily injury.[25] The large number of "weapons" seized and their various stages of preparation, raise some interesting factual issues that make it imperative for a defense attorney to insure they view the evidence.

Experience has shown that some "deadly weapons" never reach the stage of preparation where they are either deadly or even recognizable as a weapon. In one such case the prosecutor dismissed the case for that reason after the defense attorney visited him to view the evidence. (Unfortunately, a codefendant in that case had already pled guilty to possessing the "deadly weapon.") In another case, it became clear that the deadly weapon in question did have a needle sharp point that could inflict serious bodily injury, but it was a tattoo gun in possession of a well known inmate tattoo artist. Albeit contraband, hardly worth life imprisonment. That case was also dismissed.

Because inmates are not permitted to buy or receive tools, they sometimes fashion tools out of other items. Unfortunately, if the item looks like it could be used as a weapon, the inmate is charged with possession of a weapon. If it looks too much like a weapon, he may be convicted of possessing a deadly weapon, regardless of its intended use. In defending such a case it helps to have the item the "tool" was created to fix.[26] It also helps if other inmates saw the defendant using the item for the intended use, or if others can testify that it is an item commonly used for purposes other than a weapon.

Where the necessity defense is not raised by the evidence, other common shortcomings in deadly weapon cases may be. Three other common reasons for acquittal in these cases include failure to prove possession, failure to prove the weapon is deadly, or failure to prove the item is a weapon.

C. The "Joint in the Joint"

It is a third degree felony to possess a controlled substance in a penal institution.[27] The overwhelming majority of these inmate cases involve a users' amount of marijuana. Once again, a misdemeanor offense becomes a 25-99 case by virtue of the inmate's residence in a penal institution and his multiple prior convictions.

The ready availability of drugs in prison is driven by a number of factors including profit, demand for personal use, its convenience as an exchange medium, the frequent comings and goings of inmates working outside the prison, the poor salary schedule for TDCJ correctional officers, visitations by inmates' friends, and gang activity. Drugs are so prevalent in TDCJ, that the state has obtained numerous indictments against *death row inmates* for possession of controlled substances. If the state obtains a conviction in such a case, it poses an interesting "stacking" issue.

Many of the possession issues discussed above in relation to deadly weapons also apply to possession of controlled substances as well, but the fungible nature of drugs makes proper handling of evidence in drug cases much more important than in weapons cases. A series of factors, however, conspire against careful handling of drug evidence.

Correctional officers are involved in numerous shakedowns. Many of the cases come to trial years later, when witnesses have little or no independent recollection of what happened. Some of the items seized in these shakedowns appear to be rather innocuous items of contraband. Only later are they determined to be drugs, such as when cigarettes are reported seized, but marijuana possession is later charged (sometimes after numerous other items have been seized). Sloppy handling of evidence, not uncommon in large shakedowns, can combine with

some or all of these other factors to make it difficult for the state to present a coherent, consistent recollection of events that jurors may be expecting.[28]

Drug testing procedures can also present problems for the state in prison drug cases, just as they do in "free world" cases. Sometimes the state conducts no laboratory analysis on the alleged drugs - only a field test. Voir dire of the unit IAD agent who conducts these field tests will generally show that unit IAD agents are not trained in conducting filed tests. The test results can be excluded by showing that the agent knows nothing more about the test than what he read in the test kit instructions.

In a recent case where the field test was excluded and no other analysis had been done by the Department of Public Safety, the state attempted to prove the substance in question was marijuana by having an inmate light the evidence on the witness stand before the jury. The court denied the defense objection to this demonstration, as it did the inmate's request to conduct his own "analysis." It is unclear what the court would have ruled if the inmate had promised not to inhale.

After the jury was unable to reach a verdict in that case, all but one of the jurors indicated the courtroom field test left little doubt that the substance was marijuana. The defense prevailed, with 10 jurors, however, on the issue of whether the state had proven that the defendant knowingly possessed the marijuana. Although it was found in the defendant's property, other inmates had access to the area where the property was stored. The case was ultimately dismissed.

MOTION PRACTICE

Form books are numerous with boilerplate motions for the defense of a criminal case. However, the motions discussed below aren't readily available, unless you have access to handwritten copies floating around prison law libraries. For that reason, the Appendices following this article contain some motions appropriate in selected inmate cases and discussed below.

A. Voir Dire

Imagine standing in front of fifty prospective jurors in a rural setting. As you look around the court room, you notice about one-third are attired in the gray uniform of a TDCJ correctional officer. As you review the juror questionnaires, you discover another one-third are either related to correctional officers, or have clerical positions at the local prison units, and finally, the Court graciously allots thirty minutes for jury selection. Since most prison units are located in rural counties, the above scenario is not uncommon, and your thirty minutes is spent hopelessly trying to identify all of the challenges for cause. Under the theory that it doesn't hurt to ask, SCFO has begun filing, with some success, a Motion to Disqualify Jurors As a Matter of Law who are employed by TDCJ-Institutional Division (Appendix). At the very least, the motion sensitizes the judge to be more inclined to excuse TDCJ employees during voir dire. The Texas Government Code section 62.105, provides that a person should be disqualified as a petite juror if he is "interested, directly or indirectly in the subject matter of the case". When the above statute is read in conjunction with Tex. Crim. Proc. Art. 35.16 C.C.P.(Challenge for Cause), it follows that correctional employees would be biased in favor of any witness employed by TDCJ, since they receive their livelihood and advancement through that agency.

B. Restraints in the Courtroom

Too often a defendant will be "chained out" from the prison into the courtroom in front of an assembled jury pool. The prejudice is obvious. While county personnel are mindful of this with pre-trial defendants, some TDCJ transportation officers are naïve to the ways of the courthouse and operate with higher level of security precautions for convicted inmates. A Motion Not to be Tried in Jail Clothes or Restraints should be filed to alert the local prosecutor and bailiffs to this violation of the presumption of innocence[29] (Appendix). Conversely, there are occasions when TDCJ specifically requests chains and jail clothes (escape history) or just chains for those administratively segregated clients with a propensity towards violence.

C. Snitch Testimony

The State's case will sometimes involve the testimony of another inmate as a key witness (although "the code of silence" operates extensively within prison and even victims often refuse to testify). The real issue from SCFO's perspective is that inducements can be offered by correctional officers to selected inmates for information that is outside the purview of the charging authority. While immunity from prosecution, dismissals, and reduced sentences are regularly encountered and cross-examined for bias in criminal trials; the reward structure takes on a more subtle context behind prison walls.

An inmate may be promised any number of perks by an officer in exchange for his "recollection." These include double chow, extra commissary, and more law library visits - all of considerable value to inmates. A standard discovery motion under *Brady v. Maryland*, 373 U.S. 83 (1963) will not expose the officer/inmate reward structure since the prosecutor will claim lack of knowledge. Because of the unique compensation at issue, SCFO routinely files a Motion to Require the State To Reveal Any Agreement which does more than ask for just "leniency agreements" (Appendix). It puts the prosecutor on notice to affirmatively question prison personnel and inmate witnesses as to other forms of "rewards" that routinely operate behind prison walls and may color testimony.

D. Limiting the Impact of Prior Convictions When an Inmate Testifies

If a defendant testifies, the jury will already know he has been convicted of something because of the crime scene.[30] Complicating his appearance on the stand, is a prior record which includes pejorative offenses, such as sexual crimes or offenses against children. SCFO has successfully used a Motion to Testify Free From Impeachment From Prior Convictions (Appendix). The argument frames the question as to prejudice that attaches in the guilt/innocence phase when, for example, your client testifies in an Assault on a Correctional Officer, and the State uses a sexual assault conviction to impeach under the Tex. R. Crim. Evid. Rule 609.

In the example above, the court must balance the impeachment value of the sexual assault conviction and the prejudice that will accrue in the jury's mind in a case charging Assault on a Correctional Officer. Since credibility is the issue in Tex. R. Evid. Rule 609, most courts could be persuaded to exclude the conviction.

The authority for the above motion is *Theus v. State*, 845 S.W. 2d 874 (Tex. Crim. App. 1996). In balancing the probative value versus prejudicial effect, the court listed five factors to be considered by the trial court before admitting the nature of the prior conviction: 1. Impeachment value; 2. Remoteness; 3. Similarity to instant offense; 4. Importance of defendant's testimony; and 5. Importance of the credibility issue.

On a related issue, in an article in the VOICE,[31] Bruce Fox details *Old Chief v. U.S.*, 117 S.CT. 644, wherein the Supreme Court ruled that in predicate offenses, the

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prior conviction could be *completely excluded* from the jury upon stipulation. The case should be used in any situation wherein any of the client's prior convictions are of such a prejudicial nature that they undermine the jury's determination on *the factual elements of the charge.*

THE CLIENT

Expect the unexpected when dealing with an inmate client. People who are confined are more difficult to represent, since they can't actively participate in their defense as do those on bond. State inmates, as a group, are even more difficult to establish the trust necessary to defend than county jail appointments unable to make bond. SCFO attorneys who have free-world public defender experience have confirmed this difference. Remember the inmate client has been confined for years, not just months.

To illustrate this SCFO dilemma, the first interview with a client usually includes a question about whether TDCJ pays the attorney's salary. These are hardened criminals who are suspicious of anyone connected to the system. This section will discuss techniques used by SCFO to help eliminate barriers between counsel and client. By no means does this section purport to be scientific, but it represents lessons learned and codified through the collective experience of SCFO.

A. Client Communications

The first interview is accomplished by calling the warden's secretary and arranging the date and time of the visit. (See Attorney Visitation Rules in the Appendix). It is advisable to request a room in which you sit across a table from your client (face to face contact), as opposed to being confined in a booth with a glass shield and a phone. Occasionally, SCFO encounters access problems with some institutions and has had to apply to the local district court for an order for contact visits, or to video tape the crime scene.[32] The law is straightforward in this circuit concerning the arbitrary denial of attorney access for security reasons. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975). Also, the Supreme Court has spoken on this issue by requiring state penal institutions to find "less restrictive means to achieve security" than a denial of a contact visit by an attorney.[33] TDCJ Publication PD-21 sets forth regulations which prohibit correctional staff from interfering with attorney access.[34] If an attorney is arbitrarily denied a prison interview or a view of the crime scene because of red tape, polite persistence is the best policy. If that is unsuccessful, apply to the district court for an order. Failure to meaningfully interview your client, his witnesses, or the scene may constitute ineffective assistance.[35]

The real challenge of inmate defense is effective communications with the client. Let the client tell his version in the initial interview. As you gather more information through discovery, and subsequent client contact, avoid being confrontational on conflicting evidence. A better technique is to reference the fact-finder and indicate that the jury will have a hard time resolving the specific inconsistency.

SCFO's policy is to reply to every correspondence from a client it represents and communicate with relatives when appropriate.[36] Inmates have 24 hours a day to think about their case, and they expect that their attorney does too. Inmates have the address of the State Bar Association and in some cases will "vent" in that direction. The Texas Disciplinary Rules of Professional Conduct require a client be promptly informed of the status of his case upon request for information.[37] SCFO has found just a timely paragraph or two will avoid most problems.

On a humorous note, interviews with clients will invariably include prison terms whose meaning is unclear, but necessary in sorting out the facts of the case. For example: "They clicked on me," is syntax for a ritual in prison where several inmates attack a prisoner for little reason other than to manipulate the weaker inmate. Clients are unaware of an attorney's lack of knowledge of their vocabulary, so it is necessary, although somewhat embarrassing, to stop the narrative and have things explained in plain English. A short list of prison terms which define some of the more commonly used words is included in the Appendix.

B. Frequently Asked Questions

While each case is different, in defending those in prison there are some questions that are recurring in the initial interview. Below are a few of the appropriate responses:

(1) *Can a new charge run concurrent with the old charge?*

The judge is required under Art. 42.08(b) Tex. R. Crim. Proc. to stack (run consecutively) a sentence for an offense committed while the defendant was in custody of TDCJ.

(2) *Why did my case result in an indictment while a similar incident involving another inmate just resulted in a disciplinary action?*

While difficult, the client should be told of a prosecutor's discretion and the analogy drawn that it is not a defense to speeding that other cars were also exceeding the speed limit.

(3) *Can I file my own pro se motion?*

SCFO advises that they first be mailed to their attorney of record for review. Some inmate motions reveal weakness in the state's case better left for trial.

(4) *Is it okay to write the Judge?*

Many defendants seriously harm their case by revealing information that a prosecutor can use as evidence. The judge usually places such letters in the court files, where the prosecutor can read them and use them against the defendant at trial. Remind the inmate that only his lawyer is prohibited from revealing privileged communications.

(5) *I've already been punished at a disciplinary hearing for the offense that I have been indicted for. Isn't that double jeopardy?*

Prison disciplinary hearings are not court proceedings within the meaning of the Fifth Amendment, *ExParte Hernandez*, 953 S.W.2d 275 (Tex. Crim. App. 1997).

C. The Client as a Gang Member

It is important to understand the client's background and motivations when preparing an inmate's defense. Look for tattoos (badges) and ask the client about gang membership. The increase in the prosecution of inmates for penal code violations has been correlated with an increase in gang activity. Staff assault incidents involving inmates have increased four fold between 1994 - 1997 from 311 to 1442. Inmate assaults have increased from 652 to 1499 in the same period.[38] As tension grows in prison, inmates seek the security of gangs. In defending inmates, be aware of this dynamic and what part it plays in the case. Additionally, examine the client's classification and disciplinary record looking for clues to better understand the client and the case. Finally, realize that more patience than usual will be required to gain the trust necessary for preparing a successful inmate case.

SOME FINAL THOUGHTS ON INMATE DEFENSE: THE JURY

A large percentage of "shank in the tank," "joint in the joint," and "punch in the nose" cases include two enhancements and a punishment range of 25 to 99 years. Therefore, in voir dire it is critical that you discuss with prospective jurors their theories of punishment (the relationship between the resultant harm and severity of sanction) in the context of ultimately

following the instructions of the court. While it is improper to directly reference, in the guilt phase closing argument, the 25 year minimum that will accrue from a guilty verdict, a reference to the "severe consequences that will attach" is permissible. Asking the jury to be clear in their deliberations and to "examine their consciences" is directed at the fundamental fairness of 25 years for an inmate who has a sharpened piece of plastic in his cell for protection.

Jurors are more sophisticated these days and everyone has access to lawyer programs and lawyer commentary. To confirm this heightened legal awareness, recently the National Law Journal released the results of a national phone poll of 1016 people eligible for jury duty[39]. On the issue of jury nullification, over 60% polled say *they would act on their own beliefs on right or wrong regardless of legal instructions from a judge*. The study concludes that lawyers need to stop relying on the judge to win cases and start learning how to present the most compelling story that appeals to a juror's sense of fair play and is in accord with juror's deeply held beliefs.

SCFO has had recent success in identifying this trend in cases where the punishment appears disproportionate to the crime. Even in cases which resulted in guilty verdicts, the jury assessed less than 25 years when two prior enhancement were offered and proven. The above analysis applies to "shank in the tank" type crimes with a 25 year minimum. This is quite different from a trial in which an inmate uses a weapon to cause serious injury. In those cases, jurors have little difficulty in assessing a life sentence. Those who defend inmates should be aware of the growing sophistication of juries and utilize tactics consistent with this trend.

David P. O'Neil has been Trial Services Director, State Counsel for Offenders, of the Texas Department of Criminal Justice, since 1995. His duties include supervising 10 felony trial attorneys, two appellate attorneys, and other personnel, as well as trying felony cases representing TDCJ inmates charged with crimes inside prison. He served as President of the Walker Co. Bar Association in 1997. From 1973-1994, O'Neil served in the U.S. Marine Corps. In 1987, he obtained an LL.M. in Military Law at the U.S. Army Judge Advocate General's School. In 1999 he taught at San Houston State University's College of Criminal Justice as an adjunct faculty member.

Frank Austin Zeigler is a Trial Services Attorney at the State Counsel for Offenders, where he has practiced since 1998. He was in private practice from 1984-1994; prior to 1984 he worked in public defender offices in Tulsa, OK. He is working on his Ph.D. in Criminal Justice at Sam Houston State University while working full time. His articles include "Vengeance as Public Policy," in Three Strikes You're Out, *Sechrest, (Ed.), Sage Publishing, 1996.*

Endnotes

[1] Texas courts have already determined that representation of inmates by SCFO trial attorneys does not represent a conflict of interest. In those cases, the courts' rulings only addressed whether a conflict existed by virtue of SCFO's relationship to TDCJ. The courts predicated their rulings on the assertion by the SCFO trial attorney that no conflict existed. *Darnen v. State*, 807 S.W.2d 407 (Tex. App. - Houston [14th Dist.] 1991, pet. ref'd); Simon v. State, 805 S.W. 2d 519 (Tex. App. - Waco 1996, no pet.). Trial courts in Bowie and Jefferson counties recently found a conflict of interest when TDCJ was unable to provide adequate staffing for SCFO Trial Services to handle inmate cases in those counties. Unlike in *Darnen* and *Simon*, where the SCFO attorney stated there was no conflict, the SCFO Trial Services Director could not make that assertion in the Bowie and Jefferson County cases. After finding there was a conflict, the court appointed local attorneys pursuant to Tex. Code Crim. Proc. Art. 26.051.

[2] See Tex. Code Crim. Proc. Art. 39.14.

[3] Tex. R. Evid. 902 establishes self-authentication requirements.

[4] Board Policy 03.46 (rev. 3) July 17, 1998.

[5] Certain manuals and directives are available through the Open Records Act, Chapter 552, Texas Government Code. Information on how TDCJ processes requests for information under the Open Records Act, is contained in the current TDCJ Open Records Manual published by TDCJ Legal Affairs Division. The Executive Director of TDCJ has the statutory responsibility for all agency information and documents.

[6] The Texas Department of Criminal Justice Use of Force Plan.

[7] Tex. Pen. Code Section 46.10.

[8] See Tex. Code Crim. Proc. Art. 46.02.

[9] If the evidence is part of a pattern or habit by the officer, argue its admissibility under Tex. R. Evid. 406.

[10] The U.S. Supreme Court has recognized that the right to show bias can rise to a constitutional level under the Confrontation Clause of the 6th Amendment, *Alaska v. Davis* 415 U.S. 308 (1974). See also *Gonzales v. State*, 929 S.W.2d 546, 549 (Tex. App. - Austin 1996, pet. ref'd)(which states that the Texas Rule of Evidence concerning bias "places no limits on the sort of evidence that may be adduced to show witness's bias or interest.").

[11] Disciplinary Rules and Procedures for Inmates, Texas Department of Criminal Justice - Institutional Division, GR-106-TE, Revised May 1991 (02/95), at pg. 11.

[12] Tex. Pen. Code Section 1.07 defines "public servant" to include one who is an "employee, or agent, of government.

[13] TDCJ Use of Force Training Manual.

[14] Tex. Pen. Code Section 22.01(a).

[15] Tex. Pen. Code Section 12.21. A one year sentence usually amounts to time served, because of jail time credit due under Ex Parte Bynum, 772 S.W.2d 113 (Tex. Crim. App. 1989).

[16] Tex. Pen. Code Section 39.03.

[17] Tex. Pen. Code Section 39.04.

[18] Section 493.001 of the Government Code authorizes the Director, TDCJ, to adopt rules governing the humane treatment of inmates. Such rules have been promulgated in TDCJ Executive Directive, PD-21, Employee's General Rules of Conduct, March 1995. They prohibit verbal and physical abuse of inmates. See also, *Vitarelli v. State*, 359 U.S. 535, 539-540, 79 S. Ct. 968, 972-973, 3L.Ed. 2d 1012 (an administrative agency must follow its own rules); and *State ex rel Anderson-El v. Shad*, 510 N.W.2d 805 (Wis. App. 1993) (applying the *Vitarelli* rule regarding administrative agencies to prison staff members).

[19] Tex. Pen. Code Section 9.31; *Dyson vs. State*, 672 S.W.2d 460 (Tex. Crim. App. 1984)

[20] *Dempsey v. State*, 266 S.W.2d 875 (Tex. Crim. App. 1954).

[21] Spakes, at 598.

[22] *Brazelton v. State*, 947 S.W.2d 644, 688 (Tex. App. - Fort Worth 1997, n.p.h.).

[23] *Egger v. State*, 817 S.W.2d 183, 185 (Tex. App. - El Paso 1991, pet. ref'd).

[24] *Rivera*, at 368-371. See also *Johnson v. State*, 650 S.W.2d 414 (Tex. Crim. App. 1983) (holding that the defense of necessity is available in a prosecution for unlawfully carrying a handgun on a licensed premise).

[25] Tex. Pen. Code Section 1.07(17)

[26] Inmate property records can corroborate whether the inmate possessed the property on the date in question.

[27] Tex. Pen. Code Section 38.11.

[28] In one recent trial, state witnesses testified on cross-examination that before the drugs in question were turned over to the IAD evidence custodian, it was stored in offices to which other inmates had unsupervised access. In another the evidence simply could not be found.

[29] The motion also asks that the inmate have an opportunity to shower and shave before his trial appearance.

[30] Don't discount putting a client on the stand just because of his present accommodations, inmates can do better than expected in many cases.

[31] Volume 26, Number 7, p. 14 (Sept. 97)

[32] SCFO's request to the court includes allowing the defendant to be present, so he may narrate the crime scene video if he testifies in the guilt/innocence phase of the trial.

[33] *Turner v. Safley*, 482 U.S. 78, 82 (1987).

[34] Rule 41, states that "employees are prohibited from interfering in any manner with the inmate's/client's right of access to court."

[35] *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994) This is true even when a third party was responsible: *People v. Clamuextle*, 626 N.E.2d 741, (Ill. App. Ct. 1985).

[36] SCFO has a Waiver of Privilege Form for relatives, since office visits are rare because of the distance to Huntsville and phone communication are hard to verify.

[37] Rule 1.03 Communication a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.

[38] Crime and Justice in Texas, 1998, Sam Houston State University Press.

[39] *Houston Chronicle*, "Potential Juror Judge Selves in Poll," p 9, Oct. 24, 1998

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BOARD POLICY

SUBJECT: INDIGENT OFFENDER REPRESENTATION FEE SCHEDULE

AUTHORITY: Texas Code of Criminal Procedure, Art. 26.051
Texas Code of Criminal Procedure, Art. 26.05

APPLICABILITY: Institutional Division (ID) and State Jail Division (SID)

PURPOSE: To establish a fee schedule for the legal representation of indigent offenders who, due to conflict of interest, cannot be represented by the State Counsel for Offenders Division.

DISCUSSION:

The Texas Board of Criminal Justice (TBCJ) has established the State Counsel for Offenders Division whose purpose is to provide legal services to offenders. Included in these services is the legal representation of offenders charged with offenses while in the custody of the Texas Department of Criminal Justice (TDCJ). On occasions, a conflict of interest arises between the offender and the State Counsel for Offenders Division. Therefore, the courts must appoint free world counsel to represent the offender (Art. 26.051 (g), Texas Code of Criminal Procedure). In those cases, the county of trial jurisdiction pays the first $250.00 of court appointed attorney fees and expenses. The balance of the legal expense is paid through the TDCJ by TBCJ authorization.

Fee disbursement cannot be authorized without the establishment of a fee schedule for the legal services rendered (Art. 26.05 (b) and (c), Texas Code of Criminal Procedure).

Expert and investigator fees cannot be paid to the experts or investigators directly, but must be paid through appointed counsel. A fee schedule for these fees must also be in place (Art. 26.05, Texas Code of Criminal Procedure).

PROCEDURE:

I. Fee Schedule

Attorney:	Out of Court	$50.00 per hour
	In Court	$75.00 per hour
Investigator:		$25.00 per hour

Interpreter:	$40.00 per hour
Medical Expert	$100.00 per hour
Travel Expense	$0.28 per mile

II. The court appointed attorney shall present his invoice for services rendered to the appointing court for approval. Upon approval, the court shall order payment. Said order and invoice shall be forwarded to the TDCJ, State Counsel for Offenders Division for processing and review. Upon review, said claim shall be forwarded to the TBCJ for action and authorization. Thereafter, it shall be tendered to the Comptroller of Public Accounts for action.

III. Invoices which have been disapproved for payment (i.e. incorrect charge, excessive amount) by the Assistant Director for State Counsel for Offenders Division will be returned with an explanation to the sender.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
HEALTH SERVICES DIVISION
AUTHORIZATION FOR RELEASE OF INFORMATION

I, _____
(Name of Offender) (TDCJ Number)

_____
(Social Security Number) (Date of Birth) (Admission Date) (Discharge Date)

hereby authorize: _____
(Name of Person or Organization)
to release the following information from my records:

(PLEASE LIST SPECIFIC INFORMATION) _____
_____

TO: _____
(Name of Person or Organization to which information is to be sent)
_____
(Address of Unit)
for the purpose of :
_____

This consent is subject to revocation at any time except to the extent that action has been taken in reliance thereon, and upon:

_____
(Date, event or condition)

This consent will expire within 180 days without express revocation.

OFFENDER REQUEST: I request the Texas Department of Criminal Justice to release specified below, to the organization, agency or individual named on this request. I understand that the information to be released includes information regarding the following conditions(s):

AIDS, AIDS related complex (ARC) and HIV antibody testing	Drug Abuse	Sickle Cell Anemia
	Psychiatric Treatment	Alcohol Abuse and Alcoholism

_____ _____
(Signature of Offender) (Date)

_____ _____
(Signature of Witness) (Date)

NOTICE TO RECIPIENTS OF INFORMATION: This information has been disclosed to you from records whose confidentiality is protected by State Law. The Texas Hospital Act (Chapter 241, Health and Safety Code), the Medical Practice Act (Article 4495b-5.08 VTCS), and the Mental Health Records Act (Chapter 611, Health and Safety Code) prohibits you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such laws.

OFFENDER CLASSIFICATION RECORDS SUBPOENA ATTACHMENT

1. ALL DISCIPLINARY REPORTS (TDCJ FORM 1-47)
2. ALL ORIGINAL OFFENSE REPORTS (NO TDCJ FORM NUMBER)
3. ALL DISCIPLINARY REPORTS (TDCJ FORM M0-01)
4. ALL DISCIPLINARY HEARING RECORDS (TDCJ FORM 1-47A)
5. ALL HEARING WORKSHEETS (TDCJ FORM CS-12)
6. ALL SERVICE INVESTIGATION WORKSHEETS (TDCJ FORM CS-10.11)
7. ALL ADMINISTRATIVE SEGREGATION REPORTS (TDCJ FORM I-169A)
8. ALL ADMINISTRATIVE SEGREGATION HEARING REPORTS (TDCJ FRM I-169A)
9. ALL ADMINISTATIVE CELL RECORDS (TDCJ FORMI-191)
10. ALL ADMINSTRATIVE MEDICAL INSPECTION REPORTS (TDCJ FORM I-7A)
11. ALL SEGREGATION CONFINEMENT RECORDS (TDCJ FORM I-201)
12. ALL SEGREGATION CONFINEMENT RECORDS (TDCJ FORM I-201-W)
13. ALL INVESTIGATIVE REPORTS FROM THE WORK LOCATION (NO TDCJ FORM NUMBER)
14. ALL OFFENDER MEDICATION RECEIVED REPORTS (NO TDCJ FORM NUMBER)
15. ALL OFFENDER REQUEST FORMS (TDCJ FORM I-60)
16. ALL INTER-0FFICE COMMUNICATIONS CONCERNING THIS OFFENDER (NO TDCJ FORM NUMBER)
17. ALL STATE DISCIPLINARY COMMITTEE AND UNIT RECLASSIFICATION COMMITTEE COMMUNICATIONS / LETTERS (TDCJ FORM RO-52)
18. ALL INTER-OFFICE COMMUNICATIONS TO THE DISTRICT ATTORNEY CONCERNING ANY ACTIONS TAKEN OR ANY OFFENSES COMMITTED WHILE IN TDCJ (NO TDCJ FORM NUMBER)
19. ALL DETAINER LETTERS (TDCJ FORM RO-7)
20. ALL SUPPORT SERVICE OFFENDER DELETION FORMS (NO TDCJ FORM NUMBER)
21. ALL SPECIAL PRECAUTION TRANSFER CHECKLISTS (TDCJ FORM AD-50)
22. ALL INTER-OFFICE COMMUNICATIONS CONCERNING OFFENDER FREE WILL DONATION TO THE TULLOS/SMITH FUND OR ANY OTHER FREE WILL DONATION (TDCJ FORM NUMBER SO-2)
23. ALL SITUATIONAL FURLOUGH REQUESTS (NO TDCJ FORM NUMBER)
24. ALL FURLOUGH INFORMATION FORMS (NO TDCJ FORM NUMBER)
25. ALL FURLOUGH AGREEMENT FORMS (NO TDCJ FORM NUMBER)
26. ALL OFFENDER GRIEVANCE FORMS (TDCJ FORM I-127)
27. ALL PERSONAL PROPERTY RECEIPTS (TDCJ FORM I-136)
28. ALL EMPLOYEE INJURY REPORT FORMS (TDCJ FORM TNG-29)
29. ALL INJURY REPORTS (TDCJ FORM SAF-04)
30. ALL SAFETY REGULATION FORMS SIGNED BY THIS OFFENDER (TDCJ FORM SAF-01)
31 ALL MEDICAL RECORDS

MEDICAL/PSYCHIATRIC RECORDS SUBPOENA ATTACHMENT

1 ALL MEDICAL RECORDS

2 ALL PSYCHOLOGICAL/PSYCHIATRIC RECORDS (INCLUDING ALL RECORDS FROM EVERY PSYCHIATRIC UNIT/FACILITY THE OFFENDER HAS BEEN IN)

3 ALL RECORDS CONTAINED IN OFFENDER'S BLUE AND BROWN FILES

4 ALL PAMIO PROGRAM RECORDS

5 ALL MEDICAL/PSYCHOLOGICAL/PSYCHIATRIC EVALUATIONS

6 ALL MEDICATION RECORDS (TO INCLUDE THE MEDICATION COMPLIANCE RECORDS FROM DATA PROCESSING)

7 ALL PRESCRIBED TREATMENT RECORDS

8. ALL RECORDS DISCUSSING/REFERENCING DIAGNOSIS AND PROGNOSIS OF PATIENT

9. ALL RECOMMENDATIONS / REFERRALS FOR MEDICAL AND PSYCHIATRIC COUNSELING

10 ALL OTHER ACTIVITIES RECORDED IN OFFENDER'S MEDICAL / PSYCHIATRIC RECORDS

11 ALL IN-PATIENT RECORDS

12. ALL OUT-PATIENT RECORDS

13 ALL RECORDS FROM MEDICAL RECORDS ARCHIVES

14. ALL ADMINISTRATIVE SEGREGATION OUT-PATIENT SOCIAL/PSYCHIATRIC NOTES.

PSYCHIATRIC THERAPIST NOTES AND ANY MEDICATION LOGS/NOTES

SUBJECTS OF SOME PERTINENT TDCJ DIRECTIVES AND POLICIES

Subject	Directive
Attorney/Offender Telephone Calls	AD-03.92
Complaints, Unit with Departmental Policies and Procedures and withThe Ruiz Final Judgment, Establishment and Administration of TDCJ Monitoring Systems for	AD-02.92
Confiscation, Guidelines for TDCJ-ID Offender Personal Property	AD-03.72
Contraband, (Offender) Confiscation and Disposal of	AD-03.72
Crime Scene Protection and Evidence Handling	AD-16.03
Disciplinary Actions, Review of Offender	AD 04.35
Disciplinary Procedures (Offender)	AD-03.76
Disciplinary Punishment, use of "Remain Line Class III," as (a Major)	AD-04.36
Employee, Evidence Handling and Crime Scene Protection	AD-16.03
Housing, Offenders Requiring Single Cell	AD-04.68
Law Enforcement Authorities, Notice to in Cases of Violence Against Offenders	AD-03.36
Law Enforcement Powers (Limited), TDCJ-ID State Jail Employee	AD-03.25
Lay-Ins, Medical	AD-03.62
Offender Aggression, Prevention of Staff Injuries Due to	AD-03.48
Offender, Disciplinary Actions	AD-04.35
Offender, Disciplinary Procedures	AD-03.76
Offender, Injury Report Photographs (Precautionary Measures to be Utilized)	AD-03.47
Offender, Searches of	AD-03.22
Offender, Transfers Requested by Elected or Appointed Officials	AD-03.74
Offender, Urine Testing	AD-03.21
Offenders Who Throw Projectiles, Management of	AD-03.80
Personal Property, Offender	AD-03.72
Personal Property, Offender	AD-03.73
Photographs, Offender Injury Report (Precautionary Measures to be Utilized)	AD-03.47
Prevention of Staff Injuries Due to Offender Aggression	AD-03.48
Standards for the Use of Force	BP-03-46
Standards Governing the Use of Force and Chemical Agents	BP-03.49
Telephone, Calls Between Attorney/Offender	AD-03.92
Telephone, Offender Access to	AD-03.90
Tobacco Policy, TDCJ	Board Rule 151.25
Use of Force, Procedures for	AD-03.46
Use of Force, Standards	BP-03.46
Use of Force Equipment, Standards Governing and Chemical Agents	BP-03.49
Use of State-Owned Vehicles	AD-02.50

CAUSE NO. _____

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
V.	§	_____ COUNTY, TEXAS
	§	
_____	§	_____JUDICIAL DISTRICT

MOTION NOT TO BE TRIED IN JAIL CLOTHES OR RESTRAINTS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant in the above entitled and numbered cause by and through his attorney of record and files this Motion not to be tried before the Jury in jail clothes and restraints and in support thereof would show the following:

I.

On Defendant's being placed in confinement, his regular civilian type clothing was taken from him and he has been compelled to be dressed in identifiable prison clothing. When Defendant is brought from the Texas Department of Criminal Justice - Institutional Division to Court, he will be handcuffed and shackled or be required to wear other such restraints.

II.

Compelling the Defendant to be tried before a Jury in such distinctive, identifiable attire and restraints will affect the Jury's judgment and violates the Defendant's constitutional right of presumption of innocence.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court order the Sheriff or Warden not to bring the Defendant to the courtroom for the purpose of trial or into the presence of any member of the jury panel attired in a prison uniform or in restraints of any kind.

Respectfully submitted,
STATE COUNSEL FOR OFFENDERS
Texas Department of Criminal Justice
Attorney for Defendant

_____

Attorney, Staff Attorney
Post Office Box 4005
Huntsville, Texas 77342-4005
(409) 437-_____
State Bar No. _____

CAUSE NO. _____

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
V.	§	_____ COUNTY, TEXAS
	§	
_____	§	_____ JUDICIAL DISTRICT

MOTION TO REQUIRE STATE TO AVOID RAISING SPECIFIC PRIOR CONVICTIONS OF DEFENDANT PURSUANT TO DEFENSE STIPULATION

Comes now, _____, by and through his counsel of record, and in accordance with Old Chief v. U.S., 136 L.Ed.2d 574, 11 S.Ct. 644, moves the court to order the State not to raise, in any manner whatsoever during the guilt-innocence phase of this trial, the specific crimes which the defendant was convicted of, and which do not directly relate to truthfulness.

I.

The Defendant, _____, if he testifies in his own defense, is willing to stipulate, for the sole purpose of the guilt innocence phase of the trial, as to his number of prior felony convictions not relating to credibility. Defendant therefore moves the Court, consistent with the holding in Old Chief, Id., recognize that when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to challenge Defendant's credibility the State cannot refuse such stipulation.

II.

The jury will already know the Defendant has been convicted of a felony, because they will be told he is an inmate of TDCJ-ID as part of the State's case in chief, since the prison unit is the location of the alleged offense. With the stipulation as to Defendant's number of prior felony convictions unrelated to trustworthiness, the specific crimes become irrelevant for purposes of impeachment. The substantial possibility of prejudice to the Defendant thereby substantially outweighs the nonexistent probative value of any prior conviction unrelated to trustworthiness.

WHEREFORE, Defendant prays this motion be granted.

Respectfully submitted,
State Counsel For Offenders
Texas Department of Criminal Justice
Attorney for Defendant

CAUSE NO. _____

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
V.	§	_____ COUNTY, TEXAS
	§	
_____	§	_____ JUDICIAL DISTRICT

MOTION TO TESTIFY FREE FROM IMPEACHMENT FROM PRIOR CONVICTIONS

Comes now, _____, By and through his counsel of record, and in accordance with Rule 609, Texas Rules of Criminal Evidence, moves the court to allow him to testify at the guilt/innocence stage of the trial free from impeachment by any prior convictions of which the State has given notice of an intent to use for such purpose, as follows:

I.

The prior convictions would so inflame the minds of the jurors that any value with reference to impeachment (these offenses having no particular correlation with truth-telling) would be outweighed by its prejudicial impact.

II.

The jury will already know the Defendant has been convicted of a felony, because they will be told he is an inmate of TDCJ-ID as part of the State's case in chief, since the prison unit is the location of the alleged offense.

III.

To require that the jury hear the nature of Defendant's prior record as a condition of his testimony would have a chilling effect on his right to a fair trial under both the Texas and U.S. Constitutions.

WHEREFORE, Defendant prays this motion be granted.

Respectfully submitted,
STATE COUNSEL FOR OFFENDERS
Texas Department of Criminal Justice
Attorney for Defendant

_____
Attorney, Staff Attorney
P. O. Box 4005
Huntsville, TX 77342-4005
(409) 437-_____
State Bar No. _____

CAUSE NO. _____

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
V.	§	_____ COUNTY, TEXAS
	§	
_____	§	_____ JUDICIAL DISTRICT

MOTION TO DISQUALIFY JURORS AS A MATTER OF LAW

Comes now, _____, By and through his counsel of record, and files this his motion to disqualify, as jurors, present employees of the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID), to protect Defendant's right to due process and equal protection of the law of the United States and Texas Constitution: to protect Defendant's right to an "impartial jury" as guaranteed by the United States and Texas Constitution; to protect Defendant's right to unbiased and unprejudiced jurors guaranteed by Article 35.16 Tex. C.C.P., and for cause would show the Court as follows:

I.

Some of the prospective jurors are employees of the Texas Department of Criminal Justice - Institutional Division. The Texas Department of Criminal Justice - Institutional Division is an agency of the State. TDCJ-ID employees generally have ready access to classification information on inmates, have regular contact with officers of internal affairs, frequently work directly or indirectly with witnesses in inmate cases and possess specialized knowledge of issues and facts that will be material to the present case and which may be relied upon and inadvertently supplied to other jurors in this cause. There is also the potential that because of their specialized training in the areas directly related to the case that other jury members would rely on their inclinations instead of engaging in the process of deliberation and evaluation on an individual basis.

II.

The State of Texas is bringing this action against the Defendant. Therefore, the State of Texas is a party to this cause. Likewise, the Texas Department of Criminal Justice is an agency of the State of Texas. An employee of the State, a party to this cause, should be foreclosed from serving on this jury.

III.

The Texas Government Code provides in Section 62.105 that "a person is disqualified to serve as a petit juror in a particular case if he is interested, directly or indirectly in the subject matter of the case." This provision does not make any exclusions for jurors in criminal cases. For this reason Section 62.105 Tex.Gov.C., should be read in conjunction with Art. 35.16 of the Texas Code of Criminal Procedure to excuse from jury service any employee of the Texas Department of Criminal Justice - Institutional Division on the grounds that while they may not have a direct interest in the case there is an indirect interest in the case.

WHEREFORE, premises considered, counsel for the Defendant requests that the foregoing motion be granted and that all employees of the Texas Department of Criminal Justice - Institutional Division be excused from jury service in this cause.

Respectfully submitted,

STATE COUNSEL FOR OFFENDERS
Texas Department of Criminal Justice
Attorney for Defendant

Attorney, Staff Attorney
P. O. Box 4005
Huntsville, TX 77342-4005
(409) 437-_____
State Bar No. _____

PRISON VOCABULARY

Affiliated: An inmate who is in a gang or who hangs out with a large group of other inmates.

Aggie: A hoe used to till the ground.

Blood-In, Blood-Out: To gain admission to some gangs you must kill someone, and to resign you must die or you will be killed by fellow members.

Clicking: When several inmates physically assault or manipulate another, usually weaker inmate.

Croaker: A prison medical officer.

Disrespect: This word, used as a verb, means to physically or mentally attack an inmate. If someone disrespects an inmate who is a gang member, the attacker disrespects the entire gang.

Drop a Dime on Them: Informing on another person.

Fall Partner: Accomplice in criminal act; rap partner.

Fish: A new inmate, especially one who has never been in prison before.

Hogging: One inmate is forced to fight other inmate, one after another, until the single inmate succumbs or he beats everyone else.

House: A cell.

Jacket: An inmates prison file or reputation.

Keister Stash: Drugs or other contraband hidden in the anus, usually inside a rubber balloon.

Locker Knocker: An inmate who steals from other inmates.

Out of Place: Inmates who are in the wrong custody area.

Punk: A weaker inmate who is considered the property of a stronger inmate.

Run: A cell block.

Running Store: An illegal operation, wherein an inmates sells other inmates items at prices often twice as much as what they cost at the commissary.

Squirrel: A mentally ill inmate (a ding).

Ticket: Inmate's record or discipline report