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# TRIAL AND TORT TRENDS



*1966 Belli Seminar*



*Edited by*

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## THE JACK RUBY TRIAL

Joe H. Tonahill \*

MR. BELL: We have a man here I think is one of the real great trial lawyers of the United States. Not only is he of magnificent physical stature, but he is a man that has all of the attributes that go into making up a great trial lawyer. He's got the attribute of imagination. He's got the attribute of courage; he's a good, damn good court lawyer. I get, once a week, from him, scribbled on a piece of paper a citation, not only from Southwest Reporters, but from the Atlantic Reporter, Pacific Reporter, something new in the law. But what I like about this man is the courage, the visceral guts of this fellow, who sits next to me, sits next to me not only ideologically, philosophy, philosophically and in spirit, but he stood about that much "taller" than I when we tried that Ruby case down there. Joe Tonahill, one of the real magnificent lawyers, one of the real lawyers, with courage and guts, one of my best friends will tell us something now about the Ruby case. If you have any questions later on, you may ask them.

MR. TONAHILL: Thank you, Doctor Belli. Doctor Belli, I'll tell you—if you weren't such a great lawyer, there's no telling what kind of a sentence they might have given old Jack Ruby down there in Dallas!

Yes, sir. And I'll get on a little bit further into this thing, and tell you exactly why Jack Ruby got that cruel, inhuman, uncivilized death verdict. A lot of people said that Jack Ruby needed lawyers from New York, lawyers from Denver, Washington, D.C., Maryland, and so forth, but you could have brought all the lawyers in this room to Dallas, Texas, to the trial of Jack Ruby; he would have walked out

\* Jasper, Texas.

of there with a death sentence. The sentence—it just fitted squarely into the wall, like all the bricks fit into the wall of these buildings around here. He didn't have a chance, and I don't think anyone down in Dallas will argue the point at all.

There were some strange things that had gone on before, during and after the Ruby trial. I suppose Mel and I could stand here and tell you *everything* happened during the trial of Jack Ruby that can happen to anybody in the trial of a lawsuit. That's another thing I'll say about my friend. He had sense enough to stay out of that part; and I fell into the trap a couple of times, but they bailed me out. Bob Considine offered to use his Diner's card to pay the last fine!

While we're talking about Mel's friend, Judge Brown, I'd like to call your attention to this fact—did you know that Judge Brown is an author, too? He hasn't written thirty-five books like Mel has, but he conceived his idea to write a book, evidently, before the grand jury returned its indictment. The grand jury came into the courtroom on Monday, following the shooting, to make its report of indictments, the bill of indictments returned, and he spoke up, he said, "Have you considered the Ruby matter yet?" and the District Attorney said, "Yes, judge; we've got an indictment." He said, "That's fine." And so along about March 12th, of '65, he wrote Mr. Sam Stewart, editor of Holt, Reinhart, and Winston, New York—he says, "About the book," and mind you, he still had a lot of motions pending before him on bills of exception, sanity trial coming up; and another thing, he was still sitting on the Ruby case—he said, "About the book; it's—perhaps it's a good thing it is not finished, because they have filed a motion to disqualify me on the grounds of having a pecuniary interest in the case. I can refute that by stating that there has been no book published or that I have not begun to write a book. We're coming along nicely. We have approximately 190 pages complete. I have been on Paul—" that's Paul Crume who's doing the writing for him—"I've been on Paul, trying to

hurry him; have called him, gone to see him, everything else I could do to hurry him, but Paul has been sick, and not been able to do as much as he wanted to." He said, "You've probably read in the papers that the Court of Criminal Appeals tossed the case back to me to determine Jack Ruby's sanity. I've set the sanity hearing for March 29th, and don't know the outcome." He didn't know the outcome! "But it's my opinion that they will never prove Ruby insane, but the case is far from being over." He's writing this book!!! "Therefore, I ask your indulgence and patience, since actually we may have a much, much better book than we had anticipated, but I do not want to put myself in the position of being disqualified."

Then on June the 21st, after we hacked him around, he wrote to Judge Dallas Blankenship, the presiding judge of that administrative and judicial district in Dallas, and said, "Dear Judge Blankenship, I would like to excuse myself from any further duty in the case of the *State of Texas v. Jack Ruby*, and therefore request that you appoint another judge to handle all future proceedings." That was after the hearing, and he had testified and a number of other people had testified, about his part in bringing the disgraceful, uncivilized verdict on Jack Ruby.

About an hour after Ruby shot Oswald in the basement of the Dallas Police Courts Building, another act of violence occurred in Sioux City, Iowa. A man named Bohan, a metal technician, and his mother and stepfather, were watching the funeral of Kennedy on TV and his stepfather came in—he was about sixty-eight years old—and he went to cursing Kennedy, and saying "Thank God he's laying in that coffin," and so forth. When the step-father said that, this fellow Bohan jumped up, grabbed his mother's scissors, stabbed him six times in the chest and mouth, and killed him. So he was just like Ruby was—a mental case. On the next day he was arraigned, and they fixed his bail at \$10,000.00. He entered a plea of not guilty, and the day before Christmas, he went before the court and changed his plea.

At that time, Mel and I were undertaking to arrange bail through a habeas hearing, and were putting on evidence at that very time when he changed his plea to guilty. Judge Paradise, was the judge of the court. It was the day before Christmas; Judge Paradise sentenced him to eight years in the penitentiary, and fined him a thousand dollars; then suspended his eight years in the penitentiary, shook hands with him, wished him a Merry Christmas, accepted the thousand dollar fine, and went home. Just imagine this fellow Ruby, the shape he's in, just no comparison to this Bohan thing, and Judge Paradise said, "It's not a reason for a citizen of the nation to release his emotions to the extent he cause another tragedy. The defendant's act indeed," he concluded, "would weigh forever on his conscience." Then he sentenced him to the eight years and suspended it.

Now, what happened to Ruby that day? He was denied bail, and had to go back upstairs and spend his Christmas in jail! Mel and I went on back to Jasper and San Francisco, and we renewed the hearing later, early in the month of January. Then we set up the change of venue hearing, and went into that thing in about two weeks, and then the judge said that he was not going to rule on the change of venue at that time, that the best test as to what was in the minds of the jurors was the voir dire, and after that he would then decide on what he was going to do. After he had told us in chambers that he definitely was going to change the venue, after he fooled with the selection of a jury for about ten days. Of course, at the end of about a month there, voir direing the jury, he immediately overruled our motion to change venue, and set the case for immediate trial, and moved the court from one end of the hall down to the other, about two hundred feet. We told Judge Brown he misunderstood, we didn't want to be moved two hundred feet, we wanted to be moved two hundred miles! So he gave us that much of a change, and

brought us nearer to the scene of the blood, that is, the scene where Oswald shot Kennedy, it's about a hundred yards from that Ruby trial courtroom out there to where Oswald ambushed President Kennedy.

Mr. Gaws: Joe. You're about to get your first question, because this is a recurring problem in these homicides of celebrities. There's both the time and the space factor, with respect to the publicity, and I'm sure the lawyers and other folks in the audience would like to know what you would recommend. Now, by the time factor, I mean that apart from the venue of where you're going to try the man, there's a question of trying to get a continuance until the publicity dies down, because the publicity may be so pervasive that, regardless of where you try the man, if he's tried within a short period of time after the commission of the offense, it may be impossible to get a fair-minded panel. Apart from that, of course, is the space factor, the removal to another venue, or county, or district, in order that if there is a basic, fundamental local prejudice, apart from the time factor, that can be overcome. Would you comment on those points?

Mr. Tomahill: Yes, because these are very important. There's a number of factors involved as to whether you go for immediate trial, after you've had your change of venue overruled, whether you ask for a continuance or don't ask for continuance.

Well, we got the case reversed on the change of venue issue; but we went immediately into the trial, and we didn't ask for a continuance. Each case stands on its own bottom, and Mel, as chief counsel, made the decision, and it was a good decision. It did result in the case being reversed. Why? Because we had so much pervasiveness and saturation of prejudice, just cruel things, things that were said about Mel, me, Ruby and everybody else connected with it. Lies upon lies, innuendos, direct accusations of all sorts of things got into the press, which I'll try to

give to you briefly, as we go along. They hit us with everything.

On top of that, we got the verdict in about fifty-three minutes. The jury couldn't possibly have read the court's instructions in that time! A number of factors all entered into the trial which are set out in the concurring opinion reversing it.

Now, Billy Sol Estes' case is a little different from ours; we asked for a change of venue to a county at least two hundred miles from Dallas, because of the local problem of Dallas' image being on trial. How could Dallas deal with Ruby fairly while the state, nation and world was judging Dallas so prejudicially? Billy Sol gave the court no alternative; he just said, "We can't get a fair trial anywhere." Couldn't get one anywhere, and didn't offer a solution to the dilemma, didn't give the court anything to go on. However, his case was reversed because they permitted the TV to enter the courtroom, which Justice Clark said is "foreign to our system of jurisprudence."

In determining whether to seek a continuance, you have to sit there in that courtroom, see what your local situation is, and how it's going to affect you. We had a strong, strong defense of psychomotor epilepsy variant, which meant that Jack's consciousness was suspended at the time Oswald came out there leering at him. He just exploded a few seconds, went for his pistol, and shot him, and the evidence showed that you can do those antisocial acts while in that state of temporary insanity. His background, and all the things that he'd been exposed to in the past, showed him doing this sort of thing, again, again, and again. I guess we documented at least a hundred violent acts that he committed, and after they were over he had no recollection or knowledge that he'd done any part of it.

So we had this strong, vital, valuable temporary insanity defense, which no jury in Dallas County at that time would have acknowledged anyhow, or respected, and without benefit of hindsight or present reflection, we thought that we

were on pretty good grounds, either way we went. We thought we had a good, strong medical defense, and thousands of documents, the evidence we had that we put into the record, to show that he couldn't get a fair trial in Dallas. So we didn't move for a continuance, and went on into trial. The best thing that happened to Jack Ruby in the appeal was the intermediate delay of about two years, and all the lawyer wrangling, which caused sympathy to swing to him, and people became convinced he was insane. We argued on the last day of the court's term in June, and then they came back three months later, October the 5th, and reversed it. We feel that that delay did play an awful important part, so far as the appeal is concerned.

But you have to approach these venue cases against the background of each factual situation—what is involved; what kind of prejudice, local or inflammatory; and what can you do with it. You document and prove it all, and make a good record for appeal. Once that is accomplished, you've got the prosecution in the groove of error already; so keep swinging with them. That's about the way the Ruby case worked out.

MR. BELLI: See *Rideau v. Louisiana*, 373 U.S. 723, where they gave the kangaroo trial in the jail, and had the defendant confess, and then showed that on TV to most of Louisiana. When the Supreme Court of the United States reversed it, they seemed to indicate that the defendant couldn't be tried anyplace where that trial had been televised. I don't know what eventually happened to that case, Joe; do you?

MR. TONAHILL: They moved it to Baton Rouge, from Lake Charles.

MR. BELLI: But they indicated that if they couldn't find someplace where that trial had not been televised that this man couldn't be tried. Query: can you commit a crime so

horrendous that you can't be brought to trial? It would seem to be so indicated from that language of the Supreme Court; indeed, the Supreme Court used the same language there for which I was so bitterly castigated by the American Bar Association. They used the word "kangaroo."

MR. TONAHILL: Kangaroo court.

MR. BELLI: So everyone knew what a kangaroo court was. Well, there was one court that didn't; but the Supreme Court did.

MR. TONAHILL: Yes, the Court decided in *Rideau* that there was this community prejudice not just between the accused and the men showing the TV, but without bothering to explore actual prejudice in the mind of the voir dire—they never reached what the voir dire thought of the TV showing of *Rideau* confessing to the murder on TV—the Court just took the mere showing of the event as sufficient to warrant a change of venue. Now a defendant is in a much better position as a result of *Rideau*, as well as the *Ruby* case. However, there's one thing: in the Court of Criminal Appeals decision in *Ruby*, the majority written by Judge Morrison, stated: "Countless thousands witnessed the shooting of Oswald on TV." Now, he used that word "witnessed." Then he comes along, and he follows *Estes*, and *Shepard*, and *Rideau*; and, using those cases, as the basis for the transfer, said that the change of venue should have been granted.

*Estes* is the one that strikes so hard at television damage to a defendant on trial. It says that it is foreign to our system of jurisprudence, and a man should not be exposed to it and so forth. We take the position along with Judge MacDonald who wrote a very strong, elaborate, and erudite concurring opinion on venue, going into great depth, much more than Morrison did, that anyone who saw the shooting on live television or re-run was a witness to the offense, and

under Texas law, Article 616, section 6 of the Code of Criminal Procedure, provides that a witness cannot serve as a juror, because they're disqualified.

The District Attorney introduced the shooting on television into evidence as evidence of the shooting, as direct evidence of the shooting. We could not object, because that's perfect evidence. That's good evidence; you couldn't have anything better than a reproduction of the actual offense. What better could you have than a photograph of the shooting, an actual photograph? And therefore, we feel that anyone who witnessed the shooting on TV cannot serve as a juror, but Judge Woodley, in one little three-line, four-line paragraph, in his concurrence, says,

"In view of another trial and future trials, it should also be clearly understood that the majority does not hold that a juror who saw the shooting of the deceased on television is, for that reason alone, disqualified or subject to challenge . . ."

MR. GANS: Isn't that involved in a continuance?

MR. BELLI: No; the codes of every state say that you're disqualified as a petit juror if you have that qualification which, anciently, you had to have to sit on the jury. You remember, from your legal history, that you had to be a witness in order to be a juror. But now every code says, in every state, that if you're a witness to an event, you cannot be a juror. Now; query: if you see something on television, are you a witness? I think so, obviously. We argued that if you look in a mirror, shave the fellow that's in the mirror, that's yourself, you damn well know that it's you! If you look in the rear view mirror and see the speed cop back there, you're a witness to that cop back there. I think it's ridiculous to say that you're not a witness if you see it by means of television. Indeed, in the middle of the trial, we went on upstairs to the Supreme Court of Texas and tried to stop the trial. We tried to have the Court hold them that these TV witnesses—these

jurors—were witnesses. Indeed, when one of the prospective jurors took the witness stand to qualify as a juror, and answered the question that he had seen it on television, Joe went up and served a subpoena on him as a witness, and Judge Brown told him, "Don't take that; don't take that. Put that away. I'll hold you in contempt if you serve him." So, we couldn't call that witness, and he sat as a juror. I think that exemplified the situation more than anything else. Any cases on that, Al?

MR. GANS: No. There are no cases on whether a person who witnesses an incident on a live television broadcast is a witness, but the point would seem to be a fairly obvious one. This might be a place to call an expert psychiatrist or psychologist on perception of an incident, as to whether that makes you a witness so that, psychologically, you would be absolutely precluded from passing on the facts impartially. At least I throw that out as a suggestion.

MR. BELLI: It wasn't that we were going to deny (we couldn't admit outright) that Ruby had shot Oswald, but what we were concerned with was the purposeful manner in which Ruby went up to Oswald—and you all remember—he went up and did that shooting. Now, these jurors who saw that on television had a better vantage point than had they been right there. You get a better editing of a fight on TV, of a football game on TV, with the six and eight pairs of eyes. So our problem was this edited, purposeful act of a man who we said was insane, or in a psychomotor variance state, an epileptic state, actually go up and do this purposeful act, and the jurors had seen that. Well, that would not destroy the question of whether he shot or not, but it would destroy their hearing *de novo* from the witness stand the first time, as to whether this act was purposeful or not. It had already been characterized by then, in the conversation with that family. The people sitting around, "Look at the fellow doing that! Look at that fellow shooting there! Why he shot. He went

up and deliberately shot him." All this rang in their minds, and it was that attitude to which we objected. I think it was much more vicious than if they'd been standing there and actually had seen it.

MR. TONAHILL: I think that this character assassination by circumstance—specialist Pete Tonkoff can probably lend something to that later on, because, on these libel, defamation and slander things that arise from TV showings, the gist of the damage, where they say "Yes, he's a communist," and they say, "No, he's not a communist." or "She's a communist; she's not a communist." is proven by putting on that very act. The statement or tort is the main damage. That's the same thing, and I think your radio and your TV defamation, and character assassination, falls right into place just like the shooting of Oswald on TV; I see no difference between that and seeing it live. I think there's plenty to gather from the comparison of the defamation on TV and radio, and the disqualification of the TV witness.

There's one thing that I think that the disgraceful denial of due process of law in the Ruby trial provoked and brought about, and that was the action of the Texas legislature, shortly thereafter, which went into session and amended the Code of Criminal Procedure in over 102 sections, providing for the very things that we were denied in the Ruby trial. Discovery, inspection, and making them tell you who they are going to use; any number of things that our motions were directed toward, which were denied by the trial court, and which were then corrected. There were debates, condemning Judge Brown in the legislature; there were debates condemning the way the case was tried; and I think that had more to do with the new Texas due process of law which came down after the Ruby trial than anything else.

QUESTION: Mr. Tonahill, I wonder if you could use your influence and get the Texas legislature to enact a law re-

quiring a man sitting on the bench to have gone through law school? Correct me if I'm wrong, sir—I understand that Judge Brown's only claim to fame was being an ex-JP. I don't think he ever saw the inside of a law school, much less—

MR. TONAHILL: He never tried a lawsuit in his life before he went on the bench!

QUESTION: Well; did he go through law school?

MR. TONAHILL: He graduated from a night school in Dallas.

QUESTION: A night school?

MR. TONAHILL: Yes.

QUESTION: I read in the paper that he'd been a former JP?

MR. TONAHILL: He had been a JP and a county judge.

MR. BELLI: They didn't turn on the lights very well at that school; it was kind of difficult to read the book.

MR. TONAHILL: Earlier I said that we had everything happen to us that can happen in a trial court house. We had the epileptic league come down there at the District Attorney's request to pass out literature damning our defense, according to the testimony of their agent.

MR. BELLI: This bordered on mob violence! The District Attorney invited the epileptic league to come down there with all their literature, knowing that we were going to raise this defense. They went amongst the prospective jurors passing out their literature, and this was just before voir dire. Well, we went into Judge Brown, and we said that that may not be wrong down here, but it's a little disconcerting, because they're liable to be upset about reading so much about our defense beforehand, so we asked how they happened to come down there, and we were told that the District Attorney had invited them down there. The Judge says, "I can't stop them; it's a free



country." Well, the District Attorney, first he inquired if they had passed out all their literature, and they said yes, and he said, "Well, I'll stop them then." And he stipulated that they couldn't go amongst the jurors any more!

Now, that's what we were up against all that period of time. To give you the complete complexion of the thing; all the newspapermen were sent over to an informal room; this was the psychiatric court, and it was appropriately named when they put all the newspapermen in there. While holding a conference with somebody there, Judge Brown came in. He hadn't been in the paper that day, so he came in, and he had his black robes on. He sneaked around over the crowd, and he couldn't get anybody's attention, so he went over to the outskirts of the crowd, and he yelled, "Fire!" And no one turned their head. They didn't pay attention at all. I think that's typical of what was going on down there.

Here is another picture for you to visualize—Joe and I coming out of that courtroom and building with some three hundred and sixty cameramen there. Every time that we came out of there those cameras would all be whirring. In the courtroom, you'd have to cover up your notes at counsel table, because they'd come in and, absolutely over your shoulder, underneath, they'd photograph your notes down there on the counsel table. At every recess, a group would come over to each side of the counsel table, to the prosecutor's table, and some of them would go up to Judge Brown, and they'd photograph everything and take interviews of everything.

One time when we left for lunch there were a husband and wife who were wearing no shoes—and this was snowy weather—and they were standing outside there with a couple of placard signs. They didn't exert any physical violence, but they followed us every place, with these signs above us; anytime that pictures were taken, these signs would be right above us, and the wife or the husband in

back of Joe and the other one in back of me. The signs would say "Psychiatrists are the tools of the devil," and they would follow us all around!

MR. GANS: I'd like to ask—I hope I'm not throwing out too many legal roadblocks here, but these are things these people might run into in their practices.

MR. TONAHILL: Well, we reversed the case. There's no such thing as a damned roadblock in the Ruby case.

MR. GANS: Unless I misunderstood, Mel just said that these photographers were coming in taking pictures of your notes and whatnot that you had there in preparation for the case. Now here's my point, ladies and gentlemen. There's a privilege against disclosure to your opponent of a lawyer's work file; what good does it do you if it's bared by the press to the whole world, including your opponent and everybody else? What becomes of the privilege? Now, I'm all for a free press, but isn't this another example of where you have liberty running riot? What is left of the word "private privilege," if they can come in and photograph a lawyer's work notes during a trial, or during a pre-trial hearing on a venue matter, and then dump them in the press for everybody to read?

MR. BELLI: There was one delightful little Italian correspondent from Rome. They were there from all over the world; from behind the Iron Curtain, the Japanese, some of them not even speaking English. This delightful little fellow from Rome, he would come up to me, and kind of pull me over to the side, and he'd say, "Italiano?" And he'd say, "Interview se parle Italiano?" and he wanted me to give him an exclusive for my countrymen there. Hell, I'm not a member of the Rome bar; I'm a member of the California bar. Then he would come around with that little equipment like that, he'd be taking these shots, too, and all the time, "Se parle Italiano?" Well, they

couldn't have read the thing if it went over in Italy, anyhow, but he was trying to take the notes, too.

MR. TONAHILL: Well, you remember the time you and I were whispering, and one of the prosecutors repeated what we were whispering, they were so close to us. We didn't even have any secrets from them, to ourselves, whispering.

MR. BELLI: Tell them about the law of confession down in Texas. This was, of course, before *Escobedo*. Tell them what the requirements were for a confession, so that they can get this in proper context.

MR. TONAHILL: Well, while you're talking about this—these pickets that they condoned, and these epileptic people running around damning our defense, we might mention the fact that this was the most tightly secured courtroom I've ever been in. They had a human seal around Jack Ruby at all times; everybody was searched that went in and out of the courtroom. The jurors were searched, 'til we finally put a stop to it. They did pick up some pistols, but there were two or three that they didn't get. Here's one of them right here. Bang! Here's the other one. Bang! (Mr. Tonahill fired each of his pistol cufflinks.)

Well, Mel wanted so badly to deliver little Lynn's baby in the courtroom; she was our number one witness, that Ruby sent the telegram to right before, fifteen minutes before he shot Oswald, and she didn't—she was almost ready for her baby to be delivered. During the jailbreak we thought she was going to have a miscarriage, because she thought that they were after her, and she nearly went to pieces out in the courtroom. Mel's wife, I think, took care of her though, out there. He finally got her on the stand and got her off, and didn't get to deliver the baby, and he was sure sick. I started to turn these guns over to him during the closing argument, but we'd had so much happen to us by then that I just didn't think we could stand any more.

MR. BELLI: Actually, to see Judge Brown, sitting out there in the corridor was a separate show. One time, with Mrs. Margarete Oswald, the mother of the man who assassinated—and the only one, no conspiracy at all—the one who assassinated the President. Judge Brown was sitting there, and he had that black robe on, and Mrs. Oswald was sitting near him, and he was throwing up peanuts and catching them. The black robe was flapping around like a big bat, and the photographers all over the world were taking a picture of this ridiculous scene and sending this abroad as the picture of American justice in an American courthouse.

Now, that was one of the things that raised me out of my seat at the end—Joe and I were sitting there, and this was no emotional outburst at all; this was something studied and calm and deliberate. I said "Thanks for a verdict of bigotry and injustice, and Jack, don't you worry; we're going to appeal." And I said that deliberately because I didn't want to have the press of the world think that this was the type of trial that we do have in the United States. Now, I wish Joe would tell you something about this fellow Kaplan that wrote this book saying that we took some pictures, and we were going to sell those pictures.

QUESTION: Jake Ehrlich, as I understand it, one of the books that he's written, his little autobiography, took the view that Mr. Belli used the wrong approach in bringing in all the psychiatrists, etc. I'm sure that Mr. Belli and Mr. Ehrlich are far more efficacious lawyers than I could ever hope to be, but I wonder about that. What is your viewpoint? What is your observation?

MR. BELLI: Do you mean whether we should have had psychiatrists or not; is that what you mean?

VOICE: No. I didn't mean that—

MR. TONAHILL: I was Assistant District Attorney, and prosecuted a number of murder cases, and I've defended about thirty-five, and I thought that the Ruby case was the cleanest, most subtle, sophisticated, adequate defense of insanity I've ever seen in my life, and I think it's been so written up by competent people and observers. There were some great doctors there: the late Manfred Guttmacher, Roy Schaeffer, Martin Towler, Walter Bromberg, Frederick Gibbs, who invented the electroencephalograph, father of the brain wave. You couldn't have had any finer and greater insanity defense than this man had.

VOICE: You're talking about the competence of the experts. What I'm talking about is should that type of flawless array of experts have been used to impress these simple jurors?

MR. TONAHILL: Well, they were a sophisticated jury, college graduates; they were the type of people that should have been impressed by great men, but, as I say, all the lawyers in this room, and the District of Columbia and California, New York and Texas, couldn't have gotten Jack Ruby out of that death sentence in Dallas.

MR. BELLI: I think he means that should we not have gone in there, not put any psychiatric defense on, sort of pleaded him not guilty and at the same time asked for mercy, and showed the emotional state of the country at the time, the emotional state of Jack Ruby, and done more of a practical and a less legal or a less sophisticated type of insanity. In other words, rather than show what we had, and what we knew, and put the defense in the doctors who would have found that they were telling the family the diagnosis and prognosis of the patient, we should have done a more lay approach to this jury, that we knew weren't going to receive any not guilty by reason of insanity; that it was too technical.

MR. TONAHILL: What you're talking about, sir, is that we

should have pitched it on patriotic insanity rather than technical insanity, and then we may have evoked some sympathy. You may be right. I still don't believe any type of defense you could have come up with would have done any good.

MR. BELLI: Didn't Judge Brown tell us we were going to have a change of venue from the beginning?

MR. TONAHILL: Yes, I mentioned earlier that he told Mel and myself in chambers, he said "We're just going to run on here at the mouth for about ten days, and let these witnesses come on and off, and on and off, and we'll figure out where to take it to." He says, "I sure do want to stay with the case; I want to go with it whenever it's moved." We didn't have any objection to that. We were led to believe that we had a real fair-minded judge there, and I guess he would be fair-minded, if he wasn't under such coercion from the prosecution.

MR. BELLI: I think you ought to talk a little about the oligarchy, and the circumstances, the pressuring and compulsion that the District Attorney and the city put on the judge, and also I think you ought to tell them that for the first time in common law history, there was a public relations officer attached to a common law court.

MR. GOTTLIEB: Did the judge see the killing on television also?

MR. TONAHILL: Yes. He was a witness, too.

This is the only time in history that a criminal trial ever had, as such, a public relations officer waiting upon the court, and taking control of the courtroom, and designating who would have a seat in the courtroom and who wouldn't. Right at the very beginning of the trial, I made a motion to declare a mistrial on the grounds that Jack Ruby was being denied a public trial as guaranteed by the Constitution, because the press had taken over more than

three-fourths of the courtroom, and—here it is from the record:

"Tonahill: 'May it please the court to present a notice of mistrial on the grounds that he has been denied a speedy and public trial as guaranteed him by the state and Federal Constitution, for the reason that a public relations officer has been assigned to the court, who has designated most of the seating arrangement in the courtroom for state, local, national and international members of the press, to which the public is denied opportunity to participate in the trial, and is therefore a denial of the right of the defendant for a public trial. As I understand it, about three hundred and fifty members of the press have been allotted seats in the courtroom, to the exclusion of the public generally as well as others. We therefore move for a mistrial.'

"The Court: 'Overrule your motion, Counsellor.'

"Tonahill: 'I note an exception.'"

This fellow Bloom, the public relations officer, had it going fine for a while; they weren't going to let certain members of the press in at all, that had criticized Dallas. They weren't going to get in at all. There were certain magazine people, and certain other syndicated columnists that were going to be denied their access to the court. Well, at that time, we were in a little fifty-seat courtroom; could only seat fifty people. Then later, he relented after so much pressure was put on him, but he arranged for the telephones, in this other courtroom, next to Judge Brown's office, he arranged for their seating badges; and they had to get a badge from him, or they couldn't get in Judge Brown's courtroom. He determined who got a badge, and who didn't get one, and he felt that under the circumstances, the Ruby trial was just like any other big, international event, such as a Republican National Convention, or Democratic National Convention, or some such thing as

that, and he pretty well controlled who got there and who didn't get there.

Mel mentions the oligarchy. There's no doubt but what this man, the public relations man, was a member of the oligarchy, and the Dallas image was quite a problem there. Here, the President who came to Dallas to create good will, for the Democratic Party, particularly there in Texas, is assassinated on the way to making his goodwill speech. Then lo and behold, to magnify that serious problem, the assassin is assassinated on live television in the Dallas police station. And nothing in the world could have dented the shining armor of the Dallas oligarchy more than this tenderloin, Damon Runyon character, Jack Ruby, slipping in there and shooting the assassin while he's handcuffed to detectives, in front of three hundred police officers and world television going on. It was just too much for them. So what is the alternative? Keep the case in Dallas, get a death sentence, and clean Dallas's hands. Judge Brown may have honestly thought he was going to transfer the case, at the time he told Mel and me he was going to transfer it. But then somebody else made up his mind differently, and he denied ever talking to us about it; said that he didn't even discuss it with us. There were a lot of built-in pressures and problems that went on, that it's pretty hard to determine. We tried to find out from the jurors their subconscious thinking; we were denied that. We asked the jurors who we knew were either lying or were mistaken, because they did have this subconscious prejudice against Ruby, if they would be willing to take a polygraph test, determine their truthfulness and so forth; well, then here comes the threat, another threat of contempt.

QUESTION: Sir, Mr. Belli started to comment on Professors Kaplan and Walsh's book, "The Trial of Jack Ruby" but was interrupted.

MR. TONAHILL: When the death verdict came in, we went

up to the hotel with members of the Ruby family, and we began to discuss the appeal. Knowing the appeal in this case would run in the neighborhood of \$25,000, we had to figure out what to do. The Ruby family had no money; they didn't have any money, and so they said, "Can you sell some pictures of Jack to Life?" One of the sisters had been dickering with Life about selling some pictures of Jack, so it was suggested that we go take some pictures of Jack in his cell, and try to sell them to Life Magazine to pay for this damn record on appeal. No fee for the attorneys, but we were going to have to hire an appellate specialist, and have this insurmountable record transcribed. By the way, this is another first—did you know that the court reporter had the damn trial record transcript copyrighted? Judge Brown permitted the copyrighting of that transcript!

Mr. BELL: I want you to get this part that Joe's talking about here; that we went up there with the Minox and did take some pictures of Jack Ruby. We had the Life photographer waiting downstairs, and had a plane to take them to New York. We had a deal with the Life photographer that any money that they got would be put in trust for Jack Ruby, and would not be available to the sister, or any member of the family, or not available to Joe or to me, and that deal didn't go through because the family started haggling as to how much money they would get from that fund, and wouldn't leave it in the fund for the appeal. Kaplan had the audacity to put in the book, that Joe and I had gone up there to take those pictures for our own use, and for our own sake. What we'd done was the only thing that I knew of to make money for this man, to protect him, and protect him on appeal, because I told him the last time I saw him up in that jail, that we were going to reverse this thing. Eventually, I did write this brief, I did buy a copy of the transcript, and I paid for this all at my own expense. Joe stayed in at that case from that time

right up to the present time, and if you'll read one of the opinions, they say through thick and through thin, this fellow exemplified the true spirit and duty of a lawyer by staying there, regardless of what the family said.

"This Court has been furnished with many outstanding briefs and many oral arguments were made by a battery of very able lawyers on both sides. This writer has been especially impressed with the conduct of Honorable Joe Tonahill. Through much stress and strain, misunderstanding among client and appellant's relatives, he has exemplified the highest standards of the legal profession, remained true to his duty, and done an outstanding job in briefing and presenting this case before this Court.

I concur in the reversal of this cause.

McDONALD, Judge"

When they got rid of him, after that case was reversed by Joe, they got rid of the best, and the only man down in Texas who knows this record and the man who would, I think without any question, get Jack Ruby out. You might ask him now what he would prognose is going to happen on the Ruby case.

Mr. TONAHILL: When we reversed it, Mel, I felt like mine and your responsibility was over then. The profession often talks about the right or choice of counsel, but there's also such a thing as a counsel having a right or choice of client. So I made my choice, and I walked away when the case was reversed; I had nothing more to do with it because the job was done. I laid down the burden that I assumed in much darker hours, and so I don't know what's going to happen in the future. They're talking about moving it, transferring it to some other county. I do know this; I'll read you what Mr. Alexander, old "Tarantula Eyes" as we describe him—

Mr. BELL: I don't know if you heard of that expression. That was one of the more endearing epithets that Joe would pass over the counsel table there. This Alexander would

sit chewing on a cigar, and that Henry Wade would sit swallowing this end of tobacco he had. I couldn't eat for four days. I've seen them chew tobacco, never in court, but I never saw him swallow it in court, and Joe would turn over there and very formally call him "Old Tarantula Eyes"; it was a very close relationship between the two of them.

Mr. TONAHILL: Well, here's what he had to say. This is in today's Washington Post, Section E5. There has been, however, no talk of taking any plea. Burleson is the lead lawyer at the moment, by order of the court, but even if he were offered a deal that sounded interesting to him, he would have to consult with not only Ruby's family, but with four other lawyers in the case. There's Sol Dunn, of Detroit, the attorney for the Ruby family; William Kuntsler of New York, Sam Houston Clinton of Austin, the American Civil Liberties entry, and Elmer Gertz of Chicago, trial lawyer. Prosecutor Alexander says tartly, "When I started lawyering, the old lawyers used to say 'If there is no doubt that he did what he did, and there is a chance of his getting the electric chair, take whatever else what you can get and then worry about getting it cut down later.' They're crucifying that poor son-of-a-bitch on the cross of their own thirst for publicity." That's what Alexander has to say about it. I don't know what they're going to do with him. It will be moved to another county, shortly, I'm sure.

The Court of Criminal Appeals recently overruled a motion for rehearing last Wednesday. We did file a reply to that motion. The state filed the most irresponsible, blatant, garrulous, insulting motion for a rehearing I've ever read in my life. They took the court to task unmercifully, accused them of shirking their duty, of not reading any of the testimony or the record, just writing an opinion. It was pretty bad; awfully bad. In our motion in reply I said, "The motion for rehearing of the state, just like the trial below, and the harlot, is fair of face, but black of

heart. . . ." The Court of Criminal Appeals allows twenty minutes to the state, on a motion for rehearing where it's been reversed. They don't permit the other side to be heard. The state refused to take the twenty minutes, and then the Court of Criminal Appeals offered them another forty-five minutes if they wanted that. They turned that down. Now, I'll tell you why I think they did. It's contained in our motion for rehearing. Because during the trial this fellow Dean, who gave the most damaging testimony against Ruby, who stated that Ruby told him and Secret Service officer Sorrels shortly after the arrest, that he killed Oswald to prove to the world that Jews have guts, that he didn't want Mrs. Kennedy to have to come back down to Dallas to testify, that he believed in due process of law, but nevertheless, Oswald would have gotten the electric chair anyhow. Dean also stated that Ruby said, "I thought about shooting him Friday night when I saw him in the line-up," (Jack got down there while they were interviewing Oswald) "and I knew then I'd do it if I got a chance." Well, there isn't anything any more poisonous, or stronger, than the malice aforethought, or premeditation, in those statements. Well, this fellow Dean testified to that, and he contradicted himself with his written report. Mr. Belli made him contradict himself using his own report which showed where Dean had been. During the interim, we produced a by-stander's bill of exception, where we figured out how much time Dean had been on television down in the basement, and had him fixed down there about twenty-five minutes before he ever went up and saw Ruby; and they put his testimony in that Ruby made that statement as *res gesta*, being spontaneous.

Mr. BELL: They had to get it out of *Escobedo*. They have a rule down in Texas that if you get it as *res gesta*, it's out of *Escobedo*. That's utterly absurd. It's a complete non-sequitor. They're as different as day and night. When *Escobedo* came down, if there was such a rule in Texas, it had to go out the window.

MR. TONAHILL: So what happened upstairs in jail? Sorrels, of the Secret Service, was up there interviewing Ruby. He went up there to interview him, to see if he was acting with anyone else, and why he did it. Dean mentioned that Sorrels was there and that Ruby made this statement to Sorrels. So we did everything we could to get hold of Sorrels, to get him to talk to us. I tried to get him to go to dinner, and he says, "Well, I can't afford one of those Belli dinners. I just eat sandwiches. I work for wages; I work for the government." We couldn't get him near us.

Lo and behold, after the trial was over and after Wade and Sorrels go to Washington to testify before the Warren Commission, it turns out that it didn't happen the way Dean testified. Sorrels directly contradicted him, and said that he was in Wade's office, with Dean, before Wade put Dean on the witness stand. Sorrels said, "No, sir. That statement wasn't made to me." But here Dean is saying that Ruby made it to Sorrels. The testimony of Sorrels was, "He [Ruby] didn't make that statement to me. Here's all I asked him: 'Were you mixed up in a conspiracy, and why did you do it?'" and Ruby said "Why do you want this information? For a magazine or the press?" "No. No; I'll guarantee you I won't do that." So then Ruby says, "Well, alright; I'll tell you anything you want to know." Well, that's not spontaneous; that's not an outburst. That's a trade, that's an exchange, and an assurance from a person in authority that it would not be used against him. So that knocked out the Dean testimony.

MR. BELL: I don't know how many of you nowadays—when you have an act or when you have an event—check your local radio station for an on-the-scene witness, or TV for on-the-scene news shots. We've gotten a lot of them to play back films that have helped us immeasurably, fires, crimes, and what not. In this situation, what we were able to do, was to get some of the old TV clips, and at the time when this fellow, Dean, says he's upstairs in the jail, and laid it

right on the line as to the time, we were able to show in the background there was a clock that had twenty minutes difference of time, right up there on the wall. That made his testimony absolutely improbable, and there was no question but what that TV shot was accurate, and that clock was up there on that wall. That was the thing that made his testimony absolutely perjurious.

MR. TONAHILL: So Dean's testimony is knocked out. As I say, we went up on one of our points, that Wade had violated—these very famous cases where a District Attorney suppresses evidence and has been called to account, is reversed later on on a coram nobis hearing, *Ashley v. Texas*, 317 F.2d 80; *United States v. Dye*, 221 F.2d 763. Those are the ones of suppression of evidence, so the reason why we say the State would not go before the Court of Criminal Appeals and argue the motion for rehearing, when they upped the time limit from twenty-five to forty-five minutes, we put in our motion for rehearing, "The kindest thing that the Court of Criminal Appeals did for the state was to reverse the case, and not require a coram nobis hearing, adversary hearing, and to go into evidence and prove that the District Attorney did suppress evidence and undertake to take this man's life, through his suppression of evidence, and we invite the Court to question him along that line, and ask him about it," and we gave them volume and page number.

But the thing I almost forgot was, Wade told the Warren Commission, he said: "I never in my life saw a state's case as weak as our first five or six witnesses were that day." He says, "I told Alexander to get me some evidence, some strong evidence, and some malice and premeditation." The next day, here comes this malice and this premeditation. That is in the Warren Commission testimony!

QUESTION: Could you make some comment on the recent book by Mark Lane, *RUSH TO JUDGMENT*, and the "white-wash" question?

MR. BELLI: Well, let me give mine first. I think the Warren Report is completely and utterly accurate. I think that there was only one man and no conspiracy. Baby didn't know Oswald, Oswald didn't know Ruby, and everything has been told that could be told. Now listen to this. I think that Lane and the rest of these people are doing what the American public likes, to write something that's sinister and ominous. You don't hear anybody say that the Warren Report is good, the United States Supreme Court is good; but they come out with some dramatic appellation of "Nine Old Men," or something in criticism, "nine dirty old men," "opening the floodgates of pornography," and you can sell something like that. So that's what they're doing, and I think that they're writing it purely for money, based on utter and complete hearsay.

MR. TONAHILL: I think if you'll read the testimony of Margerite Oswald, when she fired Mark Lane, and they excluded him from the Warren Commission, you'll get the basis of his motivation in attacking the Warren Commission, because he was humiliated by the Commission after he was fired in their presence by his client. He immediately went all over the United States and Europe making these speeches, taking the Commission to task, and the Commission hadn't even completed its job. Lane supposedly had an eye-witness to something, but he never would tell them who it was. In my opinion, RUSH TO JUDGMENT ought to be on a fiction counter; that's where it belongs. He hasn't suggested one scintilla of evidence as to who else did it besides Lee Harvey Oswald. Lane simply asked questions and provided no answers.

QUESTION: How do you account for the fact that the bullet's path was different from the way it would have had to be, had Oswald fired the shot, too?

MR. TONAHILL: The Warren Commission Report says it went through the back of his neck, from above and behind.

MR. BELLI: I think you could go into a long period of talk and answer with reference to the path of that bullet. You fellows who've tried murder cases, shooting cases, civil cases involving the trajectory and path of a bullet through a human body know that you can't reconstruct, know that you can't with any degree of certainty say how a bullet's going to go in, strike guarded muscles, muscles in tension or flexion, and then deflect from bone or from other tissue, and where it is going to go. I think it's an impossible thing to reconstruct. Eventually, maybe, there'll be something that will come out about these X-rays, but as far as I'm concerned, that Warren Report is right on the nose and accurate.



## PUBLISHER'S NOTE

Mr. Joe Tonahill has written two outstanding papers which were not presented at the Belli Seminar of 1966 due to the lack of time. We are inserting them here because of their great interest to trial lawyers, students of the law, and to historians.

The first of these papers is the next chapter entitled, **VIEWING THE JACK RUBY CASE TODAY**. "Today" was in November, 1966. Immediately upon learning of the death of Jack Ruby, I inquired of Mr. Tonahill if there were any additional comments he desired to add to this statement. His reply with regard to the death of Jack Ruby immediately follows his previous statement and commences on page 293.

The second of Mr. Tonahill's prepared papers is one of the most interesting analyses of the Warren Report which has been published—assuming that Lee Harvey Oswald had lived, could he have been convicted of the assassination of President Kennedy? This skilled and resourceful lawyer, who is so well versed in the assassination and subsequent events, says, "No!" This intriguing paper commences on page 298.

## VIEWING THE JACK RUBY CASE TODAY

Joe H. Tonahill \*

On the matter of the assassination of President Kennedy and the shooting of his assassin, Oswald, by Jack Ruby, the tragedy has not ended unfortunately. The last act curtain has not fallen. The epilogue is years distant. The assassination story and its aftermath is no longer a Dallas story. It has passed from that and moved into national history. Most of the world is now satisfied that Dallas was only incidental to the shootings themselves—insofar as causes and motives were concerned.

Jack Ruby's story is one parcel of those eventful November 1963 days that still rests in Dallas' hands. When the Court of Criminal Appeals of Texas handed down its decision October 5, 1966, on the Ruby appeal, Dallas' dilemma may well be settled once and for all.

It is difficult to understand that Jack Ruby outraged so many people by doing precisely what so many have said they would like to have done—or felt they were capable of doing. Thus, he exposed many to their own guilty judgment.

Today, many people aren't sure just what they think should be done, officially, with Jack Ruby. Most of them unhesitatingly say Ruby should not die for what he did, but the "something else" is rather too broad to be defined satisfactorily for the sake of our conscience or our society.

"If there were only some way to publicly and legally admit what nearly everybody senses is true, that Jack Ruby was and is deranged, in such a way as to lift the responsi-

\* Jasper, Texas.

bility of judgment from our hearts, it would make everyone happier," one editor wrote recently for the DALLAS TIMES HEROLD.

Had Jack Ruby shot Lee Harvey Oswald the afternoon of the assassination, Ruby would have been a hero. But at this hour, many people have accumulated this enormous side burden commitment to self-righteousness, to personal image, to politics, to ambition, and to that vague lip service we collectively (but seldom privately) pay to "the law's demands."

Many people are now caught in a dilemma, which means that any way they go will be bad. Some felt the demands of society were met in the Jack Ruby trial when the jury brought in the death sentence. Immediately thereafter, a great majority of the people in this country felt that the demands were exceeded, and it has always been unthinkable that the sentence be carried out.

Having thus cleansed and horrified themselves, those people are now faced with the problem of "just what should be done with Ruby." Since overtures have been made by the prosecution recently in which life imprisonment might be offered as a substitute for death in the electric chair, we now find that the Ruby case, to some, has moved to a point where admitting the legal alternative of life imprisonment is publicly and politically acceptable.

Ruby will probably pass eventually to the place where freedom is quietly expected.

Right now—if only Ruby would just disappear, some Dallasites and the prosecution would expect nothing else of Jack Ruby.

#### Statement Following the Death of Jack Ruby<sup>1</sup>

Ever since it was announced on December 10 from Parkland Hospital that Jack Ruby had cancer, I have been ap-

<sup>1</sup> See Editor's Note, page 292, *supra*.

prehensive as to his life expectancy. There may be cases on record where patients have died 24 days after they were diagnosed as having cancer. It just seems to me that Jack went awfully fast.

In Parkland, Jack Ruby was persona-non-grata. The Chairman of its Board refused defense lawyers' request to Judge Joe B. Brown to admit Ruby for neuro-psychiatric testing for trial purposes by Dr. Martin Towler of the University of Texas Medical School. Parkland wanted no part of Jack Ruby then (February 1964), and I assume they wanted no part of him as a patient during the 24 days he lived after they diagnosed his case as cancer. At the outset, I stated that Jack Ruby should be moved from Parkland and to the M. D. Anderson Tumor Research Center in Houston for treatment and diagnosis.

This will mean Ruby can never be tried again *in a court of law!*

Ruby always referred to himself as a "nobody" from the ghetto of Chicago, with the burning desire to become a "somebody." If he could have been transferred to the M. D. Anderson Tumor Research Center in Houston, perhaps those great men of science there in the field of tumor research could not only have cured Ruby, but there is the thought that Ruby, a definite patriot, would have offered himself to any and all desirable experimental research tests in the hope that he might to a degree atone for his dreadfully foolish act in shooting Oswald, unfortunately sealing forever Oswald's lips. In this way, Ruby might just have been the one human being to give those great research tumor scientists at M. D. Anderson a scintilla of technical fact which might fortuitously be the breakthrough in determining the cause and cure for killer cancer.

Jack Ruby, the Chicago ghetto's "nobody" would then have become "everybody's somebody."

Surely Governor Connally could have arranged for the treatment and research efforts in Jack Ruby's case at M. D. Anderson Hospital in Houston—a State institution. In

fact, Houston should have been decided upon at the venue site for Ruby's next trial for the sole reason of transferring him to Houston and making Ruby available to those great tumor scientists there at M. D. Anderson Hospital for treatment and research. Ruby would likely have insisted upon going there for treatment and research possibilities if his family had properly advised him of the opportunity and he were given the chance. Irrespective of what some may think of him, Jack Ruby was deeply patriotic. Jack Ruby was the kind of man who would have evaluated his killer-cancer as a blessing in disguise because of the tumor research potentials it might have offered those great men and women at M. D. Anderson.

In view of his death from killer-cancer, I have no doubt that no deathbed confession came from Jack Ruby touching conspiracy, etc. with Oswald or others, because he, in my opinion, was a loner all the way and had nothing more to confess regarding the matter than what he had already told us.

Undoubtedly, squealing walls will arise now from an enraged news media because Ruby's family would not agree to his answering a lot of questions. Accusations will storm the streets of Dallas now of conflicting nature as to: Why was Ruby taken to Parkland? Why was it impossible to ask Jack questions? Why were his attorneys Sol Dann and Elmer Gertz allowed to sell a tape recording of a hospital interview with Jack Ruby to Capitol Records to the exclusion of the police, the FBI and the news media generally? Why did Jack Ruby die within only 24 days after being admitted to Parkland Hospital?

I hope that the medical records at Parkland *will be* offered to the various institutions for inspection. Also, I hope that the authorities at Parkland will immediately invite a team of the top scientists in the field of tumor research at M. D. Anderson Hospital to participate in the study and the autopsy, looking toward the nature of Ruby's cancer and

the effect, if any, the type of treatment Ruby received had upon hastening his death, if it did hasten it.

Only by following such a forthright and out-in-the-open procedure will the irresponsible element of the news media be deprived of their unbridled practice of creating sinister and evil motives where no basis in fact exists for them. Otherwise, the insinuating whispers will become painful and incessant shouting!

**LEE HARVEY OSWALD COULD NOT  
HAVE BEEN LEGALLY CONVICTED  
FOR HIS ASSASSINATION  
OF PRESIDENT JOHN  
FITZGERALD KENNEDY**

*Joe H. Tonahill \**

Despite the ghost of rumor both here and abroad, to the contrary, the Warren Commission accomplished its original purpose by assembling and evaluating all ascertainable facts relating to the assassination of President Kennedy.

The staff counsel for the Warren Commission were men of great experience and legal talent. They were drawn from representative geographical and professional areas. The Commission members themselves were a highly impressive group of Republicans and Democrats.

The President's Commission on the Assassination of President Kennedy (formal title) consisted of Chief Justice Earl Warren, Sen. Richard B. Russell of Georgia, Sen. John Sherman Cooper of Kentucky, Rep. Hale Boggs of Louisiana, Rep. Gerald B. Ford of Michigan, Allen W. Dulles, a former member of the United States Diplomatic Service and former director of the Central Intelligence Agency; John J. McCloy, a former Assistant Secretary of War, a former President of the World Bank, a former United States High Commissioner for Germany. J. Lee Rankin, former Solicitor General, served as general counsel to the Commission,

\* Jasper, Texas.

and he was aided by 14 assistant counsel and 12 other staff members throughout the investigation.

**Evidentiary Problems and Aspects Regarding  
Sufficient Evidence to Legally Convict  
Oswald of the Assassination**

From a legal standpoint, an analysis of the Warren Commission Report, and particularly Chapter 4 which states the case against Oswald, is of special interest because of its evidentiary aspects.

It has been widely deplored that Oswald was killed before he could be brought to trial. Naturally, our basic emotional and intellectual demands are such that the concepts of due process and fair trial must be observed. The absence of such a trial of Oswald during his lifetime, carrying with it, of course, Oswald's right to procure and present his own side of the story, has produced conjecture and speculation, and surmise which may never be solved; consequently, both lawyers and laymen have been led to the conclusion that there was much lacking in the conclusions reached by the Warren Commission.

When one reads the Warren Commission report with the eye of a lawyer concerned with admissibility and inadmissibility of evidence, the fact is inescapable that the Report, although crammed with facts that would not be admissible on the trial of Oswald for the assassination of President Kennedy, does set out the whole picture in a perspective that a criminal trial could never achieve.

The collateral to this subject is the emphasis on prejudice to the right of fair trial and the effects on the admissibility of evidence of the premature divulgence of material by the press and local law enforcement agents at the time of Oswald's first detention, including especially:

- (1) Statements made by Oswald's wife, Marina, as to

- Oswald's ownership of the assassination weapon and other facts;
- (2) Oswald's refusal to take a polygraph test;
  - (3) The results of a thoroughly discredited paraffin test, purporting to be proof of the fact that Oswald had recently fired a gun;
  - (4) Statements of police officers and prosecuting officials that they considered they had an air-tight case against Oswald.

The Warren Report promptly concludes that, while there was a legitimate area of inquiry within the scope of the public's right to know, neither the press nor the public had the right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald:

"... The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime."

"A major consequence of the hasty and at times inaccurate divulgence of evidence after the assassination of President Kennedy was simply to give rise to groundless rumors and public confusion."

#### **Evidence That Would Have Been Admissible and Inadmissible**

It is pretty well established and documented that Oswald was not denied the right to counsel. The interesting question remains as to the character of the evidence which, from the maze of material set out in the transcript of the Commission hearings and in the exhibits produced, probably could have been adduced against Oswald on trial had he lived to stand trial.

#### **Marina's Testimony Inadmissible**

There must be deleted the testimony of his wife, Marina, for although she testified on three occasions and was ques-

tioned by the press and investigative agencies on scores of others, it is difficult to find any statement which would not be more hurtful than helpful to her husband. Under Texas law, 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." Article 714, VERNON'S ANN. C.C.P.

Considering the evidence adduced, there are many facts which appear only in the uncorroborated testimony of Marina Oswald. Chief among them are facts laying the basis for the admission of other criminal transactions—the attempt on the life of Maj. Gen. Edwin A. Walker April 10, 1963; the reputed threat to make some assault on former Vice President Richard Nixon. Whether either of these transactions would have been admissible in any event is extremely doubtful. Under Texas law, distinct criminal transactions are never admissible unless falling within some well established exception to the general rule. They must tend to connect the defendant with the offense for which he is on trial as part of a general and composite transaction. *Medina v. State*, 193 S.W.2d 196; *Morris v. State*, 198 S.W.2d 901.

It might be argued that the Walker and Kennedy incidents both showed a senseless antagonism against public figures and thus lent "credence to otherwise implausible conduct"—a sort of extension of the motive exception which is, however, ordinarily confined to sex crimes. *Head v. State*, 267 S.W.2d 419. System or *modus operandi* is another exception. *Coston v. State*, 268 S.W.2d 180.

But sharp differences exist between the two crimes: the extended, advance planning and attention given to escape routes in the Walker affair; the differing ideological images of the victims, which make Walker's demise more understandable within the framework of Oswald's known thinking than was that of President Kennedy.

In any event, it is perfectly obvious that absent Oswald's

wife's testimony, the question is academic, as there is no substantial evidence on which an attempt to introduce the prior attempts could be predicated. Texas law demands that if evidence of the commission of another crime is otherwise admissible, the rule obtains only when proof of the former may be established beyond a reasonable doubt. *Ernst v. State*, 308 S.W.2d 33.

***Remaining Evidence the Warren Commission Found  
"of Probative Value"***

These consist of:

- (1) An undated note which in no way refers to Walker;
- (2) Negative testimony of a Federal Bureau of Investigation identification expert that the retrieved but damaged bullet could not be identified as coming from any particular gun, although it "could have been" fired from the rifle used to kill President Kennedy;
- (3) Photographs of the Walker premises.

Even as to these, the note was turned over to the investigating officers by Marina and could not, in the absence of this testimony, be identified with the event; and it is unclear whether the photographs were also delivered by her or were independently found on the premises by officers searching it with her verbal permission.

The Nixon incident, of course, has no other corroboration.

In January 1964 Marina Oswald and her business manager, James Martin, told Robert Oswald, Lee Harvey Oswald's brother, that Oswald had once threatened to shoot former Vice President Richard Nixon. When Marina Oswald testified before the Warren Commission February 3-6, 1964, she had failed to mention the incident when she was asked whether Oswald had ever expressed any hostility toward any official of the United States. The Commission first learned of this incident when Robert Oswald related it to

FBI agents February 19, 1964 and to the Commission February 21.

Marina Oswald appeared before the Commission June 11, 1964 and testified that a few days before her husband's departure from Dallas to New Orleans April 24, 1963, he finished reading the morning newspaper,

"... and put on a good suit. I saw that he took a good pistol. I asked him where he was going and why he was getting dressed. He answered, 'Nixon is coming. I want to go and have a look.' He also said he would use the pistol if opportunity arose."

She reminded him that after Walker's shooting, he promised he would never repeat such an act. Marina Oswald related the events which followed:

"I called him into the bathroom. I closed the door and I wanted to prevent him and then I started to cry; and I told him that he shouldn't do this and that he promised me. I remember that I held him. We actually struggled for several minutes and then he quieted down."

***Other Facts of Oswald's Guilt Depending Entirely  
on Marina's Testimony***

As to the assassination of President Kennedy itself, it was Marina Oswald who identified the blue jacket found in the schoolbook depository building as belonging to her husband, Lee Harvey Oswald. When he left home that morning, Marina, who was still in bed, suggested that he wear the jacket. A blue jacket, later identified by her as Oswald's, subsequently was found in the building, apparently left behind by Oswald.

The shirt, threads from which were found caught in the rifle, as being the one she thought he wore to work on the morning of November 22, 1963, was identified by her.

In a crevice between the butt plate of the rifle and the

wooden stock was a tuft of several cotton fibers of dark blue, gray-black, and orange and yellow shades. On November 23, 1963 these fibers were examined by Mr. Paul M. Stombaugh, a special agent assigned to the hair and fiber unit of the FBI laboratory. He compared them with the fibers found in the shirt which Oswald was wearing when arrested in the Texas Theater. This shirt was also composed of dark blue, gray-black, and orange-yellow cotton fibers. Stombaugh testified that the colors, shades, and twist of the fibers found in the tuft on the rifle matched those in Oswald's shirt.

Stombaugh explained in his testimony that in fiber analysis, as distinct from fingerprint or firearms identification, it is not possible to state with scientific certainty that a particular small group of fibers comes from a certain piece of clothing to the exclusion of all others, because there are not enough microscopic characteristics present in fibers. Judgments as to probability will depend on the number and types of matches. He concluded:

"There is no doubt in my mind that these fibers could have come from this shirt. There is no way, however, to eliminate the possibility of the fibers having come from another identical shirt."

Marina Oswald testified that she thought her husband wore this shirt to work on that day. Mary Bledsoe, a former landlady of Oswald's, saw him on a bus approximately 10 minutes after the assassination, and identified the shirt as being the one worn by Oswald, primarily because of a distinctive hole in the shirt's right elbow. Although Oswald returned to his rooming house after the assassination and when questioned by the police claimed to have changed his shirt, the evidence indicates that he continued wearing the same shirt which he was wearing all morning and which he was still wearing when arrested.

Although Stombaugh was unable to estimate the period of time the fibers were on the rifle, he said that the fibers

"were clean, had good color to them, there was no grease on them, and they were not fragmented. They looked as if they had just been picked up." The Commission concluded that the relative freshness of the fibers was strong evidence that they were caught on the rifle on the morning of the assassination or during the preceding evening. The Commission was able to conclude that the fibers most probably came from Oswald's shirt. This adds to the conviction of the Commission that Oswald owned and handled the weapon used in the assassination.

The white jacket found in the parking lot along Oswald's reconstructed escape route after shooting Officer Tippit was identified by his wife Marina as belonging to Oswald. He was wearing a zipper jacket, which he had not been wearing moments before when he had arrived home. When arrested, he did not have the jacket. Shortly after Tippit was slain, policemen found a light colored zipper jacket along the route taken by Oswald as he attempted to escape. The Dallas police radio described him as a man wearing a white jacket, etc. It was discovered by Capt. W. B. Westbrook underneath an automobile. The jacket belonged to Oswald. Marina Oswald stated that her husband owned two jackets—one blue and the one Capt. Westbrook found. She identified the one Capt. Westbrook found as being her husband's second jacket.

Marina identified the photographs of Oswald with a rifle as being snapshots she took at his request. One Sunday while Marina was hanging diapers, Oswald asked her to take a picture of him holding a rifle, a pistol, and issues of two newspapers, later identified as *The Worker* and *The Militant*. Two pictures were taken. The Warren Commission concluded that the rifle shown in these pictures is the same rifle which was found on the sixth floor of the depository building November 22, 1963.

One of the pictures shows most of the rifle's configuration. Special Agent Lyndall Shaneyfelt, a photographer expert with the FBI, photographed the rifle used in the

assassination, attempting to duplicate the position of the rifle and the lighting; after comparing the rifle in the simulated photograph with the rifle in the actual photograph, Shaneyfelt testified, "I find it to be the same general configuration. All appearances were the same." He found "one notch in the stock at this point that appears very faintly in the photograph.

The authenticity of the pictures has been established by expert testimony which links the second picture to Oswald's Imperial Reflex camera, with which Marina Oswald testified she took the pictures. The negative of that picture was found among Oswald's possessions.

Using the recognized technique of determining whether the picture was taken with a particular camera, Shaneyfelt compared this negative with the negative which he made by taking the new picture with Oswald's camera. He concluded that the negative found in Oswald's possession was exposed in Oswald's Imperial Reflex camera to the exclusion of all other cameras. Both pictures, however, have identical backgrounds and lighting and, judging from the shadows, were taken at the same angle. They are photographs of the same scene. The Commission concluded that it is reasonably certain they were taken by the same camera at the same time, as Marina Oswald testified.

Moreover, Shaneyfelt testified in his opinion the photographs were not composites of two different photographs, and that Oswald's face had not been superimposed on another body, as contended by his mother, and Oswald also. One of the photographs taken by Marina Oswald was widely published in newspapers and magazines and in many instances, the detail of the picture is different from the original and even from each of the particulars as to configuration of the rifle. The date surrounding the taking of the picture and the purchase of the rifle reinforce the belief that the rifle in the photograph is the rifle which Oswald bought from Kline's of Chicago March 20, 1963, by mail.

Marina identified the camera found in Oswald's effects as the instrument with which those photographs were made. When the photographs of Oswald with the rifle and pistol were shown to him on the evening of November 23 and the morning of November 24, Oswald sneered, saying that they were fake photographs, that he had been photographed a number of times the day before by the police, that they had superimposed upon the photographs a rifle and a revolver. He insisted a number of times that the smaller photograph was either made from the larger photograph or the larger photograph was made from the smaller, and that at the proper time, he would show that the pictures were fakes. He was told that the two small photographs were found in the Paine garage. At that point, Oswald refused to answer any further questions. Marina Oswald testified she took the two pictures with her husband's Imperial Reflex camera when they lived on Neely Street. Her testimony was fully supported by the photographer expert, who testified in his opinion the pictures were not composites.

#### *Marina Alone Identifies the Rifle*

Most important of all, Marina Oswald alone identified the rifle as the one which Oswald owned, testified that she had seen him practice with it, that it had been moved from New Orleans to Dallas in Ruth Paine's stationwagon, and that it had been stored in a green and brown blanket in the Paine garage. She said that it was the only rifle owned by her husband following his return from the Soviet Union in June 1962. It had been purchased in March 1963 and taken to New Orleans, where Marina Oswald saw it in their rented apartment during the summer of 1963. She said he sat on the screened-in porch at night practicing with the rifle by looking through the telescopic site and operating the bolt. In September 1963 Oswald loaded their possessions in a stationwagon owned by Ruth Paine, who invited Marina



and the baby to live at her home in Irving, Texas. Marina stated that the rifle was among these possessions.

***Rifle Stored in Blanket in Paine's Garage until  
November 22, 1963***

From September 24, 1963 when Marina arrived in Irving from New Orleans until the morning of the assassination, the rifle was, according to the evidence, stored in a green and brown blanket in the Paine's garage among Oswald's other possessions. About one week after returning from New Orleans, Marina was looking in the garage for parts to the baby's crib and thought the parts might be in the blanket. When she started to open the blanket, she saw the stock of the rifle. Ruth and Michael Paine both noticed the rolled-up blanket in the garage at the time Marina Oswald was living in their home.

About three hours after the assassination, a deputy sheriff and detective saw the blanket roll tied with string lying on the floor of the Paine's garage. Stombaugh, with the FBI lab, examined the blanket and discovered a bulge approximately 10 inches long midway in the blanket. The bulge was apparently caused by a hard, protruding object which had stretched the blanket's fiber. It could have been caused by the telescopic site of the rifle, which was approximately 11 inches long.

*This is the only eye-witness testimony connecting Oswald with the assassination weapon or definitely identifying his clothing. Other descriptions of the clothing showed the usual contradictions.*

*Marina Oswald is also the only source of a wealth of background information, including facts forming the basis of the interpretation of Oswald's character, on which the "motive" of the crime depends.*

The statement that Oswald wanted to hijack an airplane for transportation to Castro's Cuba is an example. She testified that he had earlier laid plans to reach Cuba

by hijacking an airliner flying out of New Orleans, but she refused to cooperate and urged him to give it up, which he finally did. He went to Mexico on September 26, 1963 through October 3, 1963. Marina testified that Oswald told her that the purpose of the trip was to evade the American prohibition on travel to Cuba and to reach that country. He cautioned her that the trip and its purpose were to be kept strictly secret.

Connecting Oswald with the name Hidell was important because the murder weapons were purchased in that pseudonym; Mrs Oswald testified to signing the name on certain cards at his insistence. In Oswald's wallet at the time of his arrest were selective service notices of classification and a Marine certificate of service in the name of Alek James Hidell. On the Hidell selective service card, there appeared a signature "Alek J. Hidell" and a photograph of Lee Harvey Oswald. Experts on questioned documents from the Treasury Department and FBI testified that the Hidell cards were counterfeit photographic reproductions made by photographing the Oswald cards, retouching the resulting negatives, and producing the prints from the retouched negatives. The Hidell signature on the notice of classification was in the handwriting of Oswald.

Marina Oswald testified she first learned of Oswald's use of the fictitious name "Hidell" in connection with his pro-Castro activities in New Orleans. According to her testimony, he compelled her to write the name "Hidell" on membership cards in the space designated for the signature of the "chapter president." The name "Hidell" was stamped on some of the "chapter's" printed literature and on the membership application blanks. Marina Oswald testified, "I knew there was no such organization. And I know Hidell is merely an altered Fidel, and I laughed at such foolishness." Hidell was a fictitious president of an organization of which Oswald was the only member. In all probability, Hidell was the person entitled to receive mail at Oswald's box in Dallas, and that is the name he

ordered the rifle under from the Chicago mail order house. However, the portion of the application which lists the names of persons other than applicant entitled to receive mail there at the postoffice was thrown away after the box was closed May 14, 1963.

#### Excluding the Physical Evidence

Defense counsel representing Oswald would certainly be interested in the exclusion of all physical evidence. The case for the prosecution would show that Oswald had purchased the rifle; that he moved it from New Orleans to Dallas, wrapped in a green and brown blanket, which he left with his other belongings in the garage of the Paine residence in Irving; that Oswald took it from the blanket on the night of November 21, placed it in a bag made from paper he had obtained in the schoolbook depository; and that he carried it to work with him the next morning, representing that the package contained curtain rods.

#### The Illegal Search of Paine Residence

After the arrest on the afternoon of November 22, the Dallas police obtained a search warrant for the Oswald residence on North Beckley Street, but no warrant was obtained for the Paine house until the following day. Nevertheless, police went to the Irving house of Mrs. Paine, where Marina Oswald was residing and Oswald spent his weekends and stored his effects. *They conducted a search of Oswald's belongings that afternoon without a warrant and without his consent.*

It is clear from Commission documents that permission to be interviewed was given by Mrs. Paine, and that Mrs. Oswald, who was present, made no objection. *It is not at all clear that she gave consent to a search, however, or that she in any way understood what her rights and those of her husband were.*

The most important discovery at this time was the blanket

in which the rifle had been wrapped, fibers from which were later identified as being identical in all measurable characteristics, with fibers found in the abandoned bag beneath the assassination window. The Commission said, "Like hairs, the various types of natural and artificial fibers can be distinguished from each other under the microscope. Like hairs, too, individual fibers are not unique, but the expert usually can distinguish fibers from different fabrics. A major identifying characteristic of most fibers is color, and under the microscope many different shades of each color can be differentiated—for example, 50 to 100 shades of green or blue and 25 to 30 shades of black." The microscopic appearance of three types of fibers—cotton, wool and viscose—is illustrated in the Commission's exhibit on Page 589 of the Report, which is a sketch of cotton, wool and viscose and their characteristics. Two of these—cotton and viscose, were the subject of testimony by expert Stombaugh:

"Cotton is a natural fiber. Under the microscope, it resembles a twisted soda straw, and the degree of twist is an additional identifying characteristic of cotton. Cotton may be mercerized or (more commonly) unmercerized.

"Viscose is an artificial fiber. A delustering agent is usually added to viscose to cut down its luster, and under the microscope, this agent appears as millions of tiny spots on the outside of the fiber. The major identifying characteristics of viscose, apart from color, are diameter—hundreds of variations being possible—and size and distribution of delustering agent, if any."

As to the blanket, Stombaugh examined it and pointed out that it was composed of brown and green fibers, of which approximately 1-2 per cent were woolen, 20-35 per cent were cotton and the remainder delustered viscose. The viscose fibers in the blanket were of 10-15 different diameters and also varied slightly in shade and in the size and distribution of the delustering agent. (The apparent cause

of those variations was that the viscose in the blanket consisted of scrap viscose.) The cotton also varied in shade, with about 7-8 different shades of green cotton being present, but was uniform in twist.

When received by Stombaugh, the blanket was folded in approximately the shape of a narrow right triangle. A safety pin was inserted in one end of the blanket, and also at this end loosely wrapped around the blanket was a string. On the basis of creases in the blanket in this area, it appeared that the string had been tied around the blanket rather tightly at one time while something was inside the blanket. Other creases and folds were present, and among them a crease or hump approximately 10 inches long. That crease must have been caused by a hard, protruding object approximately 10 inches long, which had been tightly wrapped in the blanket, causing the yarn to stretch so that the hump was present even when the object had been extracted. The hump was approximately the same length and shape as the telescope site on the C 2766 rifle and its position with respect to the ends of the blanket was such (based on the manner in which the blanket was folded when Stombaugh received it) that had the rifle been in the blanket, the telescopic site could have made the hump.

#### *Blanket Scraped for Removal of Fibers and Hairs*

After receiving the blanket, Stombaugh scraped it to remove the foreign textile fibers and hairs that were present. He found numerous textile fibers of various types and colors and a number of limb, pubic and head hairs, all of which originated from persons of the Caucasian race and had fallen out naturally, as is shown by the shape of the roots. Several of the limb and pubic hairs matched samples of Oswald's limb and pubic hairs, obtained by the Dallas police, in all observable characteristics, including relatively unusual characteristics. For example, in both Oswald's pubic hairs and some of the blanket pubic hairs

the color was a medium brown, which remained constant to the tip, where it changed to a very light brown and then became transparent due to the lack of color pigments; the diameters were identical and rather narrow for pubic hairs; the hairs were very smooth, lacking the nubbinness characteristic of pubic hairs, and the upper two-thirds were extremely smooth for pubic hairs; the tips of the hairs were sharp, which is unusual for pubic hairs; the cuticle was very thin for pubic hairs; the scales display only a very small protrusion; the pigmentation was very fine, equally dispersed, and occasionally chained together, and displayed only very slight gapping; cortical fusi were for the most part absent; the medulla was either fairly continuous or completely absent; and the root area was rather clear of pigment and contained only a fair amount of particle fusi, which was unusual.

Similarly in both Oswald's limb hairs and some of the limb hairs from the blanket, the color was light brown through its entire length, the diameter was very fine and did not noticeably fluctuate; the tips were very sharp, which is very unusual; the scales were of medium size, with a very slight protrusion; there was a very slight gapping of the pigmentation near the cuticles; there was an unusual amount of cortical fusi equally distributed through the hair shafts; and the medulla was discontinuous, granular, very bulbous and very uneven.

Other limb, pubic and head hairs on the blanket did not come from Oswald.

#### *Paper Bag Contained Identifiable Fibers*

Stombaugh received the paper bag in which the rifle was allegedly wrapped. Fibers found inside the bag were compared with the brown viscose and green cotton fibers taken from the blanket. The brown viscose fibers found in the bag matched some of the brown viscose fibers from the blanket in all observable characteristics, such as shape,

diameter, and size and distribution of delustering agent. The green cotton fibers found in the bag were like those from the blanket, varying in shape but of a uniform twist. Each green cotton fiber from the bag matched some of the green cotton fiber from the blanket in all observable characteristics, such as shade and degree of twist. Like the blanket cotton fibers, the cotton fibers found in the bag were unmercerized.

#### *Inadmissibility of Blanket and Paper Bag*

Oswald defense counsel might well wish to raise the question of whether the admission of the blanket evidence and the paper bag evidence, in effect as a result of the search of Oswald's belongings that afternoon without a warrant and without his consent, would be such evidence that would constitute a violation of the guarantees of personal security under the Fourth and Fourteenth Amendments of the Federal Constitution.

In Texas the general rule was that the defendant has no standing to object to the search of another's premises and that a wife has implied authority to consent to the search of her husband's premises, provided she understands the nature of her act and is not subjected to implied coercion. *Nagel v. State*, 71 S.W.2d 285; *Brown v. State*, 235 S.W.2d 142. Slight circumstances will suffice to avoid the consent. *Jordan v. State*, 11 S.W.2d 323. Since *Mapp v. Ohio*, 367 U.S. 643, however, such cases as stated must be reassessed and evaluated in the light of Fourth Amendment rights of defendants and the status of evidence that is inadmissible if obtained through an apparent or questioned illegal search. *Lanza v. New York*, 370 U.S. 139.

The Supreme Court has not taken a literal or mechanical approach to the question of what constitutes a search or seizure. A hotel room, an unoccupied taxicab, as well as a store, apartment, or automobile may well fall within

the protected area. The protection extends to the effects of people, as well as to the person and houses. *United States v. Hertz*, 179 F.Supp. 913 (S.D. Calif. 1959). Invitation to enter for an interview will not justify a search after entry. *Robertson v. State*, 375 S.W.2d 457. If the search is without a warrant, the prosecution must show a consent that is unequivocal and specific, freely and intelligently given. *An invitation to enter a house extended to armed officers is usually considered an invitation secured by force. Gatlin v. United States*, 326 F.2d 666; *United States v. Roberts*, 179 F.Supp. 478.

Certainly it is doubtful that such consent was waived or extended by either Mrs. Paine or Marina Oswald. Even if Mrs. Paine consented to the examination of property in her garage known to belong to Oswald, it is fairly obvious that Marina Oswald, considering her scanty knowledge of English and Ruth Paine's difficulty with Russian in a crisis, gave no legal, intelligent consent to a search of the garage, although Marina pointed out the blanket and the belief, as she said, that it still contained the rifle. Because of these factors, there would seem to be a strong basis for excluding all of the evidence that was developed and produced through the leads and statements made by Marina Oswald, the wife of the deceased Oswald.

#### *Weaknesses in Other Witnesses*

An adroit defense lawyer would not altogether be defenseless as to remaining witnesses. While Oswald was seen on the sixth floor of the Depository Building from the southeast window from which the shots were fired thirty-five minutes before the assassination, his duties in filling book orders were primarily on the first and sixth floors. The only eye witness who ever identified him at the window first refused to make a positive identification, saying only that Oswald looked like the man he saw. Oswald's sub-

sequent departure from the building was reasonably subject to his explanation that with all the commotion, he did not think anymore work would be done that day.

It would be a fruitless task to attempt to repel evidence of Oswald's subsequent movements, (boarding a bus and leaving it; taking a taxicab; changing his clothes at his rooming house; walking down certain streets where he was seen entering the Texas Theater; resisting arrest there; possessing and attempting to use a pistol, since conduct of an accused following the commission of a crime may be inquired into generally, 23 TEXAS JURISPRUDENCE 190; and flight constitutes circumstantial evidence of guilt, *Vaccro v. United States*, 296 F.2d 500. Nor would it be necessary to show Oswald was aware that he was suspected of the crime. *McCormick & Ray*, TEXAS LAW OF EVIDENCE 394. While it would be necessary to show, as to the attempt to resist arrest in the theater, that Oswald knew he was being arrested, the evidence on this point is undisputed. *Chester v. State*, 300 S.W. 57.

There remains a question of whether Tippit's murder would be admissible. As a subsequent similar offense, it would be excluded. *Gross v. State*, 135 S.W. 373. As part of a subsequent escape attempt, it could not be shown until it first had been shown that an effort was being made to arrest him. Here the prosecution might succeed, on the proposition that the description being circulated of the President's assassin was sufficient to raise an inference that Tippit intended to hold Oswald for questioning.

The testimony of Mrs. Helen Markham, an eye witness standing on the street corner, was merely that after the men talked, Tippit got out of the car on one side and Oswald walked forward on the other side and shot him. This witness was hysterical. Her initial description of Oswald, as well as facts she stated regarding the time of the occurrence, was inaccurate. Her original identification of Oswald in a line-up occurred after she had been given sedatives, and she remained hysterical for several hours after the event. The

admissibility of the Tippit murder, accordingly, is at least arguable.

Assuming it to be admissible, however, as part of the general flight picture, the transcript of the Warren Commission hearings show the usual contradictions which arise to plague the prosecution. Domingo Benavides, the eye witness closest to Oswald, refused to identify him. The Davis sisters were confused as to whether they called the police before or after they saw Oswald leave the car and walk across the lawn. William Scoggins, the taxi driver, and an eye witness to the Tippit murder, made his identification at the same line-up where William W. Whaley, (now deceased), the driver in whose taxi Oswald made part of the trip from the Depository Building to his rooming house, and it appears from the latter and other sources that Oswald's remonstrances against being placed with the other persons in the line-up were so pronounced that any person could have picked him out as the accused without ever having seen him before.

There are, however, a number of other witnesses who, while they did not see the actual shooting, did see Oswald leave the scene and who would not be easy to attack.

#### Physical and Documentary Evidence—Its Value

Had Oswald lived and had his defense counsel been very lucky, he would be able at Oswald's trial either to exclude or impeach the testimony of a large number of key witnesses, whose accounts add so much to the strength of the Warren Commission report. This doesn't mean that what would be left, granting the unlikely event of success in all these endeavors, would leave room for reasonable doubt of Oswald's guilt, but the surprising fact is the conviction in such an event would depend to an amazing degree on documentary evidence and its interpretation by experts.

In other words, the circumstantial evidence is either more cogent or less subject to attack than the direct. Both the

rifle recovered in the Depository Building and the pistol found on Oswald's person were traced to his possession by documents with the aid of handwriting experts. The snapshots which Marina Oswald gave to police officers also are established by expert testimony identifying the rifle and pistol Oswald was holding, proving that the pictures were made with his camera.

While testimony that Oswald brought the dismantled rifle to the Depository Building is subject to attack because both the Fraziers many times described a brown package Oswald brought from Irving to Dallas on the day of the assassination as being much smaller than it would have had to be to contain a weapon, the bag itself found at the scene was shown to be made from materials to which Oswald had access, and the mute testimony of the object overpowers the statement of the witnesses.

All fingerprints on the boxes from which the assassin fired were latent; sophisticated criminological procedures were necessary to develop and identify them. Expert testimony further links the rifle with Oswald to the shirt fibers caught on its surface. Other testimony establishes that the bullet found in the Presidential limousine was fired by the rifle that was recovered, while the autopsy reports and ballistics firing tests make plain the manner in which the shots hit their mark.

If the green and brown blanket found in the Paine garage were admitted into evidence, expert testimony links fibers from it with those in the brown paper bag, suggesting that Oswald removed the rifle from the blanket and carried it to the Depository Building in the bag, while human hairs found in the blanket itself were linked from body hairs taken from Oswald after his arrest.

To the lawyer and prosecuting attorney, the Warren Report conceived as a criminal investigation carried to the utmost limits, illustrates the importance of utilizing the laboratory and experts as sources of the most cogent evidence in criminal proceedings.

It also points up the usual difficulties in dealing with the testimony of living witnesses.

The Warren Report was helpful in pointing the way toward protection of our standards of fair trial, undue publicity, toward reforms in protective procedure, and toward desirable future legislation. It represents a new synthesis which may be followed to advantage in future historicolegal investigations.