Saddling Up
DWI Rules Of Evidence

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DWI EVIDENCE

DWI trials are similar in most respects to all other criminal trials. There are a few things unique to DWIs, though, and there are a few evidentiary rules that the DWI trial lawyer must pay special attention to. This paper emphasizes those Rules of Evidence and associated cases that I believe are important in all criminal trials, and particularly so in DWI trials.

I.
RULE 101(c)
Hierarchy

Hierarchical governance shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law. Where possible, inconsistency is to be removed by reasonable construction.

A. Some Laws Are Stronger Than Others.

Rule 101(c) explains the hierarchy that binds criminal lawyers: Federal Constitution; State Constitution; the code of criminal procedure and the penal code; civil statutes; the rules of evidence; and, the common law. Understanding the hierarchy is important. If you can't win under the federal constitution, you might be able to win under some lesser rule, such as the state constitution, or a state statute, or a rule of evidence, provided, of course, that the lesser rule you want to rely on does not conflict with some greater power in the hierarchy. And sometimes, all you need is one way to win.

B. Using The Texas Constitution To Win.

1. *Heitman v. State.*

We have long known – in theory at least – that state constitutions may be more protective than their federal counterparts. *Cooper v. California*, 386 U.S. 58, 62 (1968); *Brown v. State*, 657 S.W. 2d 797, 799 (Tex. Crim. App. 1983); *See also* Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 St. Mary's L.J. 809 (1988). About 15 years ago, *Heitman v. State* eloquently suggested that this theoretical concept might also have real meaning in the courtroom. The court of criminal appeals reversed the court below for giving only "cursory treatment" to appellant's claim that the inventory search there – though lawful under the Fourth Amendment – was invalid under Article I, § 9 of the Texas Constitution. The court shuddered to think that Texans might walk "lock-step"

with the Supreme Court, and it "decline[d] to blindly follow" that Court's search and seizure opinions. *Heitman v. State*, 815 S.W. 2d 681, 690 (Tex. Crim. App. 1991). "Today we reserve for ourselves the power to interpret our own constitution." *Id*. at 682.

Heitman did not itself grant any positive relief to the defendant; it merely remanded the case to the court of appeals to conduct an independent state constitutional analysis. *Id*. On remand the Fort Worth Court of Appeals found that the inventory search did not violate Article I, § 9 of the Texas Constitution. *Heitman v. State*, 836 S.W. 2d 840, 841 (Tex. App.–Fort Worth 1992, no pet.). The decision, though, was extraordinarily important because it made it clear that competent defense lawyers could no longer ignore state constitutional issues. And that is still true today.

2. The general rule, and how to invoke it.

To take advantage of the greater protection sometimes offered by the state constitution, the lawyer must specifically invoke the Texas constitutional provision sought to be relied upon. At trial, of course, this requires a specific and timely objection. *See* TEX. R. EVID. 103(a)(1). Appellate issues based on the state constitution should be briefed in separate points of error from their federal counterparts, "with separate substantive analysis or argument provided for each ground." *Muniz v. State*, 851 S.W. 2d 238, 251 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837 (1993).

3. When the Texas Constitution is more protective.

Following are several areas in which a Texas court has interpreted our constitution more broadly than the federal constitution. I've also thrown in a few arguments that can be made, but which have not yet been recognized by the courts.

a. Search and seizure.

In *Autran v. State*, 887 S.W. 2d 31, 42 (Tex. Crim. App. 1994), a plurality of the court held that the Texas Constitution limits the authority of the police to inventory closed containers found in vehicles. *But see Trujillo v. State*, 952 S.W. 2d 879, 881 (Tex. App.–Dallas 1997, no pet.)(*Autran* not binding precedent).

In *State v. Ybarra*, 953 S.W. 2d 242, 245 (Tex. Crim. App. 1997), the court of criminal appeals held that, pursuant to Article I, § 9, "the State must prove the voluntariness of a consent to search by clear and convincing evidence," even though the federal constitution requires only proof by a preponderance of the evidence.

In *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993), disagreeing with

the Supreme Court's interpretation of a comparable issue under the Fourth Amendment, our court held that "the use of a pen register may well constitute a 'search' under Article I, § 9 of the Texas Constitution." The case was remanded to the court of appeals to determine whether such a search was unreasonable absent probable cause. *Id*. at 954. On remand the Amarillo Court of Appeals affirmed, finding it unnecessary to decide the issue found so "difficult and interesting" by the higher court. *Richardson v. State*, 902 S.W. 2d 689, 692 (Tex. App.–Amarillo 1995, no pet.). Though recent cases say little if anything about pen registers, it appears that *Richardson* is still good law.

Apparently, *Heitman* has a flip-side. In *Hulit v. State*, 982 S.W. 2d 431, 436 (Tex. Crim. App. 1998), the court held that the Texas Constitution may offer *less* protection than the United States Constitution. In that case, the court found that Article I, § 9 of the Texas Constitution does not require that a search and seizure be authorized by a warrant.

b. Double jeopardy.

In *Bauder v. State*, 921 S.W. 2d 696 (Tex. Crim. App. 1996), the court held that the Double Jeopardy Clause of the Texas Constitution – found at Article I, § 14 – provides broader protection than does its Fifth Amendment counterpart. "We therefore hold that a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id*. at 699. On February 10, 2007, the Texas Court of Criminal Appeals squarely overruled *Bauder* in *Ex Parte Lewis*. Now, "the proper rule under the Texas Constitution is the rule articulated by the United States Supreme Court in *Oregon v. Kennedy*." *Ex parte Lewis*, 219 S.W.3d 335, 337 (Tex. Crim. App. 2007). According to the new five-judge majority, the *Bauder* standard was "flawed in a number of respects." The court believed that the *Kennedy* standard was a better way to decide whether to bar retrial after a defense requested mistrial. *Id.* at 371. Judges Price, Meyers, Johnson, and Holcomb dissented.

c. Scope of voir dire.

In limited cases, "essential fairness required by the Due Process Clause of the Fourteenth Amendment" requires that potential jurors be questioned on the issue of racial bias. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). Outside this narrow area, however, there is generally no federal constitutional right to voir dire specifically directed to matters potentially prejudicial to the defendant. *See Ristaino v. Ross*, 424 U.S. 589, 594 (1976). That is, lawyers looking for a constitutional right to broad latitude on voir dire will find little solace in the Sixth or Fourteenth Amendments of the United States

Constitution.

Article I, § 10 of the Texas Constitution, however, does guarantee, among other things, the effective assistance of counsel. Accordingly, Texas cases have held that counsel is entitled to broad latitude on voir dire so that he or she can intelligently exercise their peremptory challenges, in order to render effective assistance of counsel as guaranteed by Article I, § 10 of the Texas Constitution. *E.g., Mathis v. State,* 322 S.W. 2d 629, 631 (Tex. Crim. App. 1959); *accord Shipley v. State*, 790 S.W. 2d 604, 607-08 (Tex. Crim. App. 1990); *Robinson v. State,* 720 S.W. 2d 808, 810 (Tex. Crim. App. 1986); *Smith v. State*, 703 S.W. 2d 641, 643 (Tex. Crim. App. 1985). So, if you want authority for more voir dire, look to the state constitution, and state case law.

d. Post-arrest silence.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the government from impeaching the defendant with evidence that he invoked his right to silence after being arrested and warned pursuant to *Miranda*. *See Doyle v. Ohio*, 426 U.S. 610 (1976). The *Doyle* argument, though, is unavailable if the defendant was not Mirandized. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

There is a different rule under Article I, § 10 of the Texas Constitution. In *Sanchez v. State*, 707 S.W. 2d 575, 582 (Tex. Crim. App. 1986), the court held that "a defendant may not be impeached through the use of *post-arrest, pre-Miranda* silence since such impeachment violates the defendant's right to be free from compelled self-incrimination, and also since such impeachment is improper from an evidentiary standpoint." [emphasis supplied]

e. Equal rights and due course of law.

The Fourteenth Amendment to the United States Constitution has clauses guaranteeing equal protection and due process of law. In the 1970's there was an unsuccessful effort to amend the federal constitution to add an equal rights amendment. Although the federal effort failed, in 1973 our state enacted TEX. CONST. ART. I, § 3a which provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." In *Esteves v. State*, 849 S.W. 2d 822, 823 (Tex. Crim. App. 1993), the court of criminal appeals acknowledged that this provision prohibits the exercise of peremptory challenges based on race, just as does the federal equal protection clause. On its face, our state constitutional equal rights amendment looks broader than the federal Equal Protection Clause. *See In Interest of McLean*, 725 S.W. 2d 696 (Tex. 1987). It might be argued, then, that this provision provides even more protection than the *Batson* case. *See Yebra v. State*, 915 S.W. 2d 492, 493 (Tex.

Crim. App. 1996)(Judges Overstreet and Baird, dissenting to the refusal of a petition for discretionary review, suggest that "it is time for Texas courts to ensure that Texans are sufficiently protected against the racially discriminatory use of peremptory challenges by interpreting Article I, § 3a of the Texas Constitution as providing greater protection than does the U.S. Constitution").

f. When the state loses or destroys evidence.

What remedy does the defense have when the state loses or destroys potentially exculpatory evidence? Not much, according to the Federal Constitution, unless the defendant can somehow prove bad faith on the government's part. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Good luck.

In *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 of appeals 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.

A majority of the Court of Criminal Appeals avoided the merits of the case, finding that appellant's trial objection was insufficient to preserve the error. Pena explicitly invoked the Texas due course of law provision, but "failed to argue that it provides greater protection than the federal Due Process Clause." The judge and prosecutor understood that he was complaining initially under the federal constitution and "Pena never disabused the judge of this notion even when, in reurging his prior objections to "protect the appellate record,"

> Pena was obligated to put the trial judge on notice of the specific legal theory that he intended to advocate because: the federal constitutional standard was clearly established; the trial judge and the State unmistakably relied solely on the federal standard; and there is no independent interpretation on the subject of lost or destroyed evidence under the Texas Constitution's due course of law provision. We hold that, by failing to distinguish the rights and protections afforded under the Texas due course of law provision from those provided under the Fourteenth Amendment before the trial judge in this context, Pena failed to preserve his complaint that the due course of law provides greater protection for appellate review.

Pena v. State, 285 S.W. 3d 459, 464 (Tex. Crim. App. 2009)

The good news is that after years of litigation in *Pena*, we are right back where we started. That is, nobody knows whether the state constitution provides greater protection than does its federal counterpart with regard to lost or destroyed evidence. Doubtless some future case will decide the issue, now that we know how to preserve it. In the meantime, I can see several possible uses *Pena*-type arguments. If the police videotape your client, then lose the videotape before trial, object under the State Constitution. So far, at least in the Fourth Court of Appeals, these claims have not been successful. *E.g.*, *Salazar v. State*, 185 S.W. 3d 90, 92-93 (Tex. App.–San Antonio 2005, no pet.)(San Antonio Court of Appeals declines to follow Waco Court). I have also argued that due course of law is denied when my client's breath is tested by the Intoxilyzer 5000, then flushed before I have a chance to retest it. Although I have not won yet, I intend to keep making this argument unless and until the court of criminal appeals forecloses it.

g. Must the prosecutor present exculpatory evidence to the grand jury?

As they remind us daily, prosecutors are duty-bound to seek justice. The very statute that imposes on them the rather amorphous duty to seek justice also more specifically dictates that "[t]hey shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." TEX. CODE CRIM. PROC. ANN. art. 2.01. Should not a justice-seeking prosecutor have the duty to provide significant exculpatory evidence to the grand jury?

The Federal Constitution does not help us. *United States v. Williams*, 504 U.S. 36, 51 (1992)(Fifth Amendment does not require the prosecutor to present exculpatory evidence to the grand jury). What about an argument under Article I, § 10 of the Texas Constitution, which says that "no person shall be held to answer for a criminal defense, unless on an indictment of a grand jury?" Chief Justice Lopez of the San Antonio Court of Appeals believes "that prosecutors should have a limited duty to present exculpatory evidence to a grand jury for several reasons, including: (1) a defendant's state constitutional right to a meaningful indictment; (2) a Texas prosecutor's statutory duty to see that justice is done; and (3) a Texas prosecutor's statutory obligation not to suppress facts." *In re Grand Jury Proceedings 198.GJ.20*, 129 S.W. 3d 140, 145 (Tex. App.–San Antonio 2003, rev. denied)(Lopez, C.J., dissenting). The majority opinion, of course, rejected that idea, although it did acknowledge that "[t]he *majority* of the state courts that have addressed the issue have found that prosecutors have a limited duty to present exculpatory evidence to grand juries." *Id*. at 143(emphasis supplied). *See also State v. Sandoval*, 842 S.W. 2d 782, 789 (Tex. App.–Corpus Christi 1992, pet. ref'd)(justice best served by presenting exculpatory evidence to grand jury). That sounds like a good argument to me and I've made it twice recently in cases where I thought there was significant exculpatory evidence that the grand jury never saw.

h. Guns: Bear but don't wear.

The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." So far, the United States Supreme Court has not endorsed the view, held by some, that the Second Amendment entirely prevents the state from criminalizing weapons offenses. *E.g.*, *United States v. Miller*, 307 U.S. 816, 817 (1939); *but see District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

I had a difficult case once where I argued that persons in Texas have the right to bear arms under the State Constitution, which on its face seems broader than the Second Amendment. Specifically, Article I, § 23 reads: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State, but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." I did not win this argument, and I have not won it in any of the several subsequent cases I made it in, but I still think it is interesting, and it might provide something to argue in an otherwise hopeless unlawfully carrying case. Note that the court of criminal appeals dismissed both the state and the federal constitutional arguments in *Masters v. State*, 685 S.W. 2d 654, 655 (Tex. Crim. App.), *cert. denied*, 474 U.S. 853 (1985). *Masters*, though, was a pre-*Heitman* case. Subsequently, several intermediate courts of appeals have come to similar conclusions. *E.g., Jordan v. State*, 56 S.W. 3d 326, 330 (Tex. App.–Houston [1st Dist.] 2001, pet. ref'd); *Wilson v. State*, 44 S.W. 3d 602, 605 (Tex. App.–Fort Worth 2001, pet. ref'd).

i. Is obscenity legal in Texas?

Obscenity is not protected under the First Amendment to the United States Constitution. *Roth v. United States*, 354 U.S. 476, 485 (1957). But is there a different standard under the Texas Constitution? Not according to the Texas appellate courts. At least not yet. In *Campbell v. State*, 765 S.W. 2d 816 (Tex. App.–San Antonio 1988, pet. ref'd). John Rowland argued that Article I, § 8 of the Texas Constitution is broader than the First Amendment, broad enough, indeed, to prevent the prosecution of pornographers. Although the San Antonio Court of Appeals disagreed, Justice Esquivel wanted "to see a more specific holding on the constitutionality of our obscenity laws in Texas under our constitutional provisions by our Court of Criminal Appeals." *Id*. at 823. I filed a petition for discretionary review asking for just that, but the high court was apparently less interested than the court below.

j. Bad DWI Videos.

I don't worry so much about high breath scores. I don't worry at all when I read a

DWI report that makes my client sound intoxicated almost to the point of death. Those cases are common, and we defense lawyers handle them all the time. Every DWI lawyer's nightmare, however, is the video which shows our client weaving from one side of the highway to the other, falling flat on his face when he gets out of the car, and admitting to drinking huge quantities of whiskey. How many times have you heard this on the video: "I can't do that when I am sober."

How do you keep that video out? The Fifth Amendment only excludes "testimonial' evidence. "Physical" evidence – how a person performs on the standardized field sobriety tests – is generally not excludable under the federal standard. *See Pennsylvania v. Muniz,* 496 U.S. 582, 603 (1990).

A couple of times, when I had no better argument for excluding a case-killing video, I relied on Article I § 10 of the Texas Constitution. I argue that the Texas Constitution is broader than its federal counterpart, because it says that a person "shall not be compelled to give evidence against himself." To me, forcing a person to stand in front of a video camera and perform tests certainly compels him "to give evidence against himself." Under the plain language of our constitution it seems immaterial whether that evidence is testimonial or not. Be aware that this argument has been squarely rejected by the Texas Court of Criminal Appeals in *Miffleton v. State*, 777 S.W. 2d 76, 81 (Tex. Crim. App. 1989), although that case can arguably be distinguished because it was decided some two years before *Heitman* changed the way the courts analyze state constitutional claims.

k. Cruel Or Unusual.

The Eighth Amendment of the Federal Constitution prevents cruel *and* unusual punishment, whatever that means. Well, whatever it means, it sounds linguistically different than the cruel *or* unusual punishment that is prohibited by Article I, § 13 of the Texas Constitution. This argument has been frequently made, but, to date, never successfully. The court of criminal appeals insists that the two clauses mean the same. *E.g., Lawton v. State,* 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995). In another case the court did not reject the argument that "or" is different than "and," but simply found that, assuming they were different, the Texas death penalty scheme is neither cruel nor unusual. *Anderson v. State,* 932 S.W. 2d 502, 509 (Tex. Crim. App. 1996). Still, it is an argument that I continue to make and advise other people to make in the hopes that some distinction will be some day be recognized.

II.
RULE 101(d)
When The Rules Don't Apply

(1) *Rules not applicable in certain proceedings*. These rules, except with respect to privileges, do not apply in the following situations:

(A) the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. . . .

* * * * *

A. Hearsay Is Admissible

In *Granados v. State*, 85 S.W. 3d 217, 226-27 (Tex. Crim. App. 2002), the court of criminal appeals held that the rules of evidence do not apply at suppression hearings, because these hearings involve the determination of questions of fact preliminary to the admissibility of evidence. Accordingly, the trial court did not err when it admitted testimony from one police officer about what he had heard from another officer, who had talked to still another person.

B. Personal Knowledge Is Not Required

In *Belcher v. State*, appellant argued that the officer was not competent as a witness under Rule 601 because he had no personal recollection of the events in question. The court of appeals disagreed, holding, among other things, that the trial court properly admitted this testimony because the rules of evidence do not apply at a suppression hearing. 244 S.W. 3d 531, 542 (Tex. App.–Fort Worth 2007, no pet.)

III.
RULE 103(a)
Preserving Error

(a) *Effect of Erroneous Ruling*. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context

within which questions were asked.

A. TEX. R. APP. PROC. Rule 33.1(a): Timely, Specific, Ruled-Upon Objections

> (a) *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> a. the complaint was made to the trial court by a timely request, objection, or motion that:
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
> (2) the trial court:
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a).

B. Important Preservation Cases

1. "As regards *specificity*, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W. 2d 907, 909 (Tex. Crim. App. 1992)(emphasis supplied).

2. "The objection must be *timely*; that is, the defense must have objected to the evidence, if possible, before it was actually admitted. If this was not possible, the defense must have objected as soon as the objectionable nature of the evidence became apparent and must have moved to strike the evidence, that is, to have it removed from the body of evidence the jury is allowed to consider." *Ethington v. State*, 819 S.W. 2d 854, 858 (Tex. Crim. App. 1991)(emphasis supplied).

3. "[O]ur system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented

by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." The law of procedural default applies only to the last category. *Marin v. State*, 851 S.W. 2d 275, 280 (Tex. Crim. App. 1993).

4. Both Rules 33.1 and 103 are "'judge-protecting' rules of error preservation." The party complaining on appeal must have done everything necessary at trial to bring to the trial court's attention the applicable rule of evidence and its proper application. In this case, appellant argued at trial that the evidence was admissible on hearsay grounds. On appeal, he argued that the Confrontation Clause required its admission. "An objection on hearsay does not preserve error on Confrontation Clause grounds." *Reyna v. State*, 168 S.W. 3d 173, 179 (Tex. Crim. App. 2005).

5. If your only objection at trial is "hearsay," you cannot later complain on appeal that this evidence violated the defendant's confrontation rights. *Lopez v. State*, 168 S.W.3d 173, 175 (Tex. Crim. App. 2005).

C. Exceptional Situations

1. Pre-trial motions.

If the court sets a pretrial hearing in compliance with article 28.01 of the Texas Code of Criminal Procedure, "any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters." TEX. CODE CRIM. PROC. ANN. art. 28.01(2).

2. Charging instrument error.

"If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code." TEX. CODE CRIM. PROC. ANN. art. 1.14(b); *See also Cook v. State*, 902 S.W. 2d 471 (Tex. Crim. App. 1995)(indictment that did not name the defendant was fundamentally defective).

3. Jury charge error.

In *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984), the court held that two different standards apply to jury charge error, depending on whether the error was subject to objection. If there was a timely objection, the error is reversible if it caused appellant "some" harm. If no proper objection was made, the error is reversible only if the error caused appellant "egregious harm." *Id*. at 171.

4. Rule 103(d): Fundamental error.

> In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

TEX. R. EVID. 103(d).

5. Blue v. State.

a. In *Blue v. State*, four judges of the court of criminal appeals relied on Rule 103(d) of the Texas Rules of Evidence and the *Marin* case to hold that comments of the trial judge that tainted appellant's presumption of innocence were fundamental error of constitutional dimension requiring no objection. 41 S.W. 3d 129, 131-32 (Tex. Crim. App. 2000). A fifth member of the court – Judge Keasler – reached the same result, but relied, not on Rule 103(d), but instead on *Marin* to find that appellant was denied his right to an impartial judge. *Id*. at 138 (Keasler, J., concurring).

b. Is *Blue* binding precedent? *See Jasper v. State*, 61 S.W. 3d 413, 421 (Tex. Crim. App. 2001)(suggesting that the Court might not be bound to follow the plurality decision in *Blue*); *see also Rabago v. State*, 75 S.W. 3d 561, 563 (Tex. App.–San Antonio 2002, pet. ref'd)("Because there is no majority opinion in *Blue*, it is not binding precedent.").

6. Limiting instructions.

a. "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal." TEX. R. EVID. 105(a).

b. *Rankin v. State*, 974 S.W. 2d 707, 713 (Tex. Crim. App.

1998)(Rule 105 requires a limiting instruction, upon proper request, when evidence is admitted).

c. If a defendant fails to request a limiting instruction at the time the evidence is admitted, the evidence is admitted for all purposes; therefore, a limiting instruction after the evidence has closed in the jury instruction is not warranted. *Hammock v. State*, 46 S.W. 3d 889, 895 (Tex. Crim. App. 2001).

D. Objections Outside The Jury's Presence.

1. Rule 103(a)(1) of the Texas Rules of Evidence provides that, if the court hears and rules on objections outside the presence of the jury, the objections need not be repeated in the jury's presence.

2. Appellant's complaint was not a motion in limine but was instead a timely and specific objection that was ruled on by the court outside the presence of the jury. Error was preserved under Rule 103(a). *Gueder v. State*, 115 S.W. 3d 11, 14 (Tex. Crim. App. 2003).

3. "When a defendant challenges the admissibility of certain evidence in a hearing outside the presence of the jury, he need not renew his objection when the evidence is offered at trial in order to preserve his complaint for review. However, if at trial the defendant states he has 'no objection' when the evidence is offered, he waives his admissibility complaint." *Welch v. State*, 993 S.W. 2d 690, 694 (Tex. App.–San Antonio 1999, no pet.)(citations omitted).

E. Hearings Outside The Jury's Presence.

1. Article 28.01 of the Texas Code of Criminal Procedure permits the trial court to set pre-trial hearings before the trial on the merits. "The trial court has discretion to 'set any criminal case for a pre-trial hearing before it is set for trial upon its merits'. The purpose of the pre-trial hearing is to enable the judge to dispose of certain matters prior to trial and thus avoid delays during the trial." *Johnson v. Texas*, 803 S.W.2d 272, 283 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991).

2. As a general rule, the court is not required to conduct pre-trial hearings. *Moore v. State*, 700 S.W. 2d 193, 205 (Tex. Crim. App. 1985). "Article 28.01 . . . is not a mandatory statute, but is one directed to the court's discretion." *Calloway v. State*, 743 S.W. 2d 645, 649 (Tex. Crim. App. 1988).

3. In at least three instances, however, Rule 104(c) of the Texas Rules of

Evidence requires hearings outside of the hearing of the jury:

a. Hearings on the admissibility of confessions;

b. Hearings on preliminary matters "when the interests of justice require;" and,

c. Hearings "when an accused is a witness, if he so requests."

4. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." TEX. R. EVID. 103(c).

5. "The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case." TEX. R. EVID. 104(d). *See also Simmons v. United States*, 390 U.S. 377 (1968).

F. The Running Objection.

A "running objection," as long as it is timely and specific, and properly advises the court of what is being objected to, will also preserve error. *Ethington v. State*, 819 S.W. 2d 854, 859 (Tex. Crim. App. 1991).

IV.
Rule 107
Open Doors

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

A. The Rule Of Optional Completeness

A recent case from the court of criminal appeals – *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007) – contains a helpful discussion of the rule of optional completeness.

Appellant called 911 to report that he had just shot his brother, and a police officer called him back and asked if he wanted to talk about it. The policeman so testified in court, but before he could finish his answer, the prosecutor "redirected" him and guided his answer to another subject. When the defense asked on cross-examination how appellant had responded to the request to talk about it, the prosecutor objected that this was hearsay, and the trial court sustained the objection and excluded the answer.

This was error. The defense was entitled to have the jury hear the entire 911 call, to rebut the prosecution's false impression that he had not given any explanation of the shooting after it had happened, and that he had been unnaturally calm.

The rule of optional completeness "permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party."

> It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. Rule 107 does not permit the introduction of other similar, but inadmissible, evidence unless it is necessary to explain properly admitted evidence. Further, the rule is not invoked by the mere reference to a document, statement, or act. And it is limited by Rule 403, which permits a trial judge to exclude otherwise relevant evidence if its unfair prejudicial effect or its likelihood of confusing the issues substantially outweighs its probative value.

Id. at 217-18. *cf. Sauceda v. State*, 129 S.W. 3d 116, 124 (Tex. Crim. App. 2004)(trial court erred in admitting entire videotape of CPS worker's interview of child-complainant, where only parts of it were necessary for impeachment).

B. Rule 106.

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. 'Writing or recorded statement' includes depositions." TEX. R. EVID. 106; *Reece v. State*, 772 S.W. 2d 198 (Tex. App.--Houston [14th Dist.] 1989, no pet.).

V.
Relevancy

Rule 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

A. Some Relevancy Cases.

1. *Layton v. State*, 2009 WL 250080 (Tex. Crim. App. 2009)(where there was no evidence how much Xanax and Valium appellant took, exactly when he took it, or what their half-life in the human body was, the trial court erred when it admitted appellant's statement in which he admitted taking these drugs, since there was no showing that this was relevant in this DWI prosecution).

2. *Markey v. State*, 996 S.W. 2d 226, 231-32 (Tex. App.–Houston [14th Dist.] 1999, no pet.)(chart prepared by prosecutor which summarized testimony of arresting officer had no probative value, was not relevant, and was therefore inadmissible, although error was harmless).

3. *Sorensen v. State*, 856 S.W. 2d 792, 794 (Tex. App.–Beaumont 1993, no pet.)(trial court erred in not permitting appellant to show the jury scars on his ankle and calf where state relied heavily on his inability to control his movements, but the error was harmless).

4. *Orrick v. State*, 36 S.W. 3d 622, 626-27 (Tex. App.–Fort Worth 2000, no pet.)(full, unopened bottle of vodka introduced for demonstrative purposes was irrelevant and trial court abused its discretion in admitting it, although error was harmless).

5. *State v. Schaeffer*, 839 S.W. 2d 113, 117-18 (Tex. App.–Dallas 1992, pet. ref'd)(where trial court properly suppressed breath test, it also properly suppressed as irrelevant audio portion of videotape which contained extensive references to the breath test; additionally, the court properly suppressed the defendant's "pressing need to urinate and his displeasure concerning the fact that his car had been towed," since neither discussion was relevant).

6. *Griffith v. State*, 55 S.W. 3d 598, (Tex. Crim. App. 2001)(appellant's

request to speak to a lawyer before taking the breath test was relevant because it showed his ability to speak, and because appellant's precondition to taking the test – consultation with a lawyer – was relevant to refusing the test).

7. *Casey v. State*, 215 S.W. 3d 870, 884 (Tex. Crim. App. 2007)(photos of appellant's roommate having sex with an unnamed female; of co-defendant appearing to be very intoxicated, and of appellant – one wherein he is urinating on the side of a building, and in another, he is flashing a gang sign were irrelevant and inadmissible, but the error was harmless).

8. *Walker v. State*, 195 S.W. 3d 250, 259 (Tex. App.–San Antonio 2006, no pet.)(that a man in appellant's driveway was arrested for possession of marijuana was irrelevant to whether appellant resisted arrest, and trial counsel was deficient for not objecting).

9. *Young v. State*, 242 S.W. 3d 192, 201 (Tex. App.–Tyler 2007, no pet.)("photographs of "a penis pump, a package of "Wet N Wild" condoms, a bottle of flavored personal lubricant, and various issues of Playboy magazine" were irrelevant in a child pornography case, but the error was harmless).

10. *Stewart v. State*, 129 S.W. 3d 93, 96 (Tex. Crim. App. 2004)(unextrapolated breath test results showing that appellant was over the legal limit when tested were relevant because they proved the consumption of alcohol, thus providing, at least "a small nudge" toward proving a fact of consequence in this DWI prosecution).

11. *Abdygapparova v. State*, 243 S.W. 3d 191 (Tex. App.–San Antonio 2007, pet. ref'd)(letter sent to appellant by a man she had never met, which detailed his sexual desires and fantasies with appellant Abdygapparova and other women, made nothing as to appellant more or less probable, and was therefore not relevant in capital murder case).

12. *See Blackburn v. State*, 820 S.W. 2d 824, (Tex. App.– Waco 1991, pet. ref'd).

VI.
Prejudice, etc.
Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

A. *Montgomery v. State.*

1. Even if evidence is relevant to something other than character conformity, and therefore admissible under Rule 404(b), it must still pass muster under Rule 403. That is, its prejudicial effect must not substantially outweigh its probative value. While an "extraneous offense" objection may be sufficient to preserve Rule 404(b) error, it will not be sufficient to preserve Rule 403 error. Thus, the opponent must make a further objection to the evidence under Rule 403. "It is now incumbent upon him, in view of the presumption of admissibility of relevant evidence, to ask the trial court to exclude the evidence by its authority under Rule 403, on the ground that the probative value of the evidence, assuming it is relevant apart from character conformity, is nevertheless substantially outweighed by, *e.g.*, the danger of unfair prejudice." *Montgomery v. State*, 810 S.W. 2d 372, 388-89 (Tex. Crim. App. 1991). An objection that the evidence is "highly prejudicial" and "inflammatory" is sufficient to invoke Rule 403. *Moreno v. State*, 858 S.W. 2d 453, 463 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 445 (1993).

2. Once this objection is made, "the trial court is called upon to weigh probativeness of the evidence against its potential for 'unfair' prejudice." *Montgomery v. State*, 810 S.W. 2d at 389. "The court would do well to inquire of the opponent what his view of the prejudice is. On the other hand, the court should ask the proponent to articulate his need. But once the rule is invoked, 'the trial judge has no discretion as to whether or not to engage in the balancing process.'" Trial courts should favor admission in close cases, since there is a presumption of admissibility of relevant evidence.

3. The court enumerated several factors which should go into the trial court's balancing decision. These factors include the inherent probativeness of the extraneous act, which is a function of both the similarity of this act to the charged conduct, and the strength of the evidence showing that appellant is guilty of the extraneous act. Another factor is the potential for the extraneous conduct to "impress the jury in some irrational but nevertheless indelible way." This is often a function of the nature of the misconduct. Also important is the amount of trial time needed to prove extraneous misconduct. "Finally, how great is the proponent's 'need' for the extraneous transaction?" This last factor has three subparts. Does the proponent have other available evidence to prove that which the extraneous conduct goes to prove, how strong is that other evidence, and is the fact to be proved related to an issue in dispute. "When the proponent has other compelling or undisputed evidence to establish the proposition or fact that the extraneous misconduct goes to prove, the misconduct evidence will weigh far less than it otherwise might in the probative versus prejudicial balance." *Id.* at 389-90.

B. Cases Favorable To The Defense.

1. *Templin v. State*, 711 S.W. 2d 30, 33-34 (Tex. Crim. App. 1986)(evidence that appellant, when he was a child, had electrocuted animals, was relevant, but unfairly prejudicial, and therefore inadmissible under Rule 403).

2. In *Reese v. State*, the court of criminal appeals set out the appropriate test for balancing the probative and prejudicial values of an item of evidence. At least four factors must be considered: "(1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." 33 S.W. 3d 238, 240-41 (Tex. Crim. App. 2000).

3. *Erazo v. State*, 144 S.W. 3d 487, 496 (Tex. Crim. App. 2004)(photos of unborn child were unfairly prejudicial).

4. *Moreno v. State*, 22 S.W. 3d 482, 489 (Tex. Crim. App. 1999)(trial court erred in permitting prosecutor to impeach the testifying defendant with evidence that he was on deferred adjudication for a felony offense and that he could go to prison there if convicted of the case in which he was testifying, because this impeachment evidence, though relevant, violated Rule 403).

5. *State v. Schaeffer*, 839 S.W. 2d 113, 117-18 (Tex. App.–Dallas 1992, pet. ref'd)(where trial court properly suppressed breath test, it also properly suppressed audio portion of videotape which contained extensive references to the breath test).

C. Cases Favorable To The State.

1. *State v. Mechler*, 153 S.W. 3d 435, 442 (Tex. Crim. App. 2005)(trial court abused its discretion when it excluded intoxilyzer test under Rule 403)

2. Although the breath test was admissible here, the court makes it clear that there might be a case in which the trial court reasonably excludes such evidence. "It may be that, in an appropriate case, a trial court could reasonably conclude that the probative value of breath test results is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. If, for example, a jury is not given adequate information with which to evaluate the probative force of breath test results, it might be that a trial court could reasonably conclude that the admission of such evidence would pose a danger of misleading the jury. Similarly, if a breath test was administered to an accused several hours after he was stopped and the results were at or below the legal limit, it might be that a trial court could reasonably conclude that the probative force of the test results was too weak to warrant admission in the face of a Rule 403 challenge."

Gigliobianco v. State, 210 S.W. 3d 637, 643 (Tex. Crim. App. 2006).

D. Stipulating To Priors.

1. Two prior DWI convictions must be proven to establish a felony DWI. These priors are jurisdictional, and if the defendant stipulates to their admissibility, the stipulation may be admitted into evidence, and the priors may properly be discussed in voir dire, opening statement, the jury charge, and final arguments. *Hollen v. State*, 117 S.W. 3d 798, 802 (Tex. Crim. App. 2003).

2. *See also Robles v. State*, 85 S.W. 3d 211, 213 (Tex. Crim. App. 2002)(prejudicial judgments from prior DWI's were erroneously admitted where defendant offered to stipulate); *Tamez v. State*, 11 S.W. 3d 198, 202-203 (Tex. Crim. App. 2000)(if the defendant offers to stipulate to the two prior jurisdictional convictions, additional convictions should not be read or proven in the state's case-in-chief).

VII.
Character Testimony
Rule 404

(a) Character Evidence Generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of victim*. In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character vor violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of witness*. Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

A. In General.

Rule 404 governs the admissibility of character evidence. In criminal cases, more often than not this rule is consulted when one party or the other is concerned about *bad* character evidence, or extraneous misconduct. A comprehensive discussion of this subject would comprise several books. What follows barely scratches the surface.

B. What Is extraneous?

1. "An extraneous offense is defined as any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." *Rankin v. State*, 953 S.W. 2d 740, 741 (Tex. Crim. App. 1996).

2. Extraneous misconduct need not amount to criminal activity. "The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise to criminal liability." *Plante v. State*, 692 S.W. 2d 487, 490 n. 3 (Tex. Crim. App. 1985); *see also Bishop v. State*, 869 S.W. 2d 342, 345 (Tex. Crim. App. 1993)(Rule 404(b) "applies equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses.").

3. Proof that appellant had a quantity of cocaine metabolite in his system after the accident was not “extraneous” because one of the manner and means allegations in the indictment charged recklessness “by the consumption of a controlled substance.” *Manning v. State*, 114 S.W. 3d 922, 927 (Tex. Crim. App. 2003).

C. The Defendant’s Character For Sobriety.

1. Rule 404(a)(1) permits the accused to offer “[e]vidence of a pertinent character trait.”

2. The trial court errs when it excludes evidence that a person accused of DWI has a good reputation in the community for sobriety. *Foley v. State*, 356 S.W. 2d 686, 687 (Tex. Crim. App. 1962).

D. Why Extraneous Misconduct Is Generally Inadmissible.

1. "It is a fundamental tenet of our system of jurisprudence that an accused must only be tried for the offense of which he is charged and not for being a criminal in general." *Owens v. State*, 827 S.W. 2d 911, 914 (Tex. Crim. App. 1992).

2. "Evidence of a defendant's bad character traits possesses such a devastating impact on a jury's rational disposition towards other evidence, and is such poor evidence of guilt, that an independent mandatory rule was created expressly for its exclusion." *Mayes v. State*, 816 S.W. 2d 79, 86 (Tex. Crim. App. 1991).

3. "It is a well established and fundamental principle in our system of justice that an accused person must be tried only for the offense charged and not for being a criminal (or a bad person) generally. It is for this reason that Anglo-American jurisprudence has always shown a marked reluctance to admit evidence of extraneous offenses or prior misconduct. Such evidence carries with it the danger that a defendant in a criminal action may be convicted of an implied charge of having a propensity to commit crimes generally rather than the specific offense for which he is on trial." *Templin v. State*, 711 S.W. 2d 30, 32 (Tex. Crim. App. 1986)(citations omitted).

4. "Limitations on the admissibility of evidence of an accused's prior criminal conduct are imposed, not because such evidence is without legal relevance to the general issue of whether the accused committed the act charged, but because such evidence is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against charges which he had not been notified would be brought against him." *Albrecht v. State*, 486 S.W. 2d 97,100 (Tex. Crim. App. 1972).

E. *Montgomery v. State*: The Seminal 404(b) Case.

1. Every criminal lawyer must understand *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1991). Appellant was charged with committing indecency with a child against two of his daughters. In addition to the conduct charged in the indictments, the state proved that he would quite frequently walk around in front of his daughters in the nude, with an erection. *Id.* at 393. The court of criminal appeals found that the trial court erred in admitting this evidence because the probativeness of the evidence was substantially outweighed by the danger of unfair prejudice. *Id.* at 397. In arriving at this conclusion, the court analyzed in great detail the relevancy rules, particularly Rules 403

and 404(b), and formulated standards for the admissibility of extraneous offenses, and the roles expected of trial counsel, the trial court, and the appellate courts.

2. *Montgomery* begins by restating the general rule: Character evidence is generally inadmissible if it is offered solely to show that the person acted in conformity with this character trait. The court refers to such evidence as "character conformity" evidence. Such evidence is "absolutely inadmissible" under Rule 404(b). *Id.* at 386-87.

3. Extraneous offense evidence is, however, admissible under Rule 404(b) if it has relevance apart from its tendency to show mere character conformity. Specifically, it is admissible if it makes an "elemental fact" more or less probable; if it makes more or less probable an "evidentiary fact" that inferentially proves an "elemental fact," or, if it makes more or less probable defensive evidence that undermines an "elemental fact." Id. at 387. Illustrative of permissible purposes to which extraneous offenses may be put are those listed in Rule 404(b), including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." These purposes, however, are only illustrative, and "neither mutually exclusive nor collectively exhaustive." *Id.* at 387-88.

4. The opponent of such evidence bears the burden of timely objecting. The optimal objection is that the evidence is inadmissible under Rule 404(b). Although not as precise as it might be, an objection that the evidence is not relevant, or that it constitutes an extraneous offense or misconduct, will ordinarily be sufficient to apprise the trial court of the nature of the complaint. *Id.*at 387.

5. Once the objection is lodged, the proponent of the evidence must satisfy the court that the extraneous offense has relevance apart from its tendency to prove character conformity. "The trial court should honor any request by the opponent of the evidence of articulation into the record of the purpose for which evidence is either offered by the proponent or ultimately admitted by the trial court." *Id.* at 387.

6. If the evidence has no relevance apart from character conformity, then it is absolutely inadmissible and the trial court has no discretion to admit it. If the trial court believes that it is relevant to some other issue, the trial court may admit the evidence. "Should he admit the evidence, then upon timely further request, the trial judge should instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded him it serves." *Id.* at 387-88.

F. Notice.

1. *Espinosa v. State*, 853 S.W. 2d 36, 39 (Tex. Crim. App. 1993)("when a

defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule").

2. *Buchanan v. State*, 911 S.W. 2d 11 (Tex. Crim. App. 1995)(the state does not satisfy its requirement to give the defendant notice of intent to offer extraneous misconduct evidence merely by opening its file); *but see Hayden v. State*, 66 S.W. 3d 269, 271-73 (Tex. Crim. App. 2001)(state's "act of delivering" to the defense witness statements which referred to extraneous misconduct may be sufficient conveyance of its intent to introduce such evidence and may therefore satisfy Rule 404(b) where it appears that the delivery comes shortly after the request for notice, and where the defense does not dispute actual notice).

3. *Simpson v. State*, 991 S.W. 2d 798, 801 (Tex. Crim. App. 1998)(appellant's motion requesting notice was not a self-executing request, and, because he did not obtain a ruling on it, the notice requirements of Rule 404(b) were not triggered).

4. *Umoja v. State*, 965 S.W. 2d 3, 7 (Tex. App.--Fort Worth 1997, no pet.)(notice given on the day of trial not reasonable under Rule 404(b); error harmless); *Hernandez v. State*, 914 S.W. 2d 226, 234 (Tex. App.--Waco 1996, no pet.)("notice given the Friday before trial on Monday is not reasonable; error harmless).

5. *Chimney v. State*, 6 S.W. 3d 681, 694 (Tex. App.–Waco 1999, no pet.)(notice 10 days before trial is presumptively reasonable).

G. No Mudwrestling Allowed.

1. *Burrow v. State*, 668 S.W. 2d 441, 443 (Tex. App.– El Paso 1984, no pet.)(so much extraneous misconduct came in during the trial"that the original DWI charge became a minor sideshow," and "the trial turned from *Wigmore* to mudwrestling").

VIII.
Rule 609
Impeachment by Evidence of Conviction of Crime

(a) *General Rule*. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) *Effect of Pardon, Annulment, or Certificate of Rehabilitation*. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) *Juvenile Adjudications*. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) *Pendency of Appeal*. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) *Notice*. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

A. Moral Turpitude.

1. "Generally, moral turpitude means something that is inherently immoral or dishonest." *Hutson v. State*, 843 S.W. 2d 106, 107 (Tex. App.– Texarkana 1992, no pet.);

see also Hardeman v. State, 868 S.W. 2d 404, 405 (Tex. App.– Austin 1993), *pet. dism'd*, 891 S.W. 2d 960 (Tex. Crim. App. 1995)("the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita"); *Searcy v. State Bar of Texas*, 604 S.W. 2d 256, 258 (Tex. Civ. App.– San Antonio 1980, writ ref'd n.r.e.)(acts which are base, vile or depraved).

2. "Moral turpitude has been defined as: (1) the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita; (2) conduct that is base, vile, or depraved; and (3) something that is inherently immoral or dishonest." *Ludwig v. State*, 969 S.W. 2d 22, 28 (Tex. App.– Fort Worth 1998, pet. ref'd).

3. The following offenses *do not* involve moral turpitude:

i. Misdemeanor possession of marijuana. *Bell v. State*, 620 S.W. 2d 116, 121 (Tex. Crim. App. 1981).

ii. Misdemeanor driving while intoxicated. *Shipman v. State*, 604 S.W. 2d 182, 183 (Tex. Crim. App. 1980); *accord Janecka v. State*, 937 S.W. 2d 456, 464 (Tex. Crim. App. 1996); *Ladner v. State*, 868 S.W. 2d 417, 425-26 (Tex. App.– Tyler 1993, pet. ref'd).

iii. Unlawfully carrying a pistol. *Trippell v. State*, 535 S.W. 2d 178, 180 (Tex. Crim. App. 1976); *Brousseau v. State*, 663 S.W. 2d 691, 694 (Tex. App.– Corpus Christi 1983, no pet.).

iv. Disturbing the peace. *Garza v. State*, 532 S.W. 2d 624, 625 (Tex. Crim. App. 1976).

v. Adjudication for juvenile delinquency. *Rivas v. State*, 501 S.W. 2d 918, 919 (Tex. Crim. App. 1973).

vi. Public intoxication. *Ochoa v. State*, 481 S.W. 2d 847, 850 (Tex. Crim. App. 1972); *Brousseau v. State*, 663 S.W. 2d 691, 694 (Tex. App.– Corpus Christi 1983, no pet.).

vii. Misdemeanor aggravated assault, not against a woman. *Valdez v. State*, 450 S.W. 2d 624, 625 (Tex. Crim. App. 1970).

viii. Driving with a suspended license. Stephens v. State, 417 S.W. 2d 286, 288 (Tex. Crim. App. 1967).

ix. Selling or handling whiskey. *Smith v. State*, 346 S.W. 2d 611, 611 (Tex. Crim. App. 1961); *see Rivera v. State*, 255 S.W. 2d 219, 219 (Tex. Crim. App. 1953)(violations of the liquor law).

x. Gambling. *Neill v. State*, 258 S.W. 2d 328, 331 (Tex. Crim. App. 1953).

xi. Reckless conduct and misdemeanor assaultive offenses not involving violence against women. *Patterson v. State*, 783 S.W. 2d 268, 271 (Tex. App. – Houston [14th Dist.] 1989, pet. ref'd).

xii. Criminal trespass. *Hutson v. State*, 843 S.W. 2d 106, 107 (Tex. App.– Texarkana 1992, no pet.).

xiii. Criminal mischief. *Gonzalez v. State*, 648 S.W. 2d 740, 742 (Tex. App.– Beaumont 1983, no pet.)(even where conduct involved taking money from coin operated video machines).

xiv. Contempt for failure to pay support. *Jessup v. State*, 853 S.W. 2d 141, 144 (Tex. App.– Fort Worth 1993, pet. ref'd).

4. The following offenses *do* involve moral turpitude:

i. Theft. *Milligan v. State*, 554 S.W. 2d 192, 196 (Tex. Crim. App. 1977).

ii. Prostitution. *Holgin v. State*, 480 S.W. 2d 405, 408 (Tex. Crim. App. 1972); *Husting v. State*, 790 S.W. 2d 121, 126 (Tex. App.– San Antonio 1990, no pet.).

iii. Misdemeanor aggravated assault on a female. *Trippell v. State*, 535 S.W. 2d 178, 180 (Tex. Crim. App. 1976).

iv. Misdemeanor assault by a man against a woman. *Hardeman v. State*, 868 S.W. 2d 404, 405 (Tex. App.– Austin 1993), *pet. dism'd*, 891 S.W. 2d 960 (Tex. Crim. App. 1995); *contra*, *Tenery v. State*, 680 S.W. 2d 629, 639-40 (Tex. App.– Corpus Christi 1984, pet. ref'd)(suggesting that assault on a female which was not aggravated is not a crime of moral turpitude); *see also Jessup v. State*, 853 S.W. 2d 141, 144 (Tex. App.– Fort Worth 1993, pet. ref'd).

v. Making a false report to a police officer, regardless of whether it was done for personal gain. *Robertson v. State*, 685 S.W. 2d 488, 492 (Tex. App.– Fort Worth 1985, no pet.).

vi. Indecent exposure, when coupled with an intent to arouse or gratify sexual desire. *Polk v. State*, 865 S.W. 2d 627, 630 (Tex. App.– Fort Worth 1993, pet. ref'd).

vii. Swindling. *Sherman v. State*, 62 S.W. 2d 146, 150 (Tex. Crim. App. 1933).

viii. Failure to stop and render aid. *Tate v. State Bar of Texas*, 920 S.W. 2d 727, 729-30 (Tex. App.– Houston [1st Dist.] 1996, writ denied)(although not a crime of moral turpitude *per se*, it was under the facts of this case).

B. The Balancing Test.

The proponent of prior conviction evidence "has the burden of demonstrating that the probative value of a conviction outweighs its prejudicial effect." *Theus v. State*, 845 S.W. 2d 874, 880 (Tex. Crim. App. 1992). The court listed five factors helpful in performing the balancing exercise mandated by Rule 609: the impeachment value of the particular crime; temporal proximity; similarity; importance of defendant's testimony; and, credibility. *Id*. at 880-81. The court went on to reverse appellant's conviction, even though four of the five factors favored admissibility. *Id*. at 881. Important was that the arson conviction had so little probative value on the question of appellant's credibility and had much prejudicial effect, and that the trial court did not dispel the prejudice when it had the chance. *Id*. at 881-82; *see Cryan v. State*, 798 S.W. 2d 333, 336 (Tex. App.– Beaumont 1990, no pet.); *cf., Gaffney v. State*, 937 S.W. 2d 540, 543 (Tex. App.– Texarkana 1996)(admissible because appellant presented alibi defense).

C. Probation And Deferred Adjudication.

1. A witness may not be impeached under Rule 609 for being on deferred adjudication, since this is not a conviction. *Jones v. State*, 843 S.W.2d 487, 496 (Tex. Crim. App. 1992); *Moreno v. State*, 944 S.W. 2d 685, 689 (Tex. App.– Houston [14th Dist.] 1997, pet. granted); *Soliz v. State*, 809 S.W. 2d 257, 257-58 (Tex. App.– San Antonio 1991, pet. ref'd); Green v. State, 663 S.W. 2d 145, 146 (Tex. App.– Houston 1983, pet. ref'd).

2. Although one on deferred adjudication has not been convicted, a *defendant* may impeach should be allowed to impeach a state's witness who is on deferred to show his potential bias or motive or interest in testifying for the prosecution. *Maxwell v. State*, 48 S.W. 39 196, 200 (Tex. Crim. App. 2001).

3. The trial court abused its discretion when it admitted evidence that the testifying defendant was on deferred adjudication. Although it was true that a conviction in the instant case could lead to his adjudication, the probative value of this evidence is substantially outweighed by its potential for prejudice, making it inadmissible under Rule 403. *Moreno v. State*, 22 S.W. 3d 482, 489 (Tex. Crim. App. 1999).

4. Rule 609(c) provides that a conviction in which probation has been satisfactorily completed cannot be used for impeachment provided appellant has not been subsequently convicted of a felony or crime of moral turpitude. In *Ex parte Menchaca*, the court of criminal appeals held that "there is no distinction between a probation period that has expired and one that is satisfactorily completed. Therefore, when the probationary term has expired and the witness has not been subsequently convicted of a felony or crime involving moral turpitude, the prior conviction is not admissible for impeachment purposes. Rule 609(c)." 854 S.W. 2d 128, 131 (Tex. Crim. App. 1993).

D. Juveniles.

1. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that the defendant should have been allowed to prove that the state's identification witness was on juvenile probation at the time of trial and at the time of the events he testified to. This evidence was admissible, not to generally impeach the witness's character as a truthful person, but rather to show the existence of possible bias and prejudice causing the witness to misidentify the defendant because of his vulnerable status as a probationer. *Id*. at 317-18.

E. Offenses Taken Into Consideration And Dismissed Cannot Be Used To Impeach.

1. Offenses which a defendant admits his guilt of, and are then taken into consideration and dismissed under section 12.45 of the Texas Penal Code, are not "convictions" under Rule 609, and therefore cannot be used for impeachment. *Lopez v. State*, 253 S.W. 3d 680, 682 (Tex. Crim. App. 2008).

F. *Brady v. Maryland.*

1. "*Brady* evidence includes evidence that can be used to impeach the State's witnesses." *Arroyo v. State*, 117 S.W.3d 795, 796 n. 1 (Tex. Crim. App. 2003)(the complaining witness's rap sheets).

G. Prosecutors Can't Talk Out Of Both Sides Of Their Mouth.

1. In *Arroyo v. State*, 117 S.W.3d 795 (Tex. Crim. App. 2003), appellant made

a *Brady* motion at trial requesting, among other things, offenses committed by the complaining witness which would be admissible. In response, the state turned over three offenses, but, when appellant tried to impeach the complainant with the judgments in those cases, the state objected that they were not relevant because appellant had not proven that the complainant was the same person named in the judgments. The court of criminal appeals was not amused. "We hold that the State, once it tendered [the complainant's] rap sheet to appellant without qualification, was estopped from thereafter claiming that the defense exhibits were inadmissible on the ground of identity."

H. Opening The Door.

1. "[A]n an exception to Rule 609 applies when a witness makes statements concerning his past conduct that suggest he has never been arrested, charged, or convicted of any offense." *Delk v. State*, 855 S.W. 2d 700, 704 (Tex. Crim. App. 1993)(door not opened).

2. The door was opened in *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App.1988), where the witness claimed, on direct examination, that "this is my first time going through this."

3. In *Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App.1986), the court held that appellant did *not* open the door to a prior arrest for criminal mischief when he testified that he had only once before been arrested for public intoxication.

IX.
Rule 613
Prior Statements of Witnesses: Impeachment and Support

(a) *Examining Witness Concerning Prior Inconsistent Statement.* In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party- opponent as defined in Rule 801(e)(2).

X.
Rule 615

Production of Statements of Witnesses in Criminal Cases

(a) ***Motion for Production*****. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.**

(b) ***Production of Entire Statement.*** **If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.**

(c) ***Production of Excised Statement.*** **If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.**

(d) ***Recess for Examination of Statement.*** **Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.**

(e) ***Sanction for Failure to Produce Statement.*** **If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.**

(f) ***Definition*****. As used in this rule, a "statement" of a witness means:**

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness:

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a

transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

A. Rule 612.

"If a witness uses a writing to refresh memory for the purpose of testifying either (1) while testifying; (2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or (3) before testifying, in criminal cases; an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

B. Possession Of The State.

1. *Jenkins v. State*, 912 S.W.2d 793 (Tex. Crim. App. 1993)(state need only produce statements in its possession, and record did not establish that investigator was part of the prosecutorial arm of the government).

2. A written inventory of the contents of appellant's car prepared by the testifying officer was a "statement" as contemplated by Rule 615. The witness testified that the statement had been destroyed before trial, and the trial court refused appellant's motion to strike the witness's testimony. This was not error. "This document was not in the State's possession." The state did not withhold the document, it simply was unable to produce it. The sanction provided for in this rule applies only when the state has the ability to produce, but elects not to do so, and not where, as in this case, it is unable to comply. *Cross v. State*, 877 S.W. 2d 25, 27 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd)

XI.
Rule 702
Testimony By Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

A. Rule 701.

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

B. The *Daubert* Test.

1. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Supreme Court made clear that the admissibility of scientific evidence no longer depends entirely on whether it is generally accepted in the scientific community. Now, the trial judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id*. at 597.

2. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Hartman v.* State, 946 S.W. 2d 60 (Tex. Crim. App. 1997); *Kelly v. State*, 824 S.W. 2d 568 (Tex. Crim. App. 1992).

C. *Emerson v. State* And The Admissibility Of HGN Evidence.

1. "For testimony concerning a defendant's performance on the HGN test to be admissible, it must be shown that the witness testifying is qualified as an expert on the HGN test, specifically concerning its administration and technique. In the case of a police officer or other law enforcement official, this requirement will be satisfied by proof that the officer has received practitioner certification by the State of Texas to administer the HGN. A witness qualified as an expert on the administration and technique of the HGN test may testify concerning a defendant's performance on the HGN test, but may not correlate the defendant's performance on the HGN test to a precise BAC." *Emerson v. State*, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994).

2. The trial court was within its discretion to exclude HGN tests after if found that the officer lacked credibility because he had not performed the test on video. *State v. Rudd*, 255 S.W. 3d 293, 301, 302 (Tex. App.–Waco 2008, pet. ref'd).

3. Where the undisputed testimony was that the officer did not administer the HGN test properly, the trial court abused its discretion when it admitted the results of the test. *McRae v. State*, 152 S.W. 3d 739, 743-44 (Tex. App.–Houston [1st Dist.] 2004, no pet.).

4. "The trial court abused its discretion in admitting testimony regarding the VGN test without conducting a *Daubert/Kelly* hearing to establish the reliability of the test." *Stovall v. State*, 140 S.W. 3d 712, 719-20 (Tex. App.–Tyler 2004, no pet.).

5. The trial court abused its discretion when it permitted an uncertified officer to give HGN testimony. *Ellis v. State*, 86 S.W.3d 759, 761 (Tex. App.– Waco 2002, no pet.).

XII.
Rule 705(b)
Disclosure Of Facts Or Data
Underlying Expert Opinion

(b) *Voir dire*. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

A. This Rule Is Mandatory.

See Alba v. State, 905 S.W. 2d 581, 588 (Tex. Crim. App. 1995), *cert. denied*, 116 S. Ct. 783 (1996)(Rule 705(b) is mandatory and the trial court would err if it refused to permit voir dire)

XIII.
Rule 801(d)
Hearsay

(d) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

A. Backdoor Hearsay.

1. For a good discussion of backdoor hearsay, see *Schaffer v. State*, 777 S.W. 2d 111 (Tex. Crim. App. 1989).

XIV.
Rule 803(1), (4), (8) & (18)
Hearsay Exceptions;
Availability Of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

*** * * * ***

(1) *Present Sense Impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

*** * * * ***

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

*** * * * ***

(8) *Public Records and Reports*. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

*** * * * ***

(18) *Learned Treatises*. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

A. Present Sense Impressions (Not).

"This case presents a novel question in Texas evidentiary law: Are a law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, admissible as a present sense impression exception to the hearsay rule under Tex. E. Evid. 803(1)? They are not. An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. This calculated narrative in an adversarial setting was a speaking offense report. It was not the type of unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow." *Fischer v. State*, 252 S.W.3d 375, 376 (Tex. Crim. App. 2008).

B. Medical Records.

In *Taylor v. State*, 2007 WL 2214859 (Tex. App.–Houston [1st Dist.] 2007, pet. granted), the trial court admitted testimony 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 appellant's petition for discretionary review on November 14, 2007 to determine this: "Are statements made to a "licensed professional counselor" admissible under Texas Rule of Evidence 803(4)?"

C. Public Records.

A police report is hearsay and inadmissible where offered for the purpose of proving the observations it contains. *Baker v. State*, 177 S.W.3d 113, 122 (Tex. App.–Houston [1 Dist.]2005, no pet.).

D. Learned Treatises.

See Sample 1. [MOTION FOR PRODUCTION OF FIELD SOBRIETY TRAINING MANUALS USED BY ARRESTING OFFICER]

XV.
Rule 503(b)

Lawyer-Client Privilege

(b) *Rules of Privilege*.

(1) *General rule of privilege*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) *Special rule of privilege in criminal cases*. In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

A. Article 38.38.

"Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense. In a criminal case, neither the judge nor the attorney representing the state may comment on the fact that the defendant has contacted or retained an attorney in the case." TEX. CODE CRIM. PROC. ANN. art. 38.38.

XVI.
Rule 509(b)
Physician-Patient Privilege

(b) *Limited Privilege in Criminal Proceedings*. There is no physician-patient

privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

A. Cases.

See Skinner v. State, 956 S.W. 2d 532, 538 (Tex. Crim. App. 1997)("An expert appointed pursuant to *Ake* . . . is an agent of defense counsel for purposes of the work product doctrine.").

XVII.
Rule 902
Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following.

*** * * * ***

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

*** * * * ***

(10) Business Records Accompanied by Affidavit.

(a) *Records or photocopies, admissibility; affidavit; filing*. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further,
that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given

prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial in said cause.

(b) ***Form of affidavit.*** **A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:**

No. _____

John Doe	**)**	**IN THE _____**
(Name of Plaintiff)	**)**	
	)	**COURT IN AND FOR**
v.	**)**	
	)	
Joe Roe	**)**	**_____COUNTY**
(Name of Defendant)	**)**	**TEXAS**

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 2008.

_____
Notary Public, State of Texas

Notary's printed name:

_____

My commission expires:

_____

A. Sample 2.

See Sample 2 [Notice Of Filing Of Business Record Affidavit]

NO. 900000

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

MOTION FOR PRODUCTION
OF FIELD SOBRIETY TRAINING MANUALS
USED BY ARRESTING OFFICER

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the Court order the prosecution and its witness, John Jones, to produce any and all manuals, booklets, and written materials in officer Jones's possession that he has used to learn to administer field sobriety tests.

I.

At Mr. Smith's last trial, San Antonio police John Jones testified that the standardized field sobriety tests "were designed by scientists and doctors and trained professionals. . . ." [RR I–18] He told the jury that he had attended courses sponsored by the National Highway Traffic Safety Administration [NHTSA] concerning the administration of the standardized field sobriety tests, and that he had used booklets produced by that agency in the courses. [RR I–50-51] He also testified the one leg stand is appropriate unless the subject is "extremely, extremely overweight." When pressed as to what this meant, he claimed not to know what language the manual used to define how

Sample 1

overweight a person must be to disqualify. He specifically denied being familiar with the language in the NHTSA manual that says that the one leg stand test has not been validated for persons 50 pounds or more overweight. When counsel showed officer Jones a NHTSA manual, he claimed never to have seen it, and also to be unfamiliar with the 50-pound requirement. "I don't recall that. That's not what I was trained nor have I ever instituted that language or that practice by this information that you got in this book." When asked if he thought the manual counsel had was "suspicious," he responded: "Absolutely. . . . I think your whole book is suspicious." He claimed that the manual he was trained out of "referred to obesity." "My book also refers to obesity; it does not refer to a specific number of pounds. . . ." When asked about the walk and turn test, he said: "I do not know where you're getting this number of pounds, sir. It was not in my book that I was trained out of." [RR I–65-73]

II.

"Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Court observed that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

When counsel tried to impeach officer Jones in Mr. Smith's last trial, he claimed not to recognize the manual presented to him by counsel. Instead, he invoked his "book," presumably a NHTSA manual. Fair enough. If this officer claims he trained with a

different manual, he should be ordered to bring it to Court for inspection by the defense, so that it can be used to challenge his testimony and credibility. If he is unable to produce such a manual, that too could be used for impeachment. This officer should not be allowed to avoid legitimate impeachment by claiming that he relied on a manual to which the defense has no access.

III.

The defendant asserts that:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and the Defendant has no other means of ascertaining the disclosures requested.

2. The items requested are not privileged.

3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

4. The Defendant cannot safely go to trial without production of the requested items, such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

5. The absent such discovery the Defendant's rights under Article 39.14, Article I, §§ 3, 10, 13 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1505
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this Motion has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the 12th day of April, 2006.

_____

MARK STEVENS

ORDER

On this the ____ day of _____, 2006, came to be considered Defendant's Motion For Production Of Field Sobriety Training Manuals Used By Officer, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

No. 82,000

STATE OF TEXAS	)	IN THE COUNTY COURT
V.	)	AT LAW
JOE SMITH	)	HAYS COUNTY, TEXAS

NOTICE OF FILING OF BUSINESS RECORD AFFIDAVIT

TO THE HAYS COUNTY DISTRICT ATTORNEY'S OFFICE:

On November 15, 2007, Joe Smith gives notice to the Hays County District Attorney's Office that he has on this date filed business records and an affidavit with the Hays County Clerk's Office as provided by TEX. R. EVID. 902(10. The affidavit, which is attached to this notice as Exhibit A, identifies Mary Rodriguez as custodian of the records for Doctor John Johns, of San Antonio Texas. The records are available for inspection and copying in the Hays County Clerk's Office, San Marcos, Texas.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street, Suite 1505
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

Sample 2

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Notice Of Filing Of Business Records Affidavit was hand-delivered to the Hays County District Attorney's Office; Justice Center; 110 East Martin Luther King, Jr. Drive; San Marcos, Texas, on this the 15th day of November, 2007.

_____

MARK STEVENS