

# Witness This!



*Michael Beust, Fall Term 1840*  
*The Republic of Texas*  
*County of Christian* } *November 28, 1840*  
*This day the Court took and gave*  
*the Sheriff William H. Beust, administrator of the*  
*estate of John Beust and all the heirs, under the power*  
*vested in said court, to their said estate and*  
*with their heirs, all those lands, by being hereon*  
*placed and charged of his power, to their said*  
*administrator by the way who was shown as being*  
*of the said County*

<i>1. J. Beustman 1</i>	<i>8. J. Beust 8</i>
<i>2. J. Beustman 2</i>	<i>9. J. Beustman 9</i>
<i>3. J. Beustman 3</i>	<i>10. J. Beust 10</i>
<i>4. J. Beustman 4</i>	<i>11. J. Beustman 11</i>
<i>5. J. Beustman 5</i>	<i>12. J. Beustman 12</i>
<i>6. J. Beustman 6</i>	<i>13. J. Beustman 13</i>



*Presented by the  
State Bar of Texas Law Related Education Department  
and the Star of the Republic Museum*

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# *WITNESS THIS!*

State Bar of Texas  
Law Related Education Department

Law-Related Education Department serves as a catalyst to advance law related and civic education programs throughout the state. Working with the legal community, public and private school districts, universities, and Regional Educational Service Centers, the Law-Related Education Department administers numerous programs designed to improve the administration of justice, promote civic participation and competence.

Jan L. Miller, Director  
Yvonne Greenwood, Coordinator  
Linda DeLeon, Office Manager

## The Star of the Republic Museum

The Star of the Republic Museum is located at Washington-on-the-Brazos State Historic Site, where 59 delegates gathered on March 2, 1836 to declare Texas' independence from Mexico and to draw up a constitution for the new republic. The mission of the museum is to preserve the material culture and interpret the history of the Republic of Texas and its influences of U.S. and world history. Over 6,000 artifacts and documents comprise in the museum collection, including the Grand Jury testimony on which this project is based. The museum is administered by Blinn College of Brenham, Texas.

The Museum is open seven days a week, from 10:00 a.m. to 5:00 p.m., closed Thanksgiving Day and Christmas Eve through New Year's Day. For general information, call (936) 878-2461 or visit the website at [www.starmuseum.org](http://www.starmuseum.org).

For more information about this project, contact Anne Simms McGaugh, Curator of Education, (936) 878-2461, ext. 237, [amcgaugh@blinn.edu](mailto:amcgaugh@blinn.edu)

Anne Simms McGaugh, Curator of Education

# INTRODUCTION

This curriculum guide is a collaborative effort between the State Bar of Texas Law-Related Education department and the Star of the Republic Museum. While conducting research for our first children's book, *Lone Star Waves Proudly*, we were introduced to the Star of the Republic Museum.

During a conversation with Anne Simms McGaugh, Curator of Education, she mentioned coming across an old grand jury document, which was a gift of L. Cletus Brown, Jr., about a murder in San Felipe de Austin. Using that document, she developed a mock trial script. Her research and findings sounded fascinating. It was then we spoke about creating a curriculum guide, which would contain not only the script of the mock trial, but also the literal transcription of the original grand jury document. Since the original document which motivated Anne to create the script was a grand jury document, we decided to include information on the grand jury system.

All artifacts on the cover are from the collection of the Star of the Republic Museum:

- 1) Oldest known Lone Star Flag- Gift of L. Cletus Brown, Jr.
- 2) District Court record, County of Austin, Fall Term 1840–Gift of L. Cletus Brown, Jr.
- 3) Boot knife with ivory handle, steel shaft
- 4) Tin cup, footed
- 5) Stoneware jugs, salt-glazed
- 6) English pistol, belonged to Thomas Jefferson Chambers

This guide has three major sections. The first section provides an overview of both the federal and Texas grand jury system. The second section features the literal transcription of the grand jury hearing and the mock trial script. The third section features a few classroom enrichment activities.

This guide would not have been possible without the grand jury research and writing talent of Yvonne Greenwood, Law-Related Education Coordinator.

We appreciate the help of three outstanding teachers and friends of Law-Related Education for reviewing the mock trial script:

- Nan Ellis
- Roseann Ferguson
- Betsy Gonzalez
- Sandi Woodruff

A special thank you to Chris Beasley, Graphic Designer, State Bar of Texas for photographs on cover and design of the curriculum.

# *Historical Background Of Grand Juries*

The origins of the grand jury system are obscure; some say it dates back to the ancient Greeks. Forms of the grand jury have also been traced in Scandinavian countries where jurors came to determine both law and fact. All agree, however, that the institution of the grand jury is important in history as a guarantee against unfair treatment of the criminally accused. The United States Supreme Court has stated “our constitutional grand jury was intended to operate substantially like its English progenitor.”

In 1166, the English King Henry II established a system of local informers. The men were required to report all suspects and were fined if they failed to indict an acceptable number. The informers secretly named violators to give the sheriff a chance to seize those who were indicted. The purpose was to give to the central government the benefit of local knowledge in the apprehension of those who violated the king's peace.

In 1215, King John of England was forced to sign the Magna Carta, which provided individual protections of life, liberty, and property. Although this document did not specifically address the issue of the use of grand juries, it did introduce the concept of due process of law.

In 1642, the English legal philosopher, Edward Coke, interpreted the Magna Carta as preserving life, liberty, and property subject to the “law of the land.” William Blackstone interpreted Coke's “law of the land” to require a two-tier process before a person could be deprived of (at least) life. The vote of the grand jury in the first proceeding determined whether there was probable cause to believe that the individual accused was guilty of the crime charged; the vote by the petit jury in the second proceeding determined whether there was enough evidence to convict. The petit jury provided little protection to the innocently accused, however, because the king often fined or imprisoned jurors who refused to convict. Reacting to this abuse by the king, the grand juries began to shift their focus away from mere accusation to considerations of fairness for the individual accused.

The abuse of the English king's right of initiating criminal prosecutions was one of the principal causes of the uprisings against the Stuart monarchs Charles I and

James II in England in the seventeenth century and against King George III in the American colonies in the eighteenth century.

Before grand juries, the colonies used “assistants,” whom the English monarchy authorized to make the laws, accuse suspects, and sit in judgment of criminals. Having no checks or balances, the assistants were too powerful and abusive. In response to this abuse, one of the first American grand juries charged several of the assistants themselves with violations of criminal law. Thus, the American grand jury originally began as a defense against the monarchy. It established a screen between accusations and convictions and initiated prosecutions of corrupt agents of the government.

The grand jury first appeared in the Massachusetts Bay Colony in 1635. Governor John Winthrop warned jurors to report all crimes and misdemeanors and to read the Ten Commandments as a guide to deliberations. By 1641, Massachusetts’s jurors served one-year terms. In 1649, among the crimes reported was “wife beating...having been instigated of the devil.”

By 1636, the jury’s investigatory power into governmental matters was determined when Governor William Bradford charged New Plymouth jurors to “inquire of all abuses within the body of government.” Among the New Plymouth crimes reported were Stephen Hopkins for selling beer and John Jenner for improperly grinding corn.

In England, only landowners were allowed to serve on grand juries, but the Carolinas were the only colonies to require land-holding for grand jury service. In early America, grand juries were more a part of local government than they apparently had been in England. Grand juries heard cases against town officials who failed to repair roads, levied taxes and oversaw spending, as well as heard criminal accusations.

As the colonies moved closer to revolution, the grand jury added the role of resistance to the monarchy. The case of John Peter Zenger, whose newspaper printed criticisms against the king’s appointed governor, was heard by three different grand juries, each of which refused to indict.

Colonial grand juries blocked attempts to prosecute crimes such as burning tea chests belonging to Torrey businessmen. Four civilians who were suspected to be British sympathizers were indicted along with the soldiers who fired on colonists in the Boston Massacre in March 1770. The Colonial grand juries also called for resistance to the British.

After the revolution, the United States Constitution did not provide for the use of grand juries. Even the Judiciary Act of 1789, which established the federal judiciary, did not mention grand juries. But in 1791, and the right of a grand jury in "... capital, or otherwise infamous crimes..." was guaranteed as part of the Fifth Amendment.

Partisan grand juries were not limited to Colonial times. In the Civil War South, grand juries issued indictments for violation of slave laws. These same grand juries refused to indict Ku Klux Klan members for atrocities against blacks, including hanging. Anti-war publications felt the wrath of "patriotic" grand juries. Three New York newspapers, including the New York Daily News and the Brooklyn Eagle, were publicly condemned by grand juries for encouraging the rebels. Federal action in banning the publications from the mails followed heavy public criticism.

In the 1850's in Utah, Mormon Grand Juries refused to charge church members with polygamy and indicted some non-Mormon judges who were critical of the Mormon law.

Grand juries have been part of the Texas criminal justice system since the days of the Republic of Texas. The first grand juries appeared in the state shortly after Texas won its independence from Mexico in 1836. Harris County's first grand jury convened its first session among some large trees that had been cut down, presumably using the tree trunks for benches, in March 1837. The eighteen-man jury returned two indictments on its first day, charging one person with murder and a second with larceny. The defendants were tried that very day. Not only was justice swift during the days of the Republic of Texas, it was also harsh. The convicted thief was sentenced to sustain 39 lashes on his bare back and have his right hand branded with the letter "T." Grand jury protection was included in the Texas Constitution in 1876. Throughout most of Texas history, all felony accusations were reviewed by a grand jury for possible indictment. In 1972 state law was changed to permit defendants to waive their right to grand jury indictment, but even that has only slightly changed the way prosecutors conduct their business.

Twentieth century grand juries have been responsive to local and national prejudices. In the 1940's Franklin Roosevelt's campaign against Nazi sympathizers brought forth indictments, while the 1950's saw many indictments of accused Communists in the McCarthy "Red Scare." The grand juries of the McCarthy era openly lamented the accused Communist's hiding behind the Fifth Amendment. In the 1960's state panels refused to indict whites accused of crimes against blacks. Federal grand juries had to indict whites for fraud and intimidation.

The grand jury has evolved into a vital aspect of the American judicial system. Yet, few people understand how the grand jury functions because its proceedings are not made public. The United States Supreme Court has repeatedly upheld the vital function of the grand jury by declaring "...Historically (the grand jury) has been regarded as a primary security for the innocent against hasty, malicious, and aggressive prosecution; it serves the invaluable function in our society of standing between accuser and accused, whether the latter can be an individual, minority group, or whatever, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

The modern grand jury is significantly different from its predecessor of 800 years ago. The first grand jurors knew the accused and jurors often provided testimony against the accused. Today, with the large urban populations, grand jurors seldom know the accused and rely on the evidence presented at the grand jury hearing as their sole source of knowledge of the alleged criminal activity. The first grand juries were not shields for the accused against unfair prosecution from the state. Today's grand jury functions as a safeguard against unfair accusation and prosecution.

Grand jury proceedings of 800 years ago meant a horrifying "trial by ordeal" wherein the accused must prove his innocence. Today, an indictment by the grand jury is followed by a "presumption of innocence" unless proven guilty beyond a reasonable doubt by a petit jury or a trial judge.

Ironically, England, where United States got the concept of the grand jury, abolished the system in 1933 and replaced it with the court clerk's preparing indictments.

# *Grand Juries Today*

Grand juries play an important role in the criminal justice system today. Unlike trial juries, grand juries do NOT decide if someone is guilty of criminal charges that have been brought against them, but only whether there is probable cause to believe that a crime was committed and that a specific person or persons committed it. The grand jury is not a trial jury but simply listens to evidence and decides if someone SHOULD be charged with a crime.

Some states and the federal government use grand juries to investigate and indict. The grand jury serves as a check against governmental authority because it, not the government, determines whether a citizen should be formally charged with a crime.

Grand juries are designed to perform two simple functions. First, they screen a prosecutor's criminal case in its early stages to see if enough evidence has been gathered to warrant an indictment (a written, formal accusation charging an individual with a certain crime); secondly, they act as an investigative arm of government, calling witnesses and issuing subpoenas to compel production of documents. The first function is often likened to a "shield" against malicious or baseless criminal charges, and the second to a "sword" in the hands of government prosecutors.

If there is sufficient evidence, the grand jury issues an indictment (also called a true bill). The case is then sent to a trial (petit) jury. If the grand jury does not find sufficient evidence to indict, they issue a no-bill, and the defendant is released. Because a grand jury hearing is not a trial, one may be brought before a grand jury any number of times for the same accusation.

The United States Constitution, Amendment Five, states in part:

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...*

An "infamous crime" has been defined as one which may be punished by imprisonment for more than one year (a felony). In other words, before a person is brought before a court in a felony matter, that person has the right to appear before a grand jury. In 1884 the United States Supreme Court determined, in *Hurtado v. California*, that the grand jury system is a procedure that states can abolish at will. Therefore,

since this portion of the Fifth Amendment has never been “incorporated” (made applicable to the states through the Fourteenth Amendment), states have the right to make their own decisions regarding the use of grand juries.

Most states that use the grand jury system and federal courthouses have special grand jury rooms, which are located in areas that are not generally accessible to the public. Many courts have adopted special rules that prohibit anyone not having official business with a grand jury from being anywhere near the room where the grand jury sits. Some of these rules also prohibit individuals from observing the area near the grand jury room or photographing those who enter and leave the area. These rules are designed to preserve the secrecy of the grand jury process.

## *Federal Grand Juries*

Grand juries serve as a part of the federal court process where federal crimes may have been committed. An accused person may waive federal grand jury proceedings and agree to be prosecuted by a written charge of crime called “information.”

In the federal system, there are two kinds of grand juries: “Regular grand juries” primarily decide whether to bring criminal charges; “special grand juries” are called to investigate a specific problem, such as organized crime or corruption in the government.

A federal statute requires that grand juries considering criminal charges be composed of jurors who are randomly selected from a “fair cross-section of the community in the district or division” in which the federal grand jury convenes. However, because grand juries tend to sit for a long time, they are often retired people or others whose work or home schedules allow them to spend the time required to serve.

Each judicial district has a written plan for random juror selection that has been reviewed and approved by the chief judge and the judicial conference for the circuit. Federal law specifically prohibits any exclusion based on race, religion, gender, national origin or economic status.

The clerk sends out “juror qualification forms.” Based on the responses, prospective jurors are either deemed qualified or automatically excused. The names of qualified jurors are then placed in a master jury wheel from which names are drawn randomly for federal petit and grand jury panels.

Qualifications for all federal juries include being a United States citizen, at least eighteen years of age, live in the federal district with jurisdiction over that grand jury, have no felony convictions, have no mental or physical infirmities and being proficient in English.

The presiding judge can excuse jurors for long-term illness, care of a sick family member, acute business problems, or other good reasons. Most judges, however, excuse only for very severe hardships.

Twenty-three people serve on each federal grand jury. Sixteen represent a quorum, and it takes twelve voting together to return an indictment or a no bill. After the proper numbers of persons have been qualified as grand jurors, the court will appoint one of them to be the foreperson, or presiding officer, of the grand jury. A deputy foreperson will also be appointed, so that he or she can act as presiding officer in the foreperson's absence.

The foreperson, the deputy foreperson, and the remaining members of the grand jury are sworn in or affirmed by the clerk of the court. The oath binds members of the grand jury to inquire diligently and objectively into all federal crimes committed within the district of which they have or may obtain evidence and to conduct such inquiry without malice, fear, hatred or other emotion.

After the grand jurors have been sworn, the presiding judge advises it of its obligations and how best to perform its duties. This is called the charge to the grand jury.

When the grand jury has been charged, it is taken to the grand jury room, where it will hear testimony and consider documentary evidence in the cases brought to its attention by the United States Attorney or an Assistant United States Attorney.

Unlike trial juries, federal grand juries meet only occasionally. The frequency with which a grand jury will be called into session depends on the kind of grand jury it is. If a grand jury is conducting a complicated investigation into organized crime, it may need to meet at least once a week. If a grand jury is convened to monitor the conduct of certain public activities, it may only need to meet once or twice a year.

Regular grand juries sit for a basic term of eighteen months. A court may extend this term for another six months, bringing the total possible term to twenty-four months. Special grand juries also sit for eighteen months, but their terms may be extended another eighteen months.

In the 1970's, a federal appellate court held that charges could not be brought except in an indictment signed by a prosecutor. According to this court, if the prosecutor will not sign the indictment, no case results. Thus, the government and the grand jury act as checks upon each other. This assures that neither may arbitrarily indict a person of a crime.

Even though they may not be able to bring charges on their own, federal grand juries can still investigate. In practice, though, federal grand juries do not initiate their own investigations—they depend on prosecutors who decide what they will investigate. Part of the reason why federal grand juries do not do their own investigation may be the complexity of many federal crimes, such as tax fraud and racketeering. Another reason is because the grand jury must depend on the United States Attorney's office for investigative staff, since it has none of its own.

Matters may be brought to a federal grand jury in three ways: (1) by the United States Attorney or an Assistant United States Attorney; (2) by the court that impaneled the grand jury; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member's personal attention. A federal grand jury can take action only on federal crimes that have been committed within the district in which it is impaneled.

Each federal court district has a United States Attorney whose duty it is to represent the United States in federal matters within the district and to prosecute those accused of federal crimes. When the grand jury convenes, the United States Attorney or one of the Assistant United States Attorneys will present the evidence of alleged violations of the law to the grand jury. These attorneys also advise grand jurors as to what witnesses should be called and what documentary evidence should be produced.

The grand jury may call witnesses and can compel witnesses to appear or produce documents through a subpoena. Witnesses are allowed in the grand jury room only one at a time so as not to hear testimony given by other witnesses.

If a person who is subpoenaed to testify against a federal grand jury refuses to do so, he or she will be held in civil contempt. Although civil contempt is not a crime, the person refusing to testify can be held until he or she agrees to comply with the subpoena or until the grand jury's term ends, whichever comes first (up to two years). Witnesses are allowed to refuse to answer questions by invoking the Fifth Amendment privilege against self-incrimination. A person who has been granted immunity from prosecution in exchange for testimony can be punished for contempt

if he or she subsequently refuses to testify. And if witnesses lie in their testimony, they can be charged with perjury.

Witnesses are called to testify one after another. Upon appearing to give testimony, each witness will be sworn by the grand jury foreperson or, in the foreperson's absence, the deputy foreperson. Ordinarily, the attorney for the government questions the witness first, followed next by the foreperson, and then other members of the grand jury may question the witness. Questions asked must be related only to the case under investigation.

Because of the need for secrecy, the law forbids anyone other than authorized persons from being present in the grand jury room while evidence is being presented. This means that only the grand jury, the United States Attorney, the witness under examination, the court reporter and the interpreter (if the foreperson determines one is required) may be present.

Witnesses are allowed to ask permission of the foreperson to leave the grand jury room in order to consult with his or her attorney. The grand jury is instructed to draw no adverse inference from such request because every witness has the right to confer with counsel even though counsel may not be present in the grand jury room.

Normally, neither the person under investigation nor any witness on the accused's behalf will testify before the grand jury. Federal grand juries generally do not hear witnesses for the defense because it is not their duty to find a verdict. Defense lawyers are unwelcome. Upon request, an accused may be given the opportunity by the grand jury to appear before it. Even if the accused is willing to testify voluntarily, it is recommended that he or she first be warned of the right not to testify, and may even be required to sign a formal waiver of this right.

The grand jury can listen to hearsay and other evidence that is normally inadmissible in court, such as evidence that may have been obtained illegally. Testimony can be brief, or it can take many months to complete. Members decide largely for themselves how to proceed, as long as they act as one group.

After hearing the prosecutor's evidence, the grand jurors vote on the proposed charges (an indictment). Only the evidence presented to the grand jury in the grand jury room may be considered. All persons other than members of the grand jury itself must leave the room so that the grand jury may begin its deliberations. (Federal law, Rule 6, was amended effective December 1, 1999, to permit, when necessary, an interpreter to assist a juror who is hearing or speech impaired to be present while

the grand jury is deliberating or voting.) The foreperson will ask the grand jury members to discuss and vote upon the question of whether the evidence persuades the grand jury that a crime has probably been committed by the person accused and that an indictment should be returned. Only after each grand juror has been given the opportunity to be heard will the vote be taken.

The grand jury need only meet the standard of “probable cause” to issue an indictment (as opposed to the trial standard of “beyond a reasonable doubt”). If the grand jurors decide the evidence creates probable cause to believe that a crime has been committed and that the accused was the person who committed it, they vote for a true bill, or indictment. If a grand jury votes to return a true bill, the indictment initiates a criminal case against the defendant. At least sixteen grand jurors must be present and twelve members must vote for an indictment in order to return a true bill. The United States Attorney will then prepare a formal written indictment on the case.

If a majority of the grand jurors do not think the evidence creates probable cause, they will vote not to return the indictment (known as “returning a no bill”). A decision not to indict is immediately reported to the court in writing by the foreperson so that the accused may promptly be released from jail or freed from bail.

However, a grand jury’s vote not to return an indictment may not be a final judgment. If further evidence is discovered, the case may be taken to another grand jury, and there is no violation of the Fifth Amendment guarantee against double jeopardy. The basic rule is that “jeopardy attaches” when the first witness is sworn in a bench trial (one in which there is no jury) or when the jury is sworn in if the case is to be tried by a jury. This means that if a petit jury has been sworn in and heard the evidence in a criminal case and they vote to acquit the defendant, he or she cannot be retried on those charges.

Rule 6(e) of the Federal Rules of Criminal Procedure requires that “matters occurring before the grand jury” be kept secret. This is in order to prevent the accused from escaping before arrest or tampering with witnesses. The rule also says that if anyone bound by secrecy reveals “matters occurring before” a grand jury, this is considered criminal contempt. The rule of secrecy binds anyone with access to grand jury proceedings (prosecutors, grand jurors, court reporters and clerical personnel who help a prosecutor prepare for grand jury appearances). This also encourages witnesses to speak freely without fear of retaliation or public disclosure. Witnesses, however, are not bound to the secrecy rules. Identities of the grand jurors are also kept secret, as are identities of witnesses who testify and any evidence grand juries consider.

Essentially, the grand jury may disclose matters occurring before it only to the attorneys for the government for use in the performance of their duties, but even attorneys for the government may not be informed of what took place during the grand jury's deliberations and voting.

Although federal grand jury proceedings are secret, Rule 6(e) requires that they be recorded. The notes, tapes, and/or transcripts are also secret and contents cannot be revealed except in extraordinary circumstances. A knowing violation of this rule is considered contempt of court. Prosecutors may give transcripts and other grand jury information to other prosecutors or to other grand juries, if the information is to be used to investigate and/or bring charges for the commission of crimes. Records, orders and subpoenas are kept under seal until released for trial.

Many years ago, the United States Supreme Court explained why grand jury proceedings are secret. According to the Court, which was relying on earlier common law, there are four reasons. First, secrecy prevents those who are being investigated from interfering with witnesses and otherwise tampering with the investigation. It also encourages witnesses who might be reluctant to testify if their comments were made public to speak freely before the grand jury. It decreases the likelihood that one who is about to be indicted will flee to avoid being brought to trial, and finally, it protects innocent persons whose names may be implicated in a grand jury investigation but who will never be indicted.

# *Grand Juries In Texas*

A Texas grand jury in Texas convened in Nacogdoches in September, 1837. General Thomas J. Rusk, who had been second in command to General Sam Houston, and was a lawyer in Nacogdoches at that time, stated:

*I have seen the enemy sweeping on our country in immense numbers, carry death and destruction in their train. And I have seen the tide of war roll back to its source and the bloody tyrant go in chains as humble suppliant for the poor privilege of being beyond the day of his glory. That, gentlemen of the grand jury, was a proud day, but the feelings I had do not compare with those I now feel.* (Criminal Court, Nacogdoches, Texas)

The essential function of the grand jury is evaluating evidence to determine whether or not a person should be formally accused of a crime. Grand jury protection is included in the Texas Constitution of 1876. Article 1, Section 10—Rights of Accused in Criminal Prosecutions (as amended), provides in part:

*No person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary ....*

In other words, Texas requires all persons accused of a felony to be indicted by a grand jury before being tried, just as is required in federal courts. A 1972 Texas law permits defendants to waive their right to grand jury indictments (except in cases where the state seeks the death penalty), but few criminal defendants actually do that. A grand jury also has authority to present an indictment in misdemeanor cases, but usually it does not concern itself with these offenses.

By state statute, the grand jury's duty is to inquire into the violation of any laws in the county in which it is meeting which may be prosecuted by indictment and which may be brought to its attention by the district attorney or any credible person.

Grand jurors are considered public officials and members of the district attorney's office or the court. State law does not make a grand jury's action binding on the district attorney's office, so prosecutors can take cases that have been no-billed to another grand jury to be indicted. If a grand jury returns an indictment the prosecutor does not want, they can move to have the case dismissed before it gets to trial.

Texas law is unusual in the fact that it requires only twelve member grand juries, a vote of nine represents a quorum, and nine must vote together in order to return an indictment. In fact, the grand jury may not conduct business with fewer than nine members present. The foreperson, with the consent of the judge, may excuse a grand juror in cases of emergency. Fourteen grand jurors may be sworn in, allowing two to serve as alternates. Most other states and federal law provide for twenty-three grand jurors and allow twelve to vote a true bill.

## *Qualifications for Serving on a Grand Jury in Texas*

The qualifications are:

- (1) being a citizen of Texas and of the county;
- (2) being qualified to vote;
- (3) being of sound mind and good moral character;
- (4) being able to read and write;
- (5) not having been convicted of theft or any felony;
- (6) not being under indictment or accusation of theft or any felony;
- (7) not being closely related to any person serving on the same grand jury;
- (8) not having served as a grand juror or commissioner in the year previous to his current service; and
- (9) not being a complaining witness in any matter to be heard by the grand jury during the term for which he was selected to serve as a grand juror.

Some citizens may be exempt from grand jury service. They include:

- (1) persons older than 70 years;
- (2) persons responsible for the care of a child;
- (3) persons attending an institute of higher education or a public or private high school; and
- (4) any other person that the court determines has a reasonable excuse.

# *Two Methods of Selecting Grand Jurors in Texas*

The Texas Code of Criminal Procedures provides for two methods of selecting grand jurors. The state district judge serving as the grand jury judge appoints several grand jury commissioners, who in turn nominate qualified citizens to serve on the panels. State law requires that “commissioners shall, to the extent possible, select grand jurors who the commissioners determine represent a broad cross-section of the population of the county, considering the factors of race, sex and age.” The prospective grand jurors are required to be “high upstanding citizens who are concerned with upholding the law.” The commissioners are summoned to the courthouse when the judge executes an **Order Appointment Grand Jury Commissioners** (Attachment 1). The judge then chooses the grand jury members from among those nominated.

These commissioners are sworn in by the district judge with the **Grand Jury Commission Oath** (Attachment 2). The commission then retires to the jury room to meet in secret to name twenty qualified voters of the county to form a grand jury pool. Each commissioner names four individuals to the pool. After these twenty individuals are named, one of the commissioners writes the names of the grand jury pool in random order on the list of **Grand Jurors Selected Form** (Attachment 3). After the twenty names have been placed on the form in random order, each commissioner signs the form. The document is then placed in an envelope, sealed and signed by each commission member. The district clerk then delivers the envelope. The judge administers the **Oath of Secrecy** to the district clerk and his or her deputies in open court.

After the commission has given the clerk a signed and sealed list of twenty grand jury pool members, the first twelve names on the list who are not disqualified (see qualifications listed on page16) or exempt (listed on page16) from service for various reasons are selected to form the twelve-member grand jury.

The second method is to choose the grand jury panel from the same jury pool used to select trial (petit) juries. Names are randomly selected by use of the jury computer, which is the same manner as panels for jury trials are chosen. In either case, the names are given to the grand jury judge in a specific order, and if the first twelve people on the list are qualified and able to serve, they are chosen. If not, the next person or persons are taken in the order they appear on the list. The judge retains the right to strike prospective jurors he or she considers unacceptable.

# *Grand Juries Around Texas*

## Dallas County Grand Juries:

In Dallas County, the Criminal district court judges serve as the grand jury judge on a rotating basis. The judge serving determines which method will be used to obtain grand jurors, but most use the commissioner plan. Grand juries serve for three months, but terms may be extended by the grand jury judge. There are two grand juries impanelled at all times, one meeting on Tuesdays and Thursdays and the other Mondays, Wednesdays and Fridays.

## Harris County Grand Juries:

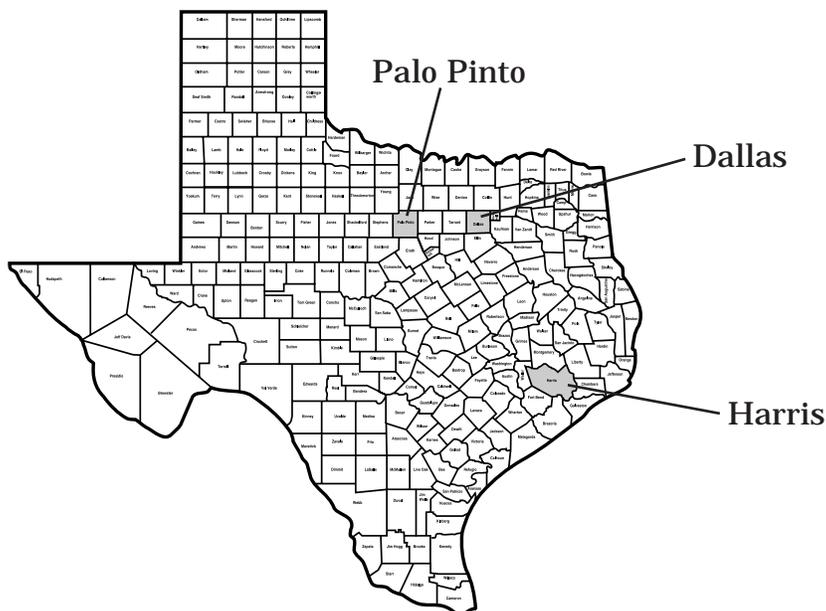
Grand jurors in Harris County are selected by using the commissioner plan. Grand juries serve two days a week for three-month terms. Five grand juries are seated at any given time, and prosecutors can pick which grand jury to present with a particular case.

## Palo Pinto County Grand Juries:

Palo Pinto County also uses the commissioner plan for choosing grand jurors. The judge makes a conscientious effort to balance urban, rural, socio-economic and racial factors in his or her selections.

In Palo Pinto County, a normal grand jury term lasts four months. During these four months, the grand jury usually meets only one day each month. In cases of special investigations, the grand jury may meet more than once a month.

## **What about Your County?**



# *Now That They Are Selected, What Happens Next?*

When grand jurors have assembled, the district judge administers the **Oath to Grand Jurors** (Attachment 4). By this oath, each juror is sworn to uphold the law, to act according to law, and to keep secret matters presented. Members then retire to the jury room to begin deliberations on cases presented to them by various members of law enforcement agencies and the district attorney.

A foreperson is designated by the judge who impanels the jury. The principal duties of the foreperson are to preside over all sessions and to see that the grand jury conducts its business in an orderly manner. Any mail addressed to the grand jury must be given unopened to the foreperson. The foreperson designates one of the grand jurors to serve as a clerk, or secretary, to the grand jury. The secretary has the responsibility of maintaining the entries of cases considered in the grand jury book.

The grand jury is the first step in the criminal trial process. It must determine if enough evidence is presented by the state, represented by the district attorney's office, to charge an individual with a criminal offense. The grand jury at times resembles a court of inquiry because all members can question witnesses in an effort to discern relevant facts and evidence.

Unlike petit juries, the grand jury itself has authority to conduct investigations, although the bulk of its work concerns charges that have already been processed and investigated by the appropriate law enforcement agency. Although investigatory power can be a benefit, the misuse of this power can lead to an abuse of the legal system. Many times, grand jurors turn investigatory powers into a license to conduct "witch hunts" and tread on the rights of private citizens.

The grand jury has the right to refuse to hear a complaint. A responsible grand jury will deliberate carefully before launching an investigation lest it become a tool of a select few individuals and not serve the best interests of justice.

Charges may be brought to the grand jury in three ways:

- (1) by the prosecuting attorney;
- (2) from any credible source, including the testimony of private citizens, heard by the grand jury in formal session with the grand jury's consent; or
- (3) offenses of which any member of the grand jury may have knowledge.

The majority of felony cases begin with the filing of a sworn complaint by a citizen or peace officer before a magistrate (usually a justice of the peace). On the basis of this sworn complaint, the magistrate will issue a warrant of arrest directing law enforcement officers to arrest the defendant named in the complaint and to hold him pending examining trial or the posting of a bond.

At the request of the defendant, an examining trial may be held before a justice of the peace. At the examining trial, the state will present witnesses to show the probability of guilt of the defendant (probable cause), and their testimony is recorded by a court reporter.

If the justice of the peace does not think that there was sufficient evidence presented against the defendant at the time of the examining trial, he may dismiss the charges and release the defendant from custody or the requirement of bond. If the magistrate finds there is probable cause, he may order that the defendant be bound over to the grand jury. The case is then presented to the grand jury by the prosecuting attorney. Testimony taken at the examining trial may be used by the grand jury, making it sometimes unnecessary to call witnesses before the grand jury.

A case that was discharged by the justice of the peace or the magistrate may nevertheless be presented to the grand jury by the prosecutor. The decision of the judge conducting the examining trial is not binding on the grand jury, and it may indict the defendant for the offense in question.

Since an indictment is only a formal charge of a crime, it does not require the degree of proof required for a conviction at trial. When an indictment is returned by the grand jury, the case is then assigned to the district court for trial.

The normal sequence for consideration of a case is that members of the grand jury are given an Indictment Form, which states the specific offense for which the accused is charged. This usually is followed by a statement by the prosecuting attorney explaining the elements of the offense (prosecutors usually simply read the police report). The prosecutor may clarify the offense by giving the penalty for that offense and any previous record the alleged offender may have. These prior offenses may range from municipal violations such as speeding tickets to more serious offenses punishable by prison sentences.

Many times the grand jury hears only from the prosecutor, but witnesses may testify if they are needed. A member of a law enforcement agency may present initial case information.

The grand jury possesses subpoena power, which compels witnesses to appear and give testimony before the grand jury. On occasion, the grand jury will request the witness to bring physical evidence. Failure to answer a grand jury subpoena is considered contempt of court.

Before each witness presents testimony to the grand jury, he or she is given the **Grand Jury Witness Oath** (Attachment 5) by the foreperson. Also, any visual evidence such as photocopies, pictures, or physical evidence may be viewed by the grand jury. Grand jurors are also given an opportunity to ask questions of the prosecutor and/or witnesses. Although the formal rules of evidence used in the courtroom are not applicable to questioning in the grand jury room, those rules are important because an indictment should be based on facts capable of being proven in court.

Normally, the accused or his or her attorney will not request witnesses to be called before the grand jury, since the grand jury does not actually try the merits of the cases presented to it. The grand jury has the right to offer an accused or suspected person an opportunity to appear or present witnesses, but it cannot force him or her to testify. Prior to any questioning of an accused or suspected person, he or she must be furnished with a written copy of certain warnings and be given a reasonable opportunity to retain and consult with an attorney before making an appearance before the grand jury. Neither a defendant nor a witness, when appearing before a grand jury, has a right to have his or her counsel present in the grand jury room.

After the presentation of the case, the prosecuting attorney and any other non-members of the grand jury must leave the grand jury room. Only members of the grand jury are permitted to be present during the deliberations and votes on indictments. After deliberating in secrecy, the grand jury votes to indict or not to indict, based upon the evidence presented. If the grand jury determines there is sufficient evidence to charge the accused, the jury votes to indict by rendering a true bill. If the jury determines that not enough evidence has been presented, a no bill is rendered. A no bill does not amount to a not guilty.

When an indictment is voted, the fact must be kept secret until a formal indictment is presented to the court. Once the verdict is rendered, the verdict is written as the last entry in a ledger-type book maintained by the grand jury secretary. The secretary records the name of the accused, the offense for which the accused is charged, the date of the offense, and names and addresses of witnesses.

If the verdict is a true bill, the foreperson indicates the vote by signing the indict-

ment form on the signature line and returns the form to the district attorney. When the grand jury indicts an offender, the district attorney then begins to prepare the case for subsequent trial. The responsibility of the grand jury ends when this presentment is made.

An individual who is not billed by a grand jury can legally be true billed by a different grand jury if additional evidence is found to indicate guilt. This subsequent indictment does not violate the Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, since the accused was not tried or convicted the first time. Prosecutors, however, cannot simply bypass the original grand jury because they did not agree with its decision. In order to represent a no-billed case to another grand jury, prosecutors must have additional evidence. Sometimes several members of a grand jury may refuse to vote for indictments because they believe the law in question is unjust. In those circumstances, prosecutors feel justified in taking the cases to a different grand jury.

Like federal grand juries, the proceedings of Texas grand juries are secret. No one besides the individual jury members know how other members vote. The verdicts of true bill and no bill indicate only that at least nine of the grand jurors voted as a unit. Jurors and witnesses are forbidden to reveal happenings during a grand jury session. Grand jury secrecy is intended to protect the public from hearing of charges that may have no basis. If the accused is true billed, his or her name may be released to the media. If the accused is not billed, his or her identity is protected by the shroud of secrecy of the proceedings. In the instance of a grand jury investigation, secrecy assures a more complete investigation if the scope and intent of the probe are kept secret. The Texas Code of Criminal Procedure states:

*The proceedings of the grand jury shall be secret. Any grand juror, bailiff, interpreter, stenographer or person operating an electronic recording device, or person preparing a typewritten transcription of a stenographic or electronic recording who discloses anything transpiring before the grand jury, regardless of whether the thing transpiring is recorded, in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, and to imprisonment not exceeding thirty day.*

*Article 20.02 (a) and (b), Tex. Code of Crim. Proc.*

The bulk of the grand jury's work concerns charges that have already been processed and investigated by a law enforcement agency. However, like its colonial counterpart, the modern grand jury has the right to investigate suspected criminal activity

within the county. To this end, the grand jury may issue subpoenas for witnesses and evidence to be provided. If the investigation were to reveal nothing more than negligence or incompetence, which are not indictable offenses, there would be no indictment. The investigative authority of the Texas grand jury is narrowly limited by Texas law, which confines grand jury investigations strictly to criminal matters that are subject to indictment. According to the Texas Code of Criminal Procedure:

*The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.*

*(Article 20.09, Tex. Code of Crim. Proc.)*

The statute clearly establishes that it is not the function of the grand jury to investigate purely social or political matters in the county. Texas appellate courts have denounced groundless snooping into the affairs of others and the use of grand jury powers as a means of satisfying curiosity. In fact, the Texas Court of Criminal Appeals reversed a defendant's conviction for perjury committed before a grand jury where it was not shown that the matter being investigated was a criminal matter. The court stated clearly that a grand jury has no right to inquire into any matter not criminal in nature. Also, a witness, held in contempt for refusing to answer questions before a grand jury, was released by the appellate court because the grand jury did not have the power to investigate a matter on the mere chance that some crime may have been committed. There must be reason to believe a crime of specific character has been committed to give a grand jury lawful authority to proceed.

Typically today, months pass between indictment and trial.

# Order Appointing Jury Commissioners

THE STATE OF TEXAS  
COUNTY OF \_\_\_\_\_

ON THIS THE \_\_\_\_ day of \_\_\_\_\_ A.D., 20 \_\_ , came on to be appointed the Jury Commissioners for the District Court of \_\_\_\_\_ County, Texas, to draw the Grand Jury Panel for the \_\_\_\_\_ TERM, said Term beginning \_\_\_\_\_, 20 \_\_ of said Court; and in Open Court the appointment of:

was made; and it appearing to the Court that each of said persons would be qualified Grand Jury Commissioners, and each reside in different sections of \_\_\_\_\_ County, Texas;

Thereafter the Sheriff of \_\_\_\_\_ County, Texas, having given due notice to each of said persons to appear in Open Court on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, at \_\_\_\_ A.M. and they having appeared and after taking the oath as required by law as to their qualifications, they were found to be qualified; and being duly charged and instructed by the Court as to their duties, to-wit: drawing the Grand Jury Panel as above stated; and thereafter on the same day, returned into open court and the clerk of the Court having been sworn by the Court to receive and safely keep said envelope containing said Grand Jury Panel was delivered to the same; whereupon the Jury Commissioners were discharged.

\_\_\_\_\_  
Judge  
\_\_\_\_th Judicial District Court  
\_\_\_\_ County, Texas

# *Grand Jury Commissioners' Oath*

*You do swear faithfully to discharge the duties required of you as Jury Commissioners; that you will not knowingly elect any man as juryman whom you believe it be unfit and not qualified; that you will not make known to anyone the name of any juryman selected by you and reported to the Court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this Court, until after said cause may be tried or continued, or the jury discharged.*

Art. 19.03 Tex. Code of Crim. Proc

# List of Grand Jurors Selected

List of Persons selected by the Jury Commissioners of the District Court of \_\_\_\_\_ County, Texas, at the \_\_\_\_\_ Term, 20\_\_\_\_, thereof to serve as Grand Jurors at the \_\_\_\_\_ Term, 20\_\_\_\_, of the said District Court, to-wit:

- |           |           |
|-----------|-----------|
| 1. _____  | 11. _____ |
| 2. _____  | 12. _____ |
| 3. _____  | 13. _____ |
| 4. _____  | 14. _____ |
| 5. _____  | 15. _____ |
| 6. _____  | 16. _____ |
| 7. _____  | 17. _____ |
| 8. _____  | 18. _____ |
| 9. _____  | 19. _____ |
| 10. _____ | 20. _____ |

We, the undersigned Jury Commissioners, appointed by the Honorable District Court of \_\_\_\_\_ County, Texas, at the \_\_\_\_\_ Term, 20\_\_\_\_, thereof, hereby certify that the foregoing is the list of the names of persons selected by us to serve as Grand Jurors for the \_\_\_\_\_ Term, 20\_\_\_\_, of the said District Court of \_\_\_\_\_ County.

Witness our signatures this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_

\_\_\_\_\_

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\_\_\_\_\_

## *Oath to Grand Jurors*

“You solemnly swear that you will diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge; the State’s counsel, your fellows and your own, you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present (indict) no person from envy, hatred, or malice; neither shall you leave any person unrepresented for love, fear, favor, affection or hope of reward; but you shall present things truly as they come to your knowledge, according to the best of your understanding, so help you God.”

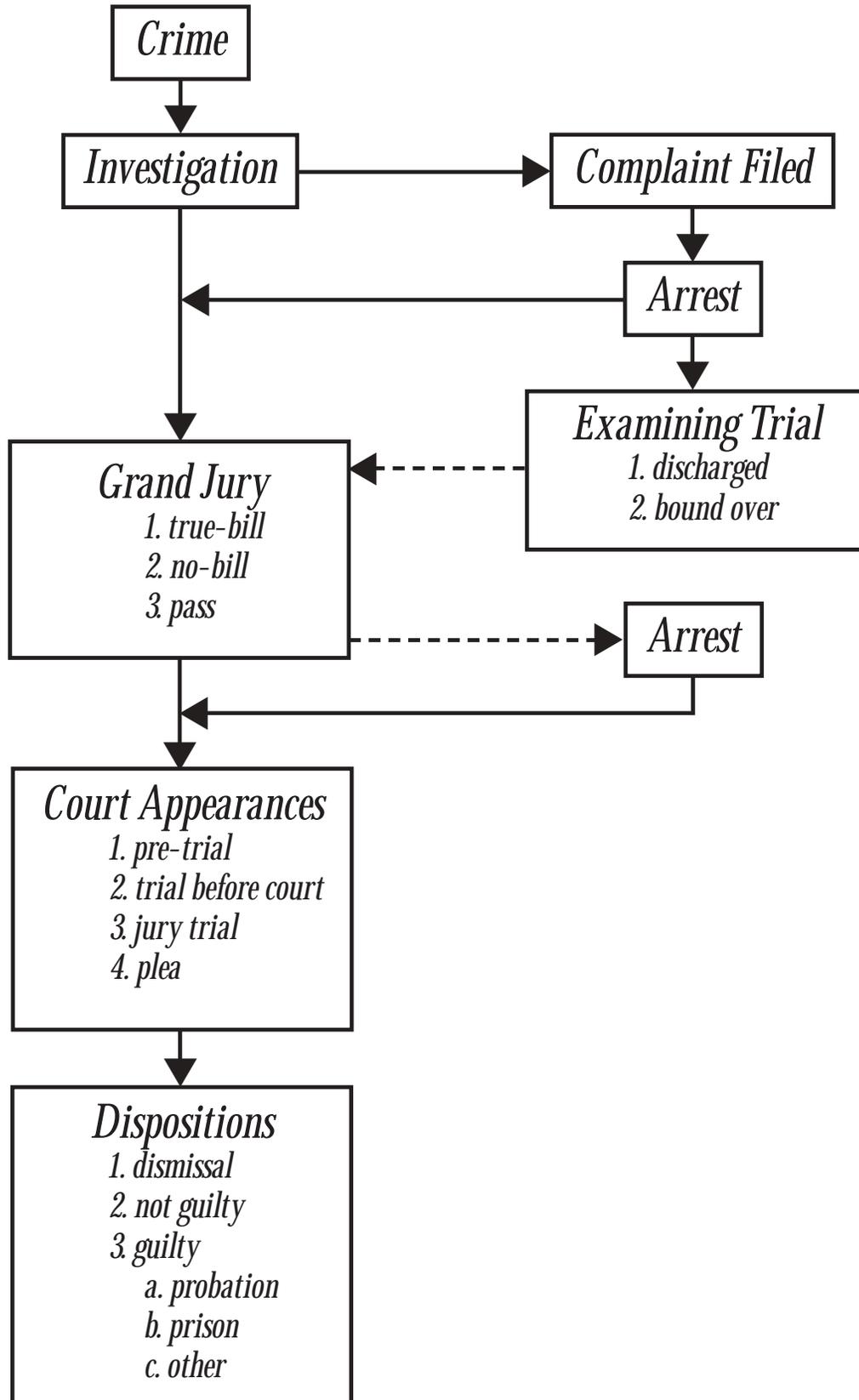
Article 19.34  
Texas Code of Criminal Procedure

## *Witness Oath Before Grand Jury*

“You solemnly swear you will not divulge either by words or signs any matter about which you may be interrogated, and that you will keep secret all proceedings of the Grand Jury which may be had in your presence, and that you will true answers make to such questions as may be propounded to you by the Grand Jury or under its directions, so help you God.”

Article 20.16  
Texas Code of Criminal Procedure

# Grand Jury In Texas



# *Juries In Texas*

*Grand Jury*



12 Citizens

*Trial Jury*  
*(Petit Jury)*



6 Citizens

( Justice of the Peace Court  
Municipal Court  
Country Court )

Or



12 Citizens

( District Court )

# *Qualifications for Serving on a Grand Jury in Texas*

*The qualifications are:*

- (1) being a citizen of Texas and of the county;
- (2) being qualified to vote;
- (3) being of sound mind and good moral character;
- (4) being able to read and write;
- (5) not having been convicted of theft or any felony;
- (6) not being under indictment or accusation of theft or any felony;
- (7) not being closely related to any person serving on the same grand jury;
- (8) not having served as a grand juror or commissioner in the year previous to his current service;

and

- (9) not being a complaining witness in any matter to be heard by the grand jury during the term for which he was selected to serve as a grand juror.

*Some citizens may be exempt from grand jury service.  
They include:*

- (1) Persons older than 70 years;
- (2) Persons responsible for the care of a child;
- (3) Persons attending an institute of higher education or a public or private high school; and
- (4) Any other person that the court determines has a reasonable excuse.

# *Glossary of Terms Used in Grand Juries:*

**Affidavit:** A written statement that is sworn to before a person is officially permitted by law to administer an oath.

**Accused:** The person accused of the commission of a crime.

**Charge to the Grand Jury:** The court's instructions to the grand jury as to its duties, functions and obligations, and how to best perform them; given by the presiding judge.

**Defendant:** A person who has been indicted by a grand jury.

**Deliberations:** The discussion by the grand jury members as to whether or not to return an indictment on a given charge against an accused.

**District Attorney:** The top criminal prosecution lawyer of each federal, state or district. Sometimes called "county attorney" or "state's attorney."

**Evidence:** Testimony of witnesses, documents and exhibits as presented to the grand jury by an attorney for the government or otherwise properly brought before it.

**Fifth Amendment:** The amendment of the U.S. Constitution which grants grand jury rights and the right and protection against self-incrimination in a criminal case or hearing.

**Grand Jurors' Immunity:** Immunity is granted to all grand jurors for their authorized actions while serving on a grand jury and means that no grand juror may be penalized for actions taken within the scope of his or her service as a grand juror.

## Hearsay

**Rule:** The rule of law that denies the admission of evidence that is not in the personal knowledge of a witness, but merely a repetition of what others have said.

**Indictment:** The written formal charge of a crime by a grand jury, returned when the required number of grand jurors vote in favor of it.

**Information:** The written formal charge of crime by the prosecutor, filed against an accused who, if charged with a serious crime, must have knowingly waived the requirement that the evidence first be presented to a grand jury.

**No Bill:** Also referred to as “not a true bill,” the “no bill” is the decision by the grand jury not to indict a person.

**Perjury:** The intentional giving of false testimony under oath.

**Petit Jury:** The trial jury, composed of twelve members, that hear a felony case after indictment and renders a verdict or decision after hearing the prosecution’s entire case and whatever evidence the defendant chooses to offer.

## Probable

**Cause:** The finding necessary in order to return an indictment against a person accused of a crime. A finding of probable cause is proper only when the evidence presented to the grand jury, without any explanation being offered by the accused, persuades the required number of grand jurors that a crime has probably been committed by the person accused.

**Quorum:** Sixteen of the twenty-three members of a federal grand jury must at all times be present at a grand jury session in order for the grand jury to be able to conduct business; nine of twelve members of a Texas grand jury represent a quorum.

**Self-Incrimination:** To be a witness against oneself; the Constitution protects one from being compelled in a criminal case to be a witness against oneself.

**Subpoena:** A court order requiring a person named in it to attend court in a case, under penalty for not doing so.

**Testimony:** An oral statement of evidence given by a witness, while under oath, during a court proceeding.

**True Bill:** The formal name for an indictment of accusation from a grand jury.

**United States**

**Attorney:** The chief legal officer for the United States government in each federal district.

*Parts of this glossary excerpt from Handbook for Federal Grand Jurors, published by the Administrative Office of the United States Courts, Washington, D.C. 20544, 2001.*

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*“Guilty or Not?”  
Mock Trial Script*

# *Story Behind The Project...*

Deep in the files at the Star of the Republic Museum, was a yellowed, fragile 16-page document that had been handwritten 163 years ago. This document contained the grand jury testimony of eight witnesses to a murder, which occurred two days previously, on September 7, 1840, in San Felipe de Austin. Driven by my interest in using primary sources as teaching tools, I carefully examined this document, and tried to figure out what it said.

The slow, tedious process began with a literal transcription, which means I tried to figure out what every word said, then typed it out exactly as it had been written, line by line, complete with misspelled words and incorrect information. Keep in mind that when the document was written, the County Clerk recorded every word that was said, probably writing with a quill pen. He would have written very quickly to give an accurate report. He often abbreviated words and phrases. In other words, his handwriting was far from neat!

The further I got into the testimony, the more fascinated I became with the story! Originally, I thought I was transcribing the testimony of the actual trial. However, it eventually became clear that it was grand jury testimony, rather than a trial.

Once the literal transcription was complete, I had to authenticate the document. Believe it or not, there are many fake documents around, which people try to pass off as “authentic.” I had to verify dates, names and places, to the best of my ability. I scoured land grant records, census records, army rosters, cemetery records and genealogical records to confirm that the witnesses who testified in this document actually existed. Once convinced that this was an authentic document, I corrected the obvious mistakes, then placed the testimony into a script format for educational use. However, much to my dismay, there was a major part of the story missing...the actual trial and the verdict! I had found all the grand jury witness testimonies, but I had no idea what the outcome was! After all the hours I had spent on this testimony, I wanted to know if the accused man was “guilty or not.”

Where does one look for information like that? I had made some inquiries, to no avail, then one day, another employee at the museum mentioned some old court records that were in our collection. “Where were they from?” I asked. “San Felipe de Austin,” was the reply. “What year?” I asked, as my pulse quickened! “Oh, about 1840,” was the reply! I could not get to them fast enough!! The records turned out to be the district court docket book, which recorded all cases heard in the court in Austin County from 1838-1843. I flipped through the book to the approximate date of the murder. I found a record of indictment, and then, several pages later, I found the missing part of the story...the trial verdict! The answer was right under my nose all the time!

This project clearly illustrates the excitement of research, and provides an authentic historical document as the basis for further research. It is my hope that from this project, students will gain a deeper understanding of the past, and be inspired to look upon history as a meaningful and fascinating connection to the present!

-Anne Simms McGaugh  
Curator of Education

# *Literal Transcription of Grand Jury Testimony*

Republic of Texas §September 9th 1840

County of Austin § San Felipe de Austin Seat No 1

Republic of Texas

vs

Charged for Murder

James P Swindle

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The prisoner being brought to the Bar and the charge read, was called on to make his voluntary statement, who stated as follows, On the evening of the 7th of the present month Mr. William R Allin-Mr. James Hensly Mr. Frasier & Mr. William Ayres all came to Mr. Mixons late in the evening. I had nothing to say to them at the time of consequence being that I was busy I left, and was gone untill some time after dark Hunting cattle and came back and Still found them there I had nothing to say to them particular but after some time in the knight Mr Brookshire and Mr Frasier & Mr Hensly appeared to be in a kind of a dispute I went out in the yard and Stood a while but did not interfeer with any of them-Mrs Mixon requested me to try to get Mr Brookshire in the house I done So but could not I still stood by they continued to be disputing after a little while Mr Hensly struck Mr Brookshire and knocked him down and then Struck me, I backed out from him a piece and drew a pistol out of my pocket he observed God Dam me I had a pistol and he would run me pistol and all he continued to follow me and Mr Frasier at his back with an open knife in his hand I told him not to rush on me he kept rushing and swor he would run me through the pailings I then shot him James Hensley this happened in Mr. Mixons yard

J.P. Swindal

Benjamin Frasier being duly sworn on the part of the Republic deposed and said  
On Monday evening last I left Mrs Besses my self Mr Hensley Mr Brookshire Mr Ayers & William R Allin and went to Mr Mixons some time before sun down after we got there Mr Brookshire got a bottle of licquor We all were out side of the yard and were drinking of the licquor Mr Hensly observed to Mr Mixon that he wished to get supper he said it was not convenient he asked why it was not convenient that he thought he kept a public house and that his money was as good as any body elses if he had anything to eat he would like to be accommodated but if he had nothing he Hensly would be satisfied Mr Mixon said he would try to have something got for him he did so Mr Hensly Mr Brookshire & Mr Ayers went in and took supper after supper- some fiew words passed between myself and Mr Brookshire rather a quarrel but I thought it was compromised then some words were passed between Mr Hensly & Mr Brookshire he Mr Hensley struck Mr Brookshire and knocked him down Mr James P. Swindal the prisoner at the bar was standing in the yard and observed that I was calculated to settle my own difficulties then were several words passed between James P Swindal the prisoner & James Hensly the decd rather insultingly Mr Swindal kept walking back towards the door and Mr Hensley moving towards him when Mr Hensley got within about 8 or 9 feet of Mr Swindal a pistol fired I saw Hensly turn round and move towards where he had started from I met him and took hold of him and asked him if he was hurt he said he was a dead man we walked on in the direction of the gate I asked him if I should send for a doctor he said no we then moved on three or four steps farther I discovered he was about to fall I eased him down on the ground and he died in the course of a minute.

Question by the Prosecutor did you see Mr Swindal shoot the pistol. ans- I did, was Mr Hensley killed by the shoot ans- he was

Question by the prosecutor had or had not Mr Hensley the decd a knife or a dirk Ans he did not with the exception of a penn knife which was found in his pocket after his death

Question by the prosecutor was or was not Mr. Swindal in bed or in the house when the quarrel commenced Ans he was in the house but I do not know whether he was in bed or not

Question by the prosecutor did or did not Mr Swindal the prisoner at the bar interfere in the quarrel of Mr Mr Hensly with Mr Brookshire

Ans that was the cause that he officially interfered and took the quarrel off of Mr Brookshires hands

Question by the ~~prosecutor~~ did you see Mr Hensly the decd strike or strike at Mr Swindal the prisoner

Ans I did not witness further states that Mr Hensly is not a quarrel some man that he never saw him in a quarrel before

Question by the prosecutor prisoner did you hear Mr Hensley say whether he had any arms or not

Ans I did not hear him say anything about having arms

Question by the prisoner did or did you not see me try to get Mr Brookshire in the house

Ans I did not

Question by the prisoner did or did not Mr Mixon try to stop the fuss and make peace

Ans he said something but I don't recollect what

Question by the prisoner were you drunk or sober during the time of this fuss Ans I was tollerably sober

Question by the prisoner did or did you not hear Mr Hensly say that he would run me pistol and all

Ans I did not

Question by the prisoner what did I say in Mr Brookshires behalf  
Ans you said that I ought to be calculated to settle my own business that two was to many for me

Question by the prisoner was or was not you both disputing with Mr Brookshire at the same time  
Ans I was not disputing with Mr Brookshire at the same time

Question by the prisoner did or did you not hear me tell Mr Hensly to stand off

Ans I did not

Question by the prisoner do you or do you not know that I was not able to contend with Mr Hensly the decd in personal combat

Ans I do not think you were

Question by the prisoner did or did you not see me give back from Mr Hensly

Ans I did see you moving back and Mr Hensly advancing on you

Question by the Court did you examine the wound  
Ans I did by candle light

Question by the Court did it appear to be done by shot or a ball  
Ans with shot

B. E. Frasier

William R. Allin being duly sworn on part of the Prisoner deposed and said Mr Brookshire Mr Hensly Mr Frasier Mr Ayers & Myself went over to Mr Mixons I put up my horse and went in and got my supper I went out and Mr Hensly called for supper for them Mr Mixon said he had no wood and his provisions were scarce Mr. Hensly observed that his money was as good as any mans and that Mr Mixon had put himself there to feed people and he wanted his supper Mr Mixon then told him he would have something got for him which he did and Mr Hensly Mr Brookshire & Mr Ayers went in and took supper They came out then and sat down before the door Mr Hensly or some one of them called for a bottle of Licquor Mr Frasier was singing and went to take a glass and sang a verse or two and Mr Brookshire observed none of your insinuations they then arose to their feet and Mr Brookshire laid off his coat and I thought would fight any moment but they after a little while made it up or agreed to be friendly. Mr Hensly the dec<sup>d</sup> then observed that Mr Brookshire or his family had belied Mr Frasier Capt Brookshire then observed that if they had he would rectify it about that time Mr Swindal the prisoner was standing in the yard with his shirt and drawers on he stood there a little bit he then went in the house and put on his pantaloons he then came out to where we were sitting and took a chair Mr Mixon at this time was trying to get Mr Brookshire to bed and Mr Hensly the dec<sup>d</sup> knocked him down I went to Mr Brookshire took hold of him and when I looked up I saw Mr Hensly the decd & Mr Swindal the prisoner at the bar Mr Swindal had a pistol in his hand and Mr Hensly was making towards him-

Mr Swindal shot, Mr Hensly then put his hand to his breast Mr Frasier asked him if he was hurt he answered I am a dead man he then by the assistance of Mr Frasier went out at the gate and walked a few steps and fell down

Question by the prisoner did or did you not see Mr Hensly strike me Ans I can't say that I did

Question by the prisoner did or did you not see me give way to Mr Hensly Ans I saw you give back and Mr Hensly following you up- Question by the prisoner did or did you not hear me tell Mr Hensly not to rush on me Ans I did

Question by the prisoner did or did you not hear Mr Hensly say that I had a pistol in my hand ~~and~~ and that he would run me pistol and all Ans I cant say that I did

Question by the prisoner how far did Mr Hensly follow me Ans I think about six or eight steps

Question by the prisoner how far do you suppose Mr Hensly was from me when the pistol fired Ans I cant say Mr Hensly was between me and Mr Swindal

Question by the prosecutor what words brought on the quarrel between Mr Swindal and Mr Hensly Ans I cant say positively whether Mr Swindal observed that two on one was to many or not but it was something to that amount

Question by the prosecutor do you consider that Mr Swindal came forward to take the part of Mr Brookshire or not

Ans I think his intentions were to take his part at that time.

Question by the prosecutor did or did not Mr Hensly say anything to bring on a quarrel between him and Swindal Ans I do not know that they spolke during the knight

Question by the prosecutor do you or do you not know that the remark of Mr Swindal that 2 on one was to many brought on the difficulty between Hensly & Swindal Ans I think it did

Question by the prosecutor was it with a ball or shot that Mr Hensly was shot Ans he was shot it seems with shot I saw ten holes

Question by the prosecutor what distance did they scatter Ans I think a glass tumbler would cover all of the holes

Question by the Court do you think that Swindal was in bed and came out to get in this combat Ans I think he had been in bed

his  
William X R Allin  
mark

William Ayres being duly sworn deposed and said

Mr Swindal on the evening of the 7<sup>th</sup> of the present month went cow hunting and came back to Mixons and put his mare up then Mr Hensly asked if he could get supper Mr Mixon said it was not convenient that there was no wood but he would try and have supper got for them in the mean time Mr Hensly said that his money was as good as any mans Mr Mixon had the supper got and they went in and ate we all came out and sat down at the door and Mr Frasier commenced singing and Mr Brookshire raised up and said no insinuations and took off his coat and Frasier took of his waistcoat Mr Hensly then said that Mr Brookshire or his family one had belied Mr Frasier and Mr Brookshire said he could

not help what his family done but when he went home he would correct it at that time Mr Hensly struck Mr Brookshire and knocked him down Mr Swindal was standing by and observed that 2 on one was to many and that Mr Frasier was calculated to settle his own business from that Mr Hensly advanced towards Mr Swindal and Mr Swindal gave back untill he got against the door some 7 or 8 steps then the pistol went off Mr Hensly through his hand up to his Breast Mr Frasier asked him if he was hurt he said yes I am a dead man He then with the assistance of Mr Frasier walked twenty or thirty yards and fell

Question by the prisoner did you see Mr Hensley strike me Ans I did not I saw him going towards you

Question by the prisoner did I or did I not observe to you that 2 was to many on one Ans you did & I observed Let's not let them fight

Question by the prisoner did or did you not hear me mention it afterwards Ans I don't think I did

Question by the prisoner did or did you not hear Mr Hensley observe that I had a pistol and that he would run me pistol and all Ans I heard him observe that you had a pistol but did not hear him say that he would run you

Question by the prisoner was or was not the moon shining brightly at the time Ans the moon was shining tollerably bright

Question by the prisoner how far do you suppose Hensly was from me when the pistol fired

Ans I think about three steps

Question by the prisoner did or did I not tell Mr Hensly not to crowd on me

Ans You did

Question by the prisoner did or did you not hear Mr Hensley say that he intended crowding me through the pailing Ans I did not

Question by the prisoner did or did you not hear Mr Hensly say when on the way to Mixons that he intended to raise a fuss with Mixon or somebody? Ans I did not hear him say that he intended raising a fuss with any body did or did you not hear me insult Hensley in any way Ans All I heard you say was that two was to many on one

Question by the prosecutor did you see Mr Swindal after Mr Hensley was shot go into the house and get a gun? Ans I did not see him go into the house and get it but I saw him immediately after Hensly was shot with a gun in the yard

Question by the prosecutor did Mr Swindal come out in his drawers Ans he did and remained a short time he then went back and put on his pantaloons and came out again and remained untill after he Hensley was shot that the words which Swindal spolke was after he came out the second time

William P. Ayres

the court then adjourned untill tomorrow morning nine o'clock

Thursday morning at 9 o'clock the court met pursuant to adjournment and proceeded with the Testimony To wit

Nathan Brookshire being duly sworn on part of the defendant deposed and said Mr James Hensly Mr Frasier Mr Ayres & myself went to Mr Mixons I called for a bottle of Licquor we knocked about there some time and drank it & Mr Hensly called for supper for Mr Frasier Himself and me Mr Mixon told him it was not convenient that his wood was out and it was Late and his girl was at the cow pen and he had nobody to help him get it Mr Hensly observed that he (Mixon) kept public house and Mr Mixon observed if nothing else would do he would try and have it got & Hensly Mr Ayres & myself sat down and ate Mr Frasier afterwards took a cup of coffee when we went out of doors Mr Frasier began to sing I told him no insinuations  
Question by the defendant was there not a good deal of noise and rudeness in the yard  
Ans there was such as is usual with drunken men  
Question was there not indecent language used such as a man would not like to hear used in his family Ans I do not know there was a great deal said but my memory is bad when I am drinking I cant recollect  
Question what time did you go to Mixons  
Ans I think it was about sundown it may have been a little before or a little after  
Question what was the object of the companies going there at that time  
Ans I do not know what their object was but I went to get some licquor

Question was or was not James Hensly the dec<sup>d</sup>  
a very strong man Ans he was a very stout man  
I have been struck by many men and never received  
such a blow as that given me by Mr Hensly  
Question is or is not Mr Swindal the prisoner at  
the bar a small and weak man  
Ans I think he is in comparrison with Mr Hensly  
Question do you think that Mr Swindal was  
any thing like able to give Hensly a fair fight  
Ans from the appearance of the two men I-  
would think he was not

his  
Nathan X Brookshire  
mark

Peter W. Ford being duly sworn on part of the deft deposed  
and said

Question by the deft did or did you not see Mr  
Swindal the prisoner at the Bar shoot James Hensly  
the dec<sup>d</sup> Ans I did  
the witness further states at the time the gentlemen  
were eating supper I was lying on the bed I contin  
ued lying then Mr Frasier went out in the  
yard and sang two songs one of them twice-  
after they were done singing I heard some loud talk  
I thought I heard a blow struck by a man-  
I then got up and looked out at the door and  
Mr Swindal and Mr Hensly came opposite the  
door the moon shone directly on Mr Hensly the  
decd he had his hat in his hand and as he  
threw his hat down the pistol fired he turn  
ed round and picked up his hat Mr Frasier  
asked him if he was hit he said he was-  
Mr Swindal went round the house and came in  
at the back door he picked up the rifle and either  
cocked her or sprung the Triggers I don't no which  
of the two when he picked up the Rifle he observed

that he would kill some more of them I told him for gods sake not that he had killed one man and that was enough I then went out where the dec<sup>d</sup> was lying at the horse rack they jumped on their horses three or four of them and said they let his friends know it I told them to stop a moment and lets examine his-wounds to see if they were fatal or if we should send for a doctor I then opened his bosom and looked by moon shine as well as I could at his wound he fetched about five or six breaths from the time I went to him and Expired we took him in the house and laid him out the wound was caused by 10 buck shot in his left breast they had spread about three inches Horrisontal and upon a perpendicular about three and a half inches Witness further states that at the time that the pistol fired Hensly the dec<sup>d</sup> was about 10 or 12 feet from James P Swindall the prisoner

Question by the defendant was or was not Mr Hensly the decd advancing upon Mr Swindall  
Ans he was untill they both he Hensly stopped and threw down his hat at the same moment that the hat was thrown down the Pistol fired

Question by the defendant at the time Hensly was advancing upon Swindal did or did you not see Mr Frasier following up and observing go it My Hensly and he Frasier having a knife in his hand Ans he did not at that time owing to my position I saw no one but the slayer and the slayn

Question by the defendant did or did you not hear any threats made at the time against Mr Swindall by Mr Frasier Ans I did not untill I went to the horse rack where Hensly was lying he further states that he then did hear some threats made against Mr Swindall the prisoner in a voice sufficient

sufficient to be heard by Mr Swindal  
who was at the house he also states that he  
does not recollect the words as he was engaged  
but the threats were violent and severe  
Question by the prosecutor what was the time  
of knight when Mr Swindall shot Mr Hensley  
Ans I think it was about 10 o clock he also states  
that he heard no harsh words passed between  
Mr Swindall & Mr Hensley  
Question by the prosecutor did you see Mr  
Swindall in his drawers sometime previous  
to the affray Ans He did  
Question was or was he not immediately previous  
to the fight dressed Ans he was  
Question was Mr Hensly getting nearer to Mr  
Swindal or was Swindal getting further off  
Ans Swindall was getting farther off when  
the firing took place  
Question by the prosecutor how far was Mr  
Swindal from the pailing when the pistol fired  
Ans he was about 20 feet  
Question by the prosecutor was or was not Mr  
Hensly drunk Ans he had the appearance  
of a very drunk man  
Question by the prosecutor was or was not Mr  
Swindal perfectly sober Ans I think he was  
Question by the prosecutor did you see Mr  
Hensly have any wepons or did you hear him  
make any threats Ans He had no wepons-  
nor did I hear him make any threats  
Question by the deft what time was Mr  
Hensly so very drunk as you speak of was it  
early in the evening when he first came there  
or was it at the time he was shot  
Ans he was drunk at both times

Peter W. Ford

Mrs. Mixon being duly Sworn on part of  
deft deposed and Said

When Hensly knocked down Mr  
Brookshire Mr Swindal observed to Mr  
Hensly dont massacre him he is drunk and  
an old man then Hensly struck at Mr  
Swindal the prisoner at the Bar I dont  
no whether he struck him or not Swindal-  
jumped back then and drew his pistol and  
told him not to rush upon him Some of  
them Said I believe it was Frasier he is  
got a Pistol: Says Hensly God dam him  
he could whip him and his pistol both and  
made at him he Swindal gave back and  
Said don't you rush upon me Mr Hensly  
I am not able to fight you and I don't want  
to hurt you and Still gave back and  
he Hensly the dec<sup>d</sup> Rushed on him he threw  
down his hat and as he raised up it seem-  
ed to me that he was in the act of pitching  
at the Said Swindle and as he done that  
the Pistol fired after he Swindal had shot  
he came into the house and Said to me  
he was Sorry he had done what he did  
that he had nothing against Hensly, he said  
that he was a small man and could not  
fight him and he did not wish to be-  
massacred

Question by the defendant when Mr Swindall  
the prisoner at the Bar first went out of the  
house as has been Stated did he or did he not  
go at your request and for what purpose did  
you request him to go Ans he did go at my  
request to try and get Mr Brookshire in the  
house. Question by deft what distance were  
Mr Hensly & Swindal apart when the pistol fired  
Ans I think about two Steps perhaps a little  
\_\_\_ more \_\_\_

the witness further states that Mr Frasier was pursuing on behind Mr Hensly's back- with a knife open in his hand

Question by deft did Mr Hensly the dec<sup>d</sup> eat Supper at your House the Knight this affray happened and was he drunk

Ans he did eat Supper I dont think he was much drunk that he paid his bill he had from drinking but I did not see him stagger any

Question by the prosecutor where were you at the time the affray took place between Hensly the dec<sup>d</sup> and the prisoner at the Bar

Ans I was Standing in the door

Question How far was Mr Hensly from the door of the house when he was shot

Ans I think about 2 Steps above the upper door

Question by the prosecutor do you or do you not Know of any harsh words or quarrel between Mr Hensly & Mr Swindal

Ans I Know of none I never heard Swindal say a word against Mr Hensly in my life as I recollect of

Question by Prosecutor did or did not Mr Swindal have a pistol in his hand about the time of the affray between Mr Brookshire & Hensly Ans he did not he drew his pistol after Mr Hensly struck at him

Question by Prosecutor how far did Mr Swindal retreat Ans he retreated about 10 steps and came up very near the house with his- back rather to the house all the time begging Mr Hensly to Stand off & not to rush upon him

her  
Sarah X Mixon  
mark

Jane Hunter being duly Sworn on part of Republic deposed and Said

Question by Prosecutor do you or do you not know any thing concerning the affray that happened at Mr Mixons on the 7<sup>th</sup> of September Ans I do not

in the month of June last past I heard  
Mr Swindal the prisoner at the bar Say  
that he had a grudge against Mr Hensly  
the dec<sup>d</sup> that is all I know about the  
matter

Question by the prosecutor did Mr  
Swindal Say those words in anger or not  
Ans he did not seem to be angry

her  
Jane X Hunter  
mark

Republic of Texas §  
County of Austin §

I William B Gayle Clerk  
Pro tem of the District Court for Said County do  
hereby certify that the foregoing Sixteen pages of  
this document contain all the evidence filed  
in this court for record in the case of the  
Republic of Texas vs James P Swindal as  
stated on page first given under my hand  
and Seal of office in the Town of San Felipe  
de Austin this the 16<sup>th</sup> day of September AD 1840  
{Committed}

Test  
William B. Gayle  
C. P. T. D. C. C. A.

# *Background Information For the Teacher*

The Grand Jury hearing took place on September 9, 1840 in San Felipe de Austin\*. James P. Swindal was on trial for the murder of James Hensley, just two days earlier. Mr. Swindal told the grand jury what had happened, and admitted firing the shot that killed Mr. Hensley, having first warned Hensley to back off. Then seven other people told their version of the story. James P. Swindal was indicted for the murder of James Hensley. Benjamin Frasier was also indicted for assault, with intent to kill. Several months later, a trial was conducted to determine the guilt or innocence of Mr. Swindal.

The men involved were leaders in Austin County at the time. Most of them were listed in the 1840 census as landowners. Nathan Brookshire was the man for whom Brookshire, Texas was named. Several of the men (Brookshire, Allin, Ayres and Hensley) served together in a company of Rangers who fought against the Comanches in 1839. Some also fought in the Texas revolution against Mexico.

According to the laws of the Republic, the punishment for murder was death. Luckily, Mr. Swindal was found not guilty. Likewise, in a later trial, Mr. Frasier was also found not guilty.

This mock trial script is based upon grand jury testimony about the murder. However, it has been adapted into a script form to recreate a murder trial, so that a verdict could be rendered.

\*San Felipe de Austin was on the west bank of Brazos, now on IH 10, two miles east of Sealy. It was founded in 1824 by Stephen F. Austin as the unofficial capital of his colony.

# *Suggestions for the Teacher Using the “Guilty or Not?” Mock Trial*

1. It is suggested that this program be used for middle school through college, due to the nature of the content. In the script, a few profanities are used because they were taken from the transcript directly. Please adapt the wording to the comfort level of your classroom. Middle School teachers may adapt the script to meet the ability level of their students.
2. The teacher may play the role of a narrator, if desired. It may be helpful to provide the audience some background information and instruction.
3. Note some of the language used:
  - “Paling” is a fence with vertical posts.
  - “Affray” is a fight or argument.
4. Note differences in courtroom procedures from today. For example, the accused person was allowed to question the witness!
5. Students could research clothing styles from the 1840s and design appropriate costumes for the cast members.
6. It is suggested that you allow the audience to participate as the jury, after informing them of the jury qualifications from 1840 (They had to be free, white, male and over 21.) Swear them in, as indicated in the “Introduction”. Between the reading of the “Closing” and the “Verdict”, the narrator may allow the audience to discuss the testimony and vote on the verdict. THEN read the actual Verdict.
7. Do not make the students memorize the script. It is important that it be read exactly as printed since the language is so unique. Students should try not to ad-lib.
8. One copy of the script is provided for the teacher’s use. The teacher will need to make eleven more copies of the script for the production. It would be helpful to highlight each cast member’s part.

# Cast

(Fill in student's name)

James P. Swindal.....

Benjamin Frasier .....

William R. Allin.....

William Ayres .....

Nathan Brookshire .....

Peter W. Ford .....

Sarah Mixon .....

Jane Hunter .....

Clerk .....

Prosecutor .....

Judge .....

Narrator .....

# *Guilty or Not? You be the Judge!*

*A historical program based on grand jury  
witness statements about a murder which took place  
in San Felipe de Austin in 1840*

*Republic of Texas  
County of Austin*

VS.

*James P. Swindal*

*Charged for the murder of  
James Hensley  
September 9, 1840*

1. Introduction
2. Statement by the Prisoner, James P. Swindal
3. Testimony and Questioning of Benjamin Frasier
4. Testimony and Questioning of William R. Allin
5. Testimony and Questioning of William Ayers
6. Testimony and Questioning of Nathan Brookshire
7. Testimony and Questioning of Peter W. Ford
8. Testimony and Questioning of Sarah Mixon
9. Testimony and Questioning of Jane Hunter
10. Closing
11. Verdict

# *Introduction*

- CLERK: All rise for the Honorable Judge William J. Jones. (The Judge enters.)
- JUDGE: (Strikes gavel.) Court is now in session. Clerk, please swear in the jury.
- CLERK: Will all members of the [name of group] please raise your right hand as a sign of agreement to be empanelled as the Grand Jury in this court trial. Do you swear to be fair in your decision as to the fate of Mr. James P. Swindal? If so, please answer, "I do."
- JURY: I do.
- CLERK: You may be seated.
- JUDGE: Clerk, please call the prisoner to the bar.
- CLERK: The court calls the prisoner, James P. Swindal, to the bar. (Swindal approaches the bar.)
- CLERK: Please state your name.
- SWINDAL: James P. Swindal
- JUDGE: You have been charged with the murder of Mr. James Hensley, on the night of September 7, 1840. How do you plead?
- SWINDAL: Not guilty, Your Honor, and I place myself in the hands of God and this court trial.
- JUDGE: Clerk, please swear in the prisoner.

# *Sworn Statement*

## *By J. P. Swindal*

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

SWINDAL: I do. (Sits.)

JUDGE: In your own words, please tell the court what happened on the night of September 7th at Mixon's Roadhouse.

SWINDAL: On the evening of the 7th of the present month, Mr. William R. Allin, Mr. James Hensley, Mr. Frasier, & Mr. William Ayres all came to Mr. Mixon's late in the evening. I had nothing to say to them at the time of consequence, being that I was busy. I left, and was gone until some time after dark, hunting cattle, and came back and still found them there. I had nothing to say to them particular, but after some time in the night, Mr. Brookshire and Mr. Frasier & Mr. Hensley appeared to be in a kind of a dispute. I went out in the yard and stood a while, but did not interfere with any of them. Mrs. Mixon requested me to try to get Mr. Brookshire in the house. I done so, but could not. I still stood by and they continued to be disputing. After a little while, Mr. Hensley struck Mr. Brookshire and knocked him down, and then struck me. I backed out from him a piece and drew a pistol out of my pocket. He observed "God Damn" me. I had a pistol and he would run me, pistol and all. He continued to follow me, and Mr. Frasier at his back with an open knife in his hand. I told him not to rush on me. He kept on and swore he would run me through the palings. I then shot him, James Hensley. This happened in Mr. Mixon's yard.

JUDGE: Thank you. You may step down. Clerk, call the first witness.

# *Testimony Of Benjamin Frasier:*

CLERK: The court calls Mr. Benjamin E. Frasier. (Frasier enters.) Please state your name.

FRASIER: Benjamin E. Frasier. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

FRASIER: I do. (Sits down.)

CLERK: In your own words, please tell the court what happened on the night of September 7th at Mixon's Roadhouse.

FRASIER: On Monday evening last, I left Mrs. Besse's, and myself, Mr. Hensley, Mr. Brookshire, Mr. Ayers, & William R. Allin went to Mr. Mixon's sometime before sun down. After we got there, Mr. Brookshire got a bottle of liquor. We all were outside of the yard and were drinking of the liquor. Mr. Hensley observed to Mr. Mixon that he wished to get supper. He said it was not convenient. He asked why it was not convenient, that he thought he kept a public house, and that his money was as good as anybody else's. If he had anything to eat, he would like to be accommodated, but if he had nothing he (Hensley) would be satisfied. Mr. Mixon said he would try to have something got for him. He did so. Mr. Hensley, Mr. Brookshire, & Mr. Ayers went in and took supper. After supper, some few words passed between myself and Mr. Brookshire. Rather a quarrel, but I thought it was compromised. Then some words were passed between Mr. Hensley & Mr. Brookshire. He (Mr. Hensley) struck Mr. Brookshire and knocked him down. Mr. James P. Swindal, the prisoner at the bar, was standing in the yard, and observed that I was calculated to settle my own difficulties. Then were several words passed between James P. Swindal (the prisoner) & James Hensley (the deceased.) Rather insultingly, Mr. Swindal kept walking back towards the door, and Mr.

Hensley moving towards him. When Mr. Hensley got within about 8 or 9 feet of Mr. Swindal, a pistol fired. I saw Hensley turn round and move towards where he had started from. I met him and took hold of him and asked him if he was hurt. He said he was a dead man. We walked on in the direction of the gate. I asked him if I should send for a doctor. He said no. We then moved on three or four steps farther. I discovered he was about to fall. I eased him down on the ground, and he died in the course of a minute.

## *Questioning Of Benjamin Frasier*

PROSECUTOR: Did you see Mr. Swindal shoot the pistol?

FRASIER: I did.

PROSECUTOR: Was Mr. Hensley killed by the shot?

FRASIER: He was.

PROSECUTOR: Had or had not Mr. Hensley, the deceased, a knife or a dirk?

FRASIER: He did not, with the exception of a pen-knife which was found in his pocket after his death.

PROSECUTOR: Was or was not Mr. Swindal in bed or in the house when the quarrel commenced?

FRASIER: He was in the house, but I do not know whether he was in bed or not.

PROSECUTOR: Did or did not Mr. Swindal, the prisoner at the bar, interfere in the quarrel of Mr. Hensley with Mr. Brookshire?

FRASIER: That was the cause, that he officially interfered and took the quarrel off of Mr. Brookshire's hands.

PROSECUTOR: Did you see Mr. Hensley, the deceased, strike or strike at Mr. Swindal, the prisoner?

FRASIER: I did not witness that. Mr. Hensley is not a quarrelsome man. I never saw him in a quarrel before.

SWINDAL: Did you hear Mr. Hensley say whether he had any arms or not?

FRASIER: I did not hear him say anything about having arms.

SWINDAL: Did or did you not see me try to get Mr. Brookshire in the house?

FRASIER: I did not.

SWINDAL: Did or did not Mr. Mixon try to stop the fuss and make peace?

FRASIER: He said something, but I don't recollect what.

SWINDAL: Were you drunk or sober during the time of this fuss?

FRASIER: I was tolerably sober.

SWINDAL: Did or did you not hear Mr. Hensley say that he would run me, pistol and all?

FRASIER: I did not.

SWINDAL: What did I say in Mr. Brookshire's behalf?

FRASIER : You said that I ought to be calculated to settle my own business; that two was too many for me.

SWINDAL: Was or was not you both disputing with Mr. Brookshire at the same time?

FRASIER: I was not disputing with Mr. Brookshire at the same time.

SWINDAL: Did or did you not hear me tell Mr. Hensley to stand off?

FRASIER: I did not.

SWINDAL: Do you or do you not know that I was not able to contend with Mr. Hensley, the deceased, in personal combat?

FRASIER: I do not think you were.

SWINDAL: Did or did you not see me give back from Mr. Hensley?

FRASIER: I did see you moving back and Mr. Hensley advancing on you.

JUDGE: Did you examine the wound?

FRASIER: I did by candlelight.

JUDGE: Did it appear to be done by shot or a ball?

FRASIER: With shot.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Testimony Of William Allin:*

CLERK: The court calls Mr. William Allin. (Allin enters.) Please state your name.

ALLIN: William R. Allin. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

ALLIN: I do. (Sits down.)

CLERK: In your own words, please tell the court what happened on the night of September 7th at Mixon's Roadhouse.

ALLIN: Mr. Brookshire, Mr. Hensley, Mr. Frasier, Mr. Ayers, & myself went over to Mr. Mixon's. I put up my horse and went in and got my supper. I went out and Mr. Hensley called for supper for them. Mr. Mixon said he had no wood and his provisions were scarce. Mr. Hensley observed that his money was as good as any man's, and that Mr. Mixon had put himself there to feed people, and he wanted his supper. Mr. Mixon then told him he would have something got for him, which he did, and Mr. Hensley, Mr. Brookshire, & Mr. Ayers went in and took supper. They came out then and sat down before the door. Mr. Hensley or some one of them called for a bottle of liquor. Mr. Frasier was singing and went to take a glass and sang a verse or two, and Mr. Brookshire observed, "None of your insinuations." They then arose to their feet and Mr. Brookshire laid off his coat, and I thought would fight any moment, but they after a little while made it up or agreed to be friendly. Mr. Hensley, the deceased, then observed that Mr. Brookshire or his family had belied Mr. Frasier. Capt. Brookshire then observed that if they had, he would rectify it. About that time, Mr. Swindal, the prisoner, was standing in the yard with his shirt and drawers on. He stood there a little bit, he then went in the house and put on his pantaloons. He then came out to where we were sitting and took a chair. Mr. Mixon at this time was trying to get Mr. Brookshire to

bed, and Mr. Hensley, the deceased, knocked him down. I went to Mr. Brookshire, took hold of him, and when I looked up, I saw Mr Hensley (the deceased) & Mr. Swindal (the prisoner at the bar.) Mr. Swindal had a pistol in his hand and Mr Hensley was making towards him. Mr. Swindal shot, Mr. Hensley then put his hand to his breast. Mr. Frasier asked him if he was hurt. He answered, "I am a dead man." He then, by the assistance of Mr. Frasier, went out at the gate, and walked a few steps and fell down.

# *Questioning Of William Allin:*

SWINDAL: Did or did you not see Mr. Hensley strike me?

ALLIN: I can't say that I did.

SWINDAL: Did or did you not see me give way to Mr. Hensley?

ALLIN: I saw you give back and Mr. Hensley following you up.

SWINDAL: Did or did you not hear me tell Mr. Hensley not to rush on me ?

ALLIN: I did.

SWINDAL: Did or did you not hear Mr. Hensley say that I had a pistol in my hand, and that he would run me, pistol and all?

ALLIN: I can't say that I did.

SWINDAL: How far did Mr. Hensley follow me?

ALLIN: I think about six or eight steps.

SWINDAL: How far do you suppose Mr. Hensley was from me when the pistol fired?

ALLIN: I can't say. Mr. Hensley was between me and Mr. Swindal.

PROSECUTOR: What words brought on the quarrel between Mr. Swindal and Mr. Hensley?

ALLIN: I can't say positively whether Mr. Swindal observed that two on one was too many or not, but it was something to that account.

PROSECUTOR: Do you consider that Mr. Swindal came forward to take the part of Mr. Brookshire, or not?

ALLIN: I think his intentions were to take his part at that time.

PROSECUTOR: Did or did not Mr. Hensley say anything to bring on a quarrel between him and Swindal?

ALLIN: I do not know that they spoke during the night.

PROSECUTOR: Do you or do you not know that the remark of Mr. Swindal that "two on one was too many" brought on the difficulty between Hensley & Swindal?

ALLIN: I think it did.

PROSECUTOR: Was it with a ball or shot that Mr. Hensley was shot?

ALLIN: He was shot it seems with shot. I saw ten holes.

PROSECUTOR: What distance did they scatter?

ALLIN: I think a glass tumbler would cover all of the holes.

JUDGE: Do you think that Swindal was in bed and came out to get in this combat?

ALLIN: I think he had been in bed.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Testimony Of William Ayres:*

CLERK: The court calls Mr. William Ayres. (Ayres enters.) Please state your name.

AYRES: William P. Ayres. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

AYRES: I do. (Sits down.)

CLERK: In your own words, please tell the court what happened on the night of September 7th at Mixon's Roadhouse.

AYRES: Mr. Swindal on the evening of the 7th of the present month went cow hunting and came back to Mixon's and put his mare up. Then Mr. Hensley asked if he could get supper. Mr. Mixon said it was not convenient- that there was no wood, but he would try and have supper got for them. In the meantime, Mr. Hensley said that his money was as good as any man's. Mr. Mixon had the supper got, and they went in and ate. We all came out and sat down at the door, and Mr. Frasier commenced singing, and Mr. Brookshire raised up and said, "No insinuations," and took off his coat, and Frasier took off his waistcoat. Mr. Hensley then said that Mr. Brookshire or his family one had belied Mr. Frasier, and Mr. Brookshire said he could not help what his family done, but when he went home he would correct it. At that time, Mr. Hensley struck Mr. Brookshire and knocked him down. Mr. Swindal was standing by and observed that two on one was too many, and that Mr. Frasier was calculated to settle his own business. From that, Mr. Hensley advanced towards Mr. Swindal, and Mr. Swindal gave back until he got against the door, some 7 or 8 steps. Then the pistol went off and Mr. Hensley threw his hand up to his breast. Mr. Frasier asked him if he was hurt. He said, "Yes, I am a dead man." He then, with the assistance of Mr. Frasier, walked twenty or thirty yards and fell.

# *Questioning Of William Ayres:*

- SWINDAL: Did you see Mr. Hensley strike me?
- AYRES: I did not. I saw him going towards you.
- SWINDAL: Did I or did I not observe to you that two was too many on one?
- AYRES: You did & I observed, "Let's not let them fight."
- SWINDAL: Did or did you not hear me mention it afterwards?
- AYRES: I don't think I did.
- SWINDAL: Did or did you not hear Mr. Hensley observe that I had a pistol, and that he would run me pistol and all?
- AYRES: I heard him observe that you had a pistol, but did not hear him say that he would run you.
- SWINDAL: Was or was not the moon shining brightly at the time?
- AYRES: The moon was shining tolerably bright.
- SWINDAL: How far do you suppose Hensley was from me when the pistol fired?
- AYRES: I think about three steps.
- SWINDAL: Did or did I not tell Mr. Hensley not to crowd on me?
- AYRES: You did.
- SWINDAL: Did or did you not hear Mr. Hensley say that he intended crowding me through the paling?

AYRES: I did not.

SWINDAL: Did or did you not hear Mr. Hensley say, when on the way to Mixon's, that he intended to raise a fuss with Mixon or somebody?

AYRES: I did not hear him say that he intended raising a fuss with anybody.

SWINDAL: Did or did you not hear me insult Hensley in any way?

AYRES: All I heard you say was that two was too many on one.

PROSECUTOR: Did you see Mr. Swindal, after Mr. Hensley was shot, go into the house and get a gun?

AYRES: I did not see him go into the house and get it, but I saw him immediately after Hensley was shot, with a gun in the yard.

PROSECUTOR: Did Mr. Swindal come out in his drawers?

AYRES: He did and remained a short time. He then went back and put on his pantaloons and came out again and remained until after he, Hensley, was shot. The words which Swindal spoke was after he came out the second time.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Testimony Of Nathan Brookshire:*

CLERK: The court calls Captain Nathan Brookshire. (Brookshire enters.)  
Please state your name.

BROOKSHIRE: Nathan Brookshire. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the  
truth, so help you God?

BROOKSHIRE: I do. (Sits down.)

CLERK: In your own words, please tell the court what happened on the  
night of September 7th at Mixon's Roadhouse.

BROOKSHIRE: Mr. James Hensley, Mr. Frasier, Mr. Ayres, & myself went to Mr.  
Mixon's. I called for a bottle of liquor; we knocked about there  
some time and drank it. Mr. Hensley called for supper for Mr.  
Frasier, himself, and me. Mr. Mixon told him it was not conven-  
ient—that his wood was out, and it was late, and his girl was at the  
cow pen, and he had nobody to help him get it. Mr. Hensley  
observed that he (Mixon) kept a public house and Mr. Mixon  
observed if nothing else would do, he would try and have it got.  
Hensley, Mr. Ayres, & myself sat down and ate. Mr. Frasier after-  
wards took a cup of coffee. When we went out of doors, Mr. Frasier  
began to sing. I told him, "No insinuations."

# *Questioning Of Nathan Brookshire:*

SWINDAL: Was there not a good deal of noise and rudeness in the yard?

BROOKSHIRE: There was such as is usual with drunken men.

SWINDAL: Was there not indecent language used such as a man would not like to hear used in his family?

BROOKSHIRE: I do not know. There was a great deal said, but my memory is bad when I am drinking. I can't recollect.

PROSECUTOR: What time did you go to Mixon's?

BROOKSHIRE: I think it was about sundown. It may have been a little before or a little after.

PROSECUTOR: What was the object of the companies going there at that time?

BROOKSHIRE: I do not know what their object was, but I went to get some liquor.

PROSECUTOR: Was or was not James Hensley, the deceased, a very strong man?

BROOKSHIRE: He was a very stout man. I have been struck by many men and never received such a blow as that given me by Mr. Hensley.

PROSECUTOR: Is or is not Mr. Swindal, the prisoner at the bar, a small and weak man?

BROOKSHIRE: I think he is, in comparison with Mr. Hensley.

PROSECUTOR: Do you think that Mr. Swindal was anything like able to give Hensley a fair fight?

BROOKSHIRE: From the appearance of the two men, I would think he was not.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Testimony Of Peter W. Ford:*

CLERK: The court calls Peter W. Ford. (Ford enters.) Please state your name.

FORD: Peter W. Ford. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

FORD: I do. (Sits down.)

PROSECUTOR: Did or did you not see Mr. Swindal, the prisoner at the bar, shoot James Hensley, the deceased?

FORD: I did. At the time the gentlemen were eating supper, I was lying on the bed. I continued lying, then Mr. Frasier went out in the yard and sang two songs, one of them twice—after they were done singing, I heard some loud talk. I thought I heard a blow struck by a man—I then got up and looked out at the door, and Mr. Swindal and Mr. Hensley came opposite the door. The moon shone directly on Mr. Hensley, the deceased. He had his hat in his hand and as he threw his hat down, the pistol fired. He turned around and picked up his hat. Mr. Frasier asked him if he was hit. He said he was—Mr. Swindal went around the house and came in at the back door. He picked up the rifle and either cocked her or sprung the triggers, I don't know which of the two. When he picked up the rifle, he observed that he would kill some more of them. I told him for God's sake not—that he had killed one man and that was enough! I then went out where the deceased was lying, at the horse rack. They jumped on their horses, three or four of them, and said they should let his friends know it. I told them to stop a moment, and let's examine his wounds to see if they were fatal, or if we should send for a doctor. I then opened his bosom and looked by moonshine, as well as I could, at his wound. He fetched about five or six breaths from the time I went to him, and expired. We

took him in the house and laid him out. The wound was caused by 10 buck shot in his left breast. They had spread about three inches horizontal, and upon a perpendicular about three and a half inches. At the time that the pistol fired, Hensley, the deceased, was about 10 or 12 feet from James P. Swindal, the prisoner.

PROSECUTOR: Was or was not Mr. Hensley, the deceased, advancing upon Mr. Swindal?

FORD: He was, then Hensley stopped and threw down his hat. At the same moment that the hat was thrown down, the pistol fired.

PROSECUTOR: At the time Hensley was advancing upon Swindal, did or did you not see Mr. Frasier following up and observing "Go it, Mr. Hensley," and he (Frasier) having a knife in his hand?

FORD: He did not. At that time, owing to my position, I saw no one but the slayer and the slain.

PROSECUTOR: Did or did you not hear any threats made at the time against Mr. Swindal by Mr. Frasier?

FORD: I did not until I went to the horse rack where Hensley was lying. I did hear some threats made against Mr Swindal, the prisoner, in a voice sufficient to be heard by Mr. Swindal, who was at the house. I do not recollect the words, as I was engaged, but the threats were violent and severe.

PROSECUTOR: What was the time of night when Mr. Swindal shot Mr. Hensley?

FORD: I think it was about 10 o'clock. I heard no harsh words passed between Mr. Swindal & Mr. Hensley.

PROSECUTOR: Did you see Mr. Swindal in his drawers sometime previous to the affray?

FORD: I did.

PROSECUTOR: Was or was he not immediately previous to the fight, dressed?

FORD: He was.

PROSECUTOR: Was Mr. Hensley getting nearer to Mr. Swindal, or was Swindal getting further off?

FORD: Swindal was getting farther off when the firing took place.

PROSECUTOR: How far was Mr. Swindal from the paling when the pistol fired?

FORD: He was about 20 feet.

PROSECUTOR: Was or was not Mr. Hensley drunk?

FORD: He had the appearance of a very drunk man.

PROSECUTOR: Was or was not Mr. Swindal perfectly sober?

FORD: I think he was.

PROSECUTOR: Did you see Mr. Hensley have any weapons, or did you hear him make any threats?

FORD: He had no weapons—nor did I hear him make any threats.

SWINDAL: What time was Mr. Hensley so very drunk, as you speak of? Was it early in the evening when he first came there, or was it at the time he was shot?

FORD: He was drunk at both times.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Testimony Of Sarah Mixon:*

CLERK: The court calls Mrs. Sarah Mixon. (Mrs. Mixon enters.) Please state your name.

MRS. MIXON: Sarah Mixon. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

MRS. MIXON: I do. (Sits down.)

CLERK: In your own words, please tell the court what happened on the night of September 7th at Mixon's Roadhouse.

MRS. MIXON: When Hensley knocked down Mr. Brookshire, Mr. Swindal observed to Mr. Hensley, "Don't massacre him. He is drunk and an old man." Then Hensley struck at Mr. Swindal, the prisoner at the bar. I don't know whether he struck him or not. Swindal jumped back then and drew his pistol and told him not to rush upon him. Some of them said (I believe it was Frasier), "He's got a pistol!" Says Hensley, "god damn him, he could whip him and his pistol both," and made at him. He (Swindal) gave back and said, "Don't you rush upon me, Mr. Hensley. I am not able to fight you and I don't want to hurt you," and he still gave back. Then he (Hensley, the deceased) rushed on him. He threw down his hat and as he raised up, it seemed to me that he was in the act of pitching at the said Swindal, and as he done that, the pistol fired. After he (Swindal) had shot, he came into the house and said to me that he was sorry he had done what he did; that he had nothing against Hensley. He said that he was a small man and could not fight him, and he did not wish to be massacred.

# *Questioning Of Sarah Mixon:*

PROSECUTOR: When Mr. Swindal, the prisoner at the bar, first went out of the house as has been stated, did he or did he not go at your request, and for what purpose did you request him to go?

MRS. MIXON: He did go at my request to try and get Mr. Brookshire in the house.

PROSECUTOR: What distance were Mr. Hensley & Swindal apart when the pistol fired?

MRS. MIXON: I think about two steps, perhaps a little more. Mr. Frasier was pursuing on behind Mr. Hensley's back—with a knife open in his hand.

PROSECUTOR: Did Mr. Hensley, the deceased, eat supper at your house the night this affray happened, and was he drunk?

MRS. MIXON: He did eat supper. I don't think he was much drunk. He paid his bill he had from drinking, but I did not see him stagger any.

PROSECUTOR: Where were you at the time the affray took place between Hensley, the deceased, and the prisoner at the bar?

MRS. MIXON: I was standing in the door.

PROSECUTOR: How far was Mr. Hensley from the door of the house when he was shot?

MRS. MIXON: I think about 2 steps above the upper door.

PROSECUTOR: Do you or do you not know of any harsh words or quarrel between Mr. Hensley & Mr. Swindal?

MRS. MIXON: I know of none. I never heard Swindal say a word against Mr. Hensley in my life, as I recollect of.

PROSECUTOR: Did or did not Mr. Swindal have a pistol in his hand about the time of the affray between Mr. Brookshire & Hensley?

MRS. MIXON: He did not. He drew his pistol after Mr. Hensley struck at him.

PROSECUTOR: How far did Mr. Swindal retreat?

MRS. MIXON: He retreated about 10 steps and came up very near the house with his back rather to the house, all the time begging Mr. Hensley to stand off & not to rush upon him.

JUDGE: If there are no further questions, the witness may step down. Clerk, call the next witness.

# *Questioning of Jane Hunter:*

CLERK: The court calls Mrs. Jane Hunter. (Mrs. Hunter enters.) Please state your name.

MRS. HUNTER: Jane Hunter. (Picks up Bible.)

CLERK: Do you swear to tell the truth, the whole truth, nothing but the truth, so help you God?

MRS. HUNTER: I do. (Sits down.)

PROSECUTOR: Do you or do you not know anything concerning the affray that happened at Mr. Mixon's on the 7th of September?

MRS. HUNTER: I do not. In the month of June last past, I heard Mr. Swindal, the prisoner at the bar, say that he had a grudge against Mr. Hensley, the deceased. That is all I know about the matter.

PROSECUTOR: Did Mr. Swindal say those words in anger or not?

MRS. HUNTER: He did not seem to be angry.

JUDGE: Thank you. If there are no more questions, the witness may stand down. Are there any more witnesses?

CLERK: No, Your Honor.

# *Closing*

JUDGE: (Strikes gavel.)

Gentlemen of the jury, you are asked to be fair in your decision based on the testimony you have heard. You must now determine the guilt or innocence of James. P. Swindal, the prisoner at the bar, charged with the murder of James Hensley on September 7, 1840 in the town of San Felipe de Austin, in the Republic of Texas.

If you believe James P. Swindal, the prisoner at the bar, was unprovoked, or you believe he was reckless when he fired his pistol causing a mortal wound in the chest of citizen James Hensley, THEN YOU MUST FIND HIM GUILTY OF MURDER.

If you believe James P. Swindal, the prisoner at the bar, was within his rights to defend himself from injury when he fired his pistol, then he is innocent of the charge of murder, and YOU MUST FIND HIM NOT GUILTY.

This court is now in recess for the purpose of jury deliberation.  
(Strikes gavel.)

CLERK: All rise. (Judge stands and leaves the bench)

# *Verdict*

CLERK: All rise. (Judge enters.)

JUDGE: Has the jury reached a verdict?

CLERK: They have, Your Honor. (Hand paper to Judge.)

JUDGE: In the matter of the Republic of Texas vs. James P. Swindal, charged with the murder of James Hensley, the jury finds the prisoner...NOT GUILTY. You are fully discharged and free to go. This court is adjourned. (Strikes gavel.)

*Enrichment Activities  
for the Classroom*

# *How Times Have Changed!*

Learning Objective(s): The student will

Determine if the Laws of the Republic of Texas were constitutional according to the current Texas Bill of Rights.

TEKS: 7.16 A, 7.21 A 7.21 B; Govt. 8 F, 14 B, 14 C, 14 E, 14 F

Materials Needed: Copy of chart for each student

Teaching Strategy:

1. The students, in pairs, will visit each learning station posted around the room. At the station, the students will read the law and then determine if it was ever a law. They will mark yes or no in the second column of their chart then move to the next station. **(All the laws listed were once law in Texas.)**
2. Once all the stations are visited, the students will determine if the Texas Bill of Rights could be used to declare the laws unconstitutional.
3. Each group will then report to the class which laws they feel never existed and what amendments in the Texas Bill of Rights protect people from these laws if they were around today.
4. After all groups have finished, the teacher will explain to the students that all the laws listed in the first column were once law in Texas. The teacher will then review each law with the students and together they should determine how these laws would violate the Texas Bill of Rights protections.

Extension for Gifted/Talented:

Students will rewrite the law to reflect current laws and punishments they feel would fit the crime listed on the chart.

## *How Times Have Changed!*

<b>Laws</b>	<b>Was This Once a Law?</b>	<b>Does this law violate the <i>Texas Bill of Rights?</i> (yes or no)</b>
1. Every person of sound memory and discretion, who shall willfully and maliciously kill any person within this republic; or shall aid, abet, or instigate the killing of any person as aforesaid, shall be deemed guilty of murder, and on conviction thereof, shall suffer death.		
2. Every person who shall kill another without premeditated malice, shall be deemed guilty of manslaughter, and on conviction thereof, shall be imprisoned such length of time as shall be adjudged by the court, not being less than one year nor more than ten years, and may be branded with the letter M, in such place as the court shall direct.		
3. Upon all indictments for murder or manslaughter, if it shall be found by the verdict of a jury, that the party indicted, killed the person for whose death he is indicted, in the lawful defense of himself or his family, or happen to kill the person as aforesaid, in attempting, by lawful means, to arrest the person killed for any reason or other high crime or misdemeanor, done and committed or hereafter to be done and committed, or in the discharge of any duty required by law or by misfortune, then and in that case, the party indicted, shall be for the same fully acquitted and discharged.		
4. Every person who shall willfully and maliciously burn any dwelling house, store, cotton gin, or authorize, shall be deemed guilty of arson, and on conviction thereof, shall suffer death.		
5. Every person who shall steal or entice away any slave, out of or from the possession of the owner or owners of such slave, shall be deemed guilty of felony, and on conviction thereof, shall suffer death.		
6. Every person who shall by force or violence, feloniously take from the person of another, any goods, money, or other article of value, shall be deemed guilty of robbery, and on conviction thereof, shall suffer death.		
7. Every person who shall break and enter into any dwelling house or store, by night, and feloniously take therefrom any goods, chattels, money or other articles of value shall be deemed guilty of burglary, and on conviction thereof, shall suffer death.		
8. Every person, who shall be accessory before the fact to any murder, arson, rape, robbery or burglary, on conviction thereof, shall suffer death.		
9. Every person who shall be accessory after the fact to any murder, arson, rape, robbery or burglary, shall on conviction thereof, be fined in any sum not exceeding one thousand dollars at the discretion of the court, and may receive thirty-nine lashes on the bare back at the discretion of the court.		

# *Did You See That?*

Learning Objective(s): The student will

Determine if he or she has what it takes to be a good witness.

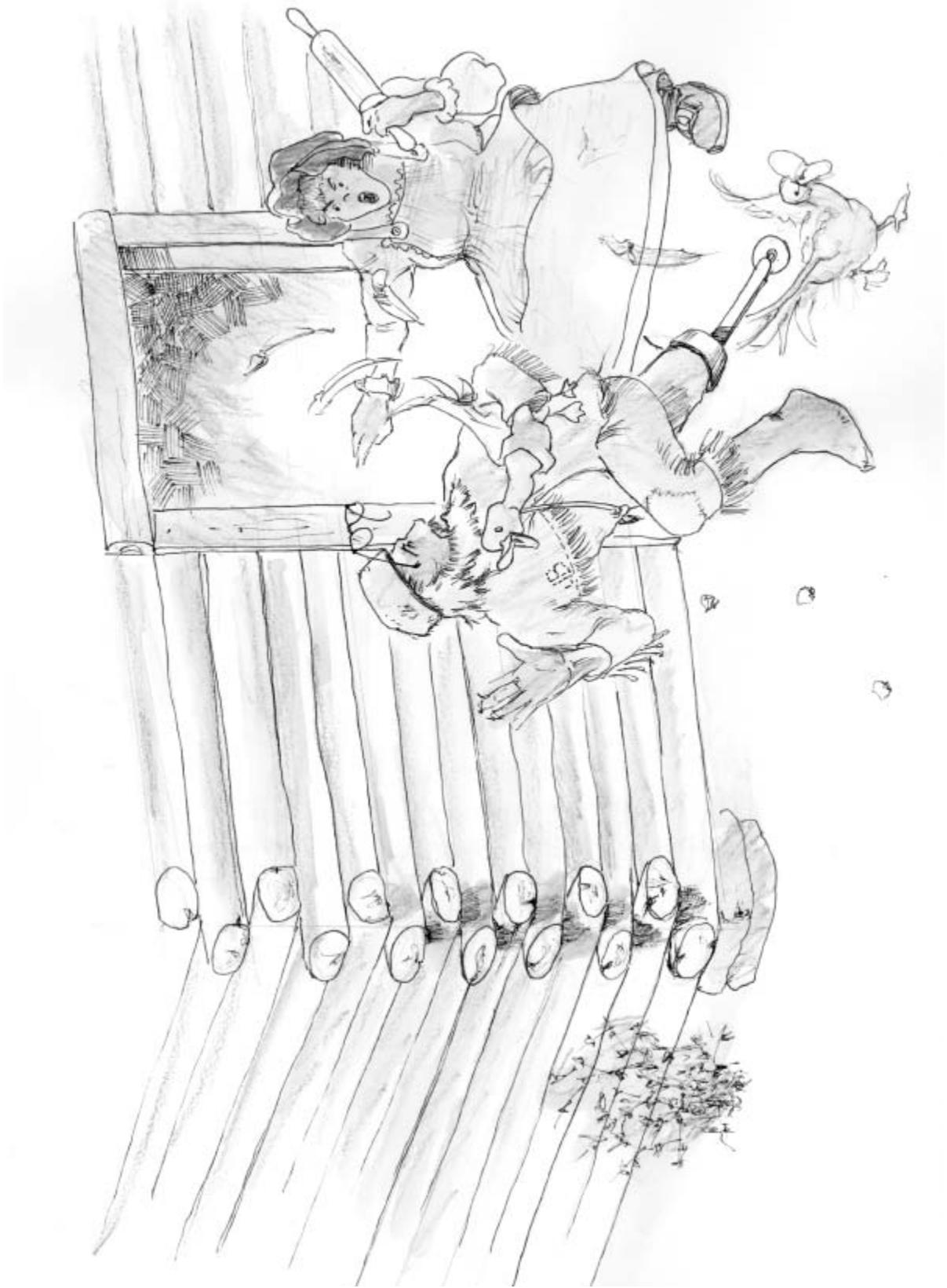
TEKS: 7.22 C; 8.20 D; GOVT 9 C

Materials Needed: Copy of DID YOU SEE THAT?

Teaching Strategy:

1. Give each student a copy of DID YOU SEE THAT? face down on his or her desk.
2. Have the students pretend they are witnesses to a crime.
3. Have the students turn the paper over and study it for thirty-seconds (or make a transparency of the picture and leave it on the screen for one minute). After the minute is up, have them turn the paper face down again (or turn off the overhead projector). Have each student write down in as much detail as possible what he or she saw.
4. Have the students turn the picture over and see how accurate they were in their description of that they thought they saw.

Extension for Gifted/Talented: Divide the class into two groups. Have each group create and set up a crime. Then have the first group dramatize their crime for the other group. After the dramatization, the second group should list all the evidence they can recall. Repeat the process, allowing the second group to dramatize their created crime while the first group watches and then lists evidence. Debrief by discussing how difficult/easy it was to come to conclusions among the “witnesses” to the crimes.



# *Analyzing Grand Jury Testimony*

Learning Objective: The students will

Compare and contrast the witness's statements.

TEKS: 7.21 B, WH 25C, GOVT 21A

Materials Needed: Grand Jury Witness Statements, copies of Venn Diagrams

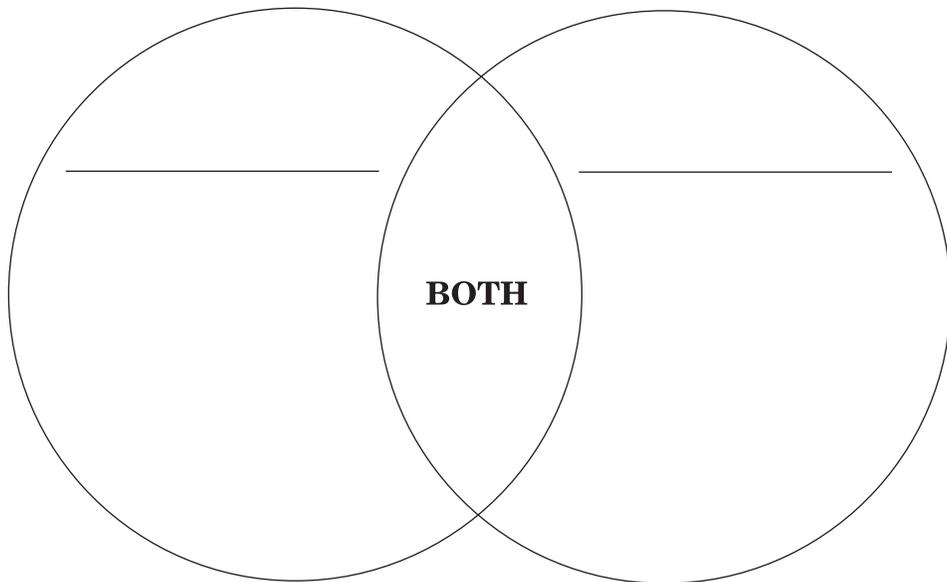
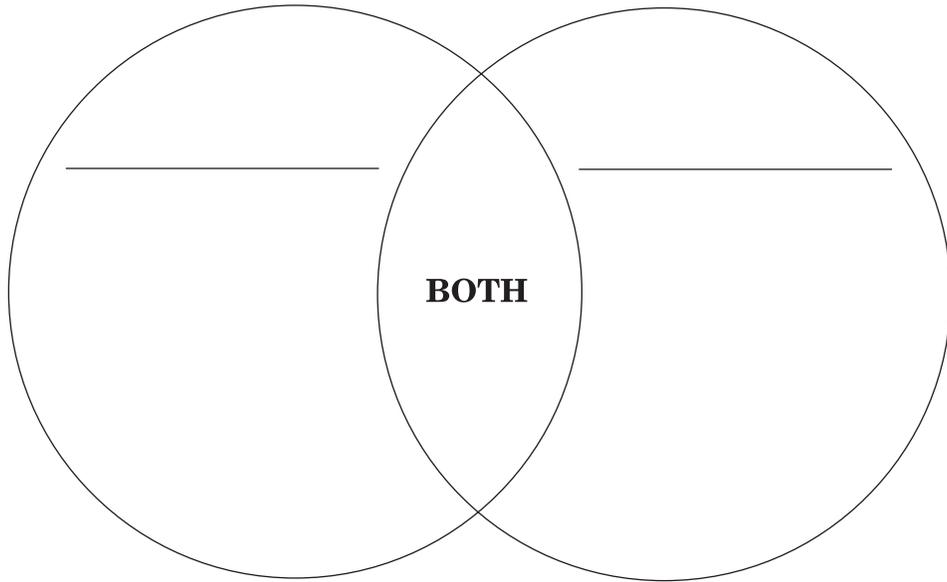
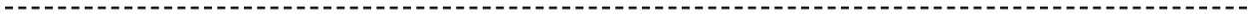
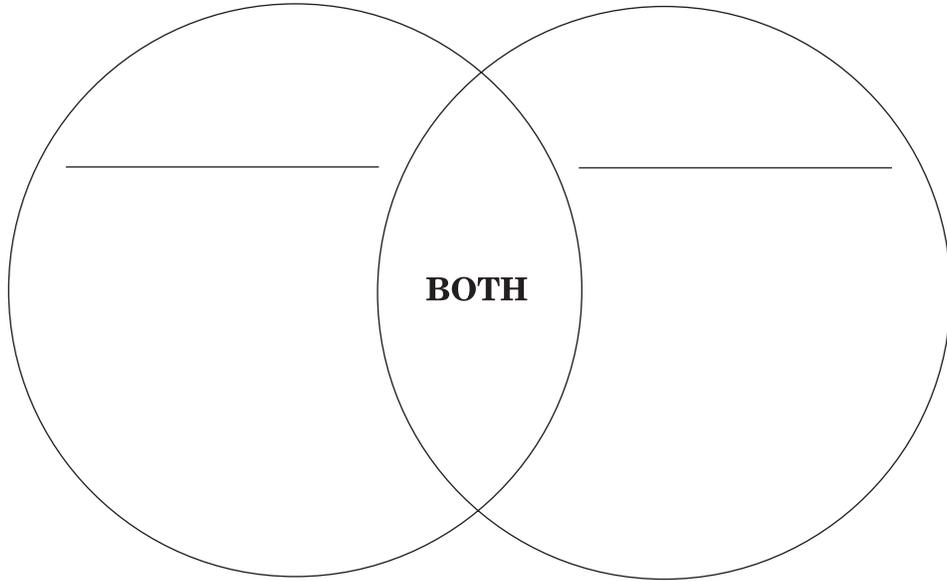
Teaching Strategies:

1. The teachers will assign four students to a group. The teacher will then give two witness statements to each group. After all the statements are distributed, the students fill in names of the witnesses on their Venn Diagram.
2. Using the witness statements, the students are to write down as many differences as they can find about the events that led up to the murder under the name of the witness on the Venn Diagram. The students will then write down similarities between the two testimonies in the section of the Venn Diagrams marked **BOTH**.
3. Once all the groups have completed their diagram, have the groups post their diagrams on the wall. Give the students time to review other groups' work. Ask each group to report to the class their findings.

Gifted And Talented:

Using the witness statements, have students sketch the murder scene described by each witness. If the class is creating a mock trial, then these could be used as evidence in the trial.

*Comparing Witness Statements - Venn Diagrams*



# *Front-Page News*

Learning Objective: The students' will

Create the front-page of a newspaper analyzing the case and the major arguments of the prosecution and defense.

TEKS: 7.21 B

Materials Needed: Copy of the *Front-Page News* instruction sheet for each group, a large poster or flip chart sheet of paper for each group, and markers.

Teaching Strategies: **This activity should be conducted before the verdict is announced.**

1. After the trial, have the jury write down its verdict. Keep the verdict a secret.
2. The class will be divided into five students per group. Each group will receive the *Front-Page News* instruction sheet.
3. The teachers will review the instructions for the different sections on the *Front-Page News* sheet with the class. After all the students' questions have been answered, each group will get markers, paper etc.
4. The next day, have the each group place its *Front-Page News* sheet on the designated classroom wall. Each group will be given five minutes to describe its project to the entire class.
5. Ask the class members who were jurors during the trial if they would like to change their votes after hearing the reports and editorials from the *Front-Page News* sheets. If any of the students want to change their votes, ask them why and what changed their opinion. Discuss with students the danger of juries hearing information outside the trial.
6. Announce the verdict in the classroom trial and then the verdict in the real historical trial.

## *Front-Page News*

<p style="text-align: center;"><b>Background Information</b></p> <p>This area should be a summary of the history of the case.</p> <p>It should be an informative paragraph.</p>	<p style="text-align: center;"><b>Cartoon</b></p> <p>The cartoon can reflect either side of the case.</p>	<p style="text-align: center;"><b>An Opposing View Editorial</b></p> <p>This area should contain an editorial with the major points for the Defense.</p> <p>This should be a persuasive paragraph.</p>
<p style="text-align: center;"><b>Graph</b></p> <p>Conduct a public opinion poll regarding some aspect of the trial. (Best witness, possible verdict, best argument for finding the defendant guilty or not guilty.)</p>	<p style="text-align: center;"><b>Quote Lines:</b></p> <p>From the poll list three quotes for either side of the issue.</p>	<p style="text-align: center;"><b>Publisher's Information</b></p> <p>Names of students who completed page</p>
	<p style="text-align: center;"><b>Guest Columnist Editorial</b></p> <p>This area should contain an editorial with the major points for the Prosecution.</p> <p>This should be a persuasive paragraph.</p>	

# Witness This!

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## E v a l u a t i o n

We hope you and your students enjoyed using **Witness This!** curriculum. We are seeking your feedback on the curriculum. Please take a moment to answer the questions listed below.

1. In what grade and course did you use the curriculum guide?
2. From which website did you download the curriculum guide?

Please circle

- Star of the Republic Museum ([starmuseum.org](http://starmuseum.org))
- State Bar of Texas website ([texasbar.com](http://texasbar.com))
- Law Focused Education Inc., website ([texaslre.org](http://texaslre.org))

or

- Did you receive a paper copy?
3. Did you conduct a mock trial using the script provided in the curriculum? If yes, did the students enjoy the mock trial?
  4. Did you use any of the enrichment activities? If yes, which ones?
  5. Did the information on the grand jury system help you gain a better understanding of the system?
  6. Any additional comments about the curriculum?
  7. Will you use the curriculum again next year?

Please send or email the evaluation to:

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