EVIDENCE IN CRIMINAL CASES

WITNESSES

ARTICLE VI

[EXCEPT RULES 607, 608 AND 609]

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I. PURPOSE AND FORMAT OF THIS PAPER

Formerly in Texas, there were separate rules of evidence in criminal and civil cases. Effective March 1, 1998, the "Texas Rules of Evidence" are the same in both civil and criminal cases. The purpose of this paper is to discuss Article VI of the "new" rules of evidence, excepting Rules 607, 608 and 609, which will be contained in the paper, *Character Evidence*, presented at this seminar by Stephanie Stevens.

The rules of Article VI will be discussed sequentially. The text of the new rule will be stated in bold print, followed by relevant case law and commentary. For the most part, the new rules are substantively identical to their predecessors. Where there is a substantive variation, the old and the new rule will be compared.

II. RULE 601: COMPETENCY AND INCOMPETENCY OF WITNESSES

A. *Text*: *TEX. R. EVID. 601*

(a) *General Rule*. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane Persons*. Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children*. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

(b) *"Dead Man's Rule" in Civil Actions*. In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

B. *Article 38.06*

1. Article 38.06 of the Texas Code of Criminal Procedure was repealed when Rule 601 went into effect. It was very similar to Rule 601, except that it required also that the witness understand the obligation of an oath.

2. "Since Rule 601 continues the 'general rule of competency' formerly codified by Article 38.06, prior precedent construing that article should continue to apply." *Long v. State*, 770 S.W. 2d 27, 29 (Tex. App. -- Houston [14th Dist. 1989), *rev'd on other grounds*, 800 S.W. 2d 545 (Tex. Crim. App. 1990).

C. *Case Law*

1. *Burden of Proof*

a. "The Texas Rules of Criminal Evidence create the presumption that a witness is competent to testify." *Dufrene v. State*, 853 S.W. 2d 86, 88 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd); *accord Hollinger v. State*, 911 S.W. 2d 35, 38 (Tex. App.--Tyler 1995, pet. ref'd); *Reyna v. State*, 797 S.W. 2d 189, 191 (Tex. App. -- Corpus Christi 1990, no pet.). "The testimony of a witness will only be excluded when questioning convinces the court that the witness does not possess sufficient intellect to accurately relate transactions about which the witness is being interrogated." *Hollinger v. State*, 911 S.W. 2d at 38.

b. "Normally, witnesses are presumed competent to testify. This is not true with regard to children who lack sufficient intellect to relate transactions about which they are questioned." *Upton v. State*, 894 S.W. 2d 426, 429 (Tex. App.--Amarillo 1995, pet. ref'd)(citations omitted).

c. "The burden of raising and proving the incompetency of a witness is on the party alleging it." *Contreras v. State*, 745 S.W. 2d 59, 62 (Tex. App. -- San Antonio 1988, no pet.).

2. *Standard of Review*

a. Rule 601 places the power to determine the competency of a witness in the hands of the trial judge. "A ruling by the trial court will not be disturbed upon review unless an abuse of discretion is shown." *Broussard v. State*, 910 S.W. 2d 952, 960 (Tex. Crim. App. 1995), *cert. denied*, 117 S. Ct. 87 (1996). To make this determination, the court must review the entire testimony of the witness. *Dufrene v. State*, 853 S.W. 2d 86, 88 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd); *accord Hollinger v. State*, 911 S.W. 2d 35, 38 (Tex. App.--Tyler 1995, pet. ref'd); *see Kirchner v. State*, 739 S.W. 2d 85, 88 (Tex. App. -- San Antonio 1987, no pet.)(reviewing court must consider all of the testimony, not just that given at the preliminary qualification hearing).

b. "A child is considered competent to testify unless it appears to the Court that she does not possess sufficient intellect to relate the transaction about which she will testify. The child no longer needs to understand the 'obligation of the oath.' The Court must simply impress on her mind the duty of being 'truthful.'" *Dufrene v. State*, 853 S.W. 2d 86, 88 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd)(citations omitted). In *Dufrene*, the child was considered competent even though her testimony was sometimes conflicting and confusing. *Id*. at 89; *See Macias v. State*, 776 S.W. 2d 255, 257 (Tex. App.--San Antonio 1989, pet. ref'd)(answers which are conflicting and show confusion do not mean the witness is incompetent); *Rodriguez v. State*, 772 S.W. 2d 167, 170 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd)(inconsistencies do not render testimony incompetent).

c. "Three elements must be considered by the court in determining whether a witness is competent to testify: 1) the competence to observe intelligently the events in question at the time of their occurrence, 2) the capacity to recollect the events, and 3) the capacity to narrate them, which involves the ability to understand questions asked and to frame intelligent answers, and the ability to understand the moral responsibility to tell the truth." *Reyna v. State*, 797 S.W. 2d 189, 191-92 (Tex. App.--Corpus Christi 1990, no pet.); *accord Hollinger v. State*, 911 S.W. 2d 35, 38 (Tex. App.--Tyler 1995, pet. ref'd); *Rodriguez v. State*, 772 S.W. 2d 167, 170 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd).

d. "In determining a person's competency to testify it has been said that the first element to be considered is a capacity to observe intelligently at the time of the events in question. The other element is the capacity to narrate. This involves on the one hand, both an ability to understand the questions asked and to frame intelligent answers and, on the other hand, a moral responsibility to tell the truth." *Solis v. State*, 647 S.W. 2d 95, 98 (Tex. App.--San Antonio 1983, no pet.).

e. The trial court's questions should be sufficient to impress upon the child her duty to be truthful. *Stahley v. State*, 814 S.W. 2d 415, 416 (Tex. App.--Dallas 1991, pet. ref'd).

f. Although it is no longer required that the child understand the difference between truth and falsehood, that the child does understand this might aid the court in concluding she is competent. *Long v. State*, 770 S.W. 2d 27, 29 (Tex. App.--Houston [14th Dist.] 1989), rev'd *on other grounds*, 800 S.W. 2d 545 (Tex. Crim. App. 1990).

g. "A prior judgment and commitment for lunacy does not in itself disqualify the witness." *Jackson v. State*, 403 S.W. 2d 145, 148 (Tex. Crim. App. 1966).

3. *The Preliminary Inquiry*

a. Rule 601(a)(2) does not require a preliminary hearing on the competency of a child witness. *Grayson v. State*, 786 S.W. 2d 504, 505 (Tex. App.--Dallas 1990, no pet.)(also, appellant did not request hearing or object to competency); *see Reyna v. State*, 797 S.W. 2d 189, 192 (Tex. App.--Corpus Christi 1990, no pet.).

b. "Although the better practice would suggest that the interviewer or the trial judge conduct preliminary questioning testing the witness's competency, such determination may be made from a review of the child's entire testimony rather than the preliminary qualification." *Romines v. State*, 717 S.W. 2d 745, 749 (Tex. App.--Fort Worth 1986, no pet.).

c. The trial court erred in holding a competency hearing in the jury room, over counsel's objections that appellant was not present and that the hearing was not public. The court did not articulate a state interest that outweighed appellant's interest in a public trial. *Guillry v. State*, 856 S.W. 2d 477, 478 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd).

d. The rules of evidence apply at a competency hearing. Because the competency hearing is a part of the trial, a defendant has the absolute right to perfect a bill of exception in question and answer form. *Kipp v. State*, 876 S.W. 2d 330, 333 (Tex. Crim. App. 1994).

e. In *Reyna v. State*, 797 S.W. 2d 189 (Tex. App.--Corpus Christi 1990, no pet.), the trial court conducted the competency hearing in the jury's presence, then announced that it had found the witness competent. Appellant, however, failed to object, thereby waiving any error stemming from an impermissible comment on the weight of the evidence. *Id*. at 192-93.

f. Counsel cannot complain on appeal that the trial court erred in not inquiring into the competency of a child if he does not request a hearing in the trial court. *McGinn v. State*, 961 S.W. 2d 161, 165 (Tex. Crim. App. 1998)(an objection that the events about which the child is testifying are too remote does not constitute a request for a hearing under Rule 601).

4. *Compulsory Psychological Examinations*

a. "Under Rule 601, a child is considered competent to testify unless it appears to the Court that she does not possess sufficient intellect to relate the transaction about which she will testify. Rule 601 does not require, nor does it empower a judge to force a witness to undergo psychiatric evaluation for the purpose of a competency determination." *Broussard v. State*, 910 S.W. 2d 952, 960 (Tex. Crim. App. 1995), *cert. denied*, 117 S. Ct. 87 (1996).

b. Although the trial court is empowered to determine competency, it has no authority to compel a witness to submit to a psychological examination. "No in-depth psychological probing is necessary for" the determination of competency under Rule 601(a)(2). *State ex rel. Holmes v. Lanford*, 764 S.W. 2d 593, 594 (Tex. App.--Houston [14th Dist.] 1989, mand. motion denied).

5. *Youth*

a. "There is no age at which the child witness is incompetent as a matter of law . . . ." *Long v. State*, 770 S.W. 2d 27, 29 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 800 S.W. 2d 545 (Tex. Crim. App. 1990).

b. “Though no minimum age for competency exists . . . the court must, nevertheless, assure itself that the child witness has the ability to intelligently observe the events, the capacity to recollect and narrate them, and the moral responsibility to tell the truth.” *Upton v. State*, 894 S.W. 2d 426, 429 (Tex. App.--Amarillo 1995, pet. ref’d).

c. Some very young witnesses have been held competent to testify:

i. *Fields v. State*, 500 S.W. 2d 500, 502 (Tex. Crim. App. 1973)(four years old).

ii. *Kirchner v. State*, 739 S.W. 2d 85, 88 (Tex. App.--San Antonio 1987, no pet.)(four years old).

iii. *Sanders v. State*, 727 S.W. 2d 670, 673 (Tex. App.--Texarkana 1987)(three and a half), *vacated on other grounds*, 761 S.W. 2d 6, 7 (Tex. Crim. App. 1988).

iv. *Hollinger v. State*, 911 S.W. 2d 35, 38 (Tex. App.--Tyler 1995, pet. ref’d)(three years old at the time of the event, four at the time of trial).

d. In *Wheeler v. United States*, 159 U.S. 523 (1895), the Court upheld the competency of a five and a half year old boy, noting that he was not, as a matter of law, absolutely incompetent. The Court went on to write: ""While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency." *Id*. at 524.

e. A six year old child who has sufficient discretion to understand the nature and obligation of an oath may be prosecuted for perjury or aggravated perjury under § 8.07(a)(1) of the Texas Penal Code. He is therefore eligible to be a competent witness. *Rich v. State*, 823 S.W. 2d 420, 422 (Tex. App.--Fort Worth 1992, pet. ref'd).

6. *The Oath*

a. The trial court need not place a child under oath. It is sufficient that the questions of competency posed by the court and the prosecutor impress upon the child the obligation to be truthful. *Hollinger v. State*, 911 S.W. 2d 35, 38 (Tex. App.--Tyler 1995, pet. ref’d).

7. *Preservation of Error*

a. Appellant may not complain for the first time on appeal that the child is incompetent. *Rich v. State*, 823 S.W. 2d 420, 421-22 (Tex. App.--Fort Worth 1992, pet. ref'd).

b. Appellant does not preserve error unless he objects or complains about the trial court's finding that the witness is competent. Merely requesting an examination for competency is insufficient. *Cooney v. State*, 803 S.W. 2d 422, 423 (Tex. App.--El Paso 1991, pet. ref'd).

c. Counsel cannot complain on appeal that the trial court erred in not inquiring into the competency of a child if he does not request a hearing in the trial court. *McGinn v. State*, 961 S.W. 2d 161, 165 (Tex. Crim. App. 1998)(an objection that the events about which the child is testifying are too remote does not constitute a request for a hearing under Rule 601).

d. In a pre-rules case, the court of criminal appeals reached the merits of appellant's competency complaint despite the fact that he had not objected at trial, noting that "we cannot and do not dispose of it on that basis because, in view of prior decisions, it is a fundamental issue in the case." *Sanchez v. State*, 479 S.W. 2d 933, 936 (Tex. Crim. App. 1972).

D. *Impeachment Based On Mental Disability*

1. Even if a witness is not insane and therefore incompetent to testify under Rule 601(a)(1), his mental impairment can be used for impeachment. *See Bouldin v. State*, 222 S.W. 555, 556-557 (Tex. Crim. App. 1920).

2. "Cross-examination of a testifying State's witness to show that the witness has suffered a recent mental illness or disturbance is proper, provided that such mental illness or disturbance is such that it might tend to reflect upon the witness's credibility." *Virts v. State*, 739 S.W. 2d 25, 30 (Tex. Crim. App. 1987).

3. The trial court erred in not permitting appellant to cross-examine the state's witness on the duration, extent and treatment of his mental condition. *Sidney v. State*, 753 S.W. 2d 410, 413 (Tex. App.--Houston [14th Dist.] 1986, pet. ref'd).

III. RULE 602: LACK OF PERSONAL KNOWLEDGE

A. *Text*: *TEX. R. EVID. 602*

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

B. *Case Law*

1. When the proponent puts forth some evidence of personal knowledge, it becomes the opponent's burden to rebut the evidence. This can be done on cross-examination or voir dire. *Roy v. State*, 813 S.W. 2d 532, 541 (Tex. App.--Dallas 1991, pet. ref'd).

2. Testimony from a witness is not inadmissible simply because the witness is unable to give "an exact quote." Verbatim recollection is impractical and is not required. Personal knowledge is all that is required. *Middlebrook v. State*, 803 S.W. 2d 355, 358-59 (Tex. App.--Fort Worth 1990, pet. ref'd).

3. "When there is some reason to doubt whether the witness possesses the requisite personal knowledge, it may be appropriate for the court to afford the opposing party a chance to take the witness on voir dire. But it is neither reasonable nor practical to permit such voir dire when there is no apparent reason for doubting that the witness is testifying from personal knowledge." *Shugars v. State*, 814 S.W. 2d 897, 898 (Tex. App.--Austin 1991, no pet.).

4. A dying declaration is admissible if it pertains to facts the declarant had personal knowledge of and could have testified to at trial had he lived. *Contreras v. State*, 745 S.W. 2d 59, 62 (Tex. App.--San Antonio 1988, no pet.).

5. Opinion testimony by a lay witness is admissible only if based on personal knowledge; it may not be based solely on hearsay. *McMillan v. State*, 754 S.W. 2d 422, 425 (Tex. App.--Eastland 1988, pet. ref'd)(testimony from owner of ring concerning its weight is inadmissible).

6. An expert witness -- here a pharmacist -- may testify that pills are valium, or diazepam, without a chemical analysis. *Sterling v. State*, 791 S.W. 2d 274, 277 (Tex. App.--Corpus Christi 1990, pet. ref'd).

7. There is no requirement that an affidavit controverting a motion to change venue comply, on its face, with Rule 602. "A controverting affidavit is not a witness' sworn statement of fact as to a matter at trial, as contemplated by Rule 602. If the compurgator takes the stand at the venue hearing to testify, his testimony would fall under the proscriptions of R.602." *Burks v. State*, 876 S.W.2d 877, 890 (Tex. Crim. App.1994), *cert. denied*, 513 U.S. 1114 (1995).

8. A witness would be incompetent to testify about matters necessarily based on speculation and conjecture, because that would be outside the witness's personal knowledge. *Turro v. State*, 950 S.W. 2d 390, 403 (Tex. App.--Fort Worth 1997, pet. ref'd)(lay witness testimony rationally based upon the witness's perception of the events and helpful to the jury, however, is admissible under Rule 701).

9. The trial court does not err in excluding the testimony of a character witness who saw the person so infrequently as not to have personal knowledge under Rule 602. *Brumbalow v. State*, 933 S.W. 2d 298, 301 (Tex. App.--Waco 1996, pet. ref'd).

10. "[F]irsthand knowledge, is a fundamental qualification of testimonial competency." *Higgins v. State*, 924 S.W. 2d 739, 745 (Tex. App.--Texarkana 1996, pet. ref'd)(testimony of witness that person had a busted lip, a black eye, a hand print on her, and a bald head from where appellant had pulled her hair out was based on the witness's personal knowledge and observations and was therefore admissible).

11. Although a lay witness may testify under Rule 701 that the defendant is insane, this testimony must be based on the perceptions of the witness. "This portion of the rule incorporates the personal knowledge requirement of Criminal Rule 602." *Bigby v. State*, 892 S.W.

2d 864, 889 (Tex. Crim. App. 1994)(an opinion based upon the opinions of others, and not the witness's personal observations, is not admissible under Rule 701).

12. The rule requiring personal knowledge is not the same as the hearsay rule. *Aguilar v. State*, 887 S.W. 2d 27, 29 n.2 (Tex. Crim. App. 1994).

IV. RULE 603: OATH OF AFFIRMATION

A. *Text*: *TEX. R. EVID. 603*

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

B. *Case Law*

1. The Nigerian defendant in *Fagbemi v. State*, 778 S.W. 2d 119 (Tex. App.--Texarkana 1989, pet. ref'd), was permitted to take his oath on his tribal icon (Akolmologoba) outside the presence of the jury, but was not allowed to do so in the presence of the jury. This was not error. There is no right to have the oath administered in the presence of the jury. "The oath's purpose to encourage a witness to be truthful can be achieved without the jury being present. The taking of the oath should not become a contest between witnesses to try to convince the jury that one oath was more binding than another oath." *Id*. at 120-21.

2. Although a party has the right to have the witnesses sworn, error is waived absent a prompt objection. The objection is untimely if made after the verdict or on motion for new trial. *Castillo v. State*, 739 S.W. 2d 280, 297, 297-98 (Tex. Crim. App. 1987); *accord Beck v. State*, 719 S.W. 2d 205, 214 (Tex. Crim. App. 1986); *Craig v. State*, 783 S.W. 2d 620, 628 (Tex. App.--El Paso 1989), *rev'd on other grounds*, 825 S.W. 2d 128 (Tex. Crim. App. 1992); *Gonzales v. State*, 748 S.W. 2d 510, 512 (Tex. App.--Houston [1st Dist.] 1988, pet. ref'd).

3. In *Gonzales v. State*, 748 S.W. 2d 510 (Tex. App.--Houston [1st Dist.] 1988, pet. ref'd), the court first held that appellant waived his right to complain that the witnesses against him were not sworn by not objecting. Next, the court held that questions asked by the judge and prosecutor of the youthful witnesses during the preliminary determination of their competency were sufficient to "impress" upon them the duty to be truthful. The children's answers to these questions "were the equivalent of an oath by affirmation." *Id*. at 512.

4. In *Grimes v. State*, 778 S.W. 2d 193 (Tex. App.--Fort Worth 1989, no pet.), the court swore appellant as a witness in the jury's presence, prior to opening statements, without objection. On appeal, appellant complained that this violated his right to self-incrimination. His conviction was affirmed. "We hold that the mere administration of the oath to a defendant does not, absent objection, rise to the level of compelling a defendant to give evidence against himself." Also, if there was error, it was cured by instruction. *Id*. at 195.

5. In *Bisby v. State*, 907 S.W. 2d 949, 953 (Tex. App.--Fort Worth 1995, pet. ref'd), witness Ford refused to either swear or affirm, so the trial court devised an alternate oath, in which he answered that he would "accurately and truthfully answer under penalty of perjury." This was found to be sufficient under Rule 603. "In this case, the trial judge devised an alternative form that evidenced a 'serious public commitment to answer truthfully' while not transgressing upon the witness's beliefs. Further, the alternative form was administered in a manner calculated to awaken Ford's conscience and to impress upon him his duty to tell the truth." *Id*. at 955.

V. RULE 604: INTERPRETERS

A. *Text*: *TEX. R. EVID. 604*

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

B. *Texas Code Of Criminal Procedure*

1. When it is determined that an accused or a witness does not understand and speak the English language, an interpreter must be appointed. If the only available interpreter lacks adequate interpreting skills, or if the interpreter is not familiar with slang, "the person charged or witness may be permitted by the court to nominate another person to act as intermediary between himself and the appointed interpreter during the proceedings." Tex. Code Crim. Proc. Ann. art. 38.30 (Vernon Supp. 1998).

2. Interpreters may also be appointed when either the accused or a witness is deaf. Tex. Code Crim. Proc. Ann. art. 38.31 (Vernon Supp. 1998).

C. *Case Law*

1. "[W]hen it is made known to the trial court that an accused does not speak and understand the English language an interpreter must be furnished to translate to the accused the trial proceedings, including particularly testimony of the witnesses presented by the State." *Baltierra v. State*, 586 S.W. 2d 553, 559 (Tex. Crim. App. 1979). Appointing trial *counsel* fluent in Spanish is not enough. *Id*. at 559 n.11; *but see Vasquez v. State*, 819 S.W. 2d 932, 937-38 (Tex. App.--Corpus Christi 1991, pet. ref'd)(appellate court finds that record fails to show that appellant failed to understand English, despite stipulation by state that he did not speak English); *Mares v. State*, 636 S.W. 2d 627, 631 (Tex. App.--San Antonio 1982, pet. ref'd)(record does not reflect that appellant was so deficient in English that the absence of a court reporter amounted to a denial of the right to confrontation).

2. The trial court has a similar duty to insure that a deaf defendant is able to understand the proceedings. *Adams v. State*, 749 S.W. 2d 635, 639 (Tex. App.--Houston [1st Dist.] 1988, pet. ref'd)(conviction reversed where trial court did not insure understanding); *cf. Brazell v. State*, 828 S.W. 2d 580, 582 (Tex. App.--Austin 1992, pet. ref'd)(trial court insured understanding

by seating deaf defendant close enough to court reporter to permit reading of simultaneous English language transcription).

3. When an interpreter is used, questions should be asked as if no interpreter was present, and the interpreter should translate the question and answer in a literal manner. Attorneys should not phrase their questions, "Ask him if he . . ., and the interpreter should not state, "He says . . . ." *Guzmon v. State*, 697 S.W. 2d 404, 407 n.1 (Tex. Crim. App. 1985).

4. Where a tape recording in a foreign language is admitted into evidence the trial court should swear an interpreter to translate the conversation for the jury. *Leal v. State*, 782 S.W. 2d 844, 849 (Tex. Crim. App. 1989).

5. Although the statutes do not provide for the appointment of a translator for one suffering from physical or mental disabilities not amounting to deafness or muteness, one appointed to this task should be qualified. *Watson v. State*, 596 S.W. 2d 867, 873 (Tex. Crim. App. 1980).

6. The trial court is not constitutionally obliged to appoint a second interpreter to act as a member of the defense team. *Nguyen v. State*, 774 S.W. 2d 348, 350 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd); *cf. DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App.), *cert. denied*, 510 U.S. 905 (1993).

7. Appellant does not have the right to reasonably effective assistance of an interpreter. Instead, the proper standard is whether the trial court abused its discretion in failing to appoint another interpreter. No abuse of discretion exists where the jury received the correct translation (eventually) and was not misled. *Gonzalez v. State*, 752 S.W. 2d 695, 698-99 (Tex. App. --Houston [1st Dist.] 1988, pet. ref'd).

8. The trial court errs in refusing to appoint an interpreter simply because the defendant is not indigent. "The statute which requires the appointment of an interpreter does not distinguish between indigent and non-indigent defendants; the right to have an interpreter appointed under the statute applies to all defendants." *Villareal v. State*, 853 S.W.2d 170, 172 (Tex. App.--Corpus Christi 1993, no pet.).

9. An interpreter, like a witness, must be sworn before being allowed to interpret testimony. An objection, though, is required to preserve error. "We hold that where an official court interpreter has been appointed and was administered the requisite oath at the time of his appointment and no objection is timely made specifically to his failure to being resworn at time of trial, no error is preserved." *Solis v. State*, 647 S.W. 2d 95, 98-99 (Tex. App.--San Antonio 1983, no pet.).

10. Appellant may waive his right to confront and cross-examine witnesses. *Briones v. State*, 595 S.W. 2d 546, 548 (Tex. Crim. App. 1980). Failure to object waives error. *Montoya v. State*, 811 S.W. 2d 671, 673 (Tex. App.--Corpus Christi 1991, no pet.).

11. Any error from the failure to swear the interpreter is waived in the absence of

an objection. *Lara v. State*, 761 S.W. 2d 481, 482 (Tex. App.--Eastland 1988, no pet.).

12. Appellant also waives his right to complain that the interpreter appointed lacked the qualifications if he makes no objection at trial. *Castillo v. State*, 807 S.W. 2d 8, 9 (Tex. App.--Corpus Christi 1991, pet. ref'd).

13. "We think it evident that the role of an interpreter is not merely to translate and explain the proceeding to a non-English speaking defendant, but to also provide that defendant a voice which can be heard and understood during a criminal proceeding. The denial of the opportunity to be heard rendered Appellant's plea of guilty involuntary and in violation of his constitutional and statutory protections." *Aleman v. State*, 957 S.W. 2d 592, 594 (Tex. App.--El Paso 1997).

14. In *Garcia v. State*, 887 S.W. 2d 862, 874 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1021 (1995), appellant complained, not about the qualifications of the interpreter, but of the accuracy of his interpretation. The court of criminal appeals held that questions about the accuracy of an interpretation are not reviewable on appeal. "As a question of fact, appellant must settle the question of a translation's accuracy at trial by impeaching the translation; cross-examination of the witness presents the most convenient vehicle, but impeachment may be accomplished by many other means." *Id*. at 875. "Independent evidence may be introduced to show that the interpreter's version was incorrect, or the interpreter may be placed in the witness stand and cross-examined as to what the witness had said." *Id*. at 875 n. 8. The court emphasized that this was not a case in which appellant consistently complained of translations, in which case the interpreter's competency would be at issue under article 38.30. *Id*. at 875 n. 7.

VI. RULE 605: COMPETENCY OF JUDGE AS WITNESS

A. *Text*: *TEX. R. EVID. 605*

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

B. *Case Law*

1. "The question should be whether the judge's statement of fact is essential to the exercise of some judicial function or is the functional equivalent of witness testimony." *Hammond v. State*, 799 S.W. 2d 741, 746 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2912 (1991). In Hammond, appellant escaped from jail after being convicted of capital murder, but before sentencing. The trial judge had the clerk of the court call the jurors and advise them of the escape, because he was concerned for their safety. The court first noted that the actions of a clerk can violate Rule 605 "when it carries the implicit imprimatur of the presiding judge." *Id*. The communication here, though, was not inappropriate, because the judge acted within his judicial capacity, and did not testify. *Id*. at 747. In a footnote, the court went on to state that there might be some circumstances under which a trial court might abuse its discretion "even in the exercise of a

judicial function." *Id.* at 747 n.5.

2. Rule 605 only prohibits a judge from testifying in the same trial over which he is presiding. It "does not encompass any future proceedings in which the judge is participating but not over which the judge is presiding." *Hensarling v. State*, 829 S.W. 2d 168, 170-71 (Tex. Crim. App. 1992). Thus, there is no error in permitting a judge to testify in a retrospective competency hearing when that hearing is presided over by another judge. *Id*.

3. A pre-trial services investigator did not act in a quasi-judicial capacity so as to invoke the provisions of Rule 605. *Cruse v. State*, 882 S.W. 2d 50, 53 (Tex. App.--Houston [14th Dist.] 1994, no pet.).

VII. RULE 606: COMPETENCY OF JUROR AS A WITNESS

A. *Text*: *TEX. R. EVID. 606*

(a) *At the Trial*. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry Into Validity of Verdict or Indictment*. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

B. *Text of Former Criminal Rule 606(b)*

(a) *At the trial*. A member of the jury may not testify as a witness before that jury in the trial of which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment*. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify as to any matter relevant to the validity of the verdict or indictment. Nor may his affidavit or evidence of any statement by him concerning as matter about which he would be precluded from testifying be received for these purposes.

C. *Case Law Interpreting Former Criminal Rule 606(b)*

1. The test for admission of testimony by a juror is whether that testimony is relevant to the verdict. This is to be determined on a case by case basis, "taking into account the court's experiences and observations, the grounds for a new trial set forth in Tex. R. App. Proc. 30(b), and the case law which was developed under the predecessor to 30(b), art. 40.03, V.A.A.C.P." *Buentello v. State*, 826 S.W.2d 610, 614 (Tex. Crim. App. 1992).

a. A juror's testimony as to another juror's statement about the parole laws was relevant to the validity of the verdict, because, if the court found that such evidence was detrimental and was received, the verdict would be constitutionally invalid. *Reese v. State*, 772 S.W. 2d 288, 291 (Tex. App.--Waco 1989, pet. ref'd).

b. An affidavit from a juror asserting that she only voted in favor of an excessive verdict to avoid being accused of racial favoritism does not state a basis for granting a new trial. *Dunkins v. State*, 838 S.W. 2d 895, 901 (Tex. App.--Texarkana 1992, pet. ref'd).

c. The test for admission of juror testimony at a hearing on a motion for new trial is whether the matter sought to be elicited is deemed by the trial court to be relevant to the validity of the verdict. Consideration of parole law and appellant's failure to testify are relevant to the validity of the verdict. *Hampton v. State*, 838 S.W. 2d 337, 340 (Tex. App.--Houston [1st Dist.] 1992, no pet.).

d. The trial court errs in excluding a juror's testimony concerning a conversation between him and another juror in which the other juror misstated the law of self-defense. *Rasbury v. State*, 832 S.W. 2d 398, 402 (Tex. App.--Fort Worth 1992, pet. ref'd).

2. A contention that testimony is inadmissible under Rule 606(b) is waived on appeal if not objected to at trial. *State v. Hernandez*, 801 S.W. 2d 8, 10 (Tex. App.--Tyler 1990, no pet.).

3. Appellant may not complain that the trial court unduly limited his right to examine jurors under Rule 606(b) unless he makes an offer of proof as required by Rule 103. *Dawkins v. State*, 822 S.W. 2d 668, 674 (Tex. App.--Waco 1991), *pet. ref'd*, 825 S.W. 2d 709 (Tex. Crim. App. 1992).

4. The appellate court will not consider the affidavit of a juror in connection with a complaint that the evidence was insufficient. *Speer v. State*, 890 S.W. 2d 87, 91 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd).

D. *Commentary About Former Criminal Rule 606(b)*

1. "No single rule of evidence is more deceptively worded than Criminal Rule 606(b). After describing in no fewer than forty-eight words what jurors may not testify about in connection with an attack upon the validity of a verdict or indictment, the rule adds an exception

which swallows each and every preceding word. The exception is simple: Jurors may testify as to anything relevant to the validity of the verdict or the indictment. Thus, Criminal Rule 606(b) places no independent limits on the ability of jurors to attack the validity of a verdict or indictment. They may testify as to any relevant matter." 1 S. Goode, O. Wellborn & M. Sharlot, Guide To The Texas Rules Of Evidence: Civil And Criminal, § 606.3 (Texas Practice 1993).

2. Apparently somebody agreed that there were problems with Rule 606(b), as it was one of the few rules which underwent substantial change during the unification process. Judge Paul Womack, chair of the Rules Committe of the Texas Court of Criminal Appeals has noted: "The exception at the end of the first sentence of the former rule ('except that a juror may testify as to any matter relevant to the validity of the verdict or indictment') was omitted; *its meaning had been unclear and its application difficult*." Paul Womack, *Some More Notes And Comments To The 1998 Revision of Texas Rules of Criminal Evidence*, 61 TEX. B. J. 549 (1998)(emphasis supplied).

E. *Former Civil Rule 606(b)*

(a) *At the Trial*. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry Into Validity of Verdict or Indictment*. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

F. *Interpretations of the Civil Rule*

1. The former civil rule is worded very similarly to present Rule 606(b). It will be useful, therefore, to examine cases and commentary which have interpreted the former civil rule.

a. "Civil Rule 606(b) severely limits the role jurors may play in attacking the validity of a verdict they rendered. It bars jurors from testifying as to: (1) any matter or statement that occurred during the course of the jury's deliberations; (2) the mental processes by which they arrived at their decision; and (3) the effect that anything had on their own or other jurors' minds or emotions. Civil Rule 606(b) also renders inadmissible jurors' affidavits and evidence as to any statement made by jurors about which they would be precluded from testifying. Only one exception qualifies this rule of incompetency: Jurors may testify as to whether any outside influence was improperly brought to bear upon any juror." 1 S. Goode, O. Wellborn & M. Sharlot, Guide To The Texas Rules Of Evidence: Civil And Criminal, § 606.3 (Texas Practice 1993).

b. Under Civil Rule 606(b), "all testimony, affidavits and other evidence is excluded from consideration by the court when an issue regarding jury misconduct is raised unless it is shown that an 'outside influence was improperly brought to bear up any juror.'" *Mitchell v. Southern Pacific Transportation Co.*, 955 S.W. 2d 300, 321 (Tex. App.--San Antonio 1997). "An 'outside influence' must emanate from a source outside the jury and its deliberations." *Id*. at 322. Events which take place in open court, or which are attributable to other members of the jury, are not "outside influences." Nor is evidence concerning how the jury perceived the trial. *Id*. at 322-23.

c. "'Outside influence' means a force external to the jury and its deliberations. Outside influence does not include information acquired by a juror and communicated to the others between the time the trial court instructs the jury and the time it renders a verdict, even where the information is not in evidence, and is unknown to jurors before trial. Outside influence, in the form of information not in evidence, must come from a non-juror. Information introduced into deliberations by a member of the jury, even if submitted with the intention of influencing and prejudicing a verdict, is not outside influence." *Durbin v. Dal-Briar Corp*., 871 S.W.2d 263, 272 (Tex.App.--El Paso 1994, writ denied)(evidence of personal knowledge coming from the presiding juror about the harmful effects of worker compensation litigation was obtained contrary to the court's instructions, but was not an outside influence, since it emanated from the jury itself).

d. *Soliz v. Saenz*, 779 S.W.2d 929, 931(Tex.App.--Corpus Christi 1989, writ denied)(reliance on personal experiences, although improper, does not constitute an "outside influence").

e. *Kendall v. Whataburger, Inc*., 759 S.W.2d 751, 755 (Tex.App.--Houston [1st Dist.] 1988, no writ)(juror, who was a paralegal, told other jurors that plaintiffs would recover the damages assessed even though they found no negligence or proximate cause).

f. *Baley v. W/W Interests, Inc*., 754 S.W.2d 313, 315-16 (Tex.App.--Houston [14th Dist.] 1988, writ denied) (two jurors visited the scene of the occurrence giving rise to the suit and told the other jurors their experiences and knowledge which they acquired).

g. *Baker v. Wal-Mart Stores, Inc*., 727 S.W.2d 53, 54-56 (Tex.App.--Beaumont 1987, no writ) (a juror, who was a nurse, told other jurors that the medication plaintiff was taking could have made the plaintiff drowsy, causing a fall).

h. *Robinson Elec. Supply Co. v. Cadillac Cable Corp*., 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.)(jury's inspiration to add pre-judgment interest to damage award, in the absence of evidence of same, was not an "outside influence").

i. *Perry v. Safeco Ins. Co*., 821 S.W.2d 279, 281 (Tex.App.-- Houston [1st Dist.] 1991, writ denied)(notes taken by jurors, use by jurors of a magazine article not in evidence, use of a dictionary to define "negligence," and the coercive influence of one juror upon the rest of the panel are not "outside influences").

G. *Case Law Interpreting Present Rule 606(b)*

1. In *Porter v. State*, 1998 WL 164549 (Tex. App.--Austin 1998), the court of appeals overruled appellant's claim of jury misconduct, employing the five-prong test set forth in *Sneed v. State*, 670 S.W. 2d 262 (Tex. Crim. App. 1984). In the process, the court observed that the civil and criminal rules of evidence have now been "unified," and that "Rule 606(b) of the new Rules contains no substantial changes." *Id*. at *8 n.3. *This must be wrong*.

VIII. RULE 610: RELIGIOUS BELIEFS OR OPINIONS

A. *Text*: *TEX. R. EVID. 610*

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

B. *This Rule Has Been Renumbered*

1. This rule was formerly numbered Texas Rule of Criminal Evidence 615. The new and the old rule are substantively identical.

IX. RULE 611: MODE AND ORDER OF INTERROGATION AND PRESENTATION

A. *Text*: *TEX. R. EVID. 611*

(a) *Control by Court*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination*. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) *Leading Questions*. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross- examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

B. *The Rule Has Been Renumbered*

1. Texas Rule of Evidence 611 was formerly known as Texas Rule of Criminal Evidence 610. Except for the new number, and a few minor changes, the two rules are substantively identical for criminal cases. At the time this paper is written, there are no published cases which cite

present Rule 611. All references in this paper, then, are to Rule 610.

C. *Case Law*

1. *Questions By Jurors*

a. Absent a clear legislative mandate, it is error for the trial court to permit jurors to ask questions, even with the imposition of procedural safeguards. This is not subject to a harmless error analysis. *Morrison v. State*, 845 S.W. 2d 882, 888-889 (Tex. Crim. App. 1992). An objection, however, is necessary to preserve error. *Gonzalez v. State*, 852 S.W.2d 102, 106 (Tex. App.--Austin 1993, pet. ref'd).

2. *Scope of Cross-Examination*

a. The Texas rule permitting cross-examination on any matter relevant to any issue in the case, including credibility "endorses the Texas practice of wide-open cross-examination. Unlike the federal rules and the majority of states, Texas has long rejected the notion that cross-examination should be restricted to the scope of direct examination." 1 S. Goode, O. Wellborn & M. Sharlot, Guide To The Texas Rules Of Evidence: Civil And Criminal, § 611.4 (Texas Practice 1993); *see Wiggins v. State*, 778 S.W. 2d 877, 895 (Tex. App.--Dallas 1989, pet. ref'd); *Arnold v. State*, 679 S.W. 2d 156, 159 n.1 (Tex. App.--Dallas 1984, pet. ref'd).

b. "Texas permits cross-examination of any matter relevant to the issues. On the other hand, cross-examination cannot extend to irrelevant, collateral and immaterial matters. A matter is `collateral' if the cross-examining party would not be entitled to prove such matter as part of his case-in-chief." *Posey v. State*, 738 S.W. 2d 321, 325 (Tex. App.--Dallas 1987, no pet.)

c. In *Ramirez v. State*, 815 S.W. 2d 636 (Tex. Crim. App. 1991), the state asked appellant's expert witness whether he was aware of a Rand Corporation study showing that repeat offenders are responsible for the great majority of crimes in this country. This was improper under Rule 610, both because the state failed to prove that this study was a recognized or standard authority, and because it assumed facts not in evidence. *Id*. at 652.

d. The trial court also has discretion to permit redirect examination which is beyond the scope of cross-examination. *Bradeen v. State*, 711 S.W. 2d 263, 265 (Tex. App.--Dallas 1986, no pet.).

e. "In Texas, the scope of cross-examination is wide open." *Felder v. State*, 848 S.W. 2d 85, 99 (Tex. Crim. App. 1992). Accordingly, appellant was not entitled to have the prosecutor restricted from asking him about his guilt during the punishment phase of a capital trial. *Id.*

3. *Leading Questions*

a. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Tex. R. Evid. 611(c).

b. "A question is impermissibly leading only when it suggests which answer, yes or no, is desired, or when it puts into the witness's mouth words to be echoed back." *Newsome v. State*, 829 S.W. 2d 260, 269 (Tex. App.--Dallas 1992, pet. ref'd)(questions which "merely ask for confirmation of testimony in the words of the prosecutor" are leading); *see Myers v. State*, 781 S.W. 2d 730, 733 (Tex. App.--Fort Worth 1989, pet. ref'd)(a leading question "instructs witness how to answer or puts into his mouth words to be echoed back").

c. Leading questions may be asked when the witness has difficulty understanding the English language. *Hernandez v. State*, 643 S.W. 2d 397, 400 (Tex. Crim. App. 1982), *cert. denied*, 462 U.S. 1144 (1983); *accord Trevino v. State*, 783 S.W. 2d 731, 733 (Tex. App.--San Antonio 1989, no pet.)(no error in permitting state to lead 15 year old complainant who attended special education classes and had difficulty communicating in English).

d. Rule 610(c) contemplates that some leading is acceptable, where necessary to develop testimony. *Newsome v. State*, 829 S.W. 2d 260, 269 (Tex. App.--Dallas 1992, pet. rdf'd)(no error where the leading questions did not supply the witness with a "false memory").

e. Some leading is permissible to "clarify" the witness's testimony. *Myers v. State*, 781 S.W. 2d 730, 733 (Tex. App.--Fort Worth 1989, pet. ref'd).

f. "When the court allows a confusing or incorrect impression to be clarified by the use of leading questions reversible error exists only if appellant was unduly prejudiced by the questions." *Stevens v. State*, 671 S.W. 2d 517, 521 (Tex. Crim. App. 1984).

g. "The asking of leading questions is seldom a ground for reversal (especially where a child is testifying)." *Uhl v. State*, 479 S.W. 2d 55, 57 (Tex. Crim. App. 1972); *see Hernandez v. State*, 643 S.W. 2d 397, 400 (Tex. Crim. App. 1982), *cert. denied*, 462 U.S. 1144 (1983)(no reversal absent showing that appellant was unduly prejudiced).

4. *Recalling Witnesses*

a. Following direct examination, the defense announced it had no questions "at this time." After his motion for instructed verdict was overruled, the defendant attempted to recall the witnesses, but was not allowed to do so. This was error. "A defendant does not lose his right to recall a State's witness for cross-examination merely because he does not exercise the right of cross-examination immediately after direct examination by the State, nor because the witness was subpoenaed by him and then placed on the witness stand by the State." *Craig v. State*, 594 S.W. 2d 91, 95-96 (Tex. Crim. App. 1980)(error not preserved, though, because no bill of exception made);

see Love v. State, 861 S.W. 2d 899, 903 (Tex. Crim. App. 1993)(appellant preserved error through an offer of proof which showed he wanted to recall the witness to impeach the credibility and reliability of his previous testimony).

b. The trial court abuses its discretion in not permitting the defense to recall a state's witness where further cross-examination would not cause undue delay in the trial or present cumulative evidence. *Love v. State*, 861 S.W. 2d 899, 904 (Tex. Crim. App. 1993).

c. Error, of course, is subject to review for harm. In *Love v. State*, 861 S.W. 2d 899, 904 (Tex. Crim. App. 1993), a three prong analysis for making this determination, and found the error was harmful. *Cf. Johnson v. State*, 773 S.W. 2d 721, 727-28 (Tex. App.--Houston [1st Dist.] 1989, pet. ref'd)(harmless error).

5. *Rebuttal*

a. "The prosecution is entitled on rebuttal to present any evidence that tends to refute the defensive theory of the accused and the evidence introduced in support of it." *Laws v. State*, 549 S.W. 2d 738, 741 (Tex. Crim. App. 1977); *Yohey v. State*, 801 S.W. 2d 232, 236 (Tex. App.--San Antonio 1990, pet. ref'd).

b. The trial court has discretion, when consistent with the administration of justice, to permit new evidence to be presented in rebuttal, although the same might not be true for purely repetitious evidence. *Long v. State*, 742 S.W.2d 302, 322 n.21 (Tex. Crim. App. 1987).

c. The trial court erred in admitting rebuttal evidence which was collateral and had nothing to do with the defensive theory. *Flannery v. State*, 676 S.W. 2d 369, 370 (Tex. Crim. App. 1984)(error was not prejudicial, though).

6. *Pre-Trial Hearings*

a. *Rule 104(d)*

"The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case." Tex. R. Evid. 104(d).

b. *Rule 104(c)*

"In a criminal case, a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or in a criminal case when an accused is a witness and so requests." Tex. R. Evid. 104(c).

c. *Case Law*

i. In *Nelson v. State*, 765 S.W. 2d 401 (Tex. Crim. App. 1989), the appellant testified outside the jury's presence on the question of admissibility of previous convictions for impeachment under Rule 609, and the court held the convictions too remote to be admissible. The state then offered the transcript of this voir dire hearing at punishment to prove appellant's criminal record. This was error. "[A]n accused testifying before a jury on the issue of guilt retains the right to reclaim his privilege to exclude any testimony given by him in a hearing conducted by the trial judge outside the presence of the jury in order to hear voir dire examination by the State to determine admissibility of his own testimony the State proposes to offer against accused, and the trial court rules his testimony inadmissible for its intended purpose and withholds it from the jury." *Id*. at 405.

ii. The trial court errs in permitting the state to cross-examine appellant's witness at a suppression hearing as to irrelevant matters. *Johnson v. State*, 803 S.W. 2d 272, 284 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2914 (1991).

iii. A hearing outside the jury's presence to determine the admissibility of a conviction alleged to be void is required as a matter of federal constitutional law. "By testifying upon such a preliminary matter out of the hearing of the jury, the accused does not subject himself to cross-examination on other issues." *Cooper v. State*, 769 S.W. 2d 301, 303-304 (Tex. App.--Houston [1st Dist.] 1989, pet. ref'd)(counsel found ineffective for not attacking the validity of a prior conviction outside the jury's presence).

iv. Appellant has no right to testify before the jury at the punishment for the limited purpose of rebutting evidence of an extraneous offense. *Cantu v. State*, 738 S.W. 2d 249, 257 (Tex. Crim. App. 1987).

v. It is improper for the state to impeach appellant's trial testimony by asking him whether he gave similar testimony at a pre-trial hearing, where his pre-trial testimony was expressly limited to other purposes. *Franklin v. State*, 606 S.W. 2d 818, 848-850 (Tex. Crim. App. 1978).

vi. When the witness chooses to testify in front of the jury, she waives her privilege against self-incrimination and her testimony is not for a limited purpose. *Green v. State*, 670 S.W. 2d 332, 333 (Tex. App.--Eastland 1984, no pet.).

d. *Simmons v. United States*

i. It is "intolerable" that a defendant should be required to give up his Fifth Amendment privilege against self-incrimination in order to effectively assert his Fourth Amendment right to suppress illegally seized evidence. *Simmons v. United States*, 390 U.S. 377, 394 (1968). "We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*

ii. A defendant who testifies at trial may be impeached with physical

evidence seized in violation of the Fourth Amendment. *United States v. Havens*, 446 U.S. 620, 627-28 (1980); *Walder v. United States*, 347 U.S. 62, 65 (1954).

7. *Preservation Of Error*

a. "When a defendant contends that his cross-examination of a witness has been unduly limited, nothing is preserved for review unless the record shows by bill of exception or otherwise what questions he wanted to propound and the answers he expected therefrom." *Easterling v. State*, 710 S.W. 2d 569, 578 (Tex. Crim. App. 1986); *accord Barnett v. State*, 615 S.W. 2d 220, 223 (Tex. Crim. App. 1981).

X. RULE 612: WRITING USED TO REFRESH MEMORY

A. *Text*: *TEX. R. EVID. 612*

If a witness uses a writing to refresh memory for the purpose of testifying either

(1) while testifying;

(2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or

(3) before testifying, in criminal cases;

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

B. *The Rule Has Been Renumbered*

1. Texas Rule of Evidence 612 was formerly known as Texas Rule of Criminal Evidence 611. Except for the new number, and a few minor changes, the two rules are substantively identical for criminal cases. At the time this paper is written, there are no published cases which cite present Rule 612. All references in this paper, then, are to Rule 611.

C. *Case Law*

1. A writing used by a witness to refresh his memory either while or before testifying is discoverable, even though that statement was not made by the witness. *See Marsh v. State*, 749 S.W. 2d 646, 649 (Tex. App.--Amarillo 1988, pet. ref'd)(statement used to refresh memory is discoverable "regardless of authorship").

2. In *Marsh v. State*, 749 S.W. 2d 646 (Tex. App.--Amarillo 1988, pet. ref'd), a supervisor from the Texas Department of Human Services testified for the state, and admitted to having previously examined records compiled by a colleague. The trial court denied defendant's request to inspect the department's file. *Id.* at 647. This was error under Rule 611. "The wording of the Rule is unambiguous and unequivocal. If a witness uses a writing to refresh his memory for the purpose of testifying, an adverse party is entitled to immediate production of the writing for the purposes specified in the Rule . . . . In this case, [the witness] used the DHS file to prepare for her testimony. Therefore, appellant was entitled to the file as he requested." *Id*. at 648.

3. Where the prosecutor testifies that he reviewed his jury selection notes prior to testifying at a *Batson* hearing, defendant is entitled to production of those notes under Rule 611. *Salazar v. State*, 795 S.W. 2d 187, 193 (Tex. Crim. App. 1990).

4. In *Pondexter v. State*, 942 S.W. 2d 577, 582 (Tex. Crim. App. 1996), *cert. denied*, 118 S. Ct. 85 (1997), the state argued that the prosecutor was not a witness under Rule 611 because he was not sworn at the *Batson* hearing. The court rejected this argument, noting that, although the prosecutor was not sworn, he did give testimony to the court regarding the reasons for his peremptory strikes. Under Rule 611, appellant would be entitled to the notes if it was shown that the prosecutor used them to refresh his recollection prior to testifying at the *Batson* hearing. Here, no error was shown "[s]ince there is no evidence from the record to establish that the prosecutor did in fact use his notes to refresh his memory during or before his testimony. . . ." *Id*.

4. Rule 611 is "cast in terms of entitlement." *Young v. State*, 830 S.W. 2d 122, 124 (Tex. Crim. App. 1992). When appellant invokes Rule 611, the trial court is obliged to honor the request by requiring the witness to produce the materials before directing appellant to proceed with cross-examination. *Id*. at 124-25.

5. Once appellant moves for production and that motion is denied, error is complete. Appellant does not bear the burden of acquiring these withheld records from the witness for inclusion in the appellate record. *Young v. State*, 830 S.W. 2d 122, 125 n.3 (Tex. Crim. App. 1992).

6. *Ballew v. State*, 640 S.W. 2d 237 (Tex. Crim. App. 1980), is a pre-rules case. There the court recognized that the attorney-client privilege extends to a psychiatrist hired to assist in the preparation of a sanity defense. The court went on to hold, however, that the privilege is waived when the defendant calls the psychiatrist to testify. Accordingly, it was not error for the trial court to compel the defense to allow the state to examine the notes and reports the witness made during his examination of the appellant, for purposes of cross-examination. *Id.* at 240.

7. In *State v. Williams*, 846 S.W. 2d 408 (Tex. App.--Houston [14th Dist.] 1992, pet.

ref'd), the defendant called a police officer during a motion hearing, and requested a copy of his report when the officer could not remember. When the state refused to comply with the court's order to produce the report, the court granted defendant's motion to suppress, and the state appealed. The court of appeals first noted that rule 611 does not technically apply here because the witness was called by the party requesting the statement. Nonetheless, the court found "that the provisions of the rule apply equally in a case where a party has called an adverse witness who is unable to recall the requested information without refreshing his recollection. Allowing the officer not to answer appellee's questions because he could not recall, and then to prohibit the officer from refreshing his memory with his offense report defeats the interests of justice. Accordingly, the trial court did not abuse its discretion. *Id*. at 410-11.

8. Where appellant's probation officer testified at the punishment phase of a capital trial that further counseling had been added as a condition of probation based on a psychological evaluation, and that he had read this evaluation prior to testifying, the trial court erred in not permitting introduction of this entire report under Rule 611. It related to his testimony, and was admissible, not for the truth of the matter asserted, "but for use by the jury in comparing the document to the witness's testimony." *Robertson v. State*, 871 S.W.2d 701, 708 (Tex. Crim. App. 1993). The error was harmless, though, since nothing in the report contradicted the testimony of the witness. *Id*. at 709.

9. In *Rosa v. State*, 961 S.W. 2d 495 (Tex. App.--San Antonio 1997), the court allowed appellant to cross examine the state's witness from his inconsistent written statement, but would not permit him to introduce the writing before the jury. This was error in violation of Rule 611, which, on its face, permits admission of the document. *Id*. at 497. Even though the rule speaks in terms of entitlement, this error is still subject a harm analysis. Here, under Rule 44.2 of the Texas Rules of Appellate Procedure, the error is harmless, because counsel was able to fully explore with the witness the inconsistencies in the statement on cross examination. "We cannot hold that the exclusion, under these circumstances, constituted harmful error." *Id*. at 500.

10. In *Yates v. State*, 941 S.W. 2d 357, 362 (Tex. App.--Waco 1997, pet. ref'd), the state's witness testified that he reviewed a particular file prior to testifying. The trial court, however, only reviewed a portion of the file -- not the entire file -- in camera. Because the witness clearly stated that he had scanned the entire file, it was error under Rule 611 for the trial court not to have reviewed the entire file. The error, though, was harmless, since "the file had no impeachment value." *Id*. at 363.

XI. RULE 613: PRIOR STATEMENTS OF WITNESSES: IMPEACHMENT AND SUPPORT

A. *Text*: *TEX. R. EVID.* 613

(a) *Examining Witness Concerning Prior Inconsistent Statement.* In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such

statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) *Examining Witness Concerning Bias or Interest.* In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) *Prior Consistent Statements of Witnesses*. A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

B. *The Rule Has Been Renumbered*

1. Texas Rule of Evidence 613 was formerly known as Texas Rule of Criminal Evidence 612. Except for the new number, and a few minor changes, the two rules are substantively identical for criminal cases. At the time this paper is written, there are no published cases which cite present Rule 613. All references in this paper, then, are to Rule 612.

C. *Prior Inconsistent Statements*

1. A proper foundation must be laid before examining a witness about a prior inconsistent statement. The witness must be told of the contents of the statement and the time and place of the statement and the person to whom it was made, and must be given the opportunity to explain or deny the statement. A written statement need not be shown to the witness, but, upon request, must be shown to opposing counsel. If the witness unequivocally admits the statement, extrinsic evidence is inadmissible.

a. "The proper predicate for impeachment by prior inconsistent statement requires that the witness first be asked if he made the contradictory statement at a certain place and time, and to a certain person. If the witness denies making the contradicting statement, it can then be proved by the prior inconsistent statement. If the witness admits the prior inconsistent statement, however, the prior statement is not admissible." *Huff v. State*, 576 S.W. 2d 645, 647 (Tex. Crim.

App. 1979)(citations omitted). Here, the prosecutor erred in reading the grand jury testimony to the witness and asking if she remembered making the statement, without first eliciting a denial. This was improper impeachment, because the proper predicate was not laid. *Id*. at 648.

b. "Generally, under such rule where the prior inconsistent statement is in writing, and the witness unequivocally admits making such statement, the instrument itself is not admissible, but the examining attorney may ask about specific sentences, remarks, or things in the prior statement. If the witness admits the remarks, etc., then the witness has impeached himself, and no portion of the written statement is admissible. If the witness admits making the written statements but upon inquiry denies portions of the statement, then the portion that contradicts the witness and only that portion may be proven for the purpose of impeachment. The fact that a statement contains portions which might impeach a witness will not furnish the proper predicate for the admission of the entire statement." *McGary v. State*, 750 S.W. 2d 782, 787 (Tex. Crim. App. 1988); *accord Andrews v. State*, 794 S.W. 2d 46, 49 (Tex. App.--Texarkana 1990, pet. ref'd)(extrinsic evidence offered to impeach should be limited to the statements the witness denies having made).

c. The party seeking to impeach must lay the proper predicate by reminding the witness when, to whom, and in what context the allegedly inconsistent statement was made, and then by affording the witness an opportunity to admit or explain or deny the statement. *Alvarez-Mason v. State*, 801 S.W. 2d 592, 595 (Tex. App.--Corpus Christi 1990, no pet.).

d. The witness must be confronted with the impeaching evidence. *Stapleton v. State*, 868 S.W. 2d 781, 787 n.9 (Tex. Crim. App. 1993).

e. In *Joseph v. State*, 960 S.W. 2d 363 (Tex. App.--Houston[1st Dist.] 1998), the state complained that appellant had not laid the proper predicate to impeach from a prior inconsistent statement but the court of appeals disagreed. Proof that the conversation in question occurred at the witness's aunt's house, sometime after October 15, 1994, provided an adequate foundation for the testimony. *Id*. at 366. The error, though, was harmless.

2. "The rule of admissibility of evidence of prior inconsistent statements should be liberally construed and the trial judge should have discretion to receive any evidence which gives promise of exposing a falsehood." *Aranda v. State*, 736 S.W. 2d 702, 707 (Tex. Crim. App. 1987).

3. Rule 612(a) does not change the common law. *McGary v. State*, 750 S.W. 2d 782, 786 n.4 (Tex. Crim. App. 1988).

4. When the witness admits the act inquired about, he has impeached himself, and extrinsic evidence should not be admitted. *Hager v. State*, 734 S.W. 2d 180, 183 (Tex. App.--Eastland 1987, pet. ref'd); *see Miller v. State*, 666 S.W. 2d 269, 274 (Tex. App.--Dallas 1984, pet. ref'd)(error may be harmless, though); *cf. Linder v. State*, 828 S.W. 2d 290 (Tex. App.--Houston [1st Dist.] 1992, pet ref'd)(admission must be unequivocal, though).

5. The trial court errs in not permitting appellant to testify that the arresting officer told him he did not appear drunk where the officer denied having said this. *Jackson v. State*, 756 S.W. 2d 82, 84 (Tex. App.--San Antonio 1988), *remanded*, 772 S.W. 2d 117 (Tex. Crim. App. 1989).

6. "A party should not, however, be permitted to use a straw-man ploy to get impeachment evidence before the jury as substantive evidence. Courts should balance the probative value of admitting the prior inconsistent statement for its legitimate impeachment purpose against the danger of unfair prejudice created by the jury misusing the statement for substantive purposes." *Miranda v. State*, 813 S.W. 2d 724, 735-38 (Tex. App.--San Antonio 1991, pet. ref'd)(error must be preserved with specific objection, however).

7. Where the appellant does not make testimonial use of a tape recording, the work-product privilege stands in a superior position the state's claim under Rule 612. *Washington v. State*, 856 S.W. 2d 184, 190 n.6 (Tex. Crim. App. 1993).

8. Where Dr. Grigson testified about how many persons he had examined and testified about, appellant was entitled to cross-examine him concerning inconsistent testimony given in other trials. The error was harmless though. *Clark v. State*, 881 S.W.2d 682, 695-97 (Tex. Crim. App. 1994).

9. The protections of Rule 612 do not apply when the witness is the defendant, because he is a party opponent. *Bondurant v. State*, 956 S.W. 2d 762, 767 (Tex. App.--Fort Worth 1997)(tape recording admissible against defendant even though he admitted its contents).

10. Rule 612(a) only applies to statements made by the witness herself. Thus, the trial court does not err in refusing to permit impeachment by pleadings signed, not by the witness, but by her attorney. *Bigby v. State*, 892 S.W. 2d 864, 886 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1162 (1995).

D. *Impeachment With Evidence Of Bias, Motive Or Prejudice*

1. *General Rule*

a. "The Court has frequently stated that great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive and animus upon the part of any witness testifying against him." *Evans v. State*, 519 S.W. 2d 868, 871 (Tex. Crim. App. 1975).

b. It is permissible under the Federal Rules of Evidence to impeach a witness by showing his bias even though the rules do not specifically refer to bias. *United States v. Abel*, 469 U.S. 45, 51 (1984).

c. "Bias is a term used in the 'common law of evidence' to describe the rela-

tionship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness's self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984).

d. "It is well settled that the motives operating upon the mind of a witness are never regarded as immaterial or collateral matters." *Kissinger v. State*, 70 S.W. 2d 740, 742 (Tex. Crim. App. 1934).

e. "It is clear that the right to cross-examination for the purpose of affecting a witness' credibility is at least dual: `A witness *may be asked* any question, the answer to which may have a tendency to affect his credibility. *And* if he denies anything that would show a motive for, [sic] or animus to, testify against a party, it *may be shown* by other witnesses and by independent facts." *Harris v. State*, 642 S.W. 2d 471, 476-77 (Tex. Crim. App. 1982).

f. The witness may not defeat appellant's offer of proof of bias simply by generally admitting an interest in seeing appellant convicted. "This Court has held . . . that when a witness admits bias and prejudice proof of particular acts tending to show this bias and prejudice is admissible to show its extent." *Jackson v. State*, 482 S.W. 2d 864, 867 (Tex. Crim. App. 1972).

g. "Though the witness admits bias or prejudice the *extent* of it may be shown." *Powitzky v. State*, 117 S.W. 2d 72, 73 (Tex. Crim. App. 1938)(emphasis supplied).

h. "[T]he burden of showing the relevance of particular evidence to the issue of bias rests on its proponent." *Chambers v. State*, 866 S.W. 2d 9, 26-27 (Tex. Crim. App. 1993)(appellant failed to prove that letter from prosecutor to traffic court in Virginia requesting reset of disorderly conduct case demonstrated any benefit to the witness).

i. When the courts want to affirm, they point out that the extent of cross-examination which is permissible to show bias rests within the sound discretion of the trial court, which must balance the probative value of the evidence against the risks associated with admission. "The potential risks include the possibility of undue prejudice, embarrassment or harassment to either a witness or a party, the possibility of misleading or confusing a jury, and the possibility of undue delay or waste of time." *Cloud v. State*, 567 S.W. 2d 801, 802-803 (Tex. Crim. App. 1978).

j. The proponent of bias evidence bears the burden of establishing the substance of the excluded evidence by making an offer of proof. Absent this, error is not preserved for appeal. *Chambers v. State*, 866 S.W. 2d 9, 26-27 (Tex. Crim. App. 1993)(appellant wholly failed to explain why evidence should have been permitted, and what he hoped to establish with evidence).

k. A prior statement admitted to show bias under Rule 612(b) need not be inconsistent. *Sparks v. State*, 943 S.W. 2d 513, 515 (Tex. App.--Fort Worth 1997, pet. ref'd).

2. *Bias Stemming From Pending Charges Or Probationary Status*

a. *Davis v. Alaska*

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

ii. "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony. . . ." *Id*. at 317. The defendant should have been allowed to expose facts to the jury from which jurors could draw appropriate inferences relating to the credibility of the witness. *Id*. at 318.

iii. Defendant's interest in cross-examination was paramount to the state's interest in protecting the anonymity of juvenile offenders. *Id.* at 319.

iv. Defendant was "denied the right of effective cross-examination which `would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 318.

b. *Error Under Davis v. Alaska*

i. In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Court held that the trial court erred in wholly barring cross-examination concerning dismissal of a drunkenness charge, where the witness admitted the case was dismissed in exchange for his promise to speak to the prosecutor, but denied the agreement affected his testimony. "By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." *Id*. at 679.

ii. The court erred in not permitting appellants to impeach an important witness for the state with the fact that he was under felony indictment for sodomy at the time of trial, where this evidence showed his bias, interest and motive. *Evans v. State*, 519 S.W. 2d 868, 873 (Tex. Crim. App. 1975).

iii. Appellant had an unqualified right to ask the state's main witness whether she too had been accused of the offense on trial, because the jury was entitled to understand the witness's vulnerable status in juvenile court and to observe her testimony. *Harris v. State*, 642

S.W. 2d 471, 479 (Tex. Crim. App. 1982).

iv. The trial court erred in not allowing appellant to prove that the complaining witness had three arrests -- for possession of marijuana, unlawfully carrying a weapon and burglary -- and that all three charges had been dismissed. It is not important that the charges had been dismissed, since there is the possibility they could be refiled. *Simmons v. State*, 548 S.W. 2d 386, 388 (Tex. Crim. App. 1977).

v. Appellant was entitled to elicit from the witness, not only that he had been convicted, but also that he had received a probated sentence, to show his bias and motive to testify. *Spain v. State*, 585 S.W. 2d 705, 709-710 (Tex. Crim. App. 1979).

vi. The defense was entitled to demonstrate to the jury the bias or motive of the state's rebuttal witness by proving that he was under indictment for possession of methamphetamine. This fact was admissible to show a basis for an inference of undue pressure due to his status as an indictee. This is true even though the prosecutor denied there was a deal for his testimony. *Randle v. State*, 565 S.W. 2d 927, 930-31 (Tex. Crim. App. 1978).

vii. The court erred in not permitting appellant to show that an important witness for the state had been arrested and charged as a participant in the robbery and murder but that these charges were not pending at the time of appellant's trial. *Castro v. State*, 562 S.W. 2d 252, 257 (Tex. Crim. App. 1978).

viii. The trial court abused its discretion in not permitting appellant to cross-examine the witness regarding his deferred adjudication status and any conversations he might have had with the prosecution, police or his probation officer about ending it. *Paley v. State*, 811 S.W. 2d 226, 229-230 (Tex. App.--Houston [1st Dist.] 1991, pet. ref'd)(error harmless, though).

ix. The trial court erred in prohibiting appellant from showing that the state had filed and then withdrawn a motion to revoke probation against its eyewitness where this tended to show the witness's potential bias and motive for testifying favorably for the state. Even though the motion had been withdrawn, it could have been refiled. *Morgan v. State*, 740 S.W. 2d 57, 59 (Tex. App.--Dallas 1987, pet. ref'd).

x. The trial court erred in not permitting appellant to develop the witness's juvenile parole status, from which the jury might have inferred the possibility of undue influence. *Buitureida v. State*, 684 S.W. 2d 133, 141 (Tex. App.--Corpus Christi 1984, pet. ref'd).

xi. The trial court erred in prohibiting appellant from showing that the state's eyewitness was under indictment for possession of heroin where her version of the events had greatly changed between the time she gave her statement and the time of trial. *Hall v. State*, 663 S.W. 2d 154, 158 (Tex. App.--Fort Worth 1983, no pet.).

xii. Appellant's conviction was reversed in *Carroll v. State*, 916 S.W.

2d 494 (Tex. Crim. App. 1996), where the trial court refused to permit impeachment of the state's witness with evidence that he was awaiting trial on an aggravated robbery charge. The broad scope of cross-examination permitted by the constitution "necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witness' testimony might be empowered to exercise control." *Id*. at 498. Such evidence is *always* admissible to prove bias. *Id*. at 498 n.5. It is not determinative that there is no agreement between the state and the witness. "What is determinative is whether appellant was allowed to demonstrate any possible bias or interest that [the witness] may hold to testify on the State's behalf. In other words, it is possible, even absent an agreement, that [the witness] believed his testimony in this case would be of later benefit." *Id*. at 500.

xiii. The trial court erred in not permitting appellant to cross-examine the mother of the complainant concerning an allegation against the complainant that he burglarized appellant's house. "[Appellant's] testimony was in direct conflict with the complainant's; a possible bias or motive on the part of the complainant and her mother to see Hilliard convicted of this offense could have been an important part of his defense and would have strengthened his own testimony.
By denying him the right to explore this possible bias, the trial court frustrated his right to effective cross-examination." *Hilliard v. State*, 881 S.W. 2d 917, 922-23 (Tex. App.--Fort Worth 1994, no pet.).

c. *No Error Under Davis v. Alaska*

i. The trial court did not err in prohibiting appellant from exploring with the accomplice the *details* of an unrelated robbery in another county, where the details shed no further light on his motive to cooperate. *Lewis v. State*, 815 S.W. 2d 560, 565 (Tex. Crim. App. 1991); *see Richardson v. State*, 744 S.W. 2d 65. 79 (Tex. Crim. App. 1987), *vacated on other grounds*, *Richardson v. Texas*, 109 S.Ct. 65 (1989).

ii. The trial court did not err in prohibiting appellant from impeaching the state's witness where appellant did not show that the witness testified against him as a result of bias, motive or ill will emanating from his status of deferred adjudication. *Callins v. State*, 780 S.W. 2d 176, 196 (Tex. Crim. App. 1986), *cert. denied*, 110 S.Ct. 3256 (1990); *see Hoyos v. State*, 951 S.W. 2d 503, 508 (Tex. App.--Houston [14th Dist.] 1997, pet. granted); *Duncan v. State*, 899 S.W. 2d 279, 281 (Tex. App.--Houston [14th Dist.] 1995, pet. ref'd).

iii. The trial court did not err in not allowing appellant to ask one testifying accomplice about the effect on his testimony of his knowledge that another accomplice, who did not testify, received a life sentence. That this reflected on the testifying witness's bias was collateral and highly speculative. *Miller v. State*, 741 S.W. 2d 382, 390 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988).

iv. "*Davis v. Alaska* is not offended when a defendant is prohibited from asking a witness about an unrelated pending charge, provided that the defendant has otherwise

been afforded a thorough and effective cross-examination and where, as here, the bias and prejudice of the witness is so patently obvious." *Carmona v. State*, 698 S.W. 2d 100, 104 (Tex. Crim. App. 1985). In *Araiza v. State*, 929 S.W. 2d 552, 557 (Tex. App.--San Antonio 1996, pet. ref'd), the court of appeals affirmed the conviction, even though appellant was not permitted to impeach the witness regarding several pending charges. Apparently, the court found that she had been impeached enough, so as to insure that her bias was "patently obvious," and that cross-examination was "thourough and effective."

v. The trial court does not err in refusing impeachment with a pending worthless check case having no connection with the instant case, where the witness is a rebuttal, and not a material or accomplice witness, and where there was nothing to show that the prosecutor was using the charge to pressure favorable testimony. *Green v. State*, 676 S.W. 2d 359, 363 (Tex. Crim. App. 1984).

vi. The trial court did not abuse its discretion in excluding proof that the arresting officer had been suspended for filing a false report about another officer. The instant case was filed prior to the incident that led to the officer's suspension. Since the officer was not trying to curry favor or redeem himself by filing this case, and since his testimony supported the charge he filed, it is very speculative to say that his testimony was any different than it would have been had he not been suspended. *Cloud v. State*, 567 S.W. 2d 801, 803 (Tex. Crim. App. 1978).

vii. The trial court did not err in refusing to allow cross-examination where the witness's probation had expired at the time of trial so that he had no pending criminal charge. *Mead v. State*, 759 S.W. 2d 437, 443 (Tex. App.--Fort Worth 1988), *rev'd on other grounds*, 819 S.W. 2d 869 (Tex. Crim. App. 1991).

viii. In *Carpenter v. State*, 952 S.W. 2d 1 (Tex. Crim. App. 1997, pet. granted), appellant wanted to cross-examine a state's witness with evidence that he had federal conspiracy charges then pending against him, but the trial court disallowed this impeachment. The court of appeals affirmed. This evidence, although relevant, was properly excluded under Rule 403, in light of the danger that the jury would have been confused or used the evidence improperly. The court of criminal appeals has granted review in this case to determine whether the trial court erred under *Carroll*.

ix. The trial court did not err in refusing to permit appellant to impeach the complainant with evidence of a juvenile adjudication. Since the complainant was the victim, it could not be argued that he was trying to shift blame from himself. Also, he was not then on probation, so there was no threat of revocation. Finally, he was not a crucial witness, since two others testified that appellant was the perpetrator. *Gilmore v. State*, 871 S.W. 2d 848, 851 (Tex. App.--Houston [14th Dist.] 1994, no pet.).

d. *Harmless Error*

i. The improper denial of an opportunity to impeach a witness for bias is subject to a harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

3. *Bias Stemming From Promises Of Leniency*

a. In *Giglio v. United States*, 405 U.S. 150 (1972), one prosecutor promised the government's key witness that he would not be indicted if he testified. Another prosecutor tried the case, and at the trial, the witness denied that he had been promised immunity. Due process requires that such a promise be disclosed to the defense, since "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id*. at 155.

b. *Giglio* "is constitutionally dictated and cannot be cleverly circumvented" by an agreement between the prosecution and defense counsel to give the witness immunity but to keep him unaware of it until after he testified. *Burkhalter v. State*, 493 S.W.2d 214, 219 (Tex. Crim. App. 1973).

c. In *Granger v. State*, 683 S.W. 2d 387 (Tex. Crim. App. 1984), appellant was first convicted upon the testimony of his accomplice, who had earlier received the death penalty. Within ten days after testifying against appellant, the accomplice was granted a new trial, and she received 50 years in prison. Appellant's conviction was reversed, and the accomplice refused to testify at the second trial. The court admitted her testimony from the first trial, finding that she was unavailable. This was error, because appellant had been denied the right to effectively cross-examine the accomplice due to the state's failure to disclose that her testimony was induced by an agreement to reduce her punishment. This was not cured by the fact that appellant was allowed to call the accomplice at the second trial and have her testify about the deal, or by the fact that the second jury knew her sentence was 50 years, because the state offered the false testimony at the second trial. *Id*. at 389-91.

d. In *Duggan v. State*, 778 S.W. 2d 465 (Tex. Crim. App. 1989), the accomplices testified against appellant and denied having any deals for leniency with the state. In the motion for new trial, the prosecutor admitted that he had told the accomplices that he would consider leniency in exchange for their testimony . The court of appeals overruled this challenge, finding no formal agreement for any specific recommendation. This was error. There is no distinction between formal or express agreements, on the one hand, and implied, suggested, insinuated or inferred agreements, on the other. "It makes no difference whether the understanding

is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal." *Id*. at 467-68.

e. The trial court must permit the appellant to introduce into evidence all of the plea bargain of the testifying accomplice. The court errs in excluding evidence that the state was not seeking an affirmative finding against the witness, and that the state would ask for no more than 50 years in prison, and, in any event, no more time than the appellant received. Even though the court of criminal appeals agrees that this latter evidence might have been a motive for the witness to have testified mildly against the appellant, this "was a decision that the jury had to make and not for any appellate court to make." *Virts v. State*, 739 S.W. 2d 25, 31-32 (Tex. Crim. App. 1987).

f. The trial court erred in not permitting appellant to prove that the state had dismissed two charges against its witness and had given him a plea bargain on the third. It is irrelevant that there was no evidence that testifying for the state was a part of the plea bargain. It is also irrelevant that two of the cases had been dismissed, since "there is always a possibility that the State may cause the charges to be refiled if it so chooses." *Parker v. State*, 657 S.W. 2d 137, 140 (Tex. Crim. App. 1983).

g. The trial court errs in forbidding cross-examination of the witness about his plea bargain, even if the witness denies that there is a plea bargain. "An effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. The cross-examiner should be allowed to expose the limits of the witness' knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the witness. The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility. An unbelievable denial of the existence of a fact can be even more probative as to lack of credibility than an affirmative admission of the fact." *Spain v. State*, 585 S.W. 2d 705, 710 (Tex. Crim. App. 1979).

h. The trial court did not err in prohibiting appellant from cross-examining the witness about a plea bargain struck by her husband, who did not testify. Appellant made no effort to show how the interests of the witness and her husband dovetailed. Arguably, the result might have been different had the evidence established merely a marital relationship. The undisputed evidence, however, was that the two were getting a divorce and were hostile to one another. *Janecka v. State*, 739 S.W. 2d 813, 831 (Tex. Crim. App. 1987).

4. *Bias Stemming From Hostility Or Violence Against Accused By Witness*

a. Appellant was entitled to prove that the state's witness had attacked appellant in public, had thrown drinks at him, and had tried to attack girls he was with, because this tended to prove here malice, bias, ill feeling, animus or prejudice. *Koehler v. State*, 679 S.W. 2d 6, 10 (Tex. Crim. App. 1984).

b. Where appellant contended that the police had beat a confession out of him, he was entitled to cross-examine the police on this issue. *Fuentes v. State*, 664 S.W. 2d 333,

335 (Tex. Crim. App. 1984).

c. Where appellant's defense to the charge of possession of cocaine was that the cocaine was planted on him by the police, the trial court erred in excluding evidence of bias or hatred by a particular class -- police officers -- against appellant. *Coleman v. State*, 545 S.W. 2d 831, 835 (Tex. Crim. App. 1977).

d. The trial court errs in not permitting appellant to prove that, the day after he was arrested for assault on a police officer, the complaining witness and several other officers came to his house and beat him. This was relevant to show the complainant's bias and prejudice and may have affected his credibility before the jury. *Blair v. State*, 511 S.W. 2d 277, 278-79 (Tex. Crim. App. 1974).

e. Where appellant was charged with possession of heroin, he should have been permitted to prove that the police beat him up shortly after his arrest, because this would have proved their bias, motive or animus. *Hooper v. State*, 494 S.W. 2d 846, 848 (Tex. Crim. App. 1973); *accord Seal v. State*, 496 S.W. 2d 621, 623 (Tex. Crim. App. 1973); *see Lansdale v. State*, 158 S.W. 2d 75, 75 (Tex. Crim. App. 1942)(trial court erred in not permitting appellant to prove "certain testimony relative to what took place at the time of his arrest by the constable").

f. The trial court erred in not permitting appellant to prove that the police shot him, where this evidence both went to appellant's defense to the offense of resisting arrest, and where it may have affected the credibility of the police officers. *Nicholson v. State*, 738 S.W. 2d 59, 62 (Tex. App.--Houston [1st Dist.] 1987, no pet.).

g. Appellant was entitled to ask the state's witness whether she and her husband had hard feelings against him, even though the witness denied this on a bill of exceptions. The jury should have been given the opportunity to judge for themselves her credibility. *Wood v. State*, 486 S.W. 2d 359, 362 (Tex. Crim. App. 1972).

h. The trial court erred in not permitting appellant to prove that the state's witness hit him on the head with a key ring after he had been arrested. *Powitzky v. State*, 117 S.W. 2d 72, 73 (Tex. Crim. App. 1938).

i. The trial court erred in not permitting appellants to question the arresting officer in a resisting arrest case about his use of a nightstick, because the officer's use of force was sharply contradicted, and because appellants' theory was that they were merely resisting the use of excessive force. *Moody v. State*, 830 S.W. 2d 698, 705 (Tex. App.--Houston [1st Dist] 1992, pet. ref'd).

j. The trial court erred in prohibiting appellant from asking the arresting officer in a resisting arrest case about his prior use of a stun gun, because this was relevant to establish the officer's motive for testifying that he had not used excessive force in this case. *Posey v. State*, 738 S.W. 2d 321, 324 (Tex. App.--Dallas 1987, pet. ref'd).

k. The trial court should have permitted appellant charged with attempted capital murder of a police officer to prove that the officer visited appellant after the shooting and said, "I should have killed you." This proved the officer's state of mind and the jury should have had the evidence to evaluate his prejudice and bias in weighing his credibility. Further, this is admissible to show the officer's ill-feeling and animus against appellant. *Moreno v. State*, 711 S.W. 2d 382, 385 (Tex. App.--Houston [14th Dist.] 1986), *rev'd on other grounds*, 755 S.W. 2d 866 (Tex. Crim. App. 1988).

l. The trial court did not abuse its discretion in excluding proof that the arresting officer had been suspended for filing a false report about another officer. The instant case was filed prior to the incident that led to the officer's suspension. Since the officer was not trying to curry favor or redeem himself by filing this case, and since his testimony supported the charge he filed, it is very speculative to say that his testimony was any different than it would have been had he not been suspended. *Cloud v. State*, 567 S.W. 2d 801, 803 (Tex. Crim. App. 1978).

m. The trial court errs in not permitting appellant to cross-examine state's witnesses about their refusal to discuss the case with his counsel before trial. *R.M.G. v. State*, 711 S.W. 2d 397, 399-400 (Tex. App.--Dallas 1986), *aff'd on other grounds, Gengnagel v. State*, 748 S.W. 2d 227 (Tex. Crim. App. 1988).

5. *Bias Related To Civil Litigation*

a. "For the purpose of discrediting him, it may be shown that a prosecuting witness has brought a civil suit for damages based upon the same occurrence as that for which the accused is being prosecuted." *Blake v. State*, 365 S.W. 2d 795, 796 (Tex. Crim. App. 1963); *accord Rhodes v. State*, 387 S.W. 2d 413, 414 (Tex. Crim. App. 1965); *Gilson v. State*, 145 S.W. 2d 182, 183 (Tex. Crim. App. 1940); *Vyoral v. State*, 224 S.W. 889, 889 (Tex. Crim. App. 1920); *Hoffman v. State*, 209 S.W. 747, 748 (Tex. Crim. App. 1919); *see Zuniga v. State*, 664 S.W. 2d 366, 369 (Tex. App.--Corpus Christi 1983, no pet.)("bringing of a civil suit is proper evidence of bias or interest").

b. The trial court erred in not permitting appellant to cross-examine the mother of the complainant in an aggravated sexual assault case concerning a pending lawsuit seeking $125,000.00 in damages against the owners of the apartment complex where the alleged incident occurred. *Shelby v. State*, 819 S.W. 2d 544, 545 (Tex. Crim. App. 1991); *accord Davis v. State*, 831 S.W. 2d 426, 442 (Tex. App.--Austin 1992, pet. ref'd).

c. The trial court did not abuse its discretion in prohibiting appellant from cross-examining a police officer concerning a corresponding civil forfeiture suit where the officer himself gained only indirectly, if at all, from such suit. This evidence has only marginal relevance. *Frierson v. State*, 839 S.W. 2d 841, 850 (Tex. App.--Dallas 1992, pet. ref'd).

d. The trial court erred in prohibiting appellant from cross-examining the complainant in a robbery case concerning the civil lawsuit she had against the store in which the

robbery took place. *Furgison v. State*, 800 S.W. 2d 587, 591 (Tex. App.--Houston [14th Dist.] 1990, pet. ref'd)(error harmless, though, in light of overwhelming evidence of guilt). *See Hoyos v. State*, 951 S.W. 2d 503, 508 (Tex. App.--Houston [14th Dist.] 1997, pet. granted)(precedential value of *Furgison* is limited).

e. The trial court did not err in prohibiting cross-examination into a previously settled lawsuit against the witness by an anonymous West Virginia prisoner where this in no way showed bias or motive. *Moody v. State*, 827 S.W. 2d 875, 891 (Tex. Crim. App. 1992).

f. The trial court does not err in prohibiting cross-examination of the complainant concerning his worker's compensation suit, since it was not a civil suit seeking damages arising from the robbery. *Deloney v. State*, 734 S.W. 2d 6, 9 (Tex. App.--Dallas 1987, pet. ref'd).

g. In *Hoyos v. State*, 951 S.W. 2d 503, 508 (Tex. App.--Houston [14th Dist.] 1997, pet. granted), the robbery complainant retained a lawyer to sue the apartment complex, not appellant. "Because appellant was not a party to the lawsuit, any motive or bias the complainant might have in testifying against him was very slim." *Id*.

h. Where the parties to the lawsuit testify, but do not testify to facts which inculpate appellant, there is no error in refusing to permit proof of a lawsuit. *Branford v. State*, 306 S.W. 2d 725, 726 (Tex. Crim. App. 1957).

i. In *Cox v. State*, 523 S.W. 2d 695, 700 (Tex. Crim. App. 1975), the court held that, where the fact of the filing of the civil case was before the jury, the court does not err in refusing to admit the pleading itself, at least where it does not contain any statement which could be used for impeachment purposes. *See Jolly v. State*, 681 S.W. 2d 689, 694 (Tex. App.--Houston [14th Dist.] 1984), *rev'd on other grounds*, 739 S.W. 2d 345 (Tex. Crim. App. 1987)(impeachment must be by cross-examination of person who initiated suit, not by introduction of pleading or by testimony of third party); *Mullins v. State*, 699 S.W. 2d 346, 351 (Tex. App.--Corpus Christi 1985, no pet.)(no error in refusing testimony of attorney where complainant admitted filing lawsuit); *but cf., Fletcher v. State*, 437 S.W. 2d 849, 852 (Tex. Crim. App. 1969)(court records, not testimony of attorney, are best evidence of pending litigation).

j. Pleadings and judgments from other cases are inadmissible as hearsay. *E.g., Jernigan v. State*, 589 S.W. 2d 681, 692 (Tex. Crim. App. 1979)(lawsuits); *Oliver v. State*, 551 S.W. 2d 346, 348 (Tex. Crim. App. 1977)(answer and judgment); *Erwin v. State*, 531 S.W. 2d 337, 338 (Tex. Crim. App. 1976)(divorce petition); *Barker v. State*, 509 S.W. 2d 353, 354 (Tex. Crim. App. 1974)(annulment petition); *Yates v. State*, 489 S.W. 2d 620, 621 (Tex. Crim. App. 1973)(divorce petition and temporary restraining order); *Brooks v. State*, 475 S.W. 2d 268, 272 (Tex. Crim. App. 1972)(temporary restraining order); *Acker v. State*, 421 S.W. 2d 398, 402 (Tex. Crim. App. 1967)(divorce petition).

k. Pleadings are inadmissible even to rebut testimony. *Barker v. State*, 509 S.W. 2d 353, 354 (Tex. Crim. App. 1974); *Hoyle v. State*, 223 S.W. 2d 231, 232 (Tex. Crim. App.

1949).

l. The trial court erred in excluding evidence that appellant's former spouse and his lawyers had tried to blackmail appellant into settling a pending family law case. *L.M.W. v. State*, 891 S.W. 2d 754, 766 (Tex. App.--Fort Worth 1994, pet. ref'd).

6. *Racial Bias*

a. The trial court permitted appellant to ask the complainant if he had anything against black people; if he had ever stated or had feelings or opposition to people of the black race, or whether there was anything in his past that would show an aversion to blacks. Counsel was not permitted to ask the complainant about various acts of alleged bigotry, including: whether he had an established propensity for hating people of the black race; if he had been terminated from employment on several occasions for violence against blacks; whether he had fired every black employee he ever had, and if he was terminated as manager of a liquor store in Florida because he had problems with black customers. This was error. "Racial bigotry is a prototypical form of bias." *Hurd v. State,* 725 S.W. 2d 249, 253 (Tex. Crim. App. 1987). It is reasonable to assume that the alleged racial bias of the witness could furnish him with a motive for favoring the state in his testimony. *Id*. at 253 n.1.

b. "[A] witness's bias or prejudice against Hispanics may be a legitimate area of inquiry under rule 612(b)." *Gonzales v. State*, 929 S.W. 2d 546, 550 (Tex. App.--Austin 1996, pet. ref'd)(trial court did not err in finding, under Rule 403, that evidence was more prejudicial than probative, though).

7. *Bias In Sexual Assault Cases*

a. In *Olden v.Kentucky*, 109 S.Ct. 480 (1988), the defendant was charged with various sexual crimes against the complainant, and his defense was consent. Defendant wanted to prove that the complainant was co-habitating with Russell, asserting that this was necessary to prove her motivation to lie against him. Specifically, defendant argued that he and the complainant had engaged in consensual sex, and that the complainant, because she feared jeopardizing her relationship with Russell, lied about being raped. The Court found that the trial court had erred in excluding this evidence, holding that a reasonable jury might have had a much different impression of the complainant's credibility had the defendant been able to expose her motivation through cross-examination. *Id*. at 483-84.

b. Where the appellant's sole defense was consent, the trial court erred in prohibiting him from presenting evidence that the complainant had previously engaged in group sexual encounters with other men. This evidence, in combination with expert testimony on the subject of nymphomania, was relevant to show the complainant's motive to protect her alleged affliction. *Chew v. State,* 804 S.W. 2d 633, 638 (Tex. App.--San Antonio 1991, pet. ref'd).

c. The trial court erred in excluding evidence that the mother of the com-

plaining witness was being investigated for physical abuse of her children, where it was appellant's defensive theory that the mother forced the child to accuse him in order to divert the attention of the authorities. *Steve v. State*, 614 S.W. 2d 137, 139-140 (Tex. Crim. App. 1981).

8. *Bias Against Justice System*

a. Appellant was entitled to prove that the state's witness had distributed handbills, and why he had distributed them, where this showed his bias and prejudice against the system of justice in Austin. *Jackson v. State*, 482 S.W. 2d 864, 868 (Tex. Crim. App. 1972).

9. *Bias Stemming From Membership In Organizations*

a. "A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias." *United States v. Abel*, 469 U.S. 45, 52 (1984).

10. *Arrest Quotas*

a. The trial court erred in not permitting appellant to cross-examine the arresting officer in a drink solicitation case about how much money he had spent at the bar, where appellant's theory was that the officer had to make meritless arrests in order to justify his expenses. *Vela v. State*, 776 S.W. 2d 721, 725 (Tex. App.--Corpus Christi 1989, no pet.). *But see Castillo v. State*, 939 S.W. 2d 1754, 759 (Tex. App.--Houston [14th Dist.] 1997, pet. ref'd)(distinguishing *Vela*, finding that the trial court did not err in excluding evidence of officer's aggregate overtime pay).

b. In *Alexander v. State*, 949 S.W. 2d 772, 775 (Tex. App.--Dallas 1997, pet. ref'd), the trial court erred in not permitting the defense to ask the arresting officer whether there was a directive from his superiors concerning the number of DWI arrests that had to be made. And, the error was harmful.

11. *Parole Files*

a. Where the defendant alleges that his file with the Texas Board of Pardons and Paroles contains letters from a state's witness which would tend to show her bias, prejudice and motive for testifying, the trial court must examine these letter in camera. If the letters do tend to show bias, they must be made available for cross-examination after the witness testifies. *Texas Board of Pardons and Paroles v. Miller*, 590 S.W. 2d 142, 145 (Tex. Crim. App. 1979).

12. *Defense Witness Bias*

a. Typically, bias by proof of pending charges is used to impeach witnesses for the state. "In most cases proof of a pending charge against a defense witness has no bearing on his motive to testify for an accused." *Alexander v. State*, 740 S.W. 2d 749, 763 n.7 (Tex. Crim. App. 1987); *see Murphy v. State*, 587 S.W. 2d 718, 723 (Tex. Crim. App. 1979); *Fentis v. State*, 528

S.W. 2d 590, 593 (Tex. Crim. App. 1975).

b. In *Dixon v. State*, 958 S.W. 2d 898 (Tex. App.--Fort Worth 1997, pet. granted), witness Pelfrey testified in behalf of the appellant, that he and his wife has socialized with appellant and that, before appellant was charged, he had planned to marry. On cross-examination the state was permitted to elicit from Pelfrey that he was facing sexual charges himself. The trial court overruled appellant's objection, finding that the pending charges were admissible to prove bias and motive. The court of appeals affirmed. Although Rule 608(b) provides that credibility may not be impeached with specific instances of conduct other than a criminal conviction, Rule 612(b) permits impeachment with proof of circumstances or statements showing bias or interest. "Thus the plain language of Rule 612(b) creates an exception to Rule 608(b) where the evidence shows bias or a motive for the witness to testify untruthfully." Here, no objection was made below under Rule 612(b). The general objection under Rule 608(b) does not suffice. But even if a proper objection had been made, the evidence would still have been admissible. "The fact that Pelfrey had charges pending against him for the same type of offense gives rise to the possibility that Pelfrey testified on Dixon's behalf because he was either antagonistic towards the State or because he empathized with Dixon." *Id*. at 900. The court of criminal appeals has granted review.

c. In *Moreno v. State*, 944 S.W. 2d 685 (Tex. App.--Houston [14th Dist.] 1997, pet. granted). appellee was charged with DWI, and, when he testified in his own behalf, the state was allowed to impeach him with the fact that he was then on deferred adjudication for attempted murder. The theory was that this pending case gave him a bias or motive to testify, since, if he were convicted, his probation could be revoked. The court of appeals reversed. There was no proof of any circumstances supporting bias or interest other than that the pending adjudication that *could* result in a conviction *if* the state filed a motion to adjudicate. "Accordingly, the state has failed to establish 'a specific connection between the witness' [appellant's] testimony and the cause, disclosing an *actual bias or motive*." Therefore, the evidence was not relevant and the trial court abused its discretion in admitting it. *Id*. at 692. The court of criminal appeals has granted discretionary review in this case.

d. Where the state is entitled to show the bias of a defense witness, it may not impeach that witness with evidence that his relatives were in trouble with the law, unless it can establish some causal connection or relationship between the relative's problem and the witness's testimony. *London v. State*, 739 S.W. 2d 842, 846 (Tex. Crim. App. 1987)(trial court erred in permitting proof of relative's problem's with the law where these problems were irrelevant).

e. Although the state may have been entitled to prove the witness's extraneous offense for bias impeachment, it was improper to prove that appellant was her co-indictee. *Kelley v. State*, 807 S.W. 2d 810, 818 (Tex. App.--Houston [14th Dist.] 1991, pet. ref'd).

f. It is permissible for the prosecution to prove that the defendant and his witness are both members of a prison gang which was sworn to secrecy and self-protection. *United States v. Abel*, 469 U.S. 45, 52 (1984).

13. *Preservation Of Error*

a. Error was preserved by an informal bill of exceptions which sufficiently showed what questions appellant would have asked the witness and the answers he might have received. "It was not necessary for counsel to show the trial court that his cross-examination of the witness would affirmatively establish the facts he sought to prove." *Hurd v. State*, 725 S.W. 2d 249, 253 (Tex. Crim. App. 1987); *accord Harris v. State*, 642 S.W. 2d 471, 479 (Tex. Crim. App. 1982); *Buitureida v. State*, 684 S.W. 2d 133, 139 (Tex. App.--Corpus Christi 1984, pet. ref'd).

b. Error is preserved by an offer of proof which included the questions appellant desired to ask, without the need of showing what facts the cross-examination would have revealed. *Koehler v. State*, 679 S.W. 2d 6, 8-9 (Tex. Crim. App. 1984).

c. Where counsel relies on an informal bill of exception to preserve error, the bill must include a summary of the proposed testimony. Merely informing the judge of an intent to establish a basis for an instruction on probable cause does not preserve error, because it does not provide a concise statement regarding the content of the testimony to be elicited. *Love v. State*, 861 S.W. 2d 899, 900-901(Tex. Crim. App. 1993).

d. Although it is error to deny the right to impeach for purposes of showing bias, prejudice, interest or motive, "in this case, appellant never advised the court that his cross-examination concerning prior arrests of the witness was for the purpose of showing bias, prejudice, interest or motive." *Robinson v. State*, 681 S.W. 2d 288, 289 (Tex. App.--San Antonio 1984, pet. ref'd).

e. A defendant is not limited to any one method of showing what the excluded testimony would have been. Here appellant preserved error by clearly explaining what the excluded testimony would have been, even though he did not establish the specific questions he intended to ask. *Gutierrez v. State*, 764 S.W. 2d 796, 798 (Tex. Crim. App. 1989).

14. *Harmful Or Harmless*

a. "[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

b. In *Shelby v. State*, 819 S.W. 2d 544, 551 (Tex. Crim. App. 1991), the court applied the *Van Arsdall* test and was unable to conclude beyond a reasonable doubt that the confrontation violation there was harmless.

15. *Ineffective counsel*

a. A statement admitted under Rule 612(a) is admissible only for impeachment. In *Owens v. State*, 916 S.W. 2d 713, 718 (Tex. App.--Waco 1996, no pet.), the court of appeals held that counsel was ineffective for not requesting a jury instruction which limited a statement admitted under Rule 612(a).

E. *Prior Consistent Statements In Texas*

1. *Rules 613(c) and 801(e)(1)(B)*

a. A prior *consistent* statement of a witness is not admissible unless it is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Tex. R. Evid. 613(c); *see* Tex. R. Crim. Evid. 801(e)(1)(B).

b. "Rule 801(e)(1)(B) requires that a prior consistent statement be made before the alleged improper influence or motive arose." Prior consistent statements made *after* a motive to falsify exists are not admissible. *Haughton v. State*, 805 S.W. 2d 405, 408 (Tex. Crim. App. 1990)(child's videotape not admissible where alleged motive for fabrication arose prior to making of videotape); *Campbell v. State*, 718 S.W. 2d 712, 717 (Tex. Crim. App. 1986)(statement not admissible because it was made after witness was promised money); *Fleming v. State*, 819 S.W. 2d 237, 246-47 (Tex. App.--Austin 1991, pet. ref'd)(no showing that statements were made before the alleged improper influence was brought); *Beaver v. State*, 736 S.W. 2d 212, 215 (Tex. App.--Corpus Christi 1987, no pet.)(statement made shortly before, and in anticipation of, trial); *Rodriguez v. State*, 687 S.W. 2d 505, 507 (Tex. App.--Houston [1st Dist.] 1985, no pet.)(statement made after defendant knew he had been accused).

c. The prior consistent statement was found admissible in the following cases: *Moody v. State*, 827 S.W. 2d 875, 893-94 (Tex. Crim. App. 1992); *Long v. State*, 821 S.W. 2d 216, 217 (Tex. App.--Houston [14th Dist.] 1991, no pet.); *Mathes v. State*, 765 S.W. 2d 853, 858-860 (Tex. App.--Beaumont 1989, pet. ref'd); *Ray v. State*, 764 S.W. 2d 406, 411 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd); *Cartmill v. State*, 748 S.W. 2d 581, 583 (Tex. App.--Dallas 1988, no pet.).

d. Error in excluding a prior consistent statement can be harmless. *Rodriguez v. State*, 687 S.W. 2d 505, 507 (Tex. App.--Houston [1st Dist.] 1985, no pet.).

e. "Where an attempt is made to impeach a witness by showing that he made statements inconsistent with his trial testimony, the witness may be supported by showing that he made statements consistent with his trial testimony after the offense in question." *Reed v. State*, 703 S.W. 2d 380, 385 (Tex. App.--Dallas 1986, pet. ref'd)(pre-rules case).

f. Even if the prior consistent statement is admissible under Rule 801(e)(1)(B), a defendant can still argue that it denies him his *constitutional* right of confrontation. *See Haughton v. State*, 805 S.W. 2d 405, 408 n.4 (Tex. Crim. App. 1990).

g. A prior consistent statement is only admissible to rebut. If offered as substantive evidence, or for the truth of the matter asserted, it is objectionable as hearsay. *Cohn v. State*, 849 S.W.2d 817, 820 n.8 (Tex. Crim. App. 1993).

E. *Collateral Matters*

1. Before the enactment of the Rules of Criminal Evidence, parties were generally not entitled to impeach on collateral matters. The continued viability of this is now questionable. *Clark v. State*, 881 S.W.2d 682, 696 n.12 (Tex. Crim. App. 1994).

XII. RULE 614: EXCLUSION OF WITNESSES

A. *Text*: *TEX. R. EVID.* 614

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

(1) a party who is a natural person or in civil cases the spouse of such natural person;

(2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

B. *The Rule Has Been Renumbered*

1. Texas Rule of Evidence 614 was formerly known as Texas Rule of Criminal Evidence 613. Except for the new number, and a few minor changes, the two rules are substantively identical for criminal cases. At the time this paper is written, there are no published cases which cite present Rule 614. All references in this paper, then, are to Rule 613.

C. *Article 36.05*

"Witnesses under rule shall be attended by an officer, and all their reasonable wants provided for, unless the court, in its discretion, directs that they be allowed to go at large; but in no case where the witnesses are under rule shall they be allowed to hear any testimony in the case." Tex. Code Crim. Proc. Ann. art. 36.05 (Vernon 1981).

D. *Article 36.06*

"Witnesses, when placed under rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under rule. The officer who attends the witnesses shall report to the court at once any violation of its instructions, and the party violating the same shall be punished for contempt of court." Tex. Code Crim. Proc. Ann. art. 36.06 (Vernon 1981).

E. *Article 56.02(b)*

"A victim is entitled to the right to be present at all public court proceedings related to the offense, subject to the approval of the judge in the case." Tex. Code Crim. Proc. Ann. art. 56.02(b) (Vernon Supp 1998).

F. *Case Law*

1. *In General*

a. Before enactment of the Rules of Criminal Evidence the decision to invoke the `Rule' was discretionary with the trial court. "Our sequestration rule is no longer discretionary with the trial court. By its own terms, the court *shall* order the witnesses excluded at the request of a party or on its own motion." *Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994); *accord. Kelley v. State*, 817 S.W. 2d 168, 171 (Tex. App.--Austin 1991, pet. ref'd).

b. The party who claims the statutory exemption from the Rule bears the burden of showing the witness's presence is in fact essential. *Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994); *see Tell v. State*, 908 S.W.2d 535, 542 (Tex. App.--Fort Worth 1995, no pet.)(appellant met his burden of showing that his investigator was essential to his case and therefore exempt from the rule); *Kelley v. State*, 817 S.W. 2d 168, 172 (Tex. App.--Austin 1991, pet. ref'd)(prosecutor met her burden by testifying under oath); *see Bath v. State*, 951 S.W. 2d 11, 23 (Tex. App.--Corpus Christi 1997, pet. ref'd)(prosecution met burden by explaining that witness "was involved with the investigation of this case since the date of the offense; that he was the lead investigator for the prosecution and helped coordinate with all the law enforcement agencies; that he assisted the prosecution in preparing this case for trial; and that his assistance and expertise would be needed with numerous items of evidence to be presented at trial"); *Hullaby v. State*, 911 S.W. 2d 921, 929 (Tex. App.--Fort Worth 1995, pet. ref'd)(clear from the record that police expert was needed to interpret gang slang and symbolism).

c. In following cases, the prosecution failed to meet its burden of establishing an exemption:

i. The trial court erred in accepting the prosecutor's conclusory request for exemption from the Rule. *Aguilar v. State*, 739 S.W. 2d 357, 359-360 (Tex. Crim. App. 1987).

ii. A merely conclusory claim that the witness is essential is not enough to justify exemption from the Rule. *Hernandez v. State*, 791 S.W. 2d 301, 306 (Tex. App.--Corpus Christi 1990, pet. ref'd)(error harmless though).

iii. Although the state made no showing that the probation officer's presence was essential, and there was nothing in the record to show this, the violation is harmless under the facts. Still, the court cautions that, absent a *showing* that the witness's presence is essential, the witness shall be excluded. *Hendley v. State*, 783 S.W. 2d 750, 752-53 (Tex. App.--Houston [1st Dist.] 1990, no pet.).

iv. The prosecutor's conclusory claim that he is entitled to have a case worker present is insufficient to justify exemption from the Rule. *Barnhill v. State*, 779 S.W. 2d 890, 892-93 (Tex. App.--Corpus Christ 1989, no pet.)(harmless).

v. "'Expediency' is not an exception under our rules." The trial court erred, therefore, in allowing the state's expert witness to remain in the courtroom during the testimony of the defense expert, simply because it was expedient. *Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994)(error harmless though where state's expert's opinion was not based on what the defense expert testified to); *but cf. Martinez v. State*, 867 S.W. 2d 30, 40 (Tex. Crim. App. 1993)(trial court has discretion to permit expert witnesses to be exempt from the rule).

vi. In *White v. State*, 958 S.W. 2d 460 (Tex. App.--Waco 1997, no pet.), the state sought an exemption for witness Cawthorn, stating merely that "the State's position is that his presence is necessary for the presentation of its case." *Id*. at 461 n.1. "A conclusory statement that the witness' presence is 'essential and necessary' is not enough." *Id*. at 463. "[T]he trial judge should carefully consider the critical importance of the testimony of the witness in determining whether to exempt him." *Id*. "The State made no attempt to explain the need for Cawthorn's presence; thus, the trial court erred when it failed to properly exercise judicial discretion in exempting him from the Rule." *Id.* And, this error was harmful under Rule 44.2 of the Texas Rules of Appellate Procedure. *Id*. at 465.

d. "Counsel is permitted to discuss the case with witnesses who have previously been placed under the rule out of the presence of each other." *Archer v. State*, 703 S.W. 2d 664, 666 n.1 (Tex. Crim. App. 1986).

e. The prosecutor may not deprive the defendant of his right to a public trial by claiming an interest in having all his friends testify, and then having them removed from the courtroom under "the rule." *Addy v. State*, 849 S.W. 2d 425, 428-430 (Tex. App.--Houston [1st Dist.] 1993, no pet.).

f. "The purpose of placing witnesses in a proceeding under the sequestration rule . . . is to prevent the testimony of one witness from influencing the testimony of another." *Bell v. State*, 938 S.W. 2d 35, 50 (Tex. Crim. App. 1997), *cert. denied*, 118 S. Ct. 90 (1997).

2. *Exclusion Of State's Witnesses*

a. The trial court erred in not excluding the complaining witness from the pre-trial suppression hearing, on authority of article 56.02(b) of the Code of Criminal Procedure. *Jimenez v. State*, 787 S.W. 2d 516, 523 (Tex. App.--El Paso 1990, no pet.).

b. If the witness is one who had no connection with either party's case and who was unlikely to be called because of a lack of personal knowledge, the trial court does not abuse its discretion in permitting that person to testify even though he heard testimony. *Guerra v. State*, 771 S.W. 2d 453, 476 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 925 (1989).

c. If the witness was one who had personal knowledge of the case, and who the party clearly anticipated calling to the stand, then the question is whether the defendant was harmed. Two questions must be asked to determine harm.

i. Did the witness actually hear the testimony of the other witnesses?

ii. Did the witness's testimony contradict the testimony of the witnesses he actually heard from the opposing side or corroborate the testimony of another witness he actually heard from the same side on an issue of fact bearing upon the issue of guilt or innocence? *Guerra v. State*, 771 S.W. 2d 453, 475-76 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 925 (1989).

d. The trial court does not abuse its discretion in permitting a witness who heard the trial to testify when the witness had not been summoned and was initially unconnected with the case, but who became a necessary witness due to events during the trial. *Valdez v. State*, 776 S.W. 2d 162, 170 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2575 (1990); *see Marx v. State*, 953 S.W. 2d 321, 338 (Tex. App.--Austin 1997, pet. granted)(rebuttal witness who did not testify about appellant's guilt or innocence); *Holloman v. State*, 942 S.W. 2d 773, 775 (Tex. App.--Beaumont 1997, no pet.)(no violation of the rule where spectator was called to testify about unforseen events arising during the course of trial); *see also Green v. State*, 682 S.W. 2d 271, 294 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985).

e. The trial court did not abuse its discretion in permitting state's witnesses to testify at punishment that defendant had a bad reputation. "Because such testimony was not relevant to Marx's guilt or innocence, its admission was not an abuse of discretion." *Marx v. State*, 953 S.W. 2d 321, 338 (Tex. App.--Austin 1997, pet. granted). Where the witness was not called until after the jury had found appellant guilty, and where her "testimony during the punishment phase of the trial neither corroborated nor contradicted evidence serving to establish or refute an element of the crime," the trial court did not abuse its discretion. *Upton v. State*, 894 S.W. 2d 426, 428 (Tex. App.--Amarillo 1995, pet. ref'd).

f. The trial court does not abuse its discretion in exempting the victim's widow from the rule following her testimony where she was the first witness to testify and her testify

could not have heard anyone else, and there was no evidence she conferred with any of the subsequent witnesses. *Cooks v. State*, 844 S.W. 2d 697, 733 (Tex. Crim. App. 1992), *cert. denied*, 113 S.Ct. 3048 (1993).

g. The trial court reversibly erred in not excluding the testimony of a bailiff, given that the state knew of his importance as a witness and failed to inform the court of that fact and failed to show any excuse for not having done so. And, the error was obviously harmful because it contradicted vital testimony of two critical defense witnesses. *Coots v. State*, 826 S.W. 2d 955, 961 (Tex. App.--Houston [1st Dist.] 1992, no pet.).

h. A violation of the Rule may be harmless. *E.g., Guerra v. State*, 771 S.W. 2d 453, 475-76 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 925 (1989); *White v. State*, 867 S.W.2d 921, 928 (Tex. App.--Houston [1st Dist] 1993, no pet.); *Kelley v. State*, 817 S.W. 2d 168, 172 (Tex. App.--Austin 1991, pet. ref'd); *Beasley v. State*, 810 S.W. 2d 838, 843 (Tex. App.--Fort Worth 1991, pet. ref'd).

i. A violation of the Rule is harmful where the complainant's testimony sufficiently coincides with the testimony of the other witnesses. *Aguilar v. State*, 739 S.W. 2d 357, 360 (Tex. Crim. App. 1987).

j. "Without clear evidence of harm to Appellant, the State and the defense cannot agree to excuse a witness from "the rule" and object later to subsequent testimony given by that same witness." *Choice v. State*, 883 S.W. 2d 325, 327 (Tex. App.--Tyler 1994, no pet.).

k. Although it was clear that the witness violated the rule, reversal was not required, where his presence in the courtroom "did not color his own testimony." *Bell v. State*, 938 S.W. 2d 35, 50 (Tex. Crim. App. 1997), *cert. denied*, 118 S. Ct. 90 (1997).

3. *Exclusion Of Defense Witnesses*

a. A different test is used to determine whether the trial court erred in forbidding a defense witness from testifying: "Where the 'particular and extraordinary circumstances' show neither the defendant nor his counsel have consented, procured, connived or have knowledge of a witness or potential witness who is in violation of the sequestration rule, and the testimony of the witness is crucial to the defense, it is an abuse of discretion exercised by the trial court to disqualify the witness." *Webb v. State*, 766 S.W. 2d 236, 244 (Tex. Crim. App. 1989).

b. The court of criminal appeals utilized the *Webb* test in *Davis v. State*, 872 S.W.2d 743 (Tex. Crim. App. 1994), to hold that the trial court erred in excluding a defense witness. There was no showing that appellant or counsel consented, procured or otherwise had knowledge of the witness's presence in the courtroom together with knowledge of the content of the witness's testimony. And, the excluded testimony was crucial where it would have corroborated testimony the jury apparently did not believe. *Id*. at 746.

c. The trial court did not err in excluding testimony where defense counsel was at the very least negligent in permitting the witnesses in the courtroom. *Chavez v. State*, 794 S.W. 2d 910, 915 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd).

d. The trial court did not err in excluding the testimony of two witnesses, where defense counsel admitted he had interviewed them both together. *Lopez v. State*, 960 S.W. 2d 948, 953 (Tex. App.--Houston [1st Dist.] 1998).

e. The trial court properly excluded appellant's guardian from the courtroom. *Koehler v. State*, 830 S.W. 2d 665, 667 (Tex. App.--San Antonio 1992, no pet.).

f. The trial court erred in excluding testimony from appellant's investigator where appellant's attorney lacked ample notice that the investigator's testimony would be necessary during trial. Counsel did not contemplate using the investigator as a witness when the rule was invoked, and the witness was not connected to appellant's case in chief, but only became a necessary witness due to events that occurred near the end of the state's case. *Tell v. State*, 908 S.W.2d 535, 542(Tex. App.--Fort Worth 1995, no pet.)(error harmless though).

4. *Expert Witnesses*

a. Before the rules took effect, the courts typically held that the trial court was vested with the discretion to exempt expert witnesses from the rule so that they could hear the testimony of other witnesses and base their opinion on this testimony. *E.g., Lewis v. State*, 486 S.W. 2d 104, 106 (Tex. Crim. App. 1972); *Carlile v. State*, 451 S.W. 2d 511, 512 (Tex. Crim. App. 1970). At least one post-rules case agrees. *See Martinez v. State*, 867 S.W. 2d 30, 40 (Tex. Crim. App. 1993)(trial court has discretion to permit expert witness to view testimony of other witnesses before giving an opinion on future dangerousness at capital trial).

b. A recent case seems to come to a different conclusion. "'Expediency' is not an exception under our rules." The trial court erred, therefore, in allowing the state's expert witness to remain in the courtroom during the testimony of the defense expert, simply because it was expedient. *Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994)(error harmless though where state's expert's opinion was not based on what the defense expert testified to).

5. *Preservation of Error*

a. A timely and specific objection, of course, is required to preserve error to a purported violation of the rule. An objection that the witness in quesiton would be allowed to listen to the testimony of others prior to giving his own testimony is sufficient to preserve error. *White v. State*, 958 S.W. 2d 460, 462 (Tex. App.--Waco 1997, no pet.).

XIV. RULE 615: PRODUCTION OF STATEMENTS OF WITNESSES IN CRIMINAL CASES

A. *Text*: *TEX. R. EVID.* 615

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

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

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

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

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

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

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

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

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

B. *The Rule Has Been Renumbered*

1. Texas Rule of Evidence 615 was formerly known as Texas Rule of Criminal Evidence 614. Except for the new number, and a few minor changes, the two rules are substantively identical for criminal cases. At the time this paper is written, there are no published cases which cite present Rule 615. All references in this paper, then, are to Rule 614.

C. *Commentary*

1. Previously, the right to discover statements of testifying witnesses was covered by the familiar case of *Gaskin v. State*, 353 S.W. 2d 467 (Tex. Crim. App. 1961). Rule 614 expands the Gaskin Rule in two respects. First, it gives the state a right of discovery similar to the defendant's. Second, it applies to some statements which have not been reduced to writing. 1 S. Goode, O. Wellborn & M. Sharlot, Guide To The Texas Rules Of Evidence: Civil And Criminal, § 615.1 (Texas Practice 1993).

2. "Whether the statement is actually used at trial to refresh the witness's recollection or for any other purpose is of no consequence." 1 S. Goode, O. Wellborn & M. Sharlot, Guide To The Texas Rules Of Evidence: Civil And Criminal, § 615.1 (Texas Practice 1993).

D. *Case Law*

1. Rule 614(d) requires the court to give counsel a recess to permit a "reasonable examination" of witness statements. Reversal is not required absent an abuse of discretion. Where the trial court suspends examination long enough for two counsel to read and comprehend the statement, there is no abuse of discretion. *Camacho v. State*, 864 S.W. 2d 524, 531 (Tex. Crim. App. 1993).

2. In *Newsome v. State*, 829 S.W. 2d 260 (Tex. App.--Dallas 1992, pet. ref'd), the first appeal was abated for a retroactive *Batson* hearing, at which time appellant sought production of the prosecutor's notes for cross-examination under Rule 614 of the Texas Rules of Criminal Evidence. The prosecutor responded that he had no notes from the jury selection itself, but that he had prepared some notes in anticipation of the *Batson* hearing. He objected to disclosure, invoking the work product privilege and the trial court sustained the objection. *Id*. at 263. The court of appeals affirmed the judgment below on two grounds. First, the court held that these "private writings that a witness has made solely for his own use in testifying and that only the witness has seen" are not "statements' within the purview of Rule 614. Second, even if these notes were within the purview of Rule 614, appellant failed to preserve this issue on appeal. Even though trial counsel requested that the notes be made a part of the record, in fact, they were not. "The record does not reflect any efforts to incorporate the statement in the appellate record nor does Newsome complain in a point of error of the trial court's refusal to include the statement in the record." *Id*. at 264.

3. In *Guilder v. State*, 794 S.W. 2d 765 (Tex. App.--Dallas 1990, no pet.), the court of appeals held that appellant's request for the prosecutor's notes under Rule 614 was properly

denied since these notes do not constitute a "statement" as contemplated by that rule. Appellant did not complain on appeal that the notes were producible under Rule 611. *Id*. at 773.

4. In *Pondexter v. State*, 942 S.W. 2d 577, 582 (Tex. Crim. App. 1996), *cert. denied*, 118 S. Ct. 85 (1997), the court of criminal appeals rejected appellant's claim that he was entitled to the prosecutor's *Batson* notes under Rule 614. Under Rule 614(f) a statement is "a written statement made by the witness that is signed or otherwise adopted or approved by him." Here, "the record does not establish that the prosecutor's notes were signed or in any way adopted by him. And even though appellant argues that the trial court erred in not preserving the notes as part of the record, it was appellant's duty to request the court to include the notes as part of the record. Appellant did not make such a request of the court." *Id*. at 582-83.

5. In *Jenkins v. State*, 912 S.W. 2d 793 (Tex. Crim. App. 1995), the state called a narcotics investigator with the Texas Department of Corrections who testified about the importation of drugs into prison and their widespread use. On cross-examination, he testified that it was part of his job to make reports and findings of his investigations. Appellant requested production of these reports under Rule 614, and the request was denied, except as to those reports that specifically concerned appellant. This was not error, since the statements were not in the possession of the prosecutor. "We hold the 'plain language' of Rule 614(a) requires a prosecutor to produce witness statements that are in the prosecutor's possession. And, since the record does not reflect that Bitter's reports were in the prosecutor's possession or that Bitter was part of the 'prosecutorial arm of the government,' the trial court did not error in denying appellant's request to order Bitter to produce them." *Id*. at 819.

6. A report by the arresting police officer detailing the items found after an inventory of appellant's car was a "statement" under Rule 614. *Cross v. State*, 877 S.W. 2d 25, 27 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd). The statement was not discoverable, however, because it had been destroyed, and was therefore not in the state's possession. *Id*.

7. The court of appeals erred in holding that victim impact statements, made pursuant to article 56.03(g), are exempted from Rule 614 of the Texas Rules of Criminal Evidence. *Enos v. State*, 899 S.W.2d 303, 305 (Tex. Crim. App. 1994).

8. The trial court did not err in refusing to order disclosure of notes prepared by the prosecutors after interviewing witnesses who testified at trial that they had reviewed the notes for accuracy. These were not statements prepared by the witnesses which were signed and otherwise approved by them. *Williams v. State*, 940 S.W. 2d 802, 807 (Tex. App.--Fort Worth 1997, pet. ref'd).

9. The officer testified that he could not find his report. "The record shows that there was no report to tender to counsel and thus Rule 614 was not violated." *Amunson v. State*, 928 S.W. 2d 601, 608 (Tex. App.--San Antonio 1996, pet. ref'd).

10. In *Johnson v. State*, 919 S.W. 2d 473, 478-79 (Tex. App.--Fort Worth 1996, pet.

ref'd), where the witness testified that his stepson had prepared the victim impact statement by "basically writing down [his] answers," the document was adopted by the witness and should have been disclosed upon request. Error was not preserved, though, because the statement was not made a part of the appellate record. *Id*.

11. In *Jordan v. State*, 897 S.W. 2d 909 (Tex. App.--Fort Worth 1995, no pet.), the state objected to disclosure of a tape recording between a witness and an employee of its office. The court of appeals held that "rule 614 does not except from production otherwise producible statements because they constitute work product." *Id*. at 917. The court proposed the following analysis under Rule 614:

> First, the trial court should determine whether the writing or recording constitutes a "statement" as that term is defined under 614(f). That determination falls within the sound discretion of the trial court. If the trial court concludes that the writing or recording is not a statement, then rule 614 cannot mandate production. If, on the other hand, the trial court determines that the writing or recording is a "statement," then production is mandatory under 614(a) if: (1) the statement is in the opposing party's possession, either actual or constructive; and (2) the statement relates to the subject matter concerning which the witness has testified. Tex.R.Crim.Evid. 614(a). Proper application of this last requirement would prevent disclosure of mental impressions, personal beliefs, trial strategy, legal conclusions, or anything else that could not fairly be said to be the witness' own statement. In other words, if the trial court determines in camera that all or a portion of the statement would otherwise constitute "work product," then it would not "relate to the subject matter concerning which the witness has testified." Contrary to the State's argument, this would abrogate the need to invoke the work-product doctrine in its traditional sense. Finally, if the trial court determines that portions of the statement do not relate to the subject matter of the witness' testimony, then 614(c) mandates that those portions be excised from the writing or recording and the remainder produced for the movant.

Id. at 918. Although the trial court erred in *Jordan*, the error was harmless. *Id*.