CROSS-EXAMINATION IN TEXAS

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I. PURPOSE OF PAPER

This paper collects the constitutional, statutory and case law of cross-examination thought to be useful to lawyers who try and appeal criminal cases in Texas. Although it focuses on, and is organized around, Article VI of the Texas Rules of Criminal Evidence, it also contains other topics, more or less related to the law of cross-examination.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. *U.S. CONST. amend. VI*

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

2. The Sixth Amendment's Confrontation Clause is applicable to the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

B. *Tex. Const. Art. I, § 10*

" In all criminal prosecutions the accused . . . shall be confronted by the witnesses against him. . . ."

C. *Tex. Code Crim. Proc. Ann. art. 1.05 (Vernon 1977)*

"In all criminal prosecutions the accused . . . shall be confronted with the witnesses against him. . . ."

D. *Tex. Code Crim. Proc. Ann. art. 1.25 (Vernon 1977)*

The defendant, upon a trial, shall be confronted with the witnesses, except in certain cases provided for in this Code where depositions have been taken."

III. LEGAL ENGINES, CORNERSTONES, AND OTHER WISHFUL THINKING

A. Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

B. "Confrontation: (1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *California v. Green*, 399 U.S. 149, 156 (1970).

C. "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

D. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

E. "The primary interest secured by the Confrontation Clause is the right of cross-examination." *Shelby v. State*, 819 S.W. 2d 544, 546 (Tex. Crim. App. 1991).

F. The court of criminal appeals "has often stated and discussed the fact that one of the greatest constitutional rights that an accused person might have is the right to confront and cross-examine the State's witnesses. . . ." *Virts v. State*, 739 S.W. 2d 25, 29 (Tex. Crim. App. 1987).

G. "Cross-examination is the cornerstone of the criminal trial process and, as such, a defendant must be given wide latitude to explore a witness' story, to test the witness' perceptions and memory and to impeach his or her credibility." *Gutierrez v. State*, 764 S.W. 2d 796, 799 (Tex. Crim. App. 1989); *accord Love v. State*, 861 S.W. 2d 899, 904 (Tex. Crim. App. 1993).

H. "The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

I. "[T]he confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trial." *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

J. "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

K. "This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

L. "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).

M. "The Texas Court of Criminal Appeals has clearly directed that the Sixth Amendment

must be liberally construed in order that an accused may receive all the protection intended by the Constitution." *Chew v. State*, 804 S.W. 2d 633, 635 (Tex. App.--San Antonio 1991, pet. ref'd).

N. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

O. A defendant's right to cross-examine witnesses is constitutionally based. "The State's right to cross-examine defense witnesses, on the other hand, is not based upon the Sixth Amendment, but rather is required for the accurate determination of guilt or innocence and in order to prevent fraud upon the court. *Keller v. State*, 662 S.W. 2d 362, 364 (Tex. Crim. App. 1984).

P. "Cross-examination serves three general purposes: cross-examination may serve to identify the witness with his community so that independent testimony may be sought and offered concerning the witness' reputation for veracity in that community; cross-examination allows the jury to assess the credibility of the witness; and, cross-examination allows facts to be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." *Carroll v. State*, 916 S.W. 2d 494, 497 (Tex. Crim. App. 1996).

IV. MODE AND ORDER OF INTERROGATION AND PRESENTATION

A. ***Control By The Court***

1. *Rule 610(a)*

"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." Tex. R. Crim. Evid. 610(a).

2. *Case Law*

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).

b. The trial court does not err in preventing a "fourth round" of cross-examination. "Clearly, the court retains wide latitude to impose reasonable limits on examination of witnesses." *Saenz v. State*, 879 S.W. 2d 301, 307 (Tex. App.--Corpus Christi 1994, no pet.).

B. ***Scope of Cross-Examination***

1. *Rule 610(b)*

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Tex. R. Crim. Evid. 610(b).

2. *Case Law*

a. This rule "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 has discretion [under Rule 610(b)] as to the extent of cross-examination of a witness for the showing of bias or as to credibility, and its decision is not subject to reversal on appeal absent a clear abuse of discretion." *Cantu v. State*, 939 S.W. 2d 627, 635 (Tex. Crim. App. 1997). In *Cantu*, the state asked a defense witness whether she thought the killing was funny, and she answered "no." The state was then allowed to impeach her with a letter she had written which indicated otherwise. This was permissible, both because it showed her strong bias towards the appellant, and because it contradicted her testimony and was therefore relevant to her credibility. *Id*.

C. ***Redirect Examination***

1. "It is a well established, Texas rule, that questions may be asked on redirect examination to explain answers on cross-examination from which wrong inferences might be drawn by the jury." *Ikeda v. State*, 846 S.W. 2d 519, 520 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd). Here, the state thoroughly cross-examined the witness concerning a prior plea, but appellant was not permitted ask questions on redirect that would have explained the witness's answers on cross. "[I]t was error for the trial court not to allow defense counsel to redirect questions to the witness on

matters which were covered in cross examination." *Id*. at 521.

2. 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.).

D. ***Leading Questions***

1. *Rule 610(c)*

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. 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. Crim. Evid. 610(c).

2. Case Law

a. "A leading question phrases a question so that it either suggests the answer desired or assumes the truth of a disputed fact." *Callahan v. State*, 937 S.W. 2d 553, 557 (Tex. App.--Texarkana 1996)(leading questions are permissible on cross-examination).

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, no pet.)(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, no pet.)(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).

h. "A trial court is given some leeway in a case dealing with a child witness and the rule against leading questions is relaxed somewhat." *Moon v. State*, 856 S.W. 2d 276, 279 (Tex. App.--Fort Worth 1993, pet. ref'd); *accord Baber v. State*, 931 S.W. 2d 359, 363 (Tex. App.--Amarillo 1996, pet. ref'd).

E. ***Recalling Witnesses***

1. *Case Law*

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); *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, 904-07 (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).

F. ***Rebuttal***

1. *Case Law*

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).

G. ***Pre-Trial Hearings***

1. *Rule 104(d)*

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

2. *Rule 104(c)*

"Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests." Tex. R. Crim. Evid. 104(c).

3. *Case Law*

a. 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.

b. 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).

c. 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).

d. 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).

e. 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).

f. 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.).

4. *Simmons v. United States*

a. 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.*

b. 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).

H. ***Calling and Interrogation of Witnesses by the Court***

1. *Federal Rule 614*

"(a) *Calling by court*. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court*. The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." Fed. R. Evid. 614.

2. *Federal Case Law*

a. The trial judge may call and question witnesses "as long as the judge remains impartial and does not exhibit prosecutorial zeal." *United States v. Zepeda-Santana*, 569 F.2d 1386, 1389 (5th Cir. 1978); *see also United States v. Herring*, 602 F.2d 1220, 1226 (5th Cir. 1979).

b. The trial court's questions of defendant in a narcotics prosecution were not improper because they represented isolated interjections for purposes of clarifying testimony already given and were unbiased and neither accusatory nor argumentative. *United States v. Rodriquez*, 835 F.2d 1090, 1094 (5th Cir. 1988).

3. *Texas Law*

a. There is nothing comparable to Federal Rule 614 in the Texas Rules of Criminal Evidence. Article 38.05 of the code of criminal procedure mandates that the court shall not, "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." Additionally, there are cases which address the right of the trial judge to interrogate witnesses.

i. The court of criminal appeals has indicated at least a general wariness of judicial questioning. *See Morrison v. State*, 845 S.W. 2d 882, 886 n. 10 (Tex. Crim. App. 1992). In *Morrison*, the court was concerned with a different, but related issue--whether *jurors* should be allowed to ask questions. The majority held that jurors should not be allowed to ask questions. *Id*. at 889. Dissenting Judge Benavides disagreed with the holding of the court, but recognized that only Texas and Oregon have rejected Federal Rule 614. *Id*. at 903.

ii. "A trial judge is permitted to question a witness when seeking information only, to clarify a point, or to get the witness to repeat something that the judge could not hear." *Moreno v. State*, 900 S.W. 2d 357, 359 (Tex. App.--Texarkana 1995, no pet.). *See Munoz v. State*, 485 S.W. 2d 782, 784 (Tex. Crim. App. 1972)(judicial questioning permissible where it was "clear from this record that such inquiry was to clarify an issue and that the judge maintained an impartial attitude when addressing such questions").

iii. Absent an objection to interference by the trial court, reversal is called for only when there is fundamental error. *Brewer v. State*, 572 S.W. 2d 719, 721 (Tex. Crim. App. 1978); *accord Moreno v. State*, 900 S.W. 2d 357, 360 (Tex. App.--Texarkana 1995, no pet.).

iv. The trial court is entitled to more leeway when the trial is before the court rather than the jury. *See Navarro v. State*, 477 S.W. 2d 291, 292 (Tex. Crim. App. 1972).

I. ***Preservation Of Error***

1. *Case Law*

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).

V. WRITING USED TO REFRESH MEMORY

A. ***Rule 611***

"If a witness uses a writing to refresh his memory for the purpose of testifying either while testifying or before testifying, 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 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." Tex. R. Crim. Evid. 611.

B. ***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). In *Poindexter v. State*, ___ S.W. 2d ___ , 1996 WL 591110 (Tex. Crim. App. October 16, 1996), the court held that Rule 611 could apply where the prosecutor gave testimony at the *Batson* hearing, even though he was not formally sworn as a witness. *Id*. at slip op. 4. The court went on to hold, however, that Rule 611 was not applicable because there was no evidence that the prosecutor actually used the notes to refresh his memory prior to testifying. *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. On direct examination the state's witness, a juvenile probation officer, testified that he had prepared for testifying by reading a psychological evaluation of defendant. The document was used to refresh the witness's memory. The report related to his testimony. *Robertson v. State*, 871 S.W. 2d 701, 708 (Tex. Crim. App. 1993), *cert. denied*, 115 S.Ct. 155 (1994). The trial court erred in not admitting this report in its entirety on cross-examination under Rule 611. "When the writing is used by the witness to refresh his memory, the opposing party upon request can inspect the document and use if for purposes of cross-examination. Further, the opposing party can introduce the document, not for the truth of the matter asserted, but for use by the jury in comparing the document to the witness's testimony." *Id*. Here, the error was harmless, however, because the report had no impeachment value. *Id*. at 709.

VI. **PRODUCTION OF STATEMENTS OF WITNESSES**

A. ***Rule 614***

"(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 his 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 objections 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 him;

(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. ***Rule 614 Applies To Pre-Trial Hearings***

1. Rule 614 applies "in criminal proceedings in all Texas courts and in examining trials before magistrates." Tex. R. Crim. Evid. 1101(a). This includes motions to suppress confessions and illegally obtained evidence. Tex. R. Crim. Evid. 1101(a)(4).

C. ***Case Law***

1. Rule 614(d) provides for a recess to allow a reasonable examination of the statement in question. How much of a recess is "reasonable?" In *Camacho v. State*, 864 S.W. 2d 524, 531 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1339 (1994), no abuse of discretion was

found where the trial court recessed long enough for counsel to read and comprehend the statement and to compare that statement with statements given by other witnesses.

2. Before Rule 614, the question on appeal was whether the trial court had abused its discretion in not ordering production. The rule now governs. "Under the provisions of Rule 614 if the requested statement is in the possession of the State, a trial court, upon timely request by the accused, must order the attorney for the State to produce such statement if it relates to the subject matter to which the witness testified." *Marquez v. State*, 757 S.W. 2d 101, 103 (Tex. App.--San Antonio 1988, pet. ref'd)(no error where record shows report was not in possession of the state).

3. The work-product rule and the attorney-client privilege cannot be asserted to prevent discovery under Rule 614(a). *Mayfield v. State*, 758 S.W. 2d 371, 375 (Tex. App.--Amarillo 1988, no pet.).

4. Rule 614 error may be harmless where the material is consistent with the trial testimony and where virtually all the information in the material is developed at trial. *Mayfield v. State*, 758 S.W. 2d 371, 375 (Tex. App.--Amarillo 1988, no pet.).

5. In *Newsome v. State*, 829 S.W. 2d 260 (Tex. App.--Dallas 1992, no pet.), 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. *See Poindexter v. State*, ___ S.W. 2d ___ , 1996 WL 591110 (Tex. Crim. App. October 16, 1996)(appellant's burden to request that notes be made part of the appellate record), slip op. 5.

6. 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. *See Poindexter v. State*, ___ S.W. 2d ___ , 1996 WL 591110 (Tex. Crim. App. October 16, 1996)(no evidence that the prosecutor's notes were signed or otherwise adopted by him), slip op. 5.

7. 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.

8. 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*.

9. 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).

10. The trial court erred, under Rule 614, in not providing to appellant a transcription of the testimony of eyewitness Madewell, given at the trial of appellant's co-defendant. The statement was in the state's possession because it was readily accessible to the state. Appellant had a particularized need for the transcript to impeach the witness. *Brooks v. State*, 893 S.W.2d 604, 608 (Tex. App.--Fort Worth 1994, no pet.)

D. ***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).

VII. **THE RULE**

A. ***Statutory Provisions***

1. *Texas Rule 613*

"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 on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a defendant which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) the victim, 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." Tex. R. Crim. Evid. 613.

2. *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).

3. *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).

4. *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. 1997).

B. ***Case Law***

1. *In General*

a. "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. 1996).

b. 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).

c. Although the court is required to exclude witnesses, Rule 613 does not

mention sanctions available when the rule is violated. "Two possible sanctions a trial court may use are holding a witness who violates the exclusion order in contempt, and the more remedial sanction of refusing to allow the witness to testify." *Bell v. State*, 938 S.W. 2d 35, 50 (Tex. Crim. App. 1996). The court's decision to allow testimony after a violation of the rule is discretionary. Reversal is required only for an abuse of discretion. *Id*. In *Bell*, although the witness in question clearly violated the rule, reversal was not required, because his presence in the courtroom did not color his own testimony. *Id*. at 51.

d. 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), *cert. denied*, 115 S. Ct. 909 (1995); *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).

e. 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), *cert. denied*, 115 S. Ct. 909 (1995)(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).

f. "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).

g. 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.).

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 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 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).

f. 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.).

g. 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); *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).

h. 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).

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 749.

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

e. 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).

VIII. IMPEACHMENT IN GENERAL

A. *Definition*

1. "To impeach a witness means adducing proof that such witness is unworthy of belief or credit. A mere showing that the State has introduced prior inconsistent statements of witnesses called to testify on its behalf does not automatically constitute impeachment." *Ransom v. State*, 789 S.W. 2d 572, 587 (Tex. Crim. App. 1989), *cert. denied*, 110 S.W. 2d 3255 (1990).

B. *The Limited Purpose Of Impeachment Evidence*

1. "Evidence admitted for the limited purpose of impeachment should not be considered by the jury as direct evidence of guilt." *Bermudez v. State*, 878 S.W. 2d 227, 230 (Tex. App.--Corpus Christi 1994, no pet.).

IX. IMPEACHMENT WITH EVIDENCE OF CONVICTION OF CRIME

A. *General Rule*

1. *Rule 609(a)*

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party." Tex. R. Crim. Evid. 609(a).

2. *What Constitutes "Moral Turpitude" In Texas*

a. "Generally, moral turpitude means something that is inherently immoral or dishonest." *Hutson v. State*, 843 S.W. 2d 106, 107 (Tex. App.--Texarkana 1992, no pet.); *see also Hardeman v. State*, 868 S.W. 2d 404, 405 (Tex. App.--Austin 1993), *pet. dism'd*, 891 S.W. 2d 960 (Tex. Crim. App. 1995)("the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita"); *Searcy v. State Bar of Texas*, 604 S.W. 2d 256, 258 (Tex. Civ. App.--San Antonio 1980, writ ref'd n.r.e.)(acts which are base, vile or depraved).

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

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

ii. Misdemeanor driving while intoxicated. *Shipman v. State*, 604 S.W. 2d 182, 183 (Tex. Crim. App. 1980); *accord Janecka v. State*, 937 S.W. 2d 456, 464 (Tex.

Crim. App. 1996); *Ladner v. State*, 868 S.W. 2d 417, 425-26 (Tex. App.--Tyler 1993, pet. ref'd).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Procedure*

a. In *Luce v. United States*, 469 U.S. 38 (1984), the defendant moved in limine to preclude the government from using a prior conviction for impeachment. This motion was overruled, and appellant did not testify. The Supreme Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.* at 43. This is also the rule in Texas. *Caballero v. State*, 919 S.W. 2d 919, 923 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd); *Morgan v. State*, 891 S.W.2d 733, 735 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd); *Richardson v. State,* 832 S.W. 2d 168, 172 (Tex. App.--Waco 1992, pet. ref'd).

b. A defendant whose motion in limine is overruled and who admits on direct examination that he was convicted waives any error on appeal concerning the admissibility of those convictions. *Perea v. State*, 870 S.W.2d 314, 319 (Tex. App.--Tyler 1994, no pet.).

c. In *Dixon v. State*, 928 S.W. 2d 564 (Tex. Crim. App. 1996), appellant called Pelfrey as a witness. Outside the presence of the jury, *Pelfrey's* counsel, not appellant's, objected to the state impeaching Pelfrey with a non-final conviction. This objection was overruled, and, before the jury, appellant's counsel made a general objection, to which the court replied: "For the reasons previously stated, I will overrule the objection." The court of criminal appeals held that, in light of the trial court's explicit reference, it was obvious that the court considered appellant's objection to have adopted Pelfrey's objection, and that the court understood the objection. Accordingly, appellant's objection was sufficient. *Id*. at 564.

4. *Proof That The Witness Was Convicted*

a. The trial court properly refused impeachment where appellant failed to introduce sufficient evidence to link the convictions to the witness. *Davis v. State*, 791 S.W. 2d 308, 310 (Tex. App.--Corpus Christi 1990, pet. ref'd).

b. "A defendant has the right to examine a witness concerning prior convictions if the questions are asked in good faith." *Aleman v. State*, 795 S.W. 2d 332, 334 (Tex. App.--Amarillo 1990). In *Aleman*, the state admitted that it had a rap sheet showing that someone with the witness's name had previously been convicted of theft in justice court, and the witness testified on voir dire, that she had no independent recollection of the conviction, and that she knew nothing about it. The rap sheet provided a good faith basis for the appellant's question. Just because the witness denied the conviction, appellant was not precluded from asking the question; he was still entitled to have the jury hear her denial. *Id.*

c. The trial court erred in denying appellant's motion for new trial where he was impeached with a conviction for murder and where the evidence reflected that he was not the person who was convicted. *Moore v. State*, 826 S.W. 2d 775, 778 (Tex. App.--Houston [14th Dist.] 1992, pet. ref'd).

d. Where appellant had originally been indicted for a felony, but the charge was reduced pursuant to a plea bargain to a misdemeanor, the state should not have been allowed to impeach concerning the original felony. *Yates v. State*, 917 S.W. 2d 915, 920 (Tex. App.--Corpus Christi 1996, pet. ref'd).

e. Evidence that the witness had been "in trouble" for writing hot checks was not proof of conviction as required by Rule 609. *Greene v. State*, 928 S.W. 2d 119, 123 (Tex. App.--San Antonio 1996, no pet.).

5. *Probative Value Must Outweigh Prejudicial Effect*

a. The proponent of prior conviction evidence "has the burden of demonstrating that the probative value of a conviction outweighs its prejudicial effect." *Theus v. State*, 845 S.W. 2d 874, 880 (Tex. Crim. App. 1992). The court listed five factors helpful in performing the balancing exercise mandated by Rule 609: the impeachment value of the particular crime; temporal

proximity; similarity; importance of defendant's testimony; and, credibility. *Id*. at 880-81. The court went on to reverse appellant's conviction, even though four of the five factors favored admissibility. *Id*. at 881. Important was that the arson conviction had so little probative value on the question of appellant's credibility and had much prejudicial effect, and that the trial court did not dispel the prejudice when it had the chance. *Id*. at 881-82; *see Cryan v. State*, 798 S.W. 2d 333, 336 (Tex. App.--Beaumont 1990, no pet.); *cf., Gaffney v. State*, 937 S.W. 2d 540, 543 (Tex. App.--Texarkana 1996)(admissible because appellant presented alibi defense).

b. In *Larrabee v. State*, 746 S.W. 2d 264, 266 (Tex. App.--Amarillo 1988, pet. ref'd), the court found that the probative value of the evidence outweighed its prejudicial effect, noting that the state made no effort to introduce the details of the prior conviction. *See also Norris v. State*, 902 S.W. 2d 428, 441 (Tex. Crim. App. 1995); *Simpson v. State*, 886 S.W. 2d 449, 453 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd); *Edwards v. State*, 883 S.W. 2d 692, 694-95 (Tex. App.--Texarkana 1994, pet. ref'd).

B. ***Time Limit***

1. *Rule 609(b)*

"Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Tex. R. Crim. Evid. 609(b).

2. *Remoteness*

a. In *Buffington v. State*, 801 S.W. 2d 151 (Tex. App.--San Antonio 1990, pet. ref'd), *cert. denied*, 112 S.Ct. 218 (1991), appellant was first tried and convicted in 1978, and at this trial appellant had been able to impeach an accomplice witness with evidence of a prior conviction. This conviction was reversed, and appellant was retried in 1988. By this time, the convictions had aged more than 10 years, and the trial court excluded them under Rule 609(b). This was not error. *Id*. at 155.

b. The trial court erred in admitting appellant's convictions where he had been released from prison 10.5 years prior to trial, where he had no intervening convictions since his release, where he was between 16 and 19 years old when these prior offenses were committed, where the longest sentence received was five years, and where none of the convictions involved narcotics offenses. *Sinegal v. State*, 789 S.W. 2d 383, 388 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd).

c. The probative value of defendant's 25 year old prior probation conviction for murder without malice was not substantially outweighed by its prejudicial effect, considering the impeachment value of the prior crime, the temporal proximity of the prior crime and the witness's subsequent history, the similarity between the prior and the present crimes, the importance of the

defendant's testimony, and the importance of credibility. *Polk v. State*, 865 S.W. 2d 627, 630-31 (Tex. App.--Fort Worth 1993, pet. ref'd). The court was particularly impressed by the fact that the defendant's testimony and credibility determined the outcome of the case.

d. Even though the witness had an intervening conviction, he trial court properly forbade appellant from impeaching the witness with a conviction from 1972 where its probative value did not substantially outweigh its prejudicial effect. Additionally, any error was harmless. *Smith v. State*, 850 S.W. 2d 275, 279 (Tex. App.--Fort Worth 1993, pet. ref'd).

e. The trial court erred in admitting appellant's 15 year old conviction where there was no intervening misconduct. *Brown v. State*, 880 S.W. 2d 249, 253 (Tex. App.--El Paso 1994, no pet.).

f. In *Butler v. State*, 890 S.W. 2d 951 (Tex. App.--Waco 1995, pet. ref'd), the state argued that the record did not establish that the prior conviction was too remote because appellant failed to show when he was released from confinement under the prior offense. The court of appeals disagreed, holding that the party urging admission bears the burden of proof. Because the state failed to prove that appellant had been released from confinement within ten years prior to his current trial, it failed to establish that the conviction did not come within rule 609(b). *Id*. at 954. Nor did the state show that the probative value of this remote conviction substantially outweighed its prejudicial effect. Accordingly, the trial court clearly abused its discretion in admitting the evidence. *Id*. at 955.

3. *Intervening Convictions Showing A Lack Of Reformation*

a. In *Lucas v. State*, 791 S.W. 2d 35 (Tex. Crim. App. 1989), the court noted that, in determining reformation, it examines the witness's age at the time of the prior incident, his conduct in the intervening years, and the relationship between the intervening conduct and the prior convictions. *Id*. at 51. The trial court erred in permitting the state to impeach appellant's witness with remote convictions, where the evidence of lack of reformation was highly contested. *Id*. at 52.

b. The trial court did not err in not permitting appellant to impeach the complainant with proof of a remote conviction for sexual assault, even though the witness had subsequently been convicted of passing a worthless check and misdemeanor theft. The first conviction did not involve dishonesty, and there was no swearing match at trial. *Kizart v. State*, 811 S.W. 2d 137, 141 (Tex. App.--Dallas 1991, no pet.).

c. An intervening conviction for conspiracy to manufacture methamphetamine revitalized a remote conviction for prostitution, making the latter conviction admissible. *Husting v. State*, 790 S.W. 2d 121, 126 (Tex. App.--San Antonio 1990, no pet.); *accord Baker v. State*, 841 S.W. 2d 542, 544 (Tex. App.--Houston [1st Dist.] 1992, no pet.); *Cunningham v. State,* 815 S.W. 2d 313, 319 (Tex. App.--Dallas 1991, no pet.); *Allen v. State*, 740 S.W. 2d 81, 83 (Tex. App.--Dallas 1987, pet. ref'd)(clear lack of reformation).

d. History of bad behavior following 1967 murder conviction permitted the state to impeach appellant. *Polk v. State*, 865 S.W. 2d 627, 630-31 (Tex. App.--Fort Worth 1993, pet. ref'd).

C. ***Effect Of Pardon, Annulment, Or Certificate Of Rehabilitation***

1. *Texas Rule 609(c)*

"Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure." Tex. R. Crim. Evid. 609(c).

2. *Probation*

a. There is no distinction between a probation period that has expired and one that is satisfactorily completed. "Therefore, when the probationary term has expired and the witness has not been subsequently convicted of a felony or crime involving moral turpitude, the prior conviction is *not* admissible for impeachment purposes. *Ex parte Menchaca*, 854 S.W. 2d 128, 131 (Tex. Crim. App. 1993)(emphasis in original).

b. The trial court erred in permitting appellant's impeachment with a prior misdemeanor for which probation had been completed. *Cryan v. State*, 798 S.W. 2d 333, 336 (Tex. App.--Beaumont 1990, no pet.).

3. *Deferred Adjudication*

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

b. Although a witness on deferred adjudication has not been convicted, a *defendant* should be allowed to impeach him to show bias under the rationale of *Davis v. Alaska. Paley v. State*, 811 S.W. 2d 226, 229-230 (Tex. App.--Houston [1st Dist.] 1991, pet. ref'd); *cf. Callins v. State*, 780 S.W. 2d 176, 197 (Tex. Crim. App. 1986), *cert. denied*, 110 S.Ct. 3256 (1990)(indicating that appellant might be able to impeach state's witness if he can show that witness testified as a result of bias, motive or ill will emanating from status of deferred adjudication); *but see Duncan v. State*, 899 S.W.2d 279, 281 (Tex. App.--Houston [14th Dist.] 1995, pet. ref'd).

4. *Motion To Revoke Probation*

a. The trial court properly denied appellant the right to impeach the state's witness where her probation period had expired. The mere filing of a motion to revoke was insufficient to prove that the probation had been revoked. *Wunneburger v. State*, 844 S.W. 2d 864, 867 (Tex. App.--Amarillo 1992, pet. ref'd).

5. *Unadjudicated Offenses Taken Into Consideration Pursuant To Section 12.45 Of The Penal Code*

a. The Tyler court believes that witnesses may be impeached by evidence of unadjudicated offenses taken into consideration in sentencing pursuant to section 12.45 of the Texas Penal Code. *Perea v. State*, 870 S.W. 2d 314, 318 (Tex. App.--Tyler 1994, no pet.). Alternatively, the court held that, since the trial court had sustained appellant's objection, no error was committed.

D. ***Juvenile Adjudications: Texas***

1. *Rule 609(d)*

"Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas." Tex. R. Crim. Evid. 609(d).

2. *When Required By The Constitution*

a. 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.

b. In *Gilmore v. State*, 871 S.W. 2d 848, 850-51 (Tex. App.--Houston [14th Dist.] 1994, no pet.), the court distinguished *Davis v. Alaska*, relying instead on § 51.13(b) of the Texas Family Code, which strictly limits the use of juvenile records.

E. ***Pendency Of Appeal***

1. *Rule 609(e)*

"Pendency of an appeal renders evidence of a conviction inadmissible." Tex. R. Crim. Evid. 609(e).

F. ***Notice***

1. *Rule 609(f)*

"Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." Tex. R. Crim. Evid. 609(f).

2. *No Notice*

a. Although strictly speaking *Espinosa v. State,* 853 S.W.2d 36 (Tex. Crim. App. 1993), was concerned with the notice requirement of *Rule 404(b)*, there is no reason for it not to have equal application to Rule 609(f). Before the state is required to give notice under either Rule, appellant must make a timely written request. Espinosa had made his request long before trial in a general motion for discovery, but it had not been ruled on in advance of trial. The court held that "when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule. In this case, appellant's discovery motion did not operate as such a request." *Id.* at 39. Had the trial court granted appellant's motion for discovery, the state would have been required to give notice. *Id.*

b. In his concurring opinion in *Espinosa*, Judge Baird offered the following helpful practice tip:

> To make an adequate request under Rule 404(b), the better practice is for the defendant to file a document entitled "Rule 404(b) Request for Notice of Intent to Offer Extraneous Conduct" and to timely serve the State with a copy of the request. In this situation, the defendant is not required to obtain a ruling from the trial judge. However, if the request is made within a discovery motion, the defendant is compelled to obtain a ruling because the State need not comply with the requests in a discovery motion until the trial judge orders compliance. Finally, a motion in limine is insufficient to invoke the notice provisions of Rule 404(b).

Espinosa v. State, 853 S.W.2d at 39-40 (Baird, J., concurring).

c. In *Buchanan v. State*, 911 S.W.2d 11 (Tex. Crim. App. 1995), appellant complained at trial that extraneous offense evidence was inadmissible because the state had not given him notice, as required by rule 404(b) of the Rules of Criminal Evidence. The state argued that it provided sufficient notice by giving appellant a copy of an offense report which referred to the extraneous offense in question. The court of criminal appeals disagreed. "We cannot conclude that the mere opening of its file containing an offense report detailing extraneous evidence satisfies the requirement of giving notice 'of intent to introduce' such evidence. The mere presence of an offense report indicating the State's awareness of the existence of such evidence does not indicate

an 'intent to introduce' such evidence in its case in chief." *Id.* at 15. Nor will the fact that appellant is aware of his prior convictions excuse non-compliance with Rule 609(f). Where the appellant requests notice and the state does not provide it, the trial court errs in admitting impeachment evidence under Rule 609. *Harper v. State*, 930 S.W. 2d 625, 631 (Tex. App.--Houston [1st Dist.] 1996)(error harmless here, though).

d. The notice requirement of Rule 609(f) applies only to conviction evidence used for impeachment, not to evidence introduced at the punishment phase to prove a prior criminal record. *Vela v. State*, 771 S.W. 2d 659, 662 (Tex. App.--Corpus Christi 1989, pet. ref'd).

G. ***Details Not Admissible***

1. Although the fact of a prior conviction might be admissible for impeachment, "the State is not permitted to allude to or in any way bring before the jury the facts surrounding the commission of the offense forming the basis for such conviction." *Garcia v. State*, 730 S.W. 2d 202, 204 (Tex. App.--San Antonio 1987, no pet.); *accord Perea v. State*, 870 S.W. 2d 314, 319 (Tex. App.--Tyler 1994, no pet.); *but see Theus v. State*, 845 S.W. 2d 874, 882 (Tex. Crim. App. 1992)(the trial court can lessen the prejudicial effect of a prior conviction by permitting appellant to prove facts which would ameliorate its impact).

H. ***To Correct A False Impression***

1. *An Exception to Rule 609*

a. Rule 609 establishes the general rule under which a witness may be impeached with evidence of a crime. "An exception to this general rule arises when a witness, during direct examination, leaves a false impression as to the extent of either his prior (1) arrests (2) convictions (3) charges or (4) 'trouble' with the police." *Prescott v. State*, 744 S.W. 2d 128, 131 (Tex. Crim. App. 1988). By leaving a false impression during his direct examination, the witness is said to have "opened the door," permitting the opponent to dispel the false impression. Id.

2. *Bootstrapping Not Allowed*

a. "Of course the State may not bootstrap its way to such impeachment by eliciting for the first time on cross-examination the blanket statement that the accused has never before been 'in trouble,' and then contradicting it. Having broached the question, the State is bound by the answer it receives." *Hammett v. State*, 713 S.W. 2d 102, 105 n.4 (Tex. Crim. App. 1986); *accord Booker v. State*, 929 S.W. 2d 57, 66 (Tex. App.--Beaumont 1996, pet. ref'd).

b. *Generally,* "[t]he exception does not apply when the false impression is created by the State's cross-examination of the defendant. The State may not rely on its own questioning on cross-examination to contradict the defendant and get in evidence collateral matters and evidence of convictions for other offenses which would otherwise be inadmissible." *Shipman v. State*, 604 S.W. 2d 182, 184-85 (Tex. Crim. App. 1980); *Statham v. State*, 683 S.W. 2d 89, 90

(Tex. App.--Dallas 1984, no pet.).

c. Where, however, the witness testifies as to his criminal record on cross-examination "without any prompting or maneuvering on the part of the State's attorney and in so doing he leaves a false impression with the jury, the State is allowed to correct that false impression by introducing evidence of the defendant's prior criminal record." *Martinez v. State*, 728 S.W. 2d 360, 362 (Tex. Crim. App. 1987).

3. *The Door Was Not Opened*

In the following cases, the courts held that the witness did *not* open the door:

a. The prosecutor did not open the door by asking whether this was the first time the witness had ever been in a courtroom--as a witness, even where the witness answered the question prematurely, before it had been completed. *Delk v. State*, 855 S.W. 2d 700, 704 (Tex. Crim. App. 1993).

b. Testimony that appellant was a businessman and not involved with drugs, but which in no way asserted that he had never before been convicted of a felony, did not leave a false impression which the state was entitled to rebut with a prior arson conviction. *Theus v. State*, 845 S.W. 2d 874, 879 (Tex. Crim. App. 1992).

c. Appellant did not open the door to a juvenile adjudication by testifying at punishment that he did not think he wanted to do it again. *Cavazos v. State*, 789 S.W. 281, 283 (Tex. Crim. App. 1989); *see Murphy v. State*, 777 S.W. 2d 44, 67 (Tex. Crim. App. 1988)("self-serving declaration by applicant that he will not violate the law if placed on probation" does not open the door); *but cf. King v. State*, 773 S.W. 2d 302, 303 (Tex. Crim. App. 1989)(testimony that appellant had never had a misdemeanor conviction and would not violate the law if placed on probation opened the door to arrest for drug delivery).

d. Testimony that "this is my first time of going through this. Hopefully, my last." Whether the door is opened depends on the question asked and its context. Here, the answer "is restrictive, responsive, reasonable and understandable," and not a deliberate attempt to portray the witness as ignorant of the criminal justice process. Even if the remark can be considered ambiguous, the court refused "to hold that the ambiguity should in every instance, inexorably be resolved against an appellant." *Prescott v. State*, 744 S.W. 2d 128, 131-32 (Tex. Crim. App. 1988).

e. Appellant did not open the door to proof of a conviction for criminal mischief by answering affirmatively to the question: "Is that the only time you have ever been arrested for public intoxication?" *Hammett v. State*, 713 S.W. 2d 102, 106 (Tex. Crim. App. 1986).

f. Testimony concerning a specific group of transactions does not open the door to cross-examination concerning all of appellant's business transactions. *Statham v. State,* 683 S.W. 2d 89, 91 (Tex. App.--Dallas 1984, no pet.).

g. Testimony that the witness had never testified before, to explain his nervousness, did not open the door to evidence of a prior assault conviction resulting from a plea. *Patterson v. State*, 783 S.W. 2d 268, 272 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd).

h. Testimony that appellant had never *committed* a felony did not open the door to evidence that he had been *charged* with a felony. *Blacklock v. State*, 681 S.W. 2d 155, 157 (Tex. App.--Houston [14th Dist.] 1984, pet. ref'd).

i. Testimony explaining that appellant remembered the instant arrest because "being arrested, its not something that occurs every day. I pay attention to something like that that happens to me." *Powell v. State*, 673 S.W. 2d 403, 405 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd).

j. The door was not opened to a prior conviction for DWI where the appellant answered that he had not had anything to drink when arrested, and that "I will not drink and drive." This answer pertained only to his feelings about drinking and driving on the night in question. *Lewis v. State*, 933 S.W. 2d 172, 178-81 (Tex. App.--Corpus Christi 1996, pet. ref'd)(error harmless, though).

k. Appellant did not open the door by asking a state's witness about drug use by a group of friends that included appellant, and about whether the behavior of these friends changed while they were on drugs. Counsel made no mention of how appellant acted on drugs. Nor was the door opened after the state questioned appellant himself. Appellant did not volunteer information about his drug usage. Rather, this came up on cross-examination. "This evidence was not admissible to correct a false impression because under these facts appellant did not create a false impression without 'prompting or maneuvering' by the State." *Lopez v. State*, 928 S.W. 2d 528, 531-32 (Tex. Crim. App. 1996).

l. The complainant did not open the door to her impeachment by testifying that she did not carry a knife. There was no testimony that she "never" carried a knife. Her "testimony that she was not carrying a weapon either at the time of the stabbing or at the time of trial was not a blanket statement creating a false impression of her prior law-abiding behavior." *Carter v. State*, 928 S.W. 2d 745, 747 (Tex. App.--Eastland 1996, pet. ref'd).

4. *The Door Was Opened*

The door was opened by the following conduct:

a. The state was entitled to introduce two pictures of appellant's cell displaying the words, "Kill, kill, Judge, D.A." and "Kill all white pig police," after appellant gratuitously testified that he had personal friends who were police officers. *Pyles v. State*, 755 S.W. 2d 98, 115 (Tex. Crim. App.), *cert. denied*, 488 U.S. 986 (1988).

b. Voluntary testimony on cross-examination, without any prompting from

the state, that appellant was scared because this was the first time he had been busted. *Martinez v. State*, 728 S.W. 2d 360, 361-62 (Tex. Crim. App. 1987).

c. Representation of himself as a law-abiding citizen who was only helping the police out of a sense of civic duty, coupled with a denial that he had ever been convicted. *Trippell v. State*, 535 S.W. 2d 178, 181 (Tex. Crim. App. 1976).

d. Appellant's testimony that he had been in trouble before on a car theft case opened the door to inquiry about various other arrests. *Reese v. State*, 531 S.W. 2d 638, 641 (Tex. Crim. App. 1976); *accord Ex parte Carter*, 621 S.W. 2d 786, 788 (Tex. Crim. App. 1981); *Bell v. State*, 620 S.W. 2d 116, 126 (Tex. Crim. App. 1981); *Nelson v. State*, 503 S.W. 2d 543, 545 (Tex. Crim. App. 1974).

e. Testimony that he had never been convicted of a felony or misdemeanor or paid a fine. *Orozco v. State*, 301 S.W. 2d 634, 635 (Tex. Crim. App. 1957).

f. Gratuitous testimony on direct examination that he had never molested the complainant "or any other child." *Beckley v. State*, 827 S.W. 2d 74, 77 (Tex. App.--Fort Worth 1992, no pet.).

g. Denial of any trouble with the law in the past ten years other than a couple of speeding tickets. *Muse v. State*, 815 S.W. 2d 769, 773-74 (Tex. App.--Waco 1991, no pet.).

h. Testimony by the state's witness that he had never before been convicted of a felony or crime of moral turpitude in this or any other state opened the door to inquiry about a prior felony conviction for transporting illegal aliens. *Hinojosa v. State*, 780 S.W. 2d 299, 302 (Tex. App.--Beaumont 1989, pet. ref'd).

i. Where the testimony of appellant's mother on direct examination created a false impression as to the details and the disposition of a prior offense, the door was opened to proof of those details. *Kendrick v. State*, 729 S.W. 2d 392, 396 (Tex. App.--Fort Worth 1987, pet. ref'd).

X. IMPEACHMENT WITH CHARACTER EVIDENCE

A. ***Rule 608(a)***

"The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Tex. R. Crim. Evid. 608(a).

B. ***Rule 405(a)***

To be qualified to testify concerning the character of a witness for truthfulness, "a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense." Tex. R. Crim. Evid. 405(a).

C. ***Case Law***

1. If a witness testifies that a person has a *good* reputation for truthfulness, it is not necessary that the witness be personally acquainted with the person, or that the witness previously discussed that reputation with anyone else. If, however, the witness testifies that the person has a *bad* reputation "the witness must have actually discussed the matter with someone, and that person must have told the witness that the defendant's general reputation for having that particular character trait was bad." *Jackson v. State*, 628 S.W. 2d 446, 450 n.2 (Tex. Crim. App. 1982).

2. As the rule notes, character for truthfulness, as opposed to untruthfulness, may not be proved unless the witness's character for truthfulness has been attacked by opinion or reputation or otherwise. Presenting evidence that merely contradicts the witness is not a sufficient attack to merit proof of truthful character. *Stewart v. State*, 587 S.W. 2d 148, 152 (Tex. Crim. App. 1979); Mehaffey v. State, 650 S.W. 2d 851, 855-56 (Tex. App.--Houston [14th Dist.] 1982, no pet.).

3. Where the witness testifies only to appellant's reputation for truth and veracity, it is error to permit impeachment question which relate only to reputation for being a peaceful and law abiding citizen. *Baize v. State*, 790 S.W. 2d 63, 66 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd).

4. Where a party calls a character witness to testify to the good reputation of a witness, the opponent can ask the witness if he has heard of specific acts of misconduct inconsistent with that reputation. *Evans v. State*, 757 S.W. 2d 759, 760 (Tex. Crim. App. 1988).

5. Before enactment of the Rules of Criminal Evidence, the only proper way to prove character was by reputation testimony. If a witness was improperly allowed to give an opinion about character, it was deemed improper to impeach the witness with "Have you heard" questions. *Ward v. State*, 591 S.W. 2d 810, 814 (Tex. Crim. App. 1978). Since under the Rules a character witness may now testify both as to what he knows and as to what he has heard, it follows that the witness may be asked on cross-examination, both "Do you know," as well as, "Have you heard" questions. *Lancaster v. State*, 754 S.W. 2d 493, 495 (Tex. App.--Dallas 1988, pet. ref'd); *see Bratcher v. State*, 771 S.W. 2d 175, 187 (Tex. App.--San Antonio 1989, no pet.); *Quiroz v. State*, 764 S.W. 2d 395, 398 (Tex. App.--Fort Worth 1989, pet. ref'd); *but see Thomas v. State*, 759 S.W. 2d 449, 452 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd)(reputation witnesses may only be impeached with "Have you heard" questions, and opinion witnesses may only be impeached with "Do you know" questions); *see also Blevins v. State*, 884 S.W. 2d 219, 229 (Tex. App.--Beaumont 1994, no pet.)("fundamental that reputation witnesses may be impeached with 'have you heard' questions whereas opinion witnesses may be impeached with 'did you know' questions").

6. "It is . . . improper to permit a witness to testify that a defendant's general reputation for being a peaceable law-abiding citizen is bad based upon the offense for which he is being tried." *Wright v. State*, 491 S.W. 2d 936, 938 (Tex. Crim. App. 1973). "It is also improper to test the knowledge of a witness who has testified to the good reputation of a defendant for being a peaceable, law-abiding citizen by asking 'have you heard' questions concerning the alleged offense for which he is being tried." *Id; accord Rodriquez v. State,* 509 S.W. 2d 319, 321 (Tex. Crim. App. 1974); *Davis v. State*, 831 S.W. 2d 839, 844 (Tex. App.--Dallas 1992, pet. ref'd). This rule is based both on the presumption of innocence and common sense. "If the discussion of the charge contained in the indictment could be used as a basis for showing that a man's reputation as a law-abiding citizen was bad, then no man who was on trial could successfully show a good reputation as a law-abiding citizen." Stephens v. State, 80 S.W. 2d 980, 982 (Tex. Crim. App. 1935).

7. That appellant was a juvenile when his reputation became known to the character witness will not render the testimony inadmissible. *Cooks v. State*, 844 S.W. 2d 697, 737 (Tex. Crim. App. 1992); *see Chandler v. State*, 744 S.W. 2d 341, 345 (Tex. App.--Austin 1988, no pet.)("juvenile probation officer is competent to testify to a defendant's reputation").

8. A reputation witness is not disqualified simply because his testimony is based on both personal experience and community reputation. *Cooks v. State*, 844 S.W. 2d 697, 737 (Tex. Crim. App. 1992).

9. If requested, the trial court should give a limiting instruction "to the effect that the questions are not to be considered as substantive evidence, and that only the credibility of the witness, and not the credibility of the defendant is being called into question." *Brown v. State*, 477 S.W. 2d 617, 220 (Tex. Crim. App. 1972).

10. It is improper to ask a witness, on redirect examination, whether he is telling the truth. This does not seek to support the witness's credibility by way of opinion or reputation, nor does it concern the witness's character for truthfulness, and therefore, it "is not consistent with rule 608(a)." This is merely a self-serving assertion as to whether or not he was telling the truth. *Wills v. State*, 867 S.W.. 2d 852, 855 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd).

XI. IMPEACHMENT WITH SPECIFIC ACTS OF MISCONDUCT

A. *Rule 608(b)*

"Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence." Tex. R. Crim. Evid. 608(b).

B. *Case Law*

1. Although Rule 608(b) "is very restrictive and allows for no exceptions . . .

constitutional considerations are of some import to this issue." Specifically, the constitutional right to "confrontation includes the opportunity for cross-examination to attempt to expose a witness's motivation in testifying." Accordingly, the trial court lacks the "discretion to prohibit a defendant from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness." *Moody v. State*, 827 S.W. 2d 875, 891 (Tex. Crim. App. 1992)(no error).

2. Rule 608(b), "by its terms, is very restrictive." Unlike Federal Rule 608(b), it allows for no exceptions. *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990); *cf. United States v. Abel,* 469 U.S. 45, 55 (1984).

3. It is error to permit impeachment by proof of specific acts of misconduct. *Knighten v. State*, 814 S.W. 2d 813, 815 (Tex. App.--Waco 1991, no pet.); *Ray v. State*, 764 S.W. 2d 406, 413 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd); *Hager v. State*, 734 S.W. 2d 180, 183 (Tex. App.--Eastland 1987, pet. ref'd).

4. The trial court erred in permitting the state to impeach appellant's witness with her prior use of heroin. *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990).

5. The trial court erred in permitting the state to impeach appellant with evidence that he had falsified information about his prior criminal record when he purchased a pistol, since this was a specific act of misconduct which had not resulted in a conviction. *Alexander v. State*, 740 S.W. 2d 749, 764 (Tex. Crim. App. 1987); *see Moreno v. State*, 711 S.W. 2d 382, 384 (Tex. App.--Houston [14th Dist.] 1986), *rev'd on other grounds*, 755 S.W. 2d 866 (Tex. Crim. App. 1988)(trial court erred in permitting impeachment of appellant by evidence that he had previously owned or fired guns).

6. Evidence that a police officer had been discharged from the police force for falsifying reports was inadmissible. *Ramirez v. State*, 830 S.W. 2d 827, 829 (Tex. App.--Corpus Christi 1992, no pet.).

7. The trial court properly refused to permit appellant to impeach the complainant with evidence that he carried a gun. *Medina v. State*, 828 S.W. 2d 268, 270 (Tex. App.--San Antonio 1992, no pet.).

8. A *witness*' credibility may not be attacked or supported by specific instances of his *own* conduct, other than conviction of crime, as permitted by Rule 609. Tex. R. Crim. Evid. 608(b). The witness may, of course, be asked about relevant specific instances of conduct concerning the person about whom he is testifying. Tex. R. Crim. Evid. 405(a). Thus, if A testifies that B has a good reputation for truthfulness, the opponent may not prove specific instances of conduct concerning A, but it may clearly inquire about specific instances of conduct concerning B. This would typically be done through "have you heard" questions.

9. The trial court did not err in not permitting appellant to question the complainant

in an aggravated assault case about her income tax returns. *Fagbemi v. State*, 778 S.W. 2d 119, 121 (Tex. App.--Texarkana 1989, pet. ref'd).

10. It is improper to impeach appellant with a probation revocation, since this is not a conviction under Rule 609. *Brown v. State*, 692 S.W. 2d 497, 500-501 (Tex. Crim. App. 1985)(harmless error, though).

11. It is improper to admit proof of the misconduct for which appellant's probation was revoked. *Cross v. State*, 586 S.W. 2d 478, 481 (Tex. Crim. App. 1979).

C. ***To Correct A False Impression***

1. As previously noted, a witness can open the door to otherwise inadmissible conduct by making a blanket assertion of good conduct which leaves a false impression with the jury.

XII. IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENTS

A. *Prior Inconsistent Statements*

1. *Rule 612(a)*

"*Examining witness concerning prior inconsistent statement*. In examining a witness concerning a prior inconsistent statement made by him, 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 him 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)." Tex. R. Crim. Evid. 612(a).

2. *Case Law*

a. 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.

i. "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.

ii. "If a witness only qualifiedly or partially admits to making a prior inconsistent statement, the statement may be used to impeach him. *Staley v. State*, 888 S.W. 2d 45, 49 (Tex. App.--Tyler 1994, no pet.). *See Broden v. State*, 923 S.W. 2d 183, 188-89 (Tex. App.--Amarillo 1996)(state was entitled to impeach witness who answered that he did not recall).

iii. "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).

iv. 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.); *see Beauchamp v. State*, 870 S.W. 2d 649, 652 (Tex. App.--El Paso 1994, pet. ref'd)(statement inadmissible where appellant did not tell the witness of its contents, or tell him of the time and place and to whom it was made).

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

vi. The proponent of the evidence must show that the statement was indeed made by the witness. *Mosquera v. State*, 877 S.W. 2d 40, 42 (Tex. App.--Corpus Christi 1994, no pet.)(trial court erred in admitting police reports comprising the witness's guilty plea papers where there was no clear showing in the record that the witness had stipulated to facts recited in the police reports).

b. "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); *accord Garcia v. State*, 871 S.W. 2d 279, 284 (Tex. App.--El Paso 1994, no pet.); *see*

also Broden v. State, 923 S.W. 2d 183, 189 (Tex. App.--Amarillo 1996)("Though not a picture of grand artistry, the questions asked . . . satisfied the requirements of Rule 612(a)").

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

d. 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)(admission must be unequivocal, though).

e. 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).

f. "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).

g. 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, 194 (Tex. Crim. App. 1993).

h. The trial court erred in not permitting appellant to impeach Dr. Grigson with prior inconsistent testimony concerning the number of capital murder defendants he had examined. *Clark v. State*, 881 S.W. 2d 682, 695-96 (Tex. Crim. App. 1994), *cert. denied*, 115 S. Ct. 1114 (1995)(harmless error, though).

i. A prior inconsistent statement admitted under Rule 612(a) is admissible only for impeachment, and not as substantive evidence. *Owens v. State*, 916 S.W. 2d 713, 718 (Tex. App.--Waco 1996).

B. ***Prior Consistent Statements***

1. *Rules 612(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. Crim. Evid. 612(c); *see* Tex. R. Crim. Evid. 801(e)(1)(B).

2. *Case Law*

a. "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).

b. A statement is not admissible under Rule 801(e)(1)(B) unless it is consistent with the trial testimony. *Kipp v. State*, 802 S.W. 2d 804, 810 (Tex. App.--Texarkana 1990), *rev'd on other grounds*, 876 S.W. 2d 330 (Tex. Crim. App. 1994).

c. The prior consistent statement was found admissible in the following cases: *McDuff v. State*, 939 S.W. 2d 607, 619 (Tex. Crim. App. 1997); *Dowthitt v. State*, 931 S.W. 2d 244, 263-64 (Tex. Crim. App. 1996); *Moody v. State*, 827 S.W. 2d 875, 893-94 (Tex. Crim. App. 1992); *Wood v. State*, 833 S.W. 2d 753, 754 (Tex. App.--Houston [1st Dist.] 1992, no pet.); *Long v. State*, 821 S.W. 2d 216, 217 (Tex. App. --Houston [14th Dist.] 1991, no pet.); *Alvarado v. State*, 816 S.W. 2d 792, 797 (Tex. App.--Corpus Christi 1991), *aff'd on other grounds*, 840 S.W. 2d 442 (Tex. Crim. App. 1992); *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).

h. The trial court properly admitted co-defendant Carlos Black's written confession under Rule 801(e)(b), as a consistent statement offered to rebut a charge of recent fabrication. *Lawton v. State*, 913 S.W. 2d 542, 561 (Tex. Crim. App. 1995). "According to the record, appellant questioned Carlos Black during cross-examination about the preparations he and the district attorney had undertaken for his trial testimony. Appellant never flatly accused Black of fabricating his testimony with the State's assistance, but it was clearly implied that Black's testimony was influenced by the district attorney's tutelage. Under these facts it is far from clear that the trial court abused its discretion." *Id*.

i. In *Dowthitt v. State*, 931 S.W. 2d 244, 263-64 (Tex. Crim. App. 1996), the trial court permitted the witness's attorney to testify to a statement implicating appellant that the witness had made to the attorney in confidence. According to the court, the witness's motive to fabricate arose at the time he made his plea bargain, and the statement had preceded that.

XIII. IMPEACHMENT WITH EVIDENCE OF BIAS, MOTIVE OR PREJUDICE

A. ***Rules 608(b) and 612(b)***

1. *Rule 608(b) And Its Exceptions*

a. "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence." Tex. R. Crim. Evid. 608(b).

b. Although Rule 608(b) "is very restrictive and allows for no exceptions . . . constitutional considerations are of some import to this issue." Specifically, the constitutional right to "confrontation includes the opportunity for cross-examination to attempt to expose a witness's motivation in testifying." Accordingly, the trial court lacks the "discretion to prohibit a defendant from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness." *Moody v. State*, 827 S.W. 2d 875, 891 (Tex. Crim. App. 1992)(no error).

c. Rule 608(b), "by its terms, is very restrictive." Unlike Federal Rule 608(b), it allows for no exceptions. *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990); *cf. United States v. Abel*, 469 U.S. 45, 55 (1984).

d. "Rule 608(b) expressly prohibits the utilization of specific instances of conduct--such as drug addiction evidence--for impeachment except to expose bias, correct any affirmative misrepresentations made on direct examination, or demonstrate lack of capacity." *Lagrone v. State*, ___ S.W. 2d ___, ___ 1997 WL 43516 (Tex. Crim. App. February 5, 1997), slip op. 8.

2. *Rule 612(b)*

a. "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 him 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." Tex. R. Crim. Evid. 612(b).

B. ***General Rule Regarding Bias, Motive Or Prejudice***

1. "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); *accord Hilliard v. State*, 881 S.W. 2d 917, 922 (Tex. App.--Fort Worth 1994, no pet.)(trial court frustrated appellant's right to effective cross-examination by denying him the right to explore possible bias).

2. "A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias, or interest for the witness to testify." *Carroll v. State*, 916 S.W. 2d 494, 497 (Tex. Crim. App. 1996).

3. 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).

4. "Bias is a term used in the 'common law of evidence' to describe the relationship 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).

5. "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).

6. "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).

7. 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).

8. "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).

9. Proof that a witness failed to appear and testify at a prior proceeding, despite reasonable efforts of the state to procure their testimony, is admissible to prove the bias of the witness. *Alexander v. State*, 919 S.W. 2d 756, 763 (Tex. App.--Texarkana 1996).

10. 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).

11. 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).

12. The proper predicate must be established to impeach for bias. "To lay a proper predicate for impeachment the witness should be asked about any possible interest or bias he may have before there is an attempt to prove interest or bias otherwise. The witness must first be informed as to the circumstances supporting a claim of bias or interest and must be given an opportunity to explain or deny such circumstances." *Willingham v. State*, 897 S.W. 2d 351, 358 (Tex. Crim. App. 1995)(citations omitted).

13. "The rule of admissibility of prior inconsistent statements should be liberally construed and the trial judge has the discretion to receive any evidence that gives promise of exposing a falsehood." *Staley v. State*, 888 S.W. 2d 45, 49 (Tex. App.--Tyler 1994, no pet.)(prior inconsistent videotapes admissible).

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

1. *Davis v. Alaska*

a. 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.

b. "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.

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

d. 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.

e. Cross-examination of a state's witness concerning bias stemming from pending charges pursuant to *Davis v. Alaska* is of constitutional stature, and is not forbidden by Rule 608(b). *Carroll v. State*, 916 S.W. 2d 494, 501 (Tex. Crim. App. 1996).

2. *Error Under Davis v. Alaska*

a. 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 drunkeness 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.

b. 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.

c. 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).

d. 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).

e. 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).

f. The trial court erred in not permitting appellant to prove that the main witness against her had been charged with a felony drug offense and the state had not filed a motion to revoke, even though the witness testified that "no one's offered me anything." *Coody v. State*, 812 S.W. 2d 631, 633-34 (Tex. App.--Houston [14th Dist.] 1991), *rev'd*, 818 S.W. 2d 68 (Tex. Crim. App. 1991). The error was harmless, though. *Coody v. State*, 841 S.W. 2d 30, 31 (Tex. App.--Houston [14th Dist.] 1992, pet. ref'd).

g. 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).

h. 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).

i. 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).

j. 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).

k. 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).

l. 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).

m. 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.).

n. In *Hilliard v. State*, 881 S.W. 2d 917, 922 (Tex. App.--Fort Worth 1994, no pet.), appellant had filed criminal charges against the witness's son, who was also the complainant's brother. The possible motive or bias on the part of the witness and the complainant to see appellant convicted "could have been an important part of his defense and would have strengthened his own testimony. *Id*. at 922-23. "By denying him the right to explore this possible bias, the trial court frustrated his right to effective cross-examination." *Id*. at 923.

3. *No Error Under Davis v. Alaska*

a. 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).

b. 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).

c. 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).

d. "*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).

e. 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).

f. 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).

g. 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).

h. The trial court did not abuse its discretion in forbidding appellant from eliciting the witness's knowledge or lack of knowledge concerning parole eligibility where this would not have further shown his vulnerable relationship with the state, or his potential bias or motive. *McDuff v. State*, 939 S.W. 2d 607, 618 (Tex. Crim. App. 1997).

4. *Harmless Error*

a. 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.*

D. ***Bias Stemming From Promises Of Leniency***

1. 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.

2. *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).

3. 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.

4. 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.

5. 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).

6. 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).

7. 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).

8. 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).

9. The trial court did not err in refusing to permit appellant to impeach the state's witness with evidence that the state had written a letter to traffic court on appellant's behalf requesting a continuance so that he could testify at appellant's trial. The witness's testimony was not pivotal. The burden of showing relevance falls on appellant, and he did not sustain that burden here, since he was unable to show how the state's letter demonstrated a benefit to the witness. *Chambers v. State*, 866 S.W. 2d 9, 26, 27 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1871 (1994).

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

1. 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).

2. 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).

3. 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).

4. 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).

5. 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").

6. 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.).

7. 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).

8. 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).

9. 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).

10. 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).

11. The trial court should have permitted appellant the attempted capital murder of a police officer 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).

12. 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).

F. ***Bias Related To Civil Litigation***

1. "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").

2. 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).

3. 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).

4. 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).

5. 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).

6. 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).

7. 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).

8. 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 c.f., 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).

9. 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).

10. 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).

G. ***Racial Bias***

1. 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 oppositions 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.

2. A party is allowed greater latitude to prove bias than untruthful character. Rules 608 and 609 are restrictive. "Rule 612, by contrast, places no limits on the sort of evidence that may be adduced to show a witness's bias or interest. Evidence of bias or interest covers a wide range, and

the field of external circumstances from which probable bias or interest may be inferred is infinite." *Gonzales v. State*, 929 S.W. 2d 546, 549 (Tex. App.--Austin 1996, pet. ref'd). "Racial prejudice is a prototypical form of bias." *Id*. at 550. Here, although the court recognized that prejudice against a defendant because he is biased may be a legitimate area of inquiry, the trial court did not abuse its discretion in excluding the evidence under Rule 403. *Id*. at 551.

H. ***Bias In Sexual Assault Cases***

1. In *Olden v. Kentucky*, 488 U. S. 227 (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 233.

2. 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).

3. The trial court erred in excluding evidence that the mother of the complaining 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).

4. The trial court erred in excluding evidence concerning marital difficulties between appellant and the complainant's mother which was relevant to appellant's defensive theory that the charges were contrived as a potential weapon in a divorce suit. *Driggers v. State*, 940 S.W. 2d 699, 705 (Tex. App.--Texarkana 1996). The error was harmless, however.

I. ***Bias Against Justice System***

1. 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).

J ***Bias Stemming From Membership In Organizations***

1. "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).

2. The trial court properly allowed the state to impeach its own recalcitrant witness with evidence that both he and the defendant were members of the "Black Villains Assassins," because their gang affiliation showed bias. *Bridgewater v. State*, 905 S.W. 2d 349, 353 (Tex. App.--Fort Worth 1995, no pet.); *see McKnight v. State*, 874 S.W. 2d 745, 746 (Tex. App.--Fort Worth 1994, no pet.)(evidence that witness and appellant belonged to same gang bore on witness's veracity and bias, and was sufficiently probative to be admissible); *see also Bynum v. State*, 731 S.W. 2d 661, 664-65 (Tex. App.--Houston [14th Dist.] 1987, no pet.).

3. In *Trinh v. State*, 930 S.W. 2d 214, 219 (Tex. App.--Fort Worth 1996, pet. ref'd), the court of appeals held that the trial court impermissibly admitted evidence of gang membership where there was no evidence connecting the witness and the appellant by gang affiliation, and where there was no evidence reflecting the nature of the gang in question. This error was waived, however, when appellant failed to move to strike the evidence after the state was unable to connect him with the gang.

K *Arrest Quotas*

1. 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.).

2. Although evidence of the arresting officer's aggregate overtime pay was relevant evidence, the trial court did not err in excluding same in light of the potential for undue prejudice, embarrassment, harassment, confusion of the issues and undue delay. *Castillo v. State*, 939 S.W. 2d 754, 758-60 (Tex. App.--Houston [14th Dist.] 1997). The jury in *Castillo* was allowed to hear that the officer was getting overtime pay for testifying in the instant case.

L. *Bias Stemming From Relationships*

1. It was not error for the state to prove that the witness enjoyed a "special relationship with" and was "romantically involved with" appellant, for the purpose of showing the witness's bias. *Vaughn v. State*, 888 S.W. 2d 62, 74-75 (Tex. App.--Houston [1st Dist.] 1994, pet. granted).

M. *Parole Files*

1. 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).

N. ***Defense Witness Bias***

1. 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); *but see Staley v. State*, 888 S.W. 2d 45, 50 (Tex. App.--Tyler 1994, no pet.)(impeachment permitted where defense witness was under indictment and being prosecuted in same court as appellant); *McKnight v. State*, 874 S.W. 2d 745, 747-48 (Tex. App.--Fort Worth 1994, no pet.)(animosity between prosecutor and witness).

2. 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).

3. 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).

4. 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).

O. ***Preservation Of Error***

1. 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).

2. 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).

3. 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, 901 (Tex. Crim. App. 1993).

4. 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).

5. 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).

P ***Harmful Or Harmless***

1. "[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).

2. 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.

3. *Davis* error is harmless where "it is difficult to see how another pending charge on a drug offense and another denial of any agreement with the prosecutor would have altered the opinion of the jurors about this witness." *Murdock v. State*, 840 S.W. 2d 558, 566 (Tex. App.--Texarkana 1992), *rev'd on other grounds*, 845 S.W. 2d 915 (Tex. Crim. App. 1993).

XIV. IMPEACHMENT WITH EVIDENCE OF MENTAL CONDITION

A. *Rule 601(a)(1)*

"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" are incompetent as witnesses. Tex. R. Crim. Evid. 601(a)(1).

B. *Case Law*

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. *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).

XV. IMPEACHMENT WITH EVIDENCE OF DRUG OR ALCOHOL USE

A. *The Test*

1. Evidence of impairment by substance abuse is admissible only if the proponent of the evidence shows that the witness was impaired at the time of the matter about which they testify. *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990)(inadmissible); *see Kennedy v. State*, 200 S.W. 2d 400, 404-405 (Tex. Crim. App. 1947)(court erred in permitting state to impeach where there was no evidence that the witness was intoxicated when the matter about which he testified occurred); *see also Simmons v. State*, 229 S.W. 2d 370, 371 (Tex. Crim. App. 1950)(that the witness was drinking wine four hours before the killing had little, if any, impact upon his testimony).

2. Drug abuse in and of itself is not admissible to impeach a witness. "The evidence must show an impairment of mental or moral sensibilities as a result of either recent or habitual drug abuse." *Epley v. State*, 704 S.W. 2d 502, 504 (Tex. App.--Dallas 1986, pet. ref'd)(inadmissible); *accord Turner v. State*, 762 S.W. 2d 705, 708 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd)(irrelevant that murder victim had used drugs prior to the date of the murder, where there was no evidence that drugs had any connection with the offense).

B. *Admissible*

1. The court properly admitted evidence of the drunken condition of appellant's wife at the homicide scene, because this was relevant to her powers of observation and recollection of the events about which she testified. *Taliaferro v. State*, 158 S.W. 2d 493, 494 (Tex. Crim. App. 1942).

2. The trial court properly admitted evidence that appellant had consumed a quart of beer at lunch, because this was relevant to his mental and physical condition at the time of the baby's death. *Sandow v. State*, 787 S.W. 2d 588, 598 (Tex. App.--Austin 1990, pet. ref'd).

3. Whether the defense witness was smoking marijuana was admissible to show motive and to test his ability to recollect the events in question. *Albiar v. State*, 705 S.W. 2d 305, 309 (Tex. App.--San Antonio 1986), *rev'd on other grounds*, 739 S.W. 2d 360 (Tex. Crim. App. 1987).

C. ***Inadmissible***

1. It is impermissible to impeach a witness with merely the fact that she is addicted to drugs. "Counsel must demonstrate an actual drug-based mental impairment during the witness' observation of the crime in order to pursue impeachment of a witness' perceptual capacity with evidence of drug addiction. *Lagrone v. State*, ___ S.W. 2d ___, ___ 1997 WL 43516 (Tex. Crim. App. February 5, 1997), slip op. 8.

2. Alcohol or drug abuse was found inadmissible in the following cases: *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990)(no proof of impairment at time of events about which witness testified); *Simmons v. State*, 229 S.W. 2d 370, 371 (Tex. Crim. App. 1950)(that the witness was drinking wine four hours before the killing had little, if any, impact upon his testimony); *Kennedy v. State*, 200 S.W. 2d 400, 404-405 (Tex. Crim. App. 1947)(court erred in permitting state to impeach where there was no evidence that the witness was intoxicated when the matter about which he testified occurred); *Turner v. State*, 762 S.W. 2d 705, 708 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd)(irrelevant that murder victim had used drugs prior to the date of the murder, where there was no evidence that drugs had any connection with the offense); *Epley v. State*, 704 S.W. 2d 502, 504 (Tex. App.--Dallas 1986, pet. ref'd)(no proof of impairment of mental or moral sensibilities).

XVI. IMPEACHMENT WITH EVIDENCE OF OCCUPATION

A. ***General Rule***

1. "Courts have long recognized that informing jurors of the occupation and background of a witness may aid them in assessing the value of the witness's testimony." 1 S. Goode, O. Wellborn & M. Sharlot, *Guide To The Texas Rules Of Evidence: Civil And Criminal*, § 608.3 (Texas Practice 1993).

2. "When the occupation is reputable, it assumedly adds to a witness' credibility. Contra, when the occupation is not so reputable in the eyes of the trier of fact, it detracts from credibility just as true impeachment evidence does." *Cravens v. State*, 687 S.W. 2d 748, 751 (Tex. Crim. App. 1985).

B. ***Exception***

1. A witness may not be impeached by evidence of occupation that de facto reveals acts of misconduct. *Cravens v. State*, 687 S.W. 2d 748, 751-52 (Tex. Crim. App. 1985)(error to allow impeachment of defense witness with evidence she is a "common prostitute").

XVII. IMPEACHMENT BY CONTRADICTION

A. The trial court erred in not permitting appellant to cross-examine officer Rosales, who failed to mention the presence of an informant, which contradicted the testimony of another state's

witness. *Dopico v. State*, 752 S.W. 2d 212, 215 (Tex. App.--Houston [1st Dist.] 1988, pet. ref'd).

XVIII. IMPEACHMENT OF THE DEFENDANT

A. *General Rule*

1. "It is well settled that when a defendant chooses to waive his privilege against self-incrimination by voluntarily taking the witness stand he is generally subject to the same rules as any other witness. He may be contradicted, impeached, made to give evidence against himself, cross-examined as to new matter, and treated in every respect as any other witness testifying in behalf of the defendant, except when some statute forbids certain matters to be used against him, such as proof of his conviction on a former trial of the present case or his failure to testify on a former trial or hearing." *Bell v. State*, 620 S.W. 2d 116, 124 (Tex. Crim. App. 1980).

B. *Impeachment With Illegally Obtained Evidence*

1. A defendant who testifies may be impeached with a voluntary statement taken in violation of *Miranda*, which would have been unusable by the government in its case in chief. *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

2. A voluntary statement may be used for impeachment, even if it is taken in violation of article 38.22. Tex. Code Crim. Proc. Ann. art. 38.22 § 5 (Vernon 1979).

3. *Involuntary* statements may not be used for impeachment. *Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978); *Lykins v. State*, 784 S.W. 2d 32, 36 (Tex. Crim. App. 1989).

4. A testifying defendant 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); *but see James v. Illinois*, 493 U.S. 307 (1990)(statement from defendant taken after a warrantless arrest that lacked probable cause may not be used to contradict a third party's testimony).

5. One Texas case holds that illegally obtained evidence should be excluded, even for impeachment, when the defendant objects under the state statutory exclusionary rule--Tex. Code Crim. Proc. Ann. art. 38.23 (Vernon Supp. 1997). *Robbins v. State*, 696 S.W. 2d 689, 690 (Tex. App.--Dallas 1985, pet. ref'd).

C. *Impeachment With Post-Arrest Silence*

1. In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Supreme Court held that the use of post-arrest, post-*Miranda* silence to impeach the accused's exculpatory trial testimony violates due process.

2. *Doyle,* of course, has been followed in Texas. *E.g., Cuellar v. State,* 613 S.W. 2d

495, 495 (Tex. Crim. App. 1981); *Franklin v. State*, 606 S.W. 2d 818, 850 (Tex. Crim. App. 1979).

3. Article I, § 10 of the Texas Constitution provides even greater protection than does federal due process. Under *Doyle*, the prosecutor is only forbidden to use post-arrest silence if the defendant was also given his *Miranda* warnings. *See Fletcher v. Weir*, 455 U.S. 603, 606-607 (1982). In Texas, on the other hand, post-arrest silence may not be used against the defendant, even if he has not been warned pursuant to Miranda. *Sanchez v. State*, 707 S.W. 2d 575, 582 (Tex. Crim. App. 1986). Such impeachment violates the defendant's privilege against self-incrimination, and "is improper from an evidentiary standpoint." *Id.*

4. For other Texas cases, *see Ruth v. State*, 645 S.W. 2d 432, 435 (Tex. Crim. App. 1986); *Harrison v. State*, 491 S.W. 2d 920, 921 (Tex. Crim. App. 1973); *Cardwell v. State*, 243 S.W. 2d 702, 704 (Tex. Crim. App. 1951).

XIX. **IMPEACHING ONE'S OWN WITNESS**

A. ***Rule 607***

1. "The credibility of a witness may be attacked by any party, including the party calling him." Tex. R. Crim. Evid. 607.

B. ***Case Law***

1. A party may now impeach its own witness without showing surprise or injury. *Miranda v. State*, 813 S.W. 2d 724, 734 (Tex. App.--San Antonio 1991, pet. ref'd).

2. Despite Rule 607, a party may not call a witness primarily for the purpose of impeaching the proposed witness with evidence that would be otherwise inadmissible. *Zule v. State*, 802 S.W. 2d 28, 34 (Tex. App.--Corpus Christi 1990, pet. ref'd)(no error in forbidding testimony of witness whose testimony would only have impeached that witness); *accord Pruitt v. State*, 770 S.W. 2d 909, 910-11 (Tex. App.--Fort Worth 1989, pet. ref'd); *see Miranda v. State*, 813 S.W. 2d 724, 735 (Tex. App.--San Antonio 1991, pet. ref'd)("Rule 403 balancing approach would require that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible"); *accord Adams v. State*, 862 S.W. 2d 139, 146 n.4 (Tex. App.--San Antonio 1993, pet. ref'd)(opponents "will have to resort to Rule 403 as its ground for objection").

3. In *Barley v. State*, 906 S.W.2d 27 (Tex. Crim. App. 1995), the court cited *Miranda* and *Pruitt*, for the proposition that prior inconsistent statements cannot be used for the *primary* purpose of placing otherwise inadmissible substantive evidence before the jury. That was not the case here, though, because there was no showing that the state knew that the witness had recanted the testimony in his prior statement. *Id*. at 40 n.11. Additionally, appellant did not object under Rule 403.

3. "`When counsel knows that a witness has nothing favorable to say, counsel should not be permitted to parade inconsistent statements before the jury in the hope that they will be treated as substantive evidence.'" *Adams v. State*, 862 S.W. 2d 139, 148 (Tex. App.--San Antonio 1993, pet. ref'd), *quoting* H. WENDORF, D. SCHLUETER & R. BARTON, TEXAS RULES OF EVIDENCE MANUAL IV-37 (3rd ed. 1991).

4. If evidence is admitted solely for impeachment, the trial court should limit the use of that evidence to impeachment only with a proper jury instruction. *Contreras v. State*, 766 S.W. 2d 891, 892 (Tex. App.--San Antonio 1989, no pet.).

5. The old "voucher rule," recognized in *Palafox v. State*, 608 S.W. 2d 177 (Tex. Crim. App. 1980), which required the state to disprove exculpatory statements it introduced, has been overruled by Rule 607. *Russeau v. State*, 785 S.W. 2d 387, 390 (Tex. Crim. App. 1990).

XX. IMPEACHMENT ON COLLATERAL MATTERS

A. *General Rule*

"The general rule is that a party is not entitled to impeach a witness on a collateral matter. 'The test as to whether a matter is collateral is whether the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea.'" *Ramirez v. State*, 802 S.W. 2d 674, 675 (Tex. Crim. App. 1990); *see Gutierrez v. State*, 764 S.W. 2d 796, 798 (Tex. Crim. App. 1989)(could the fact upon which the error is predicated have been proven for any purpose independently of the contradiction); *but see Clark v. State*, 881 S.W. 2d 682, 695-96 n. 12 (Tex. Crim. App. 1994), *cert. denied*, 115 S. Ct. 1114 (1995)(suggesting that this definition may no longer be viable in light of the rules of criminal evidence).

1. The trial court erred in permitting the state to impeach a defense witness in a sexual assault case with evidence of her prior use of heroin, since it is unquestioned that the state could not have relied on this evidence in its case in chief to prove that appellant committed sexual assault. *Ramirez v. State*, 802 S.W. 2d 674, 675 (Tex. Crim. App. 1990); *see Drone v. State*, 906 S.W. 2d 608, 616 (Tex.App.--Austin 1995, pet. ref'd)(error, if any, was harmless).

2. The trial court properly prohibited appellant from bringing extrinsic evidence that the deceased had carried a gun within the last year. This was collateral to any issue in the case, including self-defense. *Gutierrez v. State*, 764 S.W. 2d 796, 798 (Tex. Crim. App. 1989).

3. The state improperly impeached appellant with the collateral matter that he had previously lied about his criminal record on applications to purchase guns. *Alexander v. State*, 740 S.W. 2d 749, 764 (Tex. Crim. App. 1987).

4. The state improperly impeached appellant with extraneous sexual offenses which were collateral to proof of the indictment. *Celeste v. State*, 805 S.W. 2d 579, 581 (Tex. App.--Tyler 1991, no pet.).

5. The prosecution improperly impeached appellant with evidence that he had a private law practice while serving as an assistant district attorney because this was in no way relevant to a contested issue in the case. *Goldstein v. State*, 803 S.W. 2d 777, 794 (Tex. App.--Dallas 1991, pet. ref'd)(harmless error).

6. The trial court erred in permitting the state to question appellant in a resisting arrest case about domestic altercations with her husband, and when appellant denied same, to call a rebuttal witness. These altercations were irrelevant. "The State cannot create a contested issue through its cross-examination and then claim that such issue `opens the door' to rebuttal evidence." *Posey v. State*, 738 S.W. 2d 321, 325 (Tex. App.--Dallas 1987, pet. ref'd).

7. In *Arce v. State*, 720 S.W. 2d 147 (Tex. App.--San Antonio 1986, pet. ref'd), appellant's alibi witness testified that he was with appellant at the time of the robbery, and further, that appellant had worked at a hotel for approximately a year to a year and a half. The state then put on evidence showing that appellant could not have worked there this long since he had been paroled from prison less than a year prior to trial. Since appellant's whereabouts some eight months prior to the robbery were collateral, this was error. *Id*. at 149(harmless, though).

8. Whether the defense witness was smoking marijuana was not collateral, but was instead admissible to show motive and to test his ability to recollect the events in question. *Albiar v. State*, 705 S.W. 2d 305, 309 (Tex. App.--San Antonio 1986), *rev'd on other grounds*, 739 S.W. 2d 360 (Tex. Crim. App. 1987).

9. The trial court erred in not permitting appellant to impeach the complaining witness in a sexual assault case, since "separate allegations of sexual misconduct made by the boy are not collateral to the main issue at trial." *Polvado v. State*, 689 S.W. 2d 945, 950 (Tex. App.--Houston [14th Dist.] 1985, pet. ref'd).

10. The trial court erred in not permitting appellant to impeach a witness for the state with evidence that she tried to purchase drugs. This evidence tended to show motive to consent to intercourse; it was relevant to her credibility; and it would have exposed allegedly perjured or mistaken testimony. *Harrison v. State*, 686 S.W. 2d 220, 225-226 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd).

B. ***The Prosecution May Not Open Its Own Door***

1. "While great latitude is allowed in cross-examination in attempts to discredit the witness, the witness may not be cross-examined as to any fact that is collateral and irrelevant to the issue merely for the purpose of laying a predicate for the introduction of independent evidence to impeach him by a showing that, as to the matter embraced in the question, the witness has answered falsely." *Hoffman v. State*, 514 S.W. 2d 248, 252 (Tex. Crim. App. 1974).

C. ***Contradiction Is Impermissible***

1. When a witness is cross-examined on a collateral matter, the cross-examiner may not contradict the answer given by the witness. *Shipman v. State*, 604 S.W. 2d 182, 183 (Tex. Crim. App. 1980). *accord Hammett v. State*, 713 S.W. 2d 102, 105 n. 4 (Tex. Crim. App. 1986); *Flannery v. State*, 676 S.W. 2d 369, 370 (Tex. Crim. App. 1984);

D. ***Exception To The General Rule: False Impressions***

1. There is an exception to the general rule prohibiting impeachment on collateral matters. "When a witness leaves a false impression concerning a matter relating to his or her credibility, the opposing party is allowed to correct that false impression." *Ramirez v. State*, 802 S.W. 2d 674, 676 (Tex. Crim. App. 1990).

XXI. PLACING THE WITNESS IN HIS PROPER SETTING

A. ***Residence***

1. The trial court errs in prohibiting the defense from asking the witness where he lives. *Alford v. United States*, 282 U.S. 687, 692-94 (1931).

2. The trial court does not err in limiting evidence of the complainant's background in Corpus Christi, absent a showing of particularized need. *Satterwhite v. State*, 499 S.W. 2d 314, 317 (Tex. Crim. App. 1973); *see Salas v. State*, 481 S.W. 2d 825, 826 (Tex. Crim. App. 1972).

3. Where the defendant destroys the witness's credibility otherwise, the trial court does not err in excluding cross-examination as to the town the witness lives in. *Saunders v. State*, 572 S.W. 2d 944, 949 (Tex. Crim. App. 1978).

4. When the witness has been threatened, the court does not err in limiting cross-examination to the city of residence. *Cook v. State*, 738 S.W. 2d 339, 341 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd).

5. Where the security risk is obvious, the trial court does not err in denying appellant the right to ask an undercover narcotics officer his residential address, his bank, and his social acquaintances. *Richardson v. State*, 508 S.W. 2d 380, 382 (Tex. Crim. App. 1974); *see Watson v. State,* 488 S.W. 2d 816, 817 (Tex. Crim. App. 1973); *Winkle v. State*, 488 S.W. 2d 798, 800 (Tex. Crim. App. 1972); *Baldwin v. State*, 478 S.W. 2d 476, 479 (Tex. Crim. App. 1972).

B. ***Name***

1. The trial court errs in prohibiting the defense from asking the state's witness his name and where he lives. *Smith v. Illinois*, 390 U.S. 129, 132-33 (1968).

2. The trial court did not err in preventing appellant from cross-examining the state's witness concerning certain aliases he had used. "It has been held permissible . . . to limit cross-examination to prevent harm to the witness involved." *Castle v. State*, 748 S.W. 2d 230, 233 (Tex. Crim. App. 1988).

3. A complainant in a sexual assault or an aggravated sexual assault case "may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings." Tex. Code Crim. Proc. Ann. art. 57.02(b) (Vernon Supp. 1997).

a. The trial court did not err in permitting the complainant to use a pseudonym where her name was irrelevant, and where her true name had been revealed to appellant and to the jury. *Sallings v. State*, 789 S.W. 2d 408, 415 (Tex. App.--Dallas 1990, pet. ref'd).

b. "A court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue." Tex. Code Crim. Proc. Ann. art. 57.02(g) (Vernon Supp. 1997).

XXII. HEARSAY AND CONFRONTATION

A. *Hearsay And Confrontation Are Similar But Not Identical*

1. "From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." *Idaho v. Wright*, 497 U. S. 805, 813 (1990); *see Dutton v. Evans*, 400 U.S. 74, 80 (1970)(right to confrontation does not require that no hearsay ever be introduced).

2. Although the hearsay rules and the Confrontation Clause generally protect the same values, the two are not identical. "The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

3. In *Miles v. State*, 918 S.W. 2d 511 (Tex. Crim. App. 1996), the court of criminal appeals reversed appellant's conviction because the trial court erroneously admitted evidence as a statement against interest under Rule 803(24). The court recognized that this evidence might also have been violative of appellant's rights under the Confrontation Clause, but found no need to address this issue, in light of its reversal under the rules of evidence. *Id*. at 519 n.9.

4. The Confrontation Clause might be violated even if evidence is admitted under a recognized hearsay exception. "The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that

confrontation rights have been denied." *California v. Green*, 399 U.S. 149, 156 (1970).

5. Even assuming hearsay is ostensibly admissible under some exception, it may in fact be inadmissible if it lacks an indicia of reliability sufficient to insure the integrity of the fact finding process. *E.g., Trevino v. State*, 815 S.W. 2d 592, 598 (Tex. Crim. App. 1991); *Beltran v. State*, 728 S.W. 2d 382, 386-87 (Tex. Crim. App. 1987); *DeLuna v. State*, 711 S.W. 2d 44, 47 (Tex. Crim. App. 1986); *Porter v. State*, 578 S.W. 2d 742, 746 (Tex. Crim. App. 1979); *Cortez v. State*, 571 S.W. 2d 308, 312 (Tex. Crim. App. 1978); *see Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

6. The "indicia of reliability" requirement can be met in either of two ways: where the hearsay statement falls within a firmly rooted hearsay exception, or where it is supported by a showing of particularized guarantees of trustworthiness. *Idaho v. Wright*, 497 U.S. 805, 815 (1990). The Court held that a statement by child complainant to a physician admitted under the residual hearsay exception lacked the requisite "indicia of reliability." Hearsay statements are presumptively unreliable and must be excluded under the Confrontation Clause unless there is an affirmative reason rebutting the presumptive unreliability. *Id*. at 881.

7. There is no need to inquire into the indicia of reliability when the hearsay declarant is present at trial and subject to unrestricted cross-examination. *United States v. Owens*, 484 U.S. 554, 560 (1988).

8. There is no need for an independent inquiry into the reliability of co-conspirator hearsay, since this evidence falls within a firmly rooted hearsay exception. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987).

9. An objection at trial that evidence is hearsay does not preserve for appeal the question of whether that evidence violates the Confrontation Clause. "The two are neither synonymous nor necessarily coextensive." *Holland v. State*, 802 S.W. 2d 696, 698 (Tex. Crim. App. 1991).

B. ***Out-Of-Court Statements Made In Judicial Proceedings***

1. When the state offers prior courtroom testimony of a witness as an exception to the hearsay rule, the Confrontation Clause requires it to prove that the witness is unavailable. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). And then, the hearsay is admissible only if it bears an adequate "indicia of reliability." *Id.*

2. This is consistent with Texas law. *See* Tex. R. Crim. Evid. 804(b)(1).

3. A witness is not "unavailable" for confrontation purposes, unless the state has made a good faith effort to secure his presence at trial. *Barber v. Page,* 390 U.S. 719, 724-25 (1968)(not enough that witness was out of state in federal custody where prosecutors made no effort to secure his presence at trial).

4. The defendant does not waive his right to confrontation by not cross-examining the witness at his preliminary hearing where he was unaware the witness would be in federal prison at the time of his trial, and was also unaware that the state would make no effort to secure his presence. Failure to cross-examine in such circumstances "hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'" *Barber v. Page*, 390 U.S. 719, 725 (1968). Moreover, the result would likely not be different had the defendant actually cross-examined the witness at the preliminary hearing, given the different functions of the trial and the hearing. *Id. But c.f., Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972)(no confrontation violation where witness moved to Sweden and where the prior opportunity for cross-examination was at a trial and not just a hearing).

5. When the state seeks to admit prior examining trial testimony against the appellant, it bears the burden of showing an exception to the requirement of confrontation, including that appellant had an adequate opportunity to cross-examine. *Russell v. State*, 604 S.W. 2d 914, 921-22 (Tex. Crim. App. 1980)(burden not met).

C. ***Non-Judicial Out-Of-Court Statements***

1. The Confrontation Clause does not require the prosecutor to prove that the witness is unavailable for trial in order to be able to introduce evidence of spontaneous declarations and statements made for the purposes of medical diagnosis, admissible as exceptions to the hearsay rule. *White v. Illinois*, 502 U.S. 346, 356-57 (1992).

2. The government need not show that a non-testifying co-conspirator is unavailable to testify in order to admit out-of-court statements made by the co-conspirator which are exceptions to the hearsay rule. *United States v. Inadi*, 475 U.S. 387, 400 (1986).

3. The government need not show that the out-of-court declaration of a co-conspirator bears an indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 182 (1987).

4. Because of the importance of cross-examination, the courts have adopted the general rule prohibiting hearsay evidence. "But where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *White v. Illinois*, 502 U.S. 346, 356 (1992).

5. A statement not concerning the startling event and involving an event that had occurred three months before, by someone with no personal knowledge of the event described does not qualify as a spontaneous utterance, and lacks the indicia of reliability necessary to supplant the rule excluding hearsay. *Sellers v. State*, 588 S.W. 2d 915, 919 (Tex. Crim. App. 1979).

D. ***In-Court Non-Judicial Statements***

2. A DWI conviction was reversed because of the presence of spectators from MADD (Mothers Against Drunk Drivers) who wore buttons. *State v. Franklin*, 327 S.E.2d 449, 455 (W.Va.

1985)(noting the "cardinal failure . . . to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty"); *but see State v. McNaught*, 713 P.2d 457 (1986)(upholding a DWI conviction because of failure to show actual prejudice from the wearing of MADD and SADD buttons).

XXIII. PROBLEMS WITH JOINT TRIALS

A. *Bruton v. United States*

1. In *Bruton v. United States*, 391 U.S. 123 (1968), the petitioner and Evans were jointly tried, and Evans' oral confession implicating him and petitioner was admitted into evidence, with the instruction that the jury must not consider Evans' confession against petitioner. Petitioner's conviction was reversed. "We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the confrontation Clause of the Sixth Amendment." *Id*. at 126.

2. Evans did not take the stand in *Bruton*. As a result, his confession added substantial weight to the government's case in a form not subject to cross-examination. *Id.* at 128. "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Id*. at 136.

3. "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." *Id.* at 137.

4. The rule established in *Bruton* also applies in state prosecutions, and is retroactive. *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968).

B. *Reversals For Bruton Error*

1. Convictions in the following cases were reversed for *Bruton* error. *Bass v. State*, 527 S.W. 2d 556, 562-63 (Tex. Crim. App. 1975); *Lewis v. State*, 521 S.W. 2d 609, 613 (Tex. Crim. App. 1975).

C. *Redaction*

1. "We hold that the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

2. Deletion of all references to appellant might be an effective remedy. *Griffin v. State*, 486 S.W. 2d 948, 949 (Tex. Crim. App. 1972).

3. Where references to appellant could not be excised from the confession without the jury realizing that the excised portions referred to appellant, the only way to protect appellant's right to confrontation was by a separate trial. *McMahon v. State*, 582 S.W. 2d 786, 793 (Tex. Crim. App. 1978), *cert. denied*, 444 U.S. 919 (1979)(error waived, though).

D. ***Rebuttal***

1. Where the defendant testifies that his confession was coercively derived from the confession of an accomplice, the accomplice's confession may be read in rebuttal. The accomplice's confession is not hearsay, since it was offered in rebuttal, not to prove the truth of the matter asserted in the confession. *Tennessee v. Street*, 471 U.S. 409, 417 (1985).

E. ***When The Co-Defendant Testifies***

1. The co-defendant in *Bruton* did not testify. Where the co-defendant testifies and is subject to cross-examination, there is no denial of the right to confrontation. *Thomas v. State*, 533 S.W. 2d 796, 797 (Tex. Crim. App. 1976).

2. The rule stated in *Thomas* "is even stronger in a situation, such as the case at bar, where the defendant on trial calls a co-defendant (not on trial) as a witness in his own behalf." *Ricondo v. State*, 657 S.W. 2d 439, 446 (Tex. App.--San Antonio 1983, no pet.).

3. The defendant is entitled to "full and effective cross-examination" of the testifying co-defendant. *Nelson v. O'Neil*, 402 U.S. 622, 627 (1971). The question in *Nelson* was whether cross-examination could be full and effective where the co-defendant testified, but denied making the statement and claimed it was false. "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id*. at 629-30.

F. ***Interlocking Confessions***

1. The question in *Cruz v. New York*, 481 U.S. 186 (1987), was whether *Bruton* applies where the appellant's own confession corroborating that of his non-testifying co-defendant, is introduced against him. *Id.* at 188. The Court held that *Bruton* still applies in such a situation. It is appropriate, however, to consider the nature of appellant's confession, to determine whether the resulting Confrontation Clause violation is harmless. *Id*. at 194; *see Parker v. Randolph*, 442 U.S. 62 (1979)(plurality decision).

G. ***Waiver***

1. By opposing the state's motion for severance, appellant waived his right to complain of a denial of confrontation under *Bruton. McMahon v. State*, 582 S.W. 2d 786, 794 (Tex. Crim. App. 1978), *cert. denied*, 444 U.S. 919 (1979); *see Griffin v. State,* 486 S.W. 2d 948, 949 (Tex. Crim. App. 1972)(failure to move for severance may constitute waiver).

2. Appellant waives *Bruton* error by making no more than a general objection, and by not objecting to the court's charge or making any special requested limiting instructions. *Ricondo v. State*, 657 S.W. 2d 439, 446 (Tex. App.--San Antonio 1983, no pet.).

H. ***Harmless Error***

1. *Bruton* error may be harmless. *E.g., Harrington v. California*, 395 U.S. 250, 254 (1969); *Ex parte Smith*, 513 S.W. 2d 839, 846 (Tex. Crim. App. 1974); *Moore v. State*, 504 S.W. 2d 904, 905 n.1 (Tex. Crim. App. 1974); *Carey v. State*, 455 S.W. 2d 217, 223 (Tex. Crim. App. 1970); *Ortiz-Salazar v. State*, 687 S.W. 2d 502, 503 (Tex. App.--Dallas 1985, pet. ref'd).

2. *Bruton* error was found *not harmless* in the following cases. *Evans v. State,* 534 S.W. 2d 707, 711 (Tex. Crim. App. 1976); *Bass v. State*, 527 S.W. 2d 556, 562-63 (Tex. Crim. App. 1975); *Lewis v. State*, 521 S.W. 2d 609, 613 (Tex. Crim. App. 1975).

3. The appellate court need not consider whether the error is harmless or not when the trial court fails to instruct the jury not to consider the co-defendant's confession as evidence of appellant's guilt. The failure to give such a limiting instruction is error without regard to harm. *Evans v. State*, 500 S.W. 2d 846, 850 (Tex. Crim. App. 1973); *accord Hearne v. State*, 500 S.W. 2d 851, 852 (Tex. Crim. App. 1973).

I. ***Limiting Instructions***

1. *Bruton* made it clear that an instruction to the jury purporting to limit consideration of the statement to the defendant making the statement is inadequate to cure the constitutional error. *Bruton v. United States*, 391 U.S. at 137; *accord Evans v. State*, 534 S.W. 2d 707, 711 (Tex. Crim. App. 1976).

2. Nonetheless, Texas law, both before and after *Bruton,* entitles a defendant to a limiting instruction, upon request. "In all cases of multiple defendants where a defendant's confession has been admitted in evidence, the trial court is required, on proper request, to guard the rights of the codefendant on trial by limiting in his charge the purpose of the confession to establishing the guilt of the confessor only." *Evans v. State*, 500 S.W. 2d 846, 849 (Tex. Crim. App. 1973). Such an instruction might be useful in a case where A and B are tried together, A's confession is admitted, and A testifies. Because A testified, B might not be able to claim a *Bruton* error. Still, under Texas law, B should be entitled to an instruction limiting A's confession to evidence of A's guilt.

3. Moreover, the absolute-sounding rule of *Bruton* was softened somewhat in *Richardson v. Marsh*, 481 U.S. 200 (1987). "We hold that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id*. at 211.

XXIV. **INTERPRETERS**

A. ***Statutory Law***

1. When it is determined that an accused or a witness does not understand and speak the English language, and 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. 1997).

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. 1997).

3. "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation." Tex. R. Crim. Evid. 604.

B. ***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; *accord Ex parte Nanes*, 558 S.W. 2d 893 (Tex. Crim. App. 1977).

2. 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).

3. 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).

4. 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. 1993).

5. 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.).

6. 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.).

7. The trial court erred in not appointing an interpreter without first determining appellant's understanding of English as it relates to criminal proceedings. It is not enough that he understood and spoke some English. *Hernandez v. State*, 862 S.W.2d 193, 197 (Tex. App.--Beaumont 1993, pet. ref'd).

XXV. CONTROLLING UNRULY DEFENDANTS

A. *Removal From The Courtroom*

1. Although one of the basic rights guaranteed by the Confrontation clause is the accused's right to be present in the courtroom at every stage of the trial, this right can be lost be unruly behavior. *Illinois v. Allen*, 397 U.S. 337, 346 (1970).

B. *Shackling*

1. Shackling a defendant at the guilt-innocence phase is harmful because it infringes on his presumption of innocence. It is justified only under exceptional circumstances. The fact that a person is charged with capital murder does not override his presumption of innocence. The trial court abuses its discretion in shackling a defendant merely based on general concerns, where there is no violence or threats of violence during the trial. *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991)(error harmless, though, where there is no evidence that the jury actually saw the shackles); *see Cooks v. State*, 844 S.W. 2d 697, 722-23 (Tex. Crim. App. 1992)(although shackling is seriously prejudicial and only called for in rare circumstances, it was harmless here, absent evidence the jury actually saw shackles).

2. Shackling is permitted where the record supports the court's decision. *See Jacobs v. State*, 787 S.W.2d 397, 407 (Tex. Crim. App. 1990); *Marquez v. State*, 725 S.W.2d 217, 227 (Tex. Crim. App. 1987); *Kelley v. State*, 841 S.W.2d 917, 920 (Tex. App.--Corpus Christi 1992)(trial court did not abuse discretion in shackling appellant where appellant had earlier tried to hide the state's physical evidence).

3. The presence of armed guards is not inherently as prejudicial as is shackling. Accordingly, to prevail an appellant must show actual prejudice. Absent prejudice, there is no error. *Sterling v. State*, 830 S.W.2d 114, 188 (Tex. Crim. App. 1992).

4. Shackling at the punishment phase of a non-capital trial was held to be reversible error where there was no evidence of escape, threats of physical violence, resistance, repeated interruptions, or other such egregious conduct. "[J]udicial patience is part of the job and such extreme methods as binding and gagging should only be imposed after clear warnings to the defendant and as a last resort." *Shaw v. State*, 846 S.W.2d 482, 487 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd).

XXVI. **CONFRONTATION IN SEXUAL ASSAULT CASES**

A. ***Bias***

1. In *Olden v. Kentucky*, 488 U.S. 227 (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 232-33.

2. 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).

3. The trial court erred in excluding evidence that the mother of the complaining 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).

B. ***Separating The Defendant And The Complainant***

1. *The United States Constitution*

a. At issue in *Coy v. Iowa*, 487 U.S. 1021 (1988), was an Iowa statute which allowed the child complainant to testify behind a screen which prevented her from seeing the defendant at all. Id. at 1014. Iowa had upheld this procedure, since the defendant's ability to *cross-examine* the witness had not been impaired. Distinguishing between the rights of cross-examination and confrontation, the Supreme Court found that this procedure violated the Confrontation Clause. "The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential `trauma' that allegedly justified the extraordinary procedure in the present case. That face-to-face

presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Id*. at 1020. The Court reserved the question whether exceptions to the right of confrontation might be allowable when necessary to further an important public policy. *Id*. at 1021.

b. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Court answered the question reserved in *Coy*. At issue there was the constitutionality of a statute which permitted child complainants to testify outside the defendant's presence by way of one way, closed-circuit television. The Court held that, "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id*. at 855.

c. "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that cause the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e*., more than `mere nervousness or excitement or some reluctance to testify. . . ." *Id*. at 855(citations omitted).

d. A state statute which excludes the defendant, but not his lawyer, from a pre-trial, in chambers, hearing to determine the competency of child complainants, does not limit the opportunity for cross-examination, and does not violate the Confrontation Clause. *Pennsylvania v. Stincer*, 482 U.S. 730, 744 (1987).

2. *Article 38.071*

a. Texas law permits children to testify by closed-circuit television. Tex. Code Crim. Proc. Ann. art. 38.071 (Vernon Supp. 1997).

3. *Case Law*

a. In *Gonzales v. State*, 818 S.W. 2d 756 (Tex. Crim. App. 1991), the court used the same analysis applied by the Supreme Court in determine that neither the federal nor the state constitutions were violated by the use of *Craig* to closed-circuit television. *Id*. at 764. The court found no constitutional violation here in the lack of face-to-face confrontation, because there was cross-examination. *Id*. *See Hightower v. State*, 822 S.W. 2d 48, 53-54 (Tex. Crim. App.

1991)(trial court properly employed the *Craig* test to find that closed-circuit procedure was necessary).

b. Closed-circuit televised testimony is constitutionally permissible even when the child witness is not a victim of the offense then being tried, and when the offense is not enumerated in Article 38.071. *Gonzales v. State*, 818 S.W. 2d 756, 765-66 (Tex. Crim. App. 1991).

c. Appellant is not denied his Sixth Amendment right to effective assistance of counsel when he is not allowed in the same room with his lawyer during cross-examination of the child. *Hightower v. State*, 822 S.W. 2d 48, 54 (Tex. Crim. App. 1991).

d. Failure to exactly follow the provisions of the statute does not necessarily call for reversal. *Hightower v. State,* 822 S.W. 2d 48, 55 (Tex. Crim. App. 1991).

C. ***Outcry***

1. A statement by child complainant to a physician admitted under the residual hearsay exception lacked the requisite "indicia of reliability," and was therefore inadmissible under the Confrontation Clause. *Idaho v. Wright*, 497 U.S. 805, 827 (1990).

2. Texas law provides for the admissibility of an outcry statement under certain circumstances . Tex. Code Crim. Proc. Ann. art. 38.072 (Vernon Supp. 1997).

a. Article 38.072 is not facially violative of either the state or federal confrontation clauses. *Buckley v. State*, 786 S.W. 2d 357, 359 (Tex. Crim. App. 1990).

3. Failure to comply with the notice requirements of article 38.072 is subject to a harm analysis. *Dorado v. State*, 843 S.W.2d 37, 38 (Tex. Crim. App. 1992).

D. ***Rape Shield Laws***

1. *Rule 412*

"(a) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances or an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs © and (d) of this rule;

(2) it is evidence (A) that is necessary to rebut or explain scientific or medical evidence offered by the state; (B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged; (C) that relates to the motive or bias of the alleged victim; (D) is admissible under Rule 609; or (E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) The court shall seal the record of the in camera hearing required in paragraph © of this rule for delivery to the appellate court in the event of an appeal.

(e) This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use."

2. *Case Law*

a. The admissibility of sexual behavior evidence is subject to a two part test: "(1) the evidence must fall within one of the five enumerated circumstances in Rule 412(b)(2); and (2) its probative value outweighs the danger of unfair prejudice." *Boyle v. State*, 820 S.W. 2d 122, 148 (Tex. Crim. App. 1989), *cert. denied*, 112 S.Ct. 1297 (1992). Rule 412(b)(2) statutorily defines when this sort of evidence is material, obviating any need for the courts to make this determination on a case-by-case basis. *Id*. Evidence of past sexual conduct with persons other than appellant is not material to appellant's claim that sex in the instant case was consensual. *Id.* at 149. And, absent evidence that semen could be found in the complainant's mouth for two weeks after the act, evidence that the complainant had oral sex with another at this time is not material. *Id.*

b. The trial court did not err in excluding evidence of consensual intercourse with another 48 hours before being assaulted; of complainant's opinion that her attacker ejaculated inside her; and, of a doctor's testimony concerning sperm motility. Appellant did not meet his initial burden of proving materiality. *Pinson v. State*, 778 S.W. 2d 91, 94 (Tex. Crim. App. 1989).

c. That the complainant has a reputation as a common prostitute is not material to determining whether she consented to sexual activity. *Holloway v. State*, 751 S.W. 2d 866, 871 (Tex. Crim. App. 1988).

d. The Texas rape shield law does not, on its face, violate the Sixth Amendment, Article I, § 10 of the Texas Constitution, federal due process or state due course of law. *Allen v. State*, 700 S.W. 2d 924, 932 (Tex. Crim. App. 1985).

e. "If a defendant claims a victim's past sexual conduct is relevant, it is up to the defendant to make a preliminary showing that the issue is material to an issue in the case. This is not raised by merely asserting that it is so. There must be a showing of a reasonable basis for believing that the past sexual conduct is pertinent. If there is no such showing, questions concerning past sexual conduct are to be excluded. If such a showing of relevancy is made, the balancing test of [Rule 412] is to be applied in determining admissibility." *Allen v. State*, 700 S.W. 2d 924, 929 (Tex. Crim. App. 1985)(whether or not the complainant was a virgin was not material, and, even if it had been, it was too prejudicial).

f. "Where the balancing test has been met, where the balance inclines toward the accused, Texas trial courts are free and should not hesitate to admit evidence of the victim's prior sexual conduct to attack her credibility, to impeach her, if it does." *Allen v. State*, 700 S.W. 2d 924, 929 (Tex. Crim. App. 1985).

g. Reputation evidence is expressly prohibited by Rule 412(a). *Rankin v. State*, 821 S.W. 2d 230, 233 (Tex. App.--Houston [14th Dist.] 1991, no pet.).

h. Past sexual behavior evidence is not admissible to prove promiscuity where the behavior occurred after the assault alleged in the instant case. *Rankin v. State*, 821 S.W. 2d 230, 234 (Tex. App.--Houston [14th Dist.] 1991, no pet.).

i. On the issue of consent, only evidence of specific past sexual behavior with the accused is admissible. *Leger v. State*, 774 S.W. 2d 99, 101 (Tex. App.--Beaumont 1989, pet. ref'd).

j. A threshold requirement of Rule 412 is that the defendant inform the court, outside the presence of the jury, of his intent to offer evidence of prior sexual activity. *Golden v. State*, 762 S.W. 2d 630, 632 (Tex. App.--Texarkana 1988, pet. ref'd).

k. Rule 412 "does not authorize general impeachment by insinuations of unchastity or immorality." *Golden v. State*, 762 S.W. 2d 630, 632 (Tex. App.--Texarkana 1988, pet. ref'd).

l. One charged with sexual assault has a right to present evidence of promiscuous sexual conduct of a child 14 years or younger, even when consent is not raised. *Hernandez v. State*, 861 S.W. 2d 908, 910 (Tex. Crim. App. 1993).

m. Where the appellant could not prove that the mere fact that the complainant had gonorrhea would have resulted in its transmission to anyone with whom she had sex, that evidence is not material. *Smith v. State*, 737 S.W. 2d 910, 915 (Tex. App.--Fort Worth 1987, pet. ref'd).

n. The trial court did not err in admitting evidence from the complainant that she told appellant that she was a virgin and was saving herself for marriage. The court believed it a well established rule in Texas that the jury is entitled to know what happened immediately before and after the offense, and thought it unlikely that Rule 412 was meant to denigrate such a venerable rule. *Cole v. State,* 735 S.W. 2d 686, 693 (Tex. App.--Amarillo 1987), *rev'd on other grounds*, 839 S.W. 2d 798 (Tex. Crim. App. 1990).

o. Appellant bears the burden of making a preliminary showing of materiality. *Keeter v. State*, 723 S.W. 2d 356, 358 (Tex. App.--Fort Worth 1987, pet. ref'd).

p. The trial court erred in not permitting appellant to offer evidence that the complainant had been in trouble in the past for improper sexual behavior, and therefore had a motive to blame someone else. This evidence was material to the complainant's motive, and was therefore admissible under Rule 412(b)(2). *Yzaguirre v. State*, 938 S.W. 2d 127, 129 (Tex. App.--Amarillo 1996).

q. Rule 412 applies only to attempts to introduce prior consensual sexual activity. *Draheim v. State*, 916 S.W. 2d 593, 599 (Tex. App.--San Antonio 1996, pet. ref'd).

F. ***Other Confrontation Issues Arising In Sexual Assault Cases***

1. That a witness was asking for drugs was admissible to prove that she had a motive to prostitute herself for drugs, thus strengthening appellant's defense of consensual sex. *Harrison v. State*, 686 S.W. 2d 220, 225 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd).

2. The trial court erred in not permitting appellant to prove that the complainant had previously made false allegations of sexual assault. *Thomas v. State*, 669 S.W. 2d 420, 423 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd); *accord Polvado v. State*, 689 S.W. 2d 945, 950 (Tex. App.--Houston [14th Dist.] 1985, pet. ref'd)("no charge is more easily made and more difficult to disprove than a sex charge, particularly if made by a young child"); *but see Hughes v. State*, 850 S.W. 2d 260, 262-63 (Tex. App.--Fort Worth 1993, pet. ref'd)(evidence of other allegations inadmissible absent proof that other allegations were false).

3. The trial court should permit the appellant to prove that the father of the complainant had a motive for his testimony. *Polvado v. State*, 689 S.W. 2d 945, 951 (Tex. App.--Houston [14th Dist.] 1985, pet. ref'd).

4. Where children testify at trial that their mother coerced them into making tape recordings which exonerated appellant, the entire tapes were admissible. *Polvado v. State*, 689 S.W.

2d 945, 949 (Tex. App.--Houston [14th Dist.] 1985, pet. ref'd).

5. The trial court erred in not permitting appellant to impeach the complaining witness in a sexual assault case, since "separate allegations of sexual misconduct made by the boy are not collateral to the main issue at trial." *Polvado v. State*, 689 S.W. 2d 945, 950 (Tex. App.--Houston [14th Dist.] 1985, pet. ref'd).

XXVII. OBJECTING UNDER THE STATE CONSTITUTION AND STATE STATUTES

A. *Heitman v. State*

1. In *Heitman v. State*, 815 S.W. 2d 681, 690 (Tex. Crim. App. 1991), it was recognized that the federal constitution guarantees only minimum rights, and that the court of criminal appeals is free to interpret the state constitution so as to give greater protection.

2. In *Murdock v. State*, 840 S.W. 2d 558, 564 (Tex. App.--Texarkana 1992), *rev'd on other grounds*, 845 S.W. 2d 915 (Tex. Crim. App. 1993), the court considered *Heitman* with regard to a confrontation claim, and found "no reason to read the Texas guarantee in a different manner than the United States Constitution in this case."

3. In *Long v. State*, 742 S.W. 2d 302, 309 n.9 (Tex. Crim. App. 1991), *cert. denied,* 485 U.S. 993 (1988), the court suggested that the Texas Constitution affords greater confrontational rights than does the Federal Constitution. *But see Gonzales v. State*, 818 S.W. 2d 756, 764 (Tex. Crim. App. 1991)(state constitution does not afford a right to face-to-face confrontation).

4. Counsel who wish to argue that the state constitution provides greater protection than does its federal counterpart must argue the state constitutional argument in a separate point of error and must provide a separate substantive analysis and argument. *See Robinson v. State*, 851 S.W.2d 216, 232 n.1 (Tex. Crim. App. 1993).

B. *Article 38.23*

1. A testifying defendant 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).

2. One Texas case holds that illegally obtained evidence should be excluded, even for impeachment, when the defendant objects under the state statutory exclusionary rule--Tex. Code Crim. Proc. Ann. art. 38.23 (Vernon Supp. 1997). *Robbins v. State*, 696 S.W. 2d 689, 690 (Tex. App.--Dallas 1985, pet. ref'd).