. . . AND JUSTICE FOR ALL BEHIND THE WALLS

AN INMATE CRIMINAL DEFENSE PRIMER

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At the time this article was written David O'Neil was the Trial Services Director, State Counsel for Offenders, and Frank Zeigler was a trial attorney with that office. However, this article does not necessarily represent the official policy of TDCJ.

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SCOPE OF ARTICLE

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 that a centralized defense function (State Counsel for Offenders-Trial Services, hereafter SCFO) was established in 1991 to provide a 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 venue gives rise to violations. It is the only exclusive Inmate Defense office among the fifty states. Most States appoint local counsel for those unable to retain legal representation or they assign the county public defender.

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. More importantly, it will also focus on practical tips necessary to understanding the inmate client, the world he lives in, and the rules he lives by.

The article will first 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 great bulk of inmate cases, and show with specific examples how to approach complicated inmate defense issues.

Finally, with a series of practical tips common to all inmate cases; a number of appendixes 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!

I. "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; that, on appeal, there is a good faith allegation of ineffective assistance of counsel by the SCFO trial attorney; 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 "shall appoint an attorney other than an attorney appointed by the board."[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

[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 court's ruling 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 Damien 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 Darrien 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.

approval. The court forwards the bills to TDCJ, SCFO, ordering 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. Invoices that SCFO or the court deems to be excessive or erroneous will be returned with an explanation. The invoices may be returned with a clarification or correction.

The District Clerk of the appointing court should be familiar with these procedures and have all the necessary forms for submitting expenses. SCFO Administrative Services will also answer any questions regarding expenses and the status of reimbursement requests. Attorneys have generally found that the delay in payment due to the state's administrative procedures (typically 60-90 days) is more than offset by the certainty of payment often lacking with non indigent clients.

II. ENTERING THE PRISON MAZE: DISCOVERY

One of the most striking features about discovery in an inmate case is the amount of available information that may be material to your case. 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 is 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 TDCJ records are sought through discovery, prosecutors typically assert that they do not possess the documents, and that the defense may obtain them by request or subpoena directed to TDCJ. As a practical matter, SCFO has found subpoena duces tecum to be the preferred method. Laws and policies relating to confidentiality preclude TDCJ's release of the kinds of information needed by defense attorneys unless a court issues an order. Some exceptions to this general rule exist. For instance, you may receive a copy of your client's medical record by submitting his signed and completed 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

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

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, in order to timely litigate the 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. For all business records, include a request that the records be self authenticated.[3]

The department served with the subpoena will generally contact The Office of Legal Affairs, TDCJ, regarding the subpoena. 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

In addition to the Internal Affairs Investigative Report that the prosecutor has in his "open file," Internal Affairs may have other documents material to an inmate's case. 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]

[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.

Some of the UOF Report is exculpatory in almost every inmate assault case. 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 typically 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 facts the correctional officers have reported and will testify to at trial.

The importance of these reports will be underscored when you talk to your client. Inmates frequently do not call each other by name. Nicknames are common, and it may be impossible to locate a witness that your client knows was a witness to the incident. The UOF Report will list the witness by name and TDCJ number. Furthermore, your client, or the witnesses, may have been in a transient status. TDCJ may have moved them to other units within weeks or days of the incident. Even if not transients, by the time the investigation is completed, the grand jury returns an indictment (usually predicated solely on the written statements of the officers as contained in the IAD Investigative Report), and counsel is appointed, 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 your clients 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 your client

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

while the video camera is running. 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 then record 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 may be admissible to support the reasonableness of a defendant's actions in an assault or possession of a deadly weapon case, where those records reflect prior acts of violence of the other inmate. 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 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 will often not even 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

[7] Tex. Pen. Code Section 46.10.

75 North, Huntsville, Texas. It should state the name and TDCJ number of the inmate whose records you want.

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

The prevalence of assault cases, the large number of inmates with psychiatric or head trauma histories, and the relatively low IQ of most inmates, make inmate medical and psychiatric records among the most frequently requested by defense attorneys. In addressing the threshold question of competence to stand trial,[8] the initial client interview can reveal numerous reasons to obtain the psychiatric record of your client or the victim. Where competence issues are not obvious in the initial interview, the large number of cases that involve assaults almost guarantee 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

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

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 to be more problematic. In cases where a subpoena will be used, tailor the application for specific records. For example, records of all complaints and treatment for the injuries allegedly sustained at the hand of the defendant, records pertaining to preexisting injuries similar to those allegedly inflicted by the defendant, or records of mental illness.

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 he was receiving, or by the failure to receive his medications. The "Blue" file refers to records of any program an offender may have participated in, such as the Substance Abuse Program. The "Brown" files refer to his 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 your defense.[9] Any evidence of the officer's having been disciplined for bringing contraband to inmates in the prison will lead to 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 disciplinary will also contain names of witnesses who may support defense claims that the conduct constitutes evidence of the officers 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 officers 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 doggedly pursue a complaining officers 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.

[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.")

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

Records of an inmate's trust fund may be subpoenaed from, Custodian, Inmate Trust Fund Records, FM 247 at Diagnostic Unit, Huntsville, Texas.

Records of an inmate's disciplinary hearing 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 includes written statements and summaries of oral testimony.

The tape recording of an inmates 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 that was in effect during the incident in question.

THE BIG THREE: COMMON INMATE INDICTMENTS

The substantive offenses discussed below comprise a large majority of the total indictments returned on inmates. They are basically aggravated assaults, deadly weapon possessions, and drugs. Their occurrence in a prison setting, however, raises some issues unlikely to have been seen by most "free world" attorneys. The issues these offenses raise provide a perspective that should greatly benefit the defense of any inmate case.

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

One of the most common prison case 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

[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.

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 between officer and inmate of 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.

All involved then complete statements for 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 prosecutors office is consulted as to whether the matter is deemed to merit 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

[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.

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 reindictment 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

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

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. If you have properly done voir dire on the punishment range for a defendant with two prior felonies, and if the defendant testifies (and the jury is therefore aware your client has 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, you should 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 hypotheticals can establish that the officer knows that the conduct in dispute would constitute mistreatment or denial of a right or privilege. Your witnesses can then establish the conduct.

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[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.

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 raising a reasonable doubt about 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 may raise the evidence necessary for a self-defense instruction, but often his testimony is unnecessary and undesirable. The bulk of these 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.

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[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).

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 weapons in a penal institution bears testimony to the reality base of television shows such as HBO's " Oz." 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 also are oblivious to the number of inmates who possess these weapons out of a determination to ward off sexual attacks and other similarly degrading experiences.

The relatively straightforward and easily proven elements of Section 46.10, coupled with the habitual statute, explains why the state often indicts assaults involving deadly weapons under Section 46.10 rather than under Section 22.02, Aggravated Assault. This not only avoids the issue of serious bodily injury, but also obviates calling 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]

[21] Spakes, at 598.
[22] Brazelton v. State, 947 S.W.2d 644, 688 (Tex. App. - Fort Worth 1997, n.p.h.).

and the accused'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 not only be prepared enough to steadfastly assert that, if he testifies, but the defense must also present enough supporting facts to avoid a finding that the defendant's beliefs were not reasonable 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: that. 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

[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).

fear of night and day. Nothing is as compelling as recalling the image of the pathetic sexual victim who testified about the indignities perpetrated on him - reminding the jury that the only real choice the defendant had was to either stand up and defend himself when TDCJ could not protect him, 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 your client 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, this evidence can raise reasonable doubt.

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 discovery will not make mention of any informant, or even the basis for 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, and 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,

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

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.

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 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.

[26] Inmate property records can corroborate whether the inmate possessed the property on the date in question.
[27] Tex. Pen. Code Section 38.11.

The ready availability of drugs in prison is driven by a number of factors including: profit potential, 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 several 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 problem 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

[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.

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 further 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.

IV. 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 Appendix contains 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. Now, 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 has graciously allotted 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 naive 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 of 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

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

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"; for example: double chow, extra commissary, and more law library visits are 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 your client 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 to a Assault on an Correctional

[30] Don't discount putting your client on the stand just because of his present accommodations, they can do better than you think in many cases.

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

V. 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

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

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

[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)

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] Remember your client has 24 hours a day to think about his case and he expects that you do 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, your interview with the client 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 your 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 word's 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?*

[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.

The judge is required under Art. 42.08(b) Tex. R. Crim. Proc. to stack 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 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 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. Remind the inmate that only his lawyer is prohibited from revealing communications.

5. *I've already been punished 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 incidents 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 beware 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.

VI. **SOME FINAL THOUGHTS ON INMATE DEFENSE: THE JURY**

A large percentage of "shank in the tank", "joint in the joint" or "punch in the nose" cases include two enhancements and go to trial with a punishment range of 25 to 99 years, or life. 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 the 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 <u>they would act on their own beliefs on right or wrong regardless of legal instructions from a judge</u>. 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.

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[38] Crime and Justice in Texas, 1998, Sam Houston State University Press.
[39] Houston Chronicle, <u>Potential Juror Judge Selves in Poll</u>, p 9, Oct. 24, 1998

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.