MOTION PRACTICE
IN STATE COURT

San Antonio Criminal Defense Lawyers Association
1st Annual Nuts and Bolts Seminar

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I.
SCOPE OF PAPER

I have heard lawyers criticized for filing "form motions." But form motions are not necessarily bad. Over the years, good Texas lawyers have come up with a number of motions that accomplish certain purposes in criminal cases, and these motions are such that they work in every case and need not be modified at all, no matter what the facts of the individual case happen to be. I have 13 standard (I prefer "standard" to "form") pretrial motions I file in almost every state case I handle, from DWI to capital murder. Each one performs a specific function, none are ever unnecessary, and the whole lot of them can be produced on my computer in just a few minutes. I have listed the standard motions I regularly file in § III of this paper. I recommend that you use these motions, or similar ones, and that you file them all the time, just like they are. If you don't have your own list of useful pretrial motions, you can get copies from a number of places, including the Texas Criminal Defense Lawyers's Association.

It is certainly a mistake, though, to rely *exclusively* on standard motions. Every criminal case you handle is different, and, for this reason, a single set of standard motions is usually inadequate. Although I make frequent and effective use of standard motions, I also use others that are adapted to the particular needs of the case at hand. Some of these I created myself, others I stole outright from colleagues. In § IV of this paper I discuss a few of the non-standard motions that I have found especially useful in recent years. Copies of these motions are attached as Appendices 1 – 54 in § V of this paper.

Be careful. These motions are intended to be up-to-date at the time of this paper, but, by the time you decide to use one of them, the case law or statutes upon which they were based may have changed. Also, the motions discussed in this paper, by their very nature, are customized to fit particular fact situations. You may use them as guides, or starters, but you should not adopt any of them without appropriate modifications to fit your case.

II.
SOME LAW PERTAINING TO PRETRIAL MOTIONS

A. In General

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 following matters may be determined:

a. Arraignment and appointment of counsel;

b. Pleadings of defendant;

c. Special pleas;

d. Exceptions to the charging instrument;

e. Motions for continuance;

f. Motions to suppress evidence;

g. Motions for change of venue;

h. Discovery;

i. Entrapment;

j. Motion for appointment of interpreter

2. "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).

B. Time Limitations

1. *Seven Days If Hearing Set*

a. "When a criminal case is set for such pretrial hearing, 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.

b. Notice is sufficient if it is by announcement by the court in open court in the presence of the defendant or counsel; if it is by personal service upon the defendant or counsel; or, if it is deposited in the mail to either the defendant or counsel at least six days prior to the hearing. TEX. CODE CRIM. PROC. ANN. art. 28.01 § 3.

c. Failure to comply with the seven day rule can have devastating consequences. In *Postell v. State*, 693 S.W. 2d 462 (Tex. Crim. App. 1985), the trial court ordered defendant to elect who would assess punishment during the pre-trial hearing. Defendant objected to being forced to elect before voir dire, and, after his objection was overruled, he elected the court. Punishment was assessed at life imprisonment. The court of criminal appeals held that where a pre-trial hearing is held in accordance with article 28.01, the defendant may be required to file all his pleadings and motions, including his election to have the jury assess the punishment. *Id*. at 463-64.

d. Failure to comply with the time limits for filing other pre-trial motions set out in article 28.01 § 2 does not waive the defendant's right to a hearing on his motion for change of venue, because such matters are of constitutional dimension. *Faulder v. State*, 745 S.W. 2d 327, 338 (Tex. Crim. App. 1987). Such a hearing may be held after the jury is empaneled, and before the defendant enters his plea to the

indictment. *Foster v. State*, 779 S.W. 2d 845, 854 (Tex. Crim. App. 1989).

2. *At Least Ten Days Are Allowed*

a. Article 28.01 permits the court to require that all motions be filed within seven days of any pre-trial hearing. The other side of the coin are articles 27.11 and 27.12.

b. TEX. CODE CRIM. PROC. ANN. art. 27.11 allows the defendant "ten entire days, exclusive of all fractions of a day after his arrest . . . to file written pleadings." *See Oliver v. State*, 646 S.W. 2d 242, 244 (Tex. Crim. App. 1983).

c. TEX. CODE CRIM. PROC. ANN. art. 27.12 allows the defendant ten full days to file written pleadings after service of indictment, where he is entitled to be served with an indictment. *See Johnson v. State*, 567 S.W. 2d 214, 216 (Tex. Crim. App. 1978).

3. *Other Deadlines*

a. Some motions must be filed at least "before the date on which the trial on the merits commences," unless the trial court orders compliance with article 28.01. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 1.14 (b)(objections to defects in charging instruments.

C. Presence Of The Defendant

1. "The defendant must be present at the arraignment and his presence is required during any pre-trial proceeding." TEX. CODE CRIM. PROC. ANN. art. 28.01 § 1.

2. The trial court erred in holding a hearing on a motion to dismiss on speedy trial grounds in the absence of the defendant and his appointed lawyer. *Riggall v. State*, 590 S.W. 2d 460, 461-62 (Tex. Crim. App. 1979).

3. An *in camera* meeting between the court and the lawyers, but from which appellant was excluded, to discuss a strategy for dealing with a telephone call made to a venireperson was not a pretrial proceeding governed by article 28.01. As such, appellant's presence was not required. *Lawton v. State*, 913 S.W. 2d 542, 549-550 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996).

D. When Mandatory And When Permissive

1. 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).

2. 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."

3. "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).

E. Argument

1. "The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant presented for the decision of the judge." TEX. CODE CRIM. PROC. ANN. Art. 28.02.

F. Don't File Groundless, False, Harassing, Or Delaying Motions

1. Attorneys must sign all pleadings they file. TEX. CODE CRIM. PROC. ANN. art. 1.052(a). That signature constitutes the attorney's certificate that he has read the pleading and that to the best of his "knowledge, information, and belief formed after reasonable inquiry [the pleading] is not groundless and brought in bad faith or groundless and brought for harassment, unnecessary delay, or other improper purpose." TEX. CODE CRIM. PROC. ANN. art. 1.052(b).

2. Lawyers filing fictitious pleadings for improper purposes or who knowingly make groundless and false statements in pleadings to obtain a delay or to harass "shall be held guilty of contempt." TEX. CODE CRIM. PROC. ANN. art. 1.052(d).

3. "If a pleading, motion, or other paper is signed in violation of this article, the court, on motion or on its own initiative, after notice and hearing, shall impose an appropriate sanction, which may include an order to pay to the other party or parties to the prosecution or to the general fund of the county in which the pleading, motion, or other paper was filed the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees." Tex. Code Crim. Proc. Ann. art. 1.052(e).

4. "A court shall presume that a pleading, motion, or other paper is filed in good faith. Sanctions under this article may not be imposed except for good cause stated in the sanction order." TEX. CODE CRIM. PROC. ANN. art. 1.052(f).

5. "In this article, 'groundless' means without basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law." TEX. CODE CRIM. PROC. ANN. art. 1.052(h).

III.
MY STANDARD PRETRIAL MOTIONS

- Motion To Have Official Court Reporter Make A Full Record
- Defendant's Request For A Pretrial Hearing
- Motion For Discovery Of State's Witness List
- Motion For Disclosure Of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703, and 705 Of The Texas Rules Of Evidence
- Motion For Discovery Of The Arrest And Conviction Records Of State's Witnesses
- Motion To Require The State To Reveal Agreements Entered Into Between The State And Its Witnesses
- Motion For Production Of Witness Statements And Writings Used To Refresh The Recollection Of Witnesses
- Motion For Discovery Of Exculpatory And Mitigating Evidence
- Motion For Voir Dire Of Expert Witness
- Motion In Limine
- Motion To Suppress Evidence
- Motion To Suppress Written Or Oral Statements Of Defendant
- Motion For Identification Hearing Out Of The Presence Of Jury

IV.
SOME NON-STANDARD MOTIONS

A. BAIL

1. Reduction of unreasonable bail

Unreasonable bail can be challenged either by an application for writ of habeas corpus or a motion to reduce bail. **[Appendix 1: Application For Writ Of Habeas Corpus Seeking Reduction Of Bail]**

2. Entitlement to bail on misdemeanor motion to revoke

In *Ex parte Smith*, 493 S.W. 2d 958, 959 (Tex. Crim. App. 1973), the court of criminal appeals held that a defendant sentenced to misdemeanor probation is absolutely entitled to bail when the state files a motion to revoke. **[Appendix 2: Motion To Set Bond]**

3. Entitlement to bail on deferred adjudication

"We hold that a defendant whose adjudication of guilt has been deferred has not yet been convicted. Such a defendant is entitled to bail pending an adjudication hearing." *Ex parte Laday*, 594 S.W.2d 102, 104 (Tex. Crim. App. 1980); *accord Gutierrez v. State*, 927 S.W. 2d 783, 784 (Tex. App.–Houston [14th Dist.] 1996, no pet.). **[Appendix 3: Motion To Set Bond]**

B. EXPERTS

1. Notice

a. Article 39.14(b)

> "On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins."

b. Cases interpreting article 39.14(b)

i. In *Strawn v. State*, 2003 WL 21235537 (Tex. App.–Fort Worth 2003, pet. ref'd)(not designated for publication), the court of appeals observed that it was deciding an issue not previously addressed in Texas: whether a trial court could properly exclude the testimony of an expert witness for the defense whose identity was timely requested by the state but not disclosed as provided by article 39.14(b). The appellate court held that the trial court did not err in disallowing the expert's testimony, even though the state knew the witness had examined the defendant, and did not prove the defense acted in bad faith. *Id*. at *4.

ii. In *Osbourn v. State*, 59 S.W. 3d 809 (Tex. App.–Austin 2001), *aff'd* 92 S. W. 3d 531 (Tex. Crim. App. 2002), the court of appeals held that the trial court did not err when it refused to bar the state from calling an undisclosed witness, for two reasons. First, the witness's testimony did not require expertise, and was

admissible under Rule 701, without regard to Rule 702. *Id*. at 815. Second, the state did not act in bad faith, and the defense could reasonably have anticipated the witness's testimony. *Id*. at 816. The court of criminal appeals affirmed, holding that article 39.14(b) does not apply to opinion testimony from a lay witness admissible under Rule 701. *Osbourn v. State*, 92 S.W. 3d 531, 535 n. 2 (Tex. Crim. App. 2002).

iii. Article 39.14(b) applies only if a party requests disclosure and obtains from the trial court an order to disclose. *Lemasurier v. State*, 91 S.W. 3d 897, 901 n. 1 (Tex. App.–Fort Worth 2002, pet. ref'd). This statute does not give a party an automatic 20 day continuance upon announcement that the other side will call an expert. *Parker v. State*, 2002 WL 1723838 *2 (Tex. App.-Austin 2002, pet. ref'd)(the defense had not filed a request for disclosure, and the trial court denied its motion for continuance after the state gave notice).

c. Motion For Disclosure Of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703, And 705 Of The Texas Rules Of Evidence **[Appendix 4]**

d. Defendant's Response To State's 39.14(b) Motion **[Appendix 5]**

e. Letter to opposing expert **[Appendix 6]**

f. Application To Take Deposition **[Appendix 7]**

g. Objection To The Use Of Expert Witnesses, Notice Of Whom Was Not Timely Provided Pursuant To Article 39.14(b) **[Appendix 8]**

h. Expert's engagement letter **[Appendix 9]**

i. Defendant's Objection To Comment By Prosecutor Upon Claim Of Privilege By Defense Or Member Of Defense Team **[Appendix 10]**

2. Voir Dire

a. Rule 705(b)

Cross-examining the expert witness is one of the most challenging things we do as criminal lawyers. If we were civil lawyers fighting over important things like an insurance company's money, we would prepare ourselves for this challenge by deposing the other side's expert. Because our right to discovery is so restricted in criminal law, however, that is rarely an option for us. The next best thing to a real deposition taken weeks or months in advance of trial is voir dire, in the middle of trial usually, but at least outside the presence of the jury. Rule 705(b) of the Texas Rules of Evidence reads:

> 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.

Rule 705(b) is mandatory, and the trial court errs if it denies a timely and proper motion to voir dire the state's experts. *Alba v. State*, 905 S.W.2d 581, 588 (Tex. Crim. App. 1995), *cert. denied,* 116 S.Ct. 783 (1996)(this error can be harmless, though); *cf. Jenkins v. State*, 912 S.W. 2d 793, 814 (Tex. Crim. App. 1993)(trial court's error in denying a request to voir dire on facts and data underlying opinion is not preserved by request to determine witness's competency). I can think of no reason for not invoking this valuable procedure every time the state calls an expert. Doing so is a win-win proposition: in the best case, you disqualify the state's expert, or at least limit the number of topics he can give opinions on; at the very worst, you -- and your opponent -- acquire some discovery.

b. Motion For Voir Dire Of Expert Witness **[Appendix 11]**

3. The *Daubert* hearing

Parties are entitled to offer expert testimony from qualified witnesses that "will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. The party offering the evidence bears the burden of demonstrating to the trial court that this testimony is relevant and reliable. If your opponent intends to present expert testimony under Rule 702, force him to carry this burden outside the presence of the jury by requesting a *Daubert* hearing. **[Appendix 12: Motion For *Daubert* Hearing]** *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *see also 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).

4. Discovery Motions Regarding Experts And Their Evidence

a. Motion To Inspect, Examine, And Test Physical Evidence **[Appendix 13]**

b. Motion For Production Of Copies Of Computer Evidence **[Appendix 14]**

c. Motion For Production Of Copies Of Photographic And Videotape Evidence **[Appendix 15]**

d. Motion For Production Of DNA Information **[Appendix 16]**

5. Access To Evidence

a. Defendant's Ex Parte Motion For An Order To Permit Access To And Examination By A Private Physician In The Bexar County Jail **[Appendix 17]**

***b. Motion For Defense To Have Access To Evidence* [Appendix 18]**

***c. Motion For Independent Chemical Analysis Of Defendant's Blood Sample* [Appendix 19]**

6. **Ake v. Oklahoma**

a. In *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985), the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Mr. Ake's sanity was a "significant factor" both because his sole defense was insanity, and because, under Oklahoma law, future dangerousness was an aggravating factor at punishment. *Id*. at 86. *See DeFreece v. State*, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993)(due process requires "the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." ; *see also McBride v. State*, 838 S.W. 2d 248, 252 (Tex. Crim. App. 1992)(appellant was entitled to appointment of expert chemist to examine alleged cocaine). **[Appendix 20: Defendant's Ex Parte Motion To Provide Funds For Expert Assistance From A Psychiatrist]**

b. Although *Ake* itself was concerned with psychiatric assistance, "*Ake* is not limited to psychiatric experts." *Moore v. State*, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996). Due process requires "the opportunity to participate meaningfully in a judicial proceeding," *Ake v. Oklahoma*, 470 U.S. at 76, "access to the raw materials integral to the building of an effective defense," *Id.* at 77, basic tools of an adequate defense," *Id.*, and "assistance . . . crucial to the defendant's ability to marshal his defense," *Id*. at 80. Logically, then, any investigatorial or expert assistance necessary to provide these basic tools to an adequate defense should be made available. In *McBride v. State*, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992), the court held that due process required the appointment of a chemist to inspect the alleged cocaine. *See Rey v. State*, 897 S.W. 2d 333, 338-39 (Tex. Crim. App. 1995)(holding that, under the facts of this case, appellant was entitled to appointment of a forensic pathologist). *See generally Griffith v. State*, 983 S.W. 2d 282, 286 (Tex. Crim. App. 1998). **[Appendix 21: Ex Parte Motion To Appoint A Gun, Gun Handling, And Ballistics Expert To Assist In Evaluation, Preparation And Presentation Of Defense]**

c. *Ake* permits the defendant to "make an *ex parte* threshold showing to the trial court" as to his need for an expert. *Id*. at 82. Proceeding *ex parte* may be a very valuable right, necessary to avoid exposing your defensive theories prematurely. In *Williams v. State*, 958 S.W. 2d 186 (Tex. Crim. App. 1997), the trial court denied appellant his right to proceed *ex parte*, and compelled him to provide a copy of his motion requesting appointment of an expert to the state. This was error. Many times a defendant will have to provide affidavits or evidence in support of his *Ake* motion. "The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or 'work product.'" *Id*.

at 193. **[Appendix 22: Motion To Proceed Ex Parte Concerning Appointment Of Expert]**

> In essence, if an indigent defendant is not entitled to an *ex parte* hearing on his *Ake* motion, he is forced to choose between either forgoing the appointment of an expert or disclosing to the State in some detail his defensive theories or theories about weaknesses in the State's case. This is contrary to *Ake's* concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine. We decline to hold that in order for an indigent defendant to avail himself of one of the 'basic tools of an adequate defense,' he may be compelled to disclose defensive theories to the prosecution. We hold that an indigent defendant is entitled, upon proper request, to make his *Ake* motion *ex parte*.

Id. at 193-94. The right to an *ex parte* hearing is waived absent a request to do so at trial. *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999). The trial court does not err in refusing an *ex parte* hearing where the hearing held did "not reveal any material, new information to the State." *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999). *See also* TEX. CODE CRIM. PROC. ANN. art. 26.052(ef(Vernon Supp. 2003)(statutorily providing the right to an *ex parte* proceeding).

d. *Ake* is not limited to capital cases. *Taylor v. State*, 939 S.W. 2d 148, 151 (Tex. Crim. App. 1996)(sexual assault); *DeFreece v. State*, 848 S.W.2d 150, 156 n.5 (Tex. Crim. App. 1993)(murder); *see also McBride v. State*, 838 S.W. 2d 248, 249 (Tex. Crim. App. 1992)(possession of cocaine).

e. *Ake* makes it clear that the defendant bears the "threshold" burden of showing his need for assistance. The Texas Court of Criminal Appeals has always placed hyper technical demands on the defendant to prove his entitlement to expert assistance. Expect the court to be just as rigorous post-*Ake*, and make your record carefully. Otherwise, be prepared for the court to tell you later that you did not preserve the issue for appeal. In *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995), appellant explained his defensive theory and how it could effect the outcome of the case, and he supported this explanation with the affidavit of his expert, who seriously questioned the findings of the state's expert. Additionally, appellant's expert set forth his own opinion as to the mechanism of death which was consistent with appellant's defensive theory. This clearly established that the mechanism of death was to be a significant factor at trial, and was therefore sufficient to meet appellant's threshold burden. *Cf. Jackson v. State*, 992 S.W. 2d 469, 474 (Tex. Crim. App. 1999)(appellant not entitled to appointment of polygraph expert where he made no preliminary showing of a significant issue of fact either on which the State would present expert testimony or on which the knowledge of a lay jury would not be expected to encompass).

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

g. A court appointed expert can potentially serve two purposes. "First, an expert can play a partisan role in the defense, providing defense counsel with the 'tools' to challenge the State's case. In this context, due process, at a minimum, requires expert aid in an evaluation of a defendant's case in an effort to present it in the best possible light to the jury. Second, if his expert opinion supports the defense theory, an expert can testify in support of that defense. *Taylor v. State*, 939 S.W. 2d 148, 153 (Tex. Crim. App. 1996)(citations omitted). The conclusions of a defense expert are work product and should not be disclosed to the state. *Id*. at 152.

h. The denial of the appointment of an expert under *Ake* "amounts to structural error which cannot be evaluated for harm." *Rey v. State*, 897 S.W. 2d 333, 344-46 (Tex. Crim. App. 1995). *But see Williams v. State*, 958 S.W. 2d 186, 194 (Tex. Crim. App. 1997)refusal to permit appellant to make an *Ake* motion *ex parte* is subject to a harm analysis under Rule 44.2(a) of the Texas Rules of Appellate Procedure).

C. SETTING ASIDE CHARGING INSTRUMENTS

1. The Law

Generally, trial courts in Texas have no power to dismiss criminal cases without the state's consent. Dismissal without consent, however, is permitted when authorized by constitution, statute, or common law, or some inherent or implied power of the court. *See State v. Johnson*, 821 S.W. 2d 609, 612 (Tex. Crim. App. 1991).

Criminal defense lawyers seek dismissals of indictments, informations, and complaints by filing motions to set aside or to quash. Some lawyers prefer the label "motion to set aside;" some prefer "motion to quash." The court of criminal appeals recognizes that, "by definition and judicial usage "quash" and "set aside" are synonymous in their common meaning: 'to vacate, to annul, to make void.'" *State v. Eaves*, 800 S.W. 2d 220, 221 n.5 (Tex. Crim. App. 1990); *see* TEX. CODE CRIM. PROC. ANN. art. 27.03; *see also Craven v. State*, 613 S.W. 2d 488, 489 (Tex. Crim. App. 1981)("exception" is also appropriate).

Although the powers of the trial courts are limited, over the years the Texas appellate courts have recognized a wide variety of legal reasons which will require a charging instrument to be set aside. Below are just a few of the grounds that have been recognized by Texas courts.

2. Some Recognized Grounds For Setting Aside Charging Instruments

a. Unconstitutionality of the statute

An indictment based on an unconstitutional statute should be quashed. *See White v. State*, 440 S.W. 2d 660, 667 (Tex. Crim. App. 1969).

b. Manner and means

A number of indictments have been set aside for failure to allege the

manner and means of the offense. *E.g., Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(arson); *Doyle v. State*, 661 S.W. 2d 726, 730 (Tex. Crim. App. 1984)(retaliation); *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(gambling promotion); *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(criminal mischief); *Jeffers v. State*, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981)(gambling promotion); *Ellis v. State*, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981)(aggravated robbery); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(aggravated robbery); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(torturing an animal); *Ridgley v. State*, 756 S.W. 2d 870, 871 (Tex. App.–Fort Worth 1988, no pet.)(murder); *Mullinax v. State*, 756 S.W. 2d 40, 43 (Tex. App.–Texarkana 1988, no pet.)(desecration of cemetery). **[Appendix 23: Defendant's Motion To Set Aside The Indictment]**

c. Where the statute provides multiple ways to commit the offense

i. An indictment for delivery of a controlled substance must specify which of the three statutorily defined means of delivery the state intends to prove. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981).

ii. The term "governmental record" is defined in three different ways in section 37.01(1) of the Texas Penal Code, but the information does not specify which definition the state intends to rely on in this case, nor does it state why the document in question is a "governmental record" nor does it define "governmental record." *See Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994).

iii. A theft indictment should specify which of the statutory definitions of "appropriate" the state intends to prove. *Gorman v. State*, 634 S.W. 2d 681, 683-84 (Tex. Crim. App. 1982); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989)(in theft prosecution where state relies upon a defendant's act or omission to negate consent, the indictment must allege which of the statutory negatives vitiated consent); *Hoover v. State*, 736 S.W. 2d 158 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd)(theft indictment that alleges intent to deprive should specify which definition of "deprive" the state intends to rely on).

iv. An information alleging driving with a suspended license should be quashed because it failed to allege which subsection of the statute the state intended to rely upon. *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977).

v. *See Kass v. State*, 642 S.W. 2d 463, 469-70 (Tex. Crim. App. 1981)(prostitution information must specify which of type of "sexual contact" it intends to prove); *Jackson v. State*, 743 S.W. 2d 239, 240-41 (Tex. App.–Amarillo 1985, no pet.)(manner of deviate sexual intercourse).

d. Article 21.15

i. Article 21.15 of the Texas Code of Criminal Procedure provides that, whenever the state charges that a defendant has acted recklessly or negligently, the indictment or information "must allege, with reasonable certainty,

the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence."

ii. An information for indecent exposure was found deficient for not alleging with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see also State v. McCoy*, 64 S.W. 3d 90, 93 (Tex. App.–Austin 2001, no pet.)(manslaughter); *State v. Vasquez*, 34 S.W. 3d 332, 334 (Tex. App.–San Antonio 2000, no pet.)(discharge of firearm in municipality). **[Appendix 24: Defendant's Motion To Set Aside The Information]**

e. Article 21.09

i. Where a burglary indictment alleges either an attempted theft, or a completed theft (as opposed to an intent to commit theft), the indictment must provide a description of the property alleged to have been stolen, and the name of its owner. *DeVaughn v. State*, 749 62, 71 (Tex. Crim. App. 1988).

ii. An indictment for burglary of a vehicle should identify the vehicle. *Bonner v. State*, 640 S.W.2d 601, 605 (Tex. Crim. App.1982).

f. Notice, in general

1. An indictment for tampering with a governmental record must identify the government records in question. *Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *accord Cook v. State*, 824 S.W. 2d 334, 337-38 (Tex. App.–Houston [1st Dist.] 1992, pet. ref'd).

2. An indictment for welfare fraud should specify which of the many statements appellant made to the Department of Public Welfare that the state intended to rely upon for conviction. *Amaya v. State*, 551 S.W. 2d 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977.

3. An information for criminal trespass should allege either the location of the property, or the identity of its owner. *State v. Mendietta*, 898 S.W. 2d 11, 14 (Tex. App.–San Antonio 1995, no pet.).

4. The indictment charged the County's chief appraiser with misapplication of fiduciary property over a period of more than six years. The trial court properly quashed this indictment because it did not allege which purchases were made without authorization. *State v. Moff*, 2004 WL 2248097 (Tex. Crim. App. 2004).

g. Violation of an enforceable agreement not to prosecute

The trial court has the authority to quash an indictment based on the state's violation of an enforceable agreement not to prosecute. *County v. State*, 812 S.W.2d 303, 317 (Tex. Crim. App. 1989).

h. Constitutional speedy trial

1. Trial courts should set aside charging instruments with prejudice when the Sixth Amendment right to a speedy trial has been violated. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972)(setting out the four-pronged test); *e.g., Zamorano v. State*, 84 S.W. 3d 643, 649 (Tex. Crim. App. 2002); *Phillips v. State*, 650 S.W. 2d 396, 401 (Tex. Crim. App. 1983); *Turner v. State*, 545 S.W. 2d 133, 137-38 (Tex. Crim. App. 1976); *State v. Rangel*, 980 S.W. 2d 980 S.W. 2d 840, 843 (Tex. App.–San Antonio 1998, no pet.); *State v. Bruckhardt*, 952 S.W. 2d 100, 102 (Tex. App.–San Antonio 1997, no pet.). **[Appendix 25: Motion To Set Aside Information For Failure To Afford Constitutional Right To Speedy Trial]**

2. Your chances of winning a dismissal for the want of a speedy trial are enhanced considerably if you have previously sought to get a speedy trial. **[Appendix 26: Motion For Speedy Trial]**

D. EXTRANEOUS MISCONDUCT

1. In General

For the defense, the question is not *whether* to exclude extraneous misconduct, but *how*. Any successful exclusion strategy has both substantive and procedural components. The substantive law of extraneous misconduct is vast and is beyond the scope of this paper. The *procedure* involved in excluding this sort of evidence, on the other hand, while enormously important, is relatively straightforward.

2. What Is An Extraneous Act?

"[A]n extraneous offense is defined as any act or 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. 1995). The term "extraneous *offense*" is a misnomer, since the misconduct at issue need not amount to a crime in order to be excluded. "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)(unpaid debts); *see also Bishop v. State*, 869 S.W. 2d 342, 345 (Tex. Crim. App. 1993)(evidence of sexual proclivities); *But see Massey v. State*, 933 S.W. 2d 141, 154 (Tex. Crim. App. 1996)(*thoughts* about raping, killing and mutilating women in a very specific manner were not conduct and thus were not subject to Rule 404(b)).

3. Requesting Notice

Chronologically, the first thing the defense should do is request notice from the state of its intent to introduce extraneous misconduct in its case in chief, as provided by Rule 404(b) of the Texas Rules of Evidence, and at the punishment phase, as provided by article 37.07 § 3(g) of the Texas Code of Criminal Procedure. Generally, the most effective way of doing so this is by making a written *request* of the prosecutor, rather than

by filing a motion which requires some action by the court. **[Appendix 27: Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Evidence Of Conviction Under Rule 609(f) And Evidence Of An Extraneous Crime Or Bad Act Under Article 37.07]** When your client is charged with a sex offense, you should also request notice under article 38.37 of the code of criminal procedure. If the state provides notice of intent to offer misconduct, this evidence can be investigated before trial in an effort to exclude it, or, at least, to minimize its damaging effect. Better still, if the state fails to provide notice, the state should be precluded from introducing this evidence. **[Appendix 28: Objection To Notice Of Extraneous Misconduct And Request For Proper Notice]**

4. The General Motion In Limine

Next, the defense should file a motion in limine which complains broadly about all misconduct not alleged in the charging instrument. **[Appendix 29: Motion In Limine]**

The general rule is clear: a motion in limine will not preserve error. Preservation requires objection at the time the evidence is offered at trial. *Brazzell v. State*, 481 S.W.2d 130, 131 (Tex. Crim. App. 1972).

That does not mean that motions in limine have no value at all. The trial court might grant your motion in limine thus altogether preventing your opponent from offering objectionable evidence before the jury. At the very least, by granting the motion in limine, the court will force the other side not to mention the questionable evidence until a hearing is had outside the jury's presence. And, a flagrant violation of an order in limine might show prosecutorial bad faith, which will improve the defendant's chances for reversal on appeal. *See Dexter v. State*, 544 S.W. 2d 426, 428 (Tex. Crim. App. 1975).

5. Object At Trial Under Rule 103(a)(1)

a. Rule 103 (a)(1): Objections outside the jury's presence

Under Rule 103(a)(1) of the Texas Rules of Evidence, "[w]hen 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." [emphasis supplied] That is, if you can persuade the judge to hear certain objections outside the jury's presence, and she overrules these objections and admits the evidence, you need not re-urge the objections before the jury.

Be careful, though. When the evidence is later admitted, if you affirmatively state, "no objection," the error is waived for purposes of appeal. *E.g., Welch v. State*, 993 S.W. 2d 690, 694 (Tex. App.--San Antonio 1999, no pet.).

b. Defendant's Objections To Evidence Pursuant To Rule 103(a)(1) **[Appendix 30]**

E. JURY SELECTION

1. Reasonable Time To Question The Panel

a. The general rules

The right to a reasonable time to conduct voir dire is a component of effective assistance of counsel, and is therefore protected by Article I, § 10 of the Texas Constitution. *Ratliff v. State*, 690 S.W. 2d 597, 599 (Tex. Crim. App. 1985). When the appellant complains that the trial court abused its discretion in imposing a time limit on voir dire, the appellate court will consider the following:

- whether the party attempted to prolong the voir dire,
- whether the questions that the party was not permitted to ask were proper voir dire questions, and,
- whether the party was not permitted to examine prospective jurors who actually served on the jury.

McCarter v. State, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992). Each case will be examined on its own facts. What is reasonable in one case, may not be reasonable in another, depending on the complexity of the case, or the makeup of the venire, or whether cause challenges or bench conferences prolonged the voir dire. *Ratliff v. State*, 690 S.W. 2d 597, 600 (Tex. Crim. App. 1985).

b. Illustrative cases

In the following cases, the courts have found the time restrictions unreasonable, under all the facts presented:

- *Tobar v. State*, 850 S.W. 2d 182, 182 (Tex. Crim. App. 1993) (45 minutes).
- *McCarter v. State*, 837 S.W. 2d 117, 118 (Tex. Crim. App. 1992) (30 minutes).
- *Ratliff v. State*, 690 S.W. 2d 597, 600 (Tex. Crim. App. 1985) (81 minutes).
- *Thomas v. State*, 658 S.W. 2d 175, 176 (Tex. Crim. App. 1983) (45 minutes).
- *Clark v. State*, 608 S.W. 2d 667, 669 (Tex. Crim. App. 1980) (38 minutes).
- *De La Rosa v. State*, 414 S.W. 2d 668, 670 (Tex. Crim. App. 1967) (30 minutes).

- *Carmell v. State*, 784 S.W. 2d 138, 139 (Texas App. – Fort Worth 1990) (20 minutes).

- *Wheatfall v. State*, 746 S.W. 2d 8 (Tex. App. – Houston [14th Dist.] 1988, pet. ref'd) (45 minutes).

- *Rios v. State*, 4 S.W. 3d 400, 402 (Tex. App.--Houston [1st Dist.] 1999, pet. granted)(45 minutes).

- *Morris v. State*, 1 S.W. 3d 336, 342(Tex. App.--Austin 1999, no pet.)(45 minutes).

- *Clemments v. State*, 940 S.W. 2d 207, 210 (Tex. App.--San Antonio 1996, pet. ref'd).

Unquestionably, trial courts may impose time limits on voir dire, as long as the limits are not so unreasonable as to constitute an abuse of discretion. *Clark v. State*, 608 S.W. 2d 667, 669 (Tex. Crim. App. 1980).

- *Whitaker v. State*, 653 S.W. 2d 781, 781-82 (Tex. Crim. App. 1983) (50 minutes reasonable in light of "advance information provided counsel from juror information forms").

- *Barrett v. State*, 516 S.W. 2d 181, 181-82 (Tex. Crim. App. 1974) (30 minutes not an abuse of discretion where counsel spoke for 21 minutes on general principles, and where he provided 26 legal size pages of proposed questions, many of which were clearly not applicable to the case).

c. Preservation of error

To preserve error, counsel must object, and the record must show the proper questions counsel was not permitted to ask. This can be done by a bill of exception. *Ratliff v. State*, 690 S.W. 2d 597, 600 (Tex. Crim. App. 1985); *see Cartmell v. State*, 784 S.W. 2d 138, 139 (Tex. App. – Fort Worth 1990) (questions set out in motion for new trial).

d. Motion To Extend Time Limitation For Voir Dire **[Appendix 31]**

2. Defendant's Motion To Question Venire Panel Individually Concerning Publicity [Appendix 32]

F. SOME DISCOVERY

1. Motion For Production Of Recorded In-Coming Telephone Calls And Dispatch Radio Communications [Appendix 33]

2. Motion To Require Disclosure Of All Informers Relied Upon And For Production Of Said Informers In Open Court [Appendix 34]

3. Motion For Discovery Of The Arrest And Conviction Records And Evidence Admissible Under Rule 404(a)(2) Of The Texas Rules Of Evidence Concerning The Deceased, John Jones [Appendix 35]

4. Request For Notice Of Intent To Offer Statements Allegedly Made By Defendant [Appendix 36]

5. Motion For Notice Of State's Intention To Use Evidence Subject To Motion To Suppress [Appendix 37]

G. SUPPRESSION MOTIONS

1. The Usual Suppression Motion, Based On Probable Cause And Reasonable Suspicion

Ordinarily, my motions to suppress physical evidence are as general and comprehensive as I can make them, because I usually do not have all the facts at the time these motions are filed. **[Appendix 38: Motion To Suppress Evidence]**

2. When Suppression Is Based On Franks v. Delaware

When your argument, though, is that evidence must be suppressed because the affidavit underlying the search warrant contained material misstatements or omissions, in violation of *Franks v. Delaware*, the motion must be more specific. **[Appendix 39: Motion To Suppress Evidence Number Two]**

3. Suppressing Unextrapolated Breath Test Results

Although the court of criminal appeals has recently held that unextrapolated breath test results are relevant, it remains undecided whether these tests are admissible under Rules 403 and 702 of the Texas Rules of Evidence. *See Stewart v. State*, 2004 WL 385585 (Tex. Crim. App. 2004). **[Appendix 40: Motion To Suppress Breath Test Results And Any Testimony Concerning Breath Test Results]**

H. LITIGATING ENTRAPMENT, BEFORE TRIAL

1. The Law

Section 8.06 of the Texas Penal Code codifies a mixed subjective/objective test for the defense of entrapment. *England v. State*, 887 S.W. 2d 902, 910 (Tex. Crim. App. 1994). Entrapment is not usually thought of as the best defense, but sometimes it may be the best you have. In Texas, the defense has two opportunities to prevail on this defense. The first is in a pre-trial hearing, held pursuant to TEX. CODE CRIM. PROC. ANN. art. 28.01 § 1(9), where the court serves as trier of fact:

> Entrapment is a defense to prosecution. V.T.C.A. Penal Code, §§ 2.03 and 8.06(a). The entrapment defense is unique in that the Legislature deliberately provided it may be tested and determined at a pretrial hearing. Article 28.01, § 1(9). The provisions of V.T.C.A. Penal Code, 2.03(c) and (d) are to be followed by the trial court in making its determination. [citations omitted] Thus once defendant produces evidence to raise the defense, the State has the burden to disprove entrapment beyond a reasonable doubt; as trier of fact the trial court is authorized to weigh the evidence and from the circumstances draw a legal conclusion as to whether accused was entrapped.

Taylor v. State, 886 S.W.2d 262, 265 (Tex. Crim. App. 1994); *see also Soto v. State*, 681 S.W.2d 602, 604 (Tex. Crim. App. 1984)(bench trial); *Bush v. State*, 611 S.W.2d 428, 430 (Tex. Crim. App. 1980)(pretrial). If the defendant is not successful before the court, he can try again, before the jury.

2. Motion For A Separate Hearing On Entrapment As A Matter Of Law [Appendix 41]

I. LITIGATING IDENTIFICATION, BEFORE TRIAL

1. The Identification Hearing

When the defense challenges an in-court identification alleging that it was tainted by a previous illegal identification procedure, "then upon motion of defense a hearing should be held *outside the presence of the jury*, and should the court determine that such identification at the police station or elsewhere was violative of the United States Supreme Court mandates or of due process, then the prosecution is precluded from offering any evidence of such identification before the jury." *Franklin v. State*, 606 S.W. 2d 818, 852 (Tex. Crim. App. 1978)(emphasis supplied); *see also Martinez v. State*, 437 S.W. 2d 842 (Tex. Crim. App. 1969).

Anytime you can plausibly argue that your client was the victim of an illegal identification procedure, you should request a pre-trial identification hearing, as mandated by *Franklin* and *Martinez*. This is a win-win proposition for the defense, which either prevails at the hearing and suppresses the in-court identification, or obtains valuable discovery. At the hearing, the defense should at least be able to explore the witness's opportunity to view the perpetrator, the witness's degree of attention, the accuracy of his description, his level of certainty, and the time between the trial and the confrontation. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In other words, you can try the entire identification dispute for the first time outside the presence of the jury.

2. Motion For Identification Hearing Out Of Presence Of Jury [Appendix 42]

J. SEVERANCE

1. Defendants jointly or separately indicted for the same offense or for offenses arising out of the same transaction may be tried together in the discretion of the trial court, unless one has a previous admissible conviction, or joint trial would be prejudicial. TEX. CODE CRIM. PROC. ANN. art. 36.09. Additionally, severance is necessary where the state can offer a confession against one of the defendants which also implicates the co-defendant if the co-defendant is unable to confront and cross-examine the confessing defendant. *See Bruton v. United States*, 391 U.S. 123 (1968). **[Appendix 43: Motion To Sever Defendants]**

2. "If a severance is granted, the defendants may agree upon the order in which they are to be tried, but if they fail to agree, the court shall direct the order of the trial." TEX. CODE CRIM. PROC. ANN. art. 36.10; *But see Roberts v. State*, 784 S.W. 2d 430, 435 (Tex. Crim. App. 1990)(error can be harmless). **[Appendix 44: Defendants's Agreement As To Order Of Trial]**

3. **Request For Notice Of Order Of Trials [Appendix 45]**

K. FINAL ARGUMENT

1. In *Dang v. State*, 2005 WL 156721 (Tex. Crim. App. 2005), the court of criminal appeals held that the trial court abused its discretion when it limited the defense to 20 minutes for final argument in a capital murder case with a number of legal theories and factual conflicts impossible to address in that time. "It would be a hollow right to afford a defendant the right to have an argument without the right that he be allotted a reasonable time to make it." Restrictions on final argument must therefore be "reasonable." To determine reasonableness, the court provided a seven part, non-exclusive list of factors to be considered. Judge Meyers, joined by Judges Holcomb and Cochran, would have also found this time restriction to be a violation of the Sixth Amendment right to counsel.

2. Motion To Extend Time For Defense Summation [Appendix 45a]

L. SOME SENTENCING MOTIONS

1. Defendant's Motion For Modification Of Conditions Of Community Supervision [Appendix 46]

2. Objection To Inadmissible Victim Impact Evidence [Appendix 47]

M. SOME APPELLATE MOTIONS

1. Motion For New Trial [Appendix 48]

2. Motion To Stay Commencement Of Terms Of Community Service Pending Issuance Of Appellate Mandate [Appendix 49]

3. Motion To Dismiss Motion To Revoke Probation [Appendix 50]

4. Motion For Appointment Of Counsel On Appeal [Appendix 51]

5. Motion Requesting That Appellate Record Be Furnished Without Charge [Appendix 52]

6. Motion For Reasonable Bail Pending Appeal [Appendix 53]

7. Motion For Reasonable Bail Pending Final Determination Of Appeal [Appendix 54]

V.
APPENDICES

Appendix 1	**APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING REDUCTION OF BAIL**
Appendix 2	**MOTION TO SET BOND**
Appendix 3	**MOTION TO SET BOND**
Appendix 4	**MOTION FOR DISCLOSURE OF NAMES AND ADDRESSES OF EACH PERSON THE STATE MAY USE AT TRIAL TO PRESENT EVIDENCE UNDER RULES 702, 703 AND 705 OF THE TEXAS RULES OF EVIDENCE**
Appendix 5	**DEFENDANT'S RESPONSE TO STATE'S 39.14(B) MOTION**
Appendix 6	**LETTER TO OPPOSING EXPERT**
Appendix 7	**APPLICATION TO TAKE DEPOSITION OF DR. MARIA GARCIA**
Appendix 8	**OBJECTION TO THE USE OF EXPERT WITNESSES, NOTICE OF WHOM WAS NOT TIMELY PROVIDED PURSUANT TO ARTICLE 39.14(B)**
Appendix 9	**EXPERT'S ENGAGEMENT LETTER**
Appendix 10	**DEFENDANT'S OBJECTION TO COMMENT BY PROSECUTOR UPON CLAIM OF PRIVILEGE BY DEFENSE OR MEMBER OF DEFENSE TEAM**
Appendix 11	**MOTION FOR VOIR DIRE OF EXPERT WITNESS**
Appendix 12	**MOTION FOR DAUBERT HEARING**

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING BAIL REDUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

@3 files this Application for Writ of Habeas Corpus Seeking Bail Reduction, and, for good cause shows the following:

I.

Defendant is illegally confined and restrained of his liberty by the Sheriff of Bexar County, Texas in the Bexar County Adult Detention Center in San Antonio, Texas in lieu of a bond in the amount of @6. Defendant is charged with the felony offense of murder.

II.

Defendant's confinement and restraint is illegal because his bond is excessive, oppressive and beyond his financial means, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 11, 13 and 19 of the Texas Constitution, and articles 1.07 and 17.15 of the Texas Code of Criminal Procedure.

III.

Defendant respectfully requests this Court to grant defendant an evidentiary hearing and, after receiving evidence, to reduce the amount of said bond to a reasonable amount in order that defendant will have an opportunity to obtain his release from incarceration pending trial.

WHEREFORE, premises considered, defendant prays that this Court grant and

issue a Writ of Habeas Corpus to the Sheriff of Bexar County, Texas directing and commanding him to produce and have defendant before this court instanter, or at such time and place to be designated by this Court, then and there to show cause, if any he may have, why defendant should not be discharged from such illegal confinement; or that defendant be allowed bail in a reasonable amount; and defendant further prays that he be allowed immediate bail in a reasonable amount, conditioned that he be and appear at the said hearing to there await further orders of this Court. _____

Respectfully admitted:

MARK STEVENS
310 S. St. Mary's Street, Suite 1505
San Antonio, Texas 78204
(210) 226-1433
Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of defendant's Application For Writ of Habeas Corpus Seeking Bail Reduction has been delivered to the District Attorney's Office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

THE STATE OF TEXAS)

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared MARK STEVENS, who being by me duly sworn, upon oath deposes and says,

> I am the attorney for @3, defendant in this cause; I have read the above and it is all true and correct.

_____
MARK STEVENS

SUBSCRIBED AND SWORN to before me this @4 day of @5, 2004 A.D. to certify which witness my hand and seal of office.

_____
_____Notary Public, State of Texas

My commission expires: _____

ORDER OF SETTING

On this ____ day of _____, 2004 A.D., came on to be heard the application of @3 for a Writ of Habeas Corpus, and it appearing to the Court that said defendant is entitled to a hearing on said application, it is therefore ordered that the Clerk of this Court issue a Writ of Habeas Corpus directed to the Sheriff of Bexar County and commanding the said Sheriff to have and produce the person of @3 before me in the courtroom of the __ _____ Court, on the ____ day of _____, 2004 A.D. at ____ o'clock ____ .m., then and there to show cause why the said @3 should not be released from custody on a reasonable bond.

_____
_____JUDGE PRESIDING

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Application for Writ of Habeas Corpus Seeking Bail Reduction, and, said writ is issued and after hearing evidence and argument of counsel, relief on said writ is

(GRANTED) (DENIED)

Bond is set in the amount of _____.

_____

_____JUDGE PRESIDING

_____

NO. @1

STATE OF TEXAS	)	IN THE COUNTY COURT
VS.	)	AT LAW NUMBER @2
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SET BOND

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves that this Court set bond in his case in the amount of $1,000.00, and for good cause shows the following:

I.

Mr. @3a is presently on probation for the misdemeanor offense of driving while intoxicated.

II.

After the motion to revoke was filed, Mr.@3a was arrested and remanded to the Bexar County Jail without bond. Because Mr. @3a is on probation for a misdemeanor offense, he is entitled to reasonable bail. *See Ex parte Smith*, 493 S.W. 2d 958, 959 (Tex. Crim. App. 1973).

III.

Mr. @3a moves that this Court set a cash bond in the amount of $1,000.00.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully moves this Honorable Court to grant Motion To Set Bond.

Respectfully submitted:

_____
MARK STEVENS
310 S. St. Mary's Street

_____

Appendix 2

Tower Life Building, Suite 1505
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Motion To Set Bond has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

The defendant's Motion to Set Bond has been presented to the Court and the Court orders that same is hereby:

(GRANTED) (DENIED)

_____
_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SET BOND

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves that this Court set bond in his case in the amount of $1,000.00, and for good cause shows the following:

I.

Mr. @3a was placed on deferred adjudication for three years for the offense of aggravated robbery.

II.

Mr.@3a is presently incarcerated in the Bexar County Jail subject to a Motion to Enter Adjudication of Guilt and Revoke Community Supervision. He has been remanded without bond. Because Mr. @3a is on deferred adjudication he has not been convicted and is entitled to reasonable bail. *Ex parte Laday*, 594 S.W. 2d 102, 104 (Tex. Crim. App. 1980); *accord Gutierrez v. State,* 927 S.W. 2d 783, 784 (Tex. App.--Houston [14th Dist.] 1996, no pet.).

III.

Mr. @3a moves that this Court set a cash bond in the amount of $1,000.00.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully moves this Honorable Court to grant Motion To Set Bond.

Appendix 3

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 hereby certify that a copy of Motion To Set Bond has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

The defendant's Motion to Set Bond has been presented to the Court and the Court orders that same is hereby:

(GRANTED) (DENIED)

PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR DISCLOSURE OF NAMES AND ADDRESSES OF EACH PERSON THE STATE MAY USE AT TRIAL TO PRESENT EVIDENCE UNDER RULES 702, 703 AND 705 OF THE TEXAS RULES OF EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant in the above-styled and numbered cause, and, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, moves this Court to order the State of Texas to disclose the names and addresses of each person the state may use at trial to present evidence under Rules 702, 703 and 705 of the Texas Rules of Evidence, and for good cause shows the following:

I.

Article 39.14(b) of the Texas Code of Criminal Procedure provides as follows:

> On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

TEX. CODE CRIM. PROC. ANN. art. 39.14(b)(Vernon Supp. 2000).

II.

By this motion, the defense invokes article 39.14(b) and moves that this Court

order the State of Texas to disclose to undersigned counsel for the defendant the name and address of each person the state may use at trial to present evidence under Rules 702, 703, and 705 of the Texas Rules of Evidence.

III.

Undersigned counsel further requests that this notice be provided in written notice be either served personally on counsel, or delivered to counsel by certified mail, and that the written notice be provided not later than the 20th day before trial begins.

WHEREFORE, PREMISES CONSIDERED, the defendant prays that this Court order the State of Texas to provide written notice to counsel not later than the 20th day before trial begins of the name and address of each person the state may use at trial to present evidence under Rules 702, 703, and 705 of the Texas Rules of Evidence.

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 hereby certify that a copy of defendant's Motion For Disclosure of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703 and 705 of the Texas Rules of Evidence has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Motion For Disclosure of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703 and 705 of the Texas Rules of Evidence, and said Motion is hereby

(GRANTED) (DENIED).

It is therefore ordered that, not later than 5:00 p.m. on the ____ day of _____, 2004, the State of Texas shall disclose in writing and shall serve either personally or by certified mail, on _____, counsel for defendant @3 the names and addresses of each person the State may use during the trial of this case to present evidence under Rules 702, 703 and 705 of the Texas Rules of Evidence.

_____

_____JUDGE PRESIDING

October 25, 2004

Ms. Dolores Dolorosa
Assistant District Attorney
300 Dolorosa
San Antonio, TX 78205

Re: *State of Texas vs. John Jones*, No. 2004-CR-0000

Dear Ms. Dolorosa:

This letter will advise you, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following persons at trial to present evidence under Rule 702, 703, and 705 of the Texas Rules of Evidence:

Samuel Berry
Dept. of Biological Sciences
University of South Texas
P. O. Box 4050
Dallas, Texas 75021

Robert Murray
Lanier Executive Center
13300 Old Bitters Road, Suite 100
San Antonio, TX 78216

Sincerely,

Mark Stevens

MS/cvr

Appendix 5

April 10, 2004

Dr. Maria Garcia
100 Commerce Street
San Antonio, TX 78237

Dear Dr. Garcia:

I represent @3, who is scheduled to go to trial on October 1, 2004. The State of Texas has listed you as a potential witness in that case. I would like very much to interview you before trial and I realize that you are a very busy person. For that reason, I would be happy to visit you at any time or place which is most convenient to you. In all likelihood, the interview would not take more than 30 minutes of your time.

Since the state has listed you as a witness, I assume that you have talked, or will talk, to the prosecutors. I merely ask for the same opportunity to speak to you before trial.

If you have any questions, I urge you to talk to the prosecutor. The last I heard, the prosecutor assigned to this case was Mary Jones. She can be reached at the Bexar County District Attorney's Office at 335-2311. I hope she would not have any opposition to my interviewing you, but you should talk to her if you have any questions.

I will follow this letter up with a telephone call later on in the week. Again, as I said, I will only require a small amount of your time, and we can arrange the interview at any time or place that is convenient for you. It is very important to me and my client, and I hope to see you soon.

Sincerely,

Mark Stevens

MS/cr

Appendix 6

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

APPLICATION TO TAKE DEPOSITION OF DR. MARIA GARCIA

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, and makes application to take the oral deposition of Dr. Maria Garcia, Bexar County, Texas. In support of this application, defendant shows the following:

I.

Dr. Garcia conducted a physical examination of the child complainant in this case and wrote a written report about the physical injuries observed. She is therefore a material witness with highly relevant evidence to provide. Undoubtedly, the state will call Dr. Garcia as a witness at trial. It is essential that counsel for defendant interview Dr. Garcia prior to trial.

II.

Undersigned counsel has made diligent efforts to interview Dr. Garcia, but she has refused to meet with or discuss the case with counsel.

III.

The physical injuries allegedly suffered by the complainant and the doctor's conclusions about these injuries will obviously be relevant evidence. As the matter stands now, short of an order granting this application, it is not foreseeable that defendant can acquire this relevant, possibly exculpatory evidence, prior to trial. Without this evidence,

defendant will be denied his rights to effective assistance of counsel, a fair and impartial trial, compulsory process, confrontation and cross examination of witnesses, due process, due course and equal protection of the law, guaranteed by the Texas and United States Constitutions.

IV.

Depositions may be ordered in criminal cases in Texas "if good reason" exits for taking the deposition. *See* Tex. Code Crim. Proc. Ann. art. 39.02. We submit that good reason does exist in this case, because Doctor Maria Garcia is in possession of relevant, possibly exculpatory evidence, and she will not be interviewed voluntarily.

V.

This trial court has wide discretion in this area. *See James v. State*, 563 S.W. 2d 599, 602 (Tex. App. 1978); *Henriksen v. State*, 500 S.W. 2d 491, 494 (Tex. Crim. App. 1973). We have already shown why good reason does exist. We respectfully submit that there is no good reason whatsoever not to order this deposition. Failure to do so will harm defendant by precluding him from access to relevant, exculpatory evidence until it is too late to use this evidence, thereby preventing him from preparing his defense and subjecting him to surprise at trial.

VI.

The Texas Court of Criminal Appeals has intimated that "good reason" may exist for a deposition when the state's witnesses refuse to talk to defense counsel prior to trial. Doctor Garcia, of course, is in precisely this posture. *See Martinez v. State*, 507 S.W. 2d 223, 226 (Tex. Crim. App. 1974); *Gentry v. State* 494 S.W.2d 169, 172 (Tex. Crim. App. 1973); *Tucker v. State*, 461 S.W.2d 630, 634-35 (Tex. Crim. App. 1971).

WHEREFORE, PREMISES CONSIDERED, defendant prays that the Court grant

this application and order the deposition of Doctor Maria Garcia at a specific time and place.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Application To Take Deposition has been hand-delivered to the Bexar County District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered Defendant's Application to Take Deposition, and said application is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

ORDER SETTING HEARING DATE

IT IS ORDERED that the hearing on defendant's Application to Take Deposition is hereby set for ___ a.m., on the ____ day of _____, 2004 in the courtroom of the _____ in San Antonio, Texas.

SIGNED this the ____day of _____, 2004.

_____
_____JUDGE PRESIDING

ORDER FOR DEPOSITION OF WITNESS

On this the ____ day of _____, 2004, came to be heard Defendant's Application to Take Deposition and it appears to the court that this application should be granted.

IT IS THEREFORE ORDERED that the deposition of Dr. Maria Garcia be taken before

_____, on the _____ day of _____, 2004, at ____ m. at _____.

This witness is hereby ordered to report at the above stated time and place and to answer under oath such questions as may be propounded to her by the attorney for the defendant and the attorney for the state, and the witness is required to remain in attendance until such deposition is completed.

_____
JUDGE PRESIDING

STATE OF TEXAS)

AFFIDAVIT

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared Mark Stevens, who, after being duly sworn, stated:

> I am the attorney for the defendant in the above-entitled and numbered cause. I have read the foregoing Application, which is incorporated into this Affidavit by reference, and swear that all of the allegations of fact contained therein are true and correct.

_____
MARK STEVENS

SUBSCRIBED AND SWORN TO BEFORE ME on the @4 day of @5, 2004.

_____
Notary Public in and for
Bexar County, Texas

My commission expires: 1/27/05

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

OBJECTION TO THE USE OF EXPERT WITNESSES,
NOTICE OF WHOM WAS NOT TIMELY PROVIDED
PURSUANT TO ARTICLE 39.14(b)

On June 28, 2002, the state faxed to defense counsel the *State's Response To Defense Request For The Names And Addresses Of Any Person The State May Use At Trial To Present Evidence Under Rules 702, 703 and 705 of the Texas Rules of Evidence*. This list contains the names of seven witnesses. Trial is scheduled to commence on July 15, 2002. The state's response is untimely under article 39.14(b) of the Texas Code of Criminal Procedure, which requires that such witnesses be listed "not later than the 20th day before the date the trial begins." The defense objects to the use of any of these witnesses, or to any other witness who might be called to present evidence by the state under Rules 702, 703 and 704 of the Texas Rules of Evidence, because of this untimely notice.

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

Appendix 8

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Objection To The Use of Expert Witnesses, Notice of Whom Was Not Timely Provided Pursuant To Article 39.14(b) has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Objection To The Use of Expert Witnesses, Notice of Whom Was Not Timely Provided Pursuant To Article 39.14(b), and said Motion is hereby

(GRANTED) (DENIED).

_____
JUDGE PRESIDING

April 10, 2004

Dr. Joan Black
100 Baltimore
San Antonio, Texas 78201

Re: *State of Texas vs. @3*

Dear Dr. Black:

Thank you for agreeing to see @3. It is my desire to retain you as a member of the defense team in the *State of Texas vs. @3*, which I expect will be eventually set for trial in the @2 Judicial District Court of Bexar County, Texas. As a member of the defense team, I will consult with you in the evaluation, preparation, and presentation of our case in behalf of Mr. @3a. As a member of the defense team, you are bound by the lawyer-client privilege contained in Rule 503 of the Texas Rules of Evidence. Specifically, you will be considered "a representative of the lawyer" and I will ask you to assist me "in the rendition of professional legal services." As such, all communications between you and your office and the client and my office will be privileged and confidential. Should anyone not a member of the defense team attempt to speak with you about Mr. @3a or his case, please decline in view of Rule 503.

I will be in touch with you soon. Please do not hesitate to contact me if you have any questions.

Sincerely,

Mark Stevens

MS/cr

Appendix 9

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S OBJECTION TO COMMENT BY PROSECUTOR UPON CLAIM OF PRIVILEGE BY DEFENSE OR MEMBER OF DEFENSE TEAM

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 513(a) of the Texas Rule of Evidence, @3 moves the Court to instruct the attorney for the State of Texas to refrain from eliciting evidence that experts who are members of the defense team refused to speak to the prosecutors before trial, or from otherwise commenting on this refusal in the presence of the jury. In support, Mr. @3a shows the following:

I.

Tex. R. Crim. Evid. 513(a) expressly provides that a claim of privilege is not a proper subject of comment by the judge or by the prosecutor, and no inference may be drawn therefrom.

To that end the claim of privilege should be made without the knowledge of the jury as required in Tex. R. Crim. Evid. 513(b).

II.

In this case the defense employed Joan Black, M.D. to serve as a member of the defense team to consult with counsel, and to assist in the evaluation, preparation and presentation of the defense. As a member of the defense team, the expert is an agent of defense counsel for purposes of the work product doctrine, and a representative of the

lawyer for purposes of Rule 503(a)(4) of the Texas Rules of Evidence. *See Skinner v. State*, 956 S.W.2d 532, 538 (Tex. Crim. App. 1997). The conclusions of this expert are work product and should not be disclosed to the state. *Taylor v. State*, 939 S.W.2d 148, 152 (Tex. Crim. App. 1996). Additionally all communications between defendant and members of the defense team were made in furtherance of the rendition of professional legal services to the defendant, are privileged and may not be disclosed under Rule 503(b)(1) 503 (b)(2) of the Texas Rules of Evidence.

III.

Counsel instructed Doctor Black not to speak with the prosecutor, because she was a member of the defense team. When the prosecutor attempted to speak to Doctor Black, she declined to do so, because of the privilege. Doctor Black's claim of privilege should not be mentioned in the jury's presence by the prosecutor. *See* Tex. R. Evid. 513(a) and (b).

IV.

Mr. @3a makes this objection prior to trial and seeks a ruling pursuant to Rule 103(a)(1) of the Texas Rules of Evidence.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the Court grant this motion and instruct the prosecutor as requested.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Motion has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered Defendant's Objection To Comment By Prosecutor Upon Claim of Privilege By Defense Or Member Of Defense Team, and said motion is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@3 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR VOIR DIRE OF EXPERT WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court to conduct a hearing prior to trial and outside the presence of the jury to determine the preliminary question of the qualification of all expert witnesses upon which the state intends to rely at trial, and to determine the underlying facts and data upon which their opinions are based, and, for good cause, shows the following:

I.

Defendant expects the state to rely upon expert witnesses to prove its case.

II.

The burden of establishing the admissibility of an expert's opinion rests on the party offering the evidence.

III.

Whether the proferred witness possesses the requisite qualifications is a preliminary matter for the trial court to decide and not a matter of weight only to be determined by the jury.

IV.

The party offering such evidence also bears the burden of establishing its relevance, and that its probative value outweighs its prejudicial potential.

V.

Defendant requests a hearing on the preliminary question concerning the expert's qualification pursuant to Rule 104(a) of the Texas Rules of Criminal Evidence.

VI.

In addition to the Rule 104(a) hearing, the defendant is entitled to a voir dire examination out of the hearing of the jury "directed to the underlying facts and data upon which the opinion is based." See Tex. R. Crim. Evid. 705(b).

WHEREFORE, PREMISES CONSIDERED, defendant respectfully prays that this Honorable Court grant this motion and order a voir dire hearing pursuant to Rules 104(a) and 705(b).

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion For Voir Dire of Expert Witness has been delivered to the Bexar County District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion for Voir Dire Of Expert Witness, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR DAUBERT HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves that this Court set a hearing prior to trial as required by Rule 104(a) of the Texas Rules of Evidence to determine the preliminary question of the relevancy and reliability of any expert testimony proffered by the prosecution. For good cause, Mr. @3a shows the following:

I

The defense believes that the state will attempt to present to the jury testimony from expert witnesses pursuant to Rules 702, 703, and 705 of the Texas Rules of Evidence.

II.

Rule 702 permits a party to offer expert testimony from qualified witnesses that "will assist the trier of fact to understand the evidence or to determine a fact in issue." The party offering evidence from an expert bears the burden of demonstrating to the trial court that this testimony is both relevant and reliable.

III.

Under Rule 104(a), the trial court acts as a "gatekeeper," determining preliminary questions concerning the admissibility of expert testimony before this testimony is admitted for the jury's consideration. *See Daubert v. Merrell Dow Pharamaceuticals*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Hartman v. State*, 946 S.W.2d 60, 62 (Tex. Crim. App. 1997).

WHEREFORE, PREMISES CONSIDERED, defendant respectfully moves this Court to hold a hearing prior to trial as required by Rule 104(a) of the Texas Rules of Evidence to determine the preliminary question of the relevancy and reliability of any expert testimony proffered by the prosecution.

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 hereby certify that a copy of Motion For *Daubert* Hearing has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

The defendant's Motion For *Daubert* Hearing has been presented to the Court and the Court orders that same is hereby:

(GRANTED) (DENIED)

PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO INSPECT, EXAMINE AND TEST PHYSICAL EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court to order the state to produce all items of physical evidence that it has collected during its investigation of this case for inspection by defense counsel. After these items are inspected by counsel, it may be necessary to have them examined by appropriate experts. If so, defendant will return to Court with such request.

The request for inspection, examination and testing of the specific items set out above is essential to ensure the defendant his right to a fair hearing, his right to confrontation, his right to prepare a defense in his own behalf, his right to the effective assistance of counsel and due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 13 and 19 of the Texas Constitution.

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

Appendix 13

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion To Inspect, Examine and Test Physical Evidence has been delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion to Inspect, Examine and Test Physical Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF COPIES OF COMPUTER EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves for production of copies of all information, records and other data collected from the computers seized from defendant, his home, property and storage units by the State of Texas and its representatives during its investigation of him, pursuant to the Fifth, Sixth and Fourteenth Amendment of the United States Constitution, Article I, §§ 3, 10, 13, and 19 of the Texas Constitution and Article 39.14 of the Texas Code of Criminal Procedure.

I.

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 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.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant this the Defendant's Motion For Production Of Copies of Computer Evidence.

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 hereby certify that a copy of the above and foregoing Motion has been delivered to the Bexar County District Attorney, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ____ day of _____, 2004, came to be considered Defendant's Motion For Production Of Copies of Computer Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF COPIES OF PHOTOGRAPHIC AND VIDEOTAPE EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves for production of copies of all photographs and videotapes taken by the State of Texas and its representatives during its investigation of him, pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Article I, §§ 3, 10, 13, and 19 of the Texas Constitution and Article 39.14 of the Texas Code of Criminal Procedure.

I.

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.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant this the Defendant's Motion For Production Of Copies Of Photographic And Videotape Evidence.

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 hereby certify that a copy of the above and foregoing Motion has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ____ day of _____, 2004, came to be considered Defendant's Motion For Production Of Copies Of Photographic And Videotape Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF DNA INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

@3 requests that this Court order the State of Texas to produce designated information concerning DNA and serology testing, and for good cause shows the following:

I.

_____1. The DNA data for the test done in this case, and any other tests not reported, including all computer analysis and graphs. This is to include all characterizations of the DNA isolated from the samples, and their positive and negative control data.

2. Copies of all bench notes and the results from all testing of evidence including copies of all electropherograms generated from the testing of all samples, whether or not used to write a final report and whether stored in electronic format, hard copies, or otherwise.

3. Print-outs of all injection lists which include every analysis of every sample tested related to this case.

4. A description of how the evidence was stored, i.e. what other materials were kept in the same freezer or refrigerator.

5. All Serology DNA worksheets.

6. All Lab information sheets.

7. Texas DPS Physical Evidence Submission Form.

8. Any communication notes made by Mr. R. Sailors or Ms. Jane Burgett.

9. Curriculum Vitae of Mr. R. Sailors

10. Curriculum Vitae of Ms. Jane Burgett.

11. Lab Evidence Record sheets.

12. P30 testing sheet.

13. Human Origin/Species identification sheet.

14. DNA Extract Log.

15. Records of all documented cases in which there were problem with sample analyses, such as cross-contamination or other known errors.

16. Notes reflecting where the samples were collected from and how they were collected.

17. Body Diagrams.

18. Criminalistics examinations.

19. A copy of the Audit Report from the accrediting agency from their last inspection of the crime lab.

20. A complete and current copy of the crime lab's protocols for their performance of DNA analysis.

II.

The requested information is essential so that defendant can receive the effective assistance of counsel, his right to cross-examine and confront witnesses against him, and his right to present a defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Honorable Court grant this motion for production.

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 hereby certify that a copy of the defendant's Motion For Production of DNA Evidence has been delivered to the Bexar County District Attorney's Office; Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion for Production of DNA Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S EX PARTE MOTION FOR AN ORDER TO PERMIT ACCESS TO AND EXAMINATION BY A PRIVATE PHYSICIAN IN THE BEXAR COUNTY JAIL

TO THE HONORABLE JUDGE OF SAID COURT:

@3 makes this *ex parte* motion for an order seeking access to, and examination by, a private physician in the Bexar County Jail, and for good cause shows the following:

I.

Defendant is charged with capital murder, and is incarcerated in the Bexar County Jail unable to make bail.

II.

Counsel for defendant is in possession of medical records from the Bexar County Medical Center and the Bexar County Jail which shows that defendant has complained of, and has been examined for, seizure activity.

III.

If defendant does in fact suffer from epilepsy or some other seizure disorder this might serve both as a defense to the offense of capital murder, and as a mitigating circumstance, in the event that defendant is convicted. Counsel is unskilled in the field of mental health and believes that a comprehensive examination by a specialist is called for.

IV.

Counsel has arranged for Dr. John Jones, a specialist in the area of epilepsy, to conduct a comprehensive examination of defendant within the Bexar County Jail at 9:00 a.m.

on April 1, 2004. Doctor John Sparks is aware of these arrangements, has no objections to them, and has agreed to make an examination room at the jail available during the requested time. Doctor Sparks has advised, however, that a court order will be required by the sheriff.

V.

Defendant files this motion in an *ex parte* fashion, pursuant to the authority of *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Respectfully admitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for has been hand-delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered Defendant's Ex Parte Motion for An Order to Permit Access To and Examination By a Private Physician In the Bexar County Jail, and it appears to the Court that this Motion should be

(GRANTED) (DENIED)

Accordingly, it is ordered that he Sheriff of Bexar County shall make a suitable examination room in the Bexar County Jail available to Doctor John Jones and counsel Mark Stevens, for the purposes of medical examination, at _____ (time) on _____(date).

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR DEFENSE EXPERT TO HAVE ACCESS TO EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court to provide his attorney, his investigator, and his firearms expert access on April 27, 1998 to the firearm allegedly used in this case, and for good cause shows the following:

I.

The state's case against Mr. @3a is circumstantial. Its theory is that he must have intentionally or knowingly killed the complainant because the complainant did not pull the trigger himself, and because the gun could not have discharged unless Mr. @3a pulled the trigger. To attempt to prove this theory, the state will rely on testimony from one or more expert witnesses who have had access to the gun. In order to effectively defend Mr. @3a, the defense must also have access to the gun.

II.

The defense requests that counsel, counsel's investigator, and counsel's firearms expert, be allowed to examine, test, and inspect the gun. This would, of course, be accomplished without removing the gun from the presence or the custody of the State of Texas. Specifically, the defense requests that it be allowed to visually inspect the gun externally and internally, to photograph it, to measure and weigh it, to determine the trigger-pull, and to test fire it, both with and without live ammunition. A proper internal and

external inspection of the gun will require its disassembly, which will take only seconds. Our firearms expert is presently the head of the physical evidence section of the United States Postal Service, and has testified more than two hundred times as a firearms expert in courts throughout this country. He is capable of examining this gun without impairing in any way its evidentiary value.

III.

Our firearms expert will be in San Antonio on April 27, 1998, but will not be able to return for at least several weeks. In the interest of expediting this trial, the defense requests that the examination be conducted on April 27, 1998.

WHEREFORE, PREMISES CONSIDERED, the defendant requests that this Court order the State of Texas to make the gun allegedly used in this case available to undersigned counsel, to counsel's investigator, and to counsel's firearms expert on the morning of April 27, 1998, so that the defense can examine, inspect and test the gun as described above.

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 hereby certify that a copy of defendant's Motion For Defense Expert To Have Access To Evidence has been delivered to the Bexar County District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered defendant's Motion For Defense Expert To Have Access To Evidence, and said Motion is hereby

(GRANTED) (DENIED).

_____
_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR INDEPENDENT CHEMICAL ANALYSIS OF DEFENDANT'S BLOOD SAMPLE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court for an order directing the state to make available the blood sample taken at the direction of the San Antonio Police Department from the defendant on May 3, 1997 for independent chemical analysis, and for good cause shows the following:

I.

Police reports in this case reflect that defendant's blood was drawn at the direction of the San Antonio Police Department at 3:15 a.m. on May 3, 1997. The Bexar County Medical Examiner's Office subsequently analyzed this sample and asserts that the result is .07g/dl. This level is below the legal limit for intoxication in the State of Texas.

II.

Counsel for defendant desires to have this blood sample independently analyzed by a laboratory employed as a member of the defense team. The state has alleged that defendant was intoxicated at the time of the accident in question, and will no doubt try to prove that in this intoxication/manslaughter case. Defendant has a right to rebut this testimony with evidence from an independent chemical analysis. Since the sample is now in the custody of the State of Texas, an order from this Court is necessary to accomplish this analysis.

III.

Defendant is entitled to an independent chemical analysis by virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Due Course of Law Clause of article I, §§ 13 and 19 of the Texas Constitution, a right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I § 10 of the Texas Constitution, his rights to confront and cross examine witnesses against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Texas Constitution and her right to compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Texas Constitution.

WHEREFORE, premises considered, the defendant prays that the Court grant defendant's Motion for Independent Chemical Analysis Of Defendant's Blood Sample in the above-numbered and entitled cause.

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 hereby certify that a copy of defendant's Motion for Independent Chemical Analysis Of Defendant's Blood Sample has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's Motion for Independent Chemical Analysis Of Defendant's Blood Sample, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S EX PARTE MOTION TO PROVIDE FUNDS FOR EXPERT ASSISTANCE FROM A PSYCHIATRIST

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court *ex parte* pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, §§ 3, 3a, 10, 13 and 19 of the Texas Constitution, and article 26.05(a) of the Texas Code of Criminal Procedure, to provide funds for a psychiatrist to assist in the preparation of his defense, and for good cause shows the following:

I.

Defendant is indigent. He cannot afford to hire a psychiatrist to assist in the preparation of his defense. Because of the defendant's indigency, counsel was appointed by this Court.

II.

Defendant is charged with aggravated assault on a public servant.

III.

Defendant was shot in the head and seriously wounded on July 5, 2000. He has had surgery and has other surgeries scheduled in the future. Counsel has no training in the sciences of mental health or neurology, and is unable to interpret the voluminous medical records compiled to date.

Counsel believes that defendant's head injury may have a bearing on his mental health, and that this, in turn, has implications regarding his feasibility for release on bond, his competency to stand trial, and his sanity at the time of the offense and mitigation of punishment. A definitive interpretation of defendant's condition and medical records must come from a qualified expert.

IV.

Counsel has spoken with Doctor Michael Edwards, a competent and qualified forensic psychiatrist. Doctor Edwards has been made aware of the existing information regarding defendant's condition and is willing to examine defendant in the jail and to review his medical records. He is also willing to consult with defense counsel and to testify at a hearing regarding his findings. Dr. Edward's affidavit is attached. Exhibit A.

V.

If the defendant is not provided with expert assistance, he will be deprived of due process, due course, and equal protection of the laws, the effective assistance of counsel, his right to confront witnesses against him, his right to a fair and impartial trial, his right to present evidence on his own behalf, and his right to explain or deny evidence presented against him in the punishment phase, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution.

VI.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that due process permits the defendant to make an *ex parte* showing to the trial court of his need for expert assistance. Defendant requests leave to proceed in this fashion on this motion.

WHEREFORE, PREMISES CONSIDERED, defendant requests that this Court

consider this motion *ex parte* and order that he be provided with sufficient funds to have a competent psychiatrist assist him in the investigation, evaluation, preparation and presentation of his case.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1505
San Antonio, TX 78205-3192
(21026-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Defendant's *Ex Parte* Motion To Provide Funds For Expert Assistance From A Psychiatrist has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's *Ex Parte* Motion To Provide Funds For Expert Assistance From A Psychiatrist, and said motion is hereby

(GRANTED) (DENIED).

Accordingly, Doctor Michael Edwards is appointed to assist the defense in the evaluation, preparation and presentation of the defense.

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE JUVENILE COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

EX PARTE MOTION TO APPOINT A GUN, GUN HANDLING, AND BALLISTICS EXPERT TO ASSIST IN EVALUATION, PREPARATION AND PRESENTATION OF DEFENSE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3, 3a, 10, 13 and 19 of the Texas Constitution, to appoint a gun, gun handling and ballistics expert to assist in the evaluation, preparation, and presentation of his defense, and for good cause shows the following:

I.

Defendant is indigent. He cannot afford to hire a gun expert to assist in the evaluation, preparation and presentation of his defense. Because of the defendant's indigency, counsel was appointed by this Court.

II.

All weapons operate differently and their operation necessarily depends on many variables that only an expert would know about or understand. Because counsel is untrained in the fields of ballistics and guns, which are both central to this case, defendant will be deprived of a fair trial without a gun and ballistics expert to assist him in the evaluation, preparation, and presentation of his defense.

III.

This case was reported and believed to be an accidental shooting/accidental discharge case. Now the state is charging defendant with manslaughter. Therefore, the very charge against the defendant now cries out for rebuttal by a competent gun and ballistics expert, since the gun itself goes to the heart of the state's case.

IV.

In light of the charge against the Defendant, it is essential that counsel seek the appointment of a gun, gun handling and ballistics expert to assist in the evaluation, preparation and presentation of his defense, pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

We seek court appointment of a gun, gun handling and ballistics expert, John Jones (See Exhibit A, attached), pursuant to the *Ake* case. Without an expert to assist in the evaluation, preparation and presentation of his defense, the state's evaluation from the Regional Crime Lab will go unchallenged for want of expert assistance. This will deny defendant due process and due course of law, equal protection of the law, effective assistance of counsel, the right to confront and cross-examine witness against him, and his right to compulsory process, contrary to the Constitutions of Texas and the United States.

V.

If the defendant is not provided with expert assistance, he will be deprived of due process, due course, and equal protection of the laws, the effective assistance of counsel, his right to confront witnesses against him, his right to a fair and impartial trial, his right to present evidence on his own behalf, and his right to explain or deny evidence presented against him in the punishment phase, in violation of the Sixth and Fourteenth Amendments

to the United States Constitution and Article I, §§ 3, 3a, 10, 13 and 19 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant requests that this Court consider this motion and order that he be provided with sufficient funds to have a competent gun, gun handling and ballistics expert assist him in the investigation, evaluation, preparation and presentation of his defense.

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 hereby certify that a copy of Ex Parte Motion To Appoint A Gun, Gun Handling and Ballistics Expert To Assist In Evaluation, Preparation and Presentation of Defense has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered defendant's Ex Parte Motion To Appoint A Gun, Gun Handling and Ballistics Expert To Assist In Evaluation, Preparation and Presentation of Defense.

This Court, after having reading the pleadings, is of the opinion that said motion should be granted;

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED, that _____ is hereby appointed as gun, gun handling and ballistics expert to assist in evaluation, preparation, and presentation of the defense for the defendant.

IT IS FURTHER ORDERED that the said _____ after the conclusion of his evaluation be paid up to in the sum not to exceed_____.

SIGNED on this the _____ day of _____, 2004.

_____

_____PRESIDING JUDGE

STATE OF TEXAS)

AFFIDAVIT

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared @3, who after being duly sworn stated:

> I am the attorney in the above-entitled and numbered cause. I have read the foregoing Ex parte Motion To Appoint A Gun, Gun Handling, And Ballistics Expert To Assist In Evaluation, Preparation, And Presentation Of Defense and swear that all of the allegations of fact contained therein are true and correct.

MARK STEVENS

SUBSCRIBED AND SWORN TO BEFORE ME on the @4 day of @5, 2004.

Notary Public in and for
Bexar County, Texas

My commission expires: 1/27/05

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO PROCEED EX PARTE CONCERNING APPOINTMENT OF EXPERT

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Honorable Court to allow the defendant and counsel to proceed *ex parte* in the presentation of this motion to appoint an expert to assist in the evaluation, preparation and presentation of the defense, and for good cause shows the following:

I.

Defendant is indigent. He cannot afford to hire an expert to assist in the evaluation, preparation and presentation of his defense. Because of his indigent status, counsel was appointed by the court.

II.

When this motion is heard, defendant will tender to the court defendant's exhibit number 1 which is a sealed envelope containing the motion defendant desires to be heard *ex parte*. Defendant requests that this motion be kept sealed at all times, and that it only be reviewed by this Court, or the Court of Appeals, should an appeal become necessary.

III.

Ake v. Oklahoma, 470 U.S. 68, 82 (1985), requires the trial court to provide an expert to assist the defense upon an *ex parte* threshold showing of need for assistance with significant issues relating to defensive theories of the case. *See generally*, Note, *In the Wake*

of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack Of Ex Parte Access to Expert Services, 67 N.Y.U.L. Rev. 154 (1992). If the defendant is now allowed to proceed *ex parte* in this hearing, he will be deprived of due course, due process and equal protection of the laws, effective representation of counsel, his right to confront witnesses against him, his right to a fair and impartial trial, his right to present evidence on his own behalf, and his right to explain or deny evidence presented against him in the punishment phase, by reason of his indigent status in violation of the Fourteenth Amendment to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant requests that this Court consider this motion and order that he be provided with an *ex parte* hearing on the motion to have a competent expert appointed to assist him in the investigation, evaluation, preparation and presentation of his case.

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 hereby certify that a copy of defendant's Motion To Proceed *Ex parte* Concerning Appointment of Expert has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came on to be considered defendant's Motion to Proceed *Ex Parte* Concerning Appointment of Expert, and said motion is hereby:

(GRANTED) (DENIED)

_____

_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves that the indictment filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment in this case purports to allege that Mr. @3a caused serious bodily injury to the complainant, but it does not allege the manner and means by which such injury was caused. This indictment is defective and should be set aside because it fails to allege the manner and means of the commission of the offense. *E.g. Ellis v. State*, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981)(aggravated robbery).

II.

Because of these defects:

1. The indictment does not accuse defendant of an "act or omission which, by law, is declared to be an offense", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.01.

2. The offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.02(7).

3. The indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.

4. The indictment does not possess "[t]he certainty . . . such as will enable the accused

to plead the judgment that may be given upon it in bar of any prosecution for the same offense," in violation of TEX. CODE CRIM. PROC. ANN. art. 21.04 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 10 and 19 of the Texas Constitution.

5. The indictment does not "charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant and with what degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . ." in violation of TEX. CODE CRIM. PROC. ANN. art. 21.11 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution.

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause.

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 hereby certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE COUNTY COURT
VS.	)	AT LAW NUMBER @
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant in the above-styled and numbered cause, and, prior to announcing ready, moves that the information filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

The information is defective because it does not allege with reasonable certainty the act relied upon by the state to show that defendant acted recklessly. *Gengnagel v. State*, 748 S.W. 2d 227, 230 (Tex. Crim. App. 1988); See Tex. Code Crim. Proc. Ann. art. 21.15.

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause.

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 hereby certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 DISTRICT COURT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SET ASIDE INFORMATION FOR FAILURE TO AFFORD CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant in the above styled and numbered cause and, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and articles 1.03, 1.04 and 1.05 of the Texas Code of Criminal Procedure, moves the Court to set aside the information for failure to afford the defendant a speedy trial, and shows the following in support:

I.

The information in this case was filed on November 17, 2001.

II.

There are no satisfactory reasons for the delay in bringing defendant to trial.

III.

The defendant has never waived his right to a speedy trial.

IV.

The defendant has been substantially prejudiced because of the failure of the State to afford her a speedy trial, in that he has suffered substantial anxiety and concern.

WHEREFORE, PREMISES CONSIDERED, the defendant respectfully prays that this Court set the matter for a hearing and, after said hearing, that the Court order this information set aside with prejudice.

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 hereby certify that a copy of Motion To Set Aside Information For Failure To Afford Constitutional Right To Speedy Trial has been delivered to the District Attorney's Office, 300 Dolorosa, San Antonio, TX , on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be heard defendant's Motion to Set Aside the Information For Failure to Afford Constitutional Right to a Speedy Trial, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR SPEEDY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, by and through his undersigned counsel, and moves the Court for a speedy trial in his case, and for good cause shows the following:

I.

Defendant is guaranteed the right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and article 1.05 of the Texas Code of Criminal Procedure.

II.

Defendant was arrested on November 17, 2001 for driving while intoxicated which allegedly occurred at that date. Trial has been scheduled a number of times most recently for the week beginning August 10, 2003. The defense understands that the state will announce not ready for trial on that date due to the absence of an essential witness.

If defendant is convicted of this offense after September 1, 2003, he will be subject to an expensive surcharge. He was arrested well in advance of this date, and it is unfair that he should be subjected to this surcharge, just because his case could not be tried before September 1, 2003. He moves that trial be held and concluded before then.

WHEREFORE, PREMISES CONSIDERED, defendant moves that trial in this case be scheduled as soon as possible.

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 hereby certify that a copy of defendant's Motion For Speedy Trial has been delivered to the District Attorney's Office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion For Speedy Trial, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLE 37.07

TO THE BEXAR COUNTY DISTRICT ATTORNEY'S OFFICE:

I.

Pursuant to Rule 404(b) of the Texas Rules of Evidence and article 38.27 of the Texas Code of Criminal Procedure, defendant requests the state to give reasonable notice in advance of trial of its intent to introduce in its case-in-chief evidence of crimes, wrongs, or acts other than that arising in the same transaction.

II.

Pursuant to Rule 609(f) of the Texas Rules of Evidence, defendant requests that the state give sufficient advance written notice of its intent to use evidence of a conviction against the following witnesses:

@3

III.

Pursuant to Article 37.07, § 3(g) of the Texas Code of Criminal Procedure, defendant requests that the state give reasonable notice of intent to introduce against the defendant evidence

of an extraneous crime or bad act at the punishment phase of the trial.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's original Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Article 38.37 And Evidence Of Conviction Under Rule 609(f) has been delivered to the District Attorney's Office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

OBJECTION TO NOTICE OF EXTRANEOUS MISCONDUCT AND REQUEST FOR PROPER NOTICE

Defendant objects to the "notice" provided in the *State's First Notice of Intent To Introduce Evidence Of Extraneous Offenses Pursuant To Tex. R. Crim. Evid. 404(b), 609(f), And Tex. Code Crim. Proc. Arts. 37.07*, and in the *State's Amended Notice of Intent To Introduce Evidence Of Extraneous Offenses Pursuant To Tex. R. Crim. Evid. 404(b), 609(f), And Tex. Code Crim. Proc. Arts. 37.07*, because the "notice" therein provided is so non-specific and non-descriptive that it fails to provide the notice to which defendant is entitled to by those statutory and rule provisions. Defendant requests that the state provide, before commencement of jury selection, reasonable written notice of all extraneous misconduct it intends to offer at any stage of this trial, including guilt\innocence or punishment, as required by TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(g); and TEX. R. EVID. 404(b) and 609(f), as well as by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of Article I, §§ 13 and 19 of the Texas Constitution.

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 hereby certify that a copy of defendant's Objection to Notice of Extraneous Misconduct and Request For Proper Notice been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the @4 day of @5, 2004.

_____
MARK STEVENS

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court before trial in limine for an order instructing the District Attorney, his representatives and witnesses to refrain from making any direct or indirect reference whatsoever, at trial before the jury to any of the following matters:

I.

Defendant moves to exclude all extraneous crime or misconduct evidence which is not alleged in the indictment, unless it can be shown to the Court, outside the presence of the jury by sufficient proof that defendant perpetrated such conduct, that this evidence is relevant to a material issue in the case, other than character conformity, and that its probative value outweighs its potential for prejudice.

II.

If the prosecutor is allowed to allude to, comment upon, inquire about, or introduce evidence concerning, any of the above matters, ordinary objections during the course of trial, even sustained with proper instructions to the jury, will not remove the harmful effect of same in view of its highly prejudicial content.

WHEREFORE, PREMISES CONSIDERED, defendant, prays that this Court order and instruct the District Attorney, his representatives and witnesses, not to elicit or give testimony respecting, allude to, cross-examine respecting, mention, or refer to any of the

above matters until a hearing has been held outside the presence of the jury at which time this Court can determine the admissibility of these matters.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion in Limine was delivered to the Bexar County District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion in Limine, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO PUNISHMENT EVIDENCE PURSUANT TO RULE 103(a)(1)

TO THE HONORABLE JUDGE OF THE @2 JUDICIAL DISTRICT COURT:

@3 objects prior to trial, under Rule 103(a)(1) of the Texas Rules of Evidence, to certain evidence he believes the state may offer at trial.

I.
Rule 103(a)(1)

Rule 103(a)(1) of the Texas Rules of Evidence provides that : "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." In this document, the defense reurges all objections it has previously made, and makes further objections to evidence discussed herein, also under Rule 103(a)(1).

II.
Previously Urged Objections

On October 21-23, 2003, pre-trial hearings were held on various motions filed by the defense and on that date and shortly thereafter, this Court ruled. Mr. @3a lodged numerous objections to admission of certain evidence and he reurges those objections at this time. If those objections are again overruled, the defense requests that the Court consider the objections as having been made if the state offers the evidence at trial, and that the defense not be required to make the objections again as is provided by Rule 103(a)(1).

III.
The Right To Silence

During the pre-trial hearing, Corporal John Long testified that he thought Mr. @3a's behavior was odd at the time he showed him the Explorer on Lazy Lane. As a result, Mr. Long asked Mr. @3a for more details about Mrs. @3a's disappearance, at which time Mr. @3a asserted his right to silence. Specifically, according to Mr. Long, Mr. @3a said: "Well I don't want to say too much because I've read a book where the first person you all suspect is the husband when someone comes up missing." Texans have the constitutional right to remain silent in the face of questioning by the police. Mr. @3a objects to the state eliciting evidence before the jury that he invoked his constitutional right to remain silent. Eliciting this sort of evidence would violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Doyle v. Ohio*, 426 U.S. 610 (1976); *Sanchez v. State*, 707 S.W. 2d 575 (Tex. Crim. App. 1986). And this evidence is irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. Additionally, whatever marginal relevance the evidence has is substantially outweighed by its potential for unfairly prejudicing the jury, in violation of Rule 403 of the Rules of Evidence.

IV.
The Right To Counsel

On November 29, 2002, Ranger Ryder, and Terrell Hills Police Department Officers Jack Parr and Joe Davis searched Mr. @3a's residence and attempted to question him. Defendant moves to exclude any reference to his having requested to speak to a lawyer before speaking to officers or agents of the State of Texas and to his refusal to speak to said officers and agents until being allowed to do so. Such references would be contrary to article 38.38 of the Texas Code of Criminal Procedure, Rules 401, 402 and 403 of the Texas Rules

of Evidence, and to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Doyle v. Ohio*, 426 U.S. 610 (1976); *Sanchez v. State*, 707 S.W. 2d 575 (Tex. Crim. App. 1986). And this evidence is irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. Additionally, whatever marginal relevance the evidence has is substantially outweighed by its potential for unfairly prejudicing the jury, in violation of Rule 403 of the Rules of Evidence.

V.
The Attorney-Client Privilege

The state has listed two of Mr. @3a's attorneys as potential witnesses--Barry Moore and Kerry Grant. Confidential communications between Mr. @3a and his attorneys are privileged and inadmissible against Mr. @3a. *See* TEX. R. EVID. 503(b)(1). Additionally, any fact that came to the knowledge of either attorney by reason of the attorney-client relationship is privileged and may not be disclosed in Texas. *See* TEX. R. EVID. 503(b)(2). No evidence should be elicited from either attorney until this Court has determined outside the presence of the jury, that they have unprivileged evidence to give. Mr. @3a should not be required to assert the attorney-client privilege in the presence of the jury. *See* TEX. R. EVID. 513. And the fact that Mr. @3a contacted or retained attorneys may not be used against him or commented on by the prosecutors or the Court. *See* TEX. CODE CRIM. PROC. ANN. art. 38.38.

VI.
Hearsay From The Complainant

The discovery provided the defense in this case is filled with references allegedly made by the complainant about Mr. @3a to third parties. We move to exclude any reference to hearsay testimony from the complainant unless said testimony is admissible under Rules

801, 802 and 803 of the Texas Rules of Evidence, and the Confrontation Clauses of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

VII.
Extraneous Misconduct

Mr. @3a moves to exclude all extraneous crime or misconduct evidence which is not alleged in the indictment in cause number @1, unless it can be shown by sufficient proof that defendant perpetrated such conduct. In deciding whether to admit such evidence this Court "must, under rule 104(b) of the Texas Rules of Evidence), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State*, 884 .W. 2d 154, 160 (Tex. Crim. App. 1994). Additionally, the state must prove that this extraneous evidence is relevant to a material issue in the case other than character conformity, and that its probative value outweighs its potential for prejudice. In this case, such "evidence" includes but is not limited to the following:

1. that on or about January 10, 2003, Mr. @3a allegedly engaged in the neglectful supervision of Ray or Clay or Cliff @3a.

2. that on or about January 10, 2003, Mr. @3a engaged in the conduct of injury of a child with, or struck with his hand or a bat or a unknown object, Ray or Clay or Cliff @3a.

3. that Mr. @3a was ever neglectful or abusive to his children, or that any state agency has ever conducted such an investigation.

4. that Mr. @3a was ever neglectful or abusive to @6.

5. that on or about November 23, 2002, Mr. @3a intentionally or knowingly operated a utility vehicle owned by Richard Gray without Mr. Gray's consent.

6. that on or about November 23, 2003, Mr. @3a unlawfully appropriated a utility vehicle owned by Richard Gray without Mr. Gray's consent.

7. that on or about December 3, 2002, Mr. @3a altered a telephone message book of

Richard Gray with intent to repair its verity or availability as evidence.

8. that on or about December 3, 2002, Mr. @3a, with intent to influence Richard Gray, a witness in an official proceeding, offered to confer a benefit on Mr. Gray if he would testify falsely.

9. that between January 1, 2000 through November 22, 2002, Mr. @3a engaged in harassing and fraudulent conduct, specifically large volume merchandise return and refund scheme, resulting in him being banned or prohibited from frequenting various stores in Bexar County.

10. that beginning on or about October, 1999 and continuing through December 31, 2002, Mr. @3a unlawfully appropriated some $60,000.00 from Larry Barry and Mona Barry, without their effective consent.

The state cannot prove beyond a reasonable doubt that Mr. @3a perpetrated any of these transactions. Mr. @3a has not been convicted of any offense concerning these transactions, as required by Rule 609 of the Texas Rules of Evidence. These transactions are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). These transactions are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403.

VIII.
Undisclosed Extraneous Misconduct

Mr. @3a also moves to exclude all extraneous crime or misconduct evidence, notice of which was requested by defendant, but not provided by the state as required by Rules 404(b) and 609(f) of the Texas Rules of Criminal Procedure, and article 37.07 of the Texas Code of Criminal Procedure.

IX
Opinion Testimony

Mr. @3a objects to anyone giving expert opinion testimony unless that person is both qualified under Rule 702 of the Texas Rules of Evidence, and was timely designated as an expert, as required by article 39.14(b) of the Texas Code of Criminal Procedure.

X.
Undesignated Witnesses

Mr. @3a objects to any witness-lay or expert--testifying for the state unless that person was timely designated as a witness, as required by order of this Court dated October 21, 2003.[RR.II--15-16]

XI.
Victim Impact Evidence

Mr. @3a objects to the admission of any victim impact or victim character evidence at the first phase of the trial.

XII.
Divorce Documents on Computer

The state seized a number of computers ands computer equipment from Mr. @3a's home and effects. We have previously objected to the admissions of any evidence from the computers because that evidence was illegally obtained for a number of reasons.

Recently, the state has notified the defense that it intends to attempt to prove that certain evidence purportedly relating to Mrs. @3a's intention to divorce Mr. @3a was found on one of the computers seized, and this evidence was viewed by someone, was sent off to a storage facility, and later deleted. Besides being inadmissible because it was illegally obtained, this evidence is inadmissible for the following reasons.

A. The computer in question was one of several owned by the @3a family and it cannot be proven that @3 viewed the evidence in question, or that he sent it to the storage facility, or that he deleted it. Absent such proof, the evidence is irrelevant under Rules 401 and 402, and whatever marginal relevance it may have is substantially outweighed by its potential for prejudice.

B. The divorce information in question is hearsay, inadmissable under Rules 801, 802 and 803 of the Texas Rules of Evidence, and the Confrontation Clauses of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

C. The divorce information in question, some of which purportedly comes information provided by the complainant to her divorce attorney, contains a number of damaging

and unsupported claims which would be highly prejudicial to Mr. @3a. Such information is entirely irrelevant to this prosecution and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. Whatever marginal relevant it might have is substantially outweighed by its potential for prejudice, making it irrelevant under Rule 403.

XIII.
Transcripts of Recorded Conversations

The state has tendered to the defense transcripts of certain conversations purportedly between Mr. @3a and others. The prosecutors advise the defense that they want the jury to use these transcripts. Respectfully, the defense disagrees that the transcripts thus far provided by the state fully and accurately capture the recorded conversations. The defense maintains that the tapes themselves are the best evidence of the content of the conversations, and that the transcripts will not assist the jury in learning the true evidence. Allowing the jury to use these transcripts will deny Mr. @3a the right to confront and cross-examine witnesses against him and the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

XIV.
Personal Writings

Various writings were seized from Mr. @3a and his home and vehicles and computers pursuant to several search warrants. The state maintains that some of these documents were written by Mr. @3a and some were not. Those personally written to him are inadmissible under article 18.02(10) of the Texas Code of Criminal Procedure. Those not personally written by him are irrelevant, unfairly prejudicial, and inadmissible under Rules 401, 402, and 403 of the Texas Rules of Evidence.

XV.
Untested Character Evidence

The defense objects to the presentation of any evidence by the state concerning his

character through character witnesses who have not been previously examined outside the presence of the jury.

XVI.
Miscellaneous Irrelevant And Prejudicial Evidence

The defense knows from discover that various items of evidence have been examined in this case. Several things have been disclosed to the defense that apparently have no even arguable connection to the alleged offense. Admission of these unrelated items would violate Rules 401, 402, and 403 of the Texas Rules of Evidence, and we object.

1. A baseball bat discovered in a room long after Mr. @3a had been in the room.

2. A .380 caliber handgun, with ammunition, found in Mr. @3a's home, and an unidentified metal fragment found in the trailer at 9394 S.W.W. White Road.

3. Various ordinary household items purchased at Home Depot on November 16, 2002.

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 hereby certify that a copy of Defendant's Objections To Punishment Evidence Pursuant To Rule 103(a)(1) has been delivered to the District Attorney's Office, 300 Dolorosa, San Antonio, TX 78205 on the @4 of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's Objections To Punishment Evidence Pursuant To Rule 103(a)(1), and said Objections are hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO EXTEND TIME LIMITATION FOR VOIR DIRE

Now comes @3, defendant in the above styled and numbered cause, and objects to the time limitation set by the court for voir dire, and requests additional time to conduct voir dire examination, and in support of such motion shows the following:

I.

Defendant is charged with the offense of driving while intoxicated.

II.

Defendant has pleaded not guilty to this offense and demanded a jury trial on the issue of guilt or innocence.

III.

The court has determined that each party shall be allotted 30 minutes to voir dire the entire venire.

IV.

This time limitation is unreasonable because it does not permit defendant to sufficiently inquire so as to be able to intelligently exercise challenges for cause and peremptory challenges. This time restriction denies defendant the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. The restriction also violates defendant's rights to a fair and impartial jury, due process, due course and equal protection of the law, guaranteed by the United States and Texas Constitutions.

V.

In *Ratliff v. State*, 690 S.W. 2d 597 (Tex. Crim. App. 1985), the court noted that three factors are relevant in determining whether the trial court abused its discretion in imposing a time limit: (a) whether defendant's examination reveals an attempt to prolong the voir dire with irrelevant, immaterial or repetitious questions, unnecessary to assist intelligent jury selection; (b) whether the unasked questions were proper voir dire questions, and (c) whether the defendant was not permitted to individually examine jurors who served on the jury. *Id.* at 599-600. The defense assures the Court that it will ask proper questions and will not prolong the jury selection process with irrelevant, immaterial or repetitious questions. Even so, the defense will not be able to adequately examine each venireperson on the panel in the thirty minutes allotted.

Clemments v. State, 940 S.W. 2d 207, 210 (Tex. App.--San Antonio 1996, pet. ref'd), was tried in Bexar County. There the trial court allotted the defense one hour to conduct voir dire in the felony offense of injury to a child, and the Court of Appeals reversed under *Ratliff*.

> We recognize that time constraints and the control of voir dire are legitimate concerns of the trial court; however, the voir dire process is designed to insure that, to the greatest extent possible, a fair and impartial jury is seated. As such, *the predominant interest of the trial court should be to protect the right of each party to the intelligent exercise of peremptory challenges*. An automatic and rigid time limit on the voir dire process threatens such interest.

Id. at 210-211(emphasis supplied)(citation omitted). A rigid, 30 minute time limit will similarly threaten this defendant's right to the effective assistance of counsel guaranteed by Article I, § 10 of the Texas Constitution.

VI.

Counsel believes he can conduct an adequate voir dire in this case in one hour, and

he requests that he be allowed that amount of time.

WHEREFORE, PREMISES CONSIDERED, defendant prays the court grant this motion and allow both sides additional time to voir dire potential jurors.

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 hereby certify that a copy of defendant's Motion To Extend Time Limitation For Voir Dire has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came to be considered defendant's Motion to Extend Time Limitation For Voir Dire, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO QUESTION VENIRE PANEL INDIVIDUALLY CONCERNING PUBLICITY

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court for leave to question the venire panel individually about their exposure to any publicity in the case, and for good cause shows the following:

I.

The trial court has discretion to permit individual voir dire in a non-capital case. *See* Tex. Code Crim. App. Proc. Ann. art. 35.17(1).

II.

Since Shirley @3a was reported missing in November, 2002, this case has been extensively publicized in both the local and national media. The publicity has been in the form of television and, radio reports, and newspaper articles. Based on this publicity it is reasonable to believe that many of the venire would have heard something about this case. Counsel intends to ask the venire as a whole whether they have heard any publicity about the case.

III.

After determining whether the individual venire persons have heard about the case, counsel proposes to question them individually, outside the presence of each other, about what they have heard.

IV.

This questioning must be done individually, because to do so in the presence of other venire persons, would possibly taint those venire persons.

V.

In *Smith v. State*, 703 S.W.2d 641 (Tex. Crim. App. 1985), the Texas Court of Criminal Appeals held that the trial court abused its discretion in denying appellant his right to an individual voir dire in a non-capital case on the question of pre-trial publicity. Such questioning was necessary in *Smith*, and is necessary in our case, to permit the defendant to intelligently exercise his peremptory challenges as guaranteed by article I § 10 of the Texas Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. Additionally, such questioning is necessary to determine whether venire persons are subject to challenge for cause under article 35.16 of the Texas Code of Criminal Procedure, and to permit defendant to be tried by a fair and impartial jury, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, §§ 10, 13, and 19 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, the defendant prays that this Honorable Court permit his counsel to question individually all prospective jurors who acknowledge having heard something about the case during voir dire.

Respectfully submitted:_____

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Motion to Question Venire Panel individually Concerning Publicity has been delivered to the District Attorney's Office, Bexar County Courthouse, San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came to be considered Defendant's Motion to Question Venire Panel Individually Concerning Publicity, and said motion is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE PRESIDING COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF RECORDED IN-COMING TELEPHONE CALLS AND DISPATCH RADIO COMMUNICATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Mr. @3a respectfully moves this Honorable Court for Production of all recorded in-coming telephone calls to "911," or to the sheriff's office, or to the police station requesting assistance in the 9411 block of Valley Rock, Case # 96685542/01, Bexar County, San Antonio, Texas, on November 10, 1996; all recorded communications between the dispatcher and police officers dispatched to the 9411 block of Valley Rock, Bexar County, San Antonio, Texas, on November 10, 1996; and, all recorded communications between police officers who had anything to do with the investigation of this case on November 10, 1996, and in support thereof, shows the following:

I.

Counsel believes that recordings were made of in-coming calls to "911", to the sheriff's office, and to the police station, and radio communications between the police dispatcher and police officers, and radio communications between police officers.

II.

These recordings will provide information as to who initially requested assistance, the reason assistance was requested, the state of mind of the responding officers, as well as other significant events occurring before, during and after this alleged offense. This information is material and relevant to the defense.

III.

The information is not privileged, or, if privileged, then the privilege must give way to the overriding interest defendant has in preparing and presenting his case and in order to preserve his rights to compulsory process confrontation, effective assistance of counsel, and due process of law, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 13 and 19 of the Texas Constitution.

IV.

Such information is within the exclusive control and possession of the State, and is not otherwise procurable by the defendant through the exercise of due diligence.

V.

That this motion is made in good faith and not for the purpose of delay.

WHEREFORE, premises considered, defendant respectfully requests that he be allowed to inspect, listen to, and copy all recorded in-coming telephone calls to "911" or the sheriff's office, or to the police station requesting assistance in the 9411 block of Valley Rock, Case # 96685542/01, Bexar County, San Antonio, Texas on November 10, 1996; all recorded communications between the dispatcher and police officers dispatched to the 9411 block of Valley Rock, Bexar County, San Antonio, Texas, on November 10, 1996; and, all recorded communications between police officers who had anything to do with the investigation of this case or the arrest of defendant on November 10, 1996. Additionally, the defendant requests that this Court immediately enter an order that all such recordings be preserved and not destroyed until this cause is finally disposed of. In the alternative, defendant requests that this Court conduct an in-camera inspection of these records to determine questions of materiality, relevance and privilege.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion For Production of Recorded In-coming Telephone Calls and Dispatch Radio Communications has been delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion for Production of Recorded In-Coming Telephone Calls and Dispatch and Radio Communications, and said motion is hereby

(GRANTED) (DENIED)

_____
_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO REQUIRE DISCLOSURE OF ALL INFORMERS RELIED UPON AND FOR PRODUCTION OF SAID INFORMERS IN OPEN COURT

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court to instruct the prosecution to reveal the true name and present address of all informers in advance of the Motion To Suppress hearing in this case, and to produce these persons at this hearing for cross-examination by the defense. Alternatively, defendant moves that the state be ordered to produce all informers for an in camera examination by this Court, and for good cause, shows the following:

I.

The search warrant affidavit alleges that the affiant relied on information provided by a person "whose identity cannot be revealed for security reasons." Counsel has been unable to determine this alleged informer's identity or address, and has no other certain way of identifying this person, or even of determining whether such a person exists, unless the state discloses the information.

II.

If the informer participated in the alleged offense, or was present at the time of the alleged offense or the arrest, or if he is otherwise a material witness to the transaction or whether defendant knowingly committed the offense, his\her identity must be disclosed. *See*

Roviaro v. United States, 353 U.S. 53 (1957). Under Rule 508(c) of the Texas Rules of Evidence, the defendant's right to disclosure is even broader than required by *Roviaro*. Under subsection (2) of this rule, disclosure is required merely upon showing that the informer's testimony is "necessary to a fair determination of the issues of guilt, innocence." *See Bodin v. State*, 807 S.W.2d 313, 317-318 (Tex. Crim. App. 1991). The state knows whether its informer fits one of these categories, and if so, the identity of that person must be disclosed. *See Anderson v. State*, 817 S.W.2d 69, 72 (Tex. Crim. App. 1991)("Whenever it is shown that an informant was an eyewitness to an alleged offense then certainly that informant can in fact give testimony "necessary to a fair determination of the issues of guilt, innocence"); *Loving v. State*, 882 S.W.2d 42, 45 (Tex. App.--Houston [1st Dist.] 1994, no pet.)(trial court erred in refusing to determine under Rule 508(c)(2), whether informer, who was at the scene moments before the arrest, would have supported defendant or police).

III.

Additionally, under subsection (3) of Rule 508(c), disclosure is required where information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.

IV.

A party who seeks relief under *Franks v. Delaware*, 438 U.S. 154 (1978), must establish by a preponderance of the evidence that an agent of the government has intentionally or recklessly made a misstatement in the search warrant affidavit which is material to a finding of probable cause. If so, and if the remainder of the affidavit when the material misstatement is set aside is insufficient to establish probable cause, then the warrant is void and its fruits must be excluded from evidence. *Id*. at 155-56. The so-called “good

faith exception" does not apply if the warrant was issued in reliance on a deliberate or reckless material misstatement. *See United States v. Leon*, 468 U.S. 897, 923 (1984).

V.

In the instant case, the police officer-affiant on the warrant for the place searched swore that he relied upon information from an unnamed informer who claimed that he had seen defendant in possession of contraband at 2326 Elm within 48 hours of seeking the warrant. Defendant controverts this claim by an affidavit attached to this motion in which he swears that he was not at the address during this time frame. Also attached is the affidavit of Mary Jones who lived at the place searched. Both these affidavits are offered solely to establish defendant's rights guaranteed by the Texas and United States Constitution and The Texas Rules of Evidence. Defendant asserts that either the informer -- if such a person really exists -- lied when he\she reported seeing defendant in possession of contraband at the time and place in question, or the affiant was untruthful when he included this claim in his affidavit.

VI.

Defendant submits that his affidavit raises a "*plausible showing*" that the affidavit and warrant here were not based on information "received from an informer reasonably believed to be reliable or credible." *See Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991)(emphasis supplied)("Since the defendant may not actually know the nature of the informer's testimony, however, he or she should *only be required to make a plausible showing* of how the informer's information may be important"). If the informer lied, then he\she is very clearly not "credible and reliable," as the officer claimed in his affidavit. In such case, an inquiry must be made whether the officer reasonably believed the informer was reliable or credible, or was reckless in relying on such a person as the sole basis for probable

cause in this case. If the affiant lied, then the affidavit is based on an intentional misstatement which is material to probable cause. Whether the officer acted recklessly or intentionally, if his affidavit misstates a fact material to the finding of probable cause, then the affidavit and warrant are defective and defendant is entitled to have the fruits of the search and seizure suppressed under *Franks v. Delaware*.

VII.

The officer has sworn to what he says the informer told him, and common sense teaches that the officer will not testify differently. The only way fairly to determine if the informer or the affiant is untruthful is to question the informer, under oath, in Court. This, of course, requires that the state disclose this person's identity, if in fact the person exists. If the state is unwilling to disclose the informer's identity in open court, this Court should "direct that the disclosure be made in camera." TEX. R. EVID. 508(c)(3). *See Heard v. State*, 995 S.W.2d 317, 320-21 (Tex. App.--Corpus Christi 1999, pet. ref'd)("To protect the informer's confidentiality while also allowing the court to rule based on full disclosure of relevant information, rule 508 requires that the State be permitted to submit evidence for the trial court to review in camera"). This Court has the authority to order an in camera hearing even if not requested by the state. *See Hackleman v. State*, 919 S.W.2d 440, 450 (Tex. App.--Austin 1996, pet. ref'd). If this procedure is utilized, defendant requests that the Court inquire, in camera, of the informer whether the informer made the statement about the defendant which is attributed to him\her in the affidavit. Based on the answers given by the informer, this Court should then be able to determine whether material misstatements were in fact made in the affidavit, and whether affiant acted either intentionally or with reckless disregard for the truth. If so, and if the Court finds that the affidavit would not provide probable cause absent the misstatements, then the warrant is void, and the evidence seized

must be suppressed.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court order the prosecution to disclose the true name and present address of all informers in advance of trial in this case, and to produce these persons at the hearing on defendant's Motion To Suppress Evidence for cross-examination by the defense. Alternatively, defendant moves that the state be ordered to produce all informers for an in camera examination by this Court.

Respectfully submitted:

MARK STEVENS
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Tower Life Building, Suite 1505
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion To Require Disclosure Of All Informers Relied Upon And For Production Of Said Informers In Open Court has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

_____On this the ___ day of _____, 2004, came to be considered Motion To Require Disclosure Of All Informers Relied Upon And For Production Of Said Informers In Open Court, and said motion is hereby

(GRANTED) (DENIED)

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3.	)	BEXAR COUNTY, TEXAS

MOTION FOR DISCOVERY OF THE ARREST AND CONVICTION RECORDS AND EVIDENCE ADMISSIBLE UNDER RULE 404(a)(2) OF THE TEXAS RULES OF EVIDENCE CONCERNING THE DECEASED, JOHN JONES

TO THE HONORABLE JUDGE OF SAID COURT:

@3 seeks discovery of the arrest and conviction records and all evidence admissible under Rule 404(a)(2) of the Texas Rules of Evidence concerning the deceased, John Jones, and shows the following in support of this request:

I.

Evidence of the following admissible pursuant to Rule 609 of the Texas Rules of Evidence; the Sixth and Fourteenth Amendments to the United States Constitution; and, Article I, § 10 of the Texas Constitution:

1. final felony convictions;

2. felony convictions for which probation has not been satisfactorily completed;

3. final misdemeanor convictions involving moral turpitude;

4. misdemeanor convictions involving moral turpitude for which probation has not been successfully completed;

5. offenses pending between the date of this offense and trial, which might have a bearing on the witness's motive to testify, including juvenile cases, felonies and misdemeanor cases, convictions, probations or deferred adjudications. *See Davis v. Alaska*, 415 U.S. 308 (1974).

II.

Pursuant to Rule 404(a)(2) of the Texas Rules of Evidence, evidence of a pertinent character trait of the alleged victim of the crime offered by the accused is admissible. Any evidence that John Jones has been convicted of, or committed, any crime of violence is evidence of a pertinent character trait and therefore admissible under Rule 404(a)(2).

III.

Mr.@3a has no access to records of local law enforcement agencies, the Texas Crime Information Center and the National Crime Information Center, but the prosecutor does. Mr. @3a moves that this Court order the state to examine the records of its local law enforcement agencies, the Texas Crime Information Center, and the National Crime Information Center concerning the arrest and conviction records of Mr. Jones for evidence admissible under the above cited constitutional and statutory provisions, rules, and case law.

IV.

Defendant requests an evidentiary hearing at which he can establish that the records he requests exist and are in possession of the state and are otherwise discoverable. *See Smith v. State*, 721 S.W.2d 844, 851 (Tex. Crim. App. 1986); *Reed v. State*, 644 S.W.2d 494, 497-99 (Tex. App.–Corpus Christi 1982, pet. ref'd).

V.

If this Court overrules this motion for discovery, we request the Court to order the state to produce the arrest and conviction records for an *in camera* review, to determine their discover- ability. If the Court persists in not ordering discovery, we ask that the records be made a part of the appellate record in this case, if there is an appeal.

WHEREFORE, PREMISES CONSIDERED, Mr. @3a prays that this Honorable Court order the state to disclose the arrest and conviction records and all evidence admissible

under Rule 404(a)2) of the Texas Rules of Evidence concerning John Jones.

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 hereby certify that a copy of the Motion For Discovery Of The Arrest And Conviction Records And Evidence Admissible Under Rule 404(a)(2) Of The Texas Rules Of Evidence Concerning The Deceased, John Jones, has been delivered to the District Attorney's Office, 300 Dolorosa, San Antonio, TX 78205, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion for Discovery of the Arrest and Conviction Records and Evidence Admissible Under Rule 404(a)(2) of the Texas Rules of Evidence Concerning the Deceased, John Jones, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

REQUEST FOR NOTICE OF INTENT TO OFFER STATEMENTS ALLEGEDLY MADE BY DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves this Court to require the state to give written notice, at least 30 days prior to hearing his Motion to Suppress Written or Oral Statements of Defendant, of all statements allegedly made by Mr. @3a, that the state intends to offer at trial. For good cause, we show the following:

I.

Review of the discovery provided to date reveals several witnesses who say that Mr.@3a made statements to them about the evidence in this case. Some of these statements were electronically recorded and some were not. Some were made to persons who were obviously agents of the State of Texas; in other cases, the agency relationships are less clear. Some were likely the product of custodial interrogation. The admissibility of each statement will depend on the facts and circumstances under which they were made, if in fact they were made.

II.

A defendant is entitled to a hearing outside the presence of the jury on the admissibility of any confession he is alleged to have made. TEX. R. EVID. 104(c). A defendant is also entitled to a hearing outside the presence of the jury on the voluntariness

of any statements he allegedly made TEX. CODE CRIM. PROC. ANN 38.22 § 6; *Jackson v. Denno*, 378 U.S. 368 (1964).

III.

Mr. @3a requires timely notice of any statement he allegedly made that the state intends to offer against him at trial so that he can properly contest its admissibility.

IV.

Additionally, he requires timely notice to avoid unfair surprise, prohibited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of Article 1, §§ 13 and 19 of the Texas Constitution; and so that he can confront the witnesses against him and receive the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

V.

And, timely production of a true, complete, and accurate copy of all recordings of a defendant that the state contends are admissible under article 38.22 is required under section 3(a)(5) of that provision.

VI.

Finally, article 39.14 of the Texas Code of Criminal Procedure authorizes this Court to order the state to produce and permit the inspection and copying of any written statement of the defendant.

VII.

Mr. @3a requests the state to provide to the defense the following, at least 30 days before hearing his Motion to Suppress Written or Oral Statements of Defendant:

1. A true, complete, and accurate copy of all documents containing written statements of the defendant;

2. The substance of all oral statements allegedly made by the defendant that the state intends to offer at trial, as well as the persons to whom the statements were allegedly made, and the time and place they were allegedly made;

3. A true, complete, and accurate copy of all recordings of defendant that the state contends are admissible under article 38.22 of the Texas Code of Criminal Procedure.

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 hereby certify that a copy of Request For Notice of Intent To Offer Statements Allegedly Made by Defendant has been delivered to the Bexar County District Attorney's Office; Justice Center; 300 Dolorosa, San Antonio, Texas on the @4 day of @5, 2004.

MARK STEVENS

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@3 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR NOTICE OF STATE'S INTENTION TO USE EVIDENCE SUBJECT TO MOTION TO SUPPRESS

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves for notice of the state's intention to use evidence which may be subject to defendant's motion to suppress under the laws and constitutions of the Texas and United States. Defendant requests this information be made known to him sufficiently in advance of trial in order that he may file motions to suppress as may be necessary.

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 hereby certify that a copy of the above and foregoing Motion For Notice Of State's Intention To Use Evidence Subject To Motion To Suppress has been delivered to the Bexar County District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205 on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered Motion For Notice Of State's Intention To Use Evidence Subject To Motion To Suppress, and said Motion is hereby

(GRANTED) (DENIED).

ENTERED this _____day of _____, 2004.

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant @3, by and through his undersigned counsel, and respectfully moves this Honorable Court to suppress all evidence seized as a result of the arrest of defendant and the search of defendant's person, home, papers, effects, vehicles and real property and outbuildings situated thereon, as well as all statements, either written or oral, made after such arrest. In support, defendant shows the following:

I.

The arrest and search of defendant and the seizure of items, papers and effects from him was effected without valid warrant, or probable cause, or reasonable suspicion, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Chapter 14 of the Texas Code of Criminal Procedure.

II.

The search of his vehicle was illegal, since conducted without valid warrant, or probable cause, or reasonable suspicion, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution and Article 38.23 of the Texas Code of Criminal Procedure.

III.

The search of defendant's home, real property and outbuildings situated thereon was

illegal since it was conducted without valid warrant, probable cause, reasonable suspicion, or valid consent, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, and Article 38.23 of the Texas Code of Criminal Procedure.

IV.

All statements, either written or oral, made after the said seizure of defendant are fruits of the illegal arrest and search and are therefore inadmissible as fruits of the poisonous tree.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully moves this Honorable Court to set the matter for a pretrial hearing pursuant to article 28.01 of the Texas Code of Criminal Procedure, and, after hearing evidence, that the Court suppress all evidence seized as a result of the above described arrest and search and seizure, and any and all statements, either written or oral, made pursuant to or after the arrest of the defendant.

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 hereby certify that a copy of defendant's Motion To Suppress Evidence has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

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

(GRANTED) (DENIED)

_____

_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE NUMBER TWO

TO THE HONORABLE COURT:

@3 moves to suppress all evidence seized as a result of his arrest on June 6, 2000, and the ensuing search of his apartment, vehicle, person, papers, effects, and computer equipment, as well as all statements, both written and oral, made during and after such arrest and search. The defense requests an evidentiary hearing before the jury is selected in this case, at which time we will demonstrate that the evidence obtained in this case was obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, and articles 18.01(b), 18.01(c), 18.02(10) and 38.23 of the Texas Code of Criminal Procedure.

I.
Franks v. Delaware

A. The holding in Franks

A party who seeks relief under *Franks v. Delaware* must establish by a preponderance of the evidence that an agent of the government has intentionally or recklessly made a misstatement in the search warrant affidavit which is material to a finding of probable cause. If so, and if the remainder of the affidavit when the material misstatement is set aside is insufficient to establish probable cause, then the warrant is void and its fruits must be excluded from evidence. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Courts have

recognized that material *omissions* are "treated essentially similarly to claims of material *misstatements*." *United States v. Martin*, 615 F. 2d 318, 328 (5th Cir. 1980)(emphasis supplied). The so-called "good faith exception" does not apply if the warrant was issued in reliance on a deliberate or reckless material misstatement. *See United States v. Leon*, 468 U.S. 897, 923 (1984).

The *Franks* inquiry, then, involves three steps. First, the movant must prove by a preponderance of the evidence that material misstatements or omissions were in fact made. Second, the movant must prove, again by a preponderance of the evidence, that the affiant acted either intentionally or with reckless disregard for the truth. "The requisite intent may be inferred from an affidavit committing facts that are 'clearly critical' to a finding of probable cause." *United States v. Cronan*, 937 F. 2d 163, 165 (5th Cir. 1991). Third, if the movant succeeds on steps one and two, the court must determine whether, if the misstatements had not been made, or if the omissions had been included, the affidavit would still establish probable cause. If not, then the warrant is void, and the material seized must be suppressed.

B. The omissions and misstatements made in this case

A comparison of the affidavit in this case with the facts known at this time reveal several material omissions and misstatements.

1. The affiant makes specific reference to statements given by the complainant on May 10, 2000 in which she alleges that she had sexual intercourse with six different suspects between December 1999 and April 2000. [Affidavit, § 5(d)] The affiant failed to tell the magistrate, that before making this statement accusing six persons, the complainant had made at least three other false written statements to officers of the Selma Police Department.

    a. In the first statement, on April 20, 2000, the complainant reported that a stranger had abducted her in front of her home and used force to sexually assault her in December, 1999. Before

telling the police, she had told the same story to two of her friends, to her science teacher at school, and to her father and mother. Sometime while this report was being made, the police officer who interviewed the complainant concluded she was not being truthful and told her so. The complainant continued for a time to insist that she was telling the truth, but eventually admitted that she wanted to change her statement, and that in fact she had consensual sex with a boy she had met over the Internet. The officer advised her parents and they took her home that day.

b. Later the parents called back and told the police they wanted to pursue charges against the boy, and they were told to come back on April 25. Her second statement makes no mention of her earlier false accusation of forcible rape. Instead it tells the story of two consensual sexual encounters with a person she had met on the Internet, a male named "Mike."

c. On April 28, 2000 the complainant was brought in again for more information on "Mike." At this time another officer who interviewed her found her deceptive. When confronted, she made her third written statement, which mentioned sexual relationships with only two persons -- "Mike," and "Marc."

d. In her final written statement, made latter on April 28, the complainant claimed sexual relationships with four other individuals -- Efrain, Marques, Tim, and Mike.

It was the magistrate's duty in this case to make an independent determination whether probable cause existed to order the arrest of Mr. @3a and the seizure and search of his home and property. Here, there was no physical evidence to corroborate the complainant's claim that she had been sexually assaulted by Mr. @3a. No other witnesses were offered to the magistrate to corroborate her claim of sexual assault. Probable cause, therefore, would be based on the complainant's word alone. Where the credibility of the informant is so important, clearly it would have been crucial for the magistrate to know that the informant had repeatedly lied to law enforcement -- and others -- in the recent past on the same topic. The affiant's decision to withhold this information from the magistrate appears

intentional, and was at least a reckless omission of a fact material to probable cause. Had the magistrate known that the informant in this case had lied so often in the past about this subject, it is likely that she would not have relied on her information to issue the warrant.

2. The affiant stated in his affidavit that the complainant utilized a particular "chat room" with the Internet company "Yahoo," and that persons who use this chat room service must register and provide identifying information, which is stored at Yahoo. He also states in the affidavit that a search warrant was later executed on the Yahoo Company. [Affidavit, § 5(f)-(h)] The affiant failed to inform the magistrate, however, that this subsequent search warrant, which, among other things, specifically requested information about a name allegedly used by defendant @3a -- failed to reveal any evidence that linked Mr. @3a to the chat room. It is unlikely that the magistrate would have issued a warrant to search computer equipment had she known there was no evidence to corroborate the complainant's assertion that she and Mr. @3a had chatted on the Internet.

3. The affiant exaggerates his experience when he states in his affidavit that he "has participated in numerous investigations into a wide range of both state and federal criminal law violations, to include child pornography, sex crimes and crimes against children." [Affidavit, § 5(b)] In fact, he had only recently joined the Texas Attorney General's Office, having spent the great bulk of his career with the Marion Police Department. The affiant says that his "training and experience has shown that computers sometimes retain e-mail, chats and other bits of evidence for long periods after they are used." [Affidavit, § 5(u)] The affiant does not detail what his experience and training in this area is. Counsel believes that had the affiant informed the magistrate of his limited experience with computer crimes, it is unlikely that she would have authorized the search of Mr. @3a's apartment and computer equipment.

II.
The Statements, Written and Oral

The warrant executed by agents of the state of Texas on June 6, 2000, authorized the arrest of the defendant and the search of his person, home, vehicle and effects. In this motion we have detailed how the warrant and affidavit were illegal. All fruits of this illegal warrant

and affidavit were illegally obtained and are therefore inadmissible in evidence. These illegal fruits include not only the physical, documentary and computer evidence obtained, but also any oral and written statements that defendant made to agents of the state during and after the arrest and search complained of.

Defendant respectfully moves this Honorable Court to set the matter for a pretrial hearing pursuant to article 28.01 of the Texas Code of Criminal Procedure, and, after hearing evidence, that the Court suppress all evidence seized as a result of the above described arrest and search and seizure, and any and all statements, either written or oral, made pursuant to or after the arrest of the defendant.

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 hereby certify that a copy of defendant's Motion To Suppress Evidence has been delivered to the District Attorney's Office; Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

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

(GRANTED) (DENIED)

_____

_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE COUNTY COURT
VS.	)	AT LAW NUMBER @2
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SUPPRESS BREATH TEST RESULTS AND ANY TESTIMONY CONCERNING BREATH TEST RESULTS

TO THE HONORABLE JUDGE OF SAID COURT:

@3 moves to suppress the breath test results obtained in this case and any testimony concerning those results, for the following reasons.

I.

"Retrograde extrapolation is the computation back in time of the blood-alcohol level -- that is, the estimation of the level at the time of driving based on a test result from some later time." *Mata v. State*, 46 S.W. 3d 902, 908-909 (Tex. Crim. App. 2002).

A state's "expert" witness may not use the process of retrograde extrapolation unless the prosecution bears the burden of establishing the reliability and relevance of that process by clear and convincing evidence. Defendant submits that the state will be unable to meet that burden in this case considering, among other things: the lack of clarity with which the breath test technical supervisor will be able to explain the science of retrograde extrapolation; the fact that there was only a single test of defendant's breath, which was taken well after the alleged offense; and, that the breath test technical supervisor is unaware of enough personal characteristics of defendant. Accordingly, it would be an abuse of discretion under Rules 702, 401, 402 and 403 for this Court to allow the state to rely upon retrograde extrapolation. *See Mata v. State,* 46 S.W. 3d at 917.

II.

When the state relies on the statutory definition of intoxication, proof normally comes in the form of a test showing alcohol concentration near the time of the offense.

> However, a conviction will not necessarily follow from the offer of such a test. First, the trier of fact must still be convinced beyond a reasonable doubt that the chemical test provides trustworthy evidence of alcohol concentration in a defendant's breath, blood or urine. Second, the jury must still be convinced beyond a reasonable doubt that an inference can be made from the results of the chemical test that the defendant had a 0.10 % alcohol concentration in his body *at the time of the offense.*

Forte v. State, 707 S.W. 2d 89, 94-95 (Tex. Crim. App. 1986)(emphasis in original).

Without reliable retrograde extrapolation, there is no way for the state to meet its burden of proving beyond a reasonable doubt the second prong of the *Forte* test -- that an inference can be made from the results of the breath test that the defendant had an alcohol concentration of 0.01 or more "*at the time of the offense.*" *Forte v. State*, 707 S.W. 2d at 94-95. Since reliable retrograde extrapolation is the linchpin to a valid inference of breath concentration at the time of the offense, and since the breath test technical supervisor's testimony concerning retrograde extrapolation is unreliable and therefore inadmissible in this case, any testimony concerning the defendant's breath test results at all would be unhelpful to the jury, and therefore must be excluded under Rule 702 of the Texas Rules of Evidence. Additionally, absent extrapolation testimony, any testimony about breath test results would be substantially more prejudicial than probative, and would unfairly confuse the issues and mislead the jury, in violation of Rule 403 of the Texas Rules of Evidence. *E.g., Reese v. State*, 33 S.W. 3d 238, 240 (Tex. Crim. App. 2000); *Saenz v. State*, 843 S.W. 2d 24, 28 (Tex. Crim. App. 1992); *Montgomery v. State*, 810 S.W. 2d 372, 397 (Tex. Crim. App. 1990).

III.

The proponent of breath test results must establish the predicate, which includes,

among other things, "proof of the result of the test by a witness or witnesses qualified to translate and interpret such result so as to eliminate hearsay." *Harrell v. State*, 725 S.W.2d 208, 209 (Tex. Crim. App. 1986). In this case, then, the state must be precluded from offering the breath test results, not only through the breath test technical supervisor, but also from any other witness unqualified to interpret the results so as to eliminate hearsay.

WHEREFORE, PREMISES CONSIDERED, defendant moves that this Court suppress these breath test results and any testimony concerning the breath test results.

Respectfully Submitted:

MARK STEVENS
1505 Tower Life Building
310 S. St Mary's
San Antonio, Texas 78205
(210) 226-1433
State Bar No. 01720800

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Suppress Breath Test Results and Any Testimony Concerning Breath Test Results has been delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 29th day of March, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered defendant's Motion to Suppress Breath Test Results and Any Testimony Concerning Breath Test Results, and said Motion is hereby

(GRANTED) (DENIED).

_____
PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR A SEPARATE HEARING ON ENTRAPMENT AS A MATTER OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant in the above styled and numbered cause, and moves the Court to conduct a hearing outside the jury's presence in order to determine as a matter of law whether the defendant was entrapped into commission of the offense, and, for good cause shows the following:

I.

Defendant's involvement in the conduct charged was induced by law enforcement agents using persuasion and other means likely to cause him to commit the offense.

II.

The facts of this case will reveal entrapment as a matter of law.

III.

Article 28.01 § 1(9), specifically provides for a pre-trial hearing on the issue of entrapment.

WHEREFORE, premises considered, defendant prays that the Court conduct a hearing to determine whether, as a matter of law, the defendant was entrapped and, upon such a finding, that the Court dismiss the case or acquit the defendant; should the Court determine

the Defendant was not entrapped as a matter of law, the Court should submit the entrapment defense to the jury as a fact question.

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 hereby certify that a copy of defendant's Motion For A Separate Hearing On Entrapment As A Matter Of Law has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came to be considered defendant's Motion for Separate Hearing on Entrapment, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR IDENTIFICATION
HEARING OUT OF PRESENCE OF JURY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant, in the above styled and numbered cause, and moves for an identification hearing outside the presence of the jury, prior to commencement of trial, and for good cause shows the following:

I.

Defendant expects that the state will rely upon one or more witnesses who will claim to identify defendant as the actor in this case.

II.

A hearing should be held, outside the presence of the jury and prior to commencement of trial, to determine whether:

1. Defendant was exhibited to the identification witness in a lineup after his right to counsel attached, in violation of the Sixth and Fourteenth Amendments to the United States Constitution; Article I, § 10 of the Texas Constitution; and articles 1.05 and 1.051 of the Texas Code of Criminal Procedure;

2. Defendant's identification was the fruit of an illegal arrest, search or seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution; Article I, § 9 of the Texas Constitution; and articles 1.06, 38.23 and chapter 14 of the Texas Code of Criminal Procedure.

3. Defendant's identification, under the totality of circumstances, was so unreliable and unnecessarily suggestive as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and due course of law, guaranteed by Article I, §§ 13 and 19 of the Texas Constitution. This, in turn, requires the Court to consider the witness's opportunity to view, degree of attention, accuracy of description, level of certainty, and the time between the trial and the confrontation. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

4. Any other constitutional bases exist which would require suppression of the identification evidence in this case.

III.

Defendant is entitled to an identification hearing under Texas law. *See Martinez v. State*, 437 S.W.2d 842, 848 (Tex. Crim. App. 1969); *accord Franklin v. State*, 606 S.W.2d 818, 852 (Tex. Crim. App. 1979); *see also* Tex. R. Crim. Evid. 104(c).

IV.

If this hearing discloses that the identification procedures employed in this case were unconstitutional, defendant moves to suppress the associated identification testimony, outside the presence and hearing of the jury, and requests that these objections be deemed to apply if the evidence is admitted before the jury, without the necessity of repeating those objections. *See* Tex. R. App. Proc. 52(b).

V.

Defendant requests that this Court make written findings of fact and conclusions of law regarding the admissibility of identification testimony in this case.

WHEREFORE, PREMISES CONSIDERED, defendant moves for a hearing on the admissibility of identification testimony in this case, before trial and outside the presence of

the jury, and, if this hearing discloses any unconstitutional or illegal identification procedures, defendant moves to suppress the resulting identification testimony.

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 hereby certify that a copy of defendant's Motion For Identification Hearing Out Of Presence Of Jury has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came to be considered defendant's Motion for Identification Hearing Out of Presence of Jury, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO SEVER DEFENDANTS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes, @3, defendant in the above cause, and moves the Court to sever the trial on his indictment from the trial on the indictment against co-defendant, John Jones, and for good cause shows the following:

I.

There is a previous admissible conviction against the co-defendant John Jones, and there is no previous admissible conviction against defendant, @3.

II.

A joint trial would be prejudicial to this defendant because the co-defendant has made written and oral statements incriminating defendant. If defendant and co-defendant are jointly tried, and if co-defendant's statements are admitted into evidence, and if co-defendant does not testify, defendant will be denied his rights of confrontation and cross-examination, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Article I, § 10 of the Texas Constitution, and article 1.05 of the Texas Code of Criminal Procedure. *See Bruton v. United States*, 391 U.S. 123 (1968).

WHEREFORE, PREMISES CONSIDERED, defendant prays that the trial of the indictment against him be severed from the trial of the indictment against co-defendant John Jones.

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 To Sever Defendants was delivered to the Bexar County District Attorney's Office, Justice Center, 300 Dolorosa, San Antonio, Texas on the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of_____, 2004, came to be considered Motion to Sever Defendants, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANTS' AGREEMENT AS TO ORDER OF TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes, @3, defendant and co-defendant John Jones, through their undersigned counsel, and hereby agree that, pursuant to Article 36.10 of the Texas Code of Criminal Procedure, if the motion to sever filed by defendant is granted, the co-defendant John Jones will be tried first, and for good cause show the following:

I.

If the cases are severed, and defendant is tried first, co-defendant will invoke his constitutional privilege not to testify in behalf of defendant. This will deprive defendant of his rights to compulsory process, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Article I, § 10 of the Texas Constitution, as well as his rights to due process and due course of law, guaranteed by the Texas and United States Constitutions. If co-defendant is tried first, on the other hand, the privilege against self-incrimination will be no impediment to his testifying in behalf of defendant.

II.

Article 36.10 of the Texas Code of Criminal Procedure permits the defendants to agree on the order of trial. This document is evidence of that agreement.

WHEREFORE, PREMISES CONSIDERED, defendants pray that this motion of Defendants' Agreement As to Order of Trial be granted.

Respectfully submitted:

NAME	MARK STEVENS
Address	310 S. St. Mary's Street
City/State	Tower Life Building, Suite 1505
Phone Number	San Antonio, TX 78205-3192
State Bar Number	(210) 226-1433
	State Bar No. 19184200
Attorney for Defendant	Attorney for Defendant

CO-DEFENDANT DEFENDANT

CERTIFICATE OF SERVICE

I certify that a copy of Defendants' Agreement As to Order of Trial was delivered to the Bexar County District Attorney's Office, Justice Center, 300 Dolorosa, San Antonio, Texas on the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of_____, 2004, came to be considered Defendants' Agreement As to Order Of Trial, and said motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

REQUEST FOR NOTICE OF ORDER OF TRIALS

TO THE HONORABLE JUDGE OF SAID COURT:

@3 has been indicted in three different indictments, each of which charge multiple crimes. Under § 3.04 of the Texas Penal Code he has an absolute right to separate trials on these indictments. He requests separate trials and also that the state notify him which case the state intends to try first, at least 30 days before trial is to commence.

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 hereby certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to Bexar County District attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO EXTEND TIME FOR DEFENSE SUMMATION

@3 objects to the time limitation set by the court for defense summation and requests additional time for the following reasons:

I.

Defendant is charged with the offense of capital murder. Twenty-five witnesses testified over five full days in court. There were a number of conflicts in the testimony and the offense is both serious and the case complex. The indictment alleges eleven different ways Mr. @4 could be guilty of this offense, and the jury charge submits two lesser included offenses, and includes instructions on the law of parties and the voluntariness of Mr. @4's written statement.

II.

The defense intends to argue a number of legal theories and factual conflicts that will be provided to this Court *ex parte*, so as not to prematurely and unnecessarily divulge its strategy to the state.

III.

The court has determined that each party shall be allotted 20 minutes to deliver summations in this case.

IV.

In *Dang v. State*, 2005 WL 156721 (Tex. Crim. App. 2005), the Texas Court of Criminal Appeals reversed a capital murder conviction finding that the trial court had abused its discretion in limiting the defense to 20 minutes to argue. In doing so, the Court set out the following seven non-exclusive factors to consider: (1) the quantity of the evidence; (2) the duration of the trial; (3) conflicts in the testimony; (4) the seriousness of the offense; (5) the complexity of the case; (6) whether counsel used the time allotted efficiently; and, (7) whether counsel set out what issues were not discussed because of the time limitation. *Id*. at *5. When these factors are considered in Mr. @4's case it is clear that 20 minutes is not enough time to argue.

V.

A proper argument in this case requires a minimum of 40 minutes, and the defense requests at least this amount of time. This Court will abuse its discretion if it restricts the defense to a 20 minute summation.

VI.

Additionally, restricting the defense to 20 minutes will deny Mr. @4 the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. *See Dang v. State*, 2005 WL 156721 *6-7 (Tex. Crim. App. 2005)(J. Meyers, concurring, joined by Holcomb & Cochran, JJ.); *see also Herring v. New York*, 422 U.S. 853 (1975).

WHEREFORE, PREMISES CONSIDERED, Mr. @4 prays that the court grant this motion and allow the defense additional time to make its summation.

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 hereby certify that a copy of defendant's Motion To Extend Time For Defense Summation has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @5 day of @6, 2004.

MARK STEVENS

ORDER

On this the ___ day of _____, 2004, came to be considered defendant's Motion to Extend Time For Defense Summation, and said motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION FOR MODIFICATION OF CONDITIONS OF COMMUNITY SUPERVISION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant in the above styled and numbered cause, and files this Defendant's Motion For Modification Of Conditions Of Community Supervision pursuant to article 42.12 § 10 of the Texas Code of Criminal Procedure, and for good cause shows:

I.

On July 21, 1999, Mr. @3a plead nolo contendere to manslaughter, on July 21, 1999 he was sentenced to eight years deferred adjudication, a $2,500.00 fine, and 180 days jail time as a condition of community supervision.

II.

Mr. @3a has now served more than 60 days of the 180 days imposed as a condition of community supervision. By this motion, he respectfully requests that this Court modify his conditions of community supervision by reducing the period of confinement to 90 days, with the remaining 90 days to be served under house arrest with an electronic monitor. This request is based on the following reasons:

1. Mr. @3a has never before been convicted of a crime in this or any other state.

2. The crime for which Mr. @3a was convicted--manslaughter--is undeniably a serious one having tragic consequences in his case. Nonetheless, the crime was not intentionally or knowingly committed, bu rather it was a reckless one. This less serious culpable mental state, from a defendant who has never been convicted of a crime, militates in favor of a more lenient sentence.

3. Although neither Mr. @3a's counsel nor the state attempted to bind this Court's imposition of confinement as a condition of community supervision, the State of Texas did make the nonbinding recommendation of 90 days. Although this recommendation was nonbinding, the fact that it was made by an experienced prosecutor is a persuasive indicator of its appropriateness.

4. Mr. @3a was gainfully employed by Mr. Bob Brown of Guadalupe County, and he believes that he can gain re-employment upon his release from jail.

5. Mr. @3a has not had an alcoholic beverage in more than 60 days. Should this Court believe that he had a drinking problem prior to his incarceration, in light of this lengthy period of detoxification, he is now an excellent candidate for alcohol treatment and/or counseling outside of jail, as a condition of community supervision.

WHEREFORE PREMISES CONSIDERED, defendant moves that this Court reconsider its imposition of 180 days in the Bexar County Jail as a condition of community supervision and impose instead 90 days confinement, to be followed by 90 days electronic monitoring.

Respectfully submitted:

_____

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion For Modification Of Conditions Of Community Supervision has been delivered to the District Attorney's Office; 300 Dolorosa, San Antonio, Texas 78205, on this the @4 day of March, 2004.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered Defendant's Motion For Modification Of Conditions Of Community Supervision, and said motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

OBJECTION TO INADMISSIBLE VICTIM IMPACT EVIDENCE

TO THE HONORABLE COURT:

Defendant objects, pursuant to Rules 103(a)(1), 403, 701 and 702 of the Texas Rules of Evidence, to the admission of further victim impact evidence in this case, for the following reasons.

1. Evidence "of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" are inadmissible as victim impact evidence. *Booth v. Maryland*, 482 U.S. 496, 502 (1987); *Payne v. Tennessee*, 501 U.S. 808, 830 n. 2 (1991); *see also Tong v. State*, 25 S.W. 3d 707, 714 (Tex. Crim. App. 2000); *Penry v. State*, 903 S.W. 2d 715, 752 (Tex. Crim. App. 1995).

2. "When the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony." *Mosley v. State*, 983 S.W. 2d 249, 262 (Tex. Crim. App. 1998).

3. Victim impact evidence "may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403." *Mosley v. State*, 983 S.W. 2d 249, 263 (Tex. Crim. App. 1998).

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 hereby certify that a copy of defendant's Objection To Inadmissible Victim Impact Evidence has been delivered to the Bexar County District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came on to be considered defendant's Objection To Inadmissible Victim Impact Evidence, and said Motion is hereby (GRANTED) (DENIED).

_____
_____PRESIDING JUDGE

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

@3 files this Motion for New Trial pursuant to Rule 21 of the Texas Rules of Appellate Procedure, and in support thereof shows the following:

I.

Sentence was imposed on June 19, 2002. This motion for new trial is therefore due on or before July 19, 2002.

II.

The Court erred when it denied defendant's motion to quash the information which complained, among other things, that the information failed to allege the manner and means by which defendant was to have caused damage to the property.

III.

The Court erred when it denied defendant's motion to quash the information which complained, among other things, that the information failed to with sufficient particularity any act on the part of the defendant which caused damage to the property.

IV.

The verdict was contrary to the law and evidence.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court grant her Motion for New Trial.

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 hereby certify that a copy of defendant's Motion for New Trial has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on @4 day of @5, 2004.

MARK STEVENS

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARK STEVENS, who after being duly sworn stated:

> I am the attorney for the defendant in the above entitled and numbered cause. I have read the foregoing Motion for New Trial and swear that all of the allegations of fact contained therein are true and correct.

_____
MARK STEVENS

SUBSCRIBED AND SWORN TO BEFORE ME on the @4 day of @5, 2004.

_____
Notary Public in and for
Bexar County, Texas

My commission expires: _____

CERTIFICATE OF PRESENTATION

I certify that I am counsel for defendant in this case and that I presented this motion to the trial court on _____, within 10 days after filing it.

_____
MARK STEVENS

ORDER SETTING HEARING DATE

IT IS ORDERED that this motion having been presented to the trial court within ten days of its filing, the hearing on the Motion for New Trial is hereby set for _____, __.m., on the ____ day of _____, 2004, in the courtroom of County Court at Law Number Six of Bexar County, Texas.

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

FIAT

On this the _____ day of _____ , 2004, came on to be considered the Motion for New Trial, and said matter is hereby set for a hearing on the ___ day of _____, 2004, at _____ o'clock, ____.m., in the courtroom of County Court at Law Number Six of Bexar County, Texas.

SIGNED on the date set forth above.

_____

_____ JUDGE PRESIDING

ORDER FOR NEW TRIAL

On this the _____day of _____, 2004, came to be heard defendant's Motion for New Trial, and it is hereby

(GRANTED) (DENIED)

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO STAY COMMENCEMENT OF TERMS OF COMMUNITY SERVICE PENDING ISSUANCE OF APPELLATE MANDATE

TO THE HONORABLE JUDGE OF SAID COURT:

@3 respectfully moves this Honorable Court to stay the commencement of each of the terms of community service until, and only if, this conviction is affirmed by the Texas Appellate Courts, and their mandates issue, making said convictions final. In support thereof, defendant shows the following:

I.

Defendant was sentenced by the court to a term of community service and assessed a fine on June 19, 2002. Various conditions of community service were imposed.

II.

Defendant will file a motion for new trial in this case within 30 days from June 19, 2002. Should this motion be overruled, defendant will perfect an appeal to the Court of Appeals.

III.

"Where an appeal is taken, the terms of [community service] do not commence until the mandate of this Court is issued." *DeLorme v. State*, 488 S.W.2d 808, 810 (Tex. Crim. App. 1973); *accord, Smith v. State*, 478 S.W.2d 518, 520 (Tex. Crim. App. 1972).

IV.

In light of this case law, defendant desires not to commence the terms of community service until, if ever this conviction is affirmed by the appellate courts and their mandates issue.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court stay the commencement of each of the terms of community service until the conviction is affirmed by the appellate courts of the State of Texas.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion to Stay Commencement of Terms of Community Service Pending Issuance of Appellate Mandate has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion to Stay Commencement of Terms of Community Service Pending Issuance of Appellate Mandate, and said motion is hereby

(GRANTED) (DENIED)

_____

_____JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION TO DISMISS
MOTION TO REVOKE PROBATION

TO THE HONORABLE COURT:

@3 moves to dismiss the motion to revoke filed against him on July 30, 2002, and for good cause shows the following:

I.

Defendant was convicted of criminal mischief on June 19, 2002and placed on probation on that date.

II.

On July 19, 2002, defendant timely filed a motion for new trial in her case.

III.

On July 30, 2002, the State of Texas filed a motion to revoke defendant's probation alleging that, on July 29, 2002, defendant failed to submit to urinalysis as directed by the court, in violation of condition number two. At the time of the alleged violation, defendant's motion for new trial had not been overruled, either in fact or by operation of law.

IV.

> When a valid appeal is taken from a criminal conviction assessing a probated sentence, the terms of community supervision do not commence until the mandate from the appellate court effecting final disposition of the appeal is issued. If there is no appeal from a conviction, the terms and conditions of community supervision commence when a motion for new trial is overruled.

McConnell v. State, 34 S.W. 3d 27, 30 (Tex. App.--Tyler 2000, no pet.)(citations omitted).

V.

As *McConnell* holds, the terms and conditions of community supervision commence when the motion for new trial is overruled. Defendant's motion for new trial was still pending at the time that the alleged violation occurred. Because the alleged violation occurred before the terms and conditions of community supervision had commenced, that alleged violation may not serve as a basis for revocation. *See Littlefield v. State*, 586 S.W. 2d 534, 535 (Tex. Crim. App. 1979)("clear that any offense committed by appellant . . . committed before his term of probation began cannot serve as the basis for revocation of his probation").

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 do hereby certify that a true and correct copy of the above and foregoing Request has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004 came to be considered Defendant's Motion to Dismiss Motion to Revoke Probation, and said Motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@3 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, @3, and moves this Court to appoint an attorney to prosecute his appeal, as provided by article 1.051(d)(1) of the Texas Code of Criminal Procedure, and for good cause, shows the following:

I.

Defendant was convicted of @6 on @7. Defendant was sentenced on @8.

II.

Defendant filed a motion for new trial and has given written notice of appeal.

III.

Defendant cannot afford to retain an attorney to prosecute his appeal. Defendant has attached an affidavit which demonstrates his financial situation.

IV.

Defendant requests an evidentiary hearing at which time proof of his inability to retain appellate counsel can be offered.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Honorable Court grant this motion for Appointment of Counsel on Appeal.

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 do hereby certify that a copy of the above and foregoing Defendant's Motion For Appointment Of Counsel On Appeal has been delivered to the District Attorney's Office, 300 Dolorosa, San Antonio, Texas 78205, on the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004 came to be considered Defendant's Motion For Appointment Of Counsel On Appeal, and said Motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION THAT APPELLATE RECORD BE FURNISHED WITHOUT CHARGE

TO THE CLERK OF SAID COURT:

@3 respectfully moves that this Court have the appellate record in this case furnished without charge, pursuant to Rule 20.2 of the Texas Rules of Appellate Procedure. and for good cause shows the following:

I.

Mr. @3a pleaded guilty to aggravated robbery and was placed on deferred adjudication probation on June 29, 1995. A Motion to Enter Adjudication of Guilt was filed and @3a was arrested on March 23, 2004. A hearing was held on this motion on July 13, 2004, an adjudication of guilt was entered, Mr. @3a was revoked, and he was sentenced to 20 years imprisonment.

II.

Mr. @3a gave written notice of appeal from this judgment on July 22, 2004. At the same time, he designated certain matters to be included in the reporter's and clerk's records.

III.

Mr. @3a is unable to pay for or give security for the appellate record in this cause. Mr. @3a's affidavit, which details his financial condition, is attached to this motion.

IV.

Mr. @3a requests an evidentiary hearing at which time proof of inability to pay or give security for this appellate record can be offered.

WHEREFORE, PREMISES CONSIDERED, @3 prays that this Court grant this Motion That Appellate Record Be Furnished Without Charge.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion That Appellate Record Be Furnished Without Charge has been delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

ORDER

On this the _____ day of _____, 2004 came to be considered Defendant's Motion That Appellate Record Be Furnished Without Charge, and said Motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared @3, who after being duly sworn stated:

> My name is @3. I am the defendant in cause numbers 1994-CR-0000 I was convicted of aggravated robbery on July13, 2004. Until my arrest on March 23, 2004, I worked as a personnel manager for WalMart in San Antonio, Texas. At that time I made approximately $800.00 a month. I am no longer employed by Wal Mart or anyone else and am incarcerated in jail. I have no income whatsoever at the present time.
>
> I have no savings account or checking account. I own one or two shares of Wal Mart stock valued at approximately $100.00 total. I have less than $50.00 in my inmate trust fund (commissary). Other than that, I have no cash at all.
>
> I own one vehicle, a 2001 Expedition. My cousin loaned me $20,000.00 to purchase this vehicle in April, 2003, and I have repaid her approximately $2,000.00. I still owe her about $18,000.00 and since I have no way of repaying this, it is my plan to sign the title over to her.
>
> My father lives in a single family dwelling at 1445 Alamo St., San Antonio, Texas 78201. When my mother died I acquired a one-sixth interest in 50% of this home. This is my father's homestead and his only residence, so I could not sell it to obtain money for this appeal. I own no other real estate.
>
> The only other property I own is a television and DVD player, and my clothing. The total value of this property is less than $750.00.
>
> I own no other property, real or personal. I am unemployed and in jail and have no way to borrow money to pay a lawyer to handle my appeal, or to pay the court reporter for the appellate record. My family paid my lawyer before, but they are unable to loan me enough money to pay my lawyers to handle the appeal and the court reporter for the appellate record. In addition to other debts I have, I owe $4,000.00 in fines and more than $12,000.00 to my family for help they recently provided.
>
> I want to appeal my cases but unless the court furnishes the appellate record without charge, I will be unable to pursue this appeal.

I am unable to pay for or give security for the appellate record in this appeal.

I have read the foregoing Motion That Appellate Record Be Furnished Without Charge and swear that all of the allegations of fact contained therein are true and correct.

_____

@3

SUBSCRIBED AND SWORN TO BEFORE ME on the @3 day of @4, 2004.

_____

Notary Public in and for
Bexar County, Texas

My commission expires: _____

NO. @1

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	@2 JUDICIAL DISTRICT
@3	)	BEXAR COUNTY, TEXAS

MOTION FOR REASONABLE BAIL PENDING APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes @3, defendant in the above styled and numbered cause, and moves this Court to set bail in a reasonable amount pending appeal, pursuant to Tex. Code Crim. Proc. Ann. art. 44.04, and shows the following in support.

I.

Defendant was convicted of three counts of robbery on September 23, 1997, was sentenced to twelve years imprisonment. Notice of Appeal was filed on October 13, 1997.

II.

Tex. Code Crim. Proc. Ann. art. 44.04 (c) provides, in pertinent part:

> Pending the appeal from any felony conviction . . . (where the punishment does not exceed 15 years confinement), the trial court may deny bail and commit the defendant to custody if there then exists good cause to believe that the defendant would not appear when his conviction became final or is likely to commit another offense while on bail, permit the defendant to remain at large on the existing bail, or, if not then on bail, admit him to reasonable bail until his conviction becomes final. The court may impose reasonable conditions on bail pending the finality of his conviction. On a finding by the court on a preponderance of the evidence of a violation of a condition, the court may revoke the bail.

III.

Defendant's punishment does not exceed 15 years. There is no cause to believe he will not appear should his conviction become final, and there is no cause to believe he will likely commit another offense while on bail. Accordingly, he is eligible for bail pending

appeal under article 44.04(c). Specifically, defendant is 84 years old and, prior to this conviction, had never before been convicted of a felony. Defendant was released from jail on bond prior to his conviction on or about August 13, 1996. Certain conditions, including electronic monitoring and no-contact orders, were imposed. These conditions were sufficient then to insure, both that defendant would appear for trial, and that he would not pose a danger to society. Those conditions would be sufficient to insure appearance and safety pending appeal.

IV.

Defendant requests he be admitted to reasonable bail, in the amount of no more than $20,000.00, until his conviction becomes final.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court set this matter for an evidentiary hearing and, after hearing evidence, that this Court set reasonable bail pending disposition of his appeal.

Respectfully submitted:

MARK STEVENS
State Bar No. 19184200
310 S. St. Mary's Street, Suite 1505
San Antonio, TX 78204
(210) 226-1433

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion For Reasonable Bail Pending Appeal has been delivered to the District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the @4 day of @5, 2004.

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion For Reasonable Bail Pending Appeal, and said motion is hereby

(GRANTED) (DENIED)

Bail is therefore set in the amount of _____until defendant's conviction becomes final.

_____

_____JUDGE PRESIDING

NO. @1

@3	)	IN THE COURT OF APPEALS
VS.	)	FOR THE THIRD
THE STATE OF TEXAS	)	DISTRICT OF TEXAS

MOTION FOR REASONABLE BAIL PENDING FINAL DETERMINATION OF APPEAL

TO THE HONORABLE JUSTICES OF SAID COURT:

Now comes @3, appellant in the above styled and numbered cause, and moves this Court of Appeals to set bail in a reasonable amount pending final determination of this appeal, pursuant to TEX. CODE CRIM. PROC. ANN. art. 44.04(h), and in support thereof shows the following:

I.
The Law

TEX. CODE CRIM. PROC. ANN. art. 44.04(h) provides, in pertinent part:

> If a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, regardless of the length of term of imprisonment, pending final determination of an appeal by the state or the defendant on a motion for discretionary review. If the defendant requests bail before a petition for discretionary review has been filed, the Court of Appeals shall determine the amount of bail.
>
> * * *
>
> The defendant's right to release under this subsection attaches immediately on the issuance of the Court of Appeals' final ruling as defined by Tex. Cr. App. R. 209(c).

II.
@3a's Convictions Were Reversed

On December 12, 2002, this Court reversed @3a's conviction under count I of

the indictment and ordered the prosecution dismissed. @3a's remaining convictions, under counts II - V of the indictment, were reversed and remanded for judgments of acquittal. *See Jones v. State*,___ S.W.3d ___, No. 02-01-00000-CR (Tex. App.--Austin, delivered December 12, 2002)(not yet published). Since neither party has yet filed a petition for discretionary review, article 44.04(h) requires that this Court "shall determine the amount of bail." This provision makes it clear that @3a is absolutely entitled to reasonable bail. Then, once bail has been set in a reasonable amount, as soon as this Court's final ruling issues, @3a's right to actual release attaches. TEX. CODE CRIM. PROC. ANN. art. 44.04(h).

III.
The Guidelines For Bail Pending Appeal

The Texas Code of Criminal Procedure, and case law from appellate courts in Texas, provide guidelines which inform this Court's decision as to what constitutes reasonable bail. When determining what bail is reasonable, the following are to be considered: appellant's ties to the community; appellant's employment record; appellant's previous compliance with bonds set in his case; appellant's prior criminal history; the nature of appellant's offense; and, appellant's financial status and ability to post bail. A discussion of these factors as they apply in this case follows. As factual support for this motion, we have attached Exhibits A, B, and C, which are declarations and affidavits from Marvin Jones, Mary Jones, and Elaine Ellen.

IV.
Ties To The Community

Marvin Jones is 41 years old. He was born in Seguin, Texas in 1961, and has been a resident of Texas his entire life. His father is deceased and his mother, Mary Jones, a retired school teacher, still lives in Seguin. @3a has three brothers. If @3a is released on bond, Ms. Jones has offered to provide a residence for him during the term of his release.

@3a was married for 16 years to Julia Jones. They divorced in September, 2000,

shortly after the indictment in this case was returned. Despite the divorce, @3a and his former wife remain good friends. They have two children, Marvin Jones, age 18 and Bryan Jones, age 13, who live in Austin, Texas, with their mother.

@3a's strong family ties to Texas militate in favor of bond pending appeal.

V.
Education and Employment Record

@3a graduated from Seguin High School in 1979, and obtained a Bachelor of Business Administration in Marketing from University of Texas at San Antonio in 1985. Since graduating from college, and prior to his imprisonment, @3a was continuously employed in sales, for various companies. At the time of his arrest he was employed as a sales manager for Silver Spurs in San Antonio, Texas, where he had worked for approximately three and a half years. Adam Bell, has offered to employ @3a at his former job immediately, if he is released on bond. Frank Sharp owns a carpet cleaning business in Canyon Lake, and has offered to employ @3a immediately if he is released on bond.

@3a's employment record since graduating from college militates in favor of reasonable bail. It is also significant that he has been offered employment should he be released on bond.

VI.
Previous Compliance With Bonds

@3a was first indicted in connection with this case in July, 1999. Shortly after his arrest he was released on a $100,000.00 bond, and he remained free on this bond until his trial more than two years later, in August, 2001. During this time, @3a was required to appear numerous times in court. He appeared each and every time he was required to and never forfeited bond.

Based on @3a's history, it can be seen that he is a reliable individual, who has always

appeared in court when required to do so. His record of compliance with his bond when first tried militates in favor of his release pending disposition of this appeal.

VII.
Prior Criminal History

Prior to being indicted on the instant offense, @3a had no criminal record. This factor militates in favor of release on reasonable bond.

VIII.
The Nature Of The Offense

Unquestionably, aggravated robbery is a serious offense. Nevertheless, appellant has always maintained his innocence, and has always been ready to appear in court to contest the state's case against him. The indictment in effect just before trial commenced alleged four first degree felony offenses and four second degree felony offenses. Despite the fact that conviction on any of the first degree felony counts provided for a sentence of up to life imprisonment, @3a dutifully appeared at each court appearance to face the charges against him. Just prior to commencement of voir dire, the state dismissed three of the first degree felony charges, and during trial, it conceded that the only remaining first degree felony charge was in fact, at most, a second degree felony. On appeal, this Court held that the evidence was legally insufficient to prove the four aggravated robbery counts, and that the conviction on the only remaining count in the indictment was improper and had to be dismissed. It is significant that the state's case against @3a has shrunk from eight offenses, including four first degree felonies, to a single second degree felony, and this should be considered by this Court in determining bond.

IX.
Financial Status and Ability To Post Bail

@3a himself is now virtually indigent, as might be expected of a man who has spent the last year and a half in prison. He has a single bank account which contains approximately

$1,700.00. His prison commissary account contains less than $100.00. He has a 401(k) retirement account which contains less than $3300.00. He owns an old motorcycle which is valued at no more than $1,500.00. These are his only assets. @3a's mother paid the cost of the appeal, and will contribute whatever she can to securing his release on bail pending retrial. Her financial condition is not strong, however. We request that this Court set bail considering @3a's personal financial condition. *Abdnor v. State*, 712 S.W. 2d 136, 142 (Tex. Crim. App. 1986).

X.
Reasonable Bail

When last tried, @3a carefully complied with all conditions of his bond, and appeared in court when required, because he was anxious to defend himself against the charges. If released on bail pending appeal, @3a commits that he will appear when required in the future. He is well educated, and well trained. He had a job prior to his incarceration, and this job is still waiting for him if released. @3a has no criminal record outside this case. In light of all these factors, and in light of @3a's ability to post bail, counsel requests that bail be set in the amount of $25,000.00. Furthermore, we request that he be allowed to secure his release by posting 10% of this amount in the registry of the trial court.

WHEREFORE, PREMISES CONSIDERED, appellant prays that this Court set bail pending final determination of this appeal in the amount of $25,000.00, and that this Court order that the trial court permit him to secure his release by posting 10% of this amount, or $2,500.00, in the registry of the trial court.

Respectfully submitted:

MARK STEVENS
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(210) 226-1433
State Bar No. 19184200

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion For Reasonable Bail Pending Final Determination of Appeal has been delivered to the District Attorney's Office, Bexar County Justice Center, San Antonio, Texas 78205, on this the @4 day of @5, 2004.

_____
MARK STEVENS

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARK STEVENS, who after being duly sworn stated:

> I am the attorney for the appellant in the above numbered and entitled cause. I have read the foregoing Motion for Reasonable Bail Pending Final Determination of Appeal and swear that all of the allegations of fact contained therein are true and correct.

_____
MARK STEVENS

SUBSCRIBED AND SWORN TO BEFORE ME on the @4 day of @5, 2004.

_____
Notary Public in and for
Bexar County, Texas

My commission expires: _____