2

CHRON FILE FOLDER

DATED: 4/2/64 to
6/10/64

RICHARD M. MOSK

July 6, 1964

Honorable Walter Jenkins
The White House
Washington, D. C.

Dear Walter:

I hate to burden you with a personal problem, but I believe that this transcends mere personal convenience and involves a function of the federal government. Hence, I feel justified in imposing upon you.

My son, Richard M. Mosk, is serving as a legal assistant to the President's Commission on the Assassination of President Kennedy. As you know, originally it was believed the Commission's work would be completed by the first of July, but it now appears that his assignment will require him to remain in Washington through most of the month of August.

Richard is an Airman First Class in the Air National Guard. He has served his six months on active duty, but was excused from his weekend tours of duty because of his work with the Commission, which required his work virtually every day of the week, with an understanding that he would make up the time upon his return to California this summer and prior to his next job, which is as a law clerk for the Supreme Court of California, beginning September 1.

Since he will not conclude his work in Washington until the end of August, it will be impossible for him to make up any time this summer before he begins his work with the Supreme Court of California. And as you know, law clerking for a Supreme Court involves night and weekend research chores at the whim and requirement of justices of the Court.

Hon. Walter Jenkins July 6, 1964

What I would appreciate very much is if you could contact the National Guard Bureau in the Pentagon and indicate that due to requirements of governmental service, Richard be excused from making up his active duty in the Air National Guard and that he immediately be placed in stand-by status.

I assure you this is not being done for the convenience of my son, for he is willing to do his duty (though as a recently married man he would not be subject to draft call), but solely because of the requirements of governmental service, all of which I believe is in the best interest of the government. This is particularly so with regard to the Presidential Commission on the Assassination of President Kennedy, the report of which will affect the welfare of our nation at home and in the world.

Anything you can do to be of assistance will be greatly appreciated by me.

Sincerely,

STANLEY MOSK
Attorney General

SM:dgt
AIRMAIL

BCC: Richard M. Mosk

THE WHITE HOUSE

WASHINGTON

July 23, 1964

Dear Stanley:

Your son, Richard, has been of considerable service to the Warren Commission, his supervisor tells me, and I am glad he could arrange to delay temporarily his training as a member of the California Air National Guard and as a Reserve of the Air Force in order that he might accept this employment.

I recognize that to make up the training he has missed, and to continue with the required Air National Guard training might seem confining. This has been discussed with the Department of the Air Force and I am informed that an exceptionally high percentage of nonprior service-men who enlist in the Air National Guard are practicing attorneys or other professional men who have chosen to fulfill their military service obligation in this way. It is only fair that all be expected to complete the training required on an equal basis, and to anticipate that some sacrifice will be required of them.

I have been advised that, based on his request, supported by his supervisor in the Warren Commission, your son will be allowed to delay his training until August 1, 1964, when it is understood his work for the Commission will be completed. He should arrange immediately with his Air National Guard unit commander to make up the training which he was scheduled to complete during the months of March through July 1964. His future service as a member of the California Air National Guard is a matter he must resolve with the State in view of the commitments he made when he enlisted in September 1963.

With kindest regards,

Sincerely,

Walter

Walter Jenkins
Special Assistant to the President

Mr. Stanley Mosk
Attorney General
State Building
San Francisco 2, California

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July 6, 1964

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Washington, D. C.

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STANLEY MOSK
Attorney General

SM:dgt
AIRMAIL

BCC: Richard M. Mosk

REP 1

M E M O R A N D U M

TO : Norman Redlich April 10, 1964

FROM : Richard Mosk

SUBJECT: COPYRIGHT

There are two statutory prohibitions against copyright in publications of the United States Government.

Title 17 U.S.C.A. § 8 provides:

> "No copyright shall subsist... in any publication of the United States Government, or any reprint, in whole or in part, thereof: ..."

Title 44 U.S.C.A. § 58 provides that the Public Printer shall sell to applicants duplicate stereotype or electrotype plates from which any Government publication is printed. The last sentence of this provision states, "No publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted."

These provisions are "designed to achieve in a democracy that depends upon accurate knowledge the broadest publicity for matters of government." Public Affairs Associates, Inc., v. Rickover, 284 F. 2d. 262, 268 (D. C. Cir., 1960) (Reed, J.) (rev'd in 369 U.S. 111 (1962) on grounds involving declaratory relief).

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On the other hand, there is a great danger of distortion. This danger is probably much greater in the case of our Report than in that of most others, since it will involve several volumes and thus probably will be abridged by private publishers. Generally, the Federal Trade Commission has acted only where there has been false advertising or misrepresentation. Stiefel, "Piracy in High Places -- Government Publications and the Copyright Law," 24 Geo. Wash. L. Rev. 423, 434 (1956), also in ASCAP, Copyright Law Symposium, No. 8, p. 3, 16 (1957); see e.g. 47 F.T.C. 1729, No. 8114 (1951) (prevented person from selling a book without clearly disclosing the title under which it was previously sold by the Government and without indicating its source). Thus, we could not rely on the Federal Trade Commission to prevent distortions, although it might use a cease and desist order to stop publishers from "passing off" their publications as the original government publication. Furthermore, such remedies as defamation and unfair competition which are making headway in the area of distortions and copying, would not be of much use to the Commission.

Bill in Congress.

One suggestion is to introduce a bill in Congress specifically providing copyright protection for the Report.

There are a few cases of similar legislation. Congress passed private acts directing that copyright be granted to the heirs of private authors whose works had been published by the Government, An Act for the Relief of Mis ress Henry R. Schoolcraft, 11 Stat. 557 (1859); An Act for the Relief of Mrs. William Herndon, 14 Stat. 587 (1866). On a few occasions prior to the 1909 act, Congress passed special acts to preserve the copyright in private works that were to be incorporated in Government documents. 32 Stat. 746 (1902); 34 Stat. 836 (1906). In 1938 an act was passed authorizing the Postmaster General to secure copyright on behalf of the United States in philatelic catalogs to be prepared by him from time to time. 52 Stat. 6 (now included in 7 U.S.C.A. §§ 8). In 1955 Congress authorized the State of Illinois to have the exclusive right in interstate commerce to use a particular design consisting of a profile of the head of Lincoln superimposed upon a map of Illinois. 69 Stat. 631. Congress authorized Representative Cannon to secure copyright in the successive editions of Cannon's Procedure in the House of Representatives, printed by the Government, e.g. 62 Stat. 1052 (1948), 73 Stat. 20 (1959). The authors of a book on Senate procedure printed by the Government were allowed to obtain a copyright. 70 Stat. 126 (1956). Congress has also protected badges, emblems, designs, marks, and words or phrases

of a large number of Government and private organizations from misuse or copying. 18 U.S.C.A., ch. 33; 36 U.S.C.A., chs. 2-8, 11-25.

However, other bills not enacted have proposed to authorize Government copyrights in particular works. E.g., H. R. J. Res. 467, 75th Cong., 1st Sess. (1957) (The Story of the Constitution by Representative Bloom); H. R. 1331, 81st Cong., 1st Sess. (1949) (illustrated history of United States coins and currency proposed for preparation by the Treasury Department); H. R. 5541, 85th Cong., 1st Sess. (1957) (official dictionary to be prepared by a proposed Government Commission).

It is unlikely that such legislation would be passed without some opposition. Congress is not oblivious to copyright problems. In 1962 a resolution was introduced calling for an investigation of copyright practices of Government employees. H. R. Res. 794, 87th Cong., 2nd Sess.. This was prompted by Congressional concern with the propriety of the astronauts having sold their personal stories to a leading magazine. 108 Cong. Rec. 20592, 87th Cong., 2nd Sess. (1962). It is likely that publishing companies and newspapers would violently oppose such legislation since it would be a bad precedent so far as they are concerned. Furthermore, a lawyer in the copyright office assured me that they would oppose any legislation of this

nature. They did not oppose the copyright on Cannon's Procedure in the House of Representatives because this type of work has traditionally been given protection. Hence, we would have the problem of whether we could get a bill enacted within a reasonable period of time, if at all. It should be noted that the present legislation in this area has been questioned. Stiefel, supra. at 448. Berger, "Copyright in Government Publications," Study No. 33, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 86th Cong., 2nd Sess. 1961; Note, "What is a 'Publication of the United States Government'? "A Search for a Meaningful Solution," 17 Rutgers L. Rev. 579 (1963).

Several years ago the Copyright Office made inquiries of a number of Government agencies that carry on extensive publication programs requesting other views on the question of copyright in Government publications. Most agencies indicated that there should be no copyright in any of their publications. However, some of them favored some provision whereby copyright could be secured in special cases in order to avoid distortion or in order to have the work published privately. Berger, supra. at 39.

There are a number of other reasons why such legislation would be unwise. Both a legislative fight and later enforcement battles in the courts might prove embarrassing

to the Commissioners.

Furthermore, there is some question as to whether we should prevent the New York Times and other newspapers from printing excerpts. While this is a major source of distortion, the Supreme Court has to put up with it every Tuesday. Newspapers, however, could be given permission to print excerpts.

An alternative might be to have a law giving the Report copyright protection for a short period of time, and thus allowing it to be circulated before private versions can be distributed. I would suspect such legislation would be just as difficult to pass as full copyright protection. Furthermore, enforcement problems would be great. If a newspaper printed the report, an injunction would be of little value. Possibly, the copying of the report could be made a crime. Such a law would have to be carefully drawn so as not to embrace the generally protected area of "fair use."

Between 1918 and 1921 a series of bills, S. 3983, 65th Cong., 2nd Sess. (1918); S. 579, 66th Cong., 1st Sess. (1919); S. 637, 67th Cong., 1st Sess. (1921), was introduced to permit the Government to secure copyright for "any Government document or work" by placing a notice of copyright on the published copies. The bills further provided that such copyrights could thereafter be released

by inserting a notice of the release on any copy. No action was taken on any of them. I do not think there would be fewer difficulties with this plan as applied to the Report than with the other suggestions for legislation.

Another possibility would be to require that private publishers insert in their publications a conspicuous statement that such publications are not the authorized versions or that they are not published by the Government. A series of bills, H. R. 6539, 63rd Congress, 1st Sess. § 44 (1913); S. 1107, 64th Cong., 1st Sess. § 82 (1915); S. 7795, 64th Cong., 2nd Sess. § 18 (1917); H. R. 8362, 66th Cong., 1st Sess. § 31 (1919), introduced between 1913 and 1919, would have required private persons who reproduce Government publications to insert in the reproductions a statement that they were not published by the Government, and would have prohibited the use of the Government Printing Office imprint and the insertion of any advertising matter in such reproductions. None of these bills was enacted. Failure to insert such notice could be made a crime or enforcement of such a provision could be handled by the Federal Trade Commission. (Although the F.T.C. has jurisdiction only (1) where the activities affect interstate commerce and (2) when the public interest is involved.) (In 1903, legislation was proposed making it a crime to attempt to copyright a government publication or falsely

advertised or private publication as emanating from the Government. H. R. Rep. No. 3892, 57th Cong., 2nd Sess. (1903)). It is arguable that this proposal would not be of much use. The unauthorized versions might be the only ones at the bookstores. See infra. Thus, they would have the widest circulation. Most people would not be discriminating enough to notice such a mark. Furthermore, they would probably not send for the Government version, having once spent their money on the private publication. However, this suggestion would seem to be better than nothing at all. At least those readers alerted to the origin of the work would not hold the Commission responsible for distortions. Here again, private book companies would put pressure on Congress to defeat such a measure. I am sure that they would be upset with a mark or legend which would cast doubt on their versions.

It has been suggested that we sponsor legislation requiring anybody who wishes to reprint the Report, to do so in full. There could be Federal Trade Commission enforcement or failure to do so could be made a crime. This proposal would certainly arouse opposition from newspapers since excerpts would be prohibited. Furthermore, "in full" would be difficult to define. Would that include appendices and supplements? However, these problems could all be cured by appropriate legislation. For example,

we could exempt all periodicals from the prohibition. With this exemption it might be easy to have the legislation enacted since it would be difficult to object to a requirement that the Report be copied accurately.

Of all of the above legislative proposals, the one requiring a notice on private publications that they are not the authorized version seems to pose the fewest number of difficulties. While it is not the most effective deterrent to distortions, I feel it is the most practicable.

Private Publication

A possible solution might be to have the Report published by a private book publisher. "Instances are ... known in which Government agencies have had works produced or owned by them published by private book publishers, with a copyright notice in the name of the publisher. [Dr. Goldberg tells me that the Department of Defense's Army Air Forces in World War II (7 Vols) was published and copyrighted by the University of Chicago Press.] In some instances, private publication may be preferred over publication through Government facilities for several reasons: private publication may be more expeditious, it may provide an edition of higher quality, the private publisher may cover the market more effectively, and - perhaps most important - the private publisher will bear

Frank Crawford Carter

Ed by Goldberg
History of U.S. Air Force 1907-1957
Samuel A Morrison
US naval operations in WWII
Little (Brown)
Hewlett + Anderson
The new world - History of AEC
Vol I

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the cost of printing and distribution. The last has been said to be the principal reason why the States have wanted their works to be copyrightable. Private publishers may be unwilling to assume the cost of printing and distribution, however, unless they can be given the exclusive rights afforded by copyright," Berger, "Copyright in Government Publication," Study No. 33, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 86th Cong., 2d Sess. 35 (1961).

There is a great deal of doubt as to whether a copyright in a Government report published privately would be valid. The copyright office asserts that it would not be since this would be an effort to circumvent the statutory prohibition of copyrights in Government Publications.

However, there is a good deal of confusion over the term "Government Publication." It might be argued that a "Government Publication" is one which is printed by the Government. It has been said that the confusion that has arisen as to the meaning of "Government Publication" is "traceable to the dual meaning of the word 'publication;' it may refer to the act of reproducing and distributing copies (printing and distribution by the Government), or it may refer to the work that is being published (a work produced by the Government, i.e., produced for the Govern-

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ment by its employees)." Id. at 30.

No clarification of the meaning of "publication of the United States Government" appears in the Rules and Regulations of the Copyright Office. 37 C.F.R. § 201 -1- 202. 8(1960). The provision resulted out of a controversy over the sale of the stereotype or electrotype plates desired by Representative James D. Richardson for use in a publication "prepared, compiled and edited by him on behalf of the Joint Committee on Printing" I Messages and Papers of the Presidents I, II, III (1913 ed. Bureau of National Literature) copyright 1897 by James D. Richardson. See Stiefel, "Piracy in High Places" in ASCAP, Copyright Symposium No. 8, p. 3, 21, 25 (1957). The original printing bill, (which was instigated by Richardson), providing for the sale of duplicate plates by the Public Printer, was attacked on the ground that private persons might assert copyright claims upon republishing Government documents from the plates. 25 Cong. Rec. 1764 (1893). Thus the provision prohibiting such copyright was enacted. Id at 1765, 1767. 28 Stat. 608 (1895). After several volumes of Richardson's work were printed and distributed by the Government printing office, some of the volumes were printed with a copyright notice in the name of Richardson. When this was questioned in Congress, he said that he was not claiming copyright as against the Government

but only against third persons and that his claim was limited to the original matter created by his editorial work. 30 Cong. Rec. 1032-1033 55th Cong., 1st Sess. (1897). Some members of Congress felt that he had no right to claim copyright in the work since it was produced for a publication authorized by Congress. Id. at 1028-1033. A Senate Investigating Committee stated: "The Committee on Printing will not undertake to discuss the legal question here involved further than to say that the prohibition contained in the Printing Act was intended to cover every publication authorized by Congress in all possible forms, and in view of the debate which occurred at the time, it is clear to the Committee that Congress intended to prevent precisely what has happened - the copyrighting of this particular book. ...Your Committee thinks that copyright should not have issued in behalf of the Messages, and that the law as it stands is sufficient to deny copyright to any and every work once issued as a Government publication." S. Rep. No. 1473, 56th Cong.,1st Sess. (1900).. As can be seen, this statement is not free from ambiguity, Berger, "Copyright in Government Publication," Study No., 33, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 86th Cong., 2d Sess. 30 (1961); For a history of the Richardson affair, see Stiefel, "Piracy in High Places," in ASCAP, Copyright Symposium No. 8, p. 3, 21, (1957).

Nothing in the legislative history of the act of 1909 indicates the meaning of "Government Publication." H. Rept. No. 2222, 60th Cong. 2d Sess. (1909). In 1911 the Superintendent of Documents defined the term "Government Publication" as used in a different context as follows: "Any publication printed at Government expense or published by authority of Congress or any Government publishing office, or of which an edition has been bought by Congress or any Government office for division among the Members of Congress or distribution to Government officials or the public. I Superintendent of Documents, Checklist of United States Public Documents, 1789-- 1909 vii (3d ed. 1911)."

A series of bills introduced between 1913 and 1919 to revise the Printing Law, none of which passed, sought to define "Government Publication" as including "all publications printed at Government expense or published or distributed by authority of Congress." See e.g. H.R. 6539, 63rd Cong., 1st Sess. § 44 (1913); S. Rep. No. 438, 63rd Cong., 2d Sess. 50 (1914).

There has been very little case law on this question. In one case there was dictum to the effect that General Pershing's official report to the Secretary of War, presenting an account of the American Army in France was an official document of the United States Government which anyone was free to print and publish. Eggers v.

Sun Sales Corporation, 263 Fed. 373 (2d Cir. 1920). It is not clear if the document was printed by the Government. In Sherrill v. Grieves, 57 Wash. Law Rep. 286, 290 (Sup Ct. D. C. 1929), the plaintiff was an author of a book, portions of which he allowed the Government to publish in pamphlet form (with a notice of copyright in his name) for use in a government school for officers. The author was a government employee but the writing of the book was outside his employment. The plaintiff's copyright was upheld against the contention that the pamphlet was a government publication and that the material therein was therefore in the public domain. The court held that the work belonged to the plaintiff. In Sawyer v. Crowell Pub. Co., 46 F. Supp. 471, 473 (D. C. S. D. N. Y. 1942) aff'd 142 F. 2d. 497 (2d Cir. 1944), the court dealt with a map produced by government employees in the course of their duties, copyrighted by one employee and then published by the Government with notice of that copyright registration. The court held that as the map "relates directly to the subject matter of plaintiff's work" the employee could have no property right in it. Thus, this case indicates that a work produced for the Government by its employee within the scope of his employment belongs to the Government even though first printed and published privately. Cf. 7 Decs. Comp. Gen. 221 (1927) (distinguished writings that were not official, in which case the government would have

no control over or proprietary interest in the matter, and writings that were official, which would not lose their official character even though published by a private publisher); 22 Decs. Comp. Gen. 715 (1943). There are other situations in which it has been said that a work can be a government publication even though not printed at the Government printing office. American Lithographic Co. v. United States, 57 Ct. of Cl. 340 (1922) (Government authorized to get material printed by private publisher); Columbia Planograph Co., Inc. v. United States, 90 Ct. Cl. 457 (1940); See Monthly Catalogue of the United States Public Documents, January - December 1936, 3 (1936-37) (the Superintendent of Documents indicated that publications reproduced by duplicating processes other than ordinary printing will be considered to be government publications, just as those publications printed by the Government Printing Office.) From these cases, it has been concluded that "... 'Government Publication' refers to a published work produced by the Government, and perhaps to one owned by it, not to the mere act of printing and publishing by the Government." Berger "Copyright in Government Publications", Study No. 33, Studies Prepared by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 86th Cong., 2d Sess. 32 (1961).

In Public Affairs Associates, Inc. v. Rickover,

284 F. 2d 262 (D.C. Cir., 1960) (held that Admiral Rickover could get a copyright on his speeches which were prepared by him outside working hours) rev'd, 369 U.S. 111 (1962) (sketchy statement of facts not a satisfactory basis for a discretionary grant of declaratory relief), Justice Reed stated, "The language of the original statute on printing -- 'No ... Government publication shall be copyrighted' -- seems to refer to a publication actually produced by the Public Printer. The Printing Office provision seems to mean, if read naturally, 'produced in that office.' The Copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by governmental authority." A treatise writer has stated that the term "Government Publication" "undoubtedly embraces all official documents and reports emanating from the Government as well as the interminable registers, bulletins and circulars of information prepared and issued by the various bureaus, agencies and projects maintained by the Government." Howell's Copyright Law 47 (Latman ed. 1962).

While there is no case right on point, it can be seen that it is at best dubious whether a copyright in a private publisher would be valid. Furthermore, 44 U.S.C.A. 111 (Supp) provides: "All printing, binding, and blank-

book work for Congress, the Executive Office, the Judiciary (other than the Supreme Court of the United States), and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office except (1) such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere; and (2) printing in field printing plants operated by any such executive department, independent office, or establishment, and the procurement of printing by any such executive department, independent office, or establishment from allotments for contract field printing, if approved by the Joint Committee on Printing." 44 U.S.C. 111a provides: "Such Printing, binding and blank-book work authorized by law, as the Public Printer is not able or equipped to do at the Government Office, may be produced elsewhere under contracts made by him with the approval of the Joint Committee on Printing." This requirement of a waiver might be an added hurdle to private publication, although I have no idea how difficult it would be to obtain.

Mr. Eisenberg has told me that some of the Commissioners were insistent that private facilities not be used in our investigative activities. It is possible that they would not approve of private publication either. Also, Dr. Goldberg tells me that the Government Printing Office

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would do the job much more quickly than a private publisher.

If we could get a publishing company to handle the report, without the protection of the copyright, and if we received authorization to do so, the idea is appealing in that distribution would be more widespread and efficient. Thus, the report would "beat" the other privately published versions to the bookstores. However, in my opinion, the above mentioned difficulties outweigh the benefits to be gained.

Government Printing Office Distribution

If the Report is published by the Government Printing Office, it might be possible to reduce the hazard of distorted versions if distribution were made through local bookstores. People would probably prefer the Government edition (assuming the Report can be confined to one volume, excluding appendices and indices) if it is as accessible as private editions. Furthermore, private editions would probably be more expensive since they are generally published at greater cost than are Government publications. The Government Printing Office could obtain a mailing list and solicit orders from bookstores around the country. Also, some means should be devised to make the Report available abroad quickly so that private editions in foreign countries might be discouraged. (Is it possible to send over translated versions? See discussion of the Denning

Report, infra.)

The Government Printing Office does sell Government Publications at a discount to book dealers and quantity purchasers. 44 U.S.C.A. 72a. (Somehow they get around 44 U.S.C.A. 71, Supp, which says only one copy of any document shall be sold to the same person). Thus, bookstores can make a profit off the sale of the Report.

I feel that we should work out some arrangement with the Government Printing Office whereby widespread circulation can be achieved rapidly. This would go a long way towards solving the problem of distortions. Also, we should have some kind of conspicuous legend on the Report indicating that it is the only official Government publication or some such identification. Another problem to consider is how we would distribute the extra volumes containing the appendices and indices.

Lord Denning's Report

You asked me to find out how the Denning Report (Lord Denning's Report (1963)) was handled by the British Government. I spoke to someone in the British Information Service who related to me the following account. Apparently officials in Her Majesty's Stationery Office were quite concerned with the problem of private publications. They feared the possibility that paperbacks with lurid covers and other deceptive and distorted publications would come

out. This type of a British Government Publication is automatically covered under the Crown Copyright. The United Kingdom Copyright Act of 1956, § 39 in 36 Halisbury's Statutes of England. 132 (2d ed. 1956). Furthermore, the Report was distributed through bookstores in England ("Printed and published by Her Majesty's Stationery Office-To be purchased from . . .or through any bookseller," Back cover of Report) and in this country. My informant said that 100,000 copies were originally printed and sold and that the Government continued to print more copies. He estimated a sale of 150,000. Only about 1,000 copies were sold in this country since the British Information Service was only authorized to receive 1500 copies.

A United States company (I assume from the Library of Congress Card Catalog that it was the Popular Library Co. of New York) immediately photographed the Report and had an edition out within two days of distribution of the original report. Also, the New York Evening Post ran about 90% of the report in serial form. Because these copies appeared so quickly, the British did not seek to restrain their sale. Furthermore, the Popular Library Version printed the report in full, although it had a hard cover. Some officials were upset by the fact that this version had a British seal on the cover.

However, the British Government went to court

in France and in other European countries and successfully prevented publishers from publishing copies of the Report. The British were able to catch these piracies because of the time taken to translate the Report.

THE WHITE HOUSE

WASHINGTON

July 23, 1964

Dear Stanley:

Your son, Richard, has been of considerable service to the Warren Commission, his supervisor tells me, and I am glad he could arrange to delay temporarily his training as a member of the California Air National Guard and as a Reserve of the Air Force in order that he might accept this employment.

I recognize that to make up the training he has missed, and to continue with the required Air National Guard training might seem confining. This has been discussed with the Department of the Air Force and I am informed that an exceptionally high percentage of nonprior service-men who enlist in the Air National Guard are practicing attorneys or other professional men who have chosen to fulfill their military service obligation in this way. It is only fair that all be expected to complete the training required on an equal basis, and to anticipate that some sacrifice will be required of them.

I have been advised that, based on his request, supported by his supervisor in the Warren Commission, your son will be allowed to delay his training until August 1, 1964, when it is understood his work for the Commission will be completed. He should arrange immediately with his Air National Guard unit commander to make up the training which he was scheduled to complete during the months of March through July 1964. His future service as a member of the California Air National Guard is a matter he must resolve with the State in view of the commitments he made when he enlisted in September 1963.

With kindest regards,

Sincerely,

Walter

Walter Jenkins
Special Assistant to the President

Mr. Stanley Mosk
Attorney General
State Building
San Francisco 2, California

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July 6, 1964

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Since he will not conclude his work in Washington until the end of August, it will be impossible for him to make up any time this summer before he begins his work with the Supreme Court of California. And as you know, law clerking for a Supreme Court involves night and weekend research chores at the whim and requirement of justices of the Court.

Hon. Walter Jenkins July 6, 1964

What I would appreciate very much is if you could contact the National Guard Bureau in the Pentagon and indicate that due to requirements of governmental service, Richard be excused from making up his active duty in the Air National Guard and that he immediately be placed in stand-by status.

I assure you this is not being done for the convenience of my son, for he is willing to do his duty (though as a recently married man he would not be subject to draft call), but solely because of the requirements of governmental service, all of which I believe is in the best interest of the government. This is particularly so with regard to the Presidential Commission on the Assassination of President Kennedy, the report of which will affect the welfare of our nation at home and in the world.

Anything you can do to be of assistance will be greatly appreciated by me.

Sincerely,

STANLEY MOSK
Attorney General

SM:dgt
AIRMAIL

BCC: Richard M. Mosk

JOHN HART ELY

5/19/92

Richard-

You inspired me to hunt for Commission papers, & I found some!

These two are fun.

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John

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cc: Mr. Willens
Mr. Ely ✓

M E M O R A N D U M

TO : J. Lee Rankin
General Counsel

May 5, 1964

FROM : John Hart Ely

Our discussion of this afternoon suggests to me that the function of my memorandum of April 22, 1964, has been misunderstood. It was designed to inform Messrs. Jenner and Liebeler as to what information concerning the Marine Corps was in our possession, and what information we lacked. It was not intended as a final, or even a preliminary, draft of the Commission's report.

I therefore felt at liberty to include suggestions phrased in the first person. If I am asked to write a draft of the Marine section of the final report, I shall neither make suggestions nor write in the first person.

Similarly, because this was a memorandum, I mentioned Oswald's venereal disease, just as I mentioned every other fact I had encountered. Upon reviewing my memorandum, I can find no passage recommending a further investigation of this disease. I intended to make no such suggestion and regret that my words were susceptible of that interpretation. I tried to treat it like any other event in Oswald's life, and intended neither to suggest that it is probative of whether or not Oswald killed President Kennedy, nor to "smear" Oswald. (Please see my memorandum of April 22, 1964, at p. 13)

cc: Mr. Willens
Mr. Ely ✓

NW 12640 DocId:59167860 Page 32

ied

M E M O R A N D U M

June 4, 1964

TO : The Files

FROM : John Hart Ely

SUBJECT : ALLAN MONROE CHANDLER

On June 4, 1964, I interviewed Allan Monroe Chandler. He complained that since he left his home town, Atlanta, he has been followed, and attempts have been made to keep him from getting to Washington (enticement by women, invitations to parties, etc.) He is of the opinion that the group which is trying to keep him out of Washington is a law enforcement agency. When I asked him who was following him, he replied that they were "young Peace Corps types with high-powered sports cars."

Chandler was recently acquitted - on self-defense grounds - of a first degree murder charge for killing a man - Frank Minsey (Mb.) - who Chandler claims is tied in with the rackets in Atlanta. He suspects some tie-in with Ruby is the cause of his troubles, although he has no knowledge of any such connection.

He claims to have spoken to Inspector Kelley of the Secret Service; his suspicions are aroused by the fact that the Secret Service agent guarding the home of Jacqueline Kennedy, whom he attempted to visit, claimed that he had never heard of Chandler.

Chandler came in because he wants to make it clear to whoever is following him that although he is capable of theorizing on the assassination, (which he did at length - claiming the expertese derived from knowing the criminal mind,) he knows no facts bearing upon it.

I assured him that the Commission was not having him followed, and that we would be happy to receive a letter setting forth his views.

In my opinion, Chandler, who indicated that he drank a good deal, gave definite signs of mental imbalance. I agree with him that he has access to no facts which would help us in our investigation.

cc: Mr. Rankin
Mr. Willens
Mr. Ely
Files

NW 50640 DocId:59167860 Page 33

JOHN HART ELY

5/19/92

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John

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General Counsel

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Mr. Ely ✓

NW 12640 DocId:59167860 Page 35

JHE:ej

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cc: Mr. Rankin
Mr. Willens
Mr. Ely
Files

NG-AFP

6 March 1964

Drill Participation, Airman Richard M. Mosk, AF 28249439

Commander
146th AB Sqdn, 146th AT Wing
Van Nuys, California

THRU: The Adjutant General
State of California
Sacramento, California

1. Airman Richard M. Mosk, a member of your unit, is currently employed by the President's Commission investigating the death of President Kennedy. Much of the activity, especially research work, is accomplished on Saturday in the Library of Congress. Airman Mosk had arranged to accomplish his drill participation with the D. C. Air Guard, which drills two Saturdays per month. The conflict of timing gave rise to a request for deferment of participation in required drills, initiated by interested members of Congress. It is anticipated the Commission will conclude its work approximately July of this year.

2. On a one-time basis, the Bureau is authorizing a deferment of the drill participation of Airman Mosk until his return to the jurisdiction of The Adjutant General of California. At that time, he will accomplish a period of inactive duty training on a basis of one eight-hour day for each two drills deferred until he has completed the participation requirement. Airman Mosk is in agreement with this procedure, and will report to the commander of his unit of assignment for this period of training upon completion of his detail in Washington. He is aware of the penalty clauses of Section 41-7, AFM 35-3, for failure to participate to the required degree.

3. There is a very good probability that Airman Mosk will relocate from the Los Angeles area to San Francisco upon his return to California. In this event, he may well be assigned to a unit at Hayward. It is suggested that The Adjutant General retain a copy of this letter for further action. Airman Mosk has also been instructed to retain a copy of this letter to present to the commander of his unit of assignment when he enters the period of training.

FOR THE CHIEF, NATIONAL GUARD BUREAU:

RAYMOND J. HIGGINS
Chief, Air Personnel Division

Copy for Airman Mosk

NW 12640 DocId:59167860 Page 37

NG-AFP 6 March 1964

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146th AB Sqdn, 146th AT Wing
Van Nuys, California

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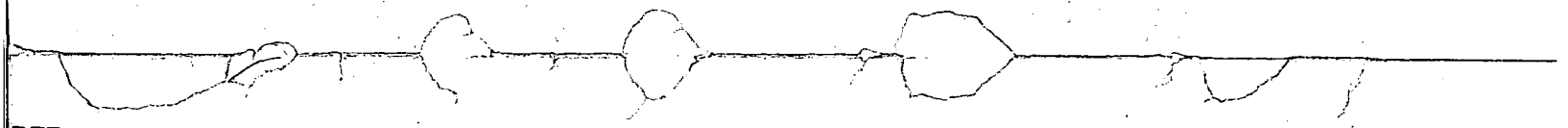
FOR THE CHIEF, NATIONAL GUARD BUREAU:

R. J. Heggins

RAYMOND J. HIGGINS
Chief, Air Personnel Division

Copy For Committee on Assassination of Pres. Kennedy

Hold for unit Commander on return to duty



DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU
WASHINGTON25, D.C.

OFFICIAL BUSINESS

POSTAGE AND FEES PAID

Richard M. Mosk
Committee on Assassination of
President Kennedy
200 Maryland Avenue, N.E.
Washington, D. C.

P.C. 8

PRESIDENT'S COMMISSION
ON THE
ASSASSINATION OF PRESIDENT KENNEDY

200 Maryland Ave. N.E.
Washington, D.C. 20002
Telephone 543-1400

EARL WARREN,
Chairman
RICHARD B. RUSSELL
JOHN SHERMAN COOPER
HALE BOGGS
GERALD R. FORD
JOHN J. McCLOY
ALLEN W. DULLES

J. LEE RANKIN,
General Counsel

April 13, 1964

MEMORANDUM

FOR: Chairman, President's Commission on the Assassination of President Kennedy

FROM: General Counsel

Richard Mitchell Mosk

Mr. Richard Mitchell Mosk, an employee of the Commission, is hereby granted security clearance for access to classified information and material up to and including the Top Secret level. This clearance is based upon a favorable full field investigation completed by the Civil Service Commission in April 1964.

Richard Mitchell Mosk
AF 28249439
3377 School Squadron, Box 79
Amarillo AFB, Texas 79111

January 2, 1964

Honorable Lee Rankin
Counsel for Warren Committee
c/o Chief Justice Earl Warren
Supreme Court Building
Washington, D.C.

Dear Mr. Rankin:

As a 1963 graduate of Harvard Law School, cum laude, and presently concluding my tour of six months' active military duty, I am very much interested in the possibility of serving your Committee during the months ahead.

I have just successfully passed the California state bar examination, and am about to be admitted to practice in California, my native state. Therefore, my experience does not include active practice of law, but I could be of service to your Committee in research, investigation, interviewing of witnesses, preparation of material for hearings, and all of the normal functions of a junior member of a law firm.

If you do have any available opportunities in that field, please let me know, and I shall be happy to come to Washington for a personal interview by the end of this month.

If you need a personal reference, I am well known to Chief Justice Warren, whom I have seen at least once every year at Pasadena on New Year's Day. And the Chief Justice is a good friend of both my mother and my father, who is the Attorney General of California.

Respectfully yours,

Richard Mitchell Mosk

Richard Mitchell Mosk

RESUME

Name: Richard M. Mosk - Born: May 18, 1939 Single

Address:

Permanent: 430 S. Roxbury Dr., Beverly Hills, Calif.

Telephone:

Permanent: CR. 1-6155

Education:

Preparatory: University High School, Los Angeles, Calif. 1953-6

College: Stanford University, 1956-60, A.B., Graduating "With Great Distinction"

Course: Liberal Arts--Political Science Major

Honors: Phi Beta Kappa; Woodrow Wilson Fellowship; Pi Sigma Alpha (National Political Science Frat.); Dean's List.

Grades: Grade Point Average of 3.6 out of maximum 4.0; Class Rankings by year -- Fr. 70th out of 778 men; Soph. 119th out of 732 men; Jr. 3rd out of 472 men in School of Humanities and Sciences; Sr. 6th out of 540 men in School of Humanities and Sciences.

Activities: 3 yr. Varsity Tennis Letterman; 1 Frosh. letter; Theta Delta Chi Social Frat.; Lettermen's Club.

Legal: Harvard Law School, 1960-1963

Standing: 1st yr. 73 Grade Point Average (B+); (65th in class of 496)
2nd yr. 72 (85th in class of 492)
3rd yr. General Average 72 (final rank in class: 72nd in class of 489)

Honors Received: Roscoe Pound Prize for highest club score in qualifying round of moot court competition; Degree of LL.B cum laude

Activities: Ames Competition (Griswold Club); Student Bar; International Law Club; California Club

Military Experience: Will be discharged March 1964

Employment Experience: Summer, 1957, Purser's office, American President Line, San Francisco.

Summers, 1958, 59, 60, 61, Assistant Tennis Instructor to Carl Earn, Beverly Hills Tennis Club, Beverly Hills, Cal.

Summer, 1962, Law Clerk - Pacht, Ross, Warne and Bernhard, Los Angeles, Calif.

PER APP
Mosk, Richard M.

JLR:HPW:mln

JAN 16 1964

Mr. Richard Mitchell Mosk
AF 28249439
3377 School Squadron, Box 79
Amarillo AFB, Texas 79111

Dear Mr. Mosk:

Thank you for your letter of January 2, 1964, regarding employment on the staff of the Presidential Commission.

As you can understand, since the establishment of the Commission many highly qualified lawyers like yourself have written to express their desire to be of service to the Commission. In view of the Commission's desire to hire only a small staff at this time, I am sorry that we are unable to take advantage of your generous offer of assistance. If the work of the Commission subsequently requires additions to the staff, I can assure you that your application will receive careful consideration.

Thank you for your interest in the work of the Commission.

Sincerely,

J. Lee Rankin
General Counsel

Ltr 1/14/64
F.B.I.

GENERAL SERVICES ADMINISTRATION

ROUTING SLIP

TO	CO	R1	R2	R3	R4	R5	R6	R7	R8	R9	R10

	NAME AND/OR SYMBOL	BUILDING, ROOM, ETC.
1.	Mr. Rankin	
2.		
3.		
4.		
5.		

- ☐ ALLOTMENT SYMBOL
- ☐ APPROVAL
- ☐ AS REQUESTED
- ☐ CONCURRENCE
- ☐ CORRECTION
- ☐ FILING
- ☐ FULL REPORT
- ☐ HANDLE DIRECT
- ☐ IMMEDIATE ACTION
- ☐ INITIALS
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ PER OUR CONVERSATION
- ☐ PER TELEPHONE CONVERSATION
- ☐ READ AND DESTROY
- ☐ RECOMMENDATION
- ☐ SEE ME
- ☐ SIGNATURE
- ☐ YOUR COMMENT
- ☐ YOUR INFORMATION
- ☐
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Mr. Mask will not be discharged from military service until March. Shall I call him?

FROM	CO	R1	R2	R3	R4	R5	R6	R7	R8	R9	R10

NAME AND/OR SYMBOL	BUILDING, ROOM, ETC.
[signature]	TELEPHONE / DATE 1/28/64

GPO : 1962 O—655346

GSA FORM 14
FEB 62

PC-8
Mosk, Richard M.

JLR:HFW:el
2/3/64

FEB 4 1964

Mr. Richard Mitchell Mosk
AF 22[illegible]39
3377 School Squadron, Box 72
Amarillo AFB, Texas 79111

Dear Mr. Mosk:

Since my letter of January 16, 1964 to you, we have had the occasion to reconsider our personnel needs in the months ahead. I would like to be advised when you could be available to work for the Commission in a law clerk capacity.

Sincerely,

J. Lee Rankin
General Counsel

lfmcs
2/3/64
J.F.R.

PC-8 Jobs
Mosk, Richard

M E M O R A N D U M

April 16, 1964

TO : J. Lee Rankin

FROM : Richard M. Mosk

SUBJECT: Interdepartmental matter

Richard M. Mosk was born in Los Angeles, California, on May 10, 1937. He graduated from Stanford University with Great Distinction in 1959. While at Stanford, Mr. Mosk was a three year varsity athletic letterman and was elected to Phi Beta Kappa and Pi Sigma Alpha, the national honorary political science fraternity. He was awarded a Marshall Fellowship. Mr. Mosk graduated, cum laude, from Harvard Law School in 1962. He served in the United States Air Force and is in the California Air National Guard. Mr. Mosk is a member of the California Bar. He is married and will clerk for Justice Mathew Tobriner of the California Supreme Court during the 1963-64 term.

NW 12640 DocId:59167860 Page 46

PRESIDENT'S COMMISSION
ON THE
ASSASSINATION OF PRESIDENT KENNEDY
200 Maryland Ave. N.E.
Washington, D.C. 20002
Telephone 543-1400

EARL WARREN,
Chairman
RICHARD B. RUSSELL
JOHN SHERMAN COOPER
HALE BOGGS
GERALD R. FORD
JOHN J. McCLOY
ALLEN W. DULLES

J. LEE RANKIN,
General Counsel

May 22, 1964

Mr. Richard Mosk
President's Commission on the
Assassination of President Kennedy
200 Maryland Avenue, N.E.
Washington, D.C.

Dear Mr. Mosk:

Immediately upon my appointment as General Counsel for the President's Commission on the Assassination of President Kennedy, the Commission instructed me to proceed as promptly as possible to obtain the necessary information and take the proper action so that all employees of the Commission would be cleared for Top Secret classified materials. This procedure was undertaken and has progressed as rapidly as it could with the assistance of the various agencies of the Government having the responsibility of making the necessary investigations.

Some of the reports have been considerably delayed because of the number and extent of the inquiries necessary. However, now the investigations have all been completed and the Commission, after reviewing the files, took action on May 19, 1964, to clear each and every member of the Staff for access to such classified materials.

Sincerely,

J. Lee Rankin

J. Lee Rankin
General Counsel

NW 12640 DocId:59167860 Page 47

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General Counsel

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J. Lee Rankin

J. Lee Rankin
General Counsel

NW 12640 DocId:59167860 Page 49

MEMORANDUM

TO : Mr. Griffin

FROM : Mr. Mosk

I checked the Dallas Morning News from October 1 to October 22.

On Wednesday, October 15, the following add appeared in the personal section:

"RUNNING MAN" please
call me. Please, please.
LEE
Section 4, page 6.

On Wednesday, October 16, the following add appeared in the personal section:

I WANT "THE RUNNING MAN"
please call me. LEE
Section 4, page 7.

On Thursday, October 17, the add in the personal section read,

I'VE just got to find
"THE RUNNING MAN" please
call me. LEE
Section 4, page 8.

On October 15, the same newspaper advertised in the entertainment section that the movie, The Running Man, starring Lee Remick, would begin a run at the Capri theatre the next day.

On Friday, October 4, on Section 4, page 3 it was stated in someone's column that "Jake La Motta and Barney Ross will play a couple of mugs in the 'Dr. Ward Story' to be filmed here [In Dallas]."

It might be of interest that around this time, Valachi was testifying before the McClellan Committee. This, of course, shook up the underworld.

As for Ruby's adds for the Carousel Club and the Vegas Club, they seemed to have run in a pattern with no perceptible change. Generally in the beginning of the week small adds would appear which resembled the following:

'JADA'
Worlds' Hottest Exotic:
Plus 4 others
CAROUSEL
or
'JADA'
corner Field & Commerce RI 7-2362

Near the end of the week and the weekends the add would be enlarged:

Tonite till 4a.m.
JADA
Worlds' Hottest
Wally Weston
plus Four Exotics
Kathy Tammi Foy

Kay True Dale
Lucky Tom Cat-Nite
Win Choice prizes
Texas - OU Tickets
Cleoptra movie
Little 'Egypt Belly Dance Album
Twist Board Exercises
CAROUSAL
Corner Field and Commerce

Occassionally, near the end of the week there would be an add for the Vegas Club:

Tonite tell 2 a.m.
FREE admission to ladies
Joe Johnson Band
Dance at the Vegas
3508 Oak Lawn LA 8-4775

I found no adds by Ruby attempting to secure a partner, nor any adds for the sale of the Carousel Club or the Vegas Club, during this period.

If you wish to pursue this further I would suggest the following steps to be taken.

1. Ask the FBI to investigate the "Running Man" ad to see who placed it, etc. Inform them of the movie.

2. Have the FBI check with all the newspapers in Dallas to see if Lee Oswald or Jack Ruby or any other suspicious character you are investigating placed ads.

3. Obtain copies of all of the Dallas daily newspapers (all editions) from the time that Oswald came to town until the assassination. I think that the Commission is already trying to get the newspapers from the week following the assassination, but this ought to be checked to avoid duplication of effort.

Mr. Mosk

M E M O R A N D U M

April 16, 1964

TO : J. Lee Rankin

FROM : Richard M. Mosk

SUBJECT: BIOGRAPHICAL SKETCH

Richard M. Mosk was born in Los Angeles, California, on May 18, 1939. He graduated from Stanford University "With Great Distinction" in 1960. While at Stanford, Mr. Mosk was a three year varsity athletic letterman and was elected to Phi Beta Kappa and Pi Sigma Alpha, the national honorary political science fraternity. He was awarded a Woodrow Wilson Fellowship. Mr. Mosk graduated, cum laude, from Harvard Law School in 1963. He served in the United States Air Force and is in the California Air National Guard. Mr. Mosk is a member of the California Bar. He is married and will clerk for Justice Mathew Tobriner of the California Supreme Court during the 1964-65 term.

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M. Mosk

OFFICE OF THE DIRECTOR

Just C 9
Dallas Times Herald Pub 2

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

April 8, 1964

BY COURIER SERVICE

Honorable J. Lee Rankin
General Counsel
The President's Commission
200 Maryland Avenue, N. E.
Washington, D. C.

Dear Mr. Rankin:

Reference is made to your letter dated April 1, 1964, requesting this Bureau to make inquiries concerning advertisements which appeared in the personal column of the "Dallas Morning News" on October 15, 16 and 17, 1963.

For your information, we have determined that identical newspaper advertisements appeared in the personal columns of both the "Dallas Morning News" and the "Dallas Times Herald" on October 15, 16 and 17, 1963. We were informed that these advertisements were placed by Mr. Robert Dent, Assistant Manager, Capri Theatre, Dallas, Texas, with the authorization of Marion T. Hudgins, Manager of the Capri Theatre. Marion T. Hudgins informed our Dallas Office that he authorized these advertisements to promote the movie, "The Running Man," starring actress Lee Remick.

The advertisements in question which appeared in both newspapers read as follows:

October 15, 1963 - "Running man - Please call me please! Please! Lee."

October 16, 1963 - "I want running man. Please call me. Lee."

October 17, 1963 - "I've just got to see the running man. Please call me. Lee."

No further inquiries are contemplated by this Bureau in this matter in the absence of a specific request from the Commission.

Sincerely yours,

J. Edgar Hoover

NW 12640 DocId:59167860 Page 55

RM/cas

February 24, 1964

MEMORANDUM

To: Mr. Howard P. Willens

From: Mr. Richard Mosk

Summary:

Under the Joint Resolution establishing the Commission, a staff member may be authorized by the Commission to administer oaths and receive evidence. Under the same Resolution, any qualified state official could be designated to administer oaths. Furthermore, Title 5, U.S.C.A. § 92a provides that in all cases in which oaths are authorized or required to be administered under the laws of the United States, they may be administered by notaries public, magistrates, court clerks, and other specified officials, duly appointed in any State, District or Territory.

If a witness gives a false statement under oath to the Commission or to anyone authorized by the Commission to take evidence, he is subject to prosecution under Title 18, U.S.C.A. § 1621 for perjury.

Neither the Federal Obstruction of Justice Statute nor criminal contempt proceedings could be invoked in a case where one gives false testimony to the Commission.

If a person gives a false statement, whether under oath or not, to the Commission or to anyone authorized by the Commission

to take evidence, he is probably subject to the sanctions imposed by the False Statement Statute, Title 18, U.S.C.A. § 1001. This statute has rarely been applied to the situation with which we are concerned. Some cases have restricted the scope of the statute in such a way as not to apply it to false statements given to certain investigators and investigative proceedings. The rationale behind this interpretation is that the statute was not intended to apply to situations where the person questioned does not initiate anything and seeks no government action. The scope of this "investigative exception" to section 1001 has not been established.

Other courts have read the statute more broadly, and they would presumably apply it whenever a material false statement is given to a government agency in any matter within its jurisdiction. This interpretation seems to be the more logical of the two.

While it is probable that Title 18, U.S.C.A. § 1001 would be applied if false statements were made to the Commission, it would be wise to administer an oath to all witnesses so that if some sanction is desired, the perjury statute would be applicable.

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"BODY"

An oath, in order to be effective, must be administered by some officer authorized by law to administer oaths. United States v. Hall, 131 U.S. 50 (1889). The Commission was granted the authority to designate who may administer oaths and receive evidence by Executive Order No. 11130, November 29, 1963 and by Paragraph "(b)" of S. J. Res. 137, 88th Cong. 1st. Sess.

Thus far, the Commission has only so authorized the members of the Commission and Mr. Rankin; however, there is no reason why the Commission could not empower staff members to administer oaths. See Boehm v. United States, 123 F. 2d 791 (8th Cir. 1941) (held that an attorney on the staff of attorneys for the Security and Exchange Commission who had been designated by an order of the Commission as an officer of the Commission and had been empowered by the order to administer oaths and take evidence for the purpose of an investigation had the power to administer oaths and take evidence in the investigation).

Furthermore, since the Joint Resolution says "any agent or agency designated by the Commission for such purpose may administer oaths and affirmations," S. J. Res. 137 (b), 88th Cong., 1st., there appears to be no reason why an authorized state official, such as a notary public, could not be empowered by the Commission to administer oaths.

Even apart from specific Commission authorization, it would seem that the proper state official could administer oaths. U.S.C. § 92a states:

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"In cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, District or Teritory, by the deputies of such clerks and prothonotaries, and by all magistrates authorized by the laws of or pertaining to any such State, District or Territory to administer oaths."

It is interesting to note that prior to the enactment of this statute, there was a great deal of confusion over the question of whether state officers were empowered to administer oaths involving Federal matters when they were not specifically authorized to do so by Federal Statute. One line of cases held that an oath administered by a state magistrate in pursuance of a valid regulation of one of the departments of the Federal Government, though without express authority from Congress, subjected the affiant to the penalties of the Federal statute against false swearing. e.g. United States v. Bailey, 34 (9 Pet.) U.S. 238 (1835); United States v. Moorehead, 243 U.S. 607 (1917); see also United States v. Hvass, 355 U.S. 570 (1958). Another line of cases stated that if no statute of the United States authorized state officers to administer oaths, there could be no conviction for perjury for statements under such oaths. e.g. United States v. Hall, 131 U.S. 50 (1889); United States v. Manion, 44 Fed. 800 (DC Wash 1891).

If a witness gives a false statement under oath to the Commission or to anyone authorized to take evidence, he is subject

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to prosecution under the perjury statute, 18 U.S.C.A. § 1621. This statute provides,

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

In United States v. Hvass, 355 U.S. 570 (1958), the Court held that a wilfully false statement of a material fact, made by an attorney under oath during the District Court's examination, under its local rule, into his fitness to practice before it, constituted perjury within the meaning of 18 U.S.C. § 1621. The Court said that the admission hearing was a "case in which a law of the United States authorizes an oath to be administered." It was pointed out that the perjury statute covers ex parte proceedings or investigations as well as ordinary adversary suits and proceedings. See also United States v. Moorehead, 243 U.S. 607 (1917). Furthermore, the Court declared that the phrase "a law of the United States," as used in the perjury statute, "is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative basis." Id. at p. 575.

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Perjury convictions have been upheld for false statements made under oath during income tax liability investigations by Internal Revenue agents, Cooper v. United States, 233 F. 2d. 821 (8th Cir. 1956); during Securities and Exchange Commission investigations, Boehm v. United States, 123 F. 2d. 791 (8th Cir. 1941); and during legislative investigations United States v. Norris, 300 U.S. 564 (1936).

It is clear that a witness who has received immunity based upon his having been compelled to answer may be prosecuted for perjury if he testifies falsely. Glickstein v. United States, 222 U.S. 139 (1911) (Immunity given under the Bankruptcy Act not applicable to a prosecution for perjury committed by the Bankrupt when he was examined under his immunity); United States v. Bufalino, 285 F. 2d. 408, 418 (2d Cir. 1960).

It must be remembered that the falsity of an alleged perjured statement must be established by the testimony of two independent witnesses or one witness and corroborating circumstances. Weiler v. United States, 323 U.S. 606 (1945). Hence, the requirements of proof in a perjury case are strict.

Falsehoods given before non-judicial inquiries, are not encompassed within 18 U.S.C. § 1503, the Federal Obstruction of Justice Statute, United States v. Scoratow, 137 F. Supp. 620 (D.C.W.D. Pa. 1956); United States v. Bufalino, 285 F. 2d. 408 (2d. Cir. 1960).

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Also, mere perjured testimony would not result in any contempt proceedings. Ex Parte Hudgings, 249 U.S. 378 (1919) (held that a false answer in court was not misbehavior in the presence of the court justifying summary punishment for contempt). For perjury to constitute contempt, it must be shown that the purpose of the perjury is to obstruct justice. In Re Michael, 326 U.S. 224 (1945) (held that a witness who testified falsely before a Grand Jury could not be punished for contempt under Section 268 of the Judicial Code for perjury alone). United States v. Brown, 116 F. 2d. 455 (7th Cir. 1940). "If the witness fully gives testimony, and in so doing testifies falsely, not in order to prevent the inquiry, but only in order to deceive, there is no contumacity, no blocking of the inquiry, and the remedy is solely by indictment for perjury and trial by jury." United States v. Arbuckle, 48 F. Supp. 537, 538 (D.C.D.C. 1943).

The False Statement Statute, 18 U.S.C.A. 1001, is probably applicable although this question is not entirely free from doubt. The statute provides,

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, ficitions or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitions or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This statute imposes a harsher penalty than does the perjury statute, while not requiring the false statement to be under oath.

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Title 18, U.S.C.A. § 1001, as originally enacted, was an amendment to the statute which penalized the making of false, fictitions or fraudulent claims against the United States, 18 U.S.C. § 80 now 18 U.S.C.A. § 287. In the 1948 recodification of the Criminal Code, the amendment was taken out of the original act and became 18 U.S.C.A. § 1001. See United States v. Gilliland, 312 U.S. 86 (1941) and United States v. Bramblett, 348 U.S. 503 (1955) for extensive surveys of the history of this statute.

The statute is intended "to protect the authorized functions of governmental departments and agencies from the perversions which might result from the deceptive practices described." United States v. Gilliland, 312 U.S. 86, 93 (1941). The Court in the Gilliland case, held that 18 U.S.C.A. § 1001 is not restricted to cases involving pecuniary or property loss to the United States. Id at p. 91-95.

The statute generally has been used for false statements, writings, and documents made by those making claims from and dealing with the government. United States v. Levin, 133 F. Supp. 88, 89 (D.C. Col. 1953, pub'd. 1956). It has also recently been used for false non-Communist affidavites, particularly as to those required by various agencies in the executive branch. See e.g. Ogden v. United States, 303 F. 2d. 724 (9th Cir. 1962) (rev'd. on other grounds).

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That the Commission would fall under the term "department or agency of the United States" requires little discussion. Title 18 U.S.C.A. § 6, provides, "the term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

The following are some of the bodies that have been held to be "agencies" within 18 U.S.C.A. § 1001: Federal Bureau of Investigation, United States v. Stark, 131 F. Supp. 190 (D.C. Md. 1955), War Assets Administration, Todorow v. United States, 173 F. 2d. 439 (9th Cir. 1949); Exclusion board in military area established under Executive Order, United States v. Meyers, 140 F. 2d. 652 (2d Cir. 1944); Veterans Administration, Sanches v. United States, 134 F. 2d. 279 (1st Cir. 1943); Commodity Credit Corporation, Spivey v. United States, 109 F. 2d. 181 (5th Cir. 1940); and the Disbursing Office of the House of Representatives, United States v. Bramblett, 348 U.S. 503 (1955). A Federal Grand Jury was held not to fall under the term "agency" within the meaning of the statute. United States v. Allen, 193 F. Supp. 954 (D.C.S.D. Calif. 1961)

There are no cases that I could find in which one has been convicted under this statute for giving false testimony to an investigation similar to the Commissions's (e.g. a Congressional investigation). The closest case involved the Federal Grand Jury.

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In United States v. Allen, supra, in addition to holding that the Grand Jury does not fall under the term "agency", the court indicated that since the defendant was a witness, making no claim against and seeking no advantage from the Government, the statute did not apply to his false statements. See infra p. 12. Another analoguous situation might be the Exclusion Board in a military area established under Executive Order. United States v. Meyer, 140 F. 2d. 652 (2d Cir. 1944) (affirmed the conviction under the old False Statement Statute for false statements made to the Board). The Statute has also been applied to false statements made to post office inspectors with regard to funds the defendent received on behalf of a charity. United States v. Beall, 126 F. Supp. 363 (D.C.N.D. Calif. 1954).

There have been several cases which concern the use of the statute against those who gave false answers to various government investigators. In United States v. Stark, 131 F. Supp. 190 (D.C. Md. 1955), the court held that negative answers, even if given under oath, by a contractor to questions asked by agents of the Federal Bureau of Investigation, (who were investigating reports of an alleged bribary attempt) as to whether the contractor knew of money given to officials of the Federal Housing Administration were not "statements" within the meaning of the statute and that the matter was not one "within the jurisdication" of the agency. The Court said at p. 206,

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"The legislative intent in the use of the word 'statement' does not fairly apply to the kind of statement involved in this case where the defendants did not volunteer any statement or representations for the purpose of making a claim upon or inducing improper action by the government against others. Nor were they legally required to make the statement."

at p. 205, the court declared,

The purpose seems to be to protect the government from the affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the Government from being the victim of some positive statement, whether, written or oral, which has the tendency and effect of perverting its normal proper activities.

at p. 206, the court stated,

There is a clear distinction between the power to investigate and the jurisdiction or authority to decide and act upon a particular subject matter .../here/ the matter was not even within the jurisdiction of the F.B.I. or the Department of Justice within the meaning of that phrase as contained in section 1001.

In United States v. Levin, 133 F. Supp. 88 (D.C. Cal. 1953, pub'd. 1956), it was held that 18 U.S.C. § 1001 did not apply to one who made the false statement to the Federal Bureau of Investigation (then involved in investigating a larceny) that he had never told anyone that he had any information as to the identity of the owner of the stolen property when in fact he had. The Court discussed at some length the case of Marzani v. United States, 168 F. 2d. 133 (10th Cir. 1948) aff'd. 335 U.S. 895 (1948) (4-4), in which the defendant, who had been requested to resign his position

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in the State Department for security reasons, falsely denied certain charges against him in an interview with his superior officer. His conviction under 18 U.S.C.A. § 1001 was affirmed by the Court of Appeals, which pointed out that the proceeding in which the false statements were made was in the nature of an appeal from the request for a resignation. The Levin case pointed out that the false statements in the Marzani case were made by one employed or entitled to employment by the United States to an officer who had the authority to make final disposition of the pending matter. The court went on to say at p. 90,

> It is clearly distinguishable from a situation where the representative of a depamment or agency of the United States is merely collecting facts or information from persons under no legal obligation to give information to determine whether any action shall be taken by that agency or department, or to sustain action which has been taken.

The court also argued that Congress did not intend that this statute apply in every investigation since numerous statutes have been enacted which authorize agents to administer oaths to those from whom they are seeking information.

In United States v. Allen, 193 F. Supp. 954, 957-959 (D.C.S.D. Cal. 1961) the court held that allegedly false answers given by the defendant as a witness before a Grand Jury were not false statements within the statute, even though the defendant was subpoenaed to appear as a witness before the Grand Jury. The Court indicated that in view of the fact that the defendant's testimony did not relate to any claim, that he sought no advantage

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from the government, and that he was merely a witness who answered questions propounded to him, the statute did not apply. The Court said that the defendant should have been charged with perjury.

In United States v. Philippe, 173 F. Supp. 582 (D.C.S.D. N.Y. 1959) it was held that the false oral denial by the defendant of a suspected source of income made to a special agent of the Internal Revenue Service investigating and interrogating the defendant under oath for possible criminal income tax evasion, did not constitute a "false statement" within the purview of U.S.C.A. § 1001. The court said at p. 584,

> "The 'statement' attributed to defendant herein we are convinced are hardly calculated to and cannot possibly pervert the authorized functions of a Special Agent of the Intelligence Division, Internal Revenue Service or for that matter the service or the department . . . Refusal of a suspect to affirmatively assist a criminal investigation in preparing a case for criminal prosecution against hemself has no tendency to pervert the investigator's function (a valid distinction is readily apparent where the suspect proffers, e.g. false net worth statements, affadivits, or question and answer statements revealing facts peculiarly within the knowledge of the suspect, not otherwise obtainable by the investigator and upon which the latter is requested to reply)."

To the same effect is United States v. Davey, 155 F. Supp. 175 (D.C.S.D. N.Y. 1957) where the defendant's motion to dismiss the charge involving 18 U.S.C. § 1001 was granted. The court held that an inquiry into the defendant's use of a fictitions name in registering with the local draft board was not a matter within the jurisdiction of the Federal Bureau of Investigation since its authority and function were investigative, and therefore

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mere negative responses to questions of such agents, though false, were not statements within the purview of the statute. The court did say that there might be other situations where statements made to the Federal Bureau of Investigation would come within the prohibition of 18 U.S.C.A. § 1001.

In the recent case of Patemnostro v. United States, 311 F. 2d. 298 (5th Cir. 1962), the court held that where the defendant's essentially "no" responses to Internal Revenue Service Agents' questions during a conference which was not initiated by the defendant and which did not relate to a claim by defendant against the United States, such responses were not statements or matters within their "jurisdiction" under 18 U.S.C.A. § 1001.

There are cases which apparently conflict wht the above cases. In United States v. McCue, 301 F. 2d. 452 (2d Cir. 1962), it was held that false statements and representations to investigating agents of the Internal Revenue Service came within the reach of 18 U.S.C.A. § 1001. The court said at p. 454,

> "Analysis of the section reveals no ambiguity. The elements of the offense are (1) a statement, (2) falsity (3) that the false statement be made 'knowingly and wilfully,' and (4) that the false statement be made in a 'matter within the jurisdiction of any department or agency of the United States.'"

The Court brushed aside the cases of United States v. Stark, 131 F. Supp. 190 (D.C.S.D. N.Y. 1957) by saying,

> The case of the citizen who replies to the policeman with an 'exculpatory'no' ' can beleft until it arises. Id at 455.

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In the McCue case, the appellants had voluntarily appeared before representatives of the Treasury Department and were under oath.

The court further pointed out that neihter the legislative history nor the Supreme Court cases contain any suggestion of "confirming the effect of the statute to any smaller area than that encompassed by its own broad language". id. (The court also held that the statute applies to oral statements. Id. at 456).

In United States v. Silver, 235 F. 2d. 375 (2d. Cir. 1956) and Smith v. United States, 257 F. 2d. 133 (10th Cir. 1958), convictions of taxpayers under 18 U.S.C.A. § 1001 for making false statements to revenue agents were upheld, although in neither case was the precise issue with which we are faced discussed. See also Neely v. United States, 300 F. 2d. 67 (9th Cir. 1962) (held that statements for which there can be convictions under 18 U.S.C.A. § 1001 are not limited to those required to be made by law or regulation).

In Brandow v. United States, 268, F. 2d. 559 (9th Cir. 1959), the court in expressly refusing to follow the cases of United States v. Levin, 133 F. Supp. 88 (D.C. Cal. 1953, pub'd. 1956), and United States v. Stark, 131 F. Supp. 190 (D.C. Md. 1955), upheld the defendant's conviction under 18 U.S.C.A. § 1001 for signing an affidavit before Internal Revenue Agents which falsely stated that at no time during discussions at a taxpayers house did a former agent or anyone else state directly or imply that the agent was willing to disclose the government's case against the taxpayer for income tax evasion.

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The Levin and Stark cases, supra, were also questioned in United States v. Van Valkenburg, 157 F. Supp. 599 (D.C. Alaska, 1958), in which it was held that false statements made to an assistant United States Attorney to induce action against a third person were with regard to matters "within the jurisdiction" of the office of the United States Attorney. Thus the Court upheld the conviction under 18 U.S.C. § 1001.

It might be argued that since there are other statutes which cover false claims, e.g. 18 U.S.C.A. 287 and other false statement statutes covering specific situations, 18 U.S.C.A. § § 1002-1027, 18 U.S.C.A. § 1001 should be read to cover any false statement to a government agency.

In one case it was stated that 18 U.S.C.A. § 1001 "was intended to serve the vital public purpose of protecting governmental functions from frustrations and distortion through deceptive practices, and it must not be construed as if its object were narrow and technical." Ogden v. United States, 303 F. 2d. 724 742 (9th Cir. 1962). In United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952) the Supreme Court referred to 18 U.S.C.A. § 1001 in broad terms by describing it as "a statute specifically outlawing all false statements on matters under the jurisdiction of agencies of the United States."

One could certainly compare the Commission's activities with those of the Federal Bureau of Investigation, Treasury agents, and a Grand Jury for purposes of deciding the applicability of the

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statute in question. The purposes of the Commission are investigative. The witnesses have initiated no action and seek nothing in the way of government action.

However, as the recent case of United States v. Citron, 221 F. Supp. 454, 455 (S.D. N.Y. 1963) pointed out, "the exact scope of this possible 'investigative exception' to section 1001 has not been established . . . its potential application would turn in any event upon the peculiar facts of a given case." It should be noted that the exception, has for the most part, been applied to criminal investigations where the defendant's false statement was an "exculpatory no". Also, several of the cases applying this exception listed as a factor, the fact that the defendant was not legally required to make the statement. e.g. United States v. Stark, 131 F. Supp. 190, 206 (D.C. Md. 1955). When one has been subpoenaed to appear as a witness, it would seem that he is legally required to answer questions put to him.

The more logical view is to take the statute at face value and say that any false statement to a government agency is a violation of 18 U.S.C.A. § 1001. The Commission's function (so far as it has been established) is of a fact finding nature. False statements would certainly hamper its activities. Thus, the purpose of the statute would be served by including within its scope false testimony given the Commission or its staff members. (Whether the testimony is material, might prove difficult to establish, although there need be no reliance on the falsehood by the Government. United States v. Blake, 206 F. Supp. 706

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(W.D. Mo. 1962)).

However, since there is some doubt as to the applicability of 18 U.S.C.A. § 1001, it would seem wise to administer an oath to all witnesses of importance so that if some sanction is desired, the perjury statute will be applicable.

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March 11, 1964

MEMORANDUM FOR MR. BELIN

FROM: Mr. Hoch

SUMMARY:

In most jurisdictions, including Texas and the federal courts, Marina would not be allowed to testify against her husband in a criminal prosecution. This incompetency would end with her husband's death, but the rule preventing her from testifying about privileged communication would not end with Oswald's death. While there is much conflict as to what is encompassed within the term "communication" it seems clear that after Oswald's death the Texas and the federal courts would allow Marina to testify about anything except oral and written communications from her husband.

The general rule is that evidence of prior criminal acts of the defendant is inadmissible in a criminal prosecution. However, such evidence may be introduced under a number of exceptions, such as to prove identity or to show a common scheme or plan. Many cases, particularly the older ones would indicate that the Walker incident would have been inadmissible in a trial of Oswald since it would not fit into any of the exceptions. Some modern courts might admit the evidence on any number of theories.

It is my feeling that in view of the fact that the Walker incident and the Kennedy assassination have not been shown to be in any way connected and that the means employed to commit the crimes are not unusually similar, the Walker crime would not be admissible.

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All it could show is that Oswald had a propensity to commit such crimes, and courts will not allow evidence for this purpose because of its prejudicial effect. Texas and the federal courts have been stricter than other courts in admitting evidence of prior crimes.

In order for a jury to consider the Walker crime, it must be shown with substantial evidence that Oswald committed it. In Texas, it must be shown beyond a reasonable doubt. If we exclude Marina's testimony, these standards would be difficult to meet.

It is clear that evidence of Oswald's flight from the TSBD, his shooting of Tippit, and his resistance to arrest would be admissible as evidence of consciousness of guilt and thus of guilt itself.

I. Would Marina Oswald's testimony concerning her husband's alleged attempted assassination of General Walker be admissible in (a) the majority of United States jurisdiction, (b) in the federal courts, and (c) in Texas?

A. The Factual Setting.

Marina Oswald testified that during the Spring, her husband attempted to assassinate General Walker. She based this conclusion on a letter he left her telling her what to do assuming he was jailed, his actions on the night in question, and his admission that he had fired at General Walker. See Ball and Belin memorandum. The similarities between this attempt and the Kennedy assassination are: (1) a rifle was used, although the ballistic test was not conclusive as to whether the same rifle was used in both crimes, (2) the objects of the crimes were well known political figures, both of whom would not be popular with pro-Communist sympathizers, and (3) the "get-away" was by means of walking and bus (assuming that Oswald assassinated President Kennedy which is really circular reasoning since the proof of the Walker killing is supposed to be probative of the identity of the assassination of President Kennedy.).

The crimes are dissimilar in that (1) one was accomplished at night, the other during a motorcade; (2) Oswald left his wife instructions as to what to do prior to the Walker incident, while he did not do so prior to the Kennedy assassination; and (3) apparently

the Walker incident was carefully planned for months, while this could not have been done with the Kennedy assassination.

B. Testimony of a Wife.

In some states the spouse would not be considered competent in this situation to testify against the other spouse, while a majority of states provide that the spouse is competent in all cases, but the witness spouse or the defendant spouse or both, have the privilege of refusing to permit the testimony to be heard. Note, "Competency of One Spouse to Testify Against the Other in Criminal Cases: Modern Trend. 38 Va L. Rev. 359 (1952).

The federal courts have recognized and consistently applied the common law rule that a wife cannot testify against her spouse when he is accused of a crime. Id. at 368.

The relevant Texas statute provides that "The husband and wife may, in all criminal actions, be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Vernon's Annot. Tex. c.c.p. art. 714.

The general rule is that the incompetency of the spouse and the privilege of each spouse against the adverse testimony of the other are terminated when the marriage ends by death. McCormick, Evidence 178 (1954); 44 Tex. Jur. 1033 (1936).

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It is quite clear that communications between husband and wife are privileged. McCormick, Evidence 168 et seq (1954). This is true in the federal courts, Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934) and in Texas, Vernon's Annot. Tex. C C P 714 ("Neither husband nor wife shall, in any case testify as to the communication made by one to the other, while married").

Written communications come within the scope of the privilege McCormick, Evidence 170 (1954); 1 McCormick and Ray, Texas Law of Evidence 419 (2nd ed. 1956). Documents of communication coming into the possession of a third person - i.e. they were obtained from the addressee spouse by voluntary delivery - should still be privileged (for otherwise the privilege could by collusion be practically nullified for written communications); but if they are obtained surreptitiously or otherwise without the addressee's consent the privilege should cease. 8 Wigmore, Evidence 668 (McNaughten edition, 1961). However, the rulings on this issue are not harmonious, id; compare Bowman v. Patrick, 32 Fed. 368 (C C ED Mo 1887)(letters from a husband to a wife found among his papers by the husband's administrator and by him delivered to the party, excluded) with Dickerson v. United States, 65 F. 2d. 824 (1st Cir. 1933) (a wife murder case, a letter by the defendant to his wife, found among her effects by a third person, handed by them to the insurer and thence to the prosecution, held admissible).

In Texas, if the documents are voluntarily delivered by the addressee spouse, the privilege should remain in favor of the other spouse. McCormick and Ray, Texas Law of Evidence, 422 (2nd ed. 1956); Walker v. State, 64 Tex. Cr. R. 70, 141 S. W. 243 (1911).

Most treatise writers contend that the privilege should extend just to communications, McCormick, Evidence, 171 (1954); 8 Wigmore, Evidence, 651 (McNaughton ed. 1961); however, a great number of courts, maybe even a majority, have construed their statutes to extend the privilege to acts, facts, conditions, and transactions not amounting to communications at all. Id.

Some cases have held that acts done privately in the wife's presence amount to "communications." e.g. People v. Dughete, 299 N.Y. 194, 86 N.E. 2d 172 (1949) (husband charged with theft; wife's testimony as to the husband's acts in her presence of bringing in the loot and hiding it under the bed and in the basement held to be a violation of the statutory privilege for "confidential communication." The court emphasized, however, that one of the hiding spots was under the nuptial bed).

Some cases would even go further and say that any information secured by the wife as a result of the marital relation and which would not have been known in the absence of such relation is protected. See McCormick, Evidence, 171 (1954); 8 Wigmore, Evidence 697

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(McNaughten ed. 1961); Spearman v. State, 68 Tex. Cr. 449, 152 S. W. 915 (1913) (dissent). Thus, cases have held that information secured by one spouse through observation during the marriage as to the health or mental condition of the other spouse would be protected. Id. Apparently, the cases in this area are in a state of confusion.

The United States Supreme Court has said that "the privilege, generally, extends only to utterances, and not to acts." Pereira v. United States, 347 U.S. 1, 6 (1953) (dictum). In Texas, communications include only utterances and not acts or conduct of a spouse. 1 McCormick and Ray, Texas Law of Evidence, 419 (2d ed. 1956); Latham v. Latham, 62 Tex. Civ. app. 431, 146 S. W. 635 (1912) (In a will contest wife allowed to testify as to husband's conduct tending to show that he was suffering from an insane delusion; Howard v. State, 103 Tex. Cr. 205, 280 S. W. 586 (1926) (in homicide case that husband came home with a bloodstained shirt not a privileged communication); Spicer v. State, 115 Tex. Cr. 110, 28 S. W. 2d 810 (1930) (in homicide case, whether witness' wife never told him that she shot deceased, not incompetent where answered in the negative); McDonald v. State, 138 Tex. Crim. 510, 136 S. W. 2d 816 (1940) (bigamy, second wife's testimony that defendant had received a letter from his first wife admitted.)

The prevailing American rule is that the privilege for communications between spouses does not end when the marriage is terminated by death. McCormick, Evidence 178 (1954); 8 Wigmore,

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Evidence § 2341 (McNaughton rev. 1961). The privilege continues in the federal courts, Pereira v. United States, 347 U.S. 1, 6 (1953) (dictum) and in Texas. Vernon's Annot. Tex. C C P 713 ("Neither husband nor wife shall, in any case testify as to a communication made by one to the other, while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation existed, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to exculpate or justify an offense for which either is on trial." This statute has been held in a criminal case to forbid the testimony from either spouse as to communications between them even though they are divorced at the time of the trial. Bell v. State, 88 Tex. Cr. 64, 224 S. W. 1108 (1920)); 1 McCormick & Ray, Texas Law of Evidence, 424 (2d ed. 1956).

Thus it can be seen that had Oswald lived, his wife would not have been allowed to testify against him in any criminal trial. After his death, Marina would not have been allowed to testify as to any privileged communications in any judicial proceeding. In Texas and in the federal courts, this privilege would have covered just actual communications. This would include his admission of the Walker incident and the written instructions he left Marina. Marina would be able to testify as to his behavior and could identify such things as the pictures. Some states would not allow Marina to testify as to any information she

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received as a result of the marital relation and which would not have been known in the absence of such relation.

Conceivably, the privilege could have been claimed by Marina before the Commission. Blau v. United States, 340 U.S. 332 (1951)(privilege applied in Federal Grand Jury Investigation). It is probable that disclosure of privileged communication may not be compelled in an administrative investigation. "Since the facts disclosed in the investigation might be introduced as evidence in a subsequent hearing, personal privileges have as much justification here as in adversary proceedings. Hence it would seem that wherever they are held to exist in the latter case, they should also extend to the former." 54 Harv. L. Rev. 1214, 1219 (1941). In Matter of City Council of New York v. Goldwater, 284 N. Y. 296, 31 N.E. 2d 31 (1940), it was held that the statutory physician-patient privilege could be asserted in an investigative hearing before a special committee of the City Council. The court said that the privilege may be asserted whenever the power of the court is involved. Here the defendant was served with a subpoena duces tecum requiring the production of hospital records. See also, McMann v. SEC, 87 F. 2d 377, 378 (2d Cir. 1937) (dictum); Cahan v. Carr, 47 F. 2d 604, 605 (9th Cir. 1930); Cahan v. United States, 283 U.S. 862 (1931)(dictum); Matter of Hirshfield v. Hanley, 228 N.Y. 346, 349, 122 N.E. 252 (1920)(dictum); but see [1926-28] Rep. Atty. Gen. Mich. 457 (1927); Sabon v. People, 142 Col. 323, 350 P.2d 576 (1960)(under Colorado statute privilege did not extend to mental

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health hearing). In United States v. Wenfree, 170 F. Supp. 659 (D.C. E.D. Pa. 1959) it was held that information obtained by IRS agents from the interrogation of a wife would not be suppressed in a prosecution of her husband for attempting to evade income taxes. The case seemed to be concerned with the wife's competency rather than privileged communications. The Court lists many state cases permitting the use of information secured extra-judicially from one spouse in the process of investigation.

It would seem that since the privilege is not constitutionally required and since Supreme Court pronouncements are directed at federal courts under the court's supervisory power, the Commission could ignore the privilege. See generally 133 ALR 732 (1941); 8 Wigmore § 2300 (a); 1 Wigmore § 4(c). Since I was not asked about this point, I really did not go into it very deeply. The point seems in doubt.

See 45 Cal Law Rev 547

C. Hearsay.

It is quite clear that admissions are admissible in every jurisdiction on any number of theories. 2 Wharton Criminal Evidence, § 397 (12th ed. 1955); McCormick, Evidence ch. 27 (1954); 2 McCormick & Ray, Texas Law of Evidence § 1162 (2d ed. 1956). Thus, the fact that Martin's testimony as to Oswald's admission that he shot at Walker was hearsay would not render it excludable.

D. Prior Criminal Acts.

1. General considerations.

The general rule is that in a criminal case, evidence that the defendant committed other crimes is inadmissible. McCormick, Evidence 327 (1954); 1 Underhill, Criminal Evidence § 205 (5th ed. 1956); Boyd v. United States, 142 U. S. 450 (1892); Ewing v. United States, 296 F. 2d 320 (9th Cir. 1961); 23 Tex. Jur. 2d 194. As will be later shown, the actual rule should be stated that in a criminal case, evidence that the defendant committed other independent and unrelated crimes is inadmissible to show that the defendant would be likely to commit the crime with which he is charged. McCormick, Evidence 327 (1954). The rule that the prosecution cannot initially introduce evidence of the defendant's bad character is universal. Id.

The reasons often given for the existence of the general rule is that (a) the probative value of the evidence is outweighed by its prejudicial effect, because it is expected that the jury

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will decide that since the defendant is a "bad man" he is likely to have committed the crime; (b) it would be unfair to the defendant since he comes into court prepared to meet the charges contained in the indictment and not other ones; and (c) the jury would become confused and the process would be time-consuming, since these crimes are collateral matters. See 1 Underhill, Criminal Evidence § 205 (5th ed. 1956); Morgan, "Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence," 3 Vand. L. Rev. 779 (1950). Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64 (1949).

It is interesting to note that many of these reasons would apply to the defendant's activities. It is clear that the evidence is not irrelevant. In fact, the main reason that the evidence is rejected is that it will weigh too much with the jury. Smith v. United States, 173 F. 2d 121 (9th Cir. 1949). It has been said that the risk of this type of evidence being prejudicial is less in a jury-waived trial. See Dixon-Yen v. State, 228 Wis. 446 279 N. W. 15 (1938); Annot. 116 A. L. R. 553 (1938).

A series of exceptions has generally been appended to the general rule. Thus, evidence of other criminal acts may be introduced in order to establish motive, intent, design or plan encompassing all of the crimes (often called a scheme or system) and identity. Such evidence can also be admitted when the collateral crime is within the "res gestae"

of the crime for which the defendant is being tried, to rebut special defenses such as mistake or accident, and it has been introduced much more freely in trials concerning sexual offenses. See People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901); United States v. Ioculo, 226 F. 2d 788, 793 (7th Cir. 1955); Note, "Admissibility of Evidence of Prior Crimes in Larceny Trials," 25 Ind. L. J. 64 (1949); Underhill, Criminal Evidence § (5th ed. 1956); Wharton, Criminal Evidence, § 233-240 (12th ed. 1955); 23 Tex. Jur. 2d 195 (1961).

McCormick has given an expanded list and has warned "that the list is not complete, for the range of relevancy outside the ban is almost infinite; and further that the purposes are not mutually exclusive, for a particular line of proof may fall within several of them. Some are phrased in terms of the immediate inference sought to be drawn, such as plan or motive, others in terms of the ultimate fact, such as knowledge, intent, or identity which the prosecution seeks to establish." McCormick, Evidence 327 (1954).

One of McCormick's exceptions is evidence "to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." Id. at 328. Very few cases were cited by McCormick under this exception. Since this exception is relevant to our problem, we will return to it in greater detail.

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Since there are so many situations which fall within the exceptions to the general rule, many writers have argued that the rule should be phrased so as to admit evidence of other crimes where relevant unless that evidence can only be used to establish the defendant's disposition to commit the crime as a basis for the inference that he did commit the crime. Morgan, Maguire & Weinstein, Cases on Evidence, 330 (1957) (see cases and treatises cited therein); ALI, Model Code of Evidence § 303.

One reason why it is felt that the rule should be so stated is that it makes clear the basis of exclusion and directs the attention of the trial court to the question of logical relevancy. Trautman, "Logical or Legal Relevancy - A Conflict in Theory," 5 Vand. L. Rev. 385, 405 (1952); see also Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 Harv. L. Rev. 988 (1938).

However, as Morgan has pointed out, "the group of exceptional situations in which the evidence is received comprehended almost all of those in which its relevancy depends upon its use as a basis for an inference to something other than disposition." Morgan, Basic Problems of Evidence, 214 (1962).

Another view suggested by treatise writers and some cases is that "the problem is not merely one of pigeon-holing, but one of balancing, on the one side, the actual need for the other crimes-evidence in the light of the issues and the other evidence available to the

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prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weaknesses of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility, McCormick Evidence 332 (1954). Under this view, the judge would have the discretion to rule on the admissibility, basing his decision on whether or not the probative value of the evidence is outweighed by the danger of undue prejudice or of misleading the jury. McCormick, id., Unif. Rules of Evid., Rule 45; Neff v. United States, 105 F. 2d 688, 692 (8th Cir. 1939) (admissibility of other crimes in discretion of court, stated as a ground for affirming the judge's rule admitting such evidence.)

McCormick's suggestion might be a way in which the Commission could handle the Walker incident.

Before going into the case law, it is well to note that this is a very confused area of the law. Most courts, when admitting evidence of other crimes, do so under one of the usual exceptions. Many of the courts disagree on the scope and the application of these exceptions. Much seems to depend on the precise facts of the case. It has been asserted that "no part of the law of evidence is more consistently and violently litigated than that having to do with the admissibility of proof of other criminal acts . . . for the purpose of helping establish some element of the criminal charge." Morgan, Maguire, and Weinstein, Cases on Evidence 380 (1957).

First we must determine if evidence of a similar crime committed by the defendant would be admissible under one of the

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exceptions or as relevant to a matter other than the defendant's propensity to commit the crime. Then we must establish if the circumstances of the Walker case are similar enough to the circumstances of the Kennedy assassination so as to warrant the inference that Oswald was involved in both. The cases have rarely separated these two matters. It has been said that the latter point is within the discretion of the trial judge. Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64, 66 s 13 (1949). Many appellate courts have, however, decided this question themselves.

It is interesting to note that most of the reported cases indicate what evidence is relevant and therefore admissible. There are not many cases passing upon those types of evidence which the established legal formulae declare to be irrelevant. I thought perhaps I was missing the cases, but I found a law review article which commented upon this phenomena. Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64, 67 n. 16 (1949). They suggest that this fact is either due to the field being under-developed or that the evidence is so clearly irrelevant that it has been consistently rejected by the trial court, from which there was no appeal. The article then states that if this is so, "then a lack of cases on this point has the same effect as numerous cases would have declaring the evidence irrelevant." id. This theory does not take us very far.

Possibly another reason for a paucity of cases excluding this evidence is that, "It is extremely difficult to prevent a determined and imaginative prosecutor from getting in evidence of other crimes."

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Morgan, Maguire, and Weinstein, Cases on Evidence 380 (1957); see also Mr. Ball who believes that courts will take in this evidence and pin any exception label to it in order to justify its admission. As I will show, I think the courts are still wary of letting in this type of evidence.

2. American Jurisdictions not Including the Federal Courts and Texas.

The landmark case in this area is People v. Molineux, 168 N.Y. 264, 61 N. E. 286 (1901). The defendant was indicted for murder by the administration of a deadly poison sent through the mail in a box which contained a bottle in which the poison was mixed in with a harmless powder in common use. The prosecution introduced evidence connecting the defendant with the alleged killing of another person sometime before, by means of the same poison mixed with a medicinal powder alleged to have been sent through the mail. The court stated the general rule and then attempted to fit the case into the exceptions.

Since the motives that the defendant allegedly had in each case had no relation to each other, it could not be said that the evidence of the other crime indicated a motive in the crime for which the defendant was being tried.

As to intent, there was no need to prove this factor since the act itself clearly indicated an intent to murder. The court pointed out that crimes referred to under this category constitute distinct classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by

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evidence of successive repetitions of the act. Examples would be receiving stolen goods and embezzlement.

Obviously, the proof in this case could not relate to disproving mistake or accident since these defenses were not and could not be raised. There was no doubt that the killing was not accidental and the cause of death was not in doubt.

As to a common scheme or plan, the court said, "To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of a system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Here there was no connection between the crimes and no connection proven in the mind of the actor. There was no common purpose which the commission of both crimes would satisfy." The court pointed out that even if there was any doubt on this point, the benefit should go to the defendant. "The naked fact that the same means were used in two cases, simply proves that two distinct crimes may have been committed by the same person by similar means."

The court said with reference to the last exception, "When the evidence of an extraneous crime tends to identify the person who committed the crime charged in the indictment, it is admissible . . . The mere fact that two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as

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the poisoner of Mrs. Adams, unless his guilt of the latter crime may be inferred from the similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet, and that no other person could have killed Mrs. Adams." Such was not the case. "Therefore, the mixed similarity of these crimes proves nothing." Hence, the court held the evidence inadmissible.

The court's view in the Molineux case as to the scope of the various exceptions was widely cited and generally accepted in the past. As I will show, some courts have expanded these exceptions and have added new exceptions. It seems clear that the Walker situation would be inadmissible in a trial of Oswald for the assassination of President Kennedy under the Molineux reasoning.

The following statements from American Jurisprudence were widely cited by the earlier cases:

> Evidence of other crimes is competent in a criminal trial to prove the specific crime charged when it tends to establish a common scheme, plan, or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. 20 Am. Jur. § 314.

> When introducing evidence of other crimes for the purpose of identification, it is necessary that there be such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. 20 Am. Jur. § 312.

Examples of cases following the Molineux view of the scope of the restriction are as follows:

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In Williams v. State, 143 So 2d. 484, 486 (Fla. 1962) (dictum) it was said, "Only such evidence of the crime at the Blue Grass Market as is relevant to show or which tends to show that defendant was present and participated in both the Blue Grass Market crime and the crime at the H & K market, that he used the same pistol in the perpetration of both crimes, or that both crimes followed a similar pattern, is admissible."

In Estes v. Commonwealth, 239 S.W. 2d 775, 777 (Ky. Ct. of App. 1922) (held in a prosecution for uttering a forged check, testimony that defendant at a railroad station a month before the offense charged procured property consigned to another than he represented himself to be and about a month before that presented a forged check payable to the same party, improperly admitted) it was said, "Evidence of another crime is not admissible even on the question of identity, unless the circumstances tend to show that he who committed the one must have committed the other."

In People v. Caulick, 359 Ill. 339, 183 N.E. 217 (1932) it was held in a prosecution for larceny of a coat from a certain company, evidence that the defendant stole and attempted to steal from two other stores within an hour or two of the charged offense was inadmissible. See also People v. Gleason, 36 Ill. App. 2d. 15, 183 N.E. 2d 523 (1962) (held that evidence that defendants had three weeks earlier participated

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in a somewhat similar theft from the same department store was not admissible on the ground that it tended to establish a common scheme, plan, or system embracing the commission of two or more closely related crimes so that proof of one would tend to establish the other); Boulston v. State, 307 p 2d. 861 (Okla. Crim. 1957) (held that admission of evidence as to armed robberies by defendant at witnesses' service stations at two other places than that of the place where the crime charged occurred was prejudicial error).

In Bunn v. State, 850 Okla. Crim. 14, 21, 184 p 2d. 621, 624 (1957) it was stated that "there have been many instances of abuse of this exception to the general rule [and] the abuse of this rule has caused the reversal of more cases on appeal in this court in recent years than that of any other one matter." This is probably an exaggeration, but it does show that counsel cannot always get this type of evidence in under the exceptions.

In State v. Velarde, 67 N.M. 224, 354 p 2d. 322 (1960) it was held in a rape prosecution that evidence that the defendant, who had claimed an alibi, had at another time abused another Indian victim improper since it could serve no purpose other than to show the defendant's disposition to commit the crime with which he was charged.

In Harris v. State, 189 Tenn. 635, 227 S. W. 2d. 8 ( ), another rape case, it was held that the admission of testimony that the witness was raped by the defendant about a week before the date of the

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offense charged, under similar circumstances, (both victims thought a knife was held to their neck and there were threats against both victims' lives) was reversible error. The court referred to another case, Warren v. State, 178 Tenn. 157, 156 S.W. 2d. 416 (1941) as marking a limit beyond which the court had not gone in permitting proof of an independent crime for the purpose of identification. In the Warren case, the two robberies were similar in that the robbers were dressed the same, carried a pistol in one hand and a flashlight in the other, had grease on, the robberies took place a few nights apart in the same area and at the same time in the same manner. The court allowed in the evidence for purposes of identification.

In State v. Stephenson, 191 Kan. 424, 381 P 2d. 335, 341 (1963) (dictum), it was said, "We hold upon the facts here presented where one is charged with a criminal offense, a statement in the nature of an admission or confession, to be admissible in evidence, must relate to the offense or offenses for which the accused is on trial." The court did say, however, that evidence that the defendant had previously been convicted of a similar crime done in a similar manner would be admissible to prove identity. Why the fact that an admission or confession is involved would alter this, I do not understand.

In State v. Folsom, 28 Wash. 2d. 421, 183 p. 2d 510 (1947) it was held in a prosecution for abortion and manslaughter that evidence that the accused performed abortions three months after the commission of the offense for which he was charged was inadmissible since there was

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no connection between the various crimes.

The major modern case allowing in evidence of prior similar crimes which would not be admissible under the Molineux formulation is People v. Peete, 28 Cal. 2d 306, 169 p. 2d 924 (1946) (Traynor, J.). In this case, the defendant had previously been convicted of the murder of her landlord. His body had been found buried under the house, the death being caused by a bullet from behind severing the spinal cord at the neck. After his death, the defendant lived in his home; opened his mail; forged his name to checks, papers and a lease of the house; and gave away his property.

In the case before the court, the defendant had been employed by the deceased as a domestic servant. The deceased was found buried, the death being caused by a shot from behind, which was an attempt to sever the spinal cord. The defendant posed as the deceased's foster sister, forged documents, opened mail, and gave away property.

The court sustained a charge to the jury which provided that if the jury believed the evidence of the previous crime, it could consider it to determine the defendant's motive, her knowledge, her intent, the absence of accident, the identity of the killer and the presence of a general scheme or plan of which both crimes were a part; but that it could not consider the evidence of the previous murder to show the defendant's disposition to commit murder, and hence the likelihood that she committed the murder for which she was charged.

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The court said that in California the rule is "that except when it shows merely criminal disposition . . . evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged." The court also declared that "When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design." Here the court determined that the unifying scheme was to acquire property. The court also said that the other murder indicated a motive for the crime (acquisition of money) and tended to identify the defendant because of the similarity between the crimes.

Justice Carter, in a strong dissent, remarked, "The development of the law in this state shows a departure from the early restrictions governing the application of exceptions to the general rule as defined in the Molineux case . . . In my opinion, the pendulum has swung too far to the side of admissibility."

In People v. Webster, 79 Cal. App. 2d 321, 179 p. 2d 633 (1947) the defendant was convicted of murder. Evidence of a similar attack by the defendant was introduced. The court considered the other attack "to determine if there was sufficient similarity in the two attacks to show a common scheme or plan." Defendant "picked up" both

women in cocktail bars and spent considerable time drinking with them. Both women had bruises and abrasions on their heads. Both women were cruelly choked, evidently with the right hand of their attacker. The garments of both were torn open leaving the upper portion of the front of the torso exposed. The court concluded, "It would be unusual to find two crimes with greater details of similarity of execution showing a common plan or scheme or system in the commission of both. Thus the evidence of the collateral crime was properly admitted."

Apparently, California, while paying lip service to the general rule, has gone quite far in admitting evidence of this nature. Also, while California courts have described the rule in terms of logical relevancy, the admission of evidence of other offenses is usually justified by reference to one of the same categories of exceptions by which the exclusionary rule is limited in other jurisdictions. Blum, "A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California," 7 U.C.L.A.L. Rev. 463 (1960).

In Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51 (1928), the defendants were charged with a series of robberies. In this case, they were being tried for one of them. The prosecution introduced evidence of the others. Witnesses to all of these robberies were in practical agreement in describing the clothing worn by the defendants, the manner of execution of the robberies, the agencies employed and other characteristics common to all of the alleged robberies. All of

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the robberies occurred in one neighborhood, and within a radius of a mile and a half. In each robbery, an automobile was employed by the robbers and only two persons were in the car. They were dressed in uniforms of bus drivers and carried guns and flashlights. Their plan was to drive their car next to that of their victims and compel them to stop. They would then impersonate officers and cause the victims to leave their cars, and then search and rob them. The robberies in each instance occurred in the late evening. It was held that since the identity of the defendants was in issue, it was not error to receive the testimony of other unconnected crimes where the sole purpose of such testimony was to establish the identity of the defendants.

The Court in Brashear v. Commonwealth, 199 S. W. 21, (Ky. Ct. App. 1919) (dictum) stated that "when a crime is committed by novel means or in a particular manner, the proof of other distinct crimes may be admitted for the purpose of identifying the accused as the perpetrator of the crime, by showing that he has committed other distinct offenses in the same manner."

In Smith v. State, 215 Ind. 629, 21 N.E. 2d 709 (1939), the defendants were convicted of maliciously and mischievously damaging the window glass of a barber shop. It was held that evidence that window fronts of other barber shops had been broken by the accused in a manner similar to that allegedly used by the accused in committing the offense with which they were charged was admissible on the issues of motive and

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identity. The court said, "Where the circumstances surrounding the offenses other than that charged are of a similar nature, showing use of similar or peculiar instrumentalities in the commission of each offense, or employment of a uniform scheme or method, evidence of such offenses is both relevant and material and is admissible as having probative force to prove the defendant guilty of the particular crime charged."

In State v. Chance, 92 Ariz. 351, 377 P. 2d 197 (1962), a robbery prosecution, it was held that evidence that the defendant used the same car, the same unusual disguise, and the same method of operation in another robbery as had been used in the crime for which he was charged, was admissible for the limited purpose of identifying the defendant. See also State v. Francis, 91 Ariz. 219, 371 P. 2d. 91, 93 (1962) (rape case; similar attempt at rape admitted for purpose of identifying defendant) where it was said ". . . [1] here a crime has been committed . . . in a peculiar or unusual manner, evidence of recent similar acts or crimes by the accused committed by the same means or in the same manner are provable to identify the accused as an inference from the similarity in method."

In Nester v. State, Nev. 334 P. 2d 524 (1959), a rape prosecution, where there was an attempt to establish the identity of the defendant by characteristic conduct involved in another rape wherein the assailant behaved in an identical manner, the trial judge heard the substance of the other rape outside the presence of the jury

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and determined as a matter of law that the evidence was admissible even though its nature would make it prejudicial under different circumstances. The appellate court held that the record did not establish that the balance struck by the trial judge between prejudice and the probative weight of the evidence was manifestly wrong.

It should be noted that the exception mentioned earlier for sex offenses generally does not apply in rape cases, so that factor was not determinative in the rape cases discussed. Lovely v. United States, 169 F. 2d. 386, 390 (4th Cir. 1949). But see Commonwealth v. Winter, 289 Pa. 234, 137 A 261, 263 (1927) where it was said:

> "The fact that A, who is being tried for the murder of Y, was one time convicted of murdering X, has no probative value to prove A guilty of murdering Y, if the two murders were in no way related. On the other hand, if A is being tried for rape or attempted rape of Y, the fact that recently he raped or attempted to rape X is admissible in evidence because it tends to prove that he possessed such an abnormal mental or moral nature as would likely lead him to commit the offense charged."

In State v. Biggs, 224 N.C. 722, 32 S. E. 352 (1944), a prosecution for murder in the course of a robbery of a filling station, it was held that evidence that the defendants perpetrated a holdup and robbery of a filling station operator in the same manner, twenty-seven days after the homicide was committed was admissible on the questions of defendant's intent, guilty knowledge and identification.

It should become increasingly clear that those courts which admit this evidence on such grounds as showing guilty knowledge and intent, are really just stating the exceptions without even attempting

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to fit the prior crime within the exception as did the court in the Molineux case. See e.g. State v. King, 111 Kan. 140, 206 P. 883 (1922); Williams v. People, 150 P. 2d 447 (1945) (Held in a prosecution of an unmarried mother for the murder of her bastard child, evidence concerning two earlier babies disposed of by defendant admissible to show deliberation and the identity of the murderer).

The above is a sampling of the cases. I think we can see from the above cases that, "the courts are not divided upon these abstract rules, but are in hopeless confusion in their application to particular facts." State v. Ford, 42 N. M. 638, 84 p. 2d. 80 (1938). The more recent cases have become more permissive in allowing in this evidence. There are a growing list of exceptions and the original exceptions have been expanded without much discussion.

3. Federal Courts.

The federal courts follow the general rules and the exceptions, 11 Cyc. of Fed. Proc. § 47. 119 et seq. (1963), but they have had just as much trouble applying them to particular factual situations.

The old but much cited case in this area is Boyd v. United States, 141 U.S. 450 (1892). The defendants were tried for murder in the perpetration of a robbery. Evidence was introduced concerning another robbery committed by the defendants in order to show, in part, the identity of the murderers. It was held that the evidence

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was inadmissible, there being little discussion of the issue. See also Fish v. United States, 215 F. 2d 544 (C. C. A. 1914) (arson for insurance - evidence that other insured items of defendant had burned under suspicious circumstances held inadmissible as having no probative value on question of whether defendant set the fire.)

In Lovely v. United States, 169 F. 2d 386 (4th Cir. 1948), the defendant was convicted of rape. He had admitted intercourse but denied that it was forcible. The court held that evidence of a prior rape under similar circumstances was inadmissible. The court said:

"[The case] was not of the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted . . . To bring evidence of other offenses within this rule, the test is not whether they have certain elements in common with the crime charged, but whether they tend to establish a preconceived plan which resulted in the commission of that plan." The court also pointed out that the right of persons accused of a crime to have the evidence confined to the issues on trial cannot be nullified by any unrealistic hypotheses.

Thus, while this case is not directly in point, it does indicate an attitude that the court will carefully scrutinize attempts to introduce evidence of prior criminal acts. See Hall v. United States, 235 F 2d. 869 (9th Cir. 1916) (In prosecution for unlawful assault upon a young girl, evidence that defendant did a similar act before inadmissible.)

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In United States v. Magee, 261 F. 2d. 609 (7th Cir. 1958), the defendant was convicted of robbing a bank. Evidence had been introduced that the defendant had robbed two other banks on the theory that it showed "ease of identification under circumstances similar to those surrounding the identification of the defendant by the Government witnesses." The conviction was reversed on the ground that such evidence was inadmissible. See also Ralston v. United States, 127 F. 2d 691 (5th Cir. 1942) (In a prosecution of city employee for conspiracy to steal fire clay belonging to the United States, held evidence of other instances in which defendant took city property inadmissible to show probability that defendant committed the crime charged).

The following cases allowed the admissibility of such evidence: Adams v. United States, 239 F. 2d 451 (D. C. Cir. 1956) (held in prosecution for housebreaking and larceny court did not abuse its discretion in admitting evidence of the defendant's participation in another alleged crime of a similar character committed the same evening); Tomlinson v. United States, 93 F. 2d. 652 (D. C. Cir. 1937) (In a prosecution for robbery, testimony that one defendant, three or four months before the offense charged, solicited witness to rob the same man at the same place as was later done by other defendants, and that such defendant outlined to the witness a plan for the commission of the proposed crime which closely conformed to the plan eventually followed, held admissible to prove plan, purpose and intent); Lotts v. United States, 152 F. 2d 623 (8th Cir. 1946)(evidence of thefts in Wisconsin and Minnesota which occurred the day before the theft in Iowa for which accused convicted, held admissible since it concerned the issue of intent and a common plan or scheme).

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4. Texas

Texas courts have been rather strict on allowing in evidence of prior criminal acts. While recognizing the exceptions, Texas courts have admitted evidence of other crimes for the purpose of identifying the accused only when there are some circumstances to connect the other crimes with the crime for which the defendant is being tried. 23 Tex. Jur. 2d 306. Furthermore, the courts have apparently required more than a similarity of offenses in order to allow in evidence of past crimes so as to show a system. Id. at 311; McCormick and Ray, Texas Law of Evidence, 366 (2d ed. 1956).

Strangely enough, one of the closest cases I could find to the Walker situation came from Texas. In Lawrence v. State, 128 Tex. Cr. 416, 82 S. W. 2d 647 (1935) the defendant was tried for the shooting of a duck hunter who was on his land. No one had identified the defendant as the murderer, and therefore all of the testimony was circumstantial. The prosecutor introduced evidence that on two prior occasions the defendant had shot at hunters. The only difference between the prior criminal acts and the one for which the defendant was being tried was that in the latter, the one doing the shooting was not clearly visible, while in the other incidents, the defendant had made himself quite visible.

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The Court of Criminal Appeals in the first hearing said that the evidence was admissible to show that the defendant intended to shoot the deceased and to show his motive. On a motion for rehearing, the court held that the evidence was inadmissible since it "constituted no link in a chain of evidence such as is contemplated in the authorities. It simply furnished a predicate for the conclusion that appellant was a bad man generally, and because he did the things towards the so named parties, he therefore did, or was likely to do, the thing which resulted in young Fisher's death." The court went on to say that the similarity of the offense indicated no "system." As the court pointed out, "hunting was general on the premises of appellant, and in the Lundy rice field during the time mentioned, and yet the state picks out three transactions, and on them relies to make out against appellant a general violent and malignant disposition towards all hunters which would include Fisher."

Thus, the court concluded that in order to fit this case under any of the exceptions to the general rule, they would have to be extended or a new exception created. "To do either would appear unwise." Wigmore disagreed with the decision. 2 Wigmore, Evidence 281 (3d ed. 1940). While there are literally hundreds of cases involving this question, none of them discussed the problem in as much length and detail as did the court in the Lawrence case.

In Missouri v State, 109 Tex. Cr. 193, 4 S. W. 2d 68 (1928), it was held in a prosecution for burglary of a corncrib that testimony

of prosecuting witness that his corncrib had been burglarized three times before and that after one of these burglaries he found a large quantity of corn on defendant's premise of the same peculiar size as those owned by him was inadmissible. The court said,

> If it had been shown in this case that the former burglaries had been committed by appellant and that in the instant case, the crime was committed in such a manner or under such facts as tended to show that the party who committed the last burglary was identical with the one who committed the first because of certain identifying facts common to both transactions, the above evidence would have been correctly admitted upon the issue of identity. . . We find nothing, however, in the facts of the first burglary, which tends to identify the man who fled from the burglarized premises on the night in question as appellant."

This is the application of the Molineux rule.

In Long v State, 39 Tex. Cr. 537, 47 S. W. 363 (1898) it was said,

> "Suppose A is on trial for the theft of a horse, and the proof should show that it was taken in a particular manner, but there was no proof identifying or connecting A with the theft of said horse; then in order to connect him with such offense, and to show that he was the guilty

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> party, if the contention of the state be correct, if he had been convicted for the theft of other horses committed in a similar manner, proof of such collateral crimes could be introduced in evidence, as tending to show that he was guilty of the offense charged against him. This we do not understand to be the rule; but this was exactly what was done in this case, -- that is, proof of independent offenses was introduced by the state as testimony tending to connect defendant with the main offense, for the purpose of corroborating the accomplices evidence.

See also Musgrove v State, 28 Tex. Cr. 57, 11 S. W. 927 (1889). (Same holding as Long case)

In Polanco v State, 133 Tex. Cr. 7, 106 S. W. 2d. 1057 (1937), a murder prosecution, it was held that evidence that the accused with two others robbed a bus driver about a month prior to the murder was not admissible to identify him as one of the men who robbed and murdered the bus driver. See also Chester v State, 300 S. W. 56 (1927) (held in a prosecution for murder of a policeman by gun, evidence that defendant had some forty minutes earlier and forty blocks away had drawn a pistol on another and had threatened to shoot him was inadmissible.)

Many cases indicate that there must be some connection between the prior criminal acts and the crime for which the defendant is being tried, in order for the evidence to be admissible..

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Lancaster v. State, 82 Tex. Cr. 473, 200 S. W. 167 (1918) (held that evidence of another robbery was not admissible to prove identity since there was nothing to connect the transaction with the one under investigation except that they were committed the same night, and the evidence showed some similarity in the appearance of the robbers.); Hill v. State, 44 Tex. Cr. 603, 73 S. W. 9 (1903) (burglary); Smith v. State, 52 Tex. Cr. 80, 105 S. W. 501 (1907) (similar acts of arson not admissible); Weatherred v. State, 100 Tex. Cr. 199, 272 S. W. 471 (1925) (previous offers to people to burn down building inadmissible in arson case).

In Texas, "system" or "scheme" cannot be shown by collateral crimes unless they fall within "res gestae," show intent, or connect the defendant with the offense charged. Similarity of act and approximation of time do not ipso facto constitute "system." 1 Underhill, Criminal Evidence, 507 (5th ed. 1955). "There must indeed be such a concurrence of common features between the several crimes as will show logically that all of them might well have resulted from a common plan or systematic course of action." 23 Tex. Jr. 2d 311.

The court in West v. State, 140 Tex. Cr. 493, 145 S. W. 2d 580 (1940), while discussing the meaning of the term "system" as used to describe the exception said, "By 'system', as we understand the term, is meant the use of the same means, the same manner and method of accomplishing a previously planned objective." Usually, this exception is applied in forgery, fraud, or embezzlement cases. See e.g. West v. State, id.

In Walker v. State, 103 Tex. Cr. 555, 282 S. W. 1070 (1926) defendant was accused of rape. It was contended that he went to the woman's house and represented that he sought to employ her, and she accompanied him on a street car to the end of the line at which point they went into the woods where he raped her. He allegedly held a gun on the victim. A witness identified the defendant as the one who had perpetrated an identical crime upon her (committed in the same manner). The evidence was held to be inadmissible. The court said, "The facts in this case clearly show that the testimony complained of comes under the category of 'systematic crimes' rather than under 'system'." See also McGowan v. State, 36 S. W. 2d 156 (1931) (other burglaries do not necessarily create a "system"); Clements v. State, 147 Tex. Cr. 531, 182 S. W. 2d 915 (1944) ("Nor can it be shown that he is engaged in a 'system' unless there are some identifying circumstances that will throw light on the crime for which he is being tried. . .")

Texas cases which have allowed in evidence of other crimes include: Peterson v. State, 81 Tex. Cr. 73, 193 S. W. 666 (1917) (Where defendant was not identified at the site of robbery for which he was being tried, evidence that he was driven from that spot to another where he committed another robbery admissible for purposes of identification); Watters v. State, 94 S. W. 1038 (1906) (held in a prosecution for cattle theft, proper to admit evidence that hides of other cattle were found buried in defendant's field as tending to identify defendant as

the one guilty of stealing the cattle); Washington v. State, 8 Tex. Ct. of App. Rep. 379 (1880) (where identity of murderer not established, proper to admit evidence that defendant admitted he had shot at victim before since shows motive and identity); Kornegay v. State, 136 Tex. Cr. 419, 125 S.W. 2d 599 (1939) (in prosecution for cattle theft, evidence that defendant stole other cattle in area and around same time held admissible to connect him with crime for which he was charged); Compton v. State, 148 Tex. Cr. 204, 186 S. W. 2d 74 (1945)(cattle theft - same holding as Kornegay case); Williams v. State, 105 Tex. Cr. 22, 285 S.W. 616 (1926) (In prosecution for burglary, proof of presence in defendant's house stolen property other than the proceeds of the burglary held admissible); McGee v. State, 112 Tex. Cr. 385, 16 S. W. 2d 1096 (1929) (passing forged check; defendant pleaded an alibi; evidence that defendant under an assumed name, on or about the same date, in the same town, passed another check practically identical with the one in question admitted on the issue of identity); Cochrane v. State, 125 Tex. Cr. 119, 67 S. W. 2d 313 (1934) (burglary; on plea of alibi, other burglaries on same night admitted); Davis v. State, 44 S.W. 1099 (1898) (same as Cochrane case).

In Cascio v. State, 146 Tex. Cr. 49, 171 S.W. 2d 356 (1943) the defendant was convicted of stealing a tire. The testimony of a witness that his tire was stolen the same night and that his tire was found in the defendant's car with the other stolen tire was held admissible. Also held admissible was the testimony of another witness who said that on the same night, he saw a person he believed to be

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the defendant attempting to enter automobiles in the vicinity of the thefts. This evidence was intended to identify the thief. The case was reversed on the ground that evidence that another theft had taken place was inadmissible since there was nothing to connect the defendant with it.

In Texas, the cases also seem confusing; however, if the Lawrence case is still good law, the Walker incident would probably not be admissible. The Lawrence case is a relatively old case and in view of the tendency to admit such evidence, it is very possible that the Texas courts would expand upon the exceptions.

5. Conclusion.

The cases are in utter chaos, apparently each case must be decided on the facts. Thus it is very difficult to predict what a court would do in any given situation. I think that the federal courts and Texas have been stricter in admitting evidence of other crimes than many other jurisdictions. However, there have not been many federal cases and there have not been any recent pronouncements in Texas.

Probably any experienced trial man would be better able to predict what would happen than someone surveying the cases. For this reason, I am a little hesitant to disagree with Mr. Ball, who feels that the Walker incident would be admissible in most places. (California is probably the most permissive state).

I just cannot see how this evidence could be used in any other way than to show that Oswald was the type of person who would shoot at the President. The evidence of the Walker shooting cannot be used to show intent or lack of mistake since these elements are already clear. I cannot

see how the Walker shooting sheds any light on the motive for killing the President, unless we really use our imaginations.

This leaves us with identity, system and similar crime. McCormick has said that courts are stricter in applying their standards of relevancy when the ultimate purpose of the prosecution is to prove identity, or the doing by the accused of the criminal act charged than they are when the evidence is offered on the ultimate issue of knowledge, intent, or other state of mind. McCormick, Evidence, 331 (1954)

There is nothing that connects the Walker shooting with the Kennedy assassination. By showing who shot Walker, we have not shown the identity of Kennedy's slayer. There is nothing to show that these two shooting were individual manifestations of a single scheme.

As we have seen, some courts will admit evidence of another crime if it is so similar to the one for which the defendant is being tried that it will tend to show that the defendant committed the crime. Here, there is nothing distinctive about the methods used in the crime. Obviously, the objects were distinctive, but there are thousands of people who could or would take a shot at both men. The use of a rifle from a distance hardly seems a "mark" which would identify the culprit or connect the two crimes. The means of carrying out the crimes are not novel enough, nor frequent enough to indicate a modus operandi.

Thus, in my opinion, the evidence is only relevant to show that Oswald was predisposed to commit the assassination. I find it very persuasive, but in theory courts will not admit the evidence. Maybe many courts

will admit it and just say it fits under one of the exceptions. However, I do not think any of the cases above, even the California cases, have admitted a separate crime with such a tenuous connection to the crime for which the defendant is being tried.

c. Sufficiency of Evidence of Prior Criminal Acts.

Assuming that proof of the Walker incident is admissible, we must then determine how much proof that Oswald did shoot at Walker is required before a jury would be allowed to consider such evidence.

Generally, it is said that it is not necessary to prove the accused's guilt of collateral offenses beyond a reasonable doubt. "It is variously stated that there must be evidence tending to prove each element of the collateral crime; that the other offense must be shown with reasonable certainty; that the guilt must be substantially shown; and that the proof of the other offense must be clear." 1 Wharton, Criminal Evidence, 560 (12th ed. 1955). In order for the jury to consider the other crimes, there should be "substantial evidence" that the defendant committed them. McCormick, Evidence 331 (1954); Labiosa v. Government of Canal Zone, 198 F. 2d 282 (5th Cir. 1952) (proof of similar offenses must be clear); People v. Albertson, 23 Cal. 2d 550, 575, 581, 596-599, 145 p. 2d 7, 20-22, 30-32 (1944) (substantial evidence). McCormick also states that in his opinion "before the evidence shall be admitted at all, this factor of substantial or unconvincing quality of the proof should be weighed in the balance. McCormick, Evidence 331 (1954).

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Texas courts require that the evidence must prove the commission of the other crimes beyond a reasonable doubt. In Ernster v. State, 165 Tex.Cr 422 308 S. W. 2d 33 (1957) the defendant was convicted of misrepresenting a written instrument affecting property. Evidence of several extraneous offenses was admitted to show motive and intent. It was held that the trial court's failure to limit the jury's consideration of the offenses to the purpose for which it was admitted and its failure to instruct the jury that they could not consider such collateral crimes unless they believed beyond a reasonable doubt that the defendant was guilty thereof constituted reversible error. See also Lankford v. State, 93 Tex. Cr. 442, 248 S. W. 389 (1923).

There would be very little evidence of the Walker incident if Marina's testimony were not admissible due to incompetency or privilege (I do not know how much light Oswald's friend who supposedly knew about the Walker incident could shed on the question). With Marina's testimony, I should think there is sufficient evidence that Oswald shot at Walker, even in Texas.

II. Would the fact that Oswald left the Texas School Book Depository Building, shot the Police Officer, and resisted arrest be admissible to show that he assassinated President Kennedy?

It is clear that the conduct of an accused person following the commission of an alleged crime is admissible since it may be circumstantially relevant to prove the commission of the acts charged. Rivers v. United States, 270 F. 2d 435, 438 (9th Cir. 1959). 23 Tex. Jur. 2d. 190.

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"It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." 2 Wigmore, Evidence, 111 (3d ed. 1940). See also United States v. Heitner, 149 F. 2d 105, 107 (2d Cir. 1945) (L. Hand. J.); 23 Tex. Jur. 2d 191 (1961); Hutchins v. State, 360 S. W. 2d 534 (1962); McCormick and Ray, Texas Law of Evidence, § 1538 (2d ed. 1956).

Some courts require that the accused should have been aware that he was charged with the crime or that he was a suspect, and some courts have said that only an unexplained flight is admissible evidence. 2 Wigmore, Evidence 116. (3d. ed. 1940). Apparently, these latter views are in the minority. id. In flight cases, Texas courts do not require that it be shown that the accused was aware that he was charged or suspected. McCormick and Ray,[2] Texas Law of Evidence, 394 (2d ed. 1956). However, in order to use resisting arrest as an incriminating fact, it must be affirmatively shown that the accused knew or should have known that an attempt was being made to arrest him. Chester v. State, 108 Tex. Cr. 150, 300 S. W. 57 (1927).

Most courts have said that the accused "may always endeavor to destroy the guilty significance of his conduct by facts which indicate it to be equally or more consistent with such other hypothesis than that of a consciousness of guilt... Such attempts at explanation are sometimes declared improper; but the general and sounder tendency is to admit them

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freely, leaving the jury to pass upon their plausibility." 2 Wigmore, Evidence 117-118 (3d ed. 1940); (9th Cir. 1959); 23 Tex. Jur. 2d 194, (1961) Chastian v. State, 97 Tex. Cr. 182, 260 S. W. 172 (1924).

Flight if shown generally is not conclusive, nor does it raise any presumption of guilt. 1 Wharton, Criminal Evidence, 262 (12th Cir. 1956). United States v. Greene, 146 Fed. 803; 23 Tex. Jur. 2d 191. (1961) (Mo. & Iowa Contr).

The evidence of flight or escape should go to the jury, who are the sole judges of its weight and sufficiency, and the motives which prompted the flight. Natually,such evidence has no probative value unless it appears that the accused fled to avoid arrest for the crime charged. "Even then, its force is slight, depending on the efforts made, the means employed, and the motive and knowledge." 1 Underhill, Criminal Evidence, 924 (5th ed. 1956). It should be noted that flight because of one crime is not relevant to establish the guilt for another crime. 1 Wharton, Criminal Evidence, 420 (12th ed. 1956); Damron v. State, 58 Tex. Cr. 255, 125 S. W. 396 (1910).

From the above statement of the law, it would seem that an inference of consciousness of guilt and hence guilt can be drawn from the fact that Oswald left the scene of the crime. While he did give an explanation for this, all of this would go to the jury. Oswald's shooting of Tippit would clearly be admissible and probative. His flight following that and his resisting arrest in the theatre would probably be more probative of his killing of Tippit; however, it might be considered along with the shooting of Tippit to show one attempt at escaping.

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JLR:RM:ej
3/3/64

M E M O R A N D U M

TO : David W. Belin

FROM : Richard Mosk

RE : Suggested Documents in connection with next weeks' witnesses

1. ROBERT JACKSON

a. Map of city or map showing motorcade of route so witness can point out position he was in, etc. You might use the FBI model replica of the scene.

b. Picture of Building or model of scene (mock-up) in order that he point out where gun came from.

c. The rifle so he can identify the barrel if possible.

d. Picture of the Negroes for identification.

2. JAMES WORRELL, JR.

a. Map of area and/or replica of the scene in order to purport his position.

b. Pictures of area and/or model of scene for identification of positions.

c. The rifle for identification if possible.

d. Picture of Oswald for identification.

e. Oswald's clothing for identification.

3. AMOS EUINS

a. Birth Certificate for his age.

b. Map, pictures of scene and/or replicas or models of scene in order to point out the details.

cc: Mr. Mosk

c. Rifle for identification.

d. Picture of Oswald, particularly one which might clearly show the "bald spot."

e. Oswald's clothing for possible identification.

4. ARNOLD ROWLAND

a. Picture of building, map of area and/or replicas of the scene in order to point out details.

b. Rifle for identification.

c. Layout of building in order to describe position of Oswald.

d. Pictures of building at time of assassination in order to determine if windows were open.

e. Picture of Oswald and Oswald's clothing for identification.

f. Pictures of or actual demonstration of a parade rest position, with a rifle and a port arms position, in order to establish ~~which~~ the position ~~the witness observed the man with the rifle.~~ of the man with the rifle, as observed by the witness.

5. EARLENE ROBERTS

a. Diagram of house, in order to determine if she could tell when and if Oswald left the house

b. Picture of Oswald for identification.

c. Oswald's lease with Mrs. Johnson, in order to determine the name he used.

6. BUELL FRAZIER

a. Map to show route they drove together.

b. Application for driver's lecense.(?)

c. Application for job with photographic concern - to see if Frazier knew anything about it.

d. Brown paper sack and replica for identification.

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e. Rifle to determine length.

f. Model or live demonstration to determine how rifle or bag was carried.

g. Pictures, layout and/or model of building (TSBD), and surrounding area to indicate movement of witness and Oswald.

h. Floor plan of building for same reason.

i. Polygraph test.(?)

7. MARY BLEDSOE

a. Street map and/or replicas of area to point out position of witness and Oswald.

b. Bus route on map.

c. Picture of bus for identification.

d. Picture of Oswald and his clothes for identification.

e. Oswald - Bledsoe lease to verify it, which in turn will show her familiarity with Oswald.

8. CECIL McWATTERS

a. Map with bus route and replica of area if possible.

b. Picture of Oswald and clothing for identification.

c. Record of police lineup.

d. Transfer ticket for identification.

e. Ticket punch.

f. Other ticket punches to determine how distinctive they are.

g. Picture of bus for identification. ("Munger" bus and/or "Marsalis bus.")

9. WILLIAM WHALEY

a. Map, pictures and/or replica of area in which he was in at the time in question.

b. Picture of Oswald and clothing for identification.

c. Bracelet for identification.

d. Record of the lineup.

e. Manifest of Whaley (and any written notations Whaley made concerning the rider, e.g. a log).

10. WILLIAM SCROGGINS

a. Map, pictures and/or mock-up of area.

b. Picture of police car for identification (if they are different models in Dallas).

c. Picture of Oswald and clothing for identification.

d. Pistol for identification.

e. Record of police lineup.

f. Report of call to dispatcher, if any.

11. HELEN MARKHAM

a. Map, pictures and/or mock-up of area.

b. Pictures of Oswald and clothing for identification.

c. Pistol for identification.

12. JEANNETTE DAVIS & VIRGINIA DAVIS

a. Map, pictures and/or mock-up of area.

b. Picture of Oswald and clothing for identification.

c. Gun and shells for identification.

d. Record of lineup.

13. TED CALLAWAY

a. Map, pictures and/or mock-up of area.

b. Picture of Oswald and clothing for identification.

c. Record of lineup.

d. Pistol for identification.

March 11, 1964

MEMORANDUM FOR MR. BELIN

FROM: Mr. Mook

SUMMARY:

In most jurisdictions, including Texas and the federal courts, Marina would not be allowed to testify against her husband in a criminal prosecution. This incompetency would end with her husband's death, but the rule preventing her from testifying about privileged communication would not end with Oswald's death. While there is much conflict as to what is encompassed within the term "communication" it seems clear that after Oswald's death the Texas and the federal courts would allow Marina to testify about anything except oral and written communications from her husband.

The general rule is that evidence of prior criminal acts of the defendant is inadmissible in a criminal prosecution. However, such evidence may be introduced under a number of exceptions, such as to prove identity or to show a common scheme or plan. Many cases, particularly the older ones would indicate that the Walker incident would have been inadmissible in a trial of Oswald since it would not fit into any of the exceptions. Some modern courts might admit the evidence on any number of theories.

It is my feeling that in view of the fact that the Walker incident and the Kennedy assassination have not been shown to be in any way connected and that the means employed to commit the crimes are not unusually similar, the Walker crime would not be admissible.

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All it could show is that Oswald had a propensity to commit such crimes, and courts will not allow evidence for this purpose because of its prejudicial effect. Texas and the federal courts have been stricter than other courts in admitting evidence of prior crimes.

In order for a jury to consider the Walker crime, it must be shown with substantial evidence that Oswald committed it. In Texas, it must be shown beyond a reasonable doubt. If we exclude Marina's testimony, these standards would be difficult to meet.

It is clear that evidence of Oswald's flight from the TSBD, his shooting of Tippit, and his resistance to arrest would be admissible as evidence of consciousness of guilt and thus of guilt itself.

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I. Would Marina Oswald's testimony concerning her husband's alleged attempted assassination of General Walker be admissible in (a) the majority of United States Jurisdiction, (b) in the federal courts, and (c) in Texas?

A. The Factual Setting.

Marina Oswald testified that during the Spring, her husband attempted to assassinate General Walker. She based this conclusion on a letter he left her telling her what to do assuming he was jailed, his actions on the night in question, and his admission that he had fired at General Walker. See Ball and Belin memorandum. The similarities between this attempt and the Kennedy assassination are: (1) a rifle was used, although the ballistic test was not conclusive as to whether the same rifle was used in both crimes, (2) the objects of the crimes were well known political figures, both of whom would not be popular with pro-Communist sympathizers, and (3) the "get-away" was by means of walking and bus (assuming that Oswald assassinated President Kennedy which is really circular reasoning since the proof of the Walker killing is supposed to be probative of the identity of the assassination of President Kennedy.).

The crimes are dissimilar in that (1) one was accomplished at night, the other during a motorcade; (2) Oswald left his wife instructions as to what to do prior to the Walker incident, while he did not do so prior to the Kennedy assassination; and (3) apparently

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the Walker incident was carefully planned for months, while this could not have been done with the Kennedy assassination.

B. Testimony of a Wife.

In some states the spouse would not be considered competent in this situation to testify against the other spouse, while a majority of states provide that the spouse is competent in all cases, but the witness spouse or the defendant spouse or both, have the privilege of refusing to permit the testimony to be heard. Note, "Competency of One Spouse to Testify Against the Other in Criminal Cases: Modern Trend. 38 Va L. Rev. 359 (1952).

The federal courts have recognized and consistently applied the common law rule that a wife cannot testify against her spouse when he is accused of a crime. Id. at 368.

The relevant Texas statute provides that "The husband and wife may, in all criminal actions, be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Vernon's Annot. Tex. C.C.P. art. 714.

The general rule is that the incompetency of the spouse and the privilege of each spouse against the adverse testimony of the other are terminated when the marriage ends by death. McCormick, Evidence 178 (1954); 44 Tex. Jur. 1033 (1935).

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It is quite clear that communications between husband and wife are privileged. McCormick, Evidence 168 et seq (1954). This is true in the federal courts, Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934) and in Texas, Vernon's Annot. Tex. C C P 714 ("Neither husband nor wife shall, in any case testify as to the communication made by one to the other, while married").

Written communications come within the scope of the privilege McCormick, Evidence 170 (1954); 1 McCormick and Ray, Texas Law of Evidence 419 (2nd ed. 1956). Documents of communication coming into the possession of a third person - i.e. they were obtained from the addressee spouse by voluntary delivery - should still be privileged (for otherwise the privilege could by collusion be practically nullified for written communications); but if they are obtained surreptitiously or otherwise without the addressee's consent the privilege should cease. 8 Wigmore, Evidence 668 (McNaughten edition, 1961). However, the rulings on this issue are not harmonious, id; compare Bowman v. Patrick, 32 Fed. 368 (C C ED Mo 1887)(letters from a husband to a wife found among his papers by the husband's administrator and by him delivered to the party, excluded) with Dickerson v. United States, 65 F. 2d. 824 (1st Cir. 1933) (a wife murder case, a letter by the defendant to his wife, found among her effects by a third person, handed by them to the insurer and thence to the prosecution, held admissible).

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In Texas, if the documents are voluntarily delivered by the addressee spouse, the privilege should remain in favor of the other spouse. McCormick and Ray, Texas Law of Evidence, 422 (2nd ed. 1956); Walker v. State, 64 Tex. Cr. R. 70, 141 S. W. 243 (1911).

Most treatise writers contend that the privilege should extend just to communications, McCormick, Evidence, 171 (1954); 8 Wigmore, Evidence, 651 (McNaughton ed. 1961); however, a great number of courts, maybe even a majority, have construed their statutes to extend the privilege to acts, facts, conditions, and transactions not amounting to communications at all. Id.

Some cases have held that acts done privately in the wife's presence amount to "communications." e.g. People v. Daghets, 299 N.Y. 194, 86 N.E. 2d 172 (1949) (husband charged with theft; wife's testimony as to the husband's acts in her presence of bringing in the loot and hiding it under the bed and in the basement held to be a violation of the statutory privilege for "confidential communication." The court emphasized, however, that one of the hiding spots was under the nuptial bed).

Some cases would even go further and say that any information secured by the wife as a result of the marital relation and which would not have been known in the absence of such relation is protected. See McCormick, Evidence, 171 (1954); 8 Wigmore, Evidence 657

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(McNaughten ed. 1961); Spearman v. State, 69 Tex. Cr. 449, 152 S. W. 915 (1913) (dissent). Thus, cases have held that information secured by one spouse through observation during the marriage as to the health or mental condition of the other spouse would be protected. Id. Apparently, the cases in this area are in a state of confusion.

The United States Supreme Court has said that "the privilege, generally, extends only to utterances, and not to acts." Pereira v. United States, 347 U.S. 1, 6 (1953) (dictum). In Texas, communications include only utterances and not acts or conduct of a spouse. 1 McCormick and Ray, Texas Law of Evidence, 419 (2d ed. 1956); Lenhem v. Lenhem, 62 Tex. Civ. App. 431, 146 S. W. 625 (1912) (In a will contest wife allowed to testify as to husband's conduct tending to show that he was suffering from an insane delusion; Howard v. State, 103 Tex. Cr. 205, 280 S. W. 526 (1926) (in homicide case that husband came home with a blood-stained shirt not a privileged communication); Spicer v. State, 115 Tex. Cr. 110, 28 S. W. 2d 810 (1930) (in homicide case, whether witness' wife never told him that she shot deceased, not incompetent where answered in the negative); McDonald v. State, 138 Tex. Crim. 510, 136 S. W. 2d 815 (1940) (bigamy, second wife's testimony that defendant had received a letter from his first wife admitted.)

The prevailing American rule is that the privilege for communications between spouses does not end when the marriage is terminated by death. McCormick, Evidence 170 (1954); 8 Wigmore,

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Evidence § 2341 (McNaughten rev. 1961). The privilege continues in the federal courts, Pereira v. United States, 347 U.S. 1, 6 (1953) (dictum) and in Texas. Vernon's Annot. Tex. C C P 714 ("Neither husband nor wife shall, in any case testify as to a communication made by one to the other, while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation existed, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, good to exculpate or justify an offense for which either is on trial." This statute has been held in a criminal case to forbid the testimony from either spouse as to communications between them even though they are divorced at the time of the trial. Bell v. State, 88 Tex. Cr. 64, 224 S. W. 1108 (1920)); 1 McCormick & May, Texas Law of Evidence, 424 (2d ed. 1956).

Thus it can be seen that had Oswald lived, his wife would not have been allowed to testify against him in any criminal trial. After his death, Marina would not have been allowed to testify as to any privileged communications in any judicial proceeding. In Texas and in the federal courts, this privilege would have covered just actual communications. This would include his admission of the Walker incident and the written instructions he left Marina. Marina would be able to testify as to his behavior and could identify such things as the picture. Some states would not allow Marina to testify as to any information she

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received as a result of the marital relation and which would not have been known in the absence of such relation.

Conceivably, the privilege could have been claimed by Marina before the Commission. Blau v. United States, 340 U.S. 332 (1951)(privilege applied in Federal Grand Jury Investigation). It is probable that disclosure of privileged communication may not be compelled in an administrative investigation. "Since the facts disclosed in the investigation might be introduced as evidence in a subsequent hearing, personal privileges have as much justification here as in adversary proceedings. Hence it would seem that wherever they are held to exist in the latter case, they should also extend to the former." 54 Harv. L. Rev. 1214, 1219 (1941). In Matter of City Council of New York v. Goldwater, 284 N. Y. 296, 31 N.E. 2d 31 (1940), it was held that the statutory physician-patient privilege could be asserted in an investigative hearing before a special committee of the City Council. The court said that the privilege may be asserted whenever the power of the court is involved. Here the defendant was served with a subpoena duces tecum requiring the production of hospital records. See also, McMann v. SEC, 87 F. 2d 377, 378 (2d Cir. 1937) (dictum); Cahan v. Carr, 47 F. 2d 604, 605 (9th Cir. 1930); Cahan v. United States, 283 U.S. 862 (1931)(dictum); Matter of Hirshfield v. Hanley, 228 N.Y. 346, 349, 122 N.E. 252 (1920)(dictum); but see [1926-28] Rep. Atty. Gen. Mich. 457 (1927); Sabon v. People, 142 Col. 323, 350 P.2d 576 (1960)(under Colorado statute privilege did not extend to mental

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health hearing). In United States v. Wenfree, 170 F. Supp. 659 (D.C. E.D. Pa. 1959) it was held that information obtained by IRS agents from the interrogation of a wife would not be suppressed in a prosecution of her husband for attempting to evade income taxes. The case seemed to be concerned with the wife's competency rather than privileged communications. The Court lists many state cases permitting the use of information secured extra-judicially from one spouse in the process of investigation.

It would seem that since the privilege is not constitutionally required and since Supreme Court pronouncements are directed at federal courts under the court's supervisory power, the Commission could ignore the privilege. See generally 133 ALR 732 (1941); 8 Wigmore § 2300 (a); 1 Wigmore § 4(c). Since I was not asked about this point, I really did not go into it very deeply. The point seems in doubt.

See 45 Cal L Rev 347

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C. Hearsay.

It is quite clear that admissions are admissible in every jurisdiction on any number of theories. 2 Wharton Criminal Evidence, § 397 (12th ed. 1955); McCormick, Evidence ch. 27 (1954); 2 McCormick & Ray, Texas Law of Evidence § 1160 (2d ed. 1956). Thus, the fact that Marina's testimony as to Oswald's admission that he shot at Walker was hearsay would not render it excludable.

D. Prior Criminal Acts.

1. General considerations.

The general rule is that in a criminal case, evidence that the defendant committed other crimes is inadmissible. McCormick, Evidence 327 (1954); 1 Underhill, Criminal Evidence § 205 (5th ed. 1956); Boyd v. United States, 142 U. S. 450 (1892); Ewing v. United States, 296 F. 2d 320 (9th Cir. 1961); 23 Sec. Jur. 2d 194. As will be later shown, the actual rule should be stated that in a criminal case, evidence that the defendant committed other independent and unrelated crimes is inadmissible to show that the defendant would be likely to commit the crime with which he is charged. McCormick, Evidence 327 (1954). The rule that the prosecution cannot initially introduce evidence of the defendant's bad character is universal. Id.

The reasons often given for the existence of the general rule is that (a) the probative value of the evidence is outweighed by its prejudicial effect, because it is expected that the jury

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will decide that since the defendant is a "bad man" he is likely to have committed the crime; (b) it would be unfair to the defendant since he comes into court prepared to meet the charges contained in the indictment and not other ones; and (c) the jury would become confused and the process would be time-consuming, since these crimes are collateral matters. See 1 Underhill, Criminal Evidence § 205 (5th ed. 1956); Morgan, "Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence," 3 Vand. L. Rev. 779 (1950). Note, "Admissibility of Evidence of Prior Crimes in Prior Trials," 25 Ind. L. J. 64 (1949).

It is interesting to note that most of these reasons would apply to the Foundation's activities. It is clear that the evidence is not irrelevant. In fact, the main reason that the evidence is rejected is that it will weigh too much with the jury. Smith v. United States, 173 F. 2d 181 (9th in 1949). It has been said that the risk of this type of evidence being prejudicial is less in a jury-waived trial. See Ellingham v. State, 228 Wis. 448 279 N. W. 15 (1938); Annot. 116 A. L. R. 538 (1938).

A series of exceptions has generally been appended to the general rule. Thus, evidence of other criminal acts may be introduced in order to establish motive, intent, design or plan encompassing all of the crimes (often called a scheme or system) and identity. Such evidence can also be admitted when the collateral crime is within the "res gestae"

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of the crime for which the defendant is being tried, to rebut special defenses such as mistake or accident, and it has been introduced much more freely in trials concerning sexual offenses. See Peeple v. Molineaux, 168 N. Y. 264, 61 N. E. 286 (1901); United States v. Lucillo, 226 F. 2d 788, 793 (7th Cir. 1955); Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64 (1949); Underhill, Criminal Evidence § (5th ed. 1956); Wharton, Criminal Evidence, § 233-244 (12th ed. 1955); 23 Tex. Jur. 2d 195 (1961).

McCormick has given an expanded list and has warned "that the list is not complete, for the range of relevancy outside the ban is almost infinite; and further that the purposes are not mutually exclusive, for a particular line of proof may fall within several of them. Some are phrased in terms of the immediate inference sought to be drawn, such as plan or motive, others in terms of the ultimate fact, such as knowledge, intent, or identity which the prosecution seeks to establish." McCormick, Evidence 327 (1954).

One of McCormick's exceptions is evidence "to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." Id. at 328. Very few cases were cited by McCormick under this exception. Since this exception is relevant to our problem, we will return to it in greater detail.

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Since there are so many situations which fall within the exceptions to the general rule, many writers have argued that the rule should be phrased so as to admit evidence of other crimes where relevant unless that evidence can only be used to establish the defendant's disposition to commit the crime as a basis for the inference that he did commit the crime. Morgan, Maguire & Weinstein, Cases on Evidence, 380 (1957) (see cases and treatises cited therein); ALI, Model Code of Evidence § 303.

One reason why it is felt that the rule should be so stated is that it makes clear the basis of exclusion and directs the attention of the trial court to the question of logical relevancy. Trautman, "Logical or Legal Relevancy - A Conflict in Theory," 5 Vand. L. Rev. 385, 405 (1952); see also Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 Harv. L. Rev. 988 (1938).

However, as Morgan has pointed out, "the group of exceptional situations in which the evidence is received comprehended almost all of those in which its relevancy depends upon its use as a basis for an inference to something other than disposition." Morgan, Basic Problems of Evidence, 214 (1962).

Another view suggested by treating writers and some cases is that "the problem is not merely one of pigeon-holing, but one of balancing, on the one side, the actual need for the other crimes-evidence in the light of the issues and the other evidence available to the

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prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weaknesses of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility, McCormick Evidence 332 (1954). Under this view, the judge would have the discretion to rule on the admissibility, basing his decision on whether or not the probative value of the evidence is outweighed by the danger of undue prejudice or of misleading the jury. McCormick, id., Unif. Rules of Evid., Rule 45; Neff v. United States, 105 F. 2d 688, 692 (8th Cir. 1939) (admissibility of other crimes in discretion of court, stated as a ground for affirming the judge's rule admitting such evidence.)

McCormick's suggestion might be a way in which the Commission could handle the Walker incident.

Before going into the case law, it is well to note that this is a very confused area of the law. Most courts, when admitting evidence of other crimes, do so under one of the usual exceptions. Many of the courts disagree on the scope and the application of these exceptions. Much seems to depend on the precise facts of the case. It has been asserted that "no part of the law of evidence is more consistently and violently litigated than that having to do with the admissibility of proof of other criminal acts . . . for the purpose of helping establish some element of the criminal charge." Morgan, Maguire, and Weinstein, Cases on Evidence 380 (1957).

First we must determine if evidence of a similar crime committed by the defendant would be admissible under one of the

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exceptions or as relevant to a matter other than the defendant's propensity to commit the crime. Then we must establish if the circumstances of the Walker case are similar enough to the circumstances of the Kennedy assassination so as to warrant the inference that Oswald was involved in both. The cases have rarely separated these two matters. It has been said that the latter point is within the discretion of the trial judge. Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64, 66 n 13 (1949). Many appellate courts have, however, decided this question themselves.

It is interesting to note that most of the reported cases indicate what evidence is relevant and therefore admissible. There are not many cases passing upon those types of evidence which the established legal formulae declare to be irrelevant. I thought perhaps I was missing the cases, but I found a law review article which commented upon this phenomena. Note, "Admissibility of Evidence of Prior Crimes in Murder Trials," 25 Ind. L. J. 64, 67 n. 16 (1949). They suggest that this fact is either due to the field being under-developed or that the evidence is so clearly irrelevant that it has been consistently rejected by the trial court, from which there was no appeal. The article then states that if this is so, "then a lack of cases on this point has the same effect as numerous cases would have declaring the evidence irrelevant." Id. This theory does not take us very far.

Possibly another reason for a paucity of cases excluding this evidence is that, "It is extremely difficult to prevent a determined and imaginative prosecutor from getting in evidence of other crimes."

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Morgan, Maguire, and Weinstein, Cases on Evidence 380 (1957); see also Mr. Ball who believes that courts will take in this evidence and pin any exception label to it in order to justify its admission. As I will show, I think the courts are still wary of letting in this type of evidence.

2. American Jurisdictions not Including the Federal Courts and Texas.

The landmark case in this area is People v. Molineux, 168 N.Y. 264, 61 N. E. 286 (1901). The defendant was indicted for murder by the administration of a deadly poison sent through the mail in a box which contained a bottle in which the poison was mixed in with a harmless powder in common use. The prosecution introduced evidence connecting the defendant with the alleged killing of another person sometime before, by means of the same poison mixed with a medicinal powder alleged to have been sent through the mail. The court stated the general rule and then attempted to fit the case into the exceptions.

Since the motives that the defendant allegedly had in each case had no relation to each other, it could not be said that the evidence of the other crime indicated a motive in the crime for which the defendant was being tried.

As to intent, there was no need to prove this factor since the act itself clearly indicated an intent to murder. The court pointed out that crimes referred to under this category constitute distinct classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by

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evidence of successive repetitions of the act. Examples would be receiving stolen goods and embezzlement.

Obviously, the proof in this case could not relate to disproving mistake or accident since these defenses were not and could not be raised. There was no doubt that the killing was not accidental and the cause of death was not in doubt.

As to a common scheme or plan, the court said, "To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of a system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Here there was no connection between the crimes and no connection proven in the mind of the actor. There was no common purpose which the commission of both crimes would satisfy." The court pointed out that even if there was any doubt on this point, the benefit should go to the defendant. "The naked fact that the same means were used in two cases, simply proves that two distinct crimes may have been committed by the same person by similar means."

The court said with reference to the last exception, "When the evidence of an extraneous crime tends to identify the person who committed the crime charged in the indictment, it is admissible . . . The mere fact that two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as

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the poisoner of Mrs. Adams, unless his guilt of the latter crime may be inferred from the similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet, and that no other person could have killed Mrs. Adams." Such was not the case. "Therefore, the naked similarity of these crimes proves nothing." Hence, the court held the evidence inadmissible.

The court's view in the Molineux case as to the scope of the various exceptions was widely cited and generally accepted in the past. As I will show, some courts have expanded these exceptions and have added new exceptions. It seems clear that the Walker situation would be inadmissible in a trial of Oswald for the assassination of President Kennedy under the Molineux reasoning.

The following statements from American Jurisprudence were widely cited by the earlier cases:

> Evidence of other crimes is competent in a criminal trial to prove the specific crime charged when it tends to establish a common scheme, plan, or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. 20 Am. Jur. § 314.

> When introducing evidence of other crimes for the purpose of identification, it is necessary that there be such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. 20 Am. Jur. § 312.

Examples of cases following the Molineux view of the scope of the restriction are as follows:

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In Williams v. State, 143 So 2d. 484, 485 (Fla. 1962) (dictum) it was said, "Only such evidence of the crime at the Blue Grass Market as is relevant to show or which tends to show that defendant was present and participated in both the Blue Grass Market crime and the crime at the H & K market, that he used the same pistol in the perpetration of both crimes, or that both crimes followed a similar pattern, is admissible."

In Estes v. Commonwealth, 239 S.W. 2d 775, 777 (Ky. Ct. of App. 1922) (held in a prosecution for uttering a forged check, testimony that defendant at a railroad station a month before the offense charged procured property consigned to another whom he represented himself to be and about a month before that presented a forged check payable to the same party, improperly admitted) it was said, "Evidence of another crime is not admissible even on the question of identity, unless the circumstances tend to show that he who committed the one must have committed the other."

In People v. Gavlick, 350 Ill. 359, 183 N.E. 217 (1932) it was held in a prosecution for larceny of a coat from a certain company, evidence that the defendant stole and attempted to steal from two other stores within an hour or two of the charged offense was inadmissible. See also People v. Gleason, 36 Ill. App. 2d. 15, 183 N.E. 2d 523 (1962) (held that evidence that defendants had three weeks earlier participated

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in a somewhat similar theft from the same department store was not admissible on the ground that it tended to establish a common scheme, plan, or system embracing the commission of two or more closely related crimes so that proof of one would tend to establish the other); Moulton v. State, 307 p 2d. 861 (Okla. Crim. 1957) (held that admission of evidence as to armed robberies by defendant at witnesses' service stations at two other places than that of the place where the crime charged occurred was prejudicial error).

In Dunn v. State, 850 Okla. Crim. 14, 21, 184 p 2d. 621, 624 (1957) it was stated that "there have been many instances of abuse of this exception to the general rule [and] the abuse of this rule has caused the reversal of more cases on appeal in this court in recent years than that of any other one matter." This is probably an exaggeration, but it does show that counsel cannot always get this type of evidence in under the exceptions.

In State v. Velarde, 67 N.M. 224, 354 p 2d. 522 (1960) it was held in a rape prosecution that evidence that the defendant, who had claimed an alibi, had at another time abused another Indian victim improper since it could serve no purpose other than to show the defendant's disposition to commit the crime with which he was charged.

In Harris v. State, 169 Tenn. 635, 227 S. W. 2d. 3 ( ), another rape case, it was held that the admission of testimony that the witness was raped by the defendant about a week before the date of the

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offense charged, under similar circumstances, (both victims thought a knife was held to their neck and there were threats against both victims' lives) was reversible error. The court referred to another case, Warren v. State, 178 Tenn. 157, 156 S.W. 2d. 416 (1941) as marking a limit beyond which the court had not gone in permitting proof of an independent crime for the purpose of identification. In the Warren case, the two robberies were similar in that the robbers were dressed the same, carried a pistol in one hand and a flashlight in the other, had grease on, the robberies took place a few nights apart in the same area and at the same time in the same manner. The court allowed in the evidence for purposes of identification.

In State v. Stephenson, 191 Kan. 424, 381 P 2d. 335, 341 (1963) (dictum), it was said, "We hold upon the facts here presented where one is charged with a criminal offense, a statement in the nature of an admission or confession, to be admissible in evidence, must relate to the offense or offenses for which the accused is on trial." The court did say, however, that evidence that the defendant had previously been convicted of a similar crime done in a similar manner would be admissible to prove identity. Why the fact that an admission or confession is involved would alter this, I do not understand.

In State v. Folsom, 28 Wash. 2d. 421, 183 p. 2d 510 (1947) it was held in a prosecution for abortion and manslaughter that evidence that the accused performed abortions three months after the commission of the offense for which he was charged was inadmissible since there was

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no connection between the various crimes.

The major modern case allowing in evidence of prior similar crimes which would not be admissible under the Molineux formulation is People v. Peete, 28 Cal. 2d 306, 169 p. 2d 924 (1946) (Traynor, J.). In this case, the defendant had previously been convicted of the murder of her landlord. His body had been found buried under the house, the death being caused by a bullet from behind severing the spinal cord at the neck. After his death, the defendant lived in his home; opened his mail; forged his name to checks, papers and a lease of the house; and gave away his property.

In the case before the court, the defendant had been employed by the deceased as a domestic servant. The deceased was found buried, the death being caused by a shot from behind, which was an attempt to sever the spinal cord. The defendant posed as the deceased's foster sister, forged documents, opened mail, and gave away property.

The court sustained a charge to the jury which provided that if the jury believed the evidence of the previous crime, it could consider it to determine the defendant's motive, her knowledge, her intent, the absence of accident, the identity of the killer and the presence of a general scheme or plan of which both crimes were a part; but that it could not consider the evidence of the previous murder to show the defendant's disposition to commit murder, and hence the likelihood that she committed the murder for which she was charged.

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The court said that in California the rule is "that except when it shows merely criminal disposition . . . evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged." The court also declared that "When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design." Here the court determined that the unifying scheme was to acquire property. The court also said that the other murder indicated a motive for the crime (acquisition of money) and tended to identify the defendant because of the similarity between the crimes.

Justice Carter, in a strong dissent, remarked, "The development of the law in this state shows a departure from the early restrictions governing the application of exceptions to the general rule as defined in the Molineux case . . . In my opinion, the pendulum has swung too far to the side of admissibility."

In People v. Webster, 79 Cal. App. 2d 321, 179 p. 2d 633 (1947) the defendant was convicted of murder. Evidence of a similar attack by the defendant was introduced. The court considered the other attack "to determine if there was sufficient similarity in the two attacks to show a common scheme or plan." Defendant "picked up" both

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woman in cocktail bars and spent considerable time drinking with them. Both women had bruises and abrasions on their heads. Both women were cruelly choked, evidently with the right hand of their attacker. The garments of both were torn open leaving the upper portion of the front of the torso exposed. The court concluded, "It would be unusual to find two crimes with greater details of similarity of execution showing a common plan or scheme or system in the commission of both. Thus the evidence of the collateral crime was properly admitted."

Apparently, California, while paying lip service to the general rule, has gone quite far in admitting evidence of this nature. Also, while California courts have described the rule in terms of logical relevancy, the admission of evidence of other offenses is usually justified by reference to one of the same categories of exceptions by which the exclusionary rule is limited in other jurisdictions. Blum, "A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California," 7 U.C.L.A.L. Rev. 463 (1960).

In Whiteman v. State, 119 Ohio St. 289, 164 N.E. 51 (1923), the defendants were charged with a series of robberies. In this case, they were being tried for one of them. The prosecution introduced evidence of the others. Witnesses to all of these robberies were in practical agreement in describing the clothing worn by the defendants, the manner of execution of the robberies, the agencies employed and other characteristics common to all of the alleged robberies. All of

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the robberies occurred in one neighborhood, and within a radius of a mile and a half. In each robbery, an automobile was employed by the robbers and only two persons were in the car. They were dressed in uniforms of bus drivers and carried guns and flashlights. Their plan was to drive their car next to that of their victims and compel them to stop. They would then impersonate officers and cause the victims to leave their cars, and then search and rob them. The robberies in each instance occurred in the late evening. It was held that since the identity of the defendants was in issue, it was not error to receive the testimony of other unconnected crimes where the sole purpose of such testimony was to establish the identity of the defendants.

The Court in Brashear v. Commonwealth, 199 S. W. 21, (Ky. Ct. App. 1919) (dictum) stated that "when a crime is committed by novel means or in a particular manner, the proof of other distinct crimes may be admitted for the purpose of identifying the accused as the perpetrator of the crime, by showing that he has committed other distinct offences in the same manner."

In Smith v. State, 215 Ind. 629, 21 N.E. 2d 709 (1939), the defendants were convicted of maliciously and mischievously damaging the window glass of a barber shop. It was held that evidence that window fronts of other barber shops had been broken by the accused in a manner similar to that allegedly used by the accused in committing the offense with which they were charged was admissible on the issues of motive and

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identity. The court said, "Where the circumstances surrounding the offenses other than that charged are of a similar nature, showing use of similar or peculiar instrumentalities in the commission of each offense, or employment of a uniform scheme or method, evidence of such offenses is both relevant and material and is admissible as having probative force to prove the defendant guilty of the particular crime charged."

In State v. Chance, 92 Ariz. 351, 377 P. 2d 197 (1962), a robbery prosecution, it was held that evidence that the defendant used the same car, the same unusual disguise, and the same method of operation in another robbery as had been used in the crime for which he was charged, was admissible for the limited purpose of identifying the defendant. See also State v. Francis, 91 Ariz. 219, 371 P. 2d. 97, 98 (1962) (rape case; similar attempt at rape admitted for purpose of identifying defendant) where it was said ". . . [illegible] here a crime has been committed . . . in a peculiar or unusual manner, evidence of recent similar acts or crimes by the accused committed by the same means or in the same manner are provable to identify the accused as an inference from the similarity in method."

In Nestar v. State, Nev. 334 P. 2d 524 (1959), a rape prosecution, where there was an attempt to establish the identity of the defendant by characteristic conduct involved in another rape wherein the assailant behaved in an identical manner, the trial judge heard the substance of the other rape outside the presence of the jury

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--and determined as a matter of law that the evidence was admissible even though its nature would make it prejudicial under different circumstances. The appellate court held that the record did not establish that the balance struck by the trial judge between prejudice and the probative weight of the evidence was manifestly wrong.

It should be noted that the exception mentioned earlier for six offenses generally does not apply in rape cases, so that factor was not determinative in the rape cases discussed. Lovely v. United States, 169 F. 2d. 386, 390 (4th Cir. 1949). But see Commonwealth v. Winter, 289 Pa. 204, 137 A 261, 263 (1927) where it was said:

> "The fact that A, who is being tried for the murder of Y, was one time convicted of murdering X, has no probative value to prove A guilty of murdering Y, if the two murders were in no way related. On the other hand, if A is being tried for rape or attempted rape of Y, the fact that recently he raped or attempted to rape X is admissible in evidence because it tends to prove that he possessed such an abnormal mental or moral nature as would likely lead him to commit the offense charged."

In State v. Blum, 224 N.C. 722, 32 S. E. 352 (1944), a prosecution for murder in the course of a robbery of a filling station, it was held that evidence that the defendants perpetrated a holdup and robbery of a filling station operator in the same manner, twenty-seven days after the homicide was committed was admissible on the questions of defendant's intent, guilty knowledge and identification.

It should become increasingly clear that those courts which admit this evidence on such grounds as showing guilty knowledge and intent, are really just stating the exceptions without even attempting

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to fit the prior crime within the exception as did the court in the Molineux case. See e.g. State v. King, 111 Kan. 140, 206 P. 883 (1922); Williams v. People, 158 P. 2d 447 (1945) (Held in a prosecution of an unmarried mother for the murder of her bastard child, evidence concerning two earlier babies disposed of by defendant admissible to show deliberation and the identity of the murderer).

The above is a sampling of the cases. I think we can see from the above cases that, "the courts are not divided upon these abstract rules, but are in hopeless confusion in their application to particular facts." State v. Ford, 42 N. M. 638, 84 P. 2d. 80 (1938). The more recent cases have become more permissive in allowing in this evidence. There are a growing list of exceptions and the original exceptions have been expanded without much discussion.

3. Federal Courts.

The federal courts follow the general rules and the exceptions, 11 Cyc. of Fed. Proc. § 47. 119 et seq. (1963), but they have had just as much trouble applying them to particular factual situations.

The old but much cited case in this area is Boyd v. United States, 141 U.S. 450 (1892). The defendants were tried for murder in the perpetration of a robbery. Evidence was introduced concerning another robbery committed by the defendants in order to show, in part, the identity of the murderers. It was held that the evidence

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was inadmissible, there being little discussion of the issue. See also Fish v. United States, 215 F. 2d 544 (C. C. A. 1914) (arson for insurance - evidence that other insured items of defendant had burned under suspicious circumstances held inadmissible as having no probative value on question of whether defendant set the fire.)

In Lovely v. United States, 169 F. 2d 386 (8th Cir. 1948), the defendant was convicted of rape. He had admitted intercourse but denied that it was forceable. The court held that evidence of a prior rape under similar circumstances was inadmissible. The court said:

"[The case] was not of the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted . . . To bring evidence of other offenses within this rule, the test is not whether they have certain elements in common with the crime charged, but whether they tend to establish a preconceived plan which resulted in the commission of that plan." The court also pointed out that the right of persons accused of a crime to have the evidence confined to the issues on trial cannot be nullified by any unrealistic hypotheses.

Thus, while this case is not directly in point, it does indicate an attitude that the court will carefully scrutinize attempts to introduce evidence of prior criminal acts. See Hall v. United States, 235 F 2d. 869 (9th Cir. 1916) (In prosecution for unlawful assault upon a young girl, evidence that defendant did a similar act before inadmissible.)

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In United States v. Magee, 261 F. 2d. 609 (7th Cir. 1958), the defendant was convicted of robbing a bank. Evidence had been introduced that the defendant had robbed two other banks on the theory that it showed "ease of identification under circumstances similar to those surrounding the identification of the defendant by the Government witnesses." The conviction was reversed on the ground that such evidence was inadmissible. See also Railton v. United States, 127 F. 2d 691 (5th Cir. 1942) (In a prosecution of city employee for conspiracy to steal fire clay belonging to the United States, held evidence of other instances in which defendant took city property inadmissible to show probability that defendant committed the crime charged).

The following cases allowed the admissibility of such evidence: Adams v. United States, 239 F. 2d 451 (D. C. Cir. 1956) (held in prosecution for housebreaking and larceny court did not abuse its discretion in admitting evidence of the defendant's participation in another alleged crime of a similar character committed the same evening); Tomlinson v. United States, 93 F. 2d. 652 (D. C. Cir. 1937) (In a prosecution for robbery, testimony that one defendant, three or four months before the offence charged, solicited witness to rob the same man at the same place as was later done by other defendants, and that such defendant outlined to the witness a plan for the commission of the proposed crime which closely conformed to the plan eventually followed, held admissible to prove plan, purpose and intent); Lotts v. United States, 152 F. 2d 623 (8th Cir. 1946)(evidence of thefts in Wisconsin and Minnesota which occurred the day before the theft in Iowa for which accused convicted, held admissible since it concerned the issue of intent and a common plan or scheme).

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4. Texas

Texas courts have been rather strict on allowing in evidence of prior criminal acts. While recognizing the exceptions, Texas courts have admitted evidence of other crimes for the purpose of identifying the accused only when there are some circumstances to connect the other crimes with the crime for which the defendant is being tried. 23 Tex. Jur. 2d 306. Furthermore, the courts have apparently required more than a similarity of offenses in order to allow in evidence of past crimes so as to show a system. Id. at 311; McCormick and Ray, Texas Law of Evidence, 366 (2d ed. 1956).

Strangely enough, one of the closest cases I could find to the Walker situation came from Texas. In Lawrence v. State, 128 Tex. Cr. 416, 82 S. W. 2d 647 (1935) the defendant was tried for the shooting of a duck hunter who was on his land. No one had identified the defendant as the murderer, and therefore all of the testimony was circumstantial. The prosecutor introduced evidence that on two prior occasions the defendant had shot at hunters. The only difference between the prior criminal acts and the one for which the defendant was being tried was that in the latter, the one doing the shooting was not clearly visible, while in the other incidents, the defendant had made himself quite visible.

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The Court of Criminal Appeals in the first hearing said that the evidence was admissible to show that the defendant intended to shoot the deceased and to show his motive. On a motion for rehearing, the court held that the evidence was inadmissible since it "constituted no link in a chain of evidence such as is contemplated in the authorities. It simply furnished a predicate for the conclusion that appellant was a bad man generally, and because he did the things towards the so named parties, he therefore did, or was likely to do, the thing which resulted in young Fisher's death." The court went on to say that the similarity of the offense indicated no "system." As the court pointed out, "hunting was general on the premises of appellant, and in the Lundy rice field during the time mentioned, and yet the state picks out three transactions, and on them relies to make out against appellant a general violent and malignant disposition towards all hunters which would include Fisher."

Thus, the court concluded that in order to fit this case under any of the exceptions to the general rule, they would have to be extended or a new exception created. "To do either would appear unwise." Wigmore disagreed with the decision. 2 Wigmore, Evidence 281 (3d ed. 1940). While there are literally hundredsof cases involving this question, none of them discussed the problem in as much length and detail as did the court in the Lawrence case.

In Missouri v State, 109 Tex. Cr. 193, 4 S. W. 2d 68 (1928), it was held in a prosecution for burglary of a corncrib that testimony

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of prosecuting witness that his corncrib had been burglarized three times before and that after one of these burglaries he found a large quantity of corn on defendant's premise of the same peculiar size as those owned by him was inadmissible. The court said,

> If it had been shown in this case that the former burglaries had been committed by appellant and that in the instant case, the crime was committed in such a manner or under such facts as tended to show that the party who committed the last burglary was identical with the one who committed the first because of certain identifying facts common to both transactions, the above evidence would have been correctly admitted upon the issue of identity. . . We find nothing, however, in the facts of the first burglary, which tends to identify the man who fled from the burglarized premises on the night in question as appellant."

This is the application of the Holineux rule.

In Long v State, 39 Tex. Cr. 537, 47 S. W. 363 (1898) it was said,

> "Suppose A is on trial for the theft of a horse, and the proof should show that it was taken in a particular manner, but there was no proof identifying or connecting A with the theft of said horse; then in order to connect him with such offense, and to show that he was the guilty

> party, if the contention of the state be correct, if he had been convicted for the theft of other horses committed in a similar manner, proof of such collateral crimes could be introduced in evidence, as tending to show that he was guilty of the offense charged against him. This we do not understand to be the rule; but this was exactly what was done in this case, -- that is, proof of independent offenses was introduced by the state as testimony tending to connect defendant with the main offense, for the purpose of corroborating the accomplices evidence.

See also Musgrove v State, 28 Tex. Cr. 57, 11 S. W. 927 (1889). (Same holding as Long case)

In Polanco v State, 133 Tex. Cr. 7, 106 S. W. 2d. 1057 (1937), a murder prosecution, it was held that evidence that the accused with two others robbed a bus driver about a month prior to the murder was not admissible to identify him as one of the men who robbed and murdered the bus driver. See also Chester v State, 300 S. W. 56 (1927) (held in a prosecution for murder of a policeman by gun, evidence that defendant had some forty minutes earlier and forty blocks away had drawn a pistol on another and had threatened to shoot him was inadmissible.)

Many cases indicate that there must be some connection between the prior criminal acts and the crime for which the defendant is being tried, in order for the evidence to be admissible.

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Lancaster v. State, 82 Tex. Cr. 473, 200 S. W. 167 (1918) (held that evidence of another robbery was not admissible to prove identity since there was nothing to connect the transaction with the one under investigation except that they were committed the same night, and the evidence showed some similarity in the appearance of the robbers.); Hill v. State, 44 Tex. Cr. 603, 73 S. W. 9 (1903) (burglary); Smith v. State, 52 Tex. Cr. 80, 105 S. W. 501 (1907) (similar acts of arson not admissible); Weatherred v. State, 100 Tex. Cr. 199, 272 S. W. 471 (1925) (previous offers to people to burn down building inadmissible in arson case).

In Texas, "system" or "scheme" cannot be shown by collateral crimes unless they fall within "res gestae," show intent, or connect the defendant with the offence charged. Similarity of act and approximation of time do not ipso facto constitute "system." 1 Underhill, Criminal Evidence, 507 (5th ed. 1955). "There must indeed be such a concurrence of common features between the several crimes as will show logically that all of them might well have resulted from a common plan or systematic course of action." 23 Tex. Jr. 2d 311.

The court in West v. State, 140 Tex. Cr. 493, 145 S. W. 2d 580 (1940), while discussing the meaning of the term "system" as used to describe the exception said, "By 'system', as we understand the term, is meant the use of the same means, the same manner and method of accomplishing a previously planned objective." Usually, this exception is applied in forgery, fraud, or embezzlement cases. See e.g. West v. State, id.

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In Walker v. State, 103 Tex. Cr. 555, 281 S. W. 1070 (1926) defendant was accused of rape. It was contended that he went to the woman's house and represented that he sought to employ her, and she accompanied him on a street car to the end of the line at which point they went into the woods where he raped her. He allegedly held a gun on the victim. A witness identified the defendant as the one who had perpetrated an identical crime upon her (committed in the same manner). The evidence was held to be inadmissible. The court said, "The facts in this case clearly show that the testimony complained of comes under the category of 'systematic crimes' rather than under 'system'." See also McGowan v. State, 36 S. W. 2d 156 (1931) (other burglaries do not necessarily create a "system"); Clements v. State, 147 Tex. Cr. 531, 182 S. W. 2d 915 (1944) ("Nor can it be shown that he is engaged in a 'system' unless there are some identifying circumstances that will throw light on the crime for which he is being tried. . .")

Texas cases which have allowed in evidence of other crimes include: Eatemon v. State, 81 Tex. Cr. 73, 193 S. W. 666 (1917) (Where defendant was not identified at the site of robbery for which he was being tried, evidence that he was driven from that spot to another where he committed another robbery admissible for purposes of identification); Watters v. State, 94 S. W. 1038 (1906) (held in a prosecution for cattle theft, proper to admit evidence that hides of other cattle were found buried in defendant's field as tending to identify defendant as

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the one guilty of stealing the cattle); Washington v. State, 8 Tex. Ct. of App. Rep. 379 (1880) (where identity of murderer not established, proper to admit evidence that defendant admitted he had shot at victim before since shows motive and identity); Kornegay v. State, 136 Tex. Cr. 419, 125 S.W. 2d 599 (1939) (in prosecution for cattle theft, evidence that defendant stole other cattle in area and around same time held admissible to connect him with crime for which he was charged); Compton v. State, 148 Tex. Cr. 204, 186 S. W. 2d 74 (1945)(cattle theft - same holding as Kornegay case); Williams v. State, 105 Tex. Cr. 22, 285 S.W. 616 (1926) (In prosecution for burglary, proof of presence in defendant's house stolen property other than the proceeds of the burglary held admissible); McGee v. State, 112 Tex. Cr. 385, 16 S. W. 2d 1096 (1929) (passing forged check; defendant pleaded an alibi; evidence that defendant under an assumed name, on or about the same date, in the same town, passed another check practically identical with the one in question admitted on the issue of identity); Cochrane v. State, 125 Tex. Cr. 119, 67 S. W. 2d 313 (1934) (burglary; on plea of alibi, other burglaries on same night admitted); Davis v. State, 44 S.W. 1099 (1898) (same as Cochrane case).

In Cascio v. State, 146 Tex. Cr. 49, 171 S.W. 2d 356 (1943) the defendant was convicted of stealing a tire. The testimony of a witness that his tire was stolen the same night and that his tire was found in the defendant's car with the other stolen tire was held admissible. Also held admissible was the testimony of another witness who said that on the same night, he saw a person he believed to be

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the defendant attempting to enter automobiles in the vicinity of the thefts. This evidence was intended to identify the thief. The case was reversed on the ground that evidence that another theft had taken place was inadmissible since there was nothing to connect the defendant with it.

In Texas, the cases also seem confusing; however, if the Lawrence case is still good law, the Walker incident would probably not be admissible. The Lawrence case is a relatively old case and in view of the tendency to admit such evidence, it is very possible that the Texas courts would expand upon the exceptions.

5. Conclusion.

The cases are in utter chaos, apparently each case must be decided on the facts. Thus it is very difficult to predict what a court would do in any given situation. I think that the federal courts and Texas have been stricter in admitting evidence of other crimes than many other jurisdictions. However, there have not been many federal cases and there have not been any recent pronouncements in Texas.

Probably any experienced trial man would betbetter able to predict what would happen than someone surveying the cases. For this reason, I am a little hesitant to disagree with Mr. Ball, who feels that the Walker incident would be admissible in most places. (California is probably the most permissive state).

I just cannot see how this evidence could be used in any other way than to show that Oswald was the type of person who would shoot at the President. The evidence of the Walker shooting cannot be used to show intent or lack of mistake since these elements are already clear. I cannot

see how the Walker shooting sheds any light on the motive for killing the President, unless we really use our imaginations.

This leaves us with identity, system and similar crime. McCormick has said that courts are stricter in applying their standards of relevancy when the ultimate purpose of the prosecution is to prove identity, or the doing by the accused of the criminal act charged than they are when the evidence is offered on the ultimate issue of knowledge, intent, or other state of mind. McCormick, Evidence, 331 (1954)

There is nothing that connects the Walker shooting with the Kennedy assassination. By showing who shot Walker, we have not shown the identity of Kennedy's slayer. There is nothing to show that these two shooting were individual manifestations of a single scheme.

As we have seen, some courts will admit evidence of another crime if it is so similar to the one for which the defendant is being tried that it will tend to show that the defendant committed the crime. Here, there is nothing distinctive about the methods used in the crime. Obviously, the objects were distinctive, but there are thousands of people who could or would take a shot at both men. The use of a rifle from a distance hardly seems a "mark" which would identify the culprit or connect the two crimes. The means of carrying out the crimes are not novel enough, nor frequent enough to indicate a modus operandi.

Thus, in my opinion, the evidence is only relevant to show that Oswald was predisposed to commit the assassination. I find it very persuasive, but in theory courts will not admit the evidence. Maybe many courts

will admit it and just say it fits under one of the exceptions. However, I do not think any of the cases above, even the California cases, have admitted a separate crime with such a tenuous connection to the crime for which the defendant is being tried.

c. Sufficiency of Evidence of Prior Criminal Acts.

Assuming that proof of the Walker incident is admissible, we must then determine how much proof that Oswald did shoot at Walker is required before a jury would be allowed to consider such evidence.

Generally, it is said that it is not necessary to prove the accused's guilt of collateral offenses beyond a reasonable doubt. "It is variously stated that there must be evidence tending to prove each element of the collateral crime; that the other offense must be shown with reasonable certainty; that the guilt must be substantially shown; and that the proof of the other offense must be clear." 1 Wharton, Criminal Evidence, 560 (12th ed. 1955). In order for the jury to consider the other crimes, there should be "substantial evidence" that the defendant committed them. McCormick, Evidence 331 (1954); Labiosa v. Government of Canal Zone, 198 F. 2d 282 (5th Cir. 1952) (proof of similar offenses must be clear); People v. Albertson, 23 Cal. 2d 550, 575, 581, 596-599, 145 p. 2d 7, 20-22, 30-32 (1944) (substantial evidence). McCormick also states that in his opinion "before the evidence shall be admitted at all, this factor of substantial or unconvincing quality of the proof should be weighed in the balance. McCormick, Evidence 331 (1954).

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Texas courts require that the evidence must prove the commission of the other crimes beyond a reasonable doubt. In Ernster v. State, 165 Tex.Cr 422 308 S. W. 2d 33 (1957) the defendant was convicted of misrepresenting a written instrument affecting property. Evidence of several extraneous offenses was admitted to show motive and intent. It was held that the trial court's failure to limit the jury's consideration of the offenses to the purpose for which it was admitted and its failure to instruct the jury that they could not consider such collateral crimes unless they believed beyond a reasonable doubt that the defendant was guilty thereof constituted reversible error. See also Lankford v. State, 93 Tex. Cr. 442, 248 S. W. 389 (1923).

There would be very little evidence of the Walker incident if Marina's testimony were not admissible due to incompetency or privilege (I do not know how much light Oswald's friend who supposedly knew about the Walker incident could shed on the question). With Marina's testimony, I should think there is sufficient evidence that Oswald shot at Walker, even in Texas.

II. Would the fact that Oswald left the Texas School Book Depository Building, shot the Police Officer, and resisted arrest be admissible to show that he assassinated President Kennedy?

It is clear that the conduct of an accused person following the commission of an alleged crime is admissible since it may be circumstantially relevant to prove the commission of the acts charged. Rivers v. United States, 270 F. 2d 435, 438 (9th Cir. 1959). 23 Tex. Jur. 2d. 190.

"It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." 2 Wigmore, Evidence, 111 (3d ed. 1940). See also United States v. Heitner, 149 F. 2d 105, 107 (2d Cir. 1945) (L. Hand. J.); 23 Tex. Jur. 2d 191 (1961); Hutchins v. State, 360 S. W. 2d 534 (1962); McCormick and Ray, Texas Law of Evidence, § 1538 (2d ed. 1956).

Some courts require that the accused should have been aware that he was charged with the crime or that he was a suspect, and some courts have said that only an unexplained flight is admissible evidence. 2 Wigmore, Evidence 116. (3d. ed. 1940). Apparently, these latter views are in the minority. id. In flight cases, Texas courts do not require that it be shown that the accused was aware that he was charged or suspected. McCormick and Ray,[2] Texas Law of Evidence, 394 (2d ed. 1956). However, in order to use resisting arrest as an incriminating fact, it must be affirmatively shown that the accused knew or should have known that an attempt was being made to arrest him. Chester v. State, 108 Tex. Cr. 150, 300 S. W. 57 (1927).

Most courts have said that the accused "may always endeavor to destroy the guilty significance of his conduct by facts which indicate it to be equally or more consistent with such other hypothesis than that of a consciousness of guilt... Such attempts at explanation are sometimes declared improper; but the general and sounder tendency is to admit them

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freely, leaving the jury to pass upon their plausibility." 2 Wigmore, Evidence 117-118 (3d ed. 1940); (9th Cir. 1959); 23 Tex. Jur. 2d 194, (1961) Chastian v. State, 97 Tex. Cr. 182, 260 S. W. 172 (1924).

Flight if shown generally is not conclusive, nor does it raise any presumption of guilt. 1 Wharton, Criminal Evidence, 262 (12th Cir. 1956). United States v. Greene, 146 Fed. 803; 23 Tex. Jur. 2d 191. (1961) (Mo. & Iowa Contr).

The evidence of flight or escape should go to the jury, who are the sole judges of its weight and sufficiency, and the motives which prompted the flight. Natually,such evidence has no probative value unless it appears that the accused fled to avoid arrest for the crime charged. "Even then, its force is slight, depending on the efforts made, the means employed, and the motive and knowledge." 1 Underhill, Criminal Evidence, 924 (5th ed. 1956). It should be noted that flight because of one crime is not relevant to establish the guilt for another crime. 1 Wharton, Criminal Evidence, 420 (12th ed. 1956); Damron v. State, 58 Tex. Cr. 255, 125 S. W. 396 (1910).

From the above statement of the law, it would seem that an inference of consciousness of guilt and hence guilt can be drawn from the fact that Oswald left the scene of the crime. While he did give an explanation for this, all of this would go to the jury. Oswald's shooting of Tippit would clearly be admissible and probative. His flight following that and his resisting arrest in the theatre would probably be more probative of his killing of Tippit; however, it might be considered along with the shooting of Tippit to show one attempt at escaping.

February 17, 1964

MEMORANDUM

To: Messrs. Hubert and Griffin

From: Richard Mosk

SUMMARY

There are no degrees of murder in Texas. There can be verdicts of justifiable or excusable homicide in which cases the defendant is acquitted. The defendant may be acquitted if he is adjudged insane at the time of the act. He can also be convicted of first or second degree negligent homicide. One charged with murder may be found guilty of negligent homicide.

The punishment for murder is death or confinement in the pentitentiary for life or for any term of years not less than two. If the jury finds that the defendant did not act with "malice aforethought" the maximum sentence that may be imposed is five years. However, a second conviction for a capital offense requires a sentence of life imprisonment as does a third conviction for a felony. While Texas does not have the crime of manslaughter, the tests usually employed to distinguish manslaughter and murder in other states are similar to the one used in Texas to distinguish murder with "malice aforethought" from murder without "malice aforethought."

If the jury assesses a sentence greater than the minimum sentence, the judge must impose an indeterminate sentence ranging from the minimum sentence required by law to the sentence imposed by the jury. This applies to homicide cases, but does not apply where the Habitual Criminal Statute is involved.

If the jury so recommends, a suspended sentence will be imposed if the punishment assessed by the jury does not exceed five years, even if it is a murder case. Furthermore, the judge may give probation in any felony case with certain exceptions, so long as the sentence does not exceed ten years. One of these exceptions is that probation may not be given where the offense is murder.

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BODY

The Texas Penal Code provides that "Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing." Vernon's Annot. Texas P.C. Art. 1256.

There are two forms of noncriminal homicide. The first is "justifiable homicide" which includes such cases as the killing of felons attempting to escape arrest, killing in order to prevent felonies, killing in self-defense, and others. Vernon's Annot. Texas P.C. Arts. 1207-1227. The second is "excusable homicide" which is defined as " . . . the death of a human being . . . by accident or misfortune though caused by the act of another who is in the prosecution of a lawful object by lawful means." Vernon's Annot. Texas P.C. Art. 1228. Both of these defenses may be raised at the trial and, if found valid by the jury, will result in an acquittal.

Another defense is the one of insanity. The Penal Code states "No act done in a state of insanity can be punished as an offense." Vernon's Annot. Texas P.C. Art. 34. Insanity at the time of the commission of the alleged act is a complete defense against the act charged, but insanity at the time of the trial is not a defense to the act charged but has the effect only of postponing the trial so long as the insanity exists. Vernon's Annot. Texas P.C. Art. 34.

The M'Naughton test has been applied in Texas, McGee v. State, 155 Tex. Crim. Rep. 639, 238 S.W. 2nd 707 (1951), but the irresistable impulse test has not yet been recognized. Ross v. State, 153 Tex. Crim. Rep. 312, 220 S.W. 2nd 137 (1948). The accused has the burden of proving insanity by a preponderance of the evidence. Newman v. State, 99 Tex. Crim. Rep. 363, 269 S.W. 440 (1924).

A verdict of sanity at the time of the trial of the murder prosecution and insanity at the time of the homicide would call for the release of the defendant (i.e. "temporary insanity"), but a finding of insanity at both times requires the defendant to be committed to the state hospital. Vernon's Annot. Texas C.C.P. 932b.

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The offense of manslaughter no longer exists, since the legislature repealed the manslaughter statute. Vernon's Annot. Texas P.C., Arts. 1254-1255. See Gatlin v. State, 133 Tex. Crim. Rep. 247, 20 S.W. 2nd 431 (1929); Gunjardo v. State, 113 Tex. Crim. Rep. 570, 24 S.W. 2nd 56 (1929) (in which it was stated that manslaughter is no longer a defense against murder and thus all unlawful killing above the grade of negligent homicide is murder).

Homicide by negligence is divided into two degrees. Negligent homicide in the first degree consists of the causing of death of another by negligence and carelessness in the performance of an unlawful act. Vernon's Annot. Texas P.C. 1231. It is punishable by confinement in jail not exceeding one year or by a fine not exceeding $1,000. Vernon's Annot. Texas P.C. 1237. Second degree negligent homicide consists of the causing of death of another by negligence not including a felony and carelessness in the performance of an unlawful act. Vernon's Annot. Texas P.C. 1238. Where the unlawful act is a misdemeanor, it carries a punishment of imprisonment in jail not exceeding three years or by a fine not exceeding $3,000. Vernon's Annot. Texas P.C. Art. 1242. Where the unlawful act is merely one for which an action would lie, the punishment consists of a fine not exceeding $1,000 and imprisonment in jail not exceeding one year. Vernon's Annot. Texas P.C. Art. 1243.

Article 694 of the Code of Criminal Procedure states, "In a prosecution for an offense including lower offenses, the jury may find the defendant not guilty of the higher offense, but guilty of any lower offense included." Article 695 of the Code of Criminal Procedure states: "The following offenses include different degrees: (1) Murder, which includes all the lesser degrees of culpable homicide and also an assault with intent to commit murder . . . " It has been held that a charge of murder carries with it a charge of negligent homicide. Wallace v. State, 145 Tex. Crim. Rep. 625, 170 S.W. 2nd 762 (1943).

Although murder was at one time divided into murder of the first degree and murder of the second degree, degrees of murder do not exist under the present statute. See Hunt v. State, 123 Tex. Crim. Rep. 559, 59 S.W. 2nd 836 (1933). (Degrees of murder were abolished by Act, 33 Gen. Leg. Chap. 116.)

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The punishment for murder is "death or confinement in the penitentiary for life or for any term of years not less than two." Vernon's Annot. Texas P.C. 1257. However, if the jury believes that the defendant "was prompted and acted without malice aforethought, they cannot assess the punishment at a period longer than five years. Vernon's Annot. Tex. P.C. Art. 1257b. A second conviction for a capital offense requires a life sentence as does a third conviction for a felony. Vernon's Annot. Texas P.C. Arts. 63 and 64. Thus, in summary, the only restrictions placed upon the jury for fixing the punishment, in addition to the Habitual Criminal Statute, is that of the minimum sentence of two years and, in case of the absence of "malice aforethought," the maximum sentence of five years.

It is interesting to note that murder without "malice aforethought" is defined as "a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection . . . " Vernon's Annot. Texas P.C. Art. 1257c. This would seem to be equivalent to the definition of manslaughter that exists in most states.

Texas also has an Indeterminate Sentence Law which provides that if the jury shall assess the punishment of an offense at a longer period of time than the minimum period of imprisonment, the judge, instead of pronouncing a definite time of imprisonment, shall pronounce an indeterminate sentence of imprisonment fixing in such sentence as the minimum, the minimum time prescribed by law and as the maximum time, the term fixed by the jury. Vernon's Annot. Texas C.C.P. Art. 775. This Indeterminate Sentence Law applies to a conviction for murder. Miller v. State, 129 Tex. Crim. Rep. 166, 84 S.W. 2nd 459 (1935), but it does not apply where one is sentenced to life imprisonment under the Habitual Criminal Statute. Ex parte Mason, 154 Tex. Crim. Rep. 517, 229 S. W. 2nd 73 (1950).

Another alternative sentence is the suspended sentence. Articles 776 of the Code of Criminal Procedure states: "Where there is

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a conviction of any felony in any district or criminal district court of this State, except murder, perjury, burglary of a private residence at night, robbery, arson, incest, bigamy, seduction and abortion and the punishment assessed by the jury shall not exceed five years, the court shall suspend sentence upon written sworn application made therefor by the defendant, filed before the trial begins. When the defendant has no counsel, the court shall inform the defendant of his right to make such application, and the court shall appoint counsel to prepare and present same if desired by defendant. In no case shall sentence be suspended except when the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or in any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty."

In Penal Code Art. 1257a, which concerns evidence admissable in prosecutions for felonious homicides, it is stated "that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act." One case has indicated that this latter provision repeals CCP Art. 776 only as to murder. Ritzler v. State, 143 Tex. Crim. Rep. 327, 158 S.W. 2nd 495 (1942). (Held that CCP Art. 776 was not repealed as to robbery cases.) Thus, in a case of murder, if the sentence does not exceed five years, a suspended sentence is possible.

In spite of the rather clear language of CCP Art. 776, the courts have construed the statute to mean that the sentence cannot be suspended unless so recommended by the jury. Brown v. State, 156 Tex. Crim. Rep. 652, 245 S.W. 2nd 497 (1952). Whitehead v. State, 162 Tex. Crim. Rep. 507, 287 S.W. 2nd 497 (1956). Macaluso v. State, 167 Tex. Crim. Rep. 216, 320 S.W. 2nd 5 (1959).

The Adult Probation and Parole Law, Vernon's Annot. Tex. CCP Supp. Art. 7Ø1d II, was enacted in 1957, and it provides that "when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, [the courts] shall have the power, after conviction or a plea of guilty for any felony crime or offense except murder, rape, and offenses against morals, decency, and chastity, where the maximum punishment assessed the defendant does not exceed ten years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed or, if no sentence has been imposed, for the maximum period for which the defendant might have been sentenced, or impose a

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fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Any such person placed on probation shall be under the supervision of such court." The statute goes on to provide that nothing in this Act shall be construed as repealing the Suspended Sentence Law. Vernon's Annot. Tex. CCP Supp. Art. 776d V.

While no relevant cases have come down on this statute that I can find, it would seem that probation cannot be given in any case of murder, but it can be given in the case of negligent homicide which, as we have seen, is not considered murder. Vernon's Annot. Tex. P.C. Art. 1256.