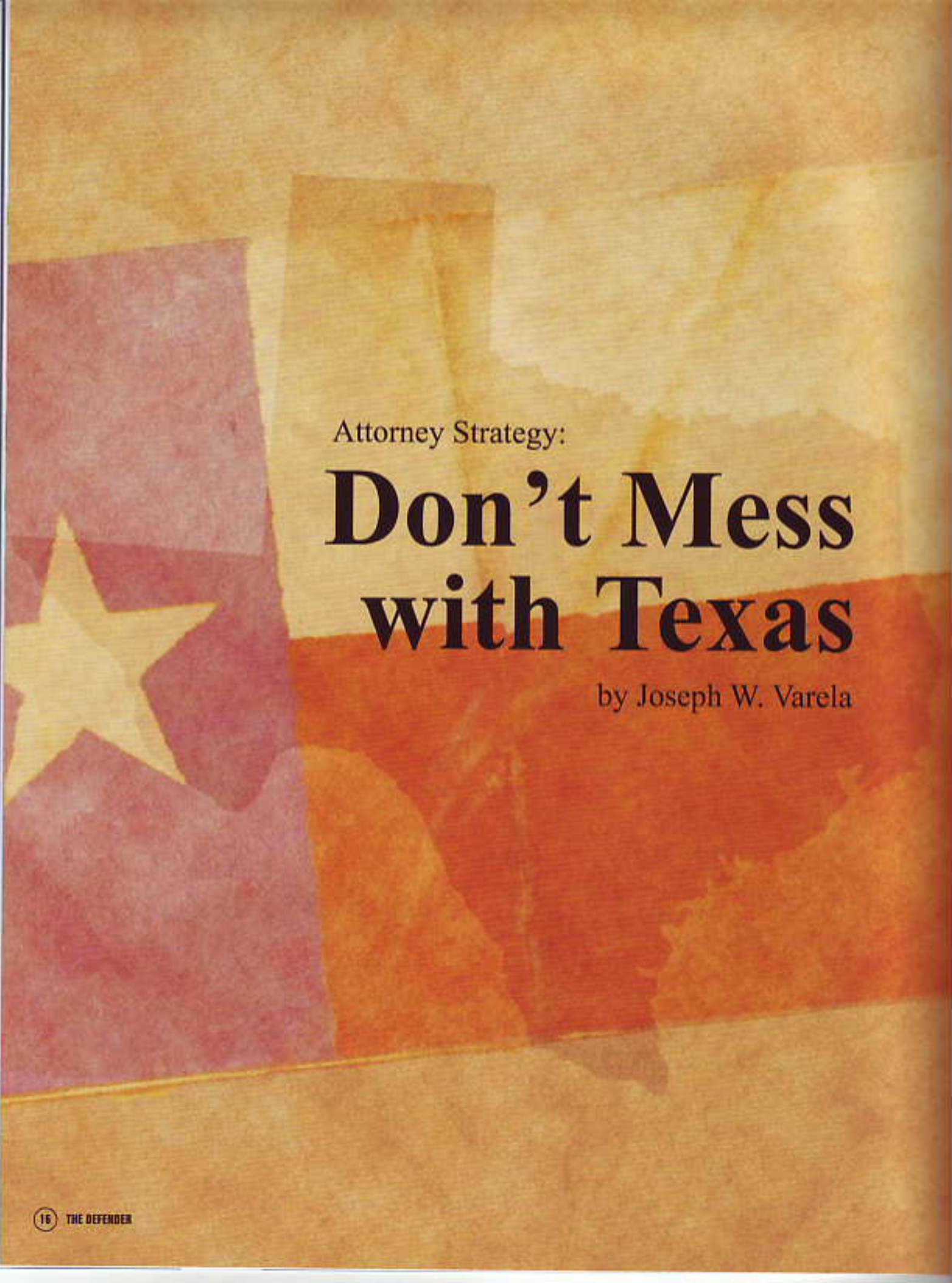

Attorney Strategy:

Don't Mess with Texas

by Joseph W. Varela

Terrain is not neutral—it either helps or hinders each of the opposed forces. Commanders must develop an eye for terrain; they must recognize its limitations and possibilities for protecting friendly forces and putting the enemy at a disadvantage. Successful commanders understand terrain and how it affects operations. They are able to grasp the potential capabilities and limitations of the space in which they operate.

U.S. Army Field Manual 100-5[1]

It's fashionable among defense lawyers to knock Texas criminal practice. The assumption is that Texas is somehow behind the times, almost medieval in its criminal procedure, to the detriment of those unfortunate enough to find themselves accused in a Texas court. Even a superficial analysis shows this assumption to be altogether false; Texas defendants enjoy many basic rights denied to the accused in other American systems of criminal jurisprudence.

Several years ago I attended a seminar on federal practice, sponsored by the Federal Public Defender's office. It was no surprise that the speakers were mostly federal defenders, other federal employees, or lawyers who practice in federal court more-or-less exclusively. Several were fulsome in their praise of the "Article III courts" as a great forum that provides manifold opportunities for defense lawyers to exercise creativity in defending clients.

A student raised his hand and took issue, pointing out that there are many rights Texas defendants have that federal defendants do not. That set me to thinking. I abandoned my note-taking, took a fresh sheet of paper, and started listing them off the top of my head. It was apparent that the objector was right.

Terrain is essential to consider at all levels of military strategy, from the infantry squad inching its way through a jungle in 1967, to the clash of titanic army groups in the Soviet steppes in 1941. It is one factor that commanders can do nothing to alter.[2] Strategy and tactics must be adjusted to the terrain, and not the other way around.

Here I argue that the "terrain" in Texas favors defendants over that in the federal system, and by implication, in the states that more-or-less follow federal practice.

What follows is not an exclusive list of Texas law beneficial to the defense. It is also not my intention to delve into the intricacies of case law and local practice. But I think the following examples demonstrate that if one must be indicted, Texas might not be such a bad place after all.

The Corroboration Rule

In federal court a defendant can be convicted solely on the testimony of a co-defendant, accomplice, or co-conspirator. *United States v. Arledge*, 553 F.3d 881 (5th Cir. 2008). This is especially true where the judge gives the jury an instruction on accomplice testimony. *United States v. Osum*, 943 F.2d 1394 (5th Cir. 1991).

Contrast this with the situation in Texas. Article 38.14 of the Texas Code of Criminal Procedure is a general corroboration statute that requires corroboration of accomplice testimony. Article 38.141 requires corroboration of a witness who is not a peace officer, but who is acting covertly on behalf of law enforcement. And Senate Bill 1681 recently established Art. 38.075, which imposes a new corroboration requirement on jailhouse snitches.

This is a substantial additional burden on the prosecution. Many cases which would be upheld in the federal courts would fail in state court because of the corroboration rule. At trial, because Texas law requires jury instructions on accomplices both as a matter of law and as a matter of fact, there are opportunities for good lawyering. *Smith v. State*, 286 S.W.3d 412 (Tex. App.-Corpus Christi 2008).

Jury Punishment

Article III and the Sixth Amendment to the United States Constitution provide a right to a jury trial, but that right extends to the issue of guilt only (the Eighth Amendment requires a jury to assess punishment in capital cases. *Ring v. Arizona*, 536 U.S. 584 (2002)).

In Texas the defendant can elect whether he wants the judge or the jury to assess punishment after a jury trial. Tex. Code Crim. Proc. art. 37.07 2(b). This election is a statutory right, not a constitutional right. *Tinney v. State*, 578 S.W.2d 137, 138 (Tex. Crim. App. 1979). It applies to felonies and misdemeanors punishable by jail.

This is a huge advantage. If you are in federal court facing a "hanging judge," you're stuck. There's simply no decision for the lawyer to make. But in Texas you can, and must, carefully size up the judge and the prospective jury pool, look at your client and his facts, and decide who will sentence. And the prosecutor has nothing to say about it.

Probation Eligibility

There is no general probation eligibility in federal court. Look at the sentencing guidelines; although they are no longer mandatory, almost everyone convicted of a federal crime will do some amount of time in prison.

In Texas, Article 42.12 of the Code of Criminal Procedure gives defendants a general right to be considered for probation if they have never been convicted of a felony and punishment is assessed at 10 years or less, excepting only a few offenses.

This is another advantage which works several ways for the defense. First, it is possible to be convicted of a very serious crime, such as aggravated robbery with a firearm, and still avoid any prison time if the jury sees fit to grant probation. Second, when the prosecutor knows your client is probation eligible, it provides him with an incentive to offer a better plea bargain. Third, it is widely believed that the presence of probation on the table during jury deliberation causes juries to agree on a lower sentence of imprisonment than they otherwise would have imposed.

No Sentencing Guidelines

Federal judges were bound by mandatory sentencing guidelines. Even after *United States v. Booker*, 543 U.S. 220 (2005), which made the guidelines merely advisory, federal judges still continue to follow them in most instances. These guidelines apply complicated formulae to a defendant's offense, criminal history, and aggravating and mitigating factors, and specifically exclude some factors that defense lawyers think are relevant to sentencing. The result is that the defendant falls into a cell in a matrix which specifies a narrow range of punishment.

Texas law does not contain guidelines. Rather, the Penal Code specifies ranges of punishment which are broader than the approach in the Federal guidelines. For example, a person accused of aggravated robbery who is probation-eligible can receive as little as five years probation and as much as life in prison. This extreme range generates much uncertainty, but the defense lawyer can use that uncertainty to his advantage if he has an attractive client. Whether the defense elects judge or jury punishment, a broad range of punishment allows the defense attorney the opportunity to present mitigating evidence such as age, mental condition, prior military service, medical problems, susceptibility to peer pressure, family and community ties, and the like, which could not even be considered under the federal guidelines.

Admissibility of Statements

Federal law allows the admissibility of a defendant's statements in any form. In other words, as long as the record shows that *Miranda* was complied with, oral statements come in. If a defendant denies making an oral statement, it's his word against that of the agents.

But in Texas the admissibility of statements which are the product of custodial interrogation is governed by Article 38.22 of the Texas Code of Criminal Procedure. This statute requires a recording or a writing, and the *Miranda* warnings have to appear in the recording or writing. This prevents law enforcement from testifying that the defendant responded orally to custodial interrogation. Many statements, or purported statements, of the defendant that would be admissible in Federal court are not admissible in Texas courts.

Exclusionary Rule

In federal court, the only searches and seizures affected by the Fourth Amendment are those that are the result of governmental action. *Burdeau v. McDowell*, 256 U.S. 465 (1921). In other words, only searches by police, or persons acting at the direction of the police, implicate the Fourth Amendment.

However, Article 38.23 of the Texas Code of Criminal Procedure provides that "No evidence obtained by an officer or other person . . ." is admissible if it was obtained in violation of the constitution or laws of either the United States or of Texas. A "private search" by a person who is not a peace officer, which is in violation of the law, will render any items seized inadmissible. *Livingston v. State*, 731 S.W.2d 744 (Tex. App.--Beaumont 1987, pet. ref'd).

This distinction is often missed: If a burglar breaks into a house and discovers child pornography, that evidence is admissible in federal court, because the burglar was not acting at the direction of law enforcement. In Texas, because the burglar was violating the law when he found the porn, it is not admissible.

Additionally, the Texas "good faith" exception, enacted as Article 38.23(b) of the Code of Criminal Procedure, is not coextensive with the federal "good faith" exception but applies only if the supporting affidavit states probable cause. See *Gordon v. State*, 801 S.W.2d 899 (Tex. Crim. App. 1990).

Timing of Motions to Suppress

Rule 12 of the Federal Rules of Criminal Procedure specifically requires motions to suppress to be made in advance of trial. Judges typically issue a scheduling order that requires the defense to notify the prosecutor of their intent to move to suppress well in advance of the trial date.

Under Texas law, a motion to suppress need not be in writing and can be made at the time the evidence is offered. *Johnson v. State*, 743 S.W.2d 306 (Tex.App.--San Antonio 1987, no pet.); *Roberts v. State*, 545 S.W.2d 157 (Tex. Crim. App. 1977). Not only does this afford the defense an opportunity to surprise the prosecutor, such a motion can be made after jeopardy has attached.

Voir Dire

Rule 24 of the Federal Rules of Criminal Procedure states that the judge may examine prospective jurors, or the parties may be permitted to examine them. If the judge does the voir dire, the parties have the right to either ask additional proper questions or submit them to the judge who shall ask them.

In Texas the defense has the absolute right to conduct its voir dire, even to the extent of asking questions that have already been asked by the judge and the prosecutor. *McCarter v. State*, 837 S.W.2d 117 (Tex. Crim. App. 1992).

This can be another huge advantage to the defense. In a federal trial where the judge conducts all the voir dire, the defense lawyer is denied the opportunity to make contact with the jurors, to ask his questions in his own style; in short, he is prohibited from conversing with the panel.

Not so in Texas, where his advocacy can begin with his first words to the venire.

Reciprocal Discovery

Rule 16 of Federal Rules of Criminal Procedure provides that if the defense requests inspection and copying of documents and objects, and the prosecutor complies, then the prosecutor can make a similar discovery request of the defendant

Texas discovery is governed by Article 39.14, which does not provide for reciprocal discovery, except in the case of expert witnesses.

The federal rule imposes a choice on the defendant: does he forego discovery in order to retain surprise? Or does he get his discovery and perhaps pay a price? Texas law creates no such dilemma. A Texas defendant can (and should) request discovery without the burden of reciprocation.

Grand Jury Presentations

It is a crime to attempt to influence a federal grand jury by written communication. 18 U.S.C. § 1504. By contrast, it is an accepted part of Texas practice to make written grand jury presentations. Most of us have had cases no-billed because of such action.

Right to Bail

There is no federal constitutional right to bail, and neither is there a statutory one. 18 U.S.C. §3142. A detention hearing may be held and your client locked up for the duration of the war.

By contrast, Article I, Section 11 of the Texas Constitution provides that all prisoners shall be bailable, except in capital cases where proof is evident. In a very few other situations the State must move to deny bail within seven days, and if the court grants that motion, the defendant is entitled to bail 60 days later.

Deferred Adjudication

There is no deferred adjudication in federal court.

There is in Texas: Article 42.12 § 5 of the Texas Code of Criminal Procedure. This of course allows a defendant to dispose of his case without a final conviction.

Severance

There is no mandatory severance in federal court. Rule 14 of the Federal Rules of Criminal Procedure provides that the court may sever defendants or counts if it appears that the defendant will be prejudiced. The defense bears the burden of showing substantial prejudice. *Zafiro v. United States*, 506 U.S. 534 (1992).

Texas law provides for severance of offenses as a matter of right. Tex. Penal Code § 3.04. Also there is mandatory severance of parties if the co-defendant has an admissible prior conviction and the movant does not. Tex. Code Crim. Proc. art. 36.09; *Haggerty v. State*, 825 S.W.2d 545, 547 (Tex. App.-Houston [1st Dist.] 1992, no pet.)

Cross-Examination

Rule 611 of the Federal Rules of Evidence limits cross to the subject matter of the direct examination and witness credibility. The court has discretion to permit other cross. Rule 611 of the Texas Rules of Evidence states, "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." The right to cross-examine is "broad and wide-ranging and extends to any matter relevant to the issues." *Woodall v. State*, 216 S.W.3d 530 (Tex. App. – Texarkana 2007). Texas cross has been described as "wide-open." *Crosby v. State*, 696 S.W.2d 388 (Tex.App.---Dallas 1985), rev'd 750 S.W.2d 768 (Tex. Crim. App. 1987).

These are some examples of favorable terrain. Doubtless the reader can think of others.

In light of all this, the conclusion is inescapable that the "terrain" in Texas favors the defense. Texas criminal practice affords defendants many more basic rights and advantages than does the federal system and, therefore. the Texas defense lawyer has many more opportunities to make decisions and exercise strategy. If you want to do some terrain-intensive strategy and creative lawyering for your clients, Texas, not the federal system, is the place to be.

[1] Department of the Army (1993).

[2] Although tons of Agent Orange defoliant were dropped on Vietnam, it is considered to have had little effect on the jungle canopy.