

# Justice under fire

## Smith County justice harsh, critics claim

Continued from Page 1A.

ered to give false testimony and cases influenced by the prominence of the victim. In at least one case, a businessman was kept under indictment for theft for four years before winning a civil lawsuit to clear his name.

At 53, Jack Skeen, a former Tyler city attorney, municipal judge and assistant district attorney, is nearing the end of his second decade as Smith County district attorney. He is a fifth-term incumbent who has never faced an opponent.

He has a record for winning. Honored as the State Bar's Prosecutor of the Year for 1997, Skeen has been cited by a Sam Houston State University study showing that from 1989-90, Smith County led the state in meting out the longest prison sentences for major crimes and the second-longest for less violent offenses.

The question is how that record was achieved.

During the same period that Skeen's enviable conviction record has been growing, Smith County has gained a reputation in select circles for inequity in state criminal cases. Smith County judges are noted for harsh sentences, surpassed only by Smith County juries.

One of those juries recently assessed Kenneth Payne III 16 years for stealing a candy bar. That trial was overturned for jury misconduct and a new trial ordered, but not before the prosecutor quipped that the sentence might have been the result of the candy bar being "king-sized."

That prosecutor has since left Smith County. Others who haven't, however, have been accused of serious infractions: suppressing evidence, encouraging perjury and practicing selective prosecution, resulting in a notoriety that extends beyond state borders.

Much of that notoriety is based on a handful of well-publicized cases: a huge drug sweep in the late 1970s that proved to be one of the state's worst examples of planted evidence and perjured testimony; the case of Andrew Lee Mitchell, freed from death row in 1993 because of suppressed evidence at his trial; and the case of Kerry Max Cook, a death row inmate for 20 years who was tried four times before finally winning his freedom last year.

The drug sweep, in which two rogue narcotics officers lied and planted evidence to make more than a hundred cases, resulted in embarrassment to the county and prison sentences for the narcotics officers.

In the case of Mitchell, the admitted drug dealer was convicted of murdering a clerk at a fireworks stand in 1979. The conviction was overturned after it was shown that sheriff's investigators with-



State District Judge Cynthia Stevens Kent recommended a new trial for A.B. Butler, but not a pardon, later granted by Gov. George W. Bush.

held evidence showing Mitchell could not have been at the scene when the slaying occurred.

Mitchell, subsequently freed, sued and received \$40,000 from Smith County last year. It was a small victory, however. After five years of freedom, he was sent back to prison for 31 years after pleading to conspiracy to commit murder in connection with the original case.

And the Cook case, one of the better-known examples of prosecutorial misconduct in the nation, made Cook famous among reform groups and made his attorney, Paul Nugent of Houston, roundly disliked in the Smith County district attorney's office.

Skeen is quick to point out that all of those cases began before his first term in 1983. Still, the blame for them has bled over, and Skeen's office is accused of policies that may have resulted in some of the same abuses as his predecessors.

"Smith County has got to have more innocent people in jail than any other county in the state," said Nugent, whose well-documented defense of Clarence Bradley in Montgomery County freed the former school janitor from death row.

Skeen and his chief prosecutor, David Dobbs, bristle at Nugent's statement. "We're aggressive, but we're certainly not violating anyone's rights," said Skeen. "You can't find anyone any more open than we are," said Dobbs.

Later, in a written statement, Skeen said, "Any criminal district attorney who has dealt with over 24,000 felony indictments during a 17-year period is going to have complaints from defendants and some defense lawyers. We are also capable of making mistakes. However, there is no pattern of discovery violations by this office."

Skeen and Dobbs, as well as a number of defense attorneys, praise Skeen's policy of sequentially numbering pages of discovery material and giving copies of all that material to the court and defense attorneys.

That policy did not go into effect, however, until seven months ago, after a capital murder case in which defense attorney Brandon Baade found that he had not received a crucial suspect's state-



Associated Press

Press A.B. Butler was in prison 17 years for a rape in Smith County he did not commit, but DNA evidence cleared him. He became the third Texas convict to be freed as a result

ment from prosecutors.

"The only complaints we've had are from lawyers like Baade and Nugent," said Dobbs.

There are others, though most of them will voice those complaints only privately. Weldon Holcomb, however, the only living East Texas member of the Texas Criminal Defense Lawyers Hall of Fame, made his criticism public.

"Our district attorney has a win-at-all-costs policy," said Holcomb.

While Holcomb's experience spans decades, Nugent's dealings in Smith County are extensive as well. His defense of Kerry Max Cook spanned several years and convinced him that Cook's multiple trials constitute "the most egregious, documented case of prosecutorial misconduct in the history of the state."

Cook's case is unprecedented. He spent 20 years on death row for the multiple murder of a Tyler secretary. He was tried four times, a record for any capital murder defendant, and was finally freed last year on a plea bargain.

His original trial, in 1978, was a fiasco in which police lied, witnesses lied, prosecutors lied and evidence was lost.

Cook, a slight man whose sexual orientation became an issue in his first trial, went through a series of trials and mistrials while he waited in prison, a prime sexual target for other prisoners.

His case eventually caught the attention of Centurion Ministries, a nonprofit New Jersey group devoted to freeing defendants the members believe innocent. Centurion Ministries retained Nugent, who filed an appeal in 1996 that resulted in Cook's fourth and final trial. The appeals court cited prosecutorial misconduct stemming from the first trial and extending through subsequent trials, including those handled by Skeen.

James McCloskey, head of Centurion Ministries, said Cook's case was among the worst he has encountered.

"I hope I never encounter another case so dived with perjury," said McCloskey. "There was systematic prosecutorial misconduct from the very beginning under former Smith County District Attorney A.D. Clark through the current crop."

Cook was finally freed during his fourth trial earlier this year, when prosecutors unexpectedly offered him the chance to plead no contest, a deal he took with the stipulation in his trial record that he was not admitting guilt.

The strange aspects of Cook's case continued after that plea. Within weeks it was revealed that DNA tests, conducted during the trial, indicated Cook had not raped the victim and, in fact, that semen on her undergarments had come from James Mayfield, the original suspect in the case.

Then, weeks later, state District Judge Cynthia Stevens Kent, Smith County's senior jurist and a staunch supporter of Skeen, impaneled a special grand jury, appointing her husband's law partner as foreman, to hear testimony in the Cook case.

No indictments were returned by that grand jury, and both Kent and Skeen have refused to explain its purpose.

Kent also played a part in the case of A.B. Butler, pardoned May 30 by Gov. George W. Bush. Butler was imprisoned for 17 years for a rape he did not commit, then was freed earlier this year when DNA tests proved he was innocent. Butler's attorney, Randy Schaffer of Houston, applied for a pardon, and Skeen joined Schaffer in that request.

Kent recommended a new trial, an option now rendered moot by the pardon, but refused to add her recommendation for a pardon.

"Science is not infallible," said Kent. "Science once held that the Earth was flat. There is a witness in that case (the victim) and a very strong witness."

Both Kent and Bill Wright, a defense attorney employed by her court, defend Skeen's office as "one of the most open in the state."

Dobbs, however, is noted for saying, "We don't like to price the groceries before we get to the checkout stand." Euphemistically, say defense attorneys, that means Smith County prosecutors do not put plea bargains with witnesses in writing before putting those witnesses on the stand.

As a result, those witnesses can testify they were not promised anything for their testimony.

There are cases other than Cook's, as well, which are less publicized, but apparently just as inequitable, and when combined, seem to point to a historic pattern. Some of those include:

■ A child molestation case in which the victim and main witness, both minors, say they were told by a prosecutor to "just say yes" to her questions in court, despite the fact that they had attempted repeatedly to tell the prosecutor that the offense had not occurred.

■ An aggravated assault case in which evidence that the state's main witness had multiple accusations of child molestation against her was suppressed until it was learned of by accident by a defense attorney.

■ A case in which a civil lawsuit became a felony theft case and a Tyler businessman was kept under perpetual, repeated indictment for four years before making his own, unsolicited appearance before a grand jury when he finally was no-billed.

"It's simply a pattern of lying, cheating and violations of the law by Smith County prosecutors that wouldn't be tolerated in Harris or Dallas County or any of the other, larger offices in the state," said Nugent. "Dishonesty is encouraged when it helps win convictions."

It's a pattern some say has existed in

Smith County for decades, a pattern fostered by nepotism and a "good old boy" system in a town that has outgrown it.

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With his boots propped on his desk in his downtown office, Weldon Holcomb stretched his lanky frame and pondered the nearly five decades since 1953 during which he has practiced law. Much of that time has been spent in Smith County courtrooms.

He has been a prosecutor, a district attorney and a defense attorney. He once successfully argued a case before the U.S. Supreme Court, which resulted in the requirement that a suspect be afforded an attorney before being forced to appear in a police lineup.

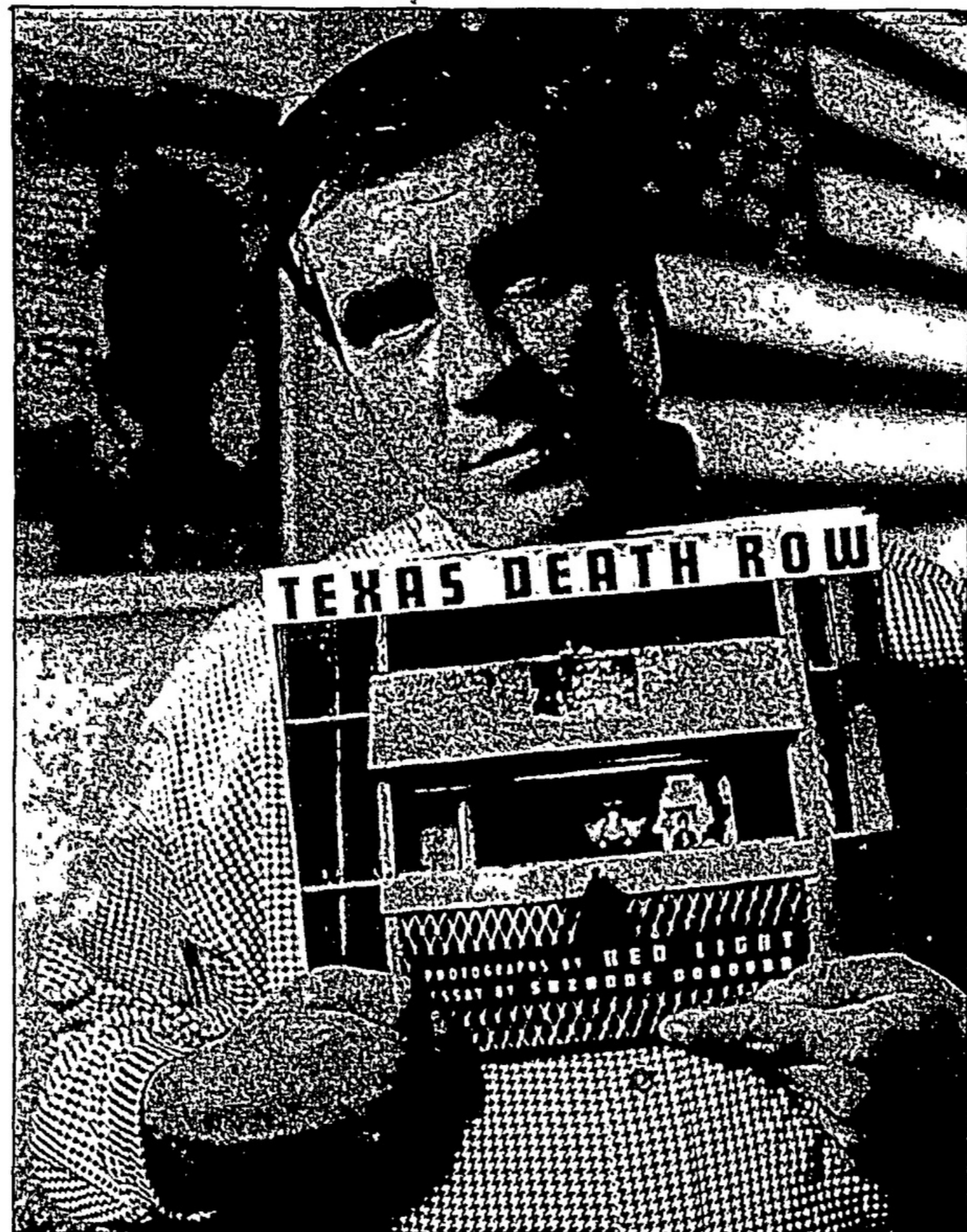
He has reached the stage of venerability at which his assessments count, and his evaluation of Smith County justice is grim.

"We have a problem in Smith County and we've had one for years," said Holcomb.

"Back in the 1930s, before I practiced, there was a problem getting confessions from Smith County accepted in other counties because they knew how they were obtained."

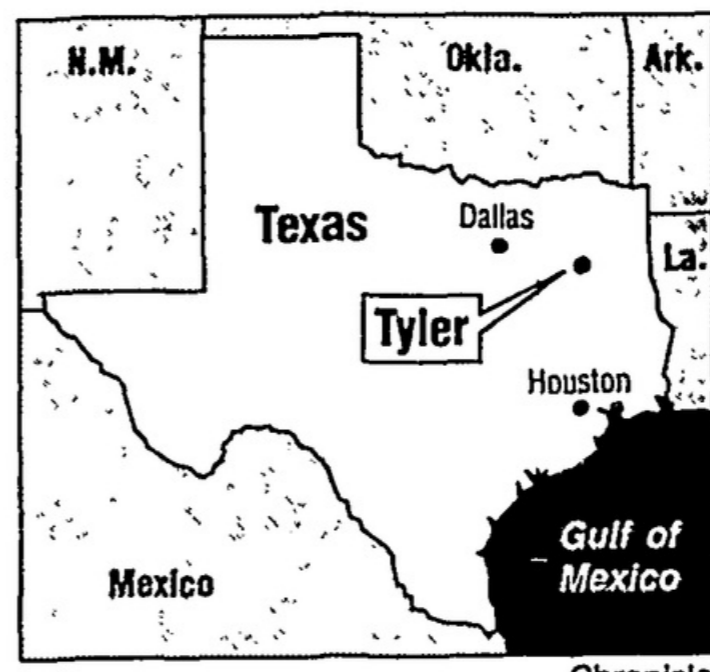
"That eventually changed, but this is a conservative area, very Southern, and other things continued. When I became district attorney (in 1959), I was the first one to prosecute black-on-black murders."

"Today ... it's a tough situation when good attorneys would rather practice outside their own county, but that's the case. Our district attorney is closely allied with police officers and it's the only county I know of where, if you want to settle a case, you talk to the arresting officer first, not the DA."



Associated Press

The most notorious Smith County case was the capital murder conviction of Kerry Max Cook, who served 20 years on death row and went to trial four times. He is now free, after agreeing to a plea deal in which he pleaded no contest to the murder of a Tyler secretary. "I hope I never encounter another case so dived with perjury," said James McCloskey, head of the nonprofit Centurion Ministries, which has taken up some death row appeals.



Chronicle

Skeen terms that criticism "an absurd exaggeration."

"When we have a violent crime, we — the prosecutors, not the defense attorneys — talk to the investigating officers and the victim and make sure they agree before entering into a plea bargain," said Skeen.

In addition, Holcomb and other Tyler lawyers, many of whom requested anonymity, said Skeen's office is so driven toward convictions that his 30 assistants are required to file a written report if they lose a case.

"The district attorney is closely allied with the police, and the judges try to outdo each other in being tough," said Holcomb.

"It's nothing crooked, nothing done for monetary gain, just a win-at-all-costs policy."

Skeen doesn't deny his ties to law enforcement. He has received honorary awards repeatedly for support of Tyler police officers.

Recently, when Smith County Sheriff's Lt. David Beddingfield, son of the chief deputy, was accused of drug violations, Skeen recused his office from the investigation, citing a "close working relationship" with the sheriff's office.

Instead, a prosecutor was called in from the Texas Attorney General's Office to work with a grand jury investigating the case.

"I don't know how you avoid prosecuting police officers," said Holcomb. "I prosecuted several when I was DA."

Holcomb is not alone in his opinions, but he is one of the few Tyler attorneys willing to make it public. Tyler, with its oil and gas business, has almost 400 lawyers, but few practice criminal law and fewer still are willing to openly criticize the district attorney in the town's tight-knit legal community.

It's a community in which intermarriage and blood ties abound:

Assistant District Attorney Alicia Caswell is married to a Tyler police detective and sometimes prosecutes cases her husband investigates. County Court-at-Law Judge Randall Rogers' wife, Lois, works as court coordinator for County Court-at-Law Judge Thomas Dunn, whose court coordinator, Anne Bingham, is married to Assistant District Attorney Matt Bingham.

Dunn's wife, Vickie, who formerly worked in the district attorney's office, now works as clerk for state District Judge Carole Clark.

Judge Clark's husband, A.D. Clark, now with the Texas Attorney General's Office, preceded Skeen as district attorney and held that office when the Cook case was filed.

And A.D. Clark is Jack Skeen's first cousin.

Across the square from Holcomb's office, perched in the only office on the 14th floor of downtown's tallest building, attorney Brandon Baade looked down toward the Smith County Court House and the office of Jack Skeen.

"Sometimes I wonder what they're going to pull out of the hat next," said Baade.

It's a safe bet that it won't be a commendation for Baade. The criminal defense attorney has been at odds with Skeen and his prosecutors for the past three years.

Privately, members of the district attorney's office equate Baade with Nugent, contending that he is overly aggressive and confrontational. Baade, they say, doesn't belong in Tyler.

"But I do belong here," said Baade. "I'm from here."

At 45, Baade is an unlikely crusader. He left the oil and gas business to pursue law, then practiced in Virginia for several years before returning to his hometown. Since then, he apparently has filed more motions attacking the district attorney's evidence policies than any other Tyler attorney.

"When they say they give you more evidence on discovery than most other offices, I think that's true," said Baade. "They give you a great deal. It's what they don't give you that worries me."

After all, Skeen's office began sequentially numbering discovery material only after failing to provide all the material to Baade in one of his cases.

Most of Baade's motions have been successful. Among his admirers he has come to be known as a "bulldog" and a "firebrand." Detractors call him a "rabble-rouser" and a "publicity seeker" and some in Skeen's office have used more unprintable terms.

Baade says he doesn't mind the references, but he resents the omissions of evidence that made his motions necessary.

"Maybe I'm naive, but I really thought the district attorney's office was just as bound to seek truth and justice as any other part of the judicial system," he said.

"That's not what they do here. They don't actually violate the law. They manipulate it, just like they did with Kerry Max Cook."

"The jokes about the Lady of Justice are true. "Around here, she really isn't blind."