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I. Scope of Paper

This paper discusses selected criminal cases, most of which were decided by the Texas Court of Criminal Appeals, the San Antonio Court of Appeals, or the United States Supreme Court, between September 1, 2008, and March 25, 2009.

II. Topics

APPEAL

1. "Bolstering" preserves error, provided it is bolstered by other objections.

***Rivas v. State*, 2009 WL 187801 (Tex. Crim. App. 2009)**

A sexual assault nurse examiner was permitted to read to the jury the history portion of her examination of a seven year old child in an aggravated sexual assault and indecency case. Appellant made numerous objections, including that the report constituted bolstering. The Court of Criminal Appeals agreed, and remanded the case to the Court of Appeals.

"Bolstering occurs "'when one item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party.'"

The Court of Appeals erred when it held that appellant's "bolstering" objection was insufficient to preserve error. "Bolstering" has not been codified in the rules of evidence, and it is problematic because of "inherent ambiguity." Here, though, appellant raised several objections in addition to bolstering. He complained that the medical exception to the hearsay rule did not apply in the absence of physical evidence of abuse, and that the evidence was inadmissible because the child had not been impeached, and that the statement would be used as a basis for the nurse's "back door" diagnosis that sexual abuse had occurred. Contrary to what the Court of Appeals held, "an objection is not defective merely because it does not identify a Rule of Evidence." "Straightforward communication in plain English will always suffice."

2. "Relevancy" objection does not preserve error under Rule 404(b).

***Ramey v. State*, 2009 WL 335276 (Tex. Crim. App. 2009)(not designated for publication)**

"This court has previously held that relevancy objections will not preserve error for Rule 404 claims on appeal."

3. Must a motion for continuance be in writing?

***Anderson v. State,* 268 S.W.3d 130 (Tex. App. – Corpus Christi 2008, pet. granted)**

Just before trial, the state announced that it was going to offer DNA evidence, at which time the defense requested a continuance by way of an oral, unsworn motion, which was denied. Appellant then pleaded guilty and appealed the denial of the motion for continuance.

The Court of Appeals held that the trial court erred when it denied appellant's motion for continuance. Although the general rule requires a motion for continuance to be written and sworn, an exception exists when the denial of an oral motion would amount to a deprivation of due process. A defendant is guaranteed a meaningful opportunity to present a complete defense. Although a defendant is not allowed to profit from his counsel's inaction, here the defense was diligent.

The Court of Criminal Appeals granted the state's petition for discretionary review to consider these questions:

> 1. Whether a Court of Appeals has decided an important question of state law that conflicts with the decision of the Court of Criminal Appeals. [Is a written motion an absolute requirement to preserve error on a claim of improper denial of a motion for continuance]
>
> 2. Whether the decision of the Court of Appeals conflicts with another Court of Appeals on the same issue.

4. When a waiver is not a waiver.

***McFadden v. State,* 2009 WL 400370 (Tex. App. – San Antonio 2009, pet. granted)**

"In the present case, there is no question that there was a plea bargain documented with boilerplate language waiving the right of appeal. However, the trial court orally admonished McFadden that he would not be allowed to appeal absent her permission, and the court subsequently gave such permission the very same day. Therefore, the trial court's oral pronouncement that McFadden could appeal with her permission, and her subsequent

permission via the trial court certification, control over the boilerplate language waiving the right to appeal. Accordingly, we hold McFadden properly preserved his right of appeal, and this court has jurisdiction over this cause."

5. State may not appeal an order returning seized property.

***In re Search Warrant Seizure*, 273 S.W.3d 398 (Tex. App. – San Antonio 2008, pet. ref'd)**

"Because the State's authority to appeal must be expressly authorized by statute, and article 44.01 does not authorize the State to appeal an order returning seized property, we do not have jurisdiction to consider these appeals."

ASSISTANCE OF COUNSEL

1. Billy *Frederick* Allen is not Billy *Wayne* Allen.

***Ex parte Allen*, 2009 WL 282739 (Tex. Crim. App. 2009)(not designated for publication)**

Applicant was convicted of murdering Sewell and Lashbrook and sentenced to 99 years imprisonment based primarily on two pieces of evidence: his palmprint was found on the roof of a car in which Lashbrook's body was found, and Sewell, before he died, made a statement that one of his killers was "Billy Allen." There was a plausibly innocent explanation for the palmprint, but the "Billy Allen" reference was problematic. Prior to trial the defense had obtained officer Clary's two-page police report that said nothing about the "Billy Allen" remark. During trial the prosecution produced Clary's *four* page report that did reference "Billy Allen." The defense did not ask for a continuance when surprised with this reference. After trial, the defense found a paramedic who heard the deceased reference, but was adamant that he said, "Billy *Wayne* Allen," not "Billy Allen." The defense did not include this arguably newly discovered evidence in its motion for new trial. Applicant's name was "Billy *Frederick* Allen. There was a Billy *Wayne* Allen, as it turned out, and, for a number of reasons, he was a much more likely murderer than the applicant. Indeed, the police later admitted that Billy Wayne Allen had been a suspect early on in the murders, but that they then focused on applicant because of the palmprint.

Applicant filed a subsequent writ of habeas corpus alleging, among other things, that his trial lawyers were ineffective because they did not "(1) properly investigate the case and discover that the victim Sewell had named someone other than applicant as his attacker; (2) move for a continuance at trial to investigate the matter when he was surprised by Officer Clary's testimony regarding Sewell's statement to Clary in the

ambulance; and (3) raise in his motion for new trial the issue of the newly discovered evidence that he discovered when he did have the matter investigated after trial.

The Court of Criminal Appeals agreed that trial counsel were ineffective, and granted Allen habeas relief. The Court agreed that a verdict that is only weakly supported by the evidence is more likely to have been affected than one with overwhelming support. Trial counsel admitted he discovered the paramedic's evidence before filing the motion for new trial, but testified that he did not include it in the motion because he believed the trial judge would have rejected the motion because of his lack of diligence in discovering the evidence before trial. This admitted lack of diligence "was precisely what deprived applicant of the opportunity to present critical evidence to the jurors and possibly obtain a favorable verdict at his trial, or at the very least, preserve an important issue for appeal: the testimony of an independent witness, who was found to be credible at least by the habeas court, that the victim repeatedly and clearly named someone other than applicant as his assailant, just hours before slipping into a coma that lasted until he died more than two months later."

2. The failure to request a limiting instruction constitutes ineffective assistance of counsel.

***Ex parte Munsch*, 2009 WL 256505 (Tex. Crim. App. 2009)(not designated for publication)**

The only evidence of penetration in this case came from a third party, Waggoner, whose testimony about what the child-complainant had told her was admitted as a prior inconsistent statement under Rule 613. Applicant's trial attorney failed to request a limiting instruction, and applicant complained in a writ that this constituted ineffective assistance of counsel. The Court of Criminal Appeals agreed.

"The record reflects that the only evidence presented to the jury that penetration occurred in the aggravated sexual assault conviction was that of Ms. Waggoner. It is also clear from the record that the intermediate appellate court, when considering the Applicant's insufficiency of the evidence claim, considered Ms. Waggoner's testimony for the truth of the matter asserted, and that a limiting instruction from the trial court would not only have been appropriate, but essential, to ensure that the jury did not misuse impeachment evidence as substantive evidence of guilt. Because Ms. Waggoner's testimony about what the complainant had told her was admitted as complainant's prior inconsistent statement, a limiting instruction would have been appropriate. Therefore, counsel's failure to request one as soon as the testimony was admitted constituted deficient performance. The Applicant has shown that counsel's performance was deficient, and that the deficient performance prejudiced the defense." [citations omitted]

3. Trial counsel was ineffective for not objecting to the inclusion of recklessness in the jury charge, where recklessness was not alleged in the indictment.

***Ex parte Simpler*, 2009 WL 256526 (Tex. Crim. App. 2009)(not designated for publication)**

The indictment alleged that applicant intentionally or knowingly assaulted a public servant, but the jury charge included the allegation that she also acted recklessly, and the prosecutor emphasized recklessness in his summation. Trial counsel was ineffective for not objecting to the submission of recklessness, a culpable mental state that was not alleged in the indictment.

4. Counsel was ineffective for not *adequately* presenting evidence of memory implantation.

***Ex parte Ard*, 2009 WL 618982 (Tex. Crim. App. 2009)(not designated for publication)**

The state's only evidence that a sexual assault occurred came from the child complainant, who outcried months after the alleged offense, after he had been in therapy for a while. At trial the defense presented expert testimony from Dr. Gottleib to support the theory that the child's testimony was the product of suggestion and coaching. Following his conviction, applicant filed a writ complaining that trial counsel had been ineffective for failing to adequately present Gottleib's testimony, and the Court of Criminal Appeals agreed. Gottleib's *trial* testimony focused on general concepts, and referred only a single time to the child's case in particular. At the *writ* hearing, Gottleib covered the topics in far greater detail, cited a number of scholarly articles, and spent a significant amount of time applying the principles of memory to the child's particular case. The trial and writ testimonies differed markedly both in scope and substance, and this difference cannot be attributed to trial strategy.

5. You're a lawyer, not a bill collector.

***Ex parte Pompa*, 2009 WL 624049 (Tex. Crim. App. 2009)(not designated for publication)**

> Applicant contends, *inter alia*, that his trial counsel rendered ineffective assistance because when applicant was not able to pay the fee he had recently learned would increase if he demanded a trial, counsel told applicant that he would be "distracted" while trying the case due to applicant's non-payment of the fee. One of trial counsel's former assistants

testified that counsel "used the language about being distracted at trial in the absence of an additional fee on many occasions, not only with [applicant], but with other clients."

The trial court has determined that trial counsel was ineffective in that counsel's increased demands for money greatly affected applicant's decision to plead guilty and that such ineffective representation prejudiced applicant. We find, therefore, that applicant is entitled to a new trial.

BAIL

1. $1,000,000.00 bail excessive in capital murder case.

***In re Estrada*, 2008 WL 4958370 (Tex. App.–San Antonio 2008, no pet. h.)(not designated for publication)**

"[W]e have found no reported Texas case sustaining bail in the amount of $1,000,000, even in the most egregious capital murder cases." Bail in this capital case was reduced from $1,000,000.00 to $600,000.00. "Other evidence presented at the habeas hearing that favors a reduction in bail includes Estrada's lack of previous convictions, his ties to the local community, and a supportive family. However, there is also evidence militating against a significant reduction in the amount of bail, including the circumstances of the capital murder to which Estrada has admitted, the fact he was on bond for a felony offense when the capital murder occurred, and his indictment for two other felonies committed against a family member. In addition, Estrada had dropped out of school and was not employed when the murder occurred. He had a troubling record of disciplinary infractions at school, indicating a failure to follow rules and difficulty controlling his behavior. The trial court rightfully could have considered Estrada's school disciplinary history and the alleged commission of various other offenses as evidence Estrada would not comply with the conditions of bond, including appearing at trial. The evidence of Estrada's pattern of being unable to control his conduct also supports a finding that, if released on bail, Estrada could pose a danger to the community."

2. But $750,000.00 is O.K.

***Ex parte Veselka*, 2008 WL 4958305 (Tex. App.–San Antonio 2008, no pet. h.)(not designated for publication)**

In this case, decided the same day as *Estrada*, the Court of Appeals upheld a $750,000.00 bond in a capital murder case, finding that, considering the facts of the case, the circumstances of appellant's arrest, appellant's ability to make bail, and his ties to the

community, "we cannot conclude that the trial court abused its discretion in only reducing the bail to $750,000."

CAPITAL MURDER

1. How transferred intent applies to the serial murder statute.

***Roberts v. State*, 273 S.W. 3d 322 (Tex. Crim. App. 2008)**

The capital murder indictment alleged that appellant killed a pregnant woman and her unborn child. The woman was in the early stages of her pregnancy, appellant did not know she was pregnant, and, according to the medical examiner, one would not know the woman was pregnant by looking at her by looking.

Appellant argued that, because it was impossible for him to know the woman was pregnant, he lacked the specific intent to cause the unborn child's death, an essential element of the offense. The Court of Criminal Appeals agreed. Because the state alleged that appellant intentionally and knowingly caused the death of the unborn child, it was required to prove beyond a reasonable doubt that culpable mental state with regard to the death of the child, regardless of any intent to kill the mother.

The doctrine of transferred intent does not help the state. "Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane." Here, "[a]ppellant intended to kill A, and did so. If he is to be charged with also intentionally and knowingly killing a second person, in this case the embryo, by killing the mother, there must be a separate specific intent to do so. [citation omitted] It is undisputed that appellant did not know [the mother] was pregnant. Lacking knowledge of the embryo's existence, appellant could not form a separate specific intent to kill the embryo, as is required by statute."

2. A dissenting opinion on the admissibility of expert testimony concerning future dangerousness.

***Espada v. State*, 2008 WL 4809235 (Tex. Crim. App. 2008)(not designated for publication)**

The state's expert was allowed to give his opinion that the appellant would

probably be dangerous in the future even though he did not know what his error rate was. The majority affirmed, holding that the fact that the expert did not know his error rate was not dispositive. Judge Womack, joined by Judge Johnson, dissented. "The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive." The dissent quoted a law review article that questioned whether future dangerousness testimony could "withstand Daubert . . . ." The dissenters then said:

> It wouldn't be very hard to research how many persons convicted of capital murder committed acts of violence after being sentenced. It must always be remembered that the capital murderer who is not sentenced to death will be sentenced to prison for life without parole. So the relevant question is whether they will commit violent acts in prison.
>
> Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will be spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted.

3. Dangerous handcuff keys.

***Beatty v. State*, 2009 WL 619191 (Tex. Crim. App. 2009)(not designated for publication)**

"[A]ppellant's possession of the handcuff key makes it more probable that he would constitute a continuing threat to both prison and free society."

CHARGING INSTRUMENTS

1. If in doubt about whether the indictment charges a felony or misdemeanor, object before trial, thereby assuring that it will be changed to do so.

***Kirkpatrick v. State*, 2009 WL 690985 (Tex. Crim. App. 2009)**

Tampering with a governmental record is a misdemeanor, unless it is done with the intent to defraud or harm another, or it involves certain types of governmental records. The two indictments in this case charged appellant with tampering with a governmental record, but they omitted any language that would elevate the misdemeanor to a felony.

Appellant was convicted and sentenced to two years imprisonment, and claimed,

for the first time on appeal, that the district court had lacked subject matter jurisdiction. The Court of Appeals agreed and ordered the prosecutions dismissed. The Court of Criminal Appeals disagreed, reversed the Court of Appeals, and remanded the case there for consideration of an unresolved issue.

In 1987 the legislature changed the way that charging instrument defects would be objected to and, of possible repaired, before trial. This is "the complete test" for the constitutional sufficiency of a charging instrument: "Can the district court and the defendant determine, from the face of the indictment, that the indictment intends to charge a felony or other offense for which a district court has jurisdiction?"

In this case, the indictment properly charged a misdemeanor, but lacked an element necessary to charge a felony. The felony offense existed, however, and "the indictment's return in a felony court put appellant on notice that the charging of the felony offense was intended." And, the face of both indictments had a heading that announced "3rd Degree Felony."

> The Penal Code section was easily ascertainable, and the notation that the offense was a third-degree felony clearly indicated that state intended to charge a felony offense and that the district court had subject-matter jurisdiction. Appellant had adequate notice that she was charged with a felony. If she had confusion about whether the State did, or intended to, charge her with a felony, she could have, and should have, objected to the defective indictment before the date of trial.

2. Tolling facts must be pled in indictment.

***Tita v. State*, 267 S.W.3d 33 (Tex. Crim. App. 2008)**

The state originally indicted appellant within the five year statute of limitations, then dismissed, and re-indicted outside the limitations period. Appellant moved to dismiss the new indictment because it was so remote that the prosecution was barred by limitations. At the hearing on the motion to dismiss, appellant argued that "the motion speaks for itself," and the state pointed out that the new indictment was not barred because the statute had been tolled by the earlier indictments which alleged the same conduct. The motion to dismiss was denied, and appellant was brought to trial on the new indictment. Twice during the trial he urged a motion for instructed verdict because the state was barred from prosecuting the case by the statute of limitations. His motions were denied, he was convicted, and he appealed.

The Court of Criminal Appeals held that the trial court erred when it denied the

motion to dismiss because the indictment neither pled a date that was within the statute of limitations, nor did it plead facts tolling the statute. " In order to avoid a dismissal, the State wished to rely upon the fact that the five-year statute of limitations had been tolled by pending indictments, but the State failed to plead that tolling fact in the indictment itself. Under those circumstances, the trial court erred in denying appellant's motion to dismiss, and the court of appeals erred in holding otherwise."

The evidence, however was not legally insufficient. Appellant moved for an instructed verdict, but he never requested an instruction on the statute of limitations defense. "Under those circumstances, the State was not obligated to prove that its prosecution was not limitations-barred."

CONFESSIONS

1. Apparently there is a limit on how much dishonesty the police can used to obtain confessions.

***Wilson v. State*, 2008 WL 5264643 (Tex. App. – San Antonio 2008, pet. filed)**

Prior to interrogating appellant about a capital murder, San Antonio police detective Raymond Roberts fabricated a forensic laboratory report to reflect that appellant's fingerprints were found on the murder weapon. In fact, no legible prints were found. When questioned initially, appellant denied any involvement. After Roberts showed him the falsified report, he admitted shooting the complainant, but claimed it was an accident. The trial court denied appellant's motion to suppress and he appealed.

The Court of Appeals reversed. Detective Roberts plainly violated § 37.09 (tampering with evidence) when he created the false document with intent to use it to induce appellant into confessing, and the trial court found that this document was the "turning point" in appellant's decision to confess. Because there was a causal connection between the detective's illegal act and the confession, the trial court erred under article 38.23 when it denied appellant's motion to suppress.

2. "I don't want to give up any right though, if I don't got no lawyer," was a clear and unequivocal invocation of the right to counsel.

***State v. Gobert*, 2009 WL 187828 (Tex. Crim. App. 2009)**

During a custodial interrogation, and just after his *Miranda* rights were read, appellant said, "I don't want to give up any right, though, if I don't got no lawyer." The police continued questioning and obtained an incriminating statement which was

suppressed by the trial court. The Austin Court of Appeals reversed, holding that appellee had not unequivocally invoked his right to counsel.

The Court of Criminal Appeals disagreed. "We agree that the appellee did not make a direct and straightforward request for a lawyer. But that does not necessarily mean that he did not adequately communicate his desire to deal with his police interrogators only through, or at least in the presence of, counsel. Here, we think the appellee made that desire abundantly clear." The Court assumes that "any" meant any of the rights just read to him, including the right to silence, in the absence of counsel. Appellee's statement was an indirect expression of a possible willingness to waive his right to silence, but only if first afforded the right to counsel.

"Just because a statement is conditional does not mean it is equivocal, ambiguous, or otherwise unclear. The only aspect of the appellee's statement that was tentative was whether he would in fact be willing to "give up" any of his Miranda rights. What was absolutely crystal clear about his statement was that he did not desire to do so (or to be pressured by the police to do so) in the absence of counsel. It was more than sufficient to alert the interrogating officers that if they desired to speak with the appellee further, in an attempt to persuade him to waive any of the other rights that Miranda confers upon him, then they must first afford him the right to have counsel present during that attempt. Before they could take advantage of the appellee's apparent amenability to talk, and thereby forego his constitutional right to stand mute, the interrogating officers were obliged to abide by his clearly stated condition."

3. Question-first interrogation technique violated *Miranda.*

***Martinez v. State*, 272 S.W.3d 615 (Tex. Crim. App. 2008)**

The police obtained a statement from appellant without complying with *Miranda*, then warned him and got another one, and the state used only the second statement at trial. Admitting the second statement was error. "In this case, the officers did not apprise appellant of his Miranda rights when they began custodial interrogation and failed to apply any curative measures in order to ameliorate the harm caused by the Miranda violation. Appellant's videotaped statement was therefore inadmissible."

4. Right to counsel attached when defendant was arraigned by the magistrate at the hospital.

***Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008)**

The police brought a magistrate to the hospital and she arraigned appellant. His

Sixth Amendment right to counsel attached at this time, and he invoked his right to counsel by answering "yes" to the magistrate's question if he wanted an attorney appointed. By answering "yes" to the magistrate's next question, whether he wanted to talk to the police, however, appellant did not initiate contact with the police. "The court of appeals erred in holding that Appellant initiated contact with the police and waived his previously invoked rights to counsel."

CONFRONTATION

1. Is a state forensic lab's report "testimonial?"

***Melendez-Diaz v. Massachusetts*, No. 07-591**

On March 17, 2008 the United States Supreme Court granted certiorari to consider the following question:

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

2. The testimonial statement of a co-defendant is admissible for impeachment.

***Del Carmen Hernandez v. State*, 273 S.W.3d 685 (Tex. Crim. App. 2008)**

Appellant called two witnesses to testify about what Leffew, a co-defendant had told them about her role in the murder. The state then called a detective and had him read the written statement he took from Leffew.

"Although *Crawford* did not provide a bright-line rule for what is to be considered testimonial, it explicitly held that a 'recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.' Here the State offered, and the trial court admitted, a custodial interrogation of a co-accused. This clearly falls within the ambit of the *Crawford* decision."

The statement was admissible, though, because it was not hearsay, offered for the truth of the matter asserted, but was instead rebuttal evidence offered for the non-hearsay purpose of impeaching Lefew's credibility. "When the appellant called the declarant, Leffew, to testify through the inmate witnesses, she placed the declarant's credibility in issue. Under Rule 806, in conjunction with Texas Rule of Evidence 613(a), the State was then permitted to impeach her credibility by introducing her prior inconsistent statement." The statement was redacted to include only those portions which were inconsistent with

the testimony of the two witnesses called by the defense, and the trial court gave the jury an appropriate limiting instruction.

3. The *Sixteenth* Amendment does not guarantee the right to confrontation.

***Beatty v. State*, 2009 WL 619191 (Tex. Crim. App. 2009)(not designated for publication)**

Appellant forfeited his right to complain about *Crawford*-type evidence contained in an exhibit by not making the proper federal constitutional objection.

> A hearsay objection does not preserve error on Confrontation Clause grounds. Neither the judge nor the parties mentioned the Confrontation Clause or *Crawford,* which was handed down five months before the punishment phase. Appellant's reference to Article 1 of the Texas Constitution, which contains many individual rights provisions, was too global to apprise the trial judge of the nature of his claim. And though appellant's objections before the jury included references to the Fourth, Fifth, and *Sixteenth* Amendments, he never actually cited the Sixth Amendment, which contains the Confrontation Clause. Even if we assumed that the trial judge interpreted appellant's reference to the Sixteenth Amendment to be intended as a reference to the Sixth Amendment, we nevertheless find that such a brief and generic reference to the Sixth Amendment, contained within a string citation to various other constitutional provisions, was not specific enough to make the trial court aware of his complaint. Finally, appellant failed to draw the trial court's attention to the specific portions of this eighty-page exhibit that he believed were inadmissible.

4. Is the statement of a confidential informant used to get a search warrant "testimonial?"

***Langham v. State*, 269 S.W.3d 108 (Tex. App. – Eastland 2008, pet. granted)**

A detective testified, over appellant's objection, that he had received information from a confidential informant that persons living at a certain address were operating a crack cocaine distribution business there, that one of them met appellant's description, and that the confidential informant had provided information in the past that had led to arrests, and that the confidential informant had been in the house within the previous forty-eight hours and had seen drugs there at that time.

The Court of Appeals rejected appellant's *Crawford* claim on appeal, finding that the informant's statement was non-testimonial.

> Here, the statements made by the confidential informant were not given to prove events of the past in a criminal prosecution in relation to those past events. The confidential informant was not "bearing testimony." The confidential informant was not making "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" necessary to the criminal prosecution in this case. The primary purpose in making the statement was not to get or give testimony or its functional equivalent. The confidential informant was not acting as a witness. There was no emergency as in *Davis*, but the absence of an emergency does not make the statements testimonial. In *Davis*, although there was an emergency, the statements were made by one who was not acting as a witness. Here, the primary purpose behind the statements of the confidential informant was not to provide testimony but to provide information to Detective Smith in order that he could obtain a search warrant. [citations omitted]

Appellant's petition for discretionary review was granted to decide this issue:

The court of appeals erred in determining that hearsay statements from the confidential informant that implicated appellant in drug dealing from the house in question were not testimonial, and were further not harmful.

5. Some statements were non-testimonial, some were testimonial, but the error was harmless.

***Rodriguez v. State*, 274 S.W.3d 760 (Tex. App. – San Antonio 2008, no pet.)**

Statements made by the complainant to the police officer outside the house were used to assess the situation and were not testimonial. The officer then entered the house and arrested appellant. Subsequent questioning was designed to learn what happened in the past and memorialize events for prosecution, and the complainant's responses were therefore testimonial. The trial court erred in admitting these subsequent statements, but the error was harmless beyond a reasonable doubt.

DEADLY CONDUCT

1. You can't shoot *at* a house if you are inside the house when you shoot.

***Reed v. State*, 268 S.W.3d 615 (Tex. Crim. App. 2008)**

Two brothers wrestled inside their home, then one pulled his handgun and fired a shot into the hallway wall. He was indicted for and convicted of the felony offense of deadly conduct, the indictment alleging that he fired the gun "at or in the direction of a habitation." The Court of Criminal Appeals held that the evidence was legally insufficient. "The plain meaning of the phrase "at or in the direction of a habitation," contemplates that the firearm was discharged from some location other than the habitation itself."

DUE COURSE OF LAW

1. Is "Due Course of Law" more than "Due Process?"

***Pena v. State*, 226 S.W.3d 634 (Tex. App.-Waco 2007, pet. granted)**

Appellant moved for independent testing of the marijuana he was charged with possessing. Testing was impossible because the state destroyed the marijuana and lost all records concerning the testing, except the lab report. The trial court denied appellant's motion to suppress the lab report, and the court of appeals reversed.

The *federal* Due Process standard is found in *Arizona v. Youngblood*, 488 U.S. 51 (1988), which requires a defendant to show bad faith when the state fails to preserve "potentially useful" evidence. Appellant failed to meet that burden here.

Although the framers of the Texas Constitution intended that "due course of law" be construed the same as is "due process of law," it is also true that both are evolving and flexible concepts.

After *Youngblood*, it has been almost impossible to prove bad faith. Since that case though, much has changed. Twelve other states have decided that the *Youngblood* standard is not adequate to address the loss or destruction of potentially exculpatory evidence.

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

> Therefore, we join those twelve states and hold that, under the Due Course of Law provision of Article I, Section 19, the State has a duty to preserve material evidence which has apparent exculpatory value, encompassing both exculpatory evidence and evidence that is potentially useful to the defense.

The court went on to adopt a three part balancing test to determine whether a defendant's state constitutional right to due course of law was violated by the state's failure to preserve potentially exculpatory evidence: would the evidence have been subject to discovery or disclosure; did the state have a duty to preserve the evidence; and, if there was a duty to preserve, was that duty breached, and, if so, what consequences should flow from the breach. The consequences depend on the degree of negligence, the importance of the evidence, and the sufficiency of the other evidence. Utilizing these tests, the court of appeals found appellant was denied due course of law.

There are three remedies for this error: dismissal; exclusion of the related evidence; an adverse inference instruction. Here, the court believed the best remedy was the instruction.

The Texas Court of Criminal Appeals granted the state's petition for discretionary review to determine, among other things, whether the due course of law provision of the Texas Constitution grants a defendant broader protection than does Federal Due Process.

2. San Antonio disagrees with Waco.

The San Antonio Court of Appeals has declined to follow *Pena*. ***See Ramirez v. State*, 2008 WL 4595015 (Tex. App. – San Antonio 2008, pet. filed); *Gutierrez v. State*, 2006 WL 542594 *2 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Garcia v. State*, 2006 WL 47046 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Salazar v. State*, 2005 WL 3115847 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication).**

DWI

1. A jury instruction on the breath test refusal is an improper comment on the weight of the evidence?

***Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008)**

The trial court gave this instruction in a breath test refusal case:

> You are instructed that where a Defendant is accused of

> violating Chapter 49.04, Texas Penal Code, it is permissible for the prosecution to offer evidence that the defendant was offered and refused a breath test, providing that he has first been made aware of the nature of the test and its purpose. A Defendant under arrest for this offense shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood.
>
> The prosecution asks you to infer that the defendant's refusal to take the test is a circumstance tending to prove a consciousness of guilt. The defense asks you to reject the inference urged by the prosecution and to conclude that because of the circumstances existing at the time of the defendant's refusal to take such test, you should not infer a consciousness of guilt.
>
> The fact that such test was refused is not sufficient standing alone, and by itself, to establish the guilt of the Defendant, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not the Defendant's refusal to take the test shows a consciousness of guilt, and the significance to be attached to his refusal, are matters for your determination.

The Corpus Court of Appeals disagreed that this was an improper comment on the weight of the evidence, and the Court of Criminal Appeals granted appellant's petition for discretionary review to determine this: "Whether the trial court's instructions to the jury concerning its use of the breath test refusal as evidence constitutes a comment on the weight of the evidence?"

The Court of Criminal Appeals reversed.

> [W]e hold that a jury instruction informing the jury that it may consider evidence of a refusal to take a breath test constitutes an impermissible comment on the weight of the evidence. By singling out that evidence, the trial court violated Articles 36.14, 38.04, and 38.05 of the Code of Criminal Procedure and committed a jury-charge error. The seemingly neutral language used in the instruction does not obviate the error. The court of appeals erred to hold that the trial court had discretion to give such an instruction.

2. The state need not allege whether the defendant was intoxicated by loss of

normal use or by the test results.

***State v. Barbernell*, 257 S.W.3d 248 (Tex. Crim. App. 2008)**

The trial court quashed an information because it failed to allege whether defendant's intoxication was because of loss of use or test results over the legal limit. The Beaumont court of appeals affirmed the trial court pursuant to *State v. Carter*, 810 S.W.2d 197 (Tex. Crim. App.1991). The Court of Criminal Appeals granted the state's petition for discretionary review which presented the following question: "Whether the manner of intoxication, either "loss of faculties" or "alcohol concentration," is an element of the offense of driving while intoxicated which must be alleged in the charging instrument?"

The Court reversed the Court of Appeals, and ruled for the state: "[W]e hold that the definitions of 'intoxicated' in Section 49.01(2) are evidentiary and therefore do not need to be alleged in a charging instrument. Therefore, a trial court should not quash a DWI information charging a defendant with DWI due to the State's failure to allege the definition of 'intoxicated' that it intends to prove at trial."

3. Appellant's admission that he used Xanax and Valium was irelevant and inadmissible without expert testimony.

***Layton v. State*, 2009 WL 250080 (Tex. Crim. App. 2009)**

When arrested for DWI appellant told the police that he had taken Xanax and Valium, and this statement was at trial, over his objection that this was irrelevant without expert testimony to provide a foundation. The Court of Criminal Appeals agreed that the trial court erred.

There was no evidence how much of these drugs appellant took, exactly when he took them, or their half-life in the human body. A lay juror could not determine whether these drugs, taken more than 12 hours before appellant's arrest would have any effect on his intoxication. There was no evidence that the officer had any medical knowledge about the use of Xanax and Valium, or about the effect of combining alcohol with them. "The trial court erred in allowing the evidence of Appellant's use of Xanax and Valium to be introduced to the jury without the State first showing that the evidence was relevant to Appellant's intoxication."

EXPERTS

1. Experts may testify about mental diseases or defects that directly rebut the mens rea necessary for the charged offense.

***Ruffin v. State*, 270 S.W.3d 586 (Tex. Crim. App. 2008)**

Appellant was charged with aggravated assault against peace officers. His expert was prepared to testify that appellant was delusional and paranoid at the time of the offense, but not that he was insane. The trial court excluded the testimony and the Court of Appeals affirmed, holding that mental health evidence that rebuts mens rea is admissible only in a murder case.

The Court of Criminal Appeals reversed. "[B]oth lay and expert testimony of a mental disease or defect that directly rebuts the particular mens rea necessary for the charged offense is relevant and admissible unless excluded under a specific evidentiary rule."

EXTRANEOUS OFFENSES

1. Finally, the "doctrine of chances" in Texas.

***DeLaPaz v. State*, 2009 WL 774846 (Tex. Crim. App. 2009)**

Appellant was a police officer charged with aggravated perjury and tampering with physical evidence regarding the false arrest of Vega for delivering and possessing drugs. Appellant wrote in a police report and testified that he had seen a man named Alonso come into contact with Vega inside a garage, and he was the only one to have seen this contact. Appellant's defense at his trial was that he had not perjured himself or tampered with evidence because his statements that he had seen Alonso contact Vega were true, and that the state's witnesses who testified otherwise were lying. When appellant rested, the state argued for the admissibility of two other arrests appellant had been involved in where he claimed either that he had witnessed the exchange of drugs or contact between the informant and the arrested person. The trial court admitted the extraneous offenses, and the Court of Appeals found this to be error and reversed appellant's convictions.

The Court of Criminal Appeals reversed the Court of Appeals's reversal. First, the extraneous offenses were admissible to rebut the defense that the state's star witness had fabricated his testimony. "Evidence of two other nearly identical acts of purported fabrication by appellant concerning "buy-bust" deals was admissible to rebut the defense position that it was the State's witnesses who were lying about the Vega drug deal."

Appellant's primary defense, though, was that he saw contact between Alonso and Vega, even though no one else had, and that therefore he had had no intent to deceive and had not deceived. This "raised a clear basis" to admit the extraneous offenses under "the

doctrine of chances."

> In each case, appellant's confidential informant planted fake drugs to frame an innocent person. In each case, appellant stated in his police report that he witnessed the contact or delivery. The extraordinary coincidence that appellant saw drug deals that no one else did three different times flies in the face of common sense. Under the "doctrine of chances," evidence of such a highly unlikely event being repeated three different times would allow jurors to conclude that it is objectively unlikely that appellant was correct in his Vega offense report or that he was truthful in his testimony that he saw contact between Alonso and Vega. Whether the extraneous-offense evidence was admissible under Rule 404(b) to rebut the assertion of innocent intent is at least subject to reasonable disagreement. As Auric Goldfinger, the infamous James Bond villain, said, "Once is happenstance. Twice is coincidence. The third time it's enemy action." Under the "doctrine of chances," no inference about appellant's general character for truthfulness is required. The fact that appellant reported three separate "I saw what no one else saw" drug deals decreases the likelihood that appellant saw any such drug deal, and therefore increases the likelihood that he knew that his statement about seeing one between Vega and Alonso was false.

2. "Relevancy" objection does not preserve error under Rule 404(b).

***Ramey v. State*, 2009 WL 335276 (Tex. Crim. App. 2009)(not designated for publication)**

"This court has previously held that relevancy objections will not preserve error for Rule 404 claims on appeal."

HABEAS

1. Mandatory deadlines in 11.07 cases.

***Gibson v. Dallas County District Clerk*, 275 S.W.3d 491 (Tex. Crim. App. 2009)**

When an application for writ of habeas corpus is filed under article 11.07, the clerk of the court must assign the application to the trial court and get a copy to the prosecutor, who has 15 days to answer. The trial court has 20 days after the state's time has expired to determine "whether the application contains allegations of controverted, previously unresolved facts material to the legality of the applicant's confinement." If so, the trial

court must enter an order designating those issues within the 20 days. If not, the trial court must forward the application to the Court of Criminal Appeals. These time deadlines are mandatory. "The Legislature's purpose in setting these deadlines was to ensure that post-conviction constitutional claims would be addressed and resolved with appropriate speed, efficiency, and fairness." The statute "does not authorize the trial court to extend the time limitations imposed by the statute, other than by a timely entry of an order designating issues."

2. What role does the Court of Criminal Appeals play as a factfinder?

***Ex parte Reed,* 271 S.W.3d 698 (Tex. Crim. App. 2008)**

The Court of Criminal Appeals is the "ultimate factfinder" in habeas procedings, and the trial judge is the "original factfinder."

The trial judge "is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed fact issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief."

Since the trial judge is in the best position to assess the credibility of the witnesses, the Court of Criminal Appeals will usually defer to that judge's findings of fact and conclusions of law when supported by the record. "When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions."

3. Will laches prevent a challenge that a death sentence is unconstitutional because the trial judge and prosecutor had a romantic relationship?

***Ex parte Hood,* 2008 WL 4946276 (Tex. Crim. App. 2008)(not designated for publication)**

The prosecutor and trial judge gave depositions in which they admitted to having had an intimate involvement in the past, and though both claimed it had ended by the time of applicant's death penalty trial, dates cited in the prosecutor's deposition are seemingly contradictory. The Court is concerned, though, that applicant says the affair was "common knowledge, yet he waited 18 years to obtain the proof he now has.

"Accordingly, the trial court shall collect or adduce any evidence it deems

necessary to make a recommendation on whether the doctrine of laches bars the consideration of applicant's claim. While the State has the burden on the issue, both parties should be allowed to be heard on the matter. The court shall also collect or adduce any evidence it deems necessary to make a recommendation on whether applicant meets the dictates of Article 11.071, § 5."

4. Not every delayed habeas petition is barred by laches.

***Ex parte Waites*, 2009 WL 252355 (Tex. Crim. App. 2009)(not designated for publication)**

Applicant was convicted and his conviction was affirmed by the Court of Appeals in 1993. Later he filed an application for writ of habeas corpus alleging that he had been denied the effective assistance of counsel because his appellate lawyer had not requested a statement of facts or file an appellate brief. The state responded that his writ was barred by laches, asserting that the prosecutor and judge were deceased and the court reporter was retired.

"Delay alone is no bar to habeas relief. In order to prevail on a laches claim respondent must make a particularized showing of prejudice in its ability to respond to the allegations in the petition. *Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex.Crim.App.1999). Although the State asserts that it will be difficult to address Applicant's habeas claims because of the passage of time, the record does not contain anything to directly support this assertion of prejudice."

HEARSAY

1. Statements made to one who is a licensed professional counselor, but not a medical doctor, may be admissible under Rule 803(4) of the Rules of Evidence?

***Taylor v. State*, 268 S.W. 3d 571 (Tex. Crim. App. 2008)**

The trial court admitted testimony in this aggravated sexual assault case from a licensed professional counselor who was not a medical doctor, or working for a medical doctor, under Rule 803(4) of the Texas Rules of Evidence, the medical diagnosis exception to the hearsay rule.

The Court of Appeals affirmed. The complainant testified that she was receiving therapy for post-traumatic stress disorder, and it is reasonable to infer that she understood she was receiving therapy to treat a medical condition resulting from the sexual assault.

The testimony was therefore admissible under Rule 803(4).

The Court of Criminal Appeals granted discretionary review, and saw this as the question before it: "Does Rule 803(4) provide for the admissibility of statements made to a licensed professional counselor in the context of on-going, long-term therapy?"

The Court held that a witness need not be a medical doctor to relate out-of-court statements made under Rule 803(4). "A declarant's statement made to a non-medical professional under circumstances that show he expects or hopes it will be relayed to a medical professional as pertinent to the declarant's diagnosis or treatment would be admissible under the rule, even though the direct recipient of the statement is not a medical professional."

In this case, the trial court abused its discretion in admitting this testimony because the proponent did not establish that the counselor's testimony about appellant's identity was pertinent to the child's treatment. Nor is it apparent from the record that the child understood that truthfulness about the identity of her assailant was improtant to the efficacy of her treatment. The error was harmless, though.

2. "Blame-shifting" statements against penal interest are usually not admissible.

***Walter v. State,* 267 S.W.3d 883 (Tex. Crim. App. 2008)**

Appellant and Markel were charged with capital murder. Roderick testified at appellant's trial about statements Markel, his brother, had made to him. The trial court admitted Roderick's testimony because Markel's statements were against his penal interest and therefore admissible under Rule 803(24) of the Texas Rules of Evidence.

Most of the exceptions to the hearsay rule involve situations where people would not normally have the opportunity to lie. Rule 803(24) is somewhat different. Its rationale is that people usually do not say things that are damaging to themselves unless they believe them to be true.

Two things are required for admissibility. First, the statement must subject the declarant to criminal liability and the declarant must realize this at the time. Second, there must be corroborating circumstances that clearly indicate the statement's trustworthiness.

There are three types of statements against penal interest. One is directly against the declarant's interest ("I killed him."). The second shares blame more or less equally ("We killed him."). The third shifts blame, and minimizes the declarant's culpability. ("We were both in on the robbery, but he pulled the trigger."). The *Walter* case clarifies

Texas's approach to the third category, which up to now was not entirely clear.

"Both statements that are directly against the declarant's interest and collateral "blame-sharing" statements may be admissible under Rule 803(24), if corroborating circumstances clearly indicate their trustworthiness. "Blame-shifting" statements that minimize the speaker's culpability are not, absent extraordinary circumstances, admissible under the rule."

"We therefore conclude that the trial court abused its discretion in admitting Markel's narrative in toto without examining each fact asserted in the narrative to assess whether that fact was directly self-incriminating or, at a minimum, shared blame equally. The trial court erred in admitting those particular statements by Markel that shifted blame to appellant."

IMPEACHMENT

1. Are the complainant's previous false allegations admissible to impeach her?

***Hammer v. State*, 256 S.W.3d 391 (Tex. App.– San Antonio 2008, pet. granted)**

On trial for indecency with a child, appellant was not permitted to prove that the complainant had falsely accused others because, according to the trial court, this evidence was substantially more prejudicial than probative, contrary to Rule 403.

The Court of Appeals affirmed. The Court first noted that this evidence would not be admissible under Rules 608 and 609 because the complainant had not been convicted of any crime. Although this kind of evidence might be admissible under the Confrontation Clause, it was not here. Prior accusations evidence is relevant only if it concerns allegations similar to those in the instant case, and the accusations are proven to be false. In this case it is not apparent that the prior allegations are false. And portions of the excluded evidence were not similar to those charged against appellant. "The trial court heard the proffered testimony and was able to determine that what little probative value, if any, the alleged testimony would have provided, was far outweighed by the danger of unfair prejudice, confusion of the issues and embarrassment to the complainant, especially given her young age. We cannot say that the trial court's determination is outside the zone of reasonable disagreement."

The Court of Criminal Appeals granted appellant's petition for discretionary review was granted to decide this issue:

The Court of Appeals incorrectly determined an important issue of state and

federal law by deciding that the trial court did not abuse its discretion by excluding impeachment evidence of complainant's previous false allegations of sexual assault and such exclusion violated petitioner's rights under the Confrontation Clause of the United States Constitution. The Court of Appeals opinion is in direct contradiction with the First Court of Appeals in its decision in *Thomas v. State*, 669 S.W..2d 420 (Tex. App. – Houston [1st Dist.] 1984, pet. ref'd), in that the Fourth Court finds the allegations which complainant fabricated are dissimilar to the offenses which petitioner is charged.

JEOPARDY

1. Does punishment for a traffic ticket bar subsequent punishment for intoxication assault?

***Ex parte Watson*, 2007 WL 4328265 (Tex. App. – Tyler 2007, pet. granted)(not designated for publication)**

Watson was involved in a wreck and was ticketed for the Class C misdemeanor offense of failure to yield the right-of-way. Later he was indicted for intoxication assault based on an injury that occurred during this same wreck. He pleaded nolo contendere to the traffic ticket and received a deferred disposition, and ultimately a dismissal. He then filed an application for writ of habeas corpus asserting that his plea on the ticket barred the felony prosecution. The trial court denied relief, and the Court of Appeals affirmed. First, the two offenses – failure to yield right-of-way, and intoxication are clearly not the "same offence" under the *Blockburger* test. Second, failure to yield right-of-way is not a lesser included offense of intoxication assault when you compare the two charging instruments.

> The class "C" misdemeanor offense of failure to yield right of way is not the same offense as intoxication assault. The State's pleading of the intoxication assault indictment to include the words "failing to yield right of way" does not make the misdemeanor offense a lesser included offense because intoxication assault does not require proof of an underlying offense and because the State did not allege all of the elements of the misdemeanor offense in the indictment for intoxication assault. Because the two offenses are different offenses, the State may seek punishment on each.

The Court of Criminal Appeals granted Watson's petition for discretionary review to determine this issue:

> The Court of Appeals erred in holding that Mr. Watson's punishment for the

offense of failure to yield the right-of-way did not bar his prosecution for intoxication assault because the indictment charging the intoxication assault included, as one of its elements, the offense of failure to yield the right-of-way, under this Court's decision in *Hall v. State*.

2. Defendant improperly convicted of felony murder and aggravated robbery.

***Littrell v. State*, 271 S.W.3d 273 (Tex. Crim. App. 2008)**

The first count of the indictment alleged that appellant committed felony murder by committing an act clearly dangerous to human life that caused another's death in the course of an aggravated robbery; the second count alleged commission of the same aggravated robbery alleged in count one. Appellant's conviction under both counts violated the Double Jeopardy Clause. The aggravated robbery was a lesser included offense of felony murder, and the legislature has not clearly expressed an intention that a defendant so charged be punished for both offenses, notwithstanding *Blockburger*.

JUDICIARY

1. Judicial civility should not be an oxymoron?

***Pena v. State*, 226 S.W.3d 634 (Tex.App.-Waco 2007, pet. granted)**

In this case, which has already been to the court of criminal appeals once, and is headed there again, two Justices on the Waco Court of Appeals held that the due course of law provision of the Texas Constitution provides more protection than the due process clause of the United States Constitution with regard to a claim that the state destroyed potentially exculpatory evidence.

The case is obviously causing some hard feelings within that Court. Chief Justice Gray dissented and accused the majority of glossing over two dispositive issues "in order to publish its thirty-six page, mediocre law-review article on the merits of Pena's issues under the Texas Constitution." Chief Justice Gray saw little if any difference between his brethern's opinions in *Pena I* and *Pena II*, and used this quote from the Bible: ""As a dog returns to its vomit, so a fool repeats his folly." Proverbs 26:11."

JURY CHARGES

1. When does a jury charge constitute an impermissible comment on the weight of the evidence?

***Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008)**

In this case the Court of Criminal Appeals held that a charge instructing the jury that it could consider the appellant's refusal to take a breath test was an impermissible comment on the weight of the evidence. In so holding, the Court noted that there are three circumstances where a trial court may properly single out evidence: (1) "First, the trial court may specifically instruct the jury when the law directs it to attach 'a certain degree of weight,' or only a particular or limited significance, to a specific category or item of evidence." (2) "Second, the Legislature has expressly required the trial court to call particular attention to specific evidence in the jury charge when the law specifically identifies it as a predicate fact from which a jury may presume the existence of an ultimate or elemental fact." (3) "Third, the trial court may instruct the jury with respect to evidence that is admissible contingent upon certain predicate facts that it is up to the jury to decide."

2. An instruction on voluntary intoxication should not be given where defendant does not rely on insanity or temporary insanity, and where there is no evidence that he was intoxicated.

***Sakil v. State*, 2008 WL 2375145 (Tex. App.– El Paso 2008, pet. granted)**

The trial court submitted an instruction on voluntary intoxication in this assault case, and appellant complained on appeal that this was error because he did not rely on the defense of insanity or temporary insanity, and the state did not prove that he was intoxicated. The Court of Appeals agreed. "We find that there was insufficient evidence for any fact finder to reach the conclusion that Appellant's psychotic behavior and resulting assault on his wife was caused by his voluntary intoxication. Such a factual conclusion, so weakly based on pyramided inferences, is simply not supported by the evidence." This instruction is a state's charge. It creates a presumption that appellant's mental state was not at issue and effectively relieved the state of proving all the elements of the offense. And it placed the burden on appellant to prove that he was not intoxicated.

The Court of Criminal Appeals granted the state's petition for discretionary review to decide the following questions:

> 1. Does a trial court err by submitting a jury charge that voluntary intoxication is not a defense to prosecution when the evidence at trial does not affirmatively show that the defendant was intoxicated?
>
> 2. Did the court of appeals err by holding that there was no evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions?
>
> 3. Does a trial court's submission of a jury charge that voluntary intoxication is not a defense to prosecution "create a presumption that an intoxicated person has the requisite mental state, thus relieving the state of proving the elements of the offense?"
>
> 4. Did the submission of an inapplicable, superfluous jury instruction cause some harm to appellant?

3. Clarification on "manner and means unknown" to the grand jury?

***Sanchez v. State*, 221 S.W.3d 769 (Tex. App. – Corpus Christi 2007, pet. granted)**

Appellant was charged in a multi-paragraph indictment with murdering complainant by choking her with his hands; by using a stun gun, and by manner and means unknown to the grand jury. The medical examiner gave his opinion that the complainant was asphyxiated, either from being manually choked, or from the use of a stun gun. No one from the grand jury testified that it had used due diligence but had been unable to determine the manner and means. The trial jury returned a general verdict of guilty of murder, and appellant appealed.

The Court of Appeals reversed and remanded for a new trial. The evidence was legally and factually sufficient to prove murder. But when the state alleges that the manner and means are unknown to the grand jury, it bears the burden of proving it. This is usually done in one of two ways. If there is no evidence at trial of the manner and means, then a *prima facie* case is made that the manner and means was unknown to the grand jury. Here, though, the medical examiner gave his opinion that the manner and means was either by manual strangulation or by the use of a stun gun. The state then could have put on a grand juror and elicited testimony that despite the use of due diligence they were unable to determine the manner and means at the time of indictment. But there was no such testimony in this case. "Therefore, there was insufficient evidence to support the theories of prosecution alleged in the second and fourth paragraphs of the indictment. [citation omitted] Consequently, the trial judge erred in authorizing the jury to convict appellant under those theories of prosecution."

The Court of Criminal Appeals granted the state's petition for discretionary review to determine the following questions:

> 1. Does a trial court commit error by instructing the jury on the state's alternate theory of murder by a "manner and means to the grand jury unknown" where the sole medical expert testified repeatedly that he could not determine the exact manner and means of death by asphyxiation?
>
> 2. When assessing charge error, is a court of appeals free to reweigh and reinterpret the evidence adduced at trial?
>
> 3. May an appellate court use the *Hicks* rule to evaluate whether a "manner and means unknown to the grand jury" theory was properly submitted to the jury and, if so, has the Thirteenth Court of Appeals applied the rule correctly?
>
> 4. In the alternative, can an erroneously submitted alternate theory be harmful when the reviewing court finds the evidence sufficient to support

the conviction under another submitted theory?

MENTAL HEALTH

1. Crazy, but not insane.

***Ex parte Thomas,* 2009 WL 693606 (Tex. Crim. App. 2009)(not designated for publication)**

The majority opinion denied Thomas's 11.071 challenge to his conviction and death sentence in an unpublished opinion. Judge Cochran filed a "statement concurring in the Court's Order," believing that Thomas's claims regarding insanity and incompetency "deserve greater explanation."

Thomas has a severe mental illness, suffering from psychotic delusions, and possibly schizophrenia, and has a history of chronic substance abuse. His behavior became increasingly bizarre in the months before the murders. On the night in question he killed his wife and two children, cut the children's hearts out, then tried to kill himself. Five days later, while in jail, he gouged his own right eye out. Later, while on death row, he gouged his left eye out and ate it. He was initially found incompetent to stand trial. After five weeks of therapy and medication he was found competent, he was then tried, convicted, and sentenced to death.

> While there is no dispute that applicant was, in laymen's terms, "crazy" at the time he killed his wife and the children, the legal question is whether he knew that what he was doing was "wrong" or a "crime" at the time he acted. There is no dispute that applicant knew that it was his wife and the children that he was stabbing to death. He may have thought that he was morally justified in doing so because she was a "Jezebel," his son was the "Anti-Christ," and Leyha was somehow evil also. He said, "I thought I was doing the will of God." But religious fervor, whether the result of a severe mental disease or inspired by a jihadist fatwâ or KKK rally, does not provide a legal excuse for the knowingly "wrongful" murder of a person.
>
> * * *
>
> This is a sad case. Applicant is clearly "crazy," but he is also "sane" under Texas law.

MOTION FOR NEW TRIAL

1. Proving "presentment" from a docket-sheet entry.

***Stokes v. State*, 2009 WL 322314 (Tex. Crim. App. 2009)**

Defendants must"present" their motions for new trial within 10 days of filing them, and filing alone does not show presentment. Here, the motion itself contained no indication it had been presented, but the docket sheet had an date-stamped entry which, though not initialed or signed, stated, "Motion New Trial presented to court no ruling per judge."

The Court of Appeals held that appellant had not shown that the motion had been presented, because the docket sheet was not signed by the judge. The Court of Criminal Appeals disagreed, and reversed.

A docket sheet is a reliable indicator of the trial judge's decisions and the business of the court. The entry here was sufficient to show presentment.

2. The rule that "[s]traightforward communication in plain English will always suffice," also applies in motions for new trial.

***Clarke v. State*, 270 S.W.3d 573 (Tex. Crim. App. 2008)**

Appellant pleaded guilty and was sentenced to 10 years imprisonment based, in part, on an allegation in the presentence investigation report that the mother of the complainant had stated she had an intuition that perhaps the defendant had sexually abused his sister. Appellant filed a motion for new trial that asserted that the presentence investigation report contained unfounded allegations from the complainant's mother that he had molested his sister. After filing the motion for new trial, but before the hearing on the motion, counsel learned that the complainant's mother had not told the prosecutor anything about having an intuition that appellant had molested his sister. In fact, when the prosecutor asked her, she said she "knew nothing about that." Counsel argued at the motion for new trial hearing that the prosecutor had been aware that the presentence investigation was false but took no steps to alert the court or defense counsel that there was exculpatory evidence, namely that the extraneous offense allegation was false. The state did not object that appellant was enlarging or changing the legal basis of his motion. The trial court denied the motion without comment.

On appeal, appellant argued that the prosecutor had deliberately deceived the trial court by knowingly allowing false evidence about an extraneous offense, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 19. The Court of Appeals held that appellant waived error because he did not make a prosecutorial

misconduct claim in his written motion for new trial, and because he did not present any constitutional claim on appeal because he did not make any constitutional argument in the trial court.

Appellant filed a PDR claiming that his complaint to the trial court was adequate to put the prosecutor and trial court on notice that he was making a *Brady* claim, which itself clearly invokes the constitutional provisions he complained of on appeal.

The Court of Criminal Appeals agreed with appellant and reversed. Appellant's complaint to the trial court concerning prosecutorial misconduct was sufficiently specific to make the judge aware of the complaint, and his complaint on appeal was essentially the same. "'Straightforward communication in plain English will always suffice.'" Appellant could not have presented a *Brady* claim in his written motion because he did not become aware of it until after the motion was filed. "The fact that the legal argument was not presented in his original written motion does not prevent appellant from having his claim heard on appeal. The argument was presented to the trial judge in time for him to rule on it. That is all that is required."

Nothing in the Rules of Appellate Procedure requires a written motion for new trial to "precisely identify the contours of a defendant's ground for granting a new trial." Rule 21.3(h) provides that a motion for new trial must be granted"when the verdict is contrary to the law and the evidence." Although a trial judge may decline to set a motion that alleges so general a ground, if he does have a hearing, and defendant proves a *Brady* violation, "the trial court has jurisdiction to rule upon the merits of that claim by granting or denying the motion for new trial."

"The constitutional provisions that appellant cited on appeal do not present any different or additional grounds for relief; rather, they are simply the underlying legal support for the claim that appellant presented to the trial court, namely that the prosecutor had a duty to inform defense counsel and the court that the extraneous matter in the PSI report was false. This was his claim in the trial court, and this was his claim in the court of appeals. He has gussied it up with legal authority, but the underlying claim is precisely the same one. It was not procedurally defaulted."

NECESSITY

1. Must the Court consider the law of parties when determining a defendant's entitlement to a necessity charge?

***Gilbert v. State*, 2007 WL 3380120 (Tex. App. – Waco 2007, pet. granted)(not designated for publication)**

In a very brief, unpublished opinion, the Court of Appeals held that the trial court did not err in refusing an instruction on necessity in this aggravated robbery trial because appellant did not admit to committing the offense.

The Court of Criminal Appeals granted appellant's petition for discretionary review to determine these issues:

> 1. The court of appeals failed to consider the law of parties upon determining appellant was not entitled to a jury charge on the justification of necessity.
>
> 2. The court of appeals failed to view the evidence in the light most favorable to appellant's requested change on the justification of necessity.

PAROLE

1. Sex offender conditions may be imposed on parolee who had never been convicted of a reportable offense, as long as he was given an opportunity to be heard.

***Ex parte Campbell*, 267 S.W.3d 916 (Tex. Crim. App. 2008)**

Campbell was paroled for burglary of a habitation and was required to comply with sex offender conditions, as a condition of parole. Several of his prior conditions had sexual undertones, but none were "reportable" conditions. When his parole was revoked for failing to observe the child safety zone he file a writ complaining that the board had no authority to impose sex offender conditions on him to begin with.

A bare majority of the Court of Criminal Appeals disagreed. Texas law does not require sex offender conditions for one without a reportable conviction, but neither does it forbid such conditions. Nor was there a procedural due process problem, because applicant was given notice and opportunity to provide relevant information to the parole

panel's decision.

PROSECUTORIAL MISCONDUCT

1. Prosecutor erred when he called defense lawyer a liar, but the error did not prejudice the defendant.

***Brown v. State,* 270 S.W.3d 564 (Tex. Crim. App. 2008)**

The prosecutor said that the defense lawyer lied in her closing argument, and the trial court overruled the defense's objection that this impermissibly struck at the defendant over his lawyer's shoulders. The Court of Criminal Appeals held that the trial court erred when it overruled the objection, but that reversal was not required because this non-constitutional error was harmless. "Viewing the State's closing as a whole, we cannot conclude that there was a willful and calculated effort to deprive appellant of a fair and impartial trial, and viewing the record as a whole, we cannot conclude that appellant was prejudiced by the remarks."

***See also Lindsey v. State,* 2008 WL 5170397 (Tex. App. – San Antonio 2008, no pet.)(not designated for publication)**(prosecutor erred when she called defense counsel a "cornered animal," but the error was harmless).

RECKLESSNESS

1. How certain must recklessness be alleged in a discharging a firearm case?

***State v. Rodriguez,* 2008 WL 506273 (Tex. App.–San Antonio 2008, pet. granted)(not designated for publication)**

The information charged that appellee did "recklessly discharge a firearm inside the corporate city limits of a municipality having a population of One Hundred Thousand (100,000) or more, namely: the City of San Antonio, by pulling the trigger on a firearm which contained ammunition and was operable." Appellee filed a motion to set aside this information asserting that it did not allege any act with reasonable certainty that would show he acted recklessly, in violation of article 21.15 of the Code of Criminal Procedure. The trial court agreed, and the state appealed.

The Court of Appeals affirmed, rejecting the state's assertion that the information was sufficient simply because it alleged Rodriguez pulled the trigger of a loaded gun containing operable ammunition. "The State's information, however, did not inform Rodriguez of the circumstances that indicate he pulled the trigger of a loaded firearm in a

reckless manner." Pulling the trigger of a loaded firearm within city limits is not reckless per se.

The Court of Criminal Appeals granted the state's petition for discretionary review to consider this issue: "The Court of Appeals erred when it concluded that an allegation that a defendant: 'recklessly discharged a firearm . . . by pulling the trigger on a firearm which contained ammunition and was operable' was insufficient to satisfy the requirement that the information 'allege with reasonable certainty the act or acts relied upon to constitute recklessness.'"

RELEVANCE

1. Appellant's admission that he used Xanax and Valium was irelevant and inadmissible without expert testimony.

***Layton v. State*, 2009 WL 250080 (Tex. Crim. App. 2009)**

When arrested for DWI appellant told the police that he had taken Xanax and Valium, and this statement was at trial, over his objection that this was irrelevant without expert testimony to provide a foundation. The Court of Criminal Appeals agreed that the trial court erred.

There was no evidence how much of these drugs appellant took, exactly when he took them, or their half-life in the human body. A lay juror could not determine whether these drugs, taken more than 12 hours before appellant's arrest would have any effect on his intoxication. There was no evidence that the officer had any medical knowledge about the use of Xanax and Valium, or about the effect of combining alcohol with them. "The trial court erred in allowing the evidence of Appellant's use of Xanax and Valium to be introduced to the jury without the State first showing that the evidence was relevant to Appellant's intoxication."

2. When the complainant has made threats and prior false allegations.

***Billodeau v. State*, 2009 WL 322244 (Tex. Crim. App. 2009)**

Appellant was convicted of aggravated sexual assault of an eight year old child, J.B., based almost entirely on the child's testimony. The trial court denied him the right to question the child about threats he had made to falsely accuse members of another family, the Klines, of molesting him, because these threats had occurred after the accusation he made against appellant. The Court of Appeals affirmed, and the Court of Criminal Appeals granted review to decide this question:

> When a defendant is accused of aggravated sexual assault, and the only evidence in the case consists of the testimony of the complainant and the testimony of the accused, should the trial court prevent the defense from presenting evidence about threats and false, similar allegations made by the complainant after the date of the charged offense, but before the date of the complainant's testimony at trial?

The Court of Criminal Appeals reversed the Court of Appeals and the trial court and remanded the case for a new trial.

Rule 613(a) of the Texas Rules of Evidence provides that a witness may be impeached with extrinsic evidence that shows bias or interest. "The fact that the complainant allegedly made such threats after accusing appellant of molestation is not dispositive. If it were so, the first person about whom a complainant lied would be rendered unable to challenge the complainant's credibility and reputation for truthfulness even if the complainant had since been shown to be a veritable Pinocchio."

"Appellant was entitled by Rule 613(b) to cross-examine J.B. about the false threats he had made against the Klines, in order to show J.B.'s motive to testify untruthfully and to present to the jury J.B.'s denials. Once J.B. had denied making the threats, appellant was entitled to present the Klines' rebutting testimony about J.B.'s threats to falsely accuse them of molestation, thus enabling the jury to use the testimony of all three witnesses in weighing J.B.'s credibility. Because appellant was not permitted to do so, he was unable to present any evidence of J.B.'s purported motive to fabricate allegations of sexual molestation. We find that the inability to fully present his defense affected a substantial right and is therefore harmful error."

3. The complainant's knowledge that appellant had killed another was irrelevant in this retaliation-by-threat case.

***Pollard v. State*, 2009 WL 322247 (Tex. Crim. App. 2009)**

Kirk made a statement to the police implicating appellant in an aggravated sexual assault case, then, after appellant was indicted, Kirk withdrew the statement. Later Kirk told the police that he retracted the statement because appellant threatened to hurt him, or have another person hurt him, and that he feared appellant would carry out his threat. Appellant had been convicted of murder in 1986, and Kirk was aware of that, but he never testified that his knowledge of appellant's violent past caused him the be afraid, or to retract the statement, or to make it more likely that appellant would carry out his threat.

The trial court admitted the evidence, apparently relying, at least in part, on the

state's argument that Kirk's awareness that appellant had killed someone previously increased the likelihood that the threat was legitimate and could be carried out. The Court of Criminal Appeals disagreed and reversed the conviction.

In a retaliation-by-threat case, a trial court would *not* abuse it's discretion by admitting a statement such as, "I've killed before and I'll do it again," that accompanied a threat. In such a case, the court could reasonably decide that the statement was admissible, not for the truth of the matter asserted, but because it was made with intent that the listener believe it was true, which makes it more probable that it was intended as a threat. Here, though, there is no evidence that appellant's threat to Kirk was accompanied by any such statement.

"[W]e hold that the evidence that Kirk knew that appellant had actually killed a person was not relevant. Kirk did not testify that his knowledge that appellant had actually killed a person contributed to his fear of appellant or to his recantation of his initial statement implicating appellant in the sexual-assault case, making the evidence that appellant had actually killed a person somewhat free-wheeling and unconnected to anything of real consequence in the case. The evidence that appellant had actually killed a person, standing alone, did not make any fact of consequence more or less probable in this retaliation-by-threat prosecution."

REOPENING

1. You may reopen if it would materially change the case in your favor.

***Birkholz v. State*, 2009 WL 89645 (Tex. App.– San Antonio 2009, no pet.)**

The real question in this intoxication manslaughter case was who was driving? On Friday, the last day evidence was presented, new evidence was offered about the seatbelts, and there was a question whether they had one or two "stop buttons." Both sides closed on Friday afternoon, planning to argue on Monday, and the defense conducted some factual research over the weekend. On Monday the defense requested to reopen to show pictures of the seatbelts in similar model cars, and a replacement seatbelt in appellant's car, which evidence tended to support the defense's theory that someone other that appellant was driving. The trial court refused the request to reopen, appellant was convicted, and he appealed.

The Court of Appeals reversed, holding that the trial court abused its discretion when it refused the request to reopen. "Texas Code of Criminal Procedure article 36.02 provides, 'The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration

of justice.' The Texas Court of Criminal Appeals has noted that a 'due administration of justice' requires a judge to reopen the case if the evidence would materially change the case in the proponent's favor. That the proffered evidence is relevant is not enough; it 'must actually make a difference in the case' and not be cumulative of evidence previously presented. In addition, the new evidence must be introduced prior to closing arguments in order to meet the standard." [citations omitted]

SEARCH AND SEIZURE

1. How much detail must your motions to suppress contain?

***Amador v. State*, 2009 WL 80204 (Tex. Crim. App. 2009)**

Appellant's motion to suppress complained of "any and all evidence [obtained as a result of an illegal, warrantless arrest] made without probable cause to believe [he] was engaged in criminal activity." The Court of Criminal Appeals found it "troubling" that the motion "did not identify what evidence he wanted suppressed, nor, as far as we can discern from the record, was such evidence identified at the suppression hearing." The Court cited a passage from LaFave's treatise on search and seizure that says a suppression motion "must . . . identify the items which the defendant seeks to suppress."

> In the absence of such identification, the State and the trial court are left unaware of how the defendant was harmed by the allegedly illegal government activity. It could be argued that, under such circumstances, the trial court could properly deny the motion to suppress as inadequate. [citations omitted] In the instant case, however, the State has not made such an argument, and we did not grant review to consider it.

***See also* In re M.A.O., 2008 WL 5170297 (Tex. App. – San Antonio 2008, no pet. h.)**(motion to suppress complaining that defendant's arrest was unreasonable and illegal pursuant to the Fourth Amendment of the United States Constitution" was not specific enough to preserve appellate complaint that the arresting officer's question went beyond the scope of the curfew violation he was investigating); ***Resendez v. State*, 256 S.W.3d 315 (Tex. App. – Houston [14 Dist.] 2007, pet. granted)**(The Court of Criminal Appeals granted the state's petition for discretionary review to determine the following question: "Did appellant preserve an article 38.22 claim when he failed to mention article 38.22 at the suppression hearing and he filed two suppression motions – one that wholly failed to mention article 38.22 and another one (filed one year earlier by a different attorney) that merely cited article 38.22 in the rubble of a shotgun objection globally citing numerous authorities?").

See Appendix 1 [Sample Motion To Suppress Evidence]

2. Can an unsworn, undated police report be the basis for denying a motion to suppress?

***Ford v. State*, 268 S.W.3d 620 (Tex. App. – Texarkana 2008, pet. granted)**

The trial court denied the defense's motion to suppress evidence based solely on an unsworn, undated police report offered by the state. The state argued on appeal that this was sufficient based on cases holding that the rules of evidence do not apply at a motion to suppress hearing.

The Court of Appeals reversed and remanded.

> Our law expressly permits a trial court to consider affidavit evidence in ruling on a motion to suppress evidence. In this case, the State failed to accompany its proffered documentary evidence with either some form of affidavit or live, sponsoring witness testimony. It is not enough for the State to ignore the requirements of Article 28.01, § 1(6) and merely read a police report to the trial court and then tender it-unsigned, undated, and unverified-as was done here.

The Court of Criminal Appeals granted the state's petition for discretionary review to determine these questions:

> 1. May a court of appeals decide an issue based on an argument that was not made in the trial court?
>
> 2. May a trial court base its ruling on an unsworn police report offered into evidence at a pre-trial suppression hearing?

3. It's unanimous: no probable cause, no justification for search, no consent.

***Baldwin v. State*, 2009 WL 605368 (Tex. Crim. App. 2009)**

Appellant fit the general description of a man seen walking at 10:30 at night looking in windows in a "medium" crime neighborhood in which there had been some recent burglaries. When the policeman saw him, he started walking faster, and when he was stopped he was very nervous, scanning the area, and asked why he needed to identify himself. The officer put him in handcuffs, believing from his behavior that he was going to fight or run, and asked him where his identification was, and appellant told him it was in his right pants pocket. The officer retrieved the wallet and found cocaine inside, hence the charge.

> At least in the context of searches, probable cause involves "a fair probability that contraband or evidence of a crime will be found." Probable cause is a relatively high level of suspicion, though it falls far short of a preponderance of the evidence standard.

The Court of Criminal Appeals concluded that the facts known to the officer "did not give rise to the relatively high level of suspicion that would constitute probable cause to arrest." Accordingly, the search of appellant was not justified as a search incident to arrest.

Nor were the conditions present for a valid plain view or plain feel seizure. Though an officer may ask for identification, he may not necessarily conduct a search to confirm identity. Here, the officer illegally searched appellant when he reached into his pocket, even assuming this was a valid investigative detention – a question the Court was not required to answer.

Nor, finally, was the search justified by consent. "Appellant's response was simply an answer to the officer's question (after being handcuffed) and not a consent for the officer to search his person."

4. Can vehicles always be searched without a warrant following the driver's arrest?

***Arizona v. Gant*, No. 07-542**

On February 25, 2008, the United States Supreme Court granted certiorari to consider this question: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of

arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

5. Searching locked safes went beyond the scope of the search warrant.

***State v. Powell,* 268 S.W.3d 626 (Tex. App. – Fort Worth 2008, pet. granted)**

The police got an arrest warrant to arrest a third party for stealing checks and possessing property obtained with stolen checks and a search warrant to search a residence for various items of property relating to stolen checks and property. The warrant did not list drugs or safes as property to be seized. Nonetheless, the police seized two safes, returned them to the police station, and drilled them without getting a second warrant, finding methamphetamine.

The trial court granted defendant's motion to suppress, finding the state's witness was not credible. The Court of Appeals affirmed. The seizure and opening of the safes exceeded the scope of the warrant. A warrant must particularly describe the things to be seized, so "nothing is left to the discretion of the officer executing the warrant." The Court rejected the state's argument that a warrant for premises also authorizes the seizure of any container on the premises that might reasonably hold items listed in the warrant. "[N]othing in the evidence in the case before us shows that Powell exercised control over either safe seized by the police. No evidence showed where the safes were found, that the safes were connected to Powell, that either safe was the safe referred to in the affidavit, or the age or size of the safes. Consequently, we cannot say that the trial court erred by concluding that the seizure and opening of the safes exceeded the scope of the warrant."

The Court of Criminal Appeals granted the state's petition for discretionary review to decide the following questions:

> 1. Did the court of appeals err by holding that the search and seizure of the locked safe(s) found on appellee's premises was not within the scope of the search which was supported by a search warrant based on probable cause?
>
> 2. Did the court of appeals err in concluding that a locked safe(s) could not be seized, notwithstanding it could be reasonably concluded that it was a repository for forged checks and other fruits which were listed to be seized pursuant to a search warrant based on probable cause?
>
> 3. Did the court of appeals err in failing to utilize the correct analytical construct appropriate to items seized and not listed to be seized in a search

warrant based on probable cause and issued pursuant to article 18.02(1), (8), (9) and (12) of the Texas Code of Criminal Procedure?

4. Did the court of appeals implicitly hold the plain view doctrine was inapplicable because the officer executing the search warrant seized "mere evidence," i.e. the locked safe(s), not listed as an item to be searched or seized in the warrant supported by probable cause?

6. Will the exclusionary rule survive much longer?

***Herring v. United States*, 129 S.Ct. 695 (2009)**

The police stopped appellant because, according to their computer, he had an active arrest warrant, and a search incident to arrest revealed drugs and an illegal weapon. There was a mistake about the warrant though. In fact it had been recalled five months earlier, but the information about the recall did not appear in the computer. When the mistake was discovered, the police were notified, but it was too late for Herring, who had already been arrested and searched.

The Court was not sure that the mistake was actually a Fourth Amendment violation, but it assumed that it was for the purposes of deciding the case. "The issue is whether the exclusionary rule should be applied."

"Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."

"Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' In such a case, the criminal should not 'go free because the constable has blundered.'" [citations omitted]

7. Traveling 20 miles below the speed limit and drifting in the lane did not give the officer reasonable suspicion to stop.

***Texas Department of Public Safety v. Gonzales,* 276 S.W.3d 88 (Tex. App – San Antonio 2008)**

San Antonio police officer Pagola testified that he stopped Gonzales because he was going 45 miles per hour in a 65 miles per hour zone, which Pagola considered to be impeding traffic, in violation of the Texas Transportation Code. Pagola further admitted that it was foggy and drizzling and the pavement was wet, and that he could not remember the traffic on the road, or whether Gonzales was actually impeding traffic. His police report, which was admitted into evidence at the ALR hearing, also noted that Gonzales was drifting in his own lane. The ALR judge found against Gonzales, but this judgment was reversed by the County Court at Law, and DPS appealed. The Court of Appeals affirmed, finding no reasonable suspicion for the stop.

Section 545.363(a) of the Texas Transportation Code proscribes driving so slow as to impede the normal and reasonable flow of traffic, except when necessary for safety. Slow driving alone, however, does not constitute a violation, unless the normal and reasonable movement of traffic is impeded. Here there was no evidence of an actual impediment. " An officer's conclusory statement that the law has been violated is not sufficient to prove reasonable suspicion." Nor did the police report about drifting help the state, because Pagola never testified that the driving was unsafe, or that he suspected intoxication. Finally, the San Antonio ordinance that prohibits driving more than 10 miles per hour under the speed limit does not change the result, because there was no evidence what the maximum reasonable and safe speed under then existing conditions would have been.

SENTENCING

1. Can a father establish his son's eligibility for probation?

***Mansfield v. State*, 2008 WL 2884638 (Tex. App – Houston [14 Dist.] 2008, pet. granted)(not designated for publication)**

Appellant put his father on at punishment but was not permitted to ask the father if appellant had ever received probation in Texas or any other state, because, according to the trial judge, he did not have personal knowledge since appellant had lived apart from his father in Alaska for a year. Appellant had to testify himself, and, in the process was forced to admit to some damaging misconduct. The jury sentenced him to 20 years imprisonment and he appealed the decision to exclude his father's testimony about prior

probation.

The Court of Appeals affirmed. Because appellant had not lived with his father his entire life, the Court could not say that the trial court abused its discretion in excluding the testimony under Rule 602 of the Texas Rules of Evidence. *Trevino v. State*, 577 S.W.2d 242 (Tex. Crim. App. 1979), in which defendant's wife was allowed to testify that she had known him since he was a minor and he had never before been convicted of a felony, was "inapposite," because in that case the question was not the admissibility of the wife's testimony, but rather whether her testimony was sufficient to establish eligibility. The Court refused to consider two arguments made by appellant – that exclusion of this evidence violated his constitutional right to present a defense, and that the evidence was admissible as a lay opinion under Rule 701 – because neither argument was made in the trial court.

The Court of Criminal Appeals granted appellant's petition for discretionary review to determine this issue: "The Court of Appeals has held that the trial court did not abuse its discretion in refusing to permit a father to testify that his son, the appellant, had never before been placed on community supervision, thus forcing appellant to take the stand to establish probation eligibility."

2. Court costs may be assessed even though not included in the oral pronouncement of sentence.

***Weir v. State*, 2009 WL 605362 (Tex. Crim. App. 2009)**

Because court costs, unlike fines and restitution, are not intended to be punitive, they can be assessed if stated in the written judgment, even though not pronounced orally in court at the time of the sentence.

3. Can the trial court assess 180 days in jail as a condition of probation *after* hearing the victim impact statement.

***Johnson v. State*, 240 S.W. 3d 76 (Tex. App.–Austin 2007, pet. granted)**

The jury found appellant guilty of indecency with a child and recommended five years probation. After the trial court imposed the probated sentence several witnesses were permitted to give victim impact statements as permitted by article 42.03, § 1(b) of the code of criminal procedure. Immediately after this the court imposed 180 days in jail as a condition of probation.

On appeal, appellant complained that the 180 days were imposed after the victim

impact statements, in violation of article 42.03, § 1(b). The Court of Appeals acknowledged that the purpose of this statute is to "alleviate any risk that the statement might affect the partiality of the fact finder at the punishment phase." Even so, there was no problem here. The judge has discretion to impose jail time as a condition at any time during the supervision period. At most, then, this was harmless error.

The Court of Criminal Appeals granted appellant's petition for discretionary review to determine this: "The Court of Appeals erred in holding that a trial court can, under article 42.12 § 12(c) of the code of criminal procedure, modify the conditions of a defendant's probation to require 180 days in jail after victim allocution under article 42.03 § 1(b) of the code of criminal procedure."

4. Probation, even if you don't want it; especially if you don't want it.

***Ivey v. State*, 2009 WL 322340 (Tex. Crim. App. 2009)**

Appellant elected to go to the jury for punishment on his DWI, and he deliberately did not file a sworn application for probation. The jury assessed 35 days incarceration, but the judge suspended the sentence and imposed probation anyway.

"We are called upon in this case to decide whether Article 42.12 of the Texas Code of Criminal Procedure confers upon a defendant a right to avoid being placed on community supervision. We hold that a trial court may place an eligible defendant on community supervision even if the defendant has elected to have his punishment assessed by the jury and the jury does not recommend it."

The trial judge has "fairly broad discretion" to give probation under article 42.12, "in the best interest of justice, the public, and the defendant," except when the sentence is more than ten years, or for certain "3g" offenses, or for felonies involving deadly weapons.

Judges can give probation for any misdemeanor offense.

A judge is required to give probation to an eligible defendant when the jury recommends it. A judge is not prohibited from suspending a jury-assessed sentence and giving probation, as long as the defendant is eligible for probation.

5. Does the state forfeit its right to complain about a defendant's ineligibility for shock probation if it does not object when shock probation is granted?

***State v. Dunbar*, 269 S.W.3d 693 (Tex. App. – Beaumont 2008, pet. granted)**

Dunbar was sentenced for indecency with a child, a "3(g)" offense. The trial court subsequently granted shock probation, and the state appealed. The Court of Appeals reversed, holding that the trial court had no authority to shock Dunbar because she had been sentenced for a 3(g) offense.

The Court of Criminal Appeals granted Dunbar's petition for discretionary review to determine this question: "Did the Court of Appeals err in holding that the State did not waive their right to appeal by not objecting to the trial court placing the petitioner on probation at the time the court ordered shock probation."

6. Restitution amount was not supported by the record.

***Ahmed v. State*, 2008 WL 4425867 (Tex. App. – San Antonio 2008)(not designated for publication)**

"The trial court has authority to order a defendant to make restitution to a victim of the offense of conviction as a condition of probation, but the amount of restitution must be just and it must have a factual basis with regard to the loss sustained by the victim." Here, the trial court abused its discretion when it ordered restitution in this attempted murder case in the amount of more than $198,000.00, even though there was nothing in the record to support this amount. The PSI was not admitted into evidence. The appeal was abated and the case was remanded to the trial court for a restitution hearing.

7. Restitution is for victims of the offense of conviction only.

***Reasor v. State*, 2008 WL 4344766 Tex. App. – San Antonio 2008, no pet.)**

The trial court put appellant on probation for a drug offense, and later revoked his probation for an incident of criminal mischief during which he allegedly caused more than $15,000.00 worth of property damage to two persons. After revoking appellant's probation, the court ordered restitution to the two criminal mischief victims. This was error. Restitution may only be ordered to persons who were the victims of the offense of conviction. Here, the persons whose property was damaged were not the "victims" of the crime for which appellant's probation was revoked.

8. Should the defense have been allowed to prove that the complainant was a convicted sex offender to rebut testimony by the state that he was a nice guy?

***Hayden v. State*, 2007 WL 1412561 (Tex. App. – Houston [1 Dist.] 2007, pet. granted)(not designated for publication)**

The complainant's daughter in this murder case testified that he had recently moved to Houston, that he was having worsening problems with alcohol, that he had raised four children, that he had worked for a meat-packing company for 45 years, and served in the Minnesota Guard. Appellant was not allowed to rebut this with evidence at sentencing that the complainant had also been a convicted sex offender in Minnesota

The Court of Appeals affirmed, holding that this evidence was inadmissible negative victim impact evidence. Nor did the trial court err in excluding evidence admissible to bolster appellant's credibility because this argument was not made in the trial court.

The Court of Criminal Appeals granted appellant's petition for discretionary review to determine this question: "Did the court of appeals err in upholding the exclusion of evidence to show that the victim was a convicted sex offender?"

SUFFICIENCY

1. Does the trial court have authority to grant a directed verdict?

***State v. Moreno*, 267 S.W.3d 65 (Tex. App. – Corpus Christi 2008, pet. granted)**

The state called three witnesses in this possession case, then told the judge that it's next witness was not present, but that he was expected "any second." When the state said it had no further witnesses, the trial court granted Moreno's motion for instructed verdict, and the state appealed.

The Court of Appeals held that the state has no right under the code of criminal procedure to appeal from an instructed verdict. Contrary to the state's argument, this was not really an appeal from the dismissal of an indictment.

The Court of Criminal granted the state's petition for discretionary review to consider the following questions:

> 1. Whether the trial court's action in purporting to grant a directed verdict, before the state rested its case while its key witness was waiting to testify just outside the courtroom, amounted instead to an improper dismissal of the indictment, which is properly appealable by the state?
>
> 2. Whether the trial court even has the underlying authority to grant a directed verdict?

2. Is there such a thing a "factual sufficiency review" anymore?

***Lancon v. State*, 2008 WL 4862513 (Tex. App. – San Antonio 2008, no pet h.)**

Originally the Fourth Court of Appeals reversed Lancon's murder conviction, finding that the evidence was factually insufficient. The Court of Appeals reversed that decision, holding that the Court of Appeals failed to defer to the jury's verdict. On remand, the Court of Appeals affirmed. Justice Speedlin wrote this in her concurring opinion:

> I write separately to express my deep concern that the Court of Criminal Appeals's opinion in *Lancon* restrains intermediate appellate courts from conducting any meaningful factual sufficiency review in cases that involve witness credibility, which, for all practical purposes, is the majority of criminal cases. Without expressly acknowledging its intent to do so, the majority opinion in Lancon modifies prior factual sufficiency case law by effectively imposing the duty on appellate courts to give "complete or total deference" to jury determinations of credibility. In doing so, the Court has blurred the line between legal and factual sufficiency review, and has moved closer to merging the two standards into one. [citations omitted]

TAMPERING WITH EVIDENCE

1. Swallow the whole thing.

***Collier v. State*, 254 S.W.3d 576 (Tex. App. – Eastland 2008, pet. granted)**

The Court of Appeals found the evidence legally and factually sufficient to prove that appellant tampered with evidence by chewing and swallowing the cocaine, or, at least most of the cocaine, after being pulled over for a traffic violation. "Collier appears to suggest the evidence is insufficient because no one saw him chewing the cocaine, as was charged. We believe, based on Collier's delay in pulling over his vehicle, coupled with the extremely small particles of an unusable amount of cocaine contained in his mouth, a rational jury could reasonably have concluded he had been chewing the cocaine, even though no one had observed him doing so."

Appellant's petition for discretionary review was granted to consider these questions:

1. Was the evidence legally and factually sufficient to show that the petitioner chewed and destroyed cocaine?

2. Even if the petitioner chewed the cocaine, was the evidentiary value destroyed as within the meaning of the statute?

UNANIMITY

1. Jury need not be unanimous as to whether the aggravated assault was because serious bodily injury was caused, or because a deadly weapon was used.

***Landrian v. State*, 268 S.W.3d 532 (Tex. Crim. App. 2008)**

Appellant was charged with aggravated assault by causing serious bodily injury and by using a deadly weapon. These two theories were submitted disjunctively, and the jury returned a general verdict of guilty.

The Court of Criminal Appeals held "that the trial judge did not err. The jury charge required the jury to unanimously find that appellant caused bodily injury. . . . The gravamen of this result-oriented offense is 'causing bodily injury.' The jury did not have to be unanimous on the aggravating factors of whether it was a 'serious' bodily injury or whether appellant used a deadly weapon."

"In sum, simple 'bodily injury' assault is punished more severely depending upon the degree of the victim's injury or the manner in which the defendant committed the particular assault. The Texas Legislature has evinced no intent that jurors need be unanimous about which aggravating factor or element that they find-severity of injury or manner in which the defendant caused the injury. It is still the same single criminal act and still the same single bodily injury to the victim. Because the aggravated-assault statute defines two or more circumstances or factors by which the defendant's punishment for a specific criminal act is increased, the defendant may be convicted if each juror concludes that at least one of the aggravating factors or elements exist."

2. Failure to stop and render aid: alternate means of committing the same offense, not separate offenses.

***Huffman v. State*, 267 S.W.3d 902 (Tex. Crim. App. 2008)**

The various statutory methods of committing the offense "failure to stop and render aid" – failing to stop, failing to return, or failing to remain – do not constitute separate

offenses, but are merely alternate means of committing the same offense. As such, the trial court may submit these different means disjunctively without violating the constitutional unanimity requirement.

After noting that there are several "factors" which indicate whether offenses are the same or different, including grammar, the Court declares that one of the best indicators is the focus or gravamen of the offense.

> If the focus of the offense is the result-that is, the offense is a "result of conduct" crime-then different types of results are considered to be separate offenses, but different types of conduct are not. On the other hand, if the focus of the offense is the conduct-that is, the offense is a "nature of conduct" crime-then different types of conduct are considered to be separate offenses. Some offenses, such as capital murder, may contain both result of conduct and nature of conduct elements, and the question becomes which aspect of the statute predominates, or possibly whether both aspects are equally important for determining the separateness of offenses.
>
> There is a third kind of focus that we have not yet discussed, and which has not been addressed in this area of the law: "circumstances surrounding the conduct." If "circumstances surrounding the conduct" is the focus of the offense, then under a focus-based approach to determining separateness of offenses, different types of conduct could establish alternate methods of committing the same offense rather than different offenses, so long as the circumstances surrounding the conduct are the same.

Appellant did not complain of another disjunctive submission – that he failed to give his name and address, his vehicle registration number, or the name of his insurer, or that he failed to provide the deceased with reasonable assistance – so the Court had "no occasion to address it."

VOIR DIRE

1. Hey (said the juror) that's my yard the defendant is driving through. But that's okay, I can be fair.

***Uranga v. State*, 247 S.W.3d 375 (Tex. App. – Texarkana 2008, pet. granted)**

During the punishment phase of this trial for possession of methamphetamine, the jury was shown a videotape of an extraneous offense in which the police were shown having a car chase with appellant.

> One of the jurors watching the videotaped chase was surprised to see Uranga's fleeing vehicle careen through the juror's own front yard. The juror thus learned that Uranga had been the previously unknown person who had driven through the juror's yard on that occasion, making him a victim of Uranga's extraneous offense. The juror reported his surprising discovery to the trial court. After receiving repeated assurances from the juror that he would remain impartial notwithstanding his victim status, the trial court kept him on the jury and denied Uranga's motion for a mistrial.

Appellant appealed, asserting that he was denied his right to a fair and impartial jury, and that the Court should presume harm because a person he had victimized was allowed to assess his punishment. The Court of Appeals disagreed and affirmed appellant's conviction. There is little in Texas case law concerning "implied bias," and a majority of the United States Supreme Court has not adopted this doctrine. The Texarkana Court of Appeals refused to adopt the concept either, and, because it found no evidence in the record of actual bias, it ruled against appellant.

> The trial court was in the best position to weigh the believability of the juror's repeated promises to both the court and the parties that, in deciding Uranga's punishment, he would not take into account his status as the victim of Uranga's extraneous criminal mischief. Therefore, to the extent that the record supports the trial court's conclusion that the juror would remain unbiased-and absent any evidence to the contrary-we cannot say our de novo review of the record affirmatively reveals a clear abuse of the trial court's discretion in ruling on Uranga's motion for a mistrial.

Appellant's petition for discretionary review was granted to decide this question: "Does the implied bias doctrine apply in a case, like Mr. Uranga's, where it is revealed during punishment that one of the jurors was the victim of the defendant's alleged extraneous conduct?"

2. *Batson* is back.

***Moore v. State*, 265 S.W.3d 73 (Tex. App. – Houston [1 Dist.] 2008, pet. granted)**

The state used seven of its ten peremptory challenges to remove seven of nine African-Americans, including venireperson Harris. According to the state, it struck Harris because she had placed question marks on her jury questionnaire, and she was an older, childless female. The trial court was persuaded that these explanations were race-neutral, but the Court of Appeals was not and reversed the conviction.

There were several problems with the state's explanations. The state did not strike all the venirepersons who failed to fully fill out their questionnaires, and it asked Harris no questions about her question marks. The state claimed it wanted jurors with children, and told the court, incorrectly as it turned out, that it had struck another similarly situated woman on the panel. In fact it was the defense that struck this other juror, not the state, and the Court of Appeals held this misrepresentation against the state. The state used a disproportionate amount of its strikes – 70% – against African-Americans. The state failed to meaningfully question Harris. The prosecutor told the trial court that her strike against another African-American "was not just based on his skin color," suggesting that it was based in part, at least, on color. Poor choice of words.

The Court of Criminal Appeals granted the state's petition for discretionary review to decide this issue: "The First Court of Appeals erred in holding that the trial court was required to find that the trial prosecutor engaged in purposeful racial discrimination when she exercised a peremptory challenge against Carol Harris, prospective juror # 16.

3. Can a jury shuffle violate *Batson*?

***Ramey v. State*, 2009 WL 335276 (Tex. Crim. App. 2009)(not designated for publication)**

Can a party violate *Batson v. Kentucky* by asking for a jury shuffle? The question was left undecided in *Ladd v. State*, 3 S.W. 3d 547 (Tex. Crim. App. 1999), where the Court of Criminal Appeals neither endorsed nor rejected the argument. In this case, the Court reiterates that it does "not endorse such a view," but does agree that it will determine appellant's *Batson's* claim "by looking at the shuffle as one of the facts of the case."

The Court assumed, arguendo, that appellant shifted the burden to the state to come forward with a race-neutral explanation when he brought to the trial court's attention that the shuffle would cause many minority jurors to be moved further down the list. The Court held that the state met its burden when it stated that it had local people assisting who provided information about the prospective jurors, and that the overwhelming number of good state's jurors were in the back of the panel. "And so that's why I asked for a shuffle."

"The explanation proffered by the State, if believed, is sufficiently race-neutral. We defer to the trial court's ruling on this point."

4. The right to inform the jury that life is mandatory upon conviction.

***Murphy v. State*, 2008 WL 963047 (Tex. App. – Houston [1 Dist.] 2008, pet. granted)(not designated for publication)**

Article 12.31(b) of the Texas Penal Code states, in pertinent part, that: "In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment without parole is mandatory on conviction of the capital felony."

The state did not seek the death penalty in this capital murder trial, and before trial began and over appellant's objection, the trial court ordered that neither party inform the jury that a sentence of life imprisonment would be automatically assessed upon conviction.

The Court of Appeals affirmed. "Though the trial court erred when it did not allow prospective jurors to be informed that appellant would receive a mandatory life sentence without parole if convicted of capital murder, nothing in the record indicates that such failure to inform the venire of this information denied appellant's right to a fair and impartial jury, the right that section 12.31(b) seeks to protect. Thus, we conclude that appellant's substantial rights were not affected by the error and hold that the error was harmless."

Appellant also asserted that the trial court committed constitutional error when it limited the scope of her voir dire, but the Court held that this issue was not preserved for appeal because the record did not show what question appellant would have asked. "The trial court may have allowed proper questions even though it did not generally approve of the line of inquiry. We cannot determine, without first knowing the questions appellant planned to ask, whether the refusal was error, and thus, whether appellant's constitutional rights were violated."

Appellant's petition for discretionary review was granted to determine these questions:

> 1. In this non-death capital murder case the appellant's constitutional claim that she was denied the effective assistance of counsel and due process of law was preserved for appellate review when the trial court refused to advise the venire that Ms. Murphy would be sentenced without parole if convicted of capital murder when requested by trial counsel as mandated by Tex. Pen. Code. Ann. § 12.31(b) and then prohibited counsel from doing so even though he failed to provide the court with a particularized question on the issue pursuant to *Sells v. State*, 121 S.W.3d 748 (Tex. Crim. App. 2003).

2. Because the trial court declined to advise the appellant's venire that she would be sentenced to life without parole as mandated by Tex. Pen. Code Ann. § 12.31(b) and then prohibited her attorney from doing so during voir dire, Ms. Murphy was denied the effective assistance of counsel and due process of law on this issue during voir dire and the harm she suffered should be assessed under Tex. R. App. P. 44.2(a).

3. Because the purpose of Tex. Pen Code Ann. §12.31(b) is its own clearly stated mandate that the venire in a non-death capital murder case shall know the guilty defendant will receive a sentence of life without parole, and review of the harm caused by the trial court's multiple failures to so inform the appellant's jury should be conducted in light of that stated purpose under Tex. R. app. P. 44.2(b).

5. Alternate jurors must not deliberate.

***Trinidad v. State*, 275 S.W.3d 52 (Tex. App. – San Antonio 2008, pet. granted)**

The trial judge instructed the alternate juror to go into the jury room with the regular 12 jurors and "be part of the deliberation process," but not vote, at both the guilt and punishment phases of the trial. Trinidad was convicted and appealed, and the Court of Appeals reversed his conviction.

The Texas Constitution precludes the deliberation of more than 12 jurors. The trial court erred when it instructed the alternate juror to deliberate in this case. Although appellant did not object to this procedure, neither did he expressly waive his right to 12 jurors. Error was preserved. And it cannot be said beyond a reasonable doubt that this error was harmless, since it is presumed that the alternate did what the judge instructed her to do – deliberate.

The Court of Criminal Appeals granted appellant's petition for discretionary review to determine this issue: "The Court of Appeals erred in determining that the presence of an alternate juror in jury deliberations was reversible error as the requirement under both the Code of Criminal Procedure and the Texas Constitution for a twelve member jury was violated."

***See also Adams v. State*, 275 S.W.3d 61 (Tex. App. – San Antonio 2008, pet. granted)**

APPENDIX 1

No. 000000

STATE OF TEXAS	)	IN THE COUNTY COURT
VS.	)	AT LAW NUMBER FOUR
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves to suppress all evidence obtained as a result of his seizure and arrest, and the search of his person and vehicle, and for good cause shows the following:

I.

On October 24, 2008 officers of the Hollywood Park Police Department stopped a vehicle driven by the defendant, seized him, searched the vehicle and his person, and arrested the defendant for the offense of driving while intoxicated.

II.

There was no reasonable suspicion to stop the vehicle or seize the defendant. The search of the vehicle and the defendant's person was conducted without warrant, reasonable suspicion, probable cause, or consent. Nor was there probable cause to arrest the defendant for driving while intoxicated. Accordingly, the stop of the vehicle, the seizure and arrest of the defendant, and the search of his person and vehicle violated the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Chapter

14 of the Texas Code of Criminal Procedure.

III.

All evidence obtained as a result of these illegal seizures, arrests, and searches, including, but not limited to any observations made by the police officers, any physical evidence seized from the defendant or the vehicle, any photographs, videotapes, or audiotapes obtained, any field sobriety tests administered, any breath, blood, or urine samples taken, and any statements, written or oral, allegedly made by the defendant, must be suppressed pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Chapter 14 of the Texas Code of Criminal Procedure. .

The defendant respectfully moves the Court to set the matter for a pretrial hearing pursuant to article 28.01 of the Texas Code of Criminal Procedure, and, after hearing evidence, that the Court suppress all evidence that was illegally obtained.

Respectfully submitted:

MARK STEVENS
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San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion to Suppress Evidence has been delivered to the Bexar County District Attorney's Office, 300 Dolorosa, San Antonio, Texas on the ____ day of March, 2009.

_____
MARK STEVENS

ORDER

The defendant's Motion to Suppress Evidence having been presented to the Court and the Court orders that same is hereby:

(GRANTED) (DENIED)

_____
PRESIDING JUDGE