
Nuts and Bolts of a Criminal Case from Start to Finish

**Improving Indigent Defense in Appointed Counsel Systems
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CHAPTER 1: HOW A CRIMINAL CASE BEGINS

The profession roles in beginning of a criminal case can be best simplified as follows:

- the police *investigate*;
- the prosecutor *charges*; and
- the defense *advises and critiques*.

A criminal defense lawyer's involvement is contingent upon a client's request for assistance. In cases where a person asks for help during the investigation phase, a lawyer may be called upon to advise a client whether to agree to cooperate with the investigation, give a voluntary statement, or consent to a search. Similarly, the lawyer could be involved in conversations with the prosecutor before he or she makes the decision to file charges.

As you will see, these opportunities are invaluable when compared with the defense lawyer's severely limited role to otherwise critique the police investigation or negotiate with the prosecutor's charging decision. It is also much harder work. Defending against a case that has been filed is fairly easy: you already know that the worst that can happen is the client will be found guilty. But when a client engages defense counsel early in the criminal investigation, there is a tremendous pressure for you to make the right strategic decisions which successfully end the investigation or prevent charges from being filed. Even if there is nothing you could do to prevent charges from being filed, you will personally feel the psychological pressure and stress of advising the client how to respond to an investigation.

With this in mind, analyze the beginning of a criminal case with the perspective of how you would advise a client at each stage in the investigative process.

I. THE RIGHTS OF POLICE TO INVESTIGATE

Much of the work that a criminal defense lawyer does related to the police investigation is to aggressively review how the police obtained evidence against your client. As our DWI hypothetical for Boot Camp illustrates, most interactions between our clients and the police will happen as part of a traffic stop. Thus, the focus of this Part will be to thoroughly understand the limits of police investigation that results in an arrest or search as compared to police investigation that results in an application for a search or arrest warrant.

When analyzing an interaction between a citizen and a peace officer, a three step process is involved:

Step One: CLASSIFICATION

Is this a consensual encounter, a community caretaking stop, an investigative detention, or an arrest?

Step Two: PROOF

Is there a factual basis for the officer's classification?

Step Three: SCOPE

Did the officer's actions stay within the parameters of the classification?

Unfortunately, the fact-specific nature of what constitutes reasonable suspicion for investigative detentions often makes linear analysis a frustrating process. Instead, the fluidity of how consensual encounters turn into investigative detentions or how prolonged detentions mutate into arrests without probable cause makes this area of the law a consistent basis for litigation.

A. Stops & Seizures Without A Warrant

Traditionally, the courts have described three distinct categories of interactions between police officers and citizens: (1) encounters, (2) investigative detentions, and (3) arrests. *State v. Woodard*, 341 S.W.3d 404, 410–11 (Tex.Crim.App.2011); *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex.Crim.App.2011). The fourth category, a community caretaking stop, is carved out as an exception if the officer is primarily motivated to stop and assist an individual whom a reasonable person would believe is in need of help. *See Corbin v. State*, 85 S.W.3d 272, 276 (Tex.Crim.App.2002).

1. Consensual Encounters

a) **Consensual encounter: defined.**

A consensual encounter occurs when “an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers.” *Crain v. State*, 315 S.W.3d 43, 49 (Tex.Crim.App.2010). A citizen may, at will, terminate a consensual encounter. *Woodard*, 341 S.W.3d at 411.

Even when the officer does not communicate to the citizen that the request for information may be ignored, the citizen's acquiescence to the officer's request does not cause the encounter to lose its consensual nature. *Id.* If it was an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred. *Id.*

b) **Amount of proof needed for consensual encounter: none.**

An officer does not need probable cause or reasonable suspicion to initiate a consensual encounter. *State v. Velasquez*, 994 S.W.2d 676, 678 (Tex.Crim.App.1999); *see also Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to ‘disregard the police and go about his business,’ the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.”) (internal citations omitted). “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

c) **Scope of consensual encounter: almost limitless.**

An officer may, without reasonable suspicion, request identification and information from a citizen. *Woodard*, 341 S.W.3d at 411. Even if the officer did not tell the citizen that the request for identification or information may be ignored, the fact that the citizen complied with the request does not negate the consensual nature of the encounter. *Id.*

With consent, police officers can detain a citizen, search a citizen's person, and search a citizen's car or home. There are few limits to the scope of consent and the burden falls upon the citizen to revoke consent or limit the scope of consent. Law enforcement does not have to inform the citizen of their right to revoke or limit consent, and so the withdrawal of consent rarely, if ever, occurs.

2. Community Caretaking Stop

a) **Community Caretaking: defined.**

The United States Supreme Court expressly recognized that police officers do much more than enforce the law, conduct investigations, and gather evidence to be used in criminal proceedings. Part of their job is to investigate accidents—where there is often no claim of criminal liability—to direct traffic and to perform other duties that can be best described as “community caretaking functions.” *Cady v. Dombrowski*, 415 U.S. 433 (1973); *Wright v. State*, 7 S.W.3d 148 (Tex.Crim.App. 1999). As part of his duty to “serve and protect,” a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help.

b) **Amount of proof needed for community caretaking: none.**

A community-caretaking stop does not require the officer to have reasonable suspicion or probable cause to believe that an offense has been committed. *See Corbin v. State*, 85 S.W.3d 272, 276 (Tex.Crim.App.2002).

c) **Scope of consensual encounter: concern for safety.**

In determining whether a police officer acted reasonably in stopping an individual to determine if he needs assistance, the following factors are relevant to said determination: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and (4) to what extent the individual—if not assisted—presented a danger to himself or others. *Id.*

3. Investigative Detentions

a) **Investigative detention: defined.**

An investigative detention occurs when an individual is encountered by a police officer, yields to the officer's display of authority, and is temporarily detained for purposes of an investigation. *Johnson v. State*, 912 S.W.2d 227, 235 (Tex.Crim.App.1995). A temporary or investigative detention is a seizure. *Francis v. State*, 922 S.W.2d 176, 178 (Tex.Crim.App.1996); *Josey v. State*, 981 S.W.2d 831, 838 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd). However, an investigative detention is characterized by a lesser amount of restraint on an individual. *See Berkemer v. McCarty*, 468 U.S. 420, 437–40 (1984); *Francis v. State*, 922 S.W.2d 176, 178 (Tex.Crim.App.1996).

b) Amount of proof needed for investigative detention: Reasonable Articulate Suspicion (RAS)

The Fourth Amendment authorizes a brief investigatory detention based on reasonable articulable suspicion in order to determine identity, briefly investigate, and/or maintain the status quo. *See Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). “ [T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Davis v. State*, 947 S.W.2d 240, 242 (Tex.Crim.App.1997) (quoting *Terry* at 21-22)). To detain an individual for investigatory purposes, i.e., without a warrant, a police officer need only have a reasonable, articulable suspicion that the individual has been, or soon will be engaged in criminal activity. *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Crim.App. 2005). Reasonable suspicion exists if the officer has specific, articulable facts that when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Ford* at 492; *Garcia v. State*, 43 S.W.3d 527, 530 (Tex.Crim.App.2001).

Because an investigative detention is a seizure, reasonable suspicion must be shown by the officer to justify the seizure. *York v. State*, 342 S.W.3d 528, 535 (Tex.Crim.App.2011); *State v. Larue*, 28 S.W.3d 549, 553 n. 8 (Tex.Crim.App.2000). Police officers may stop and detain a person if they have a reasonable suspicion that a traffic violation is in progress or has been committed. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex.Crim.App.1992).

i. Amount of Proof: Objective Standard to Determine RAS

Whether or not an officer has reasonable suspicion to detain an individual for further investigation is determined from the facts and circumstances known to the officer at the time of the detention. *See Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App.2010). The standard disregards the subjective intent or motive of the officer, and limits the inquiry to the objective justification for the detention. *State v. Elias*, 339 S.W.3d 667, 674 (Tex.Crim.App.2011).

The articulable facts must show unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to a crime. *Martinez v. State*, 348 S.W.3d 919, 923 (Tex.Crim.App. 2011). Articulable facts must amount to more than a mere inarticulate hunch, suspicion, or good faith suspicion that a crime was in progress. *Crain* at 52. Whether the officer's suspicion to believe that an individual is violating the law is reasonable is evaluated based on “an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists.” *Ford*, 158 S.W.3d at 492.

ii. Amount of Proof: Totality of circumstances to Determine RAS

The trial court takes into account the totality of the circumstances in order to determine whether reasonable suspicion existed for the stop. *Martinez*, 348 S.W.3d 919 at 923. The totality of the circumstances includes both the content of the information possessed by the police and its degree of reliability. *Alabama v. White*, 496 U.S. 325, 330 (1990); *Martinez*, 348 S.W.3d at 924; *Blevins v. State*, 74 S.W.3d 125, 130–31 (Tex.App.-Fort Worth 2002, pet. ref'd). In determining whether information possessed by police rises to the level of reasonable suspicion, the quality of the information possessed is weighed against the quantity of information possessed. *See Rojas v. State*, 797 S.W.2d 41, 43 (Tex.Crim.App.1990) (balancing quality of information against quantity of information in the probable cause context); *Blevins*, 74 S.W.3d at 130. That is, a weakness in the quality of the information possessed may be overcome by the requisite quantity of corroborating facts demonstrating the reliability of the information. *See Smith v. State*, 58 S.W.3d 784, 790 (Tex.App.-Houston [14th Dist.] 2001, pet. ref'd) (balancing quality of information against quantity of information in the investigative stop context). Conversely, when the reliability of the information is increased, less corroboration is necessary. *See Martinez*, 348 S.W.3d at 923; *State v. Sailo*, 910 S.W.2d 184, 188 (Tex.App.-Fort Worth 1995, pet. ref'd).

Courts do not separately evaluate and accept or reject the individual objective facts relied on to establish reasonable suspicion because doing so does not adequately consider the totality of the circumstances; indeed, piecemeal evaluation and rejection of individual factors is prohibited by the Supreme Court. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002); *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989). In *Woods v. State*, the Court of Criminal Appeals rejected the ‘as consistent with innocent activity as with criminal activity’ test for determining reasonable suspicion. *Woods v. State*, 956 S.W.2d 33, 38 (Tex.Crim.App.1997). The Court of Criminal Appeals observed, “We recognize that there may be instances when a person's conduct viewed in a vacuum, appears purely innocent, yet when viewed in light of the totality of the circumstances, those actions give rise to reasonable suspicion.” *Id*; see also *Loesch v. State*, 958 S.W.2d 830, 832 (Tex.Crim.App.1997)(“Because reasonable suspicion is determined by the totality of the circumstances, an appellate court must look at all of the facts together to make the reasonable suspicion determination; facts that do not show reasonable suspicion in isolation may do so when combined with other facts.”)

iii. **Amount of Proof: No Need Point to Specific Penal Code Violation**

Reasonable suspicion is a much lower level of proof than by a preponderance of the evidence. Probable cause means a “fair probability that contraband or evidence of a crime will be found, and the level of suspicion for an investigative detention is less demanding than probable cause; the standard is “some minimal level of objective justification.” *Foster v. State*, 326 S.W.3d 609 (Tex.Crim.App.,2010) (reasonable suspicion when truck lurched and revved motor even though not in violation of the law) (citing Sokolow at 7).

In *Derichweiler v. State*, 348 S.W.3d 906 (2011) the Court of Criminal Appeals recently clarified – and simultaneously broadened – the ability of law enforcement to justify an investigative detention. The Court offers persuasive rationale from the origins of *Terry*:

Unlike the case with probable cause to justify an arrest, it is not a *sine qua non* of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction. The reason is simple but fundamental. A brief investigative detention constitutes a significantly lesser intrusion upon the privacy and integrity of the person than a full-blown custodial arrest. For this reason, a warrantless investigative detention may be deemed “reasonable” for Fourth Amendment purposes on the basis of a lesser quantum or quality of information—reasonable suspicion rather than probable cause. Likewise, because a detention is less intrusive than an arrest, the specificity with which the articulable information known to the police must demonstrate that a particular penal offense has occurred, is occurring, or soon will occur, is concomitantly less. It is, after all, only an “investigative” detention. So long as the intrusion does not exceed the legitimate scope of such a detention and evolve into the greater intrusiveness inherent in an arrest- sans-probable-cause, the Fourth Amendment will tolerate a certain degree of police proaction. Particularly with respect to information suggesting that a crime is about to occur, the requirement that there be “some indication that the unusual activity is related to crime” does not necessarily mean that the information must lead inexorably to the conclusion that a particular and identifiable penal code offense is imminent. It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable— i.e., it supports more than an inarticulate hunch or intuition—to suggest that something of an apparently criminal nature is brewing.

Derichweiler at 914 (footnotes omitted).

However, the most fact-intensive, fact-specific litigation involves what constitutes reasonable articulable suspicion. The facts in *Derichweiler* are as bizarre as perhaps the behavior of Mr. Derichweiler was alleged to be. A couple in the McDonald’s drive-thru lane called 911 because a man was “grinning and just being stopped beside...and looking straight at us [,which] just didn’t seem normal to me.” *Derichweiler* at 909. Mr. Derichweiler lingered for about a minute all the while grinning and staring at the couple. *Id.* After the police arrived, Mr. Derichweiler was subsequently arrested for DWI. *Id.* At the punishment phase of trial, the jury found that he had twice before been convicted for a felony. *Id.* He was sentenced to 47 years. *Id.*

Even the majority opinion seems squeamish about whether *Derichweiler* should be cited for the proposition that the police have new, unfettered discretion at proactive law enforcement for “grinning” and “bizarre” behavior. Because the 911 call originated from two citizens who were genuinely scared by Mr. Derichweiler, the Court appears obligated to acknowledge the need to encourage and reward citizens who take affirmative steps to call the police; public policy dictates that we err on the side of caution:

While it is admittedly a close call, the information known collectively to the police in this case ultimately satisfies this standard. The appellant's conduct, particularly as directed at the Holdens, while not overtly criminal in any way, was bizarre to say the least. Moreover, the repetition of similar, apparently scrutinizing, behavior directed at parked cars in the adjacent Wal-Mart parking lot reasonably suggests a potential criminal motive that transcended any particular interest in the Holdens themselves. It reasonably suggests someone who was looking to criminally exploit some vulnerability—a weak or isolated individual to rob or an unattended auto to burgle. It matters not that all of this conduct could be construed as innocent of itself; for purposes of a reasonable-suspicion analysis, it is enough that the totality of the circumstances, viewed objectively and in the aggregate, suggests the realistic possibility of a criminal motive, however amorphous, that was about to be acted upon. Under these circumstances, the Fourth Amendment permits the police to make a brief stop to investigate, if only by their presence to avert an inchoate offense.

Derichweiler at 917.

However, Judge Meyers' dissent articulates the concern by untethering reasonable articulable suspicion to an actual crime:

According to the majority, someone can call the police and give their name and a description of a vehicle they think is suspicious, and without any other information, the police can detain the driver of the vehicle. The officer in this case had no knowledge of the specific activity that had created the caller's suspicion, and the officer never claimed that he had reasonable suspicion to detain Appellant. Still, the majority says that "appellant's strangely persistent, if admittedly non-criminal, behavior, gave rise to a reasonable suspicion that he was about to engage in criminal activity." The only thing about the call-in tip that the officer corroborated was the description of Appellant's car. The officer had no specific, articulable facts from which to develop reasonable suspicion.

I also do not see how "reasonable suspicion he was about to engage in criminal activity" allows an officer to stop someone. I thought you had to have already committed a crime or an officer had to observe you committing a crime. They might have gotten by with a community care-taking theory but I'm not buying into the anticipatory illegal behavior proposal. Nevertheless it's the law now.

I'm not saying that a 911 caller has to cite a specific penal code section when reporting suspicious activity, but a general description of non-threatening, non-criminal behavior, that is neither observed nor corroborated by an officer, is not sufficiently detailed and reliable information "to suggest that something of an apparently criminal nature is brewing." The majority says the behavior (a driver grinning at the people in the car next to him) that was observed by the 911 caller was "bizarre" and "reasonably suggests someone who was looking to criminally exploit some vulnerability—a weak or isolated individual to rob or an unattended auto to burgle." Or maybe, just maybe, Appellant could have been looking for someone to give him directions.

Derichweiler at 919.

While reasonable articulable suspicion must be more than a "hunch," *Derichweiler* seems to suggest that "suspicions" are allowed. However:

Hunch: A feeling or guess based on intuition rather than known facts.

Suspicion: A feeling or thought that something is possible, likely, or true.

What is the difference between a hunch, suspicion, and an inference? Facts.

Inference: A conclusion reached on the basis of evidence and reasoning.

In reviewing what constitutes Reasonable Articulable Suspicion, it is very difficult to draw any definitive answer, other than to reiterate that it is a fact intensive inquiry. The trial court's findings will be given almost irreversible deference. Unless the court's findings of fact are unsupported in the record, the appellate courts are loathe to supplant the finder of fact's opinion.

iv. Specific Instances Demonstrating Reasonable Articulable Suspicion to Support Investigative Detention

The Fourth Amendment is satisfied if the officer's action is supported by a particularized and objective basis for suspecting the person stopped of criminality. If such a particularized and objective basis exists, then the investigatory detention is reasonable as a matter of law, regardless of the officer's subjective motivation. *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

The following behaviors have been held to support an objective basis for reasonable suspicion:

i. Any traffic violation: OK

Ordinarily, a violation of a traffic law committed in view of a police officer is sufficient authority for a traffic stop and temporary detention. *See Lemmons v. State*, 133 S.W.3d 751, 756 (Tex.App.-Fort Worth 2004, pet. ref'd). Even if the traffic violation has no bearing on public safety and is used as a pretextual stop, any violation provides reasonable suspicion. *See State v. Kidd*, No. 03-09-00620-CR, 2010 WL 5463893 (Tex.App.-Austin 2010) (although the trial court concluded that enforcement of the 100-foot rule of using a turn signal 'leads to unreasonable, perhaps

unforeseen, circumstances,' the statute's mandatory requirement that a driver intending to turn must 'signal continuously for not less than the last 100 feet' leads to absurd results.")

ii. Speeding (without proof of exact speed): OK

Despite arguments like “the radar detector either was not properly calibrated” or “there was no evidence to show that it was calibrated,” when an officer testifies without objection that he observed the vehicle traveling in excess of the speed limit, the officer does need to prove the exact speed at which the vehicle was moving in order to have reasonable suspicion for an investigatory detention. *Dillard v. State*, 550 S.W.2d 45, 53 (Tex.Crim.App.1977) (op. on reh'g). Even if the radar had eventually been shown to be inaccurate, the officer would have been justified in relying upon it to develop reasonable suspicion for purposes of conducting a traffic stop. *Icke v. State*, 36 S.W.3d 913, 915–16 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

iii. Personal knowledge of criminal past: OK?

While being in a car with a known prostitute is reasonable suspicion (see *Acosta v. State*, 868 S.W.2d 19, 21 (Tex.App.-Austin 1993, no pet.)(holding that officer's knowledge of prostitute's background supports reasonable suspicion for investigative stop); *Green v. State*, 2004 WL 2966370 (Tex.App.-Houston [1 Dist.], 2004 (suspect in car with known prostitute)), being a known drug dealer is not enough for reasonable suspicion (see *Hawkins v. State*, 758 S.W.2d 255 (Tex.Crim.App. 1998).

In a small town where the police officer knew suspect from extensive past experiences that despite his repeated encouragements to get a driver's license, each of the police officer's subsequent encounters verified that defendant had not obtained one. The officer thus possessed reasonable suspicion when motorist tried to avoid being recognized by the officer amounted to reasonable suspicion to stop without any traffic violation. *Komoroski v. State*, 2012 WL 1947344 (Tex.App.-Ft. Worth, 2012) (not designated for publication).

iv. Reliable, corroborated, recent, and specific informant's tip: OK

An informant's tip may, in certain cases, provide reasonable suspicion. This will depend on various factors, including: 1) the credibility and reliability of the informant, 2) the specificity of the information contained in the tip or report, 3) the extent to which the information in the tip or report can be verified by officers in the field, and 4) whether the tip or report concerns active or recent activity, or has instead gone stale. *United States v. Gonzalez*, 190 F.3d 668, 672 (5th Cir.1999) (citing *Alabama v. White*, 496 U.S. 325, 328–32, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)); *United States v. Perkins*, 352 F.3d 198, 199 (5th Cir.2003) (citing same). See, e.g., *United States v. Gomez*, 623 F.3d 265 (5th Cir. 2010) (stop of defendant's vehicle was supported by reasonable suspicion because the officers still had reasonable suspicion under the 4-factor test set in *United States v. Martinez*, 486 F.3d 855 (5th Cir. 2007)); *Peralta v. State*, No. 08-09-00006-CR, 2010 WL 4851388 (Tex.App.-El Paso Nov. 30, 2010) (officer had reasonable suspicion to conduct investigatory stop, despite defense argument that he drove a red vehicle and that police radio broadcast described car as "primer-old" color and referenced no license plate number because officer possessed additional information, to wit: "[Officer] knew the ... make, and model of the car; the approximate time [D] was last seen at the apartment complex; and the area in which [D] was likely to be located."); see also *State v. Fudge*, 42 S.W.3d 226 (Tex. App. - Austin 2001) (face to face tip by unknown cab driver); *Pipkin v. State*, 114 S.W.3d 649 (Tex. App. - Fort Worth 2003) (cellular phone user identified herself and described vehicle where she observed driver smoking crack).

v. Erroneous but trustworthy information: OK

An investigatory detention or an arrest is not invalid merely because an officer relies upon reasonably trustworthy information that later proves to be erroneous. *Dancy v. State*, 728 S.W.2d 772, 783 (Tex.Crim.App.1987); *Brown v. State*, 986 S.W.2d 50, 51 (Tex.App.-Dallas 1999, no pet.) (concluding that although there was no evidence that the vehicle was actually stolen, the officers had probable cause for the warrantless arrest based on the stolen vehicle information on the “hot sheet,” thus the contraband found as a result was admissible); *Kelly v. State*, 721 S.W.2d 586, 587 (Tex.App.-Houston [1st Dist.] 1986, no writ) (finding that stop of defendant because officer believed the vehicle was stolen provided the officer with reasonable suspicion to detain defendant regardless of whether the information was shown to be inaccurate or false).

vi. Odor of marijuana: REALLY, REALLY OK

The odor of marijuana provides reasonable suspicion of criminal activity to justify an investigatory detention and probable cause to justify a search of a vehicle without a warrant. *Razo v. State*, 577 S.W.2d 709, 711 (Tex.Crim.App.1979); *Taylor v. State*, 20 S.W.3d 51, 55–56 (Tex.App.-Texarkana 2000, pet. ref'd); *Small v. State*,

977 S.W.2d 771, 774 (Tex.App.-Fort Worth 1998, no pet.); *see Isam v. State*, 582 S.W.2d 441, 444 (Tex.Crim.App.1979).

v. Factors supporting Reasonable Articulate Suspicion to Support Investigative Detention

When viewed alone, these individual factors are insufficient to provide reasonable suspicion. However, if combined with other factors, the following actions can provide a basis for reasonable suspicion:

i. Odor of alcohol while driving: Factor

Rarely will a DWI arrest only allege an odor of alcohol without articulating any other factors which suggest impairment. Thus, few – if any – cases actually have only that fact at issue to determine whether reasonable suspicion can be determined by the smell of alcohol alone. The appellate courts typically list other factors which contribute to the finding of reasonable suspicion.

It is not illegal to consume alcohol and drive a vehicle. Thus, it would appear that the odor of alcohol alone would be insufficient to support a brief investigatory detention as neither the act of driving nor drinking before driving is illegal. However, while many cases imply that the odor of alcohol is enough to warrant a detention – the opinions always cite additional factors which suggest impairment or intoxication. The best synopsis of the law is that an odor of alcohol on a motorist’s breath in conjunction with another violation or indication of impairment constitutes reasonable suspicion for an investigation of intoxication. *See Sanchez v. State*, 582 S.W.2d 813, 814–15 (Tex.Crim.App. [Panel Op.] 1979) (the odor of alcohol can constitute, or contribute to, reasonable suspicion of intoxication); *State v. Brabson*, 899 S.W.2d 741, 749 (Tex.App.-Dallas 1995), *aff’d*, 976 S.W.2d 182 (Tex.Crim.App.1998) (holding that reasonable suspicion to detain arose when the suspect honked his horn excessively and emitted a strong odor of alcohol); *Shakespeare v. State*, No. 03-00-00707-CR, 2001 Tex.App. LEXIS 2727, at *5-6, 2001 WL 421003 (Tex.App.-Austin Apr.26, 2001, no pet.) (not designated for publication); *State v. Brabson*, 899 S.W.2d 747, 749 (Tex.App.-Dallas 1995), *aff’d*, 976 S.W.2d 182 (Tex.Crim.App.1998); *State v. Wharton-Hasty*, No. 04-09-00428-CR, 2010 WL 2403730, at *2 (Tex.App.-San Antonio June 16, 2010, no pet.) (holding that bloodshot eyes and “slight” odor of alcohol were sufficient to constitute reasonable suspicion to conduct field sobriety tests); *Thomas v. State*, 336 S.W.3d 703, 709–10 (Tex.App.-Houston [1st Dist.] 2010, pet. ref’d) (officer justified in continuing detention after stopping vehicle for unrelated traffic violation when, on approaching driver after stop, he smelled alcohol on driver's breath); *Evans v. State*, 2011 WL 5994429 (Tex.App.-Eastland, 2011) (upon smelling alcohol upon approaching vehicle officer developed reasonable suspicion for DWI); *State v. Esparza*, 353 S.W.3d 276 (Tex.App.-El Paso, 2011) (once officer detected strong odor of alcohol from the defendant he had reasonable suspicion to investigate whether he was intoxicated); *Harper v. State*, 349 S.W.3d 188 (Tex.App.-Amarillo, 2011) (odor of alcohol from car allows reasonable suspicion that there was an open container of alcohol in the car and warrantless search resulting in discovery of marijuana is permissible); *State v. Priddy*, 321 S.W.3d 82, 88 (Tex.App.-Fort Worth 2010, pet. ref’d) (holding there was reasonable suspicion to detain the driver for investigation of driving while intoxicated when the officer smelled alcohol coming from the vehicle and saw the driver's bloodshot and glazed eyes); *Perales v. State*, 117 S.W.3d 434, 439 (Tex.App.-Corpus Christi 2003, pet. ref’d) (finding reasonable suspicion to detain when the officer stopped the defendant for speeding, saw that the defendant's eyes were red, smelled a strong odor of alcohol coming from the car and on Perales' breath, and noticed a beer bottle in plain view behind the seat); *State v. Woodard*, 314 S.W.3d 86 (Tex.App.-Ft.Worth 2010) (consensual encounter between defendant and officer escalated into an investigative detention only after officer had reasonable suspicion that defendant had been driving while intoxicated; after approaching defendant, officer observed defendant's bloodshot and glazed eyes, unsteadiness, staggering walk, and odor of alcohol on his breath and body, and these observations, defendant's admission that he drove the wrecked vehicle while intoxicated, and officer's report of finding a cold, partially consumed open container in the wrecked vehicle created ample, specific, articulable facts that led officer reasonably to conclude that defendant had been driving while intoxicated); *Goudeau v. State*, 209 S.W.3d 713, 719-20 (Tex. App. -Houston [14th Dist.] 2006, no pet.) (holding bloodshot eyes, slurred speech, and an open container of alcohol on the passenger's seat gave rise to reasonable suspicion defendant may have been driving while intoxicated); *Jackson v. State*, No. 05-10-00816-CR, 2012 WL 206494 (Tex.App.-Dallas Jan 25, 2012) (Officer had probable cause to arrest D for DWI, despite officer's admission that the smell of alcohol on motorist's breath did not necessarily indicate intoxication and that defendant’s bloodshot eyes could have been caused by chemicals released from the vehicle's air bag deployment);

But see State v. Wharton-Hasty, 2010 WL 2403730 (Tex.App.-San Antonio, 2010) (not designated for publication) (considering the totality of the circumstances, the observation of driver’s bloodshot eyes and the smell of a “slight” odor of alcohol on driver’s breath were not sufficiently specific articulable facts to support a reasonable suspicion that motorist was driving while intoxicated)

ii. Suspicious Actions in a High Crime Area: Factor

An officer's knowledge that the area in which a defendant is apprehended is a "high crime area" is a factor that may be taken into account along with the rest of the circumstances. *See United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding that under totality of circumstances, reasonable suspicion existed, and considering border patrol agent's knowledge that road traveled by defendant was commonly used by drug smugglers to avoid border patrol); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting that, while presence in a high-crime area alone is not enough to support reasonable suspicion, fact that incident occurs in a high crime area is relevant factor to be considered in reviewing totality of circumstances); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex.App.-Houston [14th Dist] 1991, pet. ref'd) (considering fact that defendant was "apprehended in a residential neighborhood that was known for its very high crime and its high narcotics trafficking"); *Ortega v. State*, No. 14-97-01084-CR, 1999 WL 717636, at *2 (Tex.App.-Houston [14th Dist.] Sept. 16, 1999, pet. ref'd) (not designated for publication) (holding officer's knowledge that hotel where defendant was apprehended was "a notorious location for illegal narcotics activity").

iii. Night: Factor

Law enforcement has greater latitude during nighttime hours—the time when crime is especially likely to occur. *See Amorella v. State*, 554 S.W.2d 700, 701 (Tex.Crim.App.1977) (using the late hour as a factor in determining whether law enforcement officer had reasonable suspicion); *see also Arroyo v. State*, No. 01-10-00136-CR, 2011 WL 286136 (Tex.App.-Houston [1 Dist] Jan. 27, 2011) (Sunday at 4:50 a.m. deemed "a time at which more individuals drive intoxicated").

iv. Nervousness: Factor

Nervousness is a factor to consider in determining reasonable suspicion. *Balentine v. State*, 71 S.W.3d 763, 769 (Tex.Crim.App.2002); *Illinois v. Wardlow*, 528 U.S. 119, 124, (2000); *Haas v. State*, 172 S.W.3d 42, 54 (Tex.App.-Waco 2005, pet. ref'd). "Extreme nervousness has traditionally been a fact that law enforcement has used in its list of elements leading up to either reasonable suspicion or probable cause." *Veal v. State*, 28 S.W.3d 832, 837 (Tex.App.-Beaumont 2000, pet. ref'd) (citing *U.S. v. Sokolow*, 490 U.S. 1, 3 (1989)).

v. Evasive behavior: Factor

Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

vi. Prior criminal history: Factor

While an officer's personal knowledge of an individual may itself suffice for reasonable suspicion, prior arrests alone cannot be the basis for reasonable suspicion. *United States v. Jones*, 234 F.3d 234, 242 (5th Cir.2000) (noting that prior arrest alone does not amount to reasonable suspicion), but, in certain cases, they can be a factor to consider in determining reasonable suspicion when combined with other factors and especially when those arrests are drug related; *Parker v. State*, 297 S.W.3d 803, 811 (Tex.App.-Eastland 2009, pet. ref'd) (considering lengthy criminal history, including numerous drug offenses, as part of totality of circumstances in reasonable suspicion determination); *Coleman v. State*, 188 S.W.3d 708, 718-19 (Tex.App.-Tyler 2005, pet. ref'd), *cert. denied*, 549 U.S. 999 (2006) (one of the three factors identified by officer that gave rise to reasonable suspicion was the defendant's prior arrests for drug offenses); *Powell v. State*, 5 S.W.3d 369, 378 (Tex.App.-Texarkana 1999, pet. ref'd) (same), *cert. denied*, 529 U.S. 1116 (2000) (prior drug offenses and nervousness were factors considered in determining whether post-citation detention was reasonable); *see also Morris v. State*, No. 07-06-00141-CR, 2006 WL 3193724, at *3 (Tex.App.-Amarillo Nov. 6, 2006, no pet.) (mem. op., not designated for publication) (same).

vii. Furtive gestures: Factor

Furtive movements during a police stop may be a factor giving rise to reasonable suspicion. *LeBlanc v. State*, 138 S.W.3d 603, 608 n. 5 (Tex.App.-Houston [1st Dist.] 2004, no pet.). Evidence of nervousness, furtive gestures, sudden movements, or flight alone may be innocent, but if these actions are combined with other factors, they can give rise to reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Worthey v. State*, 805 S.W.2d 435, 438-39 (Tex.Crim.App.1991); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd); *Lippert v. State*, 664 S.W.2d 712, 721 (Tex.Crim.App.1984) (holding that officer had no justification for detention where, among other factors, defendant had made "no furtive gestures or sudden movements towards a pocket or other place where a weapon might be concealed"); *McCraw v. State*, 117 S.W.3d 47, 54 (Tex.App.-Fort Worth 2003, pet. ref'd) (noting absence of any testimony defendant made furtive gestures that could have led officer to believe defendant had a weapon in the vehicle); *Gaines v. State*, 99 S.W.3d 660, 667 (Tex.App.-Houston [14th

Dist.] 2003, no pet.) (noting that United States Supreme Court opinions have recognized nervous, evasive behavior as a pertinent factor in determining reasonable suspicion for a detention). Further, a temporary detention is an appropriate method to ensure officer safety under circumstances in which an officer reasonably feels threatened. *See Rhodes v. State*, 945 S.W.2d 115, 117-18 (Tex.Crim.App.1997). *Zone v. State*, 84 S.W.3d 733, 738-39 (Tex.App.-Houston [1st Dist.] 2002), *aff'd*, 118 S.W.3d 776 (Tex. Crim.App.2003) (defendant being handed something and quickly walking away after police arrived constituted furtive movement giving rise to reasonable suspicion).

vii. Flight: Factor

Flight from a police officer, when combined with other suspicious circumstances is often a decisive factor in support of a finding of reasonable suspicion. *See, e.g., Washington v. State*, 660 S.W.2d 533, 535 (Tex.Crim.App.1983) (“Flight from a law enforcement officer ‘can provide in appropriate circumstances the key ingredient justifying the decision of a law enforcement officer to take action.’”) (quoting *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir.1976)); *Reyes v. State*, 899 S.W.2d 319, 324 (Tex.App.-Houston [14th Dist.] 1995, pet. ref'd) (characterizing flight as “the straw that broke the camel's back” in justifying officer's decision to detain appellant); *see also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (recognizing “nervous, evasive behavior” as “a pertinent factor in determining reasonable suspicion” and characterizing “headlong flight” as “the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such”); *Reyes v. State*, 899 S.W.2d 319, 325 (Tex.App.-Houston [14th Dist.] 1995, pet. ref'd) (holding that flight from authority supports reasonable suspicion for investigative detention).

vi. Specific Instances Lacking Reasonable Articulable Suspicion to Support Investigative Detention

While the totality of a number of these facts may result in reasonable suspicion, the following factors alone are insufficient:

i. Uncorroborated Anonymous Tip: NO

An uncorroborated anonymous tip, standing alone, does not establish reasonable suspicion to believe that a person is engaged or about to be engaged in criminal activity. *See Florida v. J.L.*, 529 U.S. 266, 272 (2000) (“The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”). Law enforcement “generally cannot rely alone on a police broadcast of an anonymous phone call to establish reasonable suspicion.” *Hall v. State*, 74 S.W.3d 521, 525 (Tex.App.-Amarillo 2002, no pet.) (quoting *Garcia v. State*, 3 S.W.3d 227, 234–35 (Tex.App.-Houston [14th Dist.] 1999), *aff'd*, 43 S.W.3d 527 (Tex.Crim.App.2001)); *see also Davis v. State*, 989 S.W.2d 859 (Tex.App. - Austin 1999) (phone call accurately describing defendant's vehicle with the additional claim that it was being driven "recklessly" did not provide sufficient suspicion to stop vehicle when police saw no unusual driving of the vehicle); *Garcia v. State*, 3 S.W.3d 227 (Tex. App. - Houston[14th Dist.] 1999) (anonymous tip was not sufficiently corroborated in this marijuana in home case and subsequent consent was tainted by the illegal detention); *Hall v. State*, 74 S.W.3d 521 (Tex. App. - Amarillo 2002) (anonymous tip of DWI driver coupled with no poor driving observed by law enforcement did not justify stop of automobile); *Johnson v. State*, 146 S.W.3d 719 (Tex.App. - Texarkana 2004) (anonymous tip did not justify detention); *Swaffar v State*, 258 S.W.3d 254 (Tex.App. - Fort Worth 2008) (anonymous tip of couple fighting in parking lot with man possibly intoxicated coupled with officer observation of no poor driving was not sufficient to justify stop); *State v. Sanders*, No. 04-11-00392-CR (Tex.App.-San Antonio, 2011) (officer lacked RS to justify investigatory stop of vehicle, despite officer's observation of D's vehicle crossing highway's center stripe coupled with anonymous caller's tip reporting dangerous driving by a vehicle matching D's vehicle); *State v. Wilson*, No. 06-10-00188-CR, 2011 WL 923954 (Tex.App.-Texarkana, 2011) (although officer received an anonymous tip that the vehicle contained drugs, officer was only able to corroborate, at most, "innocent details" from the tip, such as the color and make of the vehicle and that two females were in the vehicle).

ii. Police broadcast tip: NO

If the sole basis for a vehicle stop is a police broadcast and there is no evidence in the suppression hearing as to the source of the information that gave rise to the broadcast, the evidence does not justify a Terry stop. *State v. Jennings*, 958 S.W.2d 930 (Tex.App. - Amarillo 1997); *Hayes v. State*, 132 S.W.3d 147 (Tex.App. - Austin 2004) (tip for other officer that Defendant “might have a warrant” out for him did not justify detention).

iii. Avoiding a consensual encounter: NO

Avoiding police is not unlawful. *See Gurrola v. State*, 877 S.W.2d 300, 302–03 (Tex.Crim.App.1994); *Cook v. State*, 1 S.W.3d 718 (Tex.App. - El Paso 1999) (hand movements indicative of a drug transaction in a high drug transaction area coupled with defendant walking away from approaching officer did not give rise to a reasonable

suspicion); *cf Barrett v. State*, 718 S.W.2d 888, 890 (Tex. App.-Beaumont 1986, pet. ref'd) (court held that defendant's stopping of his vehicle 100 feet behind the stop line for a red light and behind a police car in the adjacent lane, created reasonable suspicion that defendant intended to avoid the police or needed assistance, justifying a brief investigatory detention).

iv. Nervousness: NO

Nervousness alone does not support a reasonable suspicion determination. *Davis v. State*, 947 S.W.2d 240, 248 (Tex.Crim.App. 1997) (“It is not indicative of guilt for a person to be nervous when confronted by police officers asking questions.”). Nervousness alone is not sufficient to establish reasonable suspicion and is of minimal probative value. *Sieffert v. State*, 290 S.W.3d 478, 485 (Tex.App.-Amarillo 2009, no pet.), citing *Deschenes v. State*, 253 S.W.3d 374, 383 n. 10 (Tex.App.-Amarillo 2008, pet. ref'd) (collected cases cited therein). See also *McQuarters v. State*, 58 S.W.3d 250, 257–58 (Tex.App.-Fort Worth 2001, pet. ref'd) (“nervousness is a weak indicator of hidden narcotics”); see also *State v. Velasquez*, 994 S.W.2d 676, 679 (Tex.Crim.App.1999) (noting even an innocent person's pulse might race when a police officer identifies himself and begins asking questions). Nervous behavior is a pertinent factor in determining reasonable suspicion, but nervousness alone is not sufficient to provide reasonable suspicion. *Green v. State*, 256 S.W.3d 456, 462 (Tex.App.-Waco 2008, no pet.); *LeBlanc v. State*, 138 S.W.3d 603, 608 n. 6 (Tex.App.-Houston [14th Dist.] 2004, no pet.); *Munera v. State*, 965 S.W.2d 523, 531 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).

v. Hunch, suspicion, “spider sense”: NO

An officer's suspicion that “something [is] out of the ordinary” is nothing more than an inarticulate hunch or suspicion—insufficient for a temporary detention. *Sieffer v. State*, 290 S.W.3d 478 (Tex.App.-Amarillo, 2009) (citing) *Talbert v. State*, 489 S.W.2d 309, 311 (Tex.Crim.App.1973). See, e.g., *Davis*, 947 S.W.2d at 245–46 (no reasonable suspicion to detain when officers concluded out-of-state driver was not intoxicated but they also believed the driver was not on a business trip as represented); *White v. State*, 574 S.W.2d 546, 547 (Tex.Crim.App.1978) (reasonable suspicion did not exist where vehicle observed driving aimlessly in mall parking lot even though there had been a rash of purse snatchings in the parking lot); *State v. Losoya*, 128 S.W.3d 413, 415 (Tex.App.-Austin 2004, pet. ref'd) (no reasonable suspicion when officers, acting on an anonymous tip of a “black male” involved in narcotics activity, observed a “black male” make a “hasty” departure from high crime area after observing the police); *Klare v. State*, 76 S.W.3d 68, 72, 77 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd) (no reasonable suspicion where pickup truck was observed parked behind a shopping center at 2:30 a.m., all the businesses were closed and the shopping center had been burglarized a number of times); *Davis v. State*, 61 S.W.3d 94, 98–99 (Tex.App.-Amarillo 2001, no pet.) (no reasonable suspicion where a group of people were gathered in a yard located in a neighborhood known for drug trafficking and defendant was observed walking to and from the group several times); *Turner v. State*, No. 05-10-01225-CR (Tex.App.-Dallas Oct 18, 2011) (officer lacked reasonable suspicion to stop vehicle leaving neighborhood despite the late hour and despite officer's hunch that the occupants were part of a burglary ring). Likewise, an officer's mere subjective opinion does not rise to the level of articulable facts. See *Ford*, 158 S.W.3d at 493.

vi. High crime area: NO

One's mere presence on a street in a high crime area at night does not provide reasonable suspicion sufficient to authorize an investigatory stop. See *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (“an individual's presence in the area of expected criminal activity, standing alone, is not enough to support reasonable particularized suspicion that [a] person is committing a crime”); *Sieffert v. State*, 290 S.W.3d 478, 484–85 (Tex.App.Amarillo 2009, no pet.) (concluding that driving a vehicle through a high crime area late at night at a speed lower than the speed limit while appearing nervous did not evince reasonable suspicion to believe criminal activity was afoot); *Cook v. State*, 1 S.W.3d 722, 726 (Tex.App.-El Paso 1999, no pet.) (mere presence at the scene was insufficient to create reasonable suspicion); *Gurrola v. State*, 877 S.W.2d 300, 303-04 (Tex.Crim.App.1994) (holding that officers lacked reasonable suspicion to detain and search appellant who walked away from argument in parking lot of apartment complex in high crime area); *Klare v. State*, 76 S.W.3d 68, 77 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd) (officer had no reasonable suspicion to detain appellant who was spotted sitting in his car behind a closed shopping center in an area that experienced burglaries in the past because the officer failed to show appellant was or was about to be engaged in criminal activity); *Brown v. Texas*, 443 U.S. 47, 49, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (holding that reasonable suspicion was not established where officers detained subject walking in alley in high crime area and noting that “officers did not claim to suspect appellant of any specific misconduct”).

While a person's presence in a particular area alone is not enough to justify an investigative detention, a person's actions in that high crime area that are consistent with criminal activity can warrant a Terry stop. See

Amorella v. State, 554 S.W.2d 700, 702–03 (Tex.Crim.App.1977) (finding reasonable suspicion when a car was parked next to a closed store late at night in a high crime area with the motor running and its trunk open, and the car drove away as the officer approached); *Cronin v. State*, No. 03–04–00266–CR, 2005 WL 3440745, at *5–6, 2005 Tex.App.LEXIS_10450, at *15–16 (Tex.App.-Austin December 16, 2005, no pet.) (released for publication) (finding reasonable suspicion when the officer saw a pickup truck drive slowly out of the parking lot of a business that had been closed for several hours, the truck appeared to come from behind the building, the officer had never seen vehicles in the parking lot after the restaurant was closed, it was late at night, and windows of a neighboring business had been broken five weeks earlier); *Holland v. State*, No. 05–04–00308–CR, 2004 WL 1842930, at *2–3, 2004 Tex.App.LEXIS_7401, at *7–8 (Tex.App.-Dallas August 18, 2004, no pet.) (not designated for publication) (finding reasonable suspicion due to a vehicle being parked at a late hour at a closed shopping center and car wash where there had been burglaries and the behavior of the vehicle in driving forward and backward).

vii. Refusal to consent: NO

Refusal to consent to a search, by itself, is insufficient to show reasonable suspicion. *See Davis v. State*, 947 S.W.2d 240, 241 (Tex.Crim.App. 1997); *Sieffert v. State*, 290 S.W.3d 478, 484 (Tex.App.-Amarillo 2009, no pet.); *Green v. State*, 256 S.W.3d 456, 462 (Tex.App.-Waco, 2008).

viii. Flight: NO

Flight alone is insufficient to justify an investigatory detention, and flight from a show of authority is only a factor in support of a finding of reasonable suspicion that an individual is involved in criminal activity. *Reyes v. State*, 899 S.W.2d 319, 325 (Tex.App.-Houston [14th Dist.] 1995, pet. ref'd); *Salazar v. State*, 893 S.W.2d 138, 141 (Tex.App.-Houston [1st Dist.] 1995, pet. ref'd, untimely filed); *Castillo v. State*, 2011 WL 4830168 (Tex.App.-San Antonio Oct 12, 2011) ; *see also Carmouche*, 10 S.W.3d at 328; *Pina*, 127 S.W.3d at 75. Because evidence of flight alone, even upon a showing of authority, is insufficient to establish reasonable suspicion for an investigative detention, there must be additional facts presented to justify a seizure.

ix. Mere conclusions of traffic violation: NO

See Ford v. State, 158 S.W.3d 488 (Tex.Crim.App. 2005) (officer's testimony that Defendant was "following too close" to another vehicle is not specific enough and thus conclusory).

x. Driving slower than the speed limit: NO

Driving 45 in a 65 when no traffic was around was insufficient to justify traffic stop based upon "Impeding Traffic" statute found at Transportation Code § 545.363.

Richardson v. State, 39 S.W.3d 634 (Tex. App. - Amarillo 2000); *see also Viveros v. State*, 828 S.W.2d 2, 3 (Tex.Crim.App.1992); *Shaffer v. State*, 562 S.W.2d 853, 854–55 (Tex.Crim.App.1978).

xi. Driving on an Improved Shoulder: NO

Merely driving on an improved shoulder is not prima facie evidence of an offense. Thus if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred. *Lothrop v. State*, S.W.3d , 2012 WL 1605145 (Tex.Crim.App. 2012).

xii. Odor of alcohol (for public intoxication): NO

So long as consumption of alcohol is not illegal in and of itself, a standard permitting or requiring detention and investigation of persons for public intoxication based solely on whether the odor of alcohol on a person's breath is "strong," "moderate," "weak" or some other such subjective classification invites unwarranted police intrusions into the affairs and freedom of persons. *Domingo v. State*, 82 S.W.3d 617 (Tex.App.-Amarillo, 2002). Because of the absence of articulable facts which could reasonably raise a suspicion that appellant had either impaired mental or physical faculties due to alcohol consumption, or a blood alcohol level of .08 or more, appellant's detention for investigation of public intoxication violated his Fourth Amendment rights.

xiii. Time of day: NO

Although the time of day and the level of criminal activity in an area may be factors to consider in determining reasonable suspicion, they are not suspicious in and of themselves; *Hudson v. State*, 247 S.W.3d 780, 786–87 (Tex.App.-Amarillo 2008, no pet.); *Green*, 256 S.W.3d at 462.

xiv. **Deliberately following the letter of the law: NO**

What happens if the reasonable suspicion is that the person is trying too hard not to get pulled over? *See Gonzalez-Gilando v. State*, 306 S.W.3d 839 (Tex.App.-Amarillo, 2010) (investigative stop of vehicle for driving a clean car, looking away from passing police officers, obey traffic warnings and abide by posted speed limits was not reasonable suspicion). People are free to drive any type of vehicle they choose, slow at a blinking yellow light, look at whom they choose while driving, and maintain a speed below the limit without expecting to be pulled over by law enforcement officers. *See Klare v. State*, 76 S.W.3d at 72 (stating that innocuous conduct alone does not justify an investigative stop);

xv. **Spinning tires: NO**

State v. Guzman, 240 S.W.3d 362 (Tex.App.-Austin 2007, pet. ref'd) (officer's observing a vehicle spinning its tires at a downtown location at night did not create reasonable suspicion of driving while intoxicated).

xvi. **Pulling out of parking lot quickly: NO**

State v. Rothrock, 2010 WL 3064303 (Tex.App.-Austin, 2010) (not designated for publication) (defendant's action of pulling out of a bar parking lot quickly late at night was insufficient to create reasonable suspicion of the defendant's intoxication).

xvii. **No turn signal when leaving private parking lot: NO**

It is not a violation of Transportation Code to fail to signal intention to turn when leaving a private parking lot. *State v. Hallman*, 157 S.W.3d 65 (Tex.App. - Fort Worth 2004).

xviii. **No turn signal when exiting freeway: NO**

The Transportation Code does not require the use of a turn signal when exiting a freeway, thus, there was no basis for the traffic stop. *Trahan v. State*, 16 S.W.3d 146 (Tex. App. - Beaumont 2000).

xix. **No turn signal when lanes merge: NO**

Mahaffey v. State, No. PD-0795-11 (Tex.Crim.App. Apr 25, 2012) (defendant was not required by the Texas signal statute to signal when the lane in which he was driving on a laned roadway merged with the lane to his left). Once the clear markings on that highway terminated, so, too, did the corresponding lane. The defendant did not change lanes; the two lanes became one. Because a signal was required only to indicate an intention to turn, change lanes, or start from a parked position, under § 545.104(a), no signal was required when the two lanes merged.

xx. **Window tint (old cars): NO**

For vehicles manufactured before 1988, and "dark window tinting" regulation does not apply. *State v. Exiga*, 71 S.W.3d 429 (Tex. App. - Corpus Christi 2002).

xxi. **Looking at the police: NO**

Garcia v. State, 43 S.W.3d 527 (Tex.Crim.App. 2001) (child looking back several times in a moving vehicle does not give rise to a reasonable suspicion that child was not wearing seat belt).

xxii. **Driving on a deserted private road: NO**

Newbrough v. State, 225 S.W.3d 863 (Tex.App. - El Paso 2007) (car turning onto a private country road did not give rise to reasonable suspicion that underage drinking in a field was about to occur).

xxiii. **Nodding off: NO**

State v Griffey, 241 S.W.3d 700 (Tex.App. - Austin 2007) (detention based upon report of falling asleep in drive-through lane at fast food joint, but being awake by the time the cops got there, not reasonable suspicion).

xxiv. **Waiting: NO**

Sosa v. State, No. 06-10-00161-CR, 2011 WL 346215 (Tex.App.-Texarkana Feb 4, 2011) (no reasonable suspicion found when defendant was present just outside a storage facility after its normal business hours, he failed to pass through the gate in thirty or forty seconds of observation, and the storage facility is occasionally broken into).

vii. **Burden of Proof: Shifts to State**

To suppress evidence on an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Ford v. State*, 158 S.W.3d at 492. A

defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Id.* Once the defendant has made this showing, the burden of proof shifts to the State, which is required to establish that the seizure was conducted pursuant to a warrant or was reasonable. *Id.*

c) **Scope of Investigative Detention: Must be Reasonably Related**

An investigative detention is reasonable, and thus constitutional, if (1) the officer's action was justified at the detention's inception, and (2) the detention was reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. at 19–20. For the officer's initial action to be justified under the first Terry prong, we ask whether there existed specific, articulable facts that, taken together with rational inferences from those facts, reasonably warranted that intrusion. *Id.* at 21. Specifically, the officer must have a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication that the unusual activity is related to a crime. *See Davis v. State*, 947 S.W.2d at 244.

a) **Initial Detention: Temporary and Limited**

Under the second Terry prong, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Kothe v. State*, 152 S.W.3d 54, 63 (Tex.Crim.App.2004). The scope of the seizure must also be restricted to that necessary to fulfill the seizure's purpose. *Florida v. Royer*, 460 U.S. 491, 500 (1983). Once the reason for a routine traffic stop is resolved, the stop may not then be used as a fishing expedition for unrelated criminal activity. *Davis*, 947 S.W.2d at 243 (quoting *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsburg, J., concurring)). During a routine traffic stop, an officer may check for outstanding warrants and demand identification, a valid driver's license, and proof of insurance from the driver. *Kothe* at 63; *Caraway*, 255 S.W.3d at 307.

b) **Prolonged Detention: Must Develop New Reasonable Suspicion**

If, during that investigation, an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to the new offense. *Goudeau v. State*, 209 S.W.3d 713, 719 (Tex.App.-Houston [14th Dist.] 2006, no pet.). The officer must be able to point to specific articulable facts, which, based on his experience and personal knowledge coupled with logical inferences drawn from these facts, warrant the additional intrusion. *Davis*, 947 S.W.2d at 244. An officer is entitled to rely on all the information obtained during his contact with a motorist in developing the articulable facts justifying continued detention. *Razo v. State*, 577 S.W.2d 709, 711 (Tex.Crim.App.1979); *Powell v. State*, 5 S.W.3d 369, 377 (Tex.App.-Texarkana 1999, pet. refused).

4. **Arrest**

a) **Arrest: defined.**

An arrest imposes a greater degree of restriction on an individual's freedom of movement than an investigatory detention. *State v. Sheppard*, 271 S.W.3d 281, 290 (Tex.Crim.App.2008). An arrest involves an almost total restraint on an individual freedom of movement. *See Dowhitt*, 931 S.W.2d at 255. Accordingly, an arrest must be justified by probable cause as opposed to reasonable suspicion. *Amores*, 816 S.W.2d at 411.

b) **Amount of proof needed for arrest: Probable Cause**

Probable cause to arrest exists when, at that moment, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information would warrant a reasonable and prudent man in believing that a particular person has committed or is committing a crime. *Jones v. State*, 493 S.W.2d 933, 935 (Tex.Crim.App.1973); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). This includes misdemeanor offenses. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)(whether the misdemeanor offense must be committed in the officer's presence has not been decided, *see n. 11*).

The Tex. Code Crim. Proc. Art 14: requires an officer to have a warrant to arrest a suspect unless an exception applies. Exceptions:

- i. He witnesses a felony or offense against the public peace whether or not the witness is a peace officer. Tex. Code Crim. App. Article 14.01(a).
- ii. Witness is a peace officer and he witnesses any offense. (Art. 14.01(b))

In addition, a peace officer may make a warrantless arrest where:

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- i. The suspect is in a suspicious place: “persons found in suspicious places and under circumstances which reasonably show that such person have been guilty of some felony, breach of peace, intoxication offense, or are about to commit some offense against the laws.” Article 14.03(a)(1).
 - ii. There is probable cause to believe:
 - a. a person has committed assault with bodily injury and there is danger that he will cause further bodily injury.
 - b. a person has violated a protective order.
 - c. a person has committed an act of family violence.
 - d. a person has interfered with another’s ability to make an emergency call.
 - iii. An admissible statement to an officer gives him probable cause to believe a person has committed a felony,
 - iv. There is satisfactory proof that the person committed a felony and the offender is about to escape.

An officer may only make a warrantless arrest at the suspect’s home where there is consent, or exigent circumstances.

5. Mutations: When The Scope Of The Stop And Seizure Changes During The Investigation

1. How Mutation Occurs: Force or Constraint Escalates into Investigative Detention.

Although no bright-line rule governs when a consensual encounter becomes a seizure, generally when an officer through force or a showing of authority restrains a citizen's liberty, the encounter is no longer consensual. *Woodard*, 341 S.W.3d at 411. A Fourth Amendment seizure occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. *Garcia–Cantu*, 253 S.W.3d at 242; see also *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) (holding that a Fourth Amendment seizure occurs when there is governmental termination of freedom of movement through means intentionally applied).

The pertinent inquiry is whether a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter. *Crain v. State*, 315 S.W.3d 43 (Tex.Crim.App. 2010) (officer sitting in car, calling for individual to “come here” along with shining spotlight on Defendant was a seizure once the Defendant yielded to that show of authority); *Garcia–Cantu*, 253 S.W.3d at 243 (“It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure.”). Examples of surrounding circumstances that may indicate a seizure are “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *U.S. v. Mendenhall*, 446 U.S.544, 554 (1980).

a. Proof Needed for Escalation

i. Totality of circumstances

Courts consider the totality of the circumstances surrounding the interaction, including the time and place, to determine whether a reasonable person in the defendant's position would have felt free either to ignore the request or to terminate the interaction. See *Woodard*, 341 S.W.3d at 411; *Castleberry*, 332 S.W.3d at 467; see also *Garcia–Cantu*, 253 S.W.3d at 243 (“Each citizen-police encounter must be factually evaluated on its own terms; there are no *per se* rules.”).

When deciding whether a consensual encounter has become a detention, courts consider several factors: “(1) whether the officer was in uniform; (2) whether the officer exhibited a weapon; (3) the number of officers present; (4) whether the officer suggested that he would get a warrant if the defendant did not comply; (5) whether the officer told the defendant he believed the defendant was carrying drugs; and (6) whether the officer told the defendant that compliance was or was not required.” *Melugin v. State*, 989 S.W.2d 470, 472 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd) (citing *Hunter*, 955 S.W.2d at 104).

ii. Focus on officer’s conduct

The surrounding circumstances, including time and place, are taken into account, but “the officer's conduct is the most important factor when deciding whether an interaction was consensual or a Fourth Amendment seizure.” *Id.*; *Crain*, 315 S.W.3d at 49 (“[T]he court focuses on whether the officer conveyed a message that compliance with the officer's request was required.”).

b. Insufficient Evidence for Escalation:

i. Police Questioning & Request for Consent: Not Enough

An officer's asking questions and requesting consent to search do not, standing alone, render an encounter a detention. *Hunter v. State*, 955 S.W.2d 102, 106 (Tex.Crim.App.1997). Only if the officer conveyed a message that compliance was required has a consensual encounter become a detention. *Id.*

ii. Acquiescence to Police Request: Not Enough

“Even when the officer did not communicate to the citizen that the request for information may be ignored, the citizen's acquiescence to an official's request does not cause the encounter to lose its consensual nature.” *Woodard*, 341 S.W.3d at 411; *see also Castleberry*, 332 S.W.3d at 466 (“[T]he fact that the citizen complied with the request does not negate the consensual nature of the encounter.”).

iii. If citizen can ignore the police, terminate the encounter or walk away: Not Enough

If the defendant had the option to ignore the request or terminate the interaction, a Fourth Amendment seizure has not occurred. *Woodard*, 341 S.W.3d at 411.

iv. Overhead Lights: Not Enough

When officers activate the overhead lights on their patrol cars for safety purposes and not to effectuate a stop or to obtain submission to a show of authority, this is still a consensual encounter. *See Hudson v. State*, 247 S.W.3d 780, 785 (Tex.App.-Amarillo 2008, no pet.)

v. Spotlight: Not Enough

The Court of Criminal Appeals has made it clear that the use of a police spotlight, alone, is not enough to transform a casual encounter into an investigatory detention. *Crain v. State*, 315 S.W.3d 43, 50–51 (Tex.Crim.App.2010); *see also Stewart v. State*, 603 S.W.2d 861, 862 (Tex.Crim.App.1980); *State v. Priddy*, 321 S.W.3d 82 (Tex.App - Fort Worth 2010)(hitting stopped car with spotlight and indicating Defendant needed to roll down window was only casual encounter.)

vi. Blocked in by Police Car: Not Enough.

Positioning a patrol car to make it difficult for a citizen to depart the scene voluntarily does not transform an encounter to a detention when the citizen could have asked the officer to move his patrol car or could have left the scene on foot. *See Garcia–Cantu*, 253 S.W.3d at 246 n. 44 (When an officer partially blocks a parked car or makes it somewhat inconvenient for the citizen to depart voluntarily, such action is not alone sufficient to constitute a detention); *Johnson v. State*, No. 14-10-01089-CR (Tex.App.-Houston [14 Dist] Dec 13, 2011) (consensual encounter despite officer parking his car at an angle that partially blocked D's car's egress and despite officer shining his spotlight in D's car—because police car did not prevent D from maneuvering around him and driving away, among other facts).

c. Sufficient Evidence for Escalation:

i. Stopping in response to police lights for traffic stop: ESCALATION

A traffic stop is a detention and must be reasonable under the United States and Texas Constitutions. *Davis v. State*, 947 S.W.2d 240, 245 (Tex.Crim.App.1997); *Caraway v. State*, 255 S.W.3d 302, 307 (Tex.App.-Eastland 2008, no pet.); *see Hudson v. State*, 247 S.W.3d 780, 785 (Tex.App.-Amarillo 2008, no pet.) (“Activation of overhead lights on a police vehicle does not necessarily make an encounter non-consensual[,]” but “when a person stops in response to a patrol car's emergency lights rather than of his own accord, an investigatory detention has occurred and reasonable suspicion is required.”); *see also Martin v. State*, 104 S.W.3d 298, 301 (Tex.App.-El Paso 2003, no pet.) (“[D]epending on the facts, the officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists.”).

ii. Response to command: ESCALATION

See Parks v. State, 2010 WL 4229043 (Tex.App.-San Antonio October 27, 2010) (No. 04-09-00650-CR) (officers communicated in an authoritative tone to defendant that he walk to the patrol car and place his hands on the car).

2. Escalating Community Caretaking to Investigative Detention

Because the community-caretaking function is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,” *Cady*, 413 U.S. at 441, a police officer may not properly

invoke his community-caretaking function if he is primarily motivated by a non-community-caretaking purpose. *Corbin*, 85 S.W.3d at 277; *Franks v. State*, 241 S.W.3d 135 (Tex.App.–Austin, 2007). While recognizing the existence of the community-caretaking exception, the Texas Court of Criminal Appeals has emphasized “its narrow applicability.” *Wright*, 7 S.W.3d at 152.

Assessing the applicability of the community-caretaking exception requires a dual inquiry: first, whether the police officer was primarily motivated by a community-caretaking purpose; and second, whether the officer's belief that the individual needed help was reasonable. *See Franks*, *id.*; *Corbin*, 85 S.W.3d at 277. If either of these prongs are not met, the stop escalates into an impermissible detention. *See, e.g. Franks, supra; Alford v. State*, No. 05-10-00922-CR (Tex.App.-Dallas Dec 6, 2011) (stop was not a reasonable exercise of the community caretaking function where officer merely observed D sitting in the passenger seat of a car talking loudly with the driver, exiting the car, walking around the car, getting in the driver's seat, and driving off).

3. Escalating Investigative Detention to Arrest

a) How Escalation Occurs: Force, Intent & Duration Escalates Detention into Arrest

In making the determination when an investigative detention escalates into an arrest, courts are to consider: (1) the amount of force displayed, (2) the duration of a detention, (3) the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, (4) the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and (5) any other relevant factors. *Sheppard*, 271 S.W.3d at 291.

For *Miranda* purposes, the *Dowthitt* factors are also illustrative in outlining four general situations when a suspect's detention may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt*, 931 S.W.2d at 255. In the first through third situations, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *Id.* (citing *Stansbury*, 511 U.S. at 322–23). Concerning the fourth situation, the officers' knowledge of probable cause must be manifested to the subject, and such manifestation could occur if information sustaining the probable cause is related by the officers to the suspect or by the suspect to the officers. *Id.*; *see Ruth v. State*, 645 S.W.2d 432, 436 (Tex.Crim.App. [Panel Op.] 1979) (holding that a suspect's “statement that he had shot the victim immediately focused the investigation on him and furnished probable cause to believe that he had committed an offense[;] [a]fter that time, the continued interrogation must be considered a custodial one”). Situation four, however, will not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Dowthitt*, 931 S.W.2d at 255. Additionally, the length of time involved is an important factor to consider in determining whether a custodial interrogation occurred. *Id.* at 256.

b) Proof Needed for Escalation

i. Factor: Amount of Force Displayed

Officers are permitted, for investigative purposes or personal safety, to use reasonable force to effectuate the goal of the stop. *See Balentine v. State*, 71 S.W.3d 763, 771 (Tex.Crim.App.2002).

ii. Focus: Reasonableness Standard

When reviewing the amount of force utilized, courts look to the reasonableness of the officer's actions from the perspective of the officer present at the scene. *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex.Crim.App.1997).

iii. Handcuffs: Typically Not Enough.

In evaluating the type of detention associated with handcuffing, a bright-line test is rejected in favor of allowing “ordinary human experience to govern.” *Rhodes* at 118. An individual may be placed in handcuffs, especially for safety purposes, to further the purpose of the investigatory stop. *Mays v. State*, 726 S.W.2d 937, 942–44 (Tex.Crim.App.1986); *see also Paulea v. State*, 2010 WL 1068176, at *7 (Tex.App.-San Antonio Mar. 24, 2010, pet. ref d) (mem. op., not designated for publication) (handcuffing suspect allowed officers to efficiently inspect scene in order to conduct a thorough investigation); cf. *Balentine*, 71 S.W.3d at 771 (investigative detention occurred where individual was escorted to patrol car and handcuffed). In contrast, a situation where an officer “blocked the appellant's car in the parking lot, drew his service revolver, ordered the appellant from his car at gunpoint, ordered him to lie face-down on the pavement with his hands behind his back, and told him he would be shot if he did not obey these orders,” an arrest occurred. *Amores v. State*, 816 S.W.2d 407, 411 (Tex.Crim.App.1991).

There are instances in which placing a defendant in handcuffs will escalate the detention into an arrest. *See Gordan v. State*, 4 S.W.3d 32 (Tex.App. - El Paso 1999). While handcuffing a Defendant does not automatically transform a temporary detention into an arrest, it did so here when officer restrained the Defendant as a matter of "policy"; *Ramirez v. State*, 105 S.W.3d 730 (Tex. App. - Austin 2003) (handcuffed citizen tips balance to finding the seizure was more than a mere detention); *State v. Crisp*, 74 S.W.3d 474 (Tex. App. - Waco 2002) (when officer's stopped car leaving suspected drug house and immediately cuffed the driver and occupants, an arrest occurred and not a temporary detention).

iv. Factor: Duration of Detention

One of the most litigated issues involves the duration of the investigative detention and what actions law enforcement officers take during the detention. Three cases provide the most thorough explanation of when an investigative detention mutates into impermissible territory: *U.S. v. Jenson*, 462 F.3d 399 (5th Cir. 2006), *St. George v. State*, 237 S.W.3d 720 (Tex.Crim.App. 2007), and *United States v. Macias* 658 F.3d 509 (5th Cir. 2011).

In *Macias*, the Fifth Circuit held that the detention after a legitimate traffic stop became impermissible once officers began lengthy questioning that had nothing to do with original purpose of the stop and was not based on reasonable suspicion. *Id.* "[A] traffic stop made for the purpose of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *St. George* at 817; *Illinois v. Cabelles*, 543 U.S. 405, 407 (2005); *Wolf v. State*, 137 S.W.3d 797 (Tex.App. - Waco 2004) (nervousness is not enough to detain beyond a normal traffic stop to wait for the drug dog for three additional minutes); *Sieffert v. State*, 290 S.W.3d 478 (Tex.App. - Amarillo 2009) (driving slow through high crime district and nervousness did not create reasonable suspicion to detain past traffic stop); *State v. Wilson*, 295 S.W.3d 759 (Tex.App. - Eastland 2009) (nervousness and refusal to consent not enough to prolong detention.); *State v. Daly*, 35 S.W.3d 237 (Tex. App. - Austin 2000) (detention was unlawful once basis for traffic stop was concluded and defendant not told he was free to leave); *Veal v. State*, 28 S.W.3d 832 (Tex. App. - Beaumont 2000) (valid traffic stop turned into illegal detention for drug investigation when officer's only articulable facts were that the defendant had a tie on at 12:30 a.m. and was slow to respond to simple questions);

However, when additional reasonable suspicion arises during the detention, the stop may be prolonged. *See Hamal v. State*, No. 02-09-00448-CR (Tex.App.-Fort Worth 2011), *reh'g overruled* Oct 27, 2011 (reasonable suspicion to continue detention while awaiting a canine to sniff vehicle based on nervousness and also officer's belief that defendant had misrepresented that she had never been arrested when, in fact, she had nine prior arrests); *Mitchell v. State*, No. 07-09-00173-CR, 2011 WL 2135368 (Tex.App.-Amarillo 2011) (officer's prolonging of stop, while awaiting drug dog, up to five minutes after he received confirmation that driver's license was invalid, was permissible where officer had sufficient information to corroborate tip concerning the alleged drug house D was seen driving away from); *Hartman v. State*, 144 S.W.3d 568 (Tex.App. - Austin 2004) (waiting five to 15 minutes for cop with video to show up for DWI investigation was not unreasonable); *Cantu v. State*, No. 04-10-00533-CR (Tex.App.-San Antonio 2011) (standard procedure of asking where driver coming from coupled with relatively short duration and fact that still within the initial purpose of the stop provides that officer did not unnecessarily delay the detention); *Kelly v. State*, 331 S.W.3d 541 (Tex.App.-Houston [14 Dist] 2011) (although officer stopped motorist for no front license plate, officer's questioning about narcotics was reasonably related to the stop, in part because of officer's knowledge defendant's criminal history); *Alleman v. State*, No. 09-10-00173-CR, 2011 WL 193496 (Tex.App.-Beaumont 2011) (motorist pretending to talk on his cell phone during the traffic stop was among the circumstances that provided officer RS to expand scope of stop);

v. Factor: Efficiency

If no reasonable suspicion develops during the investigation, prolonging the detention through inefficient or ineffective means may lead to a mutation. *See Autry v. State*, 21 S.W.3d 590 (Tex.App. - Houston [1st Dist.] 2000) (even though officers had a reasonable suspicion to detain the Defendant, once a pat down revealed nothing, a continued detention for 10 minutes while drug dog was summoned was excessive); *Herrera v. State*, 80 S.W.3d 283 (Tex. App. - Texarkana 2002) (detention was unlawful once traffic stop was concluded; delay of five to seven minutes after the business of the traffic stop was concluded for the sole purpose of obtaining an interpreter for a consent).

However, if there is a law enforcement purpose of the delay, this factor weighs heavily in legitimating the prolonged detention. *See Evans v. State*, No. 11-09-00341-CR (Tex.App.-Eastland 2011) (delay of traffic stop while waiting for more experienced officer to perform field sobriety tests deemed reasonable, where trooper had more experience and the local officer's department had policy against working the interstate); *Branch v. State*, No. 03-09-00477-CR, 2011 WL 1028958 (Tex.App.-Austin, 2011) (eight minute delay for a narcotics-detection dog to arrive at the scene did not prolong initial traffic stop beyond the time reasonably required to complete the mission of the stop);

vi. Factor: Location / Transportation

Moving a suspect a short distance to further an investigation is consistent with an investigatory detention's purpose. *Compare Francis v. State*, 922 S.W.2d 176, 180 (Tex.Crim.App.1996) (Baird, J., concurring and dissenting) (moving individual short distance to scene of crime furthered investigation), with *Delk v. State*, 855 S.W.2d 700, 712 (Tex.Crim.App.1993) (determining arrest occurred where suspects were “handcuffed, read their Miranda rights, and taken to police station”).

vii. Factor: Statements Made to Citizen

See *Smith v. State*, 219 S.W.2d 454, 456 (1949) (“The mere fact that an officer makes the statement to an accused that he is under arrest does not complete the arrest.”); *Burkhalter v. State*, 642 S.W.2d 231, 232 (Tex.App.-Houston [14th Dist.] 1982, no pet.) (holding arrest did not occur where appellant was handcuffed and told he was under arrest). See *Burkes v. State*, 830 S.W.2d 922, 925 (Tex.Crim.App.1991) (indicating officer's opinion “must certainly be considered persuasive”).

viii. Factor: Intent

Ordering a driver to perform field sobriety tests does not, without more, escalate a traffic stop into a custodial detention, despite officer's admission that driver was not free to leave. *State v. Chupik*, No. 03-09-00356-CR (Tex.App.-Austin 2011).

4. De-escalation of Investigative Detention to Consensual Encounter

Investigation is complete and citizen participation no longer required

It is not per se unreasonable for a police officer to ask questions or request consent to search after detention for a traffic stop is completed, as long as a message is not conveyed by the officer's words or acts that compliance is required. *Caraway v. State*, 255 S.W.3d at 310–11; *Saldivar v. State*, 209 S.W.3d 275, 282 (Tex.App.-Fort Worth 2006, no pet.); *James v. State*, 102 S.W.3d 162 (Tex. App. - Fort Worth 2003) (OK to ask for consent to search even after traffic stop has concluded); *Robledo v. State*, 175 S.W.3d 508 (Tex.App. - Amarillo 2005)(consent to search after traffic stop concluded); *Edmond v. State*, 116 S.W.3d 110 (Tex.App. - Houston[14th Dist] 2002)(continued detention OK in order to ask two questions about drugs); *Levi v. State*, 147 S.W.3d 541 (Tex.App. - Waco 2004)(Ok to ask for consent after end of traffic stop so long as officer does not convey message that honoring request is required); *Saldivar v. State*, 209 S.W.3d 275 (Tex.App. - Fort Worth 2006) (not per se unreasonable to ask questions or request consent to search after a detention is complete as long as message is not conveyed that compliance is required).

B. SEARCHES WITHOUT A WARRANT

Just as a person may consent to a conversation with a police officer, a person may similarly consent – or fail to adequately object – to a request to search their pockets, belongings, handbags, car, home, cellphone, computer, or office. Absent consent, the police still have the power in certain circumstances to search a person’s clothing, car, and home.

1. Searching a person

1. Frisk for Weapons (before arrest): When a reasonable person in the officer’s circumstances would have believed there was a danger to the officer’s safety or the safety of others (objective standard). *Terry v. Ohio*, 392 U.S. 1 (1968).
2. Plain Feel (during frisk): If in the course of a lawful frisk of a defendant’s clothing a police officer feels an object whose contour or mass make it immediately apparent that it is contraband, it may be seized. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Griffin v. State*, 215 S.W. 3d 403 (Tex. Ct. Crim. App. 2006).
3. Search Incident to Arrest (after arrest): Once a person is arrested the police may perform a thorough search of the person before they are booked into jail. *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

2. Searching a car

1. Search Incident to Arrest: In *Gant*, the Supreme Court narrowed the search incident to arrest exception as it pertains to vehicle searches. A search incident to arrest is permissible in two contexts:

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- i. A search for weapons based on concerns about officer safety. An officer may search the car for weapons if the defendant is within reaching distance of the passenger compartment.
 - ii. A search for evidence of the offense that the defendant was arrested for. Where an officer has probable cause to believe that a driver is committing or has committed a crime, and also has probable cause to believe that the car contains contraband or evidence of that crime, he may search the entire car, and any container inside that could reasonably hold the evidence or contraband. *US v. Ross*, 456 US 798 (1982); *Carroll v. US*, 267 US 132 (1925).

However, Where the defendant was arrested for a traffic offense, there is no reasonable basis to believe that the car contains evidence of that offense. *Gant*, 129 S.Ct. 1710.

2. Inventory Search: to protect defendant's interest in property, to protect police from unmeritorious claims, and to protect against dangerous objects that might be inside the car. The burden is on the state to show that (1) standardized inventory procedures are in place, and (2) that those procedures were followed. *Benavides v. State*, 600 S.W.2d 809 (Tex. Crim. App 1980); *State v. Stauder*, 264 S.W.3d 360 (1984).

Note: an inventory search cannot include a search of the defendant's cellular phone. The police must obtain a warrant to search the contents of a cellphone. *Riley v. California*, 573 U.S.____(2014).

3. Searching a residence

1. Exigent Circumstances:

- i. Circumstances present urgency that would prevent officers from getting a warrant;
- ii. Officers have probable cause to believe that items relating to the crime will be found or that the suspect will be found; and
- iii. The search is limited in scope by the nature of the emergency.

Example: The odor of marijuana standing alone isn't enough to give officers the right to enter a residence and search without a warrant. *Steelman v. State*, 93 S.W.3d 102 (Tex. Crim. App. 2002); *Moulden v. State*, 576 S.W.2d 817 (Tex.Crim.App. 1978).

2. Emergency Exception: Where an officer reasonably believes someone inside is seriously injured or is in immediate danger of being seriously injured. The reason for entry must be divorced from detection, investigation, or acquisition of evidence. *Gonzalez v. State*, 148 S.W.3d 702 (Tex. App. Austin 2004); *Laney v. State*, 117 S.W.3d 854 (Tex. Crim. App. 2003).
3. Search incident to arrest: Police may search area of house where Defendant could reasonably reach to retrieve a weapon or dispose of drugs. *Chimel v. California*, 395 U.S. 752 (1969).
4. Protective sweep: Police may conduct a protective sweep of the house to make sure no one is hiding. This is a very cursory, visual sweep. *Maryland v. Buie*, 494 U.S. 325 (1990).

C. **WARRANTS TO SEARCH & ARREST**

1. Standing to challenge a warrant

"To claim the protections of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Rakas v. Illinois*, 439 U.S. 128 (1978).

A visitor in another's home does not have a legitimate privacy interest in that home, but an overnight guest may. *Minnesota v. Olson*, 495 U.S. 91 (1990).

A passenger in a car could not assert the protections of the 4th Amendment in the search of a car they have no ownership interest in (*See Rakas v. Illinois*, 439 U.S. 128 (1978)), but he could assert the protections of the 4th Amendment in the seizure of his person and the car. *See Brendlin v. CA*, 127 SCt 2400 (2007).

2. Search Warrants and Defects: Tex. Code Crim. Proc. Art 18

a) Requirements for a valid search warrant

- i. A sworn affidavit establishing probable cause that:

-
- 1) A specific offense has been committed,
 - 2) The specifically described property that is to be searched for or seized is evidence of that offense or evidence that the suspect committed the offense, and
 - 3) The property is located at or on the particular person or place that will be searched (Tex. Code Crim. Proc. Art. 18.01(b))

ii. Warrant may be issued to seize the following items: Tex. Code Crim. Proc. Art. 18.02

- 1) property acquired by theft
- 2) property designed or adapted to commit an offense
- 3) arms kept for insurrection or riot
- 4) prohibited weapons
- 5) gambling equipment
- 6) obscene materials
- 7) property the possession of which is prohibited
- 8) drugs or drug paraphernalia
- 9) instruments used in the commission of crime
- 10) property or items, except the personal writings by the accused, constituting evidence the person committed an offense
- 11) persons
- 12) contraband

b) Executing the search warrant

- i. Warrant valid for 3 days (plus two: day of issuance and day of execution); magistrate must include date and time of issuance. Tex. Code Crim. Proc. Art. 18.07.
- ii. Good Faith exception: Tex. Code Crim. Proc. 38.23) (b): “It is an exception...that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.”
- iii. Knock and Announce. Previously, failure to comply with notification of the execution of a search warrant could render it invalid. This is no longer the case. *See United States v. Banks*, 540 U.S. 31 (2003)(No requirement where it would be dangerous, futile or would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence); *Hudson v. Michigan*, 547 U.S. 586 (2006); *See also Wright v. State*, 2008 Tex. Crim. App. Lexis 580 (2008)(case decided only on 4th amendment grounds remanded for reconsideration in light of *Hudson*).
- iv. Entering a Residence to arrest: CCP 15.25 (Vernon): “In case of felony, the officer may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose.”

c) Challenging the search warrant

i. Potential Search Warrant Defects:

- 1) No probable cause in warrant;
- 2) Insufficient or incorrect description of location;
- 3) In general;
- 4) If items to be seized correctly listed in affidavit but left out of warrant itself, search warrant is not valid. *Groh v. Ramirez*, 540 U.S. 551(2004).

ii. *Franks v. Delaware*, 438 U.S. 124 (1978) Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in a search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, U.S. Const. amend. IV requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

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- iii. “Four Corners” rule: the trial court’s review of the search warrant is limited to what is contained within the four corners of the application and affidavit.

D. IDENTIFICATIONS

The Due Process clause of the 5th and 14th Amendment guarantees fundamental fairness in Identification procedure. However, most of your work in challenging an eyewitness identification procedure will be from studying the social sciences. A few courts are working hard to keep up with the overwhelming concerns about the suggestibility of many identification procedures. An excellent starting point is to review the report of the special master in *State of New Jersey v Henderson*.

There are three types of identification procedures: a show up, a photo array, and a live line-up. To determine whether an identification was fair, courts look to the totality of the circumstances to determine whether the challenged ID procedure was unnecessarily suggestive, and likely to lead to misidentification. If the procedure was both unnecessarily suggestive and conducive to misidentification, then it is inadmissible at trial. *Stovall v. Denno*, 388 U.S. 293 (1967). Where an identification procedure is found to be inadmissible, a witness may still identify the defendant at trial if – and only if - there is an independent basis for the identification. An independent basis for the courtroom identification may exist if the court finds that the witnesses’ experience with the defendant prior to the tainted identification procedure is enough to provide a reliable courtroom identification.

Your role as defense counsel encompasses a responsibility to determine your local law enforcement’s identification protocol. Once you obtain the protocol, your next step is to analyze whether they followed their own protocol. Finally, you then want to compare and critique your local law enforcement protocol to the state and national standards. The Bill Blackwood LEMIT (Law Enforcement Management Institute of Texas) at Sam Houston State University provides a clearinghouse of information for Texas practitioners. When you explore the materials under the Research tab at www.lemitonline.org you will likely find that your local law enforcement identification policy was based on the LEMIT Model Policy on Eyewitness Identification. If your local agency removed or edited provisions of the model policy, you will want to find out why.

Although the report is fifteen years old, the U.S. Department of Justice research report, “Eyewitness Evidence: A Guide for Law Enforcement” is still a fantastic resource – precisely because scientists have been voicing these concerns for decades and law enforcement has been slow to adopt many of the proposed changes. You can download the PDF at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

E. STATEMENTS & CONFESSIONS

1. Understanding Why We Have *Miranda* Warnings

Given the public’s inexhaustible fascination with the criminal justice system, one particular area of focus concerns the psychology of the criminal mind. Kyra Sedgwick as *The Closer* is the latest incarnation of television characters that glorify the work of the police detective that can extract admissions through skillful interrogation. From *Columbo* to *Law & Order*, *Dagnet* to *T.J. Hooker*, *NYPD Blue* to *Starsky and Hutch*, *CHiPs* to *Miami Vice*, and *The Mod Squad* to *Hawaii Five-O*, the recurring theme is clear: good detectives get bad people to confess to crime for the benefit of law and order in society.

The tactics to elicit confessions are as numerous as the personalities that employ them. The charades range from good cop / bad cop to feigned witness accounts to implied threats or promises of leniency. Most techniques involve deception. All seem to result in some form of success. Rarely does the viewer root for the defendant, except in the cases where the detective’s partner has to reign in abusive or coercive conduct so egregious that it would offend even the sensibilities of the police show junkie.

Americans watch more television than any other nation on earth with households watching an average of 8 hours and 11 minutes every day.¹ At some point during the week, an American is likely to watch a police drama. Given the fairly predictable storyline that has persisted throughout the past sixty years (suspect commits crime, detective interrogates suspect, suspect confesses) a person need have only watched a few shows during their life to understand that nothing really good happens for the defendant in the interrogation room. Thus, given public’s awareness of the use of deception that occurs in the interrogation room as members of the viewing audience since the 1950’s, the perplexing question is why would anybody ever agree to enter the interrogation room and confess to a crime?

This is where your understanding as a criminal defense practitioner comes into play.

Miranda v. Arizona, 384 U.S. 436 (1966) stands for the proposition that suspects subject to custodial interrogation must be given certain warnings as a baseline requirement for voluntariness of a confession. Every lawyer, every police officer, and nearly every adult is aware of the *Miranda* rights.

¹ “Couch Potatoes,” *The Economist*, July 17, 2007.

But the power of *Miranda* is no longer in the warnings – it is in the Supreme Court’s opinion about why we need the warnings. The courts have diluted *Miranda*’s power over the years, but they have never diluted its *purpose*. Chief Justice Warren spent most of the majority opinion explaining why warnings are necessary, expressing concern “primarily with the interrogation atmosphere and the evils it can bring.”² The Court’s opinion warned that “even without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”³

The Court began by stressing that the “modern practice of in-custody interrogation is psychologically rather than physically oriented,” and that “blood of the accused is not the only hallmark of an unconstitutional inquisition.”⁴ The Court went on to summarize the numerous techniques that are considered the most effective psychological stratagems typically employed during interrogations:

- The interrogation takes place in the investigator's office so that the subject is deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law;
- The police display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details;
- The guilt of the subject is to be posited as a fact;
- The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it;
- The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society;
- Explanations to the contrary or protestations of innocence are dismissed and discouraged;
- Where emotional appeals and tricks are employed to no avail, the interrogator must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination;
- The examiner is to concede him the right to remain silent to invoke an undermining effect. First, the suspect is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator. After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk;
- If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, ‘I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.’⁵

As a safeguard, the instructors of this method of interrogation warn that these methods “should be used only when the guilt of the subject appears highly probable.”⁶ Consequently, the Court concluded that “such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.”⁷

In the battle over admissibility of confessions, there are two areas of repeated contention:

- 1) whether or not the person was in custody, and
- 2) whether the statement given was voluntary.

² *Id.* at 456.

³ *Id.*

⁴ *Id.* at 448, citing *Blackburn v. State of Alabama*, 361 U.S. 199 (1960).

⁵ *Id.*, at 449-456, citing Inbau & Reid, Criminal Interrogation and Confession (1962).

⁶ *Id.*

⁷ *Id.* at 457.

2. Determination of Custody

The critical objective inquiry of whether or not there is a custodial interrogation is whether a person is questioned by law enforcement officers after “being taken into custody or otherwise deprived of his freedom of action in any significant way.”⁸ There are four situations that may constitute custody *per se*:

- 1) when the suspect is physically deprived of his freedom of action in any significant way;
- 2) when a law enforcement officer tells the suspect he cannot leave;
- 3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and
- 4) where there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.⁹

Because the determination of custody is a mixed question of law and fact, the courts also consider case-specific factors in ascertaining the deprivation of freedom:

- a) location of the questioning;
- b) timing of the questioning;
- c) length of the interview;
- d) nature and tone of the questioning;
- e) whether the defendant came to the place voluntarily;
- f) the use of physical contact or physical restraint;
- g) demeanor of all the key players, both during the interview and in any proceedings held in court.¹⁰

Of the three categories of interactions between police officers and citizens, most of the litigation involves whether a consensual encounter, an investigative detention, or an interrogation should more properly be categorized as a custodial arrest.¹¹

Although the rule for determining custody involves whether an innocent person would feel deprived of his freedom in any way, the following situations have been held to be non-custodial:

- Suspect is allowed to leave the police station after the interrogation is finished¹²;
- Suspect is frisked;¹³
- Suspect is handcuffed;¹⁴
- Suspect is placed in the back of the police car;¹⁵
- Lengthy roadside field sobriety testing.¹⁶

3. Determination of Voluntariness

The determination of voluntariness relates to two separate inquiries: (1) is the confession deemed involuntary because of law enforcement overreaching, and (2) is there something about the individual suspect that puts into question whether or not his statement was freely and voluntarily made.

Because the basis for *Miranda* was to counterbalance police conduct, litigating voluntariness issues related to a suspect’s condition should be done through Article 38.22 of the Code of Criminal Procedure. On June 4, 2008 the Court of Criminal Appeals decided *Oursbourn v. State*, 2008 WL 2261744 (Tex.Crim.App.) which involved whether the trial court was obligated to submit the voluntariness issue to a jury when defense counsel failed to request it. In delivering the opinion of a unanimous Court, Judge Cochran distinguished voluntariness claims raised under the Due Process Clause and *Miranda* from those raised under the Texas Confession Statute. In explaining the distinction, *Oursbourn* sets forth that:

⁸ *Thompson v. Keohane*, 516 U.S. 99, 107 (1995) (quoting *Miranda v. Arizona*, 384 U.S. at 444).

⁹ *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex.Crim.App. 1996)

¹⁰ *Yarborough v. Alvarado*, 541 U.S. 652, 644-645 (2004).

¹¹ *See State v. Perez*, 85 S.W.3d 817 (Tex.Crim.App. 2002).

¹² *See, e.g. California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Meek v. State*, 790 S.W.2d 618 (Tex.Crim.App. 1990); *Turner v. State*, 685 S.W.2d 38 (Tex.Crim.App. 1985).

¹³ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁴ *Balentine v. State*, 71 S.W.3d 763 (Tex.Crim.App. 2002).

¹⁵ *Id.*

¹⁶ *State v. Stevenson*, 958 S.W.2d 824 (Tex.Crim.App. 1997).

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- “Due Process and *Miranda* claims of involuntariness do not require “sweeping inquiries into the state of mind of a criminal defendant who has confessed. They involve an objective assessment of police behavior.”¹⁷

There are a number of police tactics which should unequivocally invalidate the voluntariness of a confession:

- The use of force or violence;¹⁸
- Threats that suspect will lose her welfare benefits and her children if she does not confess;¹⁹
- Threats of additional prosecution;²⁰
- Threat of incarceration;²¹
- Promise of probation;²²
- Holding the suspect for extended period of time without food, medical attention, or sleep.²³

However, there are far broader areas which are considered fair play:

- Detective can falsely imply that incriminating evidence exists;²⁴
- Detective can falsely state that accomplice confessed;²⁵
- Lies and misrepresentations about evidence are permitted;²⁶
- Implied promises that the officer would “like to help,” “will try to help,” and “will do what they can”;²⁷
- Implied promise of leniency to “tell the judge to take it easy” on him.²⁸

▪“Under Articles 38.21 and 38.22 and their predecessors, fact scenarios that can raise a state-claim of involuntariness (even though they do not raise a federal constitutional claim) include the following:

- (1) The suspect was ill and on medication and that fact may have rendered his confession involuntary;
- (2) The suspect was mentally retarded and may not have “knowingly, intelligently and voluntarily” waived his rights;
- (3) The suspect “lacked the mental capacity to understand his rights”;
- (4) The suspect was intoxicated, and he “did not know what he was signing and thought it was an accident report”;
- (5) The suspect was confronted by the brother-in-law of his murder victim and beaten;
- (6) The suspect was returned to the store he broken into “for questioning by several persons armed “with six-shooters.”²⁹

4. Statutory Protections

Pursuant to Texas Code of Criminal Procedure Article 38.22, a confession must be in writing and signed by suspect or on video and *Miranda* warnings must be given prior to statement. The statements must contain specific language acknowledging that the suspect knowingly, intelligently, and voluntarily waived his rights.

If a statement was made in another jurisdiction while the defendant was in custodial interrogation, the statement may be admissible in Texas if:

- a. The statement was obtained in compliance with the laws of TX or the other state; or
- b. The statement was obtained by a federal law enforcement officer in compliance with the laws of the US.

¹⁷ *Oursbourn v. State*, 2008 WL 2261744 (Tex.Crim.App.) at *5.

¹⁸ *Farr v. State*, 519 S.W.2d 876 (Tex.Crim.App. 1975).

¹⁹ *Lynnum v. Illinois*, 372 U.S. 528 (1963).

²⁰ *Harris v. Beto*, 367 F.2d 567 (5th Cir. 1966).

²¹ *Berry v. State*, 281 S.W. 1058 (Tex.Crim.App. 1926).

²² *Bownds v. State*, 362 S.W.2d 858 (Tex.Crim.App. 1962).

²³ *Greenwald v. Wisconsin*, 390 U.S. 529 (1968)

²⁴ *Johnson v. State*, 37 S.W.2d 76 (Tex.Crim.App. 1964).

²⁵ *Schmidt v. Hewitt*, 573 F.2d 794 (3rd Cir. 1978).

²⁶ *Scott v. State*, 165 S.W.3d 27 (Tex.App.-Austin 2005) (*reversed on other grounds*).

²⁷ *Chambers v. State*, 866 S.W.2d 9, 20 (Tex.Crim.App. 1993).

²⁸ *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App. 1995).

²⁹ *Id.* at * 7 (citations omitted).

In Texas, the requirement for written warnings does not apply to “any statement which contains assertions of facts or circumstances which are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.” CCP 38.22 3(c). *See Port v. State*, 791 S.W.2d 103 (Tex. Crim. App. 1990).

F. CONSEQUENCES FOR IMPROPER POLICE INVESTIGATION: EXCLUSION OF EVIDENCE

The purpose of the exclusion rule is to prevent and deter police misconduct and to protect people from “the use at trial of evidence that was obtained in an unlawful manner.” *Wong Sun v. United States*, 371 U.S. 471 (1963) *Weeks v. United States*, 232 U.S. 383 (1914). In Texas, this is also a statutory right under Art 38.23 of the Code of Criminal Procedure. (“No evidence obtained by an officer or another person in violation (of US or TX laws or constitutions) shall be admitted in evidence against the accused on the trial of any criminal case.”)

To exclude evidence based on an illegal search, there must be a causal connection between the illegality and the obtaining of evidence. If the court finds that primary evidence was obtained illegally, then evidence gathered indirectly will be suppressed if it was found by exploiting the illegally obtained evidence. However, if the evidence was obtained by “means sufficiently distinguishable to be purged of the primary taint,” then the evidence will be admissible. *State v. Iduarte*, 268 S.W.3d 544 (Tex.Crim.App. 2008). Any statements made in response to questions about items found during an illegal search are “Fruit of the Poisonous Tree” and may not be used in court. *Id.*

However, there is also a good faith exception in the statute if the officer’s search was relying upon a warrant. Article 38.23(b) provides that “It is an exception...that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.” This additional protection for searches conducted by a warrant demonstrate both the legislative and judicial branches’ preference for police to obtain a warrant prior to a search or seizure.

CHAPTER 2: Preparing for Trial—Pre-trials, Negotiations and Pleas

This Chapter is intended to make recommendations for the new attorney. Whether you are a beginning prosecutor or defense attorney, there are many different ways to handle a criminal case. Here are a few of considerations in dealing with your client, your victim, the opposing counsel, and the trial court.

I. EVALUATING THE CASE

A. Obtaining clients

1. Ethical considerations and potential problem areas:
 - a. Conflicts of Interest
 - b. Representing co-defendants
 - c. Fees paid by someone other than the defendant
 - d. Attorney bonds – attorney or bondsman, but not both?
2. Be aware of attorney-client privilege if your potential client shows up with an entourage
3. If possible, find out what they are charged with before the first meeting
 - a. Do your homework.
 - b. Pick up a copy of the probable cause affidavit and familiarize yourself with the elements of the offense and as many of the facts as possible.
4. Written Engagement Agreements:
 - a. You should clearly set out the specific scope of your representation (*e.g.*, Representation before the grand jury, negotiating a plea, a specific criminal case, court or jury trial, revocations or adjudications, post-conviction or appeals, juvenile)
 - b. Specify your Fee Agreement in writing (retainers, hourly rates, fixed fee, etc.)
 - c. Payment schedules v. Upfront payment [note: just because your client does not pay you does not mean that you will be able to withdraw from the case]
5. Communications with your client

B. Getting to know your client

If you are appointed to represent a defendant, the local rules for your county should provide time guidelines for visiting your client in jail.

1. At the first meeting, obtain information about their addresses and telephone numbers, as well as additional people to use for contacts. Allow time for them to give you an overview of their arrest and the circumstances leading up to the arrest.
2. Ask if they are aware of any additional charges that might be filed in either the same or other counties.
3. Review your client's criminal history information (don't just rely on self-reports by the client, use resources such as PublicData.com).
4. Determine if there are co-defendants.
5. Provide the client with information about how you want them to contact you.
6. Always return phone calls, preferably within 24 hours.
7. Inform clients not to communicate about the case to anyone else. (Above all else, no e-mails and no texting about the case!)

C. Prosecution information gathering

1. Review your file as soon as you receive it. Your ability to obtain certain evidence will depend in many instances, on the timeliness of your request!
2. Ask for anything and everything associated with your case as soon as possible. Depending upon the facts

of your case, you may have the following information available:

- a. Offense reports, supplements, décor reports, call texts, inner office correspondence, investigative summaries, and all personal notes;
 - b. 911 recordings, jail call recordings, in-car videos, crime scene videos, crime scene pictures of the physical location and the victim, lapel video footage;
 - c. Witness statements- written and/or recorded;
 - d. The defendant's statement and/or interview;
 - e. Forensic evidence: ballistics, gunshot residue tests, rape exams and rape kits, DNA tests, fingerprint comparisons. If these tests have not already begun, the lead prosecutor will need to follow up and initiate the appropriate testing.
3. For serious cases (homicides or similar cases), it can be extremely helpful at trial for the prosecutor to have visited the crime scene while it is fresh. Two dimensional photographs and even videotapes don't always give you an adequate idea of the scale and relationship of items to one another.
 4. Keep in mind that evidence may be erased, recorded over, lost, destroyed or even returned to witnesses within weeks, if not sooner. The defense may claim that such evidence was improperly lost or destroyed. To prevail, the defense must establish that the State acted in bad faith in destroying the evidence and that he cannot secure similar evidence from a different source. *See Illinois v. Fisher*, 540 U.S. 544 (2004). The defense must also demonstrate that the evidence was material. *See Simmons v. State*, 100 S.W.3d 484, 494 (Texarkana 2003, pet. ref'd). **You do not want to be in the position of having to defend against such a claim!**
 5. A prosecutor should also endeavor to learn everything about the Defendant and his background. The more involved the case, the more information you will want to be armed with. A good starting point.
 - a. Complete Criminal records - arrests, adjudications/ probations, convictions and all of the underlying offense reports –
 - i. Juvenile record (some juvenile Texas Youth Commission trips can be used for enhancement purposes);
 - ii. Records from county, state (TDC pen packs) and federal system; and
 - iii. military record;
 - b. CPS records on your defendant as a perpetrator, if applicable
 - c. Jail records- all disciplinaries from county jail and prison and recordings of hearings (if they exist)
 - d. Gang membership
 - e. School records
 - f. Medical records
 - g. Mental health records- private hospitals, county, jail, prison
 - h. Pictures of tattoos - (always come in handy- to prove up priors, to corroborate a victim's descriptions of a tattoo in a nether region, or simply as punishment evidence depending upon the nature of the tattoo.
 6. The prosecution has the benefit of using grand jury subpoenas to obtain records and develop testimony before the grand jury. Once a case is indicted and in all misdemeanor cases, subpoenas must be used.
 7. Consider retaining an expert when you first spot a potential issue.

D. Becoming acquainted with your victim or victim's family

Familiarize yourself with the case first. As a general rule, the more serious the case, the quicker you will want to contact your victim.

1. If your file does not already contain information concerning how to reach your victim or family member, this is the perfect opportunity to do complete your file. All addresses, work and home phone numbers - land lines and cells - whether you victim prefers to text or talk, email addresses, as well as the contact information for someone who will always know how to reach him or her are important. In addition, make sure your victim knows how to contact you and return the calls as soon as your schedule allows- preferably the same day.

2. Set aside sufficient time not only to gain information, but also to answer any questions he or she may have.
3. Give your victim an overview of what to expect- the grand jury process, the court, the docket, plea bargaining as compared to a trial and a general timeline. More often than not, your victim will have had no exposure to the criminal justice system. Ideally, your victim should leave the meeting with a very basic understanding of what has to happen before a case is resolved.
4. If the case is a property crime, feel free to discuss the particulars of the offense. If it is crime of violence, it is better to wait until you have established a rapport with your victim before delving into sensitive subjects.
5. Explain the pitfalls of using social media and the potentially detrimental effect it could have on their testimony and, ultimately, on the case.
6. Be realistic when explaining the merits of the case. **Never guarantee a particular result or what a jury will do.** Juries are, at best, unpredictable!

E. Conducting discovery

- 1 Article 39.14 of the Code of Criminal Procedure governs discovery in a criminal case. The Michael Morton Act (SB1611) was signed into law on May 16, 2013, and applies to all offenses committed *on or after January 1, 2014*. **While the law does not require it, the best practice is to treat all offenses as if they were committed on or after January 1, 2014. One of the most significant components of the Act is subsection (f). Pursuant to this subsection, prosecutors now have a statutory duty to disclose “any exculpatory, impeachment, or mitigating document, item or information in the possession, custody or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.”**
- 2 Article 39.14 – Discovery. After receiving a timely request from the Defendant, the State, **as soon as is practicable**, shall:
 - a. Produce and permit the inspection and the electronic duplication, copying, and photographing of:
 - i. Offense Reports;
 - ii. Documents, papers, written or recorded statements of Defendant or a witness, including witness statements of law enforcement officers; and
 - iii. Books, accounts, letters, photographs or objects or other tangible things.
 - b. that constitute or contain evidence material to any matter involved in the action and
 - c. are in the possession, custody, or control of the State or any person under contract with the State.
- 3 Disclosure of Discovery Items: Discovery items may not be disclosed to third parties unless:
 - a. a court orders the disclosure,
 - b. the items have already been publicly disclosed, or
 - c. the attorney for the Defendant allows the Defendant, witness or prospective witness to review, but not duplicate items. Certain identifying information must be redacted prior to disclosure.
- 4 Documenting Discovery Compliance: Before accepting a plea of guilty or nolo contendere, or before trial, each party *shall* acknowledge in writing or on the record in open court the disclosure, receipt and list of all documents, items and information provided to the Defendant.
- 5 Use of Waivers
- 6 Compare Article 39.14 (f) with *Brady*:
 - a. A prosecutor must disclose exculpatory evidence if it is material to either guilt or punishment, including impeachment. *See Brady v. Maryland*, 373 U.S. 83 (1963); See also *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992) (describing Brady parameters in Texas).
 - b. Courts use a three part test to determine when a prosecutor has violated the Due Process Clause by failing to disclose evidence:
 - i. Has there been a failure to disclose evidence?
 - ii. Is the evidence favorable to the accused? And
 - iii. Does the evidence create a probability sufficient to undermine the confidence in the outcome of

the proceeding? See *Banks v. Dretke*, 540 U.S. 668, 691 (2004)

- c. The “State,” for purposes of the duty to disclose, includes not only the particular prosecutor but also other lawyers or employees in his office and members of law enforcement connected to the investigation and prosecution of a particular case. *Ex Parte Mitchell*, 977 S.W. 575, 578 (Tex. Crim. App. 1997).
- d. **General rule= Err on the side of disclosure!** You can always ask the judge to grant a motion in limine regarding the information in question, if you believe the evidence should not come before the jury.
- e. Illustrative examples of evidence State should have disclosed:
 - i. Key defense witness was police informant- *Weatherford v. Bursey*, 429 U.S. 545 (1977).
 - ii. Prosecution witnesses were paid gov’t informants- *U.S. v. Bagley*, 473 U.S. 667 (1985).
 - iii. Officer’s journal of witness’ lack of truthfulness written while on security detail for that witness – *Ex parte Richardson*, 70 S.W.3d 865, 871 (Tex. Crim. App. 2002)
 - iv. Eyewitness’s prior statement, evidence implicating second person - *Kyles v. Whitley*, 514 U.S. 419 (1995)
 - v. Criminal record of State’s key witness, even though prosecutor never ran criminal history check- *U.S. v. Auten*, 632 F.2d 478 (5th Cir. 1980)

7 Discovery of experts—**mutual** discovery

- a. Experts who will be used at trial are discoverable by both the prosecution and defense.
- b. The party desiring discovery must file a motion and the court may order disclosure of experts’ names and addresses not later than the 20th day before the trial begins. C.C.P. article 39.14(b). The filing of a motion in and of itself does not trigger the disclosure.

8 Document your file!!!! Both the prosecutor and the defense attorney should be sure to document all interactions between the two and the disclosure of information to the other side. Frequently issues arise later which may require one or both parties to address how discovery was conducted, particularly in cases where a trial was held. Investigating further for defense counsel

F. Investigating further for defense counsel

1. Interview witnesses provided by your client.
2. Interview family members/coworkers/friends for potential character evidence at punishment.
3. Visit the crime scene, if possible.
4. Consider having another expert review the forensic evidence.
5. Do not be afraid to request that the prosecution look into a specific claim made by your defendant or defense witness in advance of trial.
6. It is one of the trial attorney’s duties to make an independent investigation of the client’s case. *Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978).
7. The Texas Court of Criminal Appeals recently held that counsel had a duty to investigate the possibility that the client was insane at the time of the offense given the likelihood of mental illness noted in reports from jail medical personnel. *Ex Parte Imoudu* 284 S.W.3d 866, 2009 WL 1531926 (Tex.Crim.App. June 3, 2009).

G. Grand Jury

1. Commissioners appointed by a district court judge provide names of potential grand jurors. C.C.P. article 19.01
2. An alternate method of selection is also available. C.C.P. article 19.01
3. Either method ultimately results in the appointment of 12 citizens and 2 alternates to serve as grand jurors for a specified term. C.C.P. article 19.26
4. The grand jury meets regularly to review felony cases and issue an indictment or a no-bill
5. There is no right to appear before the grand jury for defense counsel or a defendant. C.C.P. Article 20.011

-
6. All proceedings of the grand jury are secret. C.C.P. article 20.02

H. Meeting with witnesses or victims

1. The prosecution will need to meet with certain victims and/or witnesses to evaluate the witness and the strengths or weaknesses of a case. Each meeting should be documented- either in writing or electronically.
2. The defense attorney's duty to investigate includes the obligation to seek out and interview defense witnesses. *Ex Parte Lilly*, 656 S.W.2d 490 (Tex. Crim. App. 1983). The failure to do so may render counsel ineffective in some cases.
3. The defense attorney should make every reasonable attempt to locate and interview witnesses suggested by the defendant.
4. Attempts to interview prosecution witnesses should be handled carefully, especially where minors are concerned.

I. Reviewing video/audio evidence

1. The defense should review all available recordings related to the case.
2. If a patrol vehicle was involved, there should be some video.
3. If the defendant is in custody, phone calls made from the jail may provide useful information.
Note: Calls made to defense counsel are privileged.
4. CAC interviews of child witnesses are not discoverable until after the child testifies, however, many offices will allow viewing prior to trial for different purposes.
5. A preservation request should be sent by the defense to the prosecution if there are recordings or other types of evidence which may only be held for a limited period of time. This request should be for preservation and copies or inspection of the interested items.

II. INDICTMENTS AND INFORMATIONS

A. Indictment

An indictment is the charging instrument returned by a Grand Jury. It is the charging instrument primarily used for felonies.

B. Informations

An information is a charging instrument which may be filed by the district or county attorney in both felony or misdemeanor cases. The right to have a case presented to a Grand Jury may be waived by a defendant in a felony case. No grand jury presentation is required for a misdemeanor.

C. Review for accuracy and notice

1. An indictment or information is a charging document designed to provide notice to the state of the elements of proof which are required, and notice to the defendant of the charges against him.
2. The requirements for a proper indictment are set out in Code of Criminal Procedure article 21.02 *et. seq.*
3. The indictment should include enough certainty that an accused would be able to plead and prevent a subsequent prosecution for the same offense. C.C.P. article 21.04
4. An indictment which tracks the language of the statute will *almost* always be sufficient. Evidentiary facts need not be pled, unless essential to provide notice. *Moreno v. State*, 721 S.W.2d 295 (Tex. Crim. App. 1986).
5. When recklessness or criminal negligence is the mental state alleged, the reckless or criminally negligent acts must also be alleged in the charging instrument. C.C.P. 21.15
6. The requirements for an information to be sufficient are set out in Code of Criminal Procedure article 21.21. The rules with respect to an indictment also apply to an information. C.C.P. article 21.23
7. More than one offense may be alleged in a single indictment or information and stated in counts if the offenses arise out of the same criminal episode. C.C.P. article 21.24, Penal code section 3.01
8. Repeated instances of the same offenses, e.g. multiple burglaries, robberies, etc, may also be included in a single indictment. C.C.P. article 21.24, Penal code section 3.01

III. PLEA NEGOTIATIONS

A. Know your penalty ranges

1. Pen time vs. Community Supervision or Deferred Adjudication
 - a. The penitentiary sentence for a capital, first, second or third degree felony is served in the Texas Department of Criminal Justice, Institutional Division. Except for certain offenses, a defendant may be considered for parole on this kind of sentence. (No parole on death sentence, life without parole, Aggravated Sexual Assault under PC 22.201 or Continuous Sexual Abuse under PC 21.02)
 - b. The state jail sentence for a state jail felony is served in a state jail. The sentence is served day for day with no early release on parole.
 - c. Community supervision (regular probation) involves a penitentiary, state jail sentence, or county jail sentence that is imposed, but then suspended for a designated period of time as long as the defendant abides by conditions of supervision set out by the Court. In most felony cases, the maximum term of community supervision is ten years. Five years is the maximum term of community supervision for state jail felonies and third degree felonies under Title 7 of the Penal Code, except online solicitation of a minor, and third degree felonies under Chapter 481 of the Health and Safety Code. The maximum term of community supervision is two years for a misdemeanor.
 - d. The court can extend the period of supervision in felonies for a period of time not to exceed a total of ten years and a misdemeanor supervision can be extended for a period not to exceed three years.
 - e. Deferred adjudication is a form of community supervision where the defendant has entered a plea of guilty or nolo contendere and the judge has found sufficient evidence to find the defendant guilty, but the guilty finding is deferred for a period of time. The maximum term of deferred adjudication community supervision is ten years for felonies and two years for misdemeanors.
 - f. Certain offenses may be ineligible for regular probation from a judge. C.C.P. 42.12 3(g).
 - g. Deferred adjudication is not available as an alternative for all offenses. C.C.P. 42.12 5(d).
 - h. Certain offenses may require a minimum term of community supervision if community supervision is offered, e.g. sex offenses.
 - i. You must read and learn Article 42.12 of the Code of Criminal Procedure regarding community supervision and deferred adjudication.

2. Alternative dispositions
 - a. Lesser included offenses - Article 37.09 C.C.P. A plea may be negotiated to a lesser included offense of a charged offense without filing a new charging instrument.
 - b. Reduction to a misdemeanor - A misdemeanor may be a lesser included offense of a felony. A plea may also be negotiated to some crime other than the charged crime, as long as the conduct fits the elements of that crime (unless both sides agree to creatively charge a crime; however, from a prosecutor's perspective, this is not necessarily encouraged).
 - c. Section 12.45 Texas Penal Code - If the prosecutor agrees, a defendant may have additional offenses, charged or uncharged, taken into account by the court during sentencing. The prosecution for that other charge is then barred. The defendant must admit guilt to the offense to which he is pleading. **Note:** you cannot 12.45 an offense into a case where the defendant receives deferred adjudication.
 - d. Section 12.44 Texas Penal Code – 12.44(a) allows a court to punish a state jail felony with the punishment available for a Class A misdemeanor (county jail time and/or fine). Despite the misdemeanor punishment, the conviction is considered a felony conviction. A state jail felony may be prosecuted and punished as if it was a Class A misdemeanor. This requires the prosecutor's consent. A conviction under 12.44(b) is not considered a felony conviction.
 - e. Pretrial Diversion or Deferred Prosecution
 - f. Dismissal – C.C.P. Art. 32.02 provides that the attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the paper in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

B. Aggravating and mitigating factors

1. There are many factors that may aggravate or mitigate a particular offense or punishment range. Certain aggravating factors will increase the punishment range for an offense, or may increase the minimum punishment available for an offense.
2. Aggravating factors may also affect parole eligibility. A conviction for certain designated offenses or an offense involving a deadly weapon may make a defendant ineligible for parole until at least half of the sentence imposed has been served day for day (no good time credit). Article 42.12(3)(g) and Article 37.07 C.C.P.
3. Basic punishment enhancements — Appendix A
4. In a state criminal practice, many mitigating factors (youth, stupidity, true remorse or whatever is mitigating to you) may not actually affect the punishment range. It will be up to the defense attorney to present that kind of mitigation evidence to a prosecutor, judge, or jury in order to achieve the best results for the client.
5. Some offenses might fall in two different penalty ranges depending upon how a particular issue is resolved by the fact finder.
 - a. An aggravated kidnapping may be punished as a second degree felony instead of a first degree felony if the victim was voluntarily released by the defendant in a safe place and the defendant proves this fact by a preponderance of the evidence. Penal Code sec. 20.04(d)
 - b. A murder may be punished as a second degree felony instead of a first degree felony if the defendant proves at punishment by a preponderance of the evidence that the murder was committed under the immediate influence of sudden passion arising from an adequate cause. Penal Code sec. 19.02(d).
 - c. Generally if some sort of mitigation or defense applies, it will be included in the penal code section related to that offense.

C. Deadly weapons

1. **Any** item which, in the manner of use or intended use, is capable of causing serious bodily injury or death, may be alleged as a deadly weapon. Tx. Penal Code sec. 1.07(a)(17). A firearm in the way that it is used, must simply be **capable** of causing SBI. It is not required that the item actually **cause** SBI or death. (A bat, a brick, a crowbar, pillow, a letter opener, scalding water, hands, feet, HIV are only a few examples of items which have been found to be deadly weapons).
2. A firearm is a deadly weapon per se.
3. An affirmative finding that a deadly weapon was involved has serious ramifications on parole eligibility. Article 42.12(3)(g) and Article 37.07 3(g)C.C.P.
4. The state may give notice of its to seek a deadly weapon finding by alleging a deadly weapon on the face of the indictment or by means of a “**Brooks**” letter. *See Brooks v. State*, 957 S.W.2d 30 (Tex. Crim. App. 1997)

D. Dealing with your opponent

1. Remember – you will likely have a long-term working relationship with a prosecutor or defense attorney. This is particularly true in smaller communities.
2. Honesty and integrity are the key.
3. You must be willing to try a case in order to maintain any long-term credibility with your opponent.
4. During negotiations, your knowledge of your client/defendant, your case and the law are crucial to knowing when to hold your position and when to compromise.
5. It is helpful to both sides when a party is willing to disclose enough information to persuade the opponent that a particular resolution is appropriate.
6. For the prosecution, if every case is the most serious case / worst defendant, you lose credibility.
7. For the defense, if every client is innocent, wants a 12.44(a), wants to join the military, or is a friend of a friend and you’re not getting paid, at some point none of your clients will benefit because you will have lost credibility. If you want the state to deviate from an office policy or standard offer, give them a compelling reason- which means one that can be used justify their decision if they are ever questioned.
8. Treat the other side they way you would like to be treated. Don’t let what happens in the courtroom become

personal.

E. Communicating the plea to your client

1. You must communicate any plea offer made to your client. Defense counsel has a duty to inform the client of any plea offer made by the State, and the failure to do so will result in ineffective assistance to the client. *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993). The duty also includes an obligation to inform the state of an acceptance of a plea offer in a timely fashion (*i.e.*, before the offer expires). *Randle*, at 580.
2. Advise your client regarding collateral consequences of guilt (*e.g.*, immigration issues).
3. If necessary, refer the client for outside advice in areas outside of your expertise.
4. Document everything you do! It is a good idea to communicate all plea offers and acceptance or refusals in writing.

F. Collateral consequences of guilt (this list is by no means exhaustive, it is simply illustrative)

1. Firearms possession may be limited – you cannot own a firearm for a specific period of time if you have been convicted of a family violence offense or a felony.
2. Sex offender registration -- Code of Criminal Procedure Chapter 62
3. Immigration consequences – deportation if convicted of an aggravated felony or two convictions for crimes of moral turpitude. Counsel must inform client whether his plea carries a risk of deportation. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
4. Driver's license suspension
5. Criminal history records – difference between arrest record and conviction record.
 - a. Expunction
 - b. Order of Non-Disclosure
6. Parole eligibility—3(g) offenses
7. Eligibility to vote

IV. GUILTY PLEAS

A. Guilty or Nolo Contendere (No Contest)

A plea of no contest has the same legal effect as a guilty plea and essentially *is* a guilty plea. The only difference is that a no contest plea cannot be used against a defendant as an admission in a civil lawsuit arising out of the criminal conduct. Article 27.02(5) C.C.P.

1. Felony cases—the plea must be made in open court by the defendant in person. Article 27.13 C.C.P.
2. Misdemeanor cases—the plea may be made by either the defendant or his counsel in open court and no additional evidence is required during the plea proceeding. Article 27.14(a) C.C.P.
3. Class C misdemeanor cases. Article 27.14(b)

B. The Plea Hearing - Article 26.13 C.C.P.

1. The admonishments which are required before the acceptance of a plea are set out in Article 26.13.
2. The judge must also determine whether the plea is entered into freely and voluntarily, and whether the defendant appears to be mentally competent.
3. The admonishments may be made orally or in writing.

C. Presentence Investigations - Article 42.12(9) C.C.P.

1. Mandatory for a felony plea involving community supervision or deferred adjudication.
2. A PSI is not required if punishment is assessed by a jury or if community supervision is not an alternative.
3. The PSI is prepared by the community supervision department for the county.
4. Defense counsel has the right to read the PSI at least 48 hours before sentencing.

D. Conditions of Supervision – Article 42.12 C.C.P.

1. Standard conditions - §11
2. Drug treatment - §14
3. Conditions for DWI related cases - §13
4. Jail as a condition (served day for day) - §12
5. Sex offender conditions - §13B
6. Creative conditions

E. Judge has the right to “bust” the plea

If the judge fails to follow a plea bargain agreement or rejects any such agreement, the defendant is allowed to withdraw his plea. Article 26.13(a)(2) This only applies to felony cases. There is no such right on misdemeanor cases. *McGuire v. State*, 617 S.W.2d 259 (Tex. Crim. App. 1981)

F. Make no promises to your client

If you promise the defendant anything (*e.g.*, that he should be released from jail or prison at a certain time based upon your expert knowledge of parole), it may invalidate the plea as involuntary.

G. Put it on the record

Or at least document your conversations in your file, so that when the client files a grievance or the defendant files a writ years down the road, you can refresh your recollection of the conversation and events surrounding your representation of that person.

V. PRETRIAL ISSUES

A. Competency and Sanity

Chapters 46B, 46C of the Code of Criminal Procedure and Article 8.01 of the Penal Code

1. If you are unable to communicate with a client in a reasonable and rational manner, and it appears that a mental illness may be involved, the defense attorney should bring that to the attention of the prosecutor and court. An evaluation for competency or sanity may be appropriate and either party or the judge may raise the issue.
2. If after a preliminary informal inquiry the court determines that evidence exists to support a finding of incompetency, the judge must order an examination.
3. Incompetency is different from insanity in that insanity is a defense to the commission of an offense, while incompetency will generally delay the prosecution while attempts to restore the defendant to competency are made.
4. Insanity is an affirmative defense where the defense must prove that at the time of the offense, the defendant, as a result of severe mental disease or defect, did not know his conduct was wrong. Tx. Penal Code 8.01.

B. Bond forfeitures or revocations

1. A defendant who posts a bond and is released from custody may have their bonds revoked or forfeited for various reasons.
2. A bond may be forfeited and a civil case initiated to collect the amount of the bond if a defendant fails to appear in court as ordered.
3. A bond may be revoked if the defendant fails to abide by any conditions imposed by a magistrate or judge. Conditions which may be imposed include those set out in C.C.P. articles 17.40, *et. seq.*

C. Expert witnesses

1. Expert witnesses may, in some cases, be paid for by the court for indigent defendants. The defense attorney should approach the judge *ex parte* and request funds be authorized to pay for the expert. *Ake v. Oklahoma*, 470 U.S. 68 (1985). (Remember to seal it in jail files as well).
2. Expert witnesses who will be used at trial are discoverable by both parties. The name and address of the expert must be disclosed 20 days in advance of trial if ordered by the judge.

D. Testing for communicable diseases

1. A court may require a defendant who has been indicted for or waived indictment for certain offenses to undergo testing for sexually transmitted diseases, AIDS, or HIV. The testing may also be done a second time following conviction. Article 21.31 C.C.P.
2. A county or municipality may also test confined inmates for AIDS or HIV in order to determine proper medical treatment or proper social management within the jail. Article 46A.01 C.C.P.

VI. COMMUNICATIONS WITH YOUR CLIENT/CLIENT'S FAMILY

A. Client in custody

You should visit the client immediately upon being retained or appointed. Suggest a way for your client to communicate with you and establish your expectations for the amount of time or visits he can expect from you.

B. Client on bond

Explain your expectations up front about how often your client can expect to see or hear from you, whether the client can just drop in at your office, where to meet you for court appearances, and any other contact you may have with you client.

C. Attorney-client privilege

1. Set the rules early on concerning who you may communicate information to within your client's family.
2. Designate a single person to be the contact, put it in writing, and obtain your client's permission to provide information to that person.
3. More grievances are based upon the failure to communicate adequately than probably any other attorney conduct.
4. If you will keep them informed, good news or bad, everyone is better off.

VII. TRIAL PREPARATIONS

A. Preparing your witness list

You should prepare a potential witness list from the first reading of the file or meeting with the client and update the list regularly. It should be reviewed and updated far enough in advance of any trial setting to give proper notice and allow subpoenas to be issued and served.

B. Punishment notice

The prosecution should begin a punishment notice contemporaneously with the preparation of a witness list. Article 37.07 controls the punishment phase and sets out the parameters of what is and is not admissible. Anything relevant to character is admissible, **provided timely notice is given.**

C. Witness contacts

1. Allow adequate time for notifying witnesses about court settings.
2. Document your conversations. If you choose not to use someone as a witness, explain why to your client. These explanations can even be memorialized in writing or on the record outside the presence of the jury.

D. View the physical evidence in advance.

E. Don't wait until the last minute.

VIII. DEALING WITH THE JUDGE

A. General Guidelines

1. Avoid ex parte communications.
2. Be professional and on time.
3. Be truthful at all times.
4. Preparation will go a long way towards gaining the Judge's respect.
5. If you don't know the law, don't bluff! Look it up.

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6. If appearing in a court for the first time, introduce yourself to the judge and staff before court begins.
 7. It is good to know the law, but better to know the Judge. Make every effort to learn each judge's specific rules for his or her courtroom. If these rules are not memorialized somewhere, find a trusted and seasoned lawyer to befriend.

B. Don't Commit Your Own Crime

1. Tampering with a witness -- Penal Code section 36.05 prohibits offering, conferring, or agreeing to confer any benefit on a witness or a prospective witness in an official proceeding to testify falsely, to withhold testimony or evidence, to elude legal process, to absent themselves after being legally summoned, or to abstain from, discontinue, or delay the prosecution of another. It also prohibits coercion of a witness or prospective witness to do any of those things. Tex. Penal Code sec. 36.05
2. Obstruction or Retaliation -- Penal Code section 36.06 prohibits harming or threatening to harm another by an unlawful act in retaliation for certain conduct or because of a person's status. Hopefully no attorney would engage in conduct of this nature. Tex. Penal Code sec. 36.06
3. Perjury -- Penal Code section 37.02 relates to false statements given under oath. Perjury can be a misdemeanor or a felony, depending upon when and under what circumstances the false sworn statement is given. Suborning perjury would not only be an ethical violation, but to encourage a client to perjure themselves may subject the attorney to prosecution as a party to the offense. Tex. Penal Code secs. 37.02 and 37.03
4. Hindering Apprehension or Prosecution -- Penal Code section 38.05 provides that a person who harbors or conceals another person or provides or aids in providing another with the means to avoid arrest or to escape and has the intent to hinder the arrest or prosecution may be committing an offense. An attorney may certainly inform a client of an outstanding warrant, however, this must be done in the spirit of an effort to bring that person into compliance with the law. Tex. Penal Code sec. 38.05
5. Bribery -- Penal Code Section 36.02 makes it an offense to intentionally or knowingly offer, confer or agree to confer on another, or solicit, accept, or agree to accept a benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter. This section also applies to benefits offered in return for consideration in a judicial or other administrative proceeding. Tex. Penal Code 36.02
6. Gifts to Public Servants -- Penal code Sections 36.08 and 36.09 govern the offering or accepting of gifts to public servants. Items valued at less than \$50 that are not cash or negotiable instruments are excluded (*i.e.*, the Christmas ham or poinsettia).

9 July 2014

Mr. Barry Alford
1319 Ballinger
Fort Worth, Texas 76102

Re: State v Avery Criss...Robbery
Cause No. 1064209D...213th District Court

Dear Mr. Alford,

Please accept this letter as legal notice of the State's intent to seek enhanced punishment under Chapter 12 of the Texas Penal Code in the trial of the above styled and numbered cause. The state will seek to introduce your client's prior felony convictions in order to:

- 1) Show that the Defendant **IS NOT** eligible for probation; and,
- 2) Enhance the range of possible punishment to 25yrs to 99yrs, Life in TDC.

HABITUAL OFFENDER NOTICE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT PRIOR TO THE COMMISSION OF THE OFFENSE OR OFFENSES SET OUT ABOVE, THE DEFENDANT WAS, ON THE 31st DAY OF JULY, 1998, CONVICTED OF THE FELONY OFFENSE OF BURGLARY OF A HABITATION IN CASE NUMBER 0615860, IN THE 213TH DISTRICT COURT, COUNTY OF TARRANT, STATE OF TEXAS, AND THAT PRIOR TO THE COMMISSION OF THE OFFENSE OR OFFENSES FOR WHICH THE DEFENDANT WAS CONVICTED AS SET OUT ABOVE, THE DEFENDANT WAS FINALLY CONVICTED ON THE 12TH DAY OF MARCH, 1991, OF THE OFFENSE OF BURGLARY OF A HABITATION, IN CAUSE NUMBER 0361263, IN THE CRIMINAL DISTRICT COURT NUMBER TWO, IN THE COUNTY OF TARRANT, STATE OF TEXAS;

This notice is in accord with *Brooks v State, 957 SW2nd 30 (Tex.Crim.App. 1997)*.

Regards,

Christy Jack
Assistant District Attorney
Tarrant County, Texas
Bar no. 10445200

CHAPTER 3: THE TRIAL OF A CRIMINAL CASE FROM SUBPOENA TO NOTICE OF APPEAL

I. PREPARING FOR TRIAL—FROM HOUSEKEEPING MATTERS TO PRETRIAL MOTIONS

A. Subpoenas and Attachments

1. Obtaining the Appropriate Subpoena –

- a. Both the State and the defendant have the right to subpoena any witness whose testimony is “material.” Article 24.03(a) C.C.P.
- b. Application for Subpoena must be in writing and shall state the name of each witness, the location and vocation, if known, and that the testimony of the witness is material to the State or to the defense. Article 24.03(a) C.C.P.

c. Issuance of Subpoena –

A subpoena may summon one or more persons to appear: before a court to testify in a criminal action at a specified term of the court or on a specified day; or in any other proceeding in which the person’s testimony may be required in accordance with this code. The person named in the subpoena to summon the person whose appearance is sought must be: a peace officer; or at least 18 years old and, at the time the subpoena is issued, not a participant in the proceeding for which the appearance is sought. Article 24.01 C.C.P.

d. Subpoena Duces Tecum –

If the witness has any instrument of writing or other thing desired as evidence, the subpoena can require them to bring the same with him and produce it in court. Article 24.02 C.C.P.

e. Subpoena for a child witness –

If you want to subpoena a witness under the age of 18, you must subpoena the adult who has custody, care or control of the child and direct that person to produce the child in court. Article 24.011 C.C.P.

2. Writ of Attachment: When a Properly Served Witness Fails to Appear –

An “Attachment” is a writ issued by a clerk of a court under seal, or by any magistrate, or by the foreman of a grand jury, in any criminal action or proceeding authorized by law, commanding some peace officer to take the body of a witness and bring him before such court, magistrate or grand jury on a day named, or forthwith, to testify in behalf of the State or of defendant, as the case may be. It shall be dated and signed officially by the officer issuing it. Article 24.11 C.C.P.

a. When writ of attachment may issue – two requirements –

The witness must have been properly served and they must reside in the county of the prosecution. Article 24.12 C.C.P.

b. Requisites of attachment –

The writ must be issued by the clerk of the court, under seal, or by any magistrate, or by the foreman of a grand jury. Article 24.11 C.C.P.

B. Alternative to Subpoena—Business Records Affidavits

1. Rule 902 of the Texas Rules of Evidence provides that business records can be self-authenticating if a proper affidavit is filed with the clerk establishing the foundation required by Texas Rules of Evidence 803(6).

2. Time to file –

At least 14 days prior to trial. If timely filed and notice is given to the parties, the custodian is not needed to authenticate the records. Tex. R. Evid. 902(10).

C. Amendment of Charging Instruments

The law on amending charging instruments is found in Chapters 28 and 45 of the Code of Criminal Procedure.

3. Class C Complaints Cannot be Amended –

Since complaints are sworn pleadings, they must be completely re-done and filed again. Article 45.018 C.C.P. Amendment of Indictment or Information. Article 28.10 C.C.P. –

- a. After notice to defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of defendant, the court shall allow defendant not less than 10 days, or a shorter period if requested by defendant, to respond to the amended indictment or information.
- b. A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if defendant does not object.
- c. An indictment or information may not be amended over defendant's objection as to form or substance if the amended indictment or information charges defendant with an additional or different offense or if the substantial rights of defendant are prejudiced.

4. How to Amend. Article 28.11 C.C.P. –

- a. All amendments of an indictment or information shall be made with the leave of the court and under its discretion.
- b. The charging instrument in the court's file is the document that must be amended. A verbal request to the judge may be sufficient if the judge makes the change to the document in the clerk's file. A written motion to amend with the requested language may also be filed. But the only effective amendment is to the face of the actual charging instrument.

5. Read Marvin Collins updated article "Texas Indictment Law" published every other year by Thompson West-in the front of the C.C.P pamphlet. It provides excellent insight into an arcane "back alley" of the law.

D. Continuances

1. Grounds for Continuance –

In general, a criminal trial may be continued on the written motion of either party "upon sufficient cause shown." Article 29.03 C.C.P.

2. Form of Continuance –

The motion must be in writing and sworn to by the party making the motion. Articles 29.03 and 29.08 C.C.P.

3. Specific Requirements –

a. 1st Motion for Continuance –

Sufficient cause is shown if the State complies with Article 29.04 or if the defense complies with Article 29.06.

(1) Article 29.04 First Motion by State –

It shall be sufficient, upon the first motion by the State for a continuance, if the same be for the want of a witness, to state:

- The name of the witness and his residence, if known, or that his residence is unknown;
- The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue; and
- That the testimony of the witness is believed by the applicant to be material for the State.

(2) Article 29.06 First Motion by Defendant –

In the first motion by defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

- The name of the witness and his residence, if known, or that his residence is not known
- The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue
- The facts which are expected to be proved by the witness, and it must appear to the court that they are material

-
- That the witness is not absent by the procurement or consent of defendant

- That the motion is not made for delay
- That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent motion, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If a motion for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the motion was of a material character, and that the facts set forth in said motion were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term.

b. Subsequent Motions for Continuance –

It is harder to establish sufficient cause in subsequent motions. Ex. If the motion is based on an “absent” witness, the motion must state that the testimony cannot be procured from any other source and the movant expects to be able to procure the attendance of the witness at the next term of court. Article 29.05 C.C.P. and Article 29.07 C.C.P.

E. Pretrial Motions

1. Time to File –

Article 28.01 states that pretrial pleadings must be filed seven days before the scheduled hearing. Local rules sometime expand that time.

2. “Must File” Motions/Requests –

- a. Request for discovery pursuant to the Michael Morton Act
- b. Motion to quash, if the indictment or information is defective
- c. Punishment election, if defendant wants the jury to assess punishment
- d. Application for probation, if defendant is eligible
- e. Requests for notice, e.g. 404(b), 609(f), and 37.07
- f. Jackson v. Denno motion to suppress oral statements
- g. Notice of insanity defense (only if insanity is an issue)
- h. Brady motions

3. Motions in General –

The trial court has discretion whether to conduct a pretrial hearing. Know your local rules and practices. If a pretrial hearing has been set, article 28.01(2) states that any ‘preliminary matter’ not raised by written motion prior to the pretrial may not be raised ‘except by permission of the court for good cause shown.’

4. Practical Considerations –

If you use ‘canned’ motions, read them before filing them. Try not to file ‘filler’ motions (wastes trees and they often contain subject matter not relevant to your case). Know the local practice regarding evidentiary v. non-evidentiary pretrial hearings.

5. Skirmishes over Evidence

a. Motion in Limine –

Limine means to limit evidence. This type of motion lets the judge and opposing counsel know there is evidence that may not be admissible and you would like to take up the issue of admissibility before opposing counsel attempts to offer the evidence.

Preserving error- a ruling on a motion in limine does not preserve error!

b. Motion to Suppress –

Obtaining a pretrial ruling on a motion to suppress does preserve error if the motion is denied and the complained of evidence is later admitted. Don’t ever say “no objection” when the complained of evidence is admitted during trial. *But see* Thomas v. State, 408 S.W.3d 877 (Tex. Crim. App. 2013) (holding that a later “no objection” will not forfeit earlier preserved error if a “context-dependent” analysis of the entire record makes clear the “defendant did not intend, nor did the trial court construe” the “no objection” as abandonment of the preserved error).

F. Trial Strategy and Preparation

Order of Preparation –

The traditional way of preparing for trial is still the best way. Prepare backwards. Begin with the jury charge, then prepare your final argument. Next prepare your evidence, opening statement, and finally, voir dire. It is hard to get to the end of the trial where the charge and argument are if you don't know where you are going. By defining the ending first, you always have your goals in mind. The more experience you have, the more these stages of preparation tend to run together. If you are new to trial law, do it by the book...backwards.

G. Trial Notebook

Make your trial notebook and include at least the following five parts.

1. Jury Charge –

Prepare or find a jury charge that includes what must be proven by the prosecution and all possible defenses and justifications that may be relevant to your case. All the facts and theories of the case must filter through the jury charge. Thus, the charge helps you recognize facts and theories as relevant or not relevant. Early preparation of the charge can keep you from following rabbit trails.

2. Final argument –

Try writing it out! This is a great exercise for the new trial lawyer. Just be sure you don't read it to the jury!

3. State's Witnesses –

Include a sheet of paper for each witness you think might be called to testify. Use this paper as a preparation page. Jot down questions and/or concerns you think of as you prepare for trial. If the witness is a police officer, include a copy of the offense report in this section. For lay witnesses, include any statement they might have made.

4. Opening Statement –

This is the story of your case. The technique for delivering the story is, not surprisingly, storytelling. Write the story out and practice telling it.

5. Voir Dire/Jury Selection –

Be sure to include a topic list of areas of the law you will want to explain to the jury.

II. VOIR DIRE

A. The Process of Selecting a Jury

1. Obtain Juror Information Sheets –

Local practice varies from county to county. Find out from the clerk's office when juror information sheets will be available and pick them up for review as soon as you can. Review and take notes.

2. Use a Jury Seating Chart for the Courtroom Where Your Case is Being Tried –

The bailiff will be able to tell you the order of seating. Fill your chart out ahead of time, but be aware of the possibility of a shuffle.

3. Challenge to the Array. Article 35.07 C.C.P. –

a. Grounds –

Only ground is that the officer summoning the jury has willfully summoned jurors with a view of securing a conviction.

To establish a prima facie violation of the requirement that there be a fair cross section of the community represented, Defendant must show:

- The group alleged to be excluded is a distinctive group
- The group is not fairly and reasonably represented in the venires from which juries are selected in relation to the number of such persons in the community
- The underrepresentation is the result of systematic exclusion. Pondexter v. State, 942 S.W.2d 577, 580 (Tex.Crim.App.1996)

b. How Made. Article 35.07 C.C.P. –

Challenge can be made by either party and must be in writing setting forth distinctly the grounds for the challenge. When made by defendant it must be supported by his affidavit or that of any credible person.

c. When Made. Article 35.06 C.C.P. –

States the challenge must be made before the court interrogates them as to their qualifications. Must be before voir dire begins. Clemons v. State, 893 S.W.2d 212, 215 (Tex.App. – El Paso 1995).

4. Motion to Shuffle. Article 35.11 C.C.P. –

Allows either side to demand a “shuffle” of the jury panel. Although the right to shuffle has been deemed “absolute”, the trial court’s refusal to grant a shuffle is subject to a harmless error analysis. See Jones v. State, 833 S.W.2d 118 (Tex. Crim. App. 1992); Ford v. State, 73 S.W.3d 923 (Tex. Crim. App. 2002).

a. When Request Must be Made –

A request to shuffle is timely if made before the State begins questioning the panel. Trejos v. State, 243 S.W.3d 30, 39 (Tex.App.- Houston [1st Dist.] 2007).

b. Procedure for Shuffle. Article 35.11 C.C.P. –

States that jurors must be randomly selected but may be done by computer.

A sufficient number of jurors from which a jury may be selected to try the case shall be randomly selected from the general panel drawn or assigned as jurors in the case.

5. Request a Court Reporter to Record Voir Dire –

Most court reporters hate voir dire because it is difficult to take down, so be sure you make the request. Any potential error that occurs during voir dire will be waived if voir dire is not recorded.

6. Time Limits –

a. In general the court may impose reasonable time limits on voir dire. McCarter v. State, 837 S.W.3d 117, 118 (Tex.Crim.App.1992). The court cannot preclude asking questions already asked by the court or opposing counsel. Each party has the right to emphasize a point or uncover a hidden bias and may not be forced to rely on other parties to ask similar questions. Williams v. State, 804 S.W.2d 95, 107 (Tex.Crim.App.1991)

b. Challenging Time Limit and Preserving Error –

(1) The Objection –

Limiting voir dire infringes on the right to counsel guaranteed by the Sixth Amendment and Article 1 Sec. 9 of the Texas Constitution which encompasses the right to question prospective jurors in order to intelligently and effectually exercise peremptory challenges and challenges for cause. McCarter v. State, 837 S.W.2d at 120.

(2) Preserving Error –

Where voir dire is terminated during collective questioning –

The record must reflect that counsel did not attempt to prolong the voir dire, and that the party was not permitted to ask proper voir dire questions. The questions should be stated for the record in a bill of exceptions. McCarter v. State, 837 S.W.2d at 120.

A question is proper if its purpose is to discover a juror’s views on an issue applicable to the case. McCarter v. State, 837 S.W.2d at 121-122.

Where voir dire is terminated during individual questioning –

In addition to the two factors set forth above, the record must reflect that jurors who counsel was precluded from asking proper questions individually went on to serve on the jury. Ratliff v. State, 690 S.W.2d 597, 600 (Tex.Crim.App.1985).

7. Excusing Jurors –

-
- a. Can't be excused for economic reasons without consent of parties. Sec. 62.110(c) Govt. Code. Can excuse for any reasonable sworn excuse other than an economic reason unless the parties are present and approve such excuse.
 - b. If court excuses a juror, any objection should be on statutory and constitutional grounds. Sec. 62.110(c) Govt. Code.
Excusing a juror for an improper reason implicates the Sixth Amendment's requirement that the venire be composed of a fair cross-section of the community. An objection based only on the statute may not preserve error on any constitutional ground. See, Gray v. State, 159 S.W.3d 95, (Tex.Crim.App. 2005)

8. Peremptory Challenges –

The right to challenge a potential juror without assigning any reason to the challenge.

- a. Batson v. Kentucky, 476 U.S. 79 (1986) and Article 35.261 C.C.P. prohibit peremptory challenges based on race. Batson forever changed the exercise of strikes, which previously had been considered the right of either side to exercise for any reason. In Batson, the U.S. Supreme Court forbade the prosecution from striking veniremen because of race (i.e. without some reason other than race itself), and now that holding has been made applicable to both sides and also extends to gender.
- b. Number of Peremptory Challenges. Article 35.15 C.C.P. –

- Capital murder—15 per side (Co-defendant cases—State and each defendant get 8 per defendant)
- Non-capital felony cases—10 per side (Co-defendant cases—State and each defendant get 6 per defendant)
- Misdemeanor cases—3 per side unless tried in district court than 5 per side (Co-defendant cases—State and each defendant get 3 per defendant regardless of court)

9. Challenges for Cause. Article 35.16 C.C.P. –

The three general categories of challenges include:

- a. Challenges made by either the State or Defense alleging some fact which renders the potential juror incapable or unfit to serve on the jury.
 - (1) Not qualified to vote in the county. Article 35.16 (a)(1) C.C.P. Not qualified in the county of the trial under the Constitution and laws of the state. (Failure to register to vote is not a disqualification).
 - (2) Convicted of misdemeanor theft or a felony. Article 35.16 (a)(2) C.C.P. Not qualified if juror has been convicted of misdemeanor theft or a felony. Juror is disqualified if currently on probation for misdemeanor theft or a felony or has completed the period of probation and not released from disabilities under Article 42.12 Sec. 20 C.C.P. Payton v. State, 572 S.W.2d 677 (Tex.Crim.App.1978), overruled on other grounds by Jones v. State, 982 S.W.2d 386 (Tex.Crim.App. 1998). **This is an absolute disqualification and can't be "consented to" by the parties. Article 35.19 C.C.P.** A completed deferred adjudication is not a disqualification.
 - (3) Under indictment or other legal accusation for misdemeanor theft or a felony. Article 35.16 (a)(3) C.C.P. Not qualified if there is a pending indictment or other accusation for misdemeanor theft or a felony. This includes a pending term of deferred adjudication. State v. Holloway, 886 S.W.2d 482, 483 (Tex.App.-Hous. [1st Dist.] 1994). **This is an absolute disqualification and can't be "consented to" by the parties. Article 35.19 C.C.P.**

Preserving error. Article 44.46 C.C.P. and discussion above.

- (4) The juror is insane. Article 35.16 (a) 4 C.C.P. An insane juror is disqualified from serving. The definition of "insane" used here is not the same as the defense of insanity. A person is qualified who has sufficient mental capacity to transact his own business with intelligence and who is able to form an intelligent conclusion on matters before him. Ex parte Lovelady, 207 S.W.2d 396, 400 (Tex.Crim.App. 1948) **This is an absolute disqualification and can't be "consented to" by the parties. Article 35.19 C.C.P.**
- (5) The most common challenges under Article 35.16 are found in (a)(9) and (a)(10). If a jury has a "bias or prejudice in favor of or against defendant" or has already reached "such a conclusion as to the guilt

or innocence of defendant” that their verdict would be influenced, they may be challenged for cause.

- b. Challenge made by the State alleging a bias or prejudice regarding capital punishment, against any phase of the law, or that the juror is related within the 3rd degree of consanguinity or affinity to defendant. Article 35.16 (b) C.C.P.
- c. Challenge made by the defense alleging a bias or prejudice against any of the laws applicable to the case upon which the defense is entitled to rely or that the juror is related within the 3rd degree of consanguinity or affinity to the victim or any prosecutor in the case. Article 35.16 (c) C.C.P.

10. Examples of Challenges for Cause –

- a. If a panel member would hold defendant’s invocation of his 5th Amendment Right to Remain Silent against him. A juror may be properly challenged “in a case where the State had proven that an accused had probably committed capital murder, but not by proof beyond a reasonable doubt, the fact that the accused had not testified, would sway [the juror] into finding the accused guilty. Guerra v. State, 771 S.W.2d 453 (Tex.Crim.App. 1988).
- b. If a panel member would be unable to consider the full range of punishment. Prospective jurors must be willing to consider the full range of punishment applicable to the offense in order to be qualified. Banda v. State, 890 S.W.2d 42 (Tex. Crim.App. 1994). A person who testifies unequivocally that he could not consider the minimum sentence as proper punishment is properly the subject of a challenge for cause. Banda v. State, 890 S.W.2d at 55. The parties may use hypotheticals during voir dire to determine a potential juror’s views on punishment. Anders v. State, 973 S.W.2d 682, 685 (Tex.App. – Tyler 1997) However, the hypothetical cannot include inadmissible evidence or misstate the law. Thompson v. State, 95 S.W.3d 537, 542 (Tex.App. – Houston [1st Dist] 2002).
- c. Can’t convict on the testimony of one witness. If a potential juror cannot convict based upon one witness whom they believed beyond a reasonable doubt, and whose testimony proved every element of the indictment beyond a reasonable doubt, then the potential juror can be validly challenged for cause. Castillo v. State, 913 S.W.2d 529, 533-34 (Tex.Crim.App. 1995); Lee v. State, 206 S.W.3d 620, 623-24 (Tex.Crim.App.2006).
- d. Bias or prejudice in favor of or against defendant. It is not unusual for a potential juror to state that a police officer would never lie under oath. If such a statement is made, the potential juror has evidenced bias against defendant. Article 35.16 (a)((9) C.C.P. Hernandez v. State, 563 S.W.2d 947, 950 (Tex.Crim.App. 1978).

In Hernandez, the Court quoted directly from the exchange that occurred between the defense lawyer and the potential juror:

- Q. Do you believe a police officer, any police officer, just because he is a police officer would not perjure himself from the witness stand?
- A. No, I believe.
- Q. He would not?
- A. Everyone is fallible at some time or another.
- Q. I am not talking about making a mistake, I am talking about telling a knowing willing falsehood from the witness stand.
- A. I don't think a police officer would tell a falsehood from the witness stand.
- Q. Under any circumstances?
- A. No, I don't.

However, a potential juror merely expressing that they would tend to believe a police officer over other witnesses but would strictly follow the court’s charge, will not give rise to a challenge for cause. Smith v. State, 907 S.W.2d 522, 531 (Tex.Crim.App. 1995).

- e. Additional reasons to challenge for cause are included in the statute.

11. Preserving error on challenges for cause –

To preserve error with respect to a trial court's denial of a challenge for cause, an appellant must:

- Assert a clear and specific challenge for cause
- Use a peremptory strike on the complained-of venire member
- Exhaust his peremptory strikes
- Request additional peremptory strikes
- Identify an objectionable juror
- Claim that he would have struck the objectionable juror with a peremptory strike if he had one to use

Allen v State, 108 S.W.3d 281, 282 (Tex.Crim.App. 2003)

12. Preserving Error. Article 35.19 & 44.46 C.C.P. –

Although the parties can't consent to allow a juror to serve with a misdemeanor theft or felony conviction, the error will be deemed waived unless defendant raises the disqualification before the verdict is entered or the disqualification was not discovered or brought to the attention of the trial court until after the verdict was entered and defendant makes a showing of significant harm by the service of the disqualified juror.

B. How to Conduct an Effective Voir Dire

1. The Law in General –

Texas law recognizes that the purpose of voir dire is to gather information to permit challenges for cause to be made (and ruled upon properly) and to permit each party to intelligently exercise peremptory strikes. Any procedure or limitation on voir dire by the trial court that unreasonably interferes with either of those two objectives is improper and may be grounds for reversal.

2. Each side can question potential jurors about the following subjects:

- a. The applicable law
- b. The punishment range, if the jury has been elected to decide punishment

3. Neither side can question potential jurors about the following subjects:

- a. The facts of the case. (Not to be confused with permissible questioning of potential jurors about hypotheticals)
- b. Commitment Questions – You cannot ask questions which have the effect of “committing” the potential juror to a particular verdict. Standefer v. State, 59 S.W.3d 177 (Tex. Crim. App. 2001).

(1) Generally – Commitment question is one that commits a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact. Standefer v. State, 59 S.W.3d at 179.

A. To determine if a commitment question is improper, a two-step analysis is followed. The first step is to determine whether the question is a commitment question. If it is a commitment question, the second step is to determine whether the question includes facts and only those facts that lead to a valid challenge for cause. If the answer to the second step is no, then the commitment question is improper. Standefer v. State, 59 S.W.3d at 182-83.

Examples of proper and improper commitment questions –

- Predisposition for Guilt if Defendant Didn't Take Breath Test –
Question to juror about whether he would have an automatic predisposition to convict if defendant did not take the breath test, was improper. Standefer v. State, 59 S.W.3d at 183
- Range of Punishment –
Counsel may commit the potential jurors to a punishment range for an offense (i.e. Sexual Assault, Aggravated Sexual Assault) by referring to the specific elements alleged in the indictment. For example, it is proper to ask if they could consider the minimum of five years imprisonment in a murder case. It is impermissible to ask if they could consider the minimum of five years imprisonment where the State alleged the defendant tortured the

victim. Cardenas v. State, 325 S.W.3d 179 (Tex.Crim.App. 2010).

- Prior Felony Conviction –
It was a proper commitment question to ask whether potential jurors would automatically disbelieve a witness who was a convicted felon. Vann v. State, 216 S.W.3d 881 (Tex.App. Fort Worth 2007)
 - Attitude about DNA –
“Who here thinks DNA is reliable?” is not a commitment question. Hawkins v. State, 278 S.W.3d 396, 401-402 (Tex.App. – Eastland 2008).
4. Practical Considerations –
Good trial lawyers use voir dire to indoctrinate potential jurors as to their views of the law and the evidence in the case. You can also use the process to begin establishing positive feelings toward your case and the client. Since voir dire is the only time during trial that attorneys can speak directly to jurors, it is extremely important that you get everyone to like you!
- a. Cover three to five topics
 - b. Ask open-ended questions
 - c. Use looping
 - d. Utilize the three “E’s”
- Elicit information
 - Establish rapport
 - Educate by having potential jurors teach each other

III. THE JURY HAVING BEEN SWORN—THE TRIAL BEGINS

A. Order of the Trial

Article 36.01 C.C.P.

B. Opening Statements

The general law of opening statements is uniform among the states and the federal court system. Opening is confined to relating the facts you expect to prove during the trial. You may not argue the case during the opening statement.

1. To Open or Not to Open? Some attorneys waive the right to give an opening statement. Generally speaking, waiving opening statement is a bad idea because it prevents you from telling the jury your story of what the case is about and it leaves the jury hearing only the prosecutor’s story.
2. When to open? Article 36.01(b) C.C.P. Counsel for the defense can choose to open immediately after the State’s opening statement or after the State rests.
3. Handling objections
“The evidence will show....”
4. Opening statement can open the door for other evidence. A defense opening statement can open the door to otherwise inadmissible evidence to rebut the defensive theory contained in opening statement. Bass v. State, 270 S.W.3d 557 (Tex.Crim.App.2008). An opening statement that does not go beyond simply pleading “not guilty” does not open the door to extraneous evidence. Robbins v. State, 88 S.W.3d 256, 161 (Tex.Crim.App.2002).

IV. RULES OF EVIDENCE AND OBJECTIONS

A. Invoking the Rule – Rule 614 and Article 36.03 C.C.P.

1. Exempt witnesses
 - Defendant
 - Person whose presence is shown to be essential to presentation of party’s cause
 - Victim, unless the victim is to testify and the court determines the testimony would be materially affected if the victim hears other testimony at the trial
2. Violating “the Rule.” If a witness who is under the “the rule” impermissibly talks to someone about the case, the trial court can exclude their testimony and/or punish the person with contempt.

B. Form of Questioning – Rule 611

1. Leading questions. The judge shall exercise reasonable control over the mode of questioning witnesses. Leading questions should not be used during direct examination of a witness except where necessary to develop the testimony. Tex. R. Evid 611(c).
2. Leading questions are permissible with child witnesses, elderly witnesses, and other witnesses with language or memory problems. Uhl v. State, 479 S.W.2d 55 (Tex. Crim. App. 1972).
3. Leading questions should be permitted on cross-examination. Tex. R. Evid. 611(c).
4. Leading questions to an adverse witness. Leading questions are permitted when questioning a hostile witness or adverse party. Tex. R. Evid. 611(c).

C. Impeachment of Witnesses – Rule 607, 608, 609, 611, 612 & 613

1. Who May Impeach? – Rule 607

The credibility of a witness may be attacked by any party, including the party calling the witness.

2. Opinion and Reputation – Rule 608

The credibility of a witness may be attacked or supported in the form of opinion or reputation evidence, subject to the following limitations:

- a. The evidence may refer only to character for truthfulness or untruthfulness
- b. Truthful character evidence only comes in after the witness' character for truthfulness is attacked
- c. Specific instances of conduct are generally not admissible to attack or support credibility of a witness

3. Impeachment by Evidence of Conviction of Crime – Rule 609

a. General rule –

The crime must be a felony or a crime of moral turpitude and the probative value must outweigh the prejudicial effect.

b. Staleness –

Time limit of 10 years since the date of conviction or release from confinement unless the trial court finds the probative value substantially outweighs the prejudicial effect.

c. Pardons and equivalents –

Convictions are not admissible if the witness completed probation or a finding of rehabilitation led to a pardon, annulment, certificate of rehabilitation or other equivalent procedure and the witness has not been convicted of a subsequent felony or crime of moral turpitude. A finding of innocence that leads to pardon, annulment, or equivalent procedure also makes the conviction inadmissible.

d. Juveniles Convictions –

Juvenile adjudications are not admissible “unless required to be admitted by the Constitution of the United States or Texas.” Davis v. Alaska, 415 U.S. 308 (1974).

e. Notice –

Rule 609(f) prohibits evidence of a criminal conviction from being admitted if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to provide sufficient advance written notice of its intent to use such evidence.

4. Writing Used to Refresh Recollection – Rule 612

When a witness temporarily forgets some aspect of his anticipated testimony, counsel may refresh his recollection at trial by handing the witness a writing hoping the writing will jog his memory. The witness also may prepare for his anticipated testimony before trial (with or without the aid of counsel) by reviewing some writing or document. Rule 612 affords trial counsel the necessary tools to (1) insure the writing is used merely to refresh recollection rather than become the final testimony; and (2) inspect the writing, to examine the witness concerning it, and to bring to the jury's attention any inconsistencies between the writing and the testimony.

5. Prior Statements of a Witness – Rule 613

This rule governs two separate forms of impeachment. Section (a) involves impeachment with proof of a witness' prior inconsistent statement and section (b) involves impeachment with proof of bias or interest. Section (c) of the rule deals with the possible rehabilitation of an impeached witness with prior *consistent* statements.

-
- a. Impeachment with prior inconsistent statements –(The Three “Cs”)
Confirm that the witness made a statement on direct that you wish to impeach, i.e. “you testified on direct that the car was red?”
Credit or call attention to the time, place, and circumstances in which the prior inconsistent statement was made, i.e. lay your predicate.
Confront the witness with the actual prior inconsistent statement
 - b. Impeachment with Bias or Interest –
You must first lay the predicate, then you must permit the witness to explain or deny the impeachment material.
 - c. Know when the impeachment is complete –
If the witness admits to the prior inconsistent statement, bias or interest, the impeachment is complete. If the witness denies or can’t remember, you may refresh recollection or impeach with extrinsic evidence.

D. Production of Witness Statements – Rule 615

After a witness testifies, always request that any statement made by that witness concerning the subject matter of their testimony be produced for examination *before* you begin your cross-examination of that witness!!

E. Objecting to Preserve Error (the Texas “Three-Step”)

In order to preserve error for appeal, a trial lawyer must know the following three steps:

1. Make a Timely Objection and State Your Precise Grounds –
 - If overruled, error is preserved.
 - If sustained, continue to step 2
2. Ask to Have the Jury Instructed to Disregard the Question, Comment or Evidence –
 - If no instruction is given, error is preserved.
 - If the judge gives an instruction, continue to step 3
3. Move for a Mistrial –
You must continue demanding some action in your favor until you get a refusal/denial in order to preserve error.

F. Running Objections

Obtain the judge’s explicit permission to make a running objection and then specifically outline the nature, grounds and extent of the objection. Each time a different witness testifies, the running objection should be renewed and thoroughly outlined.

G. Rulings on Evidence – Rule 103

Object to erroneously admitted evidence and make an offer of proof when evidence is erroneously excluded. If the error is fundamental error, it can be raised for the first time on appeal.

H. Rule of Optional Completeness – Rule 107

If a party admits part of an act, declaration, conversation, writing or recorded statement, then the opposing party may introduce any other part or any other writing or recorded statement which in fairness should be considered contemporaneously with the previously admitted evidence.

I. Common Evidentiary Predicates

1. Photographs – Rule 901. Ask witness to identify and confirm that photograph is fair and accurate representation of what is depicted. See Huffman v. State, 746 S.W.2d 212, 222 (Tex.Crim.App. 1988).
2. Audio and video tapes –
 - a. Videos with No Sound –
Witness has personal knowledge what is contained on the recording and can testify that the exhibit is a true and accurate copy of what is recorded. See, Angleton v. State, 971 S.W.2d 65 (Tex.Crim.App. 1993) and Huffman v.

State, 746 S.W.2d at 222.

b. Audio –

In audio recording, witness is acquainted with the voice of the speakers and can identify voices. Tex. R. Evid. 901 (b)(5).

3. Oral Statements of an Accused introduced under Article 38.22(3) C.C.P. –

- a. Recording device was capable of making an accurate recording and the operator was competent
- b. The recording is accurate and has not been altered
- c. Testimony of person who has knowledge of the interview and reviewed the recorded statement that the recording reflected the events of the interview is sufficient to show a recording's authenticity. Hall v. State, 67 S.W.3d 870 (Tex.Crim.App.2002). The district court is within its discretion to infer that the requirements of section 3(a)(3) have been met if the tape is an accurate portrayal of the interview. Maldonado v. State, 998 S.W.2d 239, 246 n. 9 (Tex.Crim.App.1999).

4. Business Records under Rule 803(6) –

a. Predicate –

- Record was made and kept in the regular course of business;
- It was the regular practice of the business to make the record;
- Record was made at or near the time of the event it records;
- Record was made by, or from information transmitted by, a person with knowledge acting in the regular course of business;

b. Proof of Predicate –

Elements may be established by the custodian of records or other “qualified witness” who can testify that the records satisfy the exception.

c. Self-Authenticating–

Business records can be self-authenticating if accompanied by an affidavit of the person who would otherwise provide the prerequisites for admission under Rule 803(6) and filed at least 14 days before trial and notice of the filing is promptly given to all parties. Tex. R. Evid. 902.

5. Government Records under Rule 803(8) –

a. Public Records and Reports –

Admissible if document is a copy of a record or report of a public office or agency and the document sets forth

- (1) the activities of the office or agency; (2) matters observed pursuant to duty imposed by law to which there exists a duty to report; OR (3) factual findings resulting from an investigation made pursuant to authority granted by law. Rule 803(8)(b) specifically excludes State criminal investigations in criminal trials.

b. Self-Authenticating–

Certified copies of public records are self-authenticating. Tex. R. Evid. 902. Once a document has been authenticated, no formal laying of a foundation is required for admission under Rule 803(8). Cowan v. State, 840 S.W.2d 435 (Tex. Crim. App. 1992).

V. WAIVERS AND OTHER SELF-INFLICTED WOUNDS

A. Invited Error—“Opening the Door”

This is a common mistake made by inexperienced trial lawyers. You elicit testimony you think might be helpful, only to discover that you have provided the opposition with an opportunity to prove something that would have otherwise been inadmissible.

B. Doctrine of Curative Admissibility

Common law doctrine which allows one party to introduce evidence that might otherwise be excluded to counter the unfair prejudicial use of the same evidence by the opposing party.

C. DeGarmo Doctrine

In 1985, the Texas Court of Criminal Appeals held that if a defendant admits guilt during punishment, he waives error which occurred during the guilt/innocence phase of trial. DeGarmo v. State, 691 S.W.2d 657 (Tex. Crim. App. 1985). However, where defendant is raising a constitutional objection to the admissibility of evidence or statutory rights, the Court has qualified the DeGarmo Doctrine by allowing defendant to raise those issues. Leday v. State, 983 S.W.2d 713 (Tex. Crim. App. 1998).

VI. THE COURT'S JURY CHARGE AND JURY DELIBERATIONS

In Texas, the court's instructions about the law are reduced to writing, read by the judge to the jury, and the jury is given a copy to use during deliberations. It is the responsibility of the trial lawyers in their argument to make the instructions come to life; to emphasize those that are decisive to their case and to show how the instructions blend with the evidence to compel a favorable verdict.

A. Procedures

1. Informal Charge Conference –

This is a give and take discussion, off the record, about the content of the charge. Both sides should discuss with the judge what instructions should or should not be included in the charge. This can occur at any time before the formal charge conference. In practice, the prosecution often will prepare the draft charge for the judge. Few judges prepare their own charge.

2. Formal Charge Conference. Article 36.14 C.C.P. and 36.15 C.C.P.

This conference should always take place on the record. A defense attorney may reduce special requested charges or objections to the charge to writing. If written, they should be filed with the clerk and a ruling obtained from the judge. Alternatively, the defense attorney may dictate the requests and/or objections on the record to the court reporter and obtain a ruling. All requests and objections must be made before the charge is read to the jury.

B. Harmless Error in the Charge

If the defendant objected to a defect in the court's charge, he must show on appeal that he was harmed by the defect. If defendant failed to object to the defect, he must establish "egregious harm." Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985).

C. Lesser Included Offenses

A defendant is entitled to an instruction on a lesser included offense where the proof for the offense charged includes the proof necessary to establish the lesser included offense and there is some evidence in the record that would permit a jury rationally to find that if defendant is guilty, he is guilty only of the lesser included offense. Hall v. State, 225 S.W.3d 524, 536 (Tex.Crim.App. 2007). To preserve error, an appellant must request an instruction on the lesser-included offense or object to the trial court's omission of such an instruction from the jury charge. Boles v. State, 598 S.W.2d 274, 278 (Tex. Crim. App. 1980).

D. Closing Argument

1. Argument Techniques: Prepare, Prepare, Prepare! –

- a. Argue the court's charge
- b. Settle on a primary theory of guilt/exculpation
- c. The defense generally will emphasize reasonable doubt.
- d. Refer back to voir dire
- e. Anticipate the opposing counsel's closing argument
- f. Your beliefs should be apparent to the jury, but it is improper to tell them what you believe

2. Legal Boundaries of Closing Argument –

a. In General, Trial Attorneys are Permitted to –

- Summarize the evidence
- Make reasonable deductions from the evidence
- Argue matters that are common knowledge, and
- Make a plea for a favorable verdict. Tex. Jur. 3d, Criminal Procedure: Trial §480.

-
- b. You are Not Permitted to –
Argue facts not in evidence and/or argue a proposition of law that is contrary to the law contained in the charge.
3. Examples of Improper Argument –
- a. Comment on Defendant’s Failure to Testify –
It is error for the State to directly comment on the failure of defendant to testify. Such comments violate the Fifth Amendment of the Constitution of the United States and Article I § 10 of the Texas Constitution. Lopez v. State, 793 S.W.2d 738, 741 (Tex.App. - Austin 1990).
The test to be applied is whether the language used by the prosecuting attorney was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused’ failure to testify. Lopez v. State, 793 S.W.2d at 741, citing Allen v. State, 693 S.W.2d 380, 381 (Tex.Crim.App. 1980).
Comments by the State on defendant's motive have repeatedly been held to constitute a comment on defendant's failure to testify. This is because, in many cases a defendant is the only one who could possibly know his or her motive. Lopez v. State, 793 S.W.2d at 742, citing Lee v. State, 628 S.W.2d 70 (Tex.Crim.App. 1982); Franks v. State, 574 S.W.2d 124 (Tex.Crim.App. 1978); Koller v. State, 518 S.W.2d 373 (Tex.Crim.App. 1975); Minton v. State, 162 Tex.Crim. 358, 285 S.W.2d 760 (Tex.Crim.App. 1956).
For indirect comments on defendant's failure to testify to constitute reversible error, they must call for a denial of an assertion of fact or contradictory evidence that only the appellant is in a position to offer. Griffin v. State, 554 S.W.2d 688 (Tex.Crim.App. 1977).
- b. Defendant's Right to Appeal if He is Wrongfully Convicted –
It is improper to argue that if the jury acquits a criminal may go free, but if you wrongfully convict, defendant will have the remedy of appeal. Crow v. State, 26 S.W. 209 (Tex.Crim.App. 1894).
- c. Argument Inciting Class Prejudice –
It is improper to argue that the jury should convict because of defendant's class in society. Atkeison v. State, 273 S.W. 595, 596 (Tex.Crim.App. 1925).
- d. Arguments that Refer to the Expectations or Demands of the Community for a Particular Result –
It is improper for the State to argue that the people of the community are demanding a particular result in a case, such as an acquittal or a particular sentence. Cox v. State, 247 S.W.2d 262, 263 (Tex.Crim.App.1951). However, it is not error to argue that the community expects the jury to follow the law or harsh punishment for an egregious crime as long as there is no assertion that a particular result is expected. Wilson v. State, 581 S.W.2d 661 (Tex.Crim.App. 1979).
- e. Argument Attacking Opposing Counsel –
It is error to make personal attacks on defense counsel or to imply that he or she has acted in a deceptive or dishonest manner. The objection is that the State is "striking at defendant over his attorney's shoulder." Gomez v. State, 704 S.W.2d 770, 772 (Tex.Crim.App. 1985).

E. Jury Deliberations

The jury may take the filed charge to the jury room, and they may request any exhibits admitted into evidence.
Article 36.18 C.C.P. and 36.25 C.C.P.

1. Jury Questions. Article 36.28 C.C.P. –
If the jury disagrees as to the statement of any witness, they may ask the court to have the disputed testimony read back
2. Deadlocked Jury. Article 36.31 C.C.P. –
When a jury is deadlocked, they can be discharged if both sides consent or if the court determines the length of deliberations renders it improbable that the jury can agree on a verdict. Often, the court will give “Allen” or “dynamite” charges to the jury to reconsider their position on the Defendant’s guilt rather than declaring a hung jury. Note that 23 states have rejected Allen charges.
3. Polling the Jury. Article 37.05 C.C.P.

VII. PUNISHMENT TRIAL

If a defendant is found guilty, there is a second phase of the trial to allow the fact-finder to hear additional evidence relevant to determining punishment. This evidence will be the same whether the jury or the court has been chosen to hear punishment, but may be presented differently depending upon whether it is a judge or jury.

A. Punishment Evidence. Article 37.07(3) C.C.P. –

Evidence may be offered by the prosecution and the defense as to any matter the court deems relevant to sentencing, including but not limited to:

1. Prior criminal record of defendant,
2. General reputation,
3. Character or opinions regarding his character,
4. Circumstances of the offense for which he is being tried, and
5. Any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt to have been committed by defendant or for which he could be held criminally responsible, regardless of whether he has been previously charged with or convicted of the crime or act.

B. Request for Notice of Intent to Offer 37.07 Evidence

Code of Criminal Procedure Article 37.07(3)(g) states that “on timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b).” Notice of intent to introduce an extraneous crime or bad act that has not resulted in a final conviction or a probated or suspended sentence is reasonable only if the notice includes the date and county in which the alleged crime or bad act occurred and the name of the alleged victim or the crime or bad act. A timely request to the attorney for the State must be made in order for this notice to be required.

C. Proof of Eligibility for Probation

1. Defendant Must File a Written Sworn Motion Before Voir Dire –

To be eligible for a recommendation of community supervision by a jury, defendant must, before the trial begins, file a written sworn motion with the judge that he has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in defendant's motion is true. Article 42.12 (4)(e) C.C.P. and Article 37.07 Sec. 2 (b) C.C.P. A sworn motion is not required when there is not a jury on sentencing, but it is advisable to file the motion to draw the court's attention to the issue.

2. Prior Juvenile Felony Does Not Disqualify –

An adjudication for a felony offense under Sec. 54.03 Family Code does not render one ineligible for probation as an adult. Thompson v. State, 267 S.W. 3d 514 (Tex.App. - Austin 2008).

3. Prior Felony Deferred Adjudication Does Not Disqualify –

A prior felony deferred adjudication does not render a defendant ineligible for probation on a subsequent felony. Ex parte Welch, 981 S.W.2d 183, 184 (Tex.Crim.App. 1998).

4. A Prior Felony Probation or Conviction that is on Appeal Does Not Disqualify –

Baker v. State, 520 S.W.2d 782, 783 (Tex.Crim.App. 1975). However, a pending appeal from a revocation of probation does not make defendant eligible for felony probation. Franklin v. State, 523 S.W.2d 947 (Tex.Crim.App. 1975).

5. Defendant has the Burden of Proof to Establish Eligibility –

The burden of proof is on the defendant to show that he is eligible for probation. Baker v. State, 519 S.W.2d 437 (Tex.Crim.App. 1975). The mere filing of the sworn motion for probation is not sufficient. There must be proof of eligibility. Palasota v. State, 460 S.W.2d 137, 141 (Tex.Crim.App. 1970).

6. Proof Establishing Eligibility for Probation –

Defendant's wife's testimony that she had known him since he was ten and that he had not been convicted of a felony was sufficient to require submission of a charge on probation to the jury. Trevino v. State, 577 S.W.2d 242 (Tex.Crim.App.1979). Compare with Ramirez v. State, 2000 WL 1595694 (Tex.App. -El Paso 2000), where testimony by witnesses that had not known defendant all his adult life was insufficient to require submission. In Walker v. State, 299 S.W. 417, 418 (Tex.Crim.App. 1927), the court found witnesses who had no knowledge of

defendant during several six-month absences could not say defendant did not receive a felony conviction during those absences making the testimony insufficient to establish eligibility.

7. **Court Ordered Probation –**

If eligible for probation by the court, the judge may probate the sentence where no sworn motion is made. If defendant does not receive probation from a jury because he didn't file a sworn motion for probation and he is otherwise eligible for probation from the court, the court may grant probation. See, Ivey v. State, 250 S.W.3d 121 (Tex.App. -Austin 2007).

D. The Punishment Charge

The charge and charge conference are handled the same as guilt/innocence. You should familiarize yourself with the law regarding parole instructions and community supervision. Article 37.07 C.C.P. and Article 42.12 C.C.P.

E. Hung Jury on Punishment

Article 37.07(3)(c) C.C.P. provides that in the event of a hung jury during punishment, a mistrial will be declared as to punishment only and a new jury impaneled to determine punishment.

VIII. POST TRIAL

A. Duties of the Defense Attorney

Representation by a defense attorney does not terminate when the punishment verdict is received. The determination of whether to give notice of appeal is a critical stage of the criminal process. A defense attorney, whether retained or appointed, has the duty, obligation, and responsibility to:

1. Consult with and advise the client concerning the meaning and effect of the judgment,
2. Inform the client of the right to appeal from the judgment and the necessity of giving timely notice of appeal,
3. Take other steps to pursue an appeal, if the client desires to appeal,
4. Express an opinion regarding possible grounds for appeal,
5. Outline the advantages and disadvantages of pursuing an appeal.

See Ex Parte Axel, 757 S.W.2d 369 (Tex. Crim. App. 1988).

B. File a Motion to Withdraw

Article 26.04(j)(2) C.C.P.

C. Filing a Motion for New Trial

1. **Time for Filing –**

A motion for new trial must be filed within 30 days of the date sentence is pronounced in open court. Tex. Rule App. Pro. 21.4.

2. **When it is Necessary to File –**

A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record. Tex. Rule App. Pro. 21.2.

3. **Effect of Filing –**

A motion for new trial extends the time to file a notice of appeal from 30 days to 90 days. Tex. Rule App. Pro. 26.2(a).

4. **Presenting the Motion –**

A motion must be presented to the trial court within 10 days of filing. The trial court has discretion to permit it to be presented within 75 days, but filing the motion alone is insufficient to make anything happen (except time extensions for filing notice of appeal). Tex. Rule App. Pro. 21.6.

5. **Evidence Allowed During Hearing –**

If the trial court grants a hearing on the motion for new trial, evidence may be introduced through affidavit and/or testimony. Tex. Rule App. Pro. 21.7.

6. Court's Ruling –

The motion is overruled by operation of law if the trial judge does not rule on the motion within 75 days from the date sentence was imposed. Tex. Rule App. Pro. 21.8.

D. Notice of Appeal

1. Right to Appeal –

a. The State has a limited right to appeal an order that:

- Dismisses a charging instrument,
- Grants a new trial,
- Arrests or modifies a judgment,
- Sustains a claim of former jeopardy,
- Under certain circumstances, grants a motion to suppress,
- Challenges the sentence as illegal, or
- Deals with DNA testing under Chapter 64 C.C.P. Article 44.01 C.C.P.

b. Defendant has a general right to appeal unless the case involves a plea bargain. Tex. Rule App. Pro. 25.2 and Article 44.02 C.C.P. If the case involves a plea bargain, the trial court may grant permission to appeal.

2. Time for filing Notice of Appeal –

Within 30 days of sentencing, or 90 days if a motion for new trial was timely filed. Tex. Rule App. Pro. 26.2

- a. Be aware of where the notice must be filed, i.e. trial court clerk. Tex. Rule App. Pro. 25.2(c)
- b. There must be a certification of defendant's right to appeal in the record to perfect the appeal. Tex. Rule App. Pro. 25.2(d)
- c. Time for filing a notice of appeal can be extended if the appellate court receives a proper motion requesting an extension of time within 15 days of the deadline. Tex. Rule App. Pro. 10.5(b) and 26.3

E. Bail Pending Appeal

1. Misdemeanors –

Defendant is entitled to be released on reasonable bail. Article 44.04(a) C.C.P.

2. Felonies –

No bail pending appeal if the punishment imposed is 10 years or more, or for a conviction for an offense that is ineligible for community supervision under Article 42.12(3)(g)(a)(1). Article 44.04(b) C.C.P.